Out of step: Juvenile death penalty in the United States

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. . . offenses committed by juveniles under the age of 18 do not merit the death penalty. The practice of executing such offenders is a relic of the past and is inconsistent with evolving standards of decency in a civilized society. We should put an end to this shameful practice

(In Re Kevin Stanford, 123 S.Ct. 472, **475)

Introduction

The search for a realistic alternative to capital punishment is a principal element in democratic development. In several countries, abolition has been accomplished through application and enforcement of specific provisions of domestic constitutions; or through the domestic application of international treaties, which prohibit the use of capital punishment. In others, it has been the contribution of the judiciary through their interpretation of domestic constitutions, which, whilst making no reference to the death penalty, do protect the right to life and prohibit cruel, inhuman and degrading treatment, as seen in South Africa in 1995 (Makwanyane and Mchunu v. The State, (1995) 16 HRLJ 154).

There appears to be a conspicuous global evolution towards abolition. In fact, at the time of writing, 112 nations have abolished the use of capital punishment in law or practice, and for those which still maintain the death penalty – approximately 83 nations – there are a number of categorical limitations on its use (Amnesty International, 2003). One such limitation refers to the execution of juvenile offenders; those persons below the age of eighteen at the time of their offence. Notwithstanding this restriction, the United States (US) has been the only nation in 2002 and, as of October 2003, the only nation in 2003, to have reportedly executed juvenile offenders (International Justice Project, 2003). In continuing what is increasingly seen as a barbaric and uncivilized practice, the US has, over the last decade, executed more juvenile offenders than every other nation of the world combined (International Justice Project, 2003).
This short article will attempt to review the recent developments which cast doubt on the legitimacy of executing juvenile offenders. It is within the context of juvenile crime and punishment that the diverse issues associated with the death penalty intersect most acutely, and the vagaries of the law reach their most challenging. Despite such complications, the debate on the execution of juvenile offenders persists.

**History of Juvenile Executions in the United States**

The constitutionality of the juvenile death penalty was decided by the US Supreme Court in *Thompson v. Oklahoma*, 487 US 815 (1988). With Justice Stevens writing for the plurality, it was held that there was an “evolving standard of decency” dictating the execution of offenders aged 15 and younger to be unconstitutional under the Eighth Amendment to the US Constitution. The following year, in *Stanford v. Kentucky*, 492 US 361 (1989), with Justice Scalia writing for the majority, the US Supreme Court held that the Eighth Amendment did not prohibit the execution of offenders who were 16 or 17 years old at the time of their offence. In 2002, the US Supreme Court was again faced with the opportunity to revisit the issue, but declined to do so. Nonetheless, unprecedented dissents in both cases indicated that the juvenile death penalty should be re-examined at the earliest opportunity (*In Re Kevin Stanford*, 537 US 968, 123 S.Ct. 772, and *Patterson v. Texas*, 536 US 984, 123 S.Ct. 24). Yet, when the occasion once more arose to review the matter, the US Supreme Court denied *certiorari* in *Hain v. Mullin*, 123 S.Ct. 1654 (Mem) (2003), without comment. Scott Hain was then executed on 3 April 2003, becoming the twenty-second juvenile in the US to be executed since reinstatement of the death penalty in 1976 (International Justice Project, 2003).

*Atkins v. Virginia* Holding Charts the Way for the Argument Against the Execution of Juvenile Offenders

On 26 August 2003, in an extraordinary decision, the Missouri Supreme Court held that the execution of juvenile offenders violates evolving standards of decency and is, therefore, prohibited by the US Constitution’s Eighth Amendment ban on “cruel and unusual punishment” (*State ex. rel. Simmons v. Roper* 112 S.W.3d 397 Mo., 2003). Once more the stage seems to be set for the US Supreme Court to review the compatibility of the imposition of the juvenile death penalty with the prohibition against cruel and unusual punishment (US Const. amend. VIII). In reaching its decision, the Missouri Supreme Court followed the approach taken by the US Supreme Court in *Atkins v.*
Virginia, 122 S.Ct. 2242 (2002), in which the Court held, on 20 June 2002, in a 6–3 vote, that a national consensus had evolved against the execution of those with mental retardation and thus, such executions violated the Eighth Amendment prohibition on “cruel and unusual punishment”. Similarly, in adopting this approach, the Missouri Supreme Court held that a national consensus had developed against the execution of juvenile offenders.

Overturning their 1989 holding in Penry v. Lynaugh, 492 US 302 (1989), the Court in Atkins recognized a recently established and evolving national consensus that quantifiable behavioural and cognitive limitations diminish the moral culpability of offenders with mental retardation and, consequently, impact their appropriate punishment. Concerning offenders with mental retardation, the Court specifically stated:

Because of their disabilities in areas of reasoning, judgment, and control of their impulses, however, they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct (Atkins, at **2244).

Before the Atkins decision, primarily objective factors were sought to judge a punishment’s proportionality. Formerly, State legislation, and often jury sentencing decisions, informed the Court of proportionality and prevailing standards of decency, although they were not wholly to determine it (See Enmund v. Florida, 102 S.Ct. 3368 (1982)). Atkins highlighted the uncommon use of the Court’s own subjective valuation in judging the behaviour of its citizenry and legislators. Although not seen as “dispositive”, unprecedented sources, notably professional organizations, religious groups, “the world community” and polling data, were recognized. Specifically, in the adjoined footnote, the additional subjective factors’ consistency “with the legislative evidence lends further support to our conclusion that there is a consensus among those who have addressed the issue” (Atkins, N.21).

Markedly, the European Union filed an Amicus Curiae brief in McCarver v. North Carolina, which articulated international practice and human rights standards as they pertain to the execution of persons with mental retardation (Brief for The European Union as Amicus Curiae in McCarver v. North Carolina, O.T. 2001, No. 00– 8727). The European Union’s brief was originally filed in McCarver, however North Carolina passed legislation in 2001 prohibiting the execution of those with mental retardation. Atkins was then granted certiorari and the European Union brief was re-filed in support of the prohibition against the execution of those with mental retardation. The Court noted:

Within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved (Atkins, at **2249).

Many believe that Atkins has been a positive decision for juvenile offenders convicted of murder committed at the age of 16 or 17. The objective and
subjective rationale offered by the Court in support of their decision in Atkins can be applied almost directly to juvenile offenders. This notion was acknowledged by Justice Stevens, joined by Justices Souter, Ginsburg and Breyer who found “[t]he reasons supporting [Atkins], with one exception, [to] apply with equal or greater force to the execution of juvenile offenders” (In re Stanford, at *1). The exception, the number of States expressly forbidding the execution of juvenile offenders, arguably “does not justify disparate treatment of the two classes” (In re Stanford, at *1).

It seems more than mere supposition to maintain that the threshold to demonstrate a national consensus has been lowered. In sum, the Atkins reasoning appears to be an important mechanism by which to argue against the application of capital punishment to juvenile offenders and is one that was seized upon by the Missouri Supreme Court in Simmons. The Court examined: (i) legislative action; (ii) infrequency of imposition of capital punishment on juveniles and the frequency with which the sentence is actually carried out; (iii) national and international opinion; and (iv) an independent examination of whether the death penalty, as applied to juveniles, violates evolving standards of decency and hence is barred by the Eighth and Fourteenth Amendments.

(i) Legislative Action

The Court noted that at the time of Stanford, 11 States banned the execution of juvenile offenders. Since Stanford, 5 more States have banned such executions. States have moved consistently away from the juvenile death penalty, thus indicating that the standard of decency has evolved. Since Stanford, not a single State had lowered the minimum age for execution from 18 to 17 or 16 and many States have considered legislation to raise the minimum age to 18.

(ii) Infrequency of Imposition of Capital Punishment

The Court noted that despite 22 States allowing the imposition of the death penalty on juvenile offenders, only 7, including Missouri, have actually executed juvenile offenders since re-instatement in 1976 and only three States, Texas, Virginia and Oklahoma, since 1993. The Court attributed particular significance to the fact that only 22 juvenile offenders had been executed since re-instatement. Correspondingly, the Court found the juvenile death penalty to be “so truly unusual that its potential application is more hypothetical than real” (Simmons, at **410).

(iii) National and International Opinion

Significantly, the Court cited international law prohibiting the execution of juveniles, including Article 37(a) of the Convention on the Rights of the Child
and other international treaties and agreements. In addition, the Court examined the views of the international community and also found the opposition of domestic social, professional and religious groups to confirm the national consensus against the execution of juvenile offenders.

(iv) Independent Examination

Finally, the Court examined whether the death penalty was warranted for juvenile offenders with regard to fulfilling the primary social purposes of capital punishment: retribution and deterrence. Comparing juvenile offenders to those with mental retardation, the Court found neither purpose to be advanced. In reaching this decision, the Court acknowledged the lesser culpability and reasoning capacity of juvenile offenders, basing these assertions on an assessment of the complex issues involved when addressing the blameworthiness of juvenile offenders and the use of capital punishment.

Eighth Amendment Issues Affecting Culpability and Proportionality

The Eighth Amendment succinctly prohibits all excessive punishments. It has been interpreted to demand that all punishment should be “graduated and proportioned to the offence” (Weems v. United States, 217 US 349, *367 (1910); see also Coker v. Georgia, 433 US 584 (1977)), thereby preserving the “dignity of man” (Trop v. Dulles, 356 US 86, *100 (1958)). Furthermore, the Court in the landmark decision Gregg v. Georgia, 428 US 153 (1976), held that criminal sanctions must contribute “measurably” to retribution or deterrence or both; otherwise they are to be deemed excessive and, therefore, constitutionally forbidden. Since excessiveness is judged by “the evolving standards of decency that mark the progress of a maturing society” (Gregg at *173), punishments that were once considered proportionate may be subsequently held to be unconstitutional. Capital punishment is reserved for the worst of the worst and only those “materially more depraved” than the “normal” murderer (Godfrey v. Georgia, 446 US 420, *421 (1980)).

The execution of a juvenile offender would seem to be in conflict with these fundamental principles of justice, which punish according to the degree of culpability. Given the inherent limitations of a juvenile, the two penological goals of capital punishment (retribution and deterrence) are not realized, therefore, the imposition of such a punishment is disproportionate. The retributive objectives of capital punishment are unachievable when applied to juvenile offenders. The ultimate punishment of the deprivation of one’s life must be reserved for those with ultimate personal culpability. Furthermore, capital punishment’s deterrent ambitions are similarly unrealizable when
applied to juveniles, given their impaired cognitive understanding and behavioural control.

In this regard, questions concerning adolescent development are becoming more pertinent as scientific research has revealed that, both psychologically and physiologically, juveniles are very different to adults. Clearly, the implications of such research are far reaching. Recent research documenting the “extent of change that can occur in the (adolescent) brain . . .” has been heralded as “one (of) the most remarkable findings in neuro-biology of the last decade . . .” (National Research Council, 1999).

Juvenile Development

As a child matures, one of the most significant developments within the brain takes place in the frontal lobes or pre-frontal cortex (Giedd, 2002). It is this particular area, working collaboratively with other sections of the brain, which controls impulses and calms emotions. Further, it permits comprehension of the consequences of behaviour and allows reasoned, logical and rational decision making processes to occur (Giedd, 2002). These “executive functions” do not fully develop until an individual reaches his/her early twenties (Giedd, 2002). Other studies have shown that throughout the development of the pre-frontal cortex, adolescents use an alternative part of the brain in their thought processing: the amygdala (Yurgelun-Todd, 2002). This area is associated with emotional and instinctive responses. These developments are not the only ones taking place within the adolescent brain. Additionally, it has been found that the cable of nerves (the corpus callosum), which connects both sides of the brain, appears to develop and change significantly throughout adolescence (Geidd, 2002). This cable of nerves is concerned with creativity and problem solving. Therefore, the lack of a completely formed pre-frontal cortex and corpus callosum suggests an impairment of the rational decision and thought making process, consequently placing a heavy reliance upon the emotional and instinctive response area (amygdala).

The inability of adolescents fully to appreciate the consequences of their actions, in the adult sense, impacts upon their blameworthiness in committing the deviant act. Adolescents look only to the immediate future, with a time horizon of 1–3 days (Thompson, 2002). “The brain does not have the biological machinery to inhibit impulses in the service of long term planning . . .” (Weinberger, 1998). This does not necessarily negate their knowledge of right or wrong, however, the magnitude and subsequent ramifications of a specific course of action are beyond the capability of the adolescent. Dr Mark S. Wright, President of the Kentucky Psychiatric Association noted the magnitude of “brain development research [making] the case against putting teens to
death.” (Wright 2002). A central tenet of the US justice system is that punishment is to be commensurate with the personal culpability of the offender. Juveniles cannot, and do not, have a sufficient level of personal culpability to deserve the maximum adult punishment.

**Extenuating Circumstances Compound Adolescent Immaturity**

Adolescent developmental immaturity is further compounded by the innumerable extenuating circumstances that are frequently encountered in cases involving juvenile offenders. The vast majority of juveniles on death row have suffered extreme trauma and abuse. Lewis et al.’s 1988 study of juveniles sentenced to death found that almost every individual interviewed had suffered severe physical and sexual abuse. In the majority of cases, this abuse occurred over an extended period of time and was often perpetrated by more than one family member. Such research is supported by Ewing (1990, in Horowitz, 2000 at *155) who concludes that “probably the single most consistent finding in the research on juvenile homicide to date is that children and adolescents who kill, especially those who kill family members, have generally witnessed and/or been directly victimized by domestic violence”. Numerous studies demonstrate a correlation between childhood abuse and adult violence (Maxfield, 2001; Widom, 1992).

Naturally, not every individual who endures abuse will, at a later stage, become violent. However, the prevalence of abuse is high within the general criminal/delinquent population and particularly pronounced amongst those sentenced to death (Haney, 1995; Lewis et al. 1988). Furthermore, it should be noted that abuse and trauma rarely occur within a vacuum; instead these experiences must be viewed in conjunction with other hardships suffered. Frequently, defendants experiencing abuse and trauma are often raised in impoverished environments where poverty, violence and neglect are inextricably woven into the very fabric of their everyday life. As Haney (1995, at 580) asserts: “The nexus between poverty, childhood abuse and neglect, social and emotional dysfunction, alcohol and drug abuse, and crime, is so tight in the lives of many capital defendants as to form a kind of social historical profile”.

The implications of the landmark research in adolescent brain development, together with the compounding implications of trauma, suggest that considering the culpability of a juvenile offender in the same manner as that of an adult is both misguided and ill-informed. Indeed, when viewing the international community’s perception of juvenile responsibility, a striking divergence of opinion is observed. The lack of the requisite culpability, which purportedly permits the imposition of capital punishment for juvenile offenders, is confirmed by extensive agreement amongst nations.
International Law and Consensus

An overwhelming body of treaty, general and customary international law prohibits the execution of juvenile offenders. Article 37 (a) of the United Nations (UN) Convention on the Rights of the Child (CRC) specifically prohibits the execution of juvenile offenders. 191 nations have signed and ratified the CRC with the exception of the US and Somalia. Somalia, until recently, had no recognizable government. However, on 9 May 2002, Somalia signed the CRC and announced its intention to ratify (International Justice Project, 2003). Further, Article 6(5) of the International Covenant on Civil and Political Rights (ICCPR) prohibits the death sentence for “crimes committed by persons below eighteen years of age”. The ICCPR has 149 State Parties. Upon ratification of the ICCPR, the US entered a reservation to Article 6(5), reserving the “right, subject to its constitutional constraints to impose capital punishment on any person, including such punishment for crimes committed by persons below 18 years of age”. The validity of this reservation is questionable (Schabas, 1995). In fact, even in times of war, international law prohibits the execution of juveniles (Article 68 of the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 1949).

Regional treaties also establish this prohibition. In the inter-American system, Article 4(5) of the American Convention on Human Rights prohibits the execution of juveniles; 25 of the 35 Member States of the Organization of American States are party to the Convention (Inter-American Commission on Human Rights, 2003). Indeed, within Europe, Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, as amended by Protocol No. 11 prohibits the imposition of the death penalty in peace time. Protocol No.13 also abolishes the death penalty in all circumstances including crimes committed at times of war and imminent danger.

Moreover, the UN has issued various resolutions confirming the prohibition against the execution of juveniles including: Human Rights in the Administration of Justice, in Particular Juvenile Justice (Resolution 2002/47); Rights of the Child, (Resolution 2003/86); Human Rights in Administration of Justice, (Resolution 56/161); United Nations Standard Minimum Rules for the Administration of Juvenile Justice (“The Beijing Rules”), (Resolution 40/33); The Question of the Death Penalty (Resolution 2003/67); and, Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty (E.S.C. res. 1984/50).

Most recently, the Inter-American Commission on Human Rights (IACHR) concluded that the prohibition against the execution of juveniles, defined as those under the age of 18 at the time of the offence, was now of a sufficiently indelible nature to constitute a norm of jus cogens (Domingues v. United
States, Report No. 62/02, October 22 2002). As the IACHR explained, norms of *jus cogens* “derive their status from fundamental values held by the international community, as violations of such peremptory norms are considered to shock the conscience of humankind and therefore bind the international community as a whole, irrespective of protest, recognition or acquiescence” (*Domingues* at 49).

Furthermore, the IACHR found that “by persisting in the practice of executing offenders under the age 18, the US stands alone amongst the traditional developed world nations and those of the inter-American system, and has been increasingly isolated within the entire global community” (*Domingues*, at 84). The Commission continued to find such executions to be “inconsistent with prevailing standards of decency” (*Domingues*, at 84).

Since 1990, only eight countries have reportedly executed juvenile offenders: Iran, Saudi Arabia, Nigeria, the Democratic Republic of Congo (DRC), Yemen, Pakistan, China and the US (International Justice Project, 2003). In the last three years, this small number of nations known to have executed juveniles has declined to only five: the DRC, Iran, Pakistan, China and the US. In fact, in the year 2002, and at the time of writing in 2003, the only known countries to have executed a juvenile offender were China and the US (International Justice Project, 2003). The single other country to have reportedly sentenced a juvenile to death is Sudan: on 26 April 2003 a 15-year-old was sentenced to death, along with 23 others for crimes committed during a raid on a village (Amnesty International, 2003). In 1994, Yemen changed its law to prohibit the execution of juveniles. In December 1999, the DRC called for a moratorium on all executions. However, in January 2000, a 14-year-old child soldier was executed in the DRC. Since that time, four juvenile offenders sentenced to death in the DRC in a military court were granted stays and the sentences were commuted following an appeal from the international community (Case COD 270401.1.CC, 31 May 2001, OMCT-World Organization Against Torture). The Nigerian government stressed to the UN Sub-Commission that the execution, which took place in 1997, was not of a juvenile (Summary Record of 6th Meeting of the Sub-Commission on the Promotion and Protection of Human Rights, 52nd Sess., 4 August, 2000, E/CN.4/Sub.2/2000/ SR.6 para.39 (2000)) and Saudi Arabia emphatically denies the 1992 execution of a juvenile (Summary Record of the 53rd Meeting of the Commission on Human Rights, 56th Sess., 17 April 2000, E/CN.4/2000/SR.53, paras 88 and 92).

In July 2000, Pakistan moved to outlaw the execution of juvenile offenders under the Juvenile Justice System Ordinance (International Justice Project, 2003). However, despite this Ordinance, on 3 November 2001, Pakistan executed Ali Sher for a crime he committed at the age of 13. Since this execution, President Musharrah of Pakistan commuted the death sentences of
approximately 100 young offenders to imprisonment (International Justice Project, 2003). The shift away from the juvenile death penalty is supported by the Supreme Court of Pakistan’s decision on 26 March, 2003 to “peruse and define laws relating to “the imposition of the death sentence (on) young people” (The Daily Times, 26 March, 2003).

Of the six countries, other than the US, that have reportedly executed juvenile offenders, all have either changed their laws or their governments have denied that the executions took place.

Despite the broad consensus among nations, the US Supreme Court, until Atkins, appeared to discount the practices of the international community. In fact, Chief Justice Rehnquist in Atkins took issue with the unprecedented use of the subjective sources, “foreign laws, the views of professional and religious organizations, and opinion polls”, and found such judicial activism to be antithetical to considerations of federalism (Atkins at **2252). His opinion concluded:

For if it is evidence of a national consensus for which we are looking, then the viewpoints of other countries simply are not relevant (Atkins at **2254).

Relevance of International Law

Although the 1989 decision in Stanford explicitly rejected the relevance of the practice of foreign nations, the US Supreme Court has, as discussed above, begun to look beyond national law and opinion to that of the world community. In Atkins, the views of the world community were given credence. As previously mentioned, although careful not to refer to such data as “dispositive,” in footnote 21 of the Atkins decision, the majority rehabilitated the opinions of “organizations with germane expertise” (Atkins, at **2249). As acknowledged by Chief Justice Rehnquist’s dissent, this development seems to overturn the Court’s precedent, which rejects these subjective sources as irrelevant (Stanford). This approach of reviewing international law and consensus has been adopted in a subsequent US Supreme Court ruling. In Lawrence v. Texas, 539 US (2003), the US Supreme Court referred to the practices of foreign nations and legal institutions such as the European Court of Human Rights in its judgment. Although Lawrence involved the Fourteenth Amendment to the US Constitution, the decision demonstrates the US Supreme Court’s new found impetus, in issues concerning the protection of human rights and dignity, to look to the practice of other nations.

Justice O’Connor, at the 79th Annual Meeting of the American Law Institute, highlighted that “understanding international law . . . is a duty we all share” (2002). While the US Supreme Court may not deem international law
to be binding on the United States *per se*, “conclusions reached by other countries and by the international community should at times constitute persuasive authority in American courts” (O’Connor, 2002). Justice O’Connor’s opinion is not shared by all members of the US Supreme Court. Justice Scalia’s dissent in *Atkins* was a scathing attack on the relevance of extra-American sources of consideration, giving this argument his “[p]rize for the Court’s Most Feeble Effort to fabricate national consensus” and went on to say:

Equally irrelevant are the practices of the world community whose notions of justice are (thankfully) not always those of our people (*Atkins*, at **2264*).

**Conclusion**

The insistence of the US to continue the archaic practice of executing juvenile offenders blatantly disregards norms of international law and global consensus, which in turn undermines “the steadfast commitment of the United States to advance internationally agreed human rights principles worldwide” (Secretary of State, Colin L. Powell, 2003). It remains to be seen whether the US Supreme Court will seize the opportunity to review this complex and politically emotive issue by granting *certiorari* in *Simmons*, but for Justice Stevens the time has arrived:

Given the apparent consensus that exists among the States and in the international community against the execution of a capital sentence imposed on a juvenile offender, I think it would be appropriate for the [US Supreme] Court to revisit the issue at the earliest opportunity (*Patterson v. Texas* 536 US (2002) 1, Stevens, J., dissenting).

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