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STANFORD v. KENTUCKY: DID THE COURT BITE THE CONSTITUTIONAL BULLET?

INTRODUCTION

When seventeen year old Kevin Stanford stormed a gas station and then raped, sodomized, and killed the station attendant, he resurrected a constitutional controversy.\(^1\) His death sentence for the heinous offenses forced the United States Supreme Court to consider the eighth amendment's\(^2\) limitations on juvenile executions.\(^3\)

Two nagging concerns were inherent in this Constitutional controversy. First, society has a general uncertainty about the appropriateness of capital punishment. Since *Furman v. Georgia*\(^4\) and *Gregg v. Georgia*,\(^5\) the death penalty's necessity has been widely questioned. Second, society has a special regard for minors. Supreme Court Justice Felix Frankfurter once stated, "Children have a very special place in life which law should reflect."\(^6\) Supreme Court precedent suggests that children deserve special treatment in the courts.\(^7\)

Pondering these concerns in the context of Kevin Stanford's ruthlessness, a Supreme Court plurality upheld the eighth amendment constitutionality of the death penalty for sixteen and seventeen year old capital offenders.\(^8\)

The Court's opinion in *Stanford v. Kentucky*\(^9\) and the companion case, *Wilkins v. Missouri*,\(^10\) reflects a fragile consensus among the five justices who affirmed Stanford's and Wilkins' death sentences.\(^11\) This note explores the Court's holding and its internal conflict over the proper scope of eighth amendment analysis.

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2. See infra note 17.
4. 408 U.S. 238 (1972). In *Furman*, the Supreme Court struck down several state capital punishment statutes. Id. at 256-57. The Court's primary criticism was that the statutes gave sentencing juries untrammeled discretion. This decision led to a several year hiatus on executions. It also compelled society to re-examine the necessity and humanity of the death penalty. See Note, *Gregg v. Georgia: The Search for the Civilized Standard*, 1976 DET. C.L. REV. 645.
5. 428 U.S. 153 (1976). In *Gregg*, the Supreme Court upheld the constitutionality of several state capital punishment statutes. Id. at 207. The court believed that the statutes adequately limited the sentencing jury's discretion by, inter alia, requiring bifurcated guilt-punishment proceedings.
9. Id. at 2969.
10. Id.
Juvenile executions are not new. The first documented juvenile execution occurred in 1642 in Plymouth Colony, Massachusetts. The Massachusetts courts sentenced sixteen year old Thomas Graunger to death for bestiality. Since 1642, another 281 juveniles have been executed. The most recent juvenile execution was that of a seventeen year old Texan, James Kelly Pinkerton, who had been convicted of raping and murdering two persons.

Prior to the Stanford and Wilkins cases, the Supreme Court had several opportunities to decide the constitutionality of the juvenile death penalty. In these cases, the appellants argued that the juvenile death penalty violated the constitution's eighth amendment proscription of "cruel and unusual punishments." In asking the Supreme Court to stay their executions, the appellants asserted that such punishment was disproportionate to their culpability, that their executions would further no legitimate penal purpose, and that society had "set its face against the execution of youngsters."

In each of these pre-Stanford cases, the Supreme Court refused to reverse the appellants' death sentences under the eighth amendment. This intentional issue avoidance compelled former Chief Justice Warren Burger to criticize the Court for failing to "bite the bullet."

In 1982, the Supreme Court reviewed the death sentence of sixteen year old Oklahoman, Monty Lee Eddings. In Eddings v. Oklahoma, the Court reversed Eddings' death sentence because the trial judge did not give proper consideration to Eddings' troubled childhood. By reversing on these grounds, the Court intentionally

\[12 \text{ N. Teeters & J. Hedblom, Hang By The Neck at 111 (1967).} \]
\[13 \text{ Id.} \]
\[14 \text{ Streib, The Eighth Amendment and Capital Punishment of Juveniles, 34 CLEV. ST. L. REV. 363, 376 (1986).} \]
\[15 \text{ Reidinger, The Death Row Kids, A.B.A. J., April, 1989, at 78, 80.} \]
\[16 \text{ Other juvenile capital offenders who have been executed in the 1980s include James Terry Roach, age seventeen (South Carolina, January 10, 1986) and Charles Rumbaugh, age seventeen (Texas, September 11, 1985).} \]
\[17 \text{ Thompson v. Oklahoma, 108 S. Ct. 2687 (1988) (fifteen year-old capital offender's death sentence was reversed); Eddings v. Oklahoma, 455 U.S. 104 (1982) (sixteen year-old capital offender's death sentence was reversed).} \]
\[18 \text{ The eighth amendment provides, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. This casenote focuses upon the "cruel and unusual punishments" clause of the eighth amendment.} \]
\[19 \text{ Id. at 2710 (O'Connor, J., concurring); Eddings, 455 U.S. at 110, n.5.} \]
\[20 \text{ Id. at 127 (Warren, C.J., dissenting).} \]
\[21 \text{ Id. at 106. Eddings was convicted of the first degree murder of Oklahoma State Highway Patrol Officer Crabtree. Eddings killed the officer after the officer "pulled him over" for a traffic violation.} \]
\[22 \text{ Id. at 104.} \]
\[23 \text{ Id. at 112. The Supreme Court reversed Eddings' death sentence on the basis of Lockett v. Ohio, 438 U.S. 586 (1978). In Lockett, the Court held that the sentencing jury must consider any relevant aspect of the defendant's character or record when deciding upon a sentence. Lockett, 438 U.S. at 608. The Court in Eddings held that the trial court violated the Lockett rule by disregarding Eddings' evidence of a troubled} \]
ally side-stepped the eighth amendment issue which Eddings posed in his petition for certiorari.24

Six years later, the Supreme Court reviewed the death sentence of another Oklahoma juvenile, William Wayne Thompson.25 Fifteen year old Thompson was convicted of the gruesome first degree murder of his former brother-in-law.26 An Oklahoma adult jury sentenced Thompson to death.27 On appeal to the Supreme Court, Thompson challenged the eighth amendment constitutionality of his sentence.28 A hesitant plurality spared Thompson’s life.29 Four of the justices who reversed the sentence squarely addressed the eighth amendment issue.30 Justice O’Connor provided the fifth vote for reversal.31 In her controversial concurring opinion, Justice O’Connor demonstrated her well-documented tendency of deferring to the legislature.32 Reserving the eighth amendment issue for a later date, Justice O’Connor overturned Thompson’s death sentence because of a flaw in the Oklahoma statute under which Thompson was sentenced.33 The Oklahoma capital punishment statute did not mention a minimum age at which the commission of a capital crime could lead to the offender’s execution.34 Justice O’Connor viewed this omission as a signal that the Oklahoma legislature did not carefully consider the juvenile death penalty issue.35 Justice O’Connor concluded her opinion by inviting the peoples’ elected representatives to decide the ultimate moral issue at stake in the controversy.36

In March, 1989, Stanford v. Kentucky37 and Wilkins v. Missouri38 presented the overly-ripe juvenile death penalty issue. On June 26, 1989, the Supreme Court ended years of issue evasion by upholding the eighth amendment constitutionality of seventeen year old Kevin Stanford’s and sixteen year old Heath Wilkins’ death sentences.39
STATEMENT OF THE CASE

The Supreme Court decided the constitutionality of the juvenile death penalty upon gruesome facts.\(^40\)

On January 7, 1981, Kentucky juvenile, Kevin N. Stanford, brutally raped, sodomized, and killed a gasoline station attendant, Baerbel Poore.\(^41\) He and his accomplice committed the sexual offenses at the gas station.\(^42\) They then drove Poore to a desolate country road.\(^43\) Stanford then shot Poore point-blank in the face and then lodged a bullet in the back of her head.\(^44\) Stanford and his accomplice claimed Poore's life, 300 cartons of cigarettes, two gallons of fuel, and a small amount of cash from the robbery.\(^45\) Stanford was seventeen years and four months old at the time of the killing.\(^46\)

Likewise, Missouri juvenile, Heath Wilkins, also terrorized his victim.\(^47\) On July 27, 1885, Wilkins entered an Avondale, Missouri convenience store with the intent to "rob the store and murder whoever was behind the counter."\(^48\) While his accomplice raided the cash register, Wilkins attacked Nancy Allen, the 26 year old clerk and mother of two.\(^49\) In spite of Allen's cooperation and cries for mercy, Wilkins repeatedly stabbed her in the chest, heart, and carotid artery.\(^50\) After collecting liquor, cigarettes, rolling papers, and $450 in cash, Wilkins and his accomplice abandoned the dying Nancy Allen.\(^51\) Wilkins was sixteen years and six months old at the time of the killing.\(^52\)

In *Stanford v. Kentucky*,\(^53\) Kevin Stanford was charged with first degree murder, first degree sodomy, first degree robbery, and receiving stolen property.\(^54\) A Kentucky juvenile court conducted a transfer hearing.\(^55\) The juvenile court determined that Stanford could not be rehabilitated within the juvenile justice system.\(^56\) Pursuant to a Kentucky transfer statute,\(^57\) the juvenile court waived jurisdiction over

\(^{40}\) *Id.* at 2972-73.
\(^{41}\) *Id.* at 2972. For a more graphic description of Stanford's brutality, see Brief for Respondent at 4-5, *Stanford v. Kentucky*, 109 S. Ct. 2969.
\(^{42}\) *Stanford*, 109 S. Ct. at 2972.
\(^{43}\) *Id.*
\(^{44}\) *Id.* at 2972-73.
\(^{45}\) *Id.* at 2973.
\(^{46}\) *Id.* at 2972.
\(^{47}\) *Id.* at 2973.
\(^{48}\) *Id.* Heath Wilkins provided this "purpose testimony" in the lower court proceedings.
\(^{49}\) *Id.*
\(^{50}\) *Id.*
\(^{51}\) *Id.*
\(^{52}\) *Id.*
\(^{53}\) *Id.* at 2969.
\(^{54}\) *Id.* at 2973.
\(^{55}\) *Id.*
\(^{56}\) *Id.*
\(^{57}\) KY. REV. STAT. ANN. § 208.170 (Michie/Bobbs-Merrill 1982).
Stanford's case and transferred the matter to an adult trial court. An adult trial court jury convicted Stanford of the charged crimes and sentenced him to death and 45 years imprisonment. On automatic review, the Kentucky Supreme Court affirmed the conviction and sentence. Kevin Stanford appealed to the United States Supreme Court.

In Wilkins v. Missouri, Heath Wilkins was charged with first degree murder, armed criminal action, and carrying a concealed weapon. Pursuant to a transfer statute, a Missouri juvenile court waived jurisdiction and transferred the case to an adult trial court. The juvenile court believed that Wilkins was beyond rehabilitation. Wilkins entered a guilty plea and urged the imposition of his own death sentence. The trial court convicted Wilkins of the charged offenses and sentenced him to death. Upon mandatory review, the Missouri Supreme Court affirmed the conviction and death sentence. With the help of appointed counsel, Wilkins then appealed his death sentence to the United States Supreme Court.

**Analysis**

**A. Eighth Amendment: Framework for Analysis**

Before considering the Court's opinion, it is helpful to establish the Court's traditional approach to eighth amendment controversies. Supreme Court precedent suggests that eighth amendment questions are subject to three areas of analysis.

1. *Ford v. Wainwright Analysis*

The Supreme Court's decision in *Ford v. Wainwright* sets forth the first "cruel and unusual punishment" test. Under *Ford*, a punishment is cruel and unusual if it "constitutes one of those modes or acts of punishment considered cruel..."
and unusual at the time that the Bill of Rights was adopted” (1791).72

Under the Ford test, juvenile executions are not cruel and unusual punish-ment.73 In 1791, the common law set the rebuttable presumption of incapacity to commit any felony at age 14; theoretically, anyone over age 7 could have been executed.74

2. Trop v. Dulles Analysis

Albert Trop, a private in the U.S. Army, served in French Morocco in 1944.75 While in service, he was confined in a stockade for his breach of discipline.76 He later escaped from the stockade.77 One day after his escape, he willingly surrendered to an Army officer.78 He was subsequently sentenced to three years of hard labor, forfeiture of pay and allowances, and a dishonorable discharge.79 Eight years later, Trop applied for a passport.80 He was denied the requested passport because his desertion of the Army rendered him a “non-citizen” under the Nationality Act of 1940.81 In an opinion penned by Chief Justice Earl Warren, the Supreme Court agreed that Trop’s loss of citizenship was cruel and unusual punishment.82

In Trop, the Court noted that the words of the eighth amendment are not precise and their scope is not static.83 In sparing Trop from losing his citizenship, the Court articulated a new standard for eighth amendment analysis.84 The Court declared that the amendment must “draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”85

Since the 1958 Trop decision, the Court has traditionally considered state legislation and jury/prosecutor behavior as the “measuring sticks” of society’s evolving standards of decency.86 Some jurists and academicians have called for a broader scope of Trop v. Dulles analysis.87 They maintain that opinion polls, world

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72 Id. at 405.
73 Stanford, 109 S. Ct. at 2974.
74 Id.
76 Id.
77 Id.
78 Id.
79 Id. at 88.
80 Id.
81 Id.
82 Id. at 101.
83 Id. at 100-01.
84 Id. at 101.
85 Id.
87 See Streib, supra note 14.
views, and the opinions of professional and special interest groups are essential to the determination of society's evolving standards of decency.88

Under the Trop test, courts have considered capital punishment legislation and jury/prosecutor statistics regarding the execution of juvenile capital offenders.89 Some courts have also considered opinion polls, world views, the opinions of professional and special interest groups, and analogous statutory age-based classifications.90

3. "Excessiveness" Analysis

This final area of eighth amendment analysis requires two inquiries.91 First, is the punishment proportional to the defendant's blameworthiness?92 Secondly, does the punishment materially advance any legitimate penological purpose?93 If both of these questions are answered affirmatively, the punishment is not excessive. Conversely, if either of these questions is answered negatively, the punishment is excessive and, therefore, violative of the eighth amendment.

The requirement of proportionality analysis is well established in eighth amendment jurisprudence.94 Opponents of the juvenile death penalty assert that juveniles lack the blameworthiness possessed by their adult counterparts.95 Because of this reduced culpability, the opponents argue that the death penalty is disproportionate to the youth's blameworthiness.96 This disproportionality, therefore, renders the juvenile death penalty "excessive."97

Punishment goals, like proportionality analysis, are also deeply rooted in Eighth Amendment analysis.98 If no legitimate penal goal is materially advanced by a certain punishment, that punishment is "excessive."99 Deterrence and retribution

88 Stanford, 109 S. Ct. at 2982 (Brennan, J., dissenting).
89 Id. at 2975, 2977; Thompson v. Oklahoma, 108 S. Ct. at 2693-97.
90 Among the age-based statutory classifications considered by some courts are the voting age (eighteen), the driving age (sixteen in most states), and the drinking age (eighteen - twenty-one in most states). Those who use these classifications argue that they reflect the minimum age at which juveniles are responsible and mature. Stanford, 109 S. Ct. at 2988 (Brennan, J., dissenting); Thompson, 108 S. Ct. at 2692-93.
91 See, e.g., Stanford, 109 S. Ct. at 2980; Thompson, 108 S. Ct. at 2698-2700.
92 Stanford, 109 S. Ct. at 2980.
93 Id.
95 Stanford, 109 S. Ct. at 2988.
96 Id.
97 Id.
98 See, e.g., Stanford, 109 S. Ct. at 2993 (Brennan, J., dissenting); Thompson v. Oklahoma, 108 S. Ct. at 2699, 2700.
99 Stanford, 109 S. Ct. at 2994 (Brennan, J., dissenting).
are commonly cited as the penal goals behind capital punishment. Opponents of the juvenile death penalty insist that neither goal is operative for juvenile capital offenders. They argue that a juvenile's limited blameworthiness reduces the retributive value of their execution. They also argue that a juvenile's limited ability to conduct cost-benefit analysis for their conduct reduces the deterrent effect of juvenile executions.

B. *Stanford v. Kentucky: The Scope and Effect of the Decision*

1. The Plurality

In an opinion joined by Justices White, Kennedy, and Chief Justice Rehnquist, Justice Antonin Scalia upheld the constitutionality of Stanford's and Wilkins' death sentences. After concluding that the appellants' death sentences would not have been "cruel and unusual punishment" in 1791, the plurality advanced beyond *Ford v. Wainwright* analysis and began their *Trop v. Dulles* analysis.

Under *Trop*, the plurality considered whether society's evolving standards of decency forbade juvenile executions. The plurality examined state legislative statistics and jury/prosecutor behavior. Of the 37 states which allow the death penalty, the plurality found that fifteen of them outlaw the execution of offenders under age seventeen. Twelve of the 37 jurisdictions which allow the death penalty forbid the execution of offenders under age eighteen. The plurality examined these statistics in light of the *Tison v. Arizona* decision. In *Tison*, the Court upheld the eighth amendment constitutionality of the death penalty for recklessly indifferent defendants who participate in a felony that results in death. The *Tison* court found that only eleven of the 37 death penalty jurisdictions rejected the death penalty of such defendants. The *Tison* Court concluded that the rejection of this punishment by eleven jurisdictions did not render it contrary to society's evolving

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100 *Thompson*, 108 S. Ct. at 2699.
101 *See, e.g.*, *Stanford*, 109 S. Ct. at 2994 (Brennan, J., dissenting); *Thompson*, 108 S. Ct. at 2699, 2700.
102 *Stanford*, 109 S. Ct. at 2993 (Brennan, J., dissenting).
103 *Id.*
104 *Id.* at 2980.
105 *Id.* at 2974.
106 *Ford v. Wainwright*, 477 U.S. 399 (1986) (set forth the first strand of eighth amendment analysis: Would the punishment have been "cruel and unusual" at the time the Bill of Rights was adopted (1791)?)
107 *Stanford*, 109 S. Ct. at 2974.
108 *Id.*
109 *Id.* at 2975-77.
110 *Id.* at 2975.
111 *Id.*
113 *Id.* at 158. In *Tison v. Arizona*, Ricky and Raymond Tison helped their father to escape from prison. During the getaway, the defendants commandeered a passing car which carried the murder victims. Ricky and Raymond Tison stood by and watched as their father and another prison escapee riddled the victims' bodies with bullets. *Id.* at 141.
114 *Id.* at 154.
standards of decency. Finding the *Tison* legislative statistics to be similar to those for the juvenile death penalty, the plurality in *Stanford* concluded that the execution of eighteen and seventeen year old capital offenders does not violate society's evolving standards of decency. The plurality also concluded that prosecutors are not unduly reluctant to seek nor are juries reluctant to impose the death sentence for juvenile offenders. The plurality insisted that the infrequency of juvenile executions is more readily explained by the smaller percentage of juvenile capital crimes than by any prosecutor or jury reluctance.

Conspicuously absent from the plurality's *Trop* analysis were opinion polls, age-based statutory classifications, world opinion and practice, and the opinions of professional and special interest groups. The plurality rejected this evidence as an "uncertain foundation" for constitutional law.

Proceeding to the "excessiveness" inquiry, the plurality minimized the importance of proportionality analysis. Justice Scalia insisted that objective legislative and prosecutor/jury statistics were far more important. Justice Scalia also concluded that Stanford's and Wilkins' executions would further the legitimate penal goals of retribution and deterrence.

The plurality's opinion is well-reasoned. Because juvenile executions would not have been "cruel and unusual punishment" in 1791, *Ford v. Wainwright* does not necessitate the reversal of Stanford's and Wilkins' death sentences.

The plurality's *Trop v. Dulles* analysis is proper. Few courts have ventured beyond objective legislative and jury/prosecutor statistics in their *Trop* analysis. Opinion polls and the opinions of professional and special interest groups are uncertain and reflect the values and beliefs of only limited sectors of society. Likewise, age-based statutory classifications of the voting, driving, and drinking age are unhelpful in determining society's evolving standards of decency. As Justice Scalia argued, "It is . . . absurd to think that one must be mature enough to drive carefully, to drink responsibly, or to vote intelligently, in order to be mature enough...

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115 *Id.*
116 *Stanford*, 109 S. Ct. at 2976. For reference, the Supreme Court held that society's evolving standards of decency were violated in the following cases: Solem v. Helm, 463 U.S. 277 (1983) (only 2 states mandated life imprisonment for drafting a bad check when convicted under a recidivist statute); Enmund v. Florida, 458 U.S. 782 (1982) (only 8 states allowed execution in similar felony murder circumstances).
117 *Stanford*, 109 S. Ct. at 2977.
118 *Id.*
119 *Id.* at 2979.
120 *Id.* at 2980.
121 *Id.*
122 *Id.* at 2979. "We reject petitioners' argument that we should invalidate capital punishment . . . on the ground that it fails to serve the legitimate goals of penology." *Id.*
124 See *supra* note 86.
to understand that murdering another human being is profoundly wrong.'"125 Furthermore, the voting, driving, and drinking age-based classifications are established by considering the maturity of juveniles, as a class.126 However, death penalty jurisprudence demands the individualized consideration of juveniles.127 The plurality insisted that Stanford and Wilkins received sufficient "individualized consideration" through the juvenile court's transfer hearing and the adult court's sentencing hearing.128

The plurality omitted one factor from their Trop v. Dulles analysis. In Trop, the Court considered the number of nations that would impose a similar punishment.129 Finding that only two other nations would strip an Army deserter of his citizenship, the Trop court concluded that the punishment was "cruel and unusual."130 The Stanford plurality refused to consider world opinion on the juvenile death penalty.131 Although world opinion is relevant, it is not as convincing as the American peoples' opinion, as reflected in objective legislative and jury/prosecutor statistics.132 Therefore, this omission does not appreciably weaken the plurality's opinion.

However, the plurality's opinion is flawed by their omission of proportionality analysis in their "excessiveness" inquiry. The idea that punishment must be proportional to the defendant's blameworthiness predates the discovery of America.133 Proportionality has long been required by American courts.134 In its leading proportionality case, the United States Supreme Court held, "It is a basic precept of justice that punishment for crime should be graduated and proportioned to the offense."135 Although the plurality did not formally conduct proportionality analysis, few could disagree that the egregious nature of Stanford's and Wilkins' crimes justify their death sentences. Furthermore, both Stanford and Wilkins were just months away from the age of majority when they claimed their victims' lives.136 For Stanford and Wilkins, proportionality analysis was simply a formality, albeit a constitutionally necessary one.

125 Stanford, 109 S. Ct. at 2977.
126 Id.
127 Id.
128 Id. at 2978.
129 Trop v. Dulles, 356 U.S. at 102-03.
130 Id.
131 Stanford, 109 S. Ct. at 2975, n.l.
132 See id.
133 Proportionality analysis can be traced back to the Magna Carta, the First Statute of Westminster, and the English Bill of Rights. English Courts conducted proportionality analysis in Earl of Devon's Case, 11 State Tr. 1353, 1356 (1687). In that case, a fine of 30,000 pounds upon Earl of Devon was deemed "excessive and exorbitant."
134 List of cases employing proportionality analysis, supra note 94.
135 Weems v. U.S., 217 U.S. 349, 367 (1910). In Weems, the defendant was convicted of falsifying a public document. Id. at 358. For this crime, he was sentenced to fifteen years of hard labor in chains. Id. The Supreme Court found the punishment disproportionate. Id. at 382.
136 Stanford, 109 S. Ct. at 2972-73.
Therefore, the plurality’s opinion is substantially consistent with the *Ford v. Wainwright*, *37*; *Trop v. Dulles*, and “excessiveness” framework of eight amendment analysis. The plurality’s omission of world opinion and proportionality analysis does not appreciably compromise the forcefulness of their opinion.

2. *The Concurrence*

Justice O’Connor provided the fifth vote for affirmance of Stanford’s and Wilkins’ death sentences. Her concurring opinion renews her commitment to her *Thompson v. Oklahoma* analysis. Concluding that no national consensus forbids the execution of sixteen or seventeen year old capital offenders, Justice O’Connor seemingly established age sixteen as the youngest age at which a capital offender may be executed. However, under O’Connor’s *Thompson* and *Stanford* opinions, a capital offender under age sixteen can be executed if the statute under which he was sentenced specifically established a minimum age of death-eligibility.

Justice O’Connor disagreed with the plurality’s omission of proportionality analysis. Citing considerable precedent, O’Connor properly recognized the firmly ingrained nature of proportionality analysis. O’Connor also refused to disregard age-based statutory classifications of juveniles; she believed that they were relevant in both *Thompson* and *Stanford*.

The primary criticism of Justice O’Connor’s *Stanford* opinion is her reaffirmation of her *Thompson* analysis. Justice O’Connor’s requirement that state legislatures include a minimum age in their capital punishment statute has been described as a “loose cannon of a brand new principle” on “the deck of . . . Eighth Amendment jurisprudence.” By dictating the precise wording of state legislation, Justice O’Connor “interfe[r]s with . . . the States’ legislative processes: the heart of their sovereignty.”

3. *The Dissent*

Justice Brennan vigorously advocated the reversal of Stanford’s and Wilkins’
death sentences. In an opinion joined by Justices Blackmun, Marshall, and Stevens, Justice Brennan asserted that the juvenile death penalty violated society’s “evolving standards of decency.”

Recognizing that Ford v. Wainwright permits juvenile executions, the dissent opened their opinion with Trop v. Dulles analysis. The dissent asserted that 27 states reject the juvenile death penalty. To arrive at this figure, Justice Brennan included the states which entirely reject capital punishment. Justice Scalia chided the dissent for “work[ing] its statistical magic.” Scalia believed that the juvenile death penalty inquiry should be limited to the thirty-seven states which allow capital punishment. Supreme Court precedent supports Justice Scalia’s approach.

The dissent advocated a broader scope of Trop v. Dulles analysis. Justice Brennan ventured beyond the objective legislative and jury/prosecutor statistics which have characterized Trop analysis. Citing world statistics, the opinions of special-interest groups, and age-based statutory classifications, the dissent insisted that evolving opinion militates against juvenile executions.

The dissent concluded that the juvenile death sentence is “excessive” punishment. Because juveniles are impulsive, impressionable, vulnerable, and immature, Brennan insisted that juveniles lack the necessary culpability to be executed. For the same reasons, the dissent refused to recognize any penological purpose in juvenile executions.

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148 Stanford, 109 S. Ct. at 2982 (Brennan, J., dissenting).
149 Id. at 2986.
150 477 U.S. 399.
151 356 U.S. 86.
152 Stanford, 109 S. Ct. at 2982 (Brennan, J., dissenting).
153 Id. at 2983.
154 Id.
155 Id. at 2976 n.3.
156 Id.
157 See, e.g., Penry v. Lynaugh, 109 S. Ct. 2934 (1989); Tison v. Arizona, 481 U.S. 137 (1987); Enmund v. Florida, 458 U.S. 782 (1982). These Supreme Court eighth amendment death penalty cases have considered the legislative statistics of only those thirty-seven states which allow capital punishment.
159 Stanford, 109 S. Ct. at 2982 (Brennan, J., dissenting).
160 Id.
161 Id. at 2985. Justice Brennan claims that a majority of the 65 nations that retain capital punishment prohibit juvenile executions. He also asserts that Pakistan, Bangladesh, Rwanda, Barbados, and the United States are the only nations that have executed juveniles since 1979.
162 Id. Justice Brennan cites the American Bar Association, National Council of Juvenile and Family Court Judges, National Commission on Reform of Federal Laws, and Amnesty International as groups which oppose juvenile executions.
163 Id.
164 Id. at 2986.
165 Id. at 2994.
166 Id. at 2993.
167 Id.
The dissent's suggested *Trop v. Dulles* analysis is too broad. Countless Supreme Court decisions have limited *Trop* analysis to objective evidence of society's evolving standards of decency. In 1987, Justice Lewis F. Powell noted that most of the Court's death penalty decisions have rested upon an examination of state legislative and sentencing jury decisions. Justice Powell described these factors as "a significant and reliable objective index of contemporary values." The dissent's subjective opinion polls, age-based statutory classifications, and the opinions of professional and special-interest groups are an uncertain foundation for constitutional law. Therefore, the dissent's reliance upon them is misplaced.

Equally debatable is the dissent's claim that juvenile executions are "excessive." At the time of their crimes, Kevin Stanford and Heath Wilkins were only months away from the age of majority. Both of them had previous encounters with the law. To believe that neither of them appreciated the wrongfulness of their acts is fantasy.


The Court's decision sends three strong messages. First, the decision is fragile and easily subject to change. Because both the plurality and the concurrence rely heavily upon state legislative statistics, any change in these normative statistics will change the Court's decision. Eighteen of the thirty-seven death penalty states have not established a minimum age at which a capital offender may be death-eligible. If these states "break their silence," the Court's view of the evolving standards of decency are likely to change.

Second, the decision highlights the Court's disagreement over the proper scope of Eighth Amendment analysis. Following precedent, the plurality's *Trop v. Dulles* analysis is narrowly confined to objective legislative and jury statistics. Both the concurrence and the dissent favor a broader *Trop v. Dulles* analysis. The Court also disagreed about the importance of proportionality analysis. These disagreements will affect every eighth amendment case which the Court may hear.

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169 See supra note 86.
172 Stanford, 109 S. Ct. at 2979.
173 *Id.* at 2972-73.
174 *Id.* at 2974. For example, Heath Wilkins was previously punished for burglary, theft, arson, and attempted murder. Wilkins attempted to murder his mother by putting insecticide into her Tylenol capsules.
175 *Id.* at 2976 n.3.
177 Stanford, 109 S. Ct. at 2981-82. Justice O'Connor believes that age-based statutory classifications may be relevant. Justices Brennan, Marshall, Blackmun, and Stevens insist that objective *Trop v. Dulles* factors (e.g., legislative and jury statistics) are only the starting point for analysis.
178 *Id.* at 2980. The plurality asserts that proportionality analysis is marginally important. The concurrence and the dissent assert that it is a "constitutional must."
Finally, the constitutionality of a fifteen year-old capital offender’s death sentence is still an open question. Justice O’Connor’s Thompson v. Oklahoma analysis is still operative. Under the current Court, a fifteen year-old offender may, most likely, be executed if the statute under which he was sentenced established a minimum age of death-eligibility. A change in society’s evolving standards of decency, as reflected through legislative and jury statistics, might also warrant a fifteen year-old offender’s execution.

**Conclusion**

By upholding Kevin Stanford’s and Heath Wilkins’ death sentences, the Supreme Court broke its silence on the eighth amendment constitutionality of the juvenile death penalty; the Court “bit the constitutional bullet.”

Although the plurality, concurrence, and dissent analyzed the issue under the traditional three step approach, the Justices disagreed over the proper scope of eighth amendment analysis. This disagreement will affect all eighth amendment cases which the Court may hear.

Because the Court’s decision is based upon legislative statistics and because eighteen of the thirty-seven capital punishment states have not established a minimum age of death-eligibility, the Court’s decision is very fragile. If these “silent states” express themselves, the court may find that society’s evolving standards of decency no longer warrant juvenile executions.

Finally, the constitutionality of a fifteen year-old offender’s death sentence remains an open question.

The Court’s task in *Stanford and Wilkins* was not easy. However, through considered judgment and deliberation, the Court formulated an appropriate response to Kevin Stanford’s and Heath Wilkins’ brutality.

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180 *Stanford*, 109 S. Ct. at 2981 (O’Connor, J., concurring).
181 Because Justice Anthony Kennedy did not participate in the Thompson decision, his position on the execution of fifteen year old capital offenders is unknown. However, by joining Justice Scalia’s Stanford opinion, Justice Kennedy suggested that he would uphold the constitutionality of a fifteen year old offender’s death sentence.
182 As developed in the casenote, this three-step approach includes *Ford v. Wainwright*, *Trop v. Dulles*, and “excessiveness” analysis.