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Killing Kids Who Kill: Desecrating the Sanctuary of Childhood Symposium: Thoughts on Death Penalty Issues 25 Years after Furman v. Georgia.

Richard Burr

Mandy Welch

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ADDRESSES*

KILLING KIDS WHO KILL: DESECRATING THE SANCTUARY OF CHILDHOOD

RICHARD BURR*
MANDY WELCH*

Mr. Richard Burr: We want to let you know how we will proceed so that you can be thinking with us. We have basically divided this discussion into three parts. We will spend the first ten to fifteen minutes doing some important scene-setting of the factual context in which issues arise concerning children, the death penalty, and the people who we purport to sentence to death as adults. We then will shift gears and discuss three Supreme Court cases: two that dealt directly with minimum age limits for imposition of the death penalty and one, a Texas case the Supreme Court

* The citation rules prescribed by *The Bluebook—A Uniform System of Citation*, have not been strictly adhered to throughout these addresses in deference to the requests of our authors/speakers. Materials not cited to in a given address are on file with the author.

* Richard Burr is a partner in Burr & Welch, a private firm in Houston, Texas devoted to the representation of persons facing the death penalty. He formerly directed the death penalty project of the NAACP Legal Defense Fund. His is married to Mandy Welch.

* Mandy Welch is a partner in Burr & Welch. She is the director of the former Texas Resource Center and has represented people facing the death penalty in Oklahoma and Texas since 1985.

decided, that looked at how youthfulness gets considered as mitigation in death penalty cases. Finally, we will conclude by looking at the social, political, and economic context in which the Supreme Court has operated and reached the conclusions it has in death penalty cases, and in which this issue now presents itself. That, I think, will end hopefully with a call to further advocacy and action.

Ms. Mandy Welch: The world's human rights community undoubtedly and overwhelmingly condemns the execution of those who have committed crimes and are under eighteen years of age. In fact, numerous international agreements prohibit the execution of juvenile offenders. The International Covenant on Civil and Political Rights[1] provides that a sentence of death shall not be imposed for crimes committed by persons below eighteen years of age.[2] The Convention on the Rights of the Child,[3] the American Convention on Human Rights,[4] and the Geneva Convention Relative to the Protection of Civilian Persons in Time of War[5] make similar provisions. Protocol Additional (No. I) to the Geneva Conventions of 1949[6] provides that the death penalty for an offense related to an armed conflict shall not be imposed on persons who had not attained the age of eighteen years at the time the offense was committed. Protocol Two of 1977, added to the Geneva Convention of 1949,[7] likewise prohibits the execution of juvenile offenders. Finally, the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty,[8] a United Nations Economic and Social Counsel Resolution adopted in

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1. International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Exec. Rep. 102–23 (1992), 999 U.N.T.S. 171.

2. *See* International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 6, para. 5, 999 U.N.T.S. 171, 175.

3. Convention on the Rights of the Child, Nov. 20, 1989, 28 I.L.M. 1448 (entered into force Sept. 2, 1990).

4. American Convention on Human Rights, Nov. 22, 1969, S. Treaty Doc. No. 94–2 (1978), 9 I.L.M. 673 (entered into force July 18, 1978).

5. Geneva Convention (No. IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1945, 6 U.S.T. 3516, 75 U.N.T.S. 287.

6. Protocol Additional (No. I) to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 16 I.L.M. 1391 (entered into force Dec. 7, 1978).

7. Protocol Additional (No. II) to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 16 I.L.M. 1442 (entered into force Dec. 7, 1978).

8. *Safeguards Guaranteeing Protection of the Rights of These Facing the Death Penalty*, E.S.C. Res. 1984/50, U.N. ESCOR, May 25, 1984, <gopher://gopher.un.org/oo/esc/recs/1984/50%09%09%2B>.

1984 and endorsed by the United Nations General Assembly on December 14, 1984, also prohibits the execution of juvenile offenders.[9]

More than one hundred countries either have laws which preclude the imposition of the death penalty for offenses committed by persons under eighteen years of age, or have expressed their opposition to the execution of juvenile offenders by signing one of these international agreements. Despite this overwhelming consensus among the international human rights community, a number of countries have laws which do permit the imposition of the death penalty against juvenile offenders.

Amnesty International has documented at least thirty executions of juveniles in at least eight countries since 1985. Bangladesh executed a seventeen year-old in 1986. Iran executed two seventeen year-olds in 1990 and one sixteen year-old in 1992. Iraq executed five Kurdish juveniles in 1987, and eight Kurdish juveniles in the latter part of December 1987. From 1985 through 1995, Nigeria, Pakistan, and Saudia Arabia executed people who were under eighteen years of age. Yemen executed someone as young as thirteen on July 21, 1993. Another country that has documented executions of juveniles is the United States, who from 1985 through the present, has executed nine juvenile offenders, all of whom were seventeen years old when they committed their crimes. So, we can see the kind of company the United States finds itself with respect to its policy that killing kids for crimes they committed when they were kids is all right.

In the United States, the federal government, as well as thirty-eight states, authorize the death penalty. Fifteen of those states have adopted eighteen years of age as the minimum age for imposing the death penalty. However, fourteen states expressly permit imposition of the death penalty for the commission of murder at the age of seventeen. Twenty states use sixteen as a minimum age either by statute or court decision. There have even been recent efforts in a number of states to reduce the minimum age to as low as fourteen. This last year in Congress, a bill was pending that would reduce the minimum age for the imposition of the death penalty for federal crimes to sixteen. So, it is quite apparent that the United States is running in the opposite direction from the tide of international human rights opinions.

The United States is clearly one of, if not the leader of, the execution of persons who committed crimes as juveniles. These executions are not a new phenomenon. Since 1973, when the states adopted new death penalty statutes in response to the Supreme Court's decision in *Furman v.*

9. *See Human Rights and the Administration of Justice*, G.A. Res. 39/118, U.N. GAOR, 39th Sess., Supp. No. 51, at 409, U.N. Doc.A/39/700 (1984).

Georgia,[10] one-hundred death sentences have been imposed for crimes committed by children under eighteen. Thirteen death sentences were imposed for crimes committed by fifteen year-olds, thirty-five death sentences were imposed for crimes committed by sixteen year-olds, and 112 death sentences were imposed for crimes committed by children who were seventeen years old. Of those 160 death sentences, fifty-eight remain in effect. Ninety-three of the death sentences were reversed during the first number of years after the reinstatement of the death penalty and nine of those sentences have been carried out.

I am sure that it will not surprise you to learn that while the United States is a leader in this area, Texas is clearly the leader in the United States. The total number of death sentences that have been imposed in Texas for juvenile offenses is thirty-nine. Florida is not close, but is a distant second with twenty-seven. Alabama is third with thirteen.

Currently, there are twenty-five juvenile offenders on death row in Texas. That is forty-three percent of the nation's total of fifty-eight juvenile offenders on death rows across the country. Again, I doubt that you will be surprised that, within Texas, Harris County is by far the leader in killing children. With a total of eight, almost one-third of the Texas juvenile offenders on death row are from Harris County. The other juvenile offenders are from counties scattered throughout the State of Texas. The number from Harris County is quadruple the number from any other county. There are two juvenile offenders on death row from Bexar County and two from Randall County. All of the other juvenile offenders represent the single juvenile offenders sentenced to death in their particular county.

Of the nine executions that have taken place in the United States since 1975, five took place in Texas. Texas was the first state in the United States after 1973 to execute a person sentenced to death for a crime he committed at the age of seventeen. The person's name was Charles Rumbaugh. He was sentenced to death for a robbery and murder that he committed when he was seventeen; he was executed when he was twenty-eight years old. At the time of his crime, it is unquestioned that Charles suffered from severe depression and serious multiple mental disturbances.[11] He had spent most of his young life in reform schools, mental institutions, and jails. He had a long history of attempted suicides. In fact, while he was awaiting trial, he attempted suicide by slashing his wrists with a razor. Later, he attempted suicide by taking an overdose of drugs. Charles' first conviction was overturned by the Texas Court of

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10. 408 U.S. 238 (1972) (per curiam).

11. Background materials pertaining to Charles Rumbaugh are on file with the *St. Mary's Law Journal.*

Criminal Appeals.[12] The State tried again and got another conviction, and another death sentence. By this time, Charles was determined to abandon his appeals and accomplish his suicide with the help of the State. His parents made a valiant effort to stop this. They attempted to go into court and to challenge his conviction and death sentence on his behalf. In order to do this, they gathered an abundance of evidence about Charles' mental illnesses and his inability to make rational decisions about his life, about his death sentence, and about his appeals. It was clear from the evidence that he continued to suffer from these long-standing severe mental illnesses. However, the court found that he was capable of making a rational decision with respect to his appeals and, in fact, part of its reasoning was that he did not want to spend the rest of his life in prison as his appeals were not likely to be successful. He was depressed because he was on death row and facing the death sentence. Therefore, the courts let him abandon his appeal. Without having examined the fairness and constitutionality of his death sentence, the State of Texas executed him.

What I have found as I reviewed information about juvenile death sentences and the cases involving the commission of capital murders by juveniles, is that the problems that concern us with respect to the death penalty in general are manifest in the death penalties imposed for juveniles. Like Charles Rumbaugh, it is not uncommon to see mental illness in those who are sentenced to death for crimes they committed while they were children. It is not uncommon to see that children sentenced to death are from homes where they were abused and neglected. And, it is not uncommon to see racism in the decisions that are made by juries and judges to kill children who have committed crimes.

Nationally, sixty-five percent of the juveniles executed since 1973 were either African American or Latino. Of the total currently on death row, two-thirds are children of color. Twenty-six are African American, thirteen are Latino, and only nineteen are white. Again, Texas shows to even a greater extent the racial disparities that exist in our use of the death penalty. Of the juvenile offenders on death row in Texas, eighty-four percent are either African American or Latino. Eleven are African American, ten are Latino, and only four are white. With respect to the racial disparities, Harris County again leads Texas. Of the eight juvenile offenders sent to death row from Houston or from Harris County, none are white. Four are African American, and four are Latino.

I could stand here and describe to you the conditions of these children's lives until I cried. It wouldn't take very long for tears to come to my eyes. They do when I think about it, and they certainly do when I

12. *See* Rumbaugh v. State, 589 S.W.2d 414, 419 (Tex. Crim. App. 1979) (en banc).

read about it and talk about it. But I do want to talk to you about one or two.

Joseph John Cannon was sentenced to death in Bexar County for a crime he committed when he was seventeen years old.[13] As with all juvenile offenders, his story is extraordinarily tragic.[14] Joseph has been described as the quintessential example of a child who consistently was denied basic resources, and who eventually became a danger to himself and others. At age four, Joseph was struck by a truck and suffered a fractured skull, a broken leg, and a punctured lung. He was taken to the hospital, and when he was released, instead of being sent home to loving parents, he was sent to an orphanage. He had hyperactivity and numerous other severe learning disorders, so many, that learning was almost impossible for him, and he was expelled from school in the first grade. He had no formal education beyond that point.

By the age of ten, Joseph had sniffed so much gasoline and glue and other solvents, that he suffers today from permanent brain damage. I think it is unquestioned, by those who have looked into his case, that these inhalants, which permanently damaged his brain, provided an escape for Joseph at these early ages from the sexual abuse that he suffered from his stepfather, as well as other abuse from other men in his family that he suffered from age three until he was arrested at the age of seventeen.

In late 1977, Joseph's father and brothers kicked him out of their home telling him not to come back. Joseph left with the intention of hitchhiking to Las Vegas, but because he was so hungry and had no other source of food, he broke into an apartment and was eating food out of a refrigerator when he saw a picture of the woman who lived in the apartment. As Joseph tells the story, when he saw that picture, he felt bad about what he was doing, and he sat there and waited until the police came in and arrested him.

The lawyer who was appointed to represent Joseph in the burglary case befriended him. I am sure his heart went out to this young man who so clearly had had no chance, and who had no place to go. He persuaded the judge to sentence him to five years probation, but could not turn his back on him. That lawyer managed to find a place for Joseph in the apartments where his sister lived. Unfortunately, he did not realize how

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13. *See* Cannon v. State, 691 S.W.2d 664, 667–69 (Tex. Crim. App. 1985) (en banc) (affirming the seventeen year-old defendant's conviction of capital murder and his death sentence).

14. Background materials pertaining to Joseph John Cannon are on file with the *St. Mary's Law Journal.*

severe and deep-seated Joseph's mental problems were. While Joseph was there, he shot and killed his lawyer's sister for no apparent reason.[15]

When Joseph was arrested, he immediately confessed to the murder. It was clear to the lawyers who were appointed to represent him that Joseph was severely mentally ill and that his crime was a product of that mental illness. An insanity defense was presented at the trial.[16] Those who have practiced criminal law know how impossible it is to obtain an acquittal as a result of an insanity defense. As is so often the case, the insanity defense in Joseph's case failed and he was convicted. Under the Texas statute, which we will discuss, the jury had really no choice on the evidence but to find that he would continue to be a future danger, and under Texas law he was sentenced to death.

That conviction was reversed,[17] and the second lawyers who were appointed to represent Joseph learned lessons from the first trial. Rather than ensuring that the jury would find that he was a future danger because of his mental illness, the court did not apprise the jury, which convicted and sentenced him the second time, of his horrible childhood and mental illness. However, the jury did know that he had committed a brutally horrible crime for no reason. It found on that basis he would be a future danger, and again sentenced him to death.

Those who know Joseph today say that death row has provided him, for the first time, a sense of stability, and has given him an opportunity to better himself. He has learned to read. He has taken Bible studies through correspondence and finds comfort in the study of the Bible. Joseph Cannon is scheduled to be executed on April 22nd of this year.

Mr. Richard Burr: Shifting, now, to the Supreme Court, in the late 1980s, two efforts were made to bring to the Court the fundamental constitutional question of whether it is ever appropriate under the Eighth Amendment to sentence children to death. The first case came out of Oklahoma.[18] A young man named William Wayne Thompson was fifteen at the time that he killed his brother-in-law who was terribly abusive of Thompson's sister. Thompson, a couple of other brothers, and a friend quite deliberately, and quite premeditatedly, killed the abusive husband. Thompson was sentenced to death.[19] Under Oklahoma law he was treated as a juvenile initially. However, through a certification process, he was sent to adult court. Part of the analysis that sends a juvenile to adult court is whether or not that person, because of inherent qualities in

15. *See Cannon*, 691 S.W.2d at 668–69 (detailing defendant's confession).
16. *See* Cannon v. Johnson, 134 F.3d 683, 684 (5th Cir. 1998).
17. *See id.*
18. *See* Thompson v. Oklahoma, 487 U.S. 815 (1988).
19. *See id.* at 818.

him or her, should be treated as a child or an adult. He was sent to adult court at the age of fifteen.

After trial he was convicted. After a penalty phase he was sentenced to death. He was sixteen years old at the time he actually was sentenced to death. The Supreme Court took his case on the question of whether the Eighth Amendment prohibited the death sentencing and execution of a child who committed a crime at the age of fifteen.[20] In 1988, with a 4-1-3 decision and Justice O'Connor in the middle casting the determinative vote, Wayne Thompson's death sentence was set aside.[21]

Justice Stevens, joined by Justices Marshall, Brennan and Blackmun, wrote the plurality.[22] Justice Rehnquist, joined by Justices Scalia and White wrote the dissent.[23] Justice Kennedy did not participate in the decision.[24] For many years, Eighth Amendment analysis had two components when the Court considered whether a particular punishment was cruel and unusual. The first was a so-called "objective" component, by which the court looked at the evolving standards of decency in society.[25] To try to determine that standard, the Court often looked to statutes, decisions of juries in particular kinds of cases, and to contemporary standards reflected in other ways.[26] International law was one standard the court considered. Professional bodies that had expertise in a particular area might be another. The other part of the analysis was a so-called "proportionality analysis"[27] that looked at whether a particular kind of punishment was disproportionate to the kind of crime or the kind of offender being punished.

The plurality analyzed Wayne Thompson's case under this two-part test. At that time, the array of objective standards looked like this: In terms of statutes, fourteen states at the time did not have the death penalty at all.[28] Eighteen states had the death penalty but prohibited sen-

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20. *See id.* at 820–21 (stating that it granted certiorari, in part, "to consider whether a sentence of death is cruel and unusual punishment for a crime committed by a 15-year-old child").

21. *See id.* at 838 (concluding that "the Eighth and Fourteenth Amendments prohibit the execution of a person who was under 16 years of age at the time of his or her offense").

22. *See id.*

23. *See Thompson*, 487 U.S. at 859.

24. *See id.* at 838.

25. *See id.* at 821.

26. *See id.* at 822.

27. *See id.* at 834.

28. *See Thompson*, 487 U.S. at 826 n.25 (including the District of Columbia). Whether expressly holding the death penalty unconstitutional or stating that sentences for felony convictions did not include the death penalty, the following states did not have the death penalty at the time the Supreme Court decided *Thompson v. Oklahoma*: Alaska, District

tencing to death persons under the age of sixteen.[29] Finally, nineteen states had the death penalty but expressed no age minimum at all.[30] So, thirty-two states, including the non-death states, would have forbidden the death sentencing of William Wayne Thompson. This was part of the objective picture that both the plurality and the other members of the Court considered.

International law was examined, and it presented the kind of picture that Mandy has painted for you. Other areas of the law in which we draw age lines were examined. The plurality noted that no state allowed voting or jury service for a fifteen year-old child.[31] Only one state allowed fifteen year-olds to drive without parental consent.[32] Only four allowed fifteen year-olds to marry without parental consent.[33] And in states that had legislated on the subject, none allowed fifteen year-olds to purchase pornographic materials.[34] In states where gambling was legal, none allowed fifteen year-olds to gamble.[35] And in all states, juvenile court jurisdiction extended to the age of sixteen, although with the processes of allowing certification to adult court.[36]

The Court looked at standards of professional organizations like the American Bar Association and the American Law Institute.[37] Both had promulgated standards, at that point, which prevented sentencing people to death for crimes they committed while they were below the age of sixteen.[38] Very few juries in this country, at that time and for years before, had sentenced anyone to death at that young an age. The plurality went on to say that in light of this objective picture, a sizeable majority of the states would not have sentenced William Wayne Thompson to death for any reason.[39]

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of Columbia, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, New York, North Dakota, Rhode Island, West Virginia, and Wisconsin. *See id.*

29. *See id.* at 829 (finding that of the eighteen states which have established a minimum age in their death penalty statutes, all require that the defendant be at least sixteen). Some states have set the age at even seventeen and eighteen. *See id.* at 829 n.30.

30. *See id.* at 826–27. The states included: Alabama, Arizona, Arkansas, Delaware, Florida, Idaho, Louisiana, Mississippi, Missouri, Montana, Oklahoma, Pennsylvania, South Carolina, South Dakota, Utah, Vermont, Virginia, Washington, and Wyoming. *See id.* at 828 n.26.

31. *See id.* at 824.

32. *See id.*

33. *See Thompson*, 487 U.S. at 824.

34. *See id.*

35. *See id.* at 847 app. F (saying that 39 states absolutely prohibit minors from gambling, three allow it with parental consent, and six states have no statutory age restrictions).

36. *See id.* at 824 n.22.

37. *See id.* at 830.

38. *See Thompson*, 487 U.S. at 830.

39. *See id.* at 828–29.

Then the Court began to undertake a proportionality analysis.[40] The Court first noted, that in a number of its decisions, it had recognized that young people below the age of eighteen, at least, perhaps even slightly older, were still in the process of growing and maturing.[41] As well, children suffered a number of emotional and intellectual vulnerabilities, which traditionally had enabled us to hold them less culpable than adults for things they did wrong.[42] The Court said in the face of that long tradition, it is clear that death is disproportionate for a child who could not, and should not, be held to the same degree of responsibility and culpability as an adult.[43]

The Court employed a more refined analysis to determine whether the two objectives of capital punishment, which the Court had sanctioned in the past, that is, retribution and deterrence, were served by the execution of a fifteen year-old.[44] Very quickly the plurality determined that they were not.[45] The inherent difference of a child of fifteen from adults made retribution unnecessary and inappropriate given the vulnerable nature of children.[46] The Court also determined that deterrence, again based on the lesser ability of growing children to appreciate what they have done and to be deterred by prospective punishment, had very little effect.[47] That plurality would have held that fifteen year-olds could not be sentenced to death.

Justice O'Connor, in the middle, was less certain. What was determinative for her came from the relevant legislation.[48] The nineteen states that had not made any judgment were critical for her.[49] She didn't think that the math was persuasive unless you took into account those nineteen states even though there were other states that would not have sentenced a fifteen year-old to death.[50]

In her view, the issue was resolved by recognizing that these nineteen legislatures had not made a thoughtful and considered judgment about

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40. *See id.* at 834.

41. *See id.* at 834–35.

42. *See id.*

43. *See Thompson*, 487 U.S. at 830–31.

44. *See id.* at 837–38.

45. *See id.*

46. *See id.* at 936–37.

47. *See id.* at 835–37 (explaining that "inexperience, less education, and less intelligence [and] . . . mere emotion and peer pressure" cause teenagers to be less likely to evaluate the consequences of their actions). In addition, young offenders do not attach any weight to the possibility of execution, and so it has no deterrent value. *See id.* at 837.

48. *See Thompson*, 487 U.S. at 850–51 (O'Connor, J., concurring).

49. *See id.*

50. *See id.*

what the minimum age should be for sentencing somebody to death.[51] She recounted that Eighth Amendment jurisprudence calls for reliable, thoughtful decision making in every aspect of capital trials.[52] She then decided that this principle applies to legislatures as well, and in her view, when legislatures have not said anything about age limits, they are likely not engaged in a thoughtful, deliberate, and reliable process of making a judgment.[53] She then concluded that the Court could not allow the sentencing of death to fifteen year-olds in the face of this array of legislation across the country.[54]

This analysis provided the fifth vote for William Wayne Thompson, and his death sentence ultimately was set aside. However, the dissent, written this time by Justice Scalia, began to lay the seeds with Justice Rehnquist and Justice White. This part of the Court, which would become a majority later, said that in conducting an Eighth Amendment analysis, courts should not be concerned with evolving standards of decency and the proportionality of punishment.[55] Instead, courts simply ought to consider the objective factors and make a judgment.[56] That is what the dissenters did, and their view about the nineteen states which had not set any age limit was that these states were relying on the process of certifying kids from juvenile court to adult court to make the judgment.[57] It was an individualized judgment, not a class or category-based judgment; and the states could be relied on to make a careful enough, reliable enough judgment in individual cases that if they certified a kid to be an adult for purposes of capital prosecution, that was good enough. Since there was clearly no consensus against executing fifteen year-olds, the dissent would have permitted the execution of these children.

Just a year later, the Court revisited the issue in two cases. Kevin Stanford's case from Kentucky,[58] and Heath Wilkins' case from Missouri.[59] Heath Wilkins was sixteen at the time of his offense and his death sentence. Kevin Stanford was seventeen at the time of his offense. The Court put the two cases together and, in an opinion called *Stanford v. Kentucky*,[60] the majority and the dissent reversed. The majority opinion

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51. *See id.* at 850.
52. *See id.*
53. *See Thompson*, 487 U.S. at 849–50.
54. *See id.* (O'Connor, J., concurring).
55. *See id.* at 864–65 (Scalia, J., dissenting).
56. *See id.*
57. *See id.* at 867–68.
58. *See* Stanford v. Kentucky, 492 U.S. 361 (1989).
59. *See* State v. Wilkins, 736 S.W.2d 409 (Mo. 1987), *aff'd* Stanford v. Kentucky, 492 U.S. 361 (1989).
60. 492 U.S. 361 (1989).

was written by Justice Scalia. Looking solely at objective data, he suggested that it is not the role of the Supreme Court to make a normative judgement or to engage in proportionality analysis if proportionality analysis is in any way undermined by the objective indicia of the legislation.[61]

The landscape was a little different in that case, decided just a year later in 1989. After the decision in *Thompson*, the nineteen states, which had not established a minimum age for execution, had all decided that sixteen years old was the minimum age for sentencing somebody to death. So at the time of the *Stanford* decision, the array of states was this: Of the thirty-seven states which had the death penalty, twenty-two states had decided that you only had to be sixteen to be eligible for the death penalty. Fifteen said you had to be at least seventeen. Within that group, twelve states had raised the age to eighteen. So on one hand, fifteen states would not allow the death sentencing of a sixteen year-old. Twelve within those would not have allowed the sentencing of a seventeen year-old. With the array like that, the Supreme Court, with the majority led by Justice Scalia, said that there is clearly no national consensus *against* the death sentencing and execution of sixteen and seventeen year-olds, and because of that, the constitution did not preclude such death sentences.

One of the things that Justice Scalia did note, as was noted in the dissent in *Thompson*,[62] and emphasized even more in *Stanford*,[63] was that we can rely on the individualized determination at the penalty phase of a death penalty trial to take into account the qualities of young people that are mitigating.[64] This should give assurance to us, he wrote, that if there are sixteen or seventeen year-olds who are truly not deserving of death, they will not be sentenced to death because of the ability to take into account the qualities associated with youth that have to do with lack of judgment and impulsivity and a kind of maturational process making people vulnerable to doing things without thinking terribly well about the consequence.

This leads us to the third case we want to talk about briefly. And then we want to step back again to the larger political and social context to look at this issue.

Ms. Mandy Welch: The case I want to talk to you about is *Johnson v. Texas*.[65] The reason it is important in the context of the execution of juveniles is because of the light it sheds on the values we place on youth

61. *See Stanford*, 492 U.S. at 369.

62. *See Thompson*, 487 U.S. at 867–68 (Scalia, J., dissenting).

63. *See Stanford*, 492 U.S. at 374–75.

64. *See id.*

65. 509 U.S. 350 (1993).

as a factor, which we should be considering in determining a person's moral culpability or blameworthiness.

For those of you who do not practice death penalty law in Texas, I want to tell you briefly what the death penalty statute in Texas requires, or at least what it did. If someone was convicted of a capital crime at the penalty phase of the trial, the jury was required to answer three special issues: One, whether or not the acts of the defendant were deliberate; two, whether the defendant would commit acts of violence that would constitute a continuing threat to society; and three, if it was raised by the evidence, whether or not the acts of the defendant were provoked by the victim.[66] Note that the third issue was not presented unless the facts raised it.

That statute did not appear to give the jury an opportunity to consider mitigating evidence as the Supreme Court had required in a number of other cases; and the statute was challenged in a case called *Penry v. Lynaugh*.[67] In that case, Justice O'Connor wrote an opinion for the Court stating that when the Texas statute does not allow the jury to consider information about the defendant, such as Penry's mental retardation and severe abuse as a child, in its decision to impose death, then the court must give the jury another instruction in addition to the three special issues.[68] This instruction is given so that the jury has an opportunity to say, "even though this person may commit acts of violence in the future, I believe that these other factors—the mental retardation in Penry's case, and the history of abuse that contributed to the crime, and the prospect for future violence—mitigates sufficiently so that the defendant should not be subjected to the penalty of death."[69]

Now, once *Penry* was decided, people in Texas who were doing death penalty work assumed that if there was information that truly went to the moral culpability of a defendant—telling you deep in your heart you should give special consideration to these factors in deciding whether or not to kill this person—based on the decision in *Penry*, the death penalty in such a case was no good because the jury had really sentenced that person to death on the basis of one decision: Do I think the person might be dangerous in the future?

And so, when the Supreme Court granted certiorari in *Johnson v. Texas*[70] to consider whether or not Dorsey Johnson's jury was able to take into consideration his youth—he was nineteen at the time of the

66. *See* TEX. CODE CRIM. PROC. ANN. art. 37.071 (Vernon Supp. 1997).
67. 492 U.S. 302 (1989).
68. *See Penry*, 492 U.S. at 327–29.
69. *See* TEX. CODE CRIM. PROC. ANN. art. 37.0711 (Vernon Supp. 1997).
70. 509 U.S. 350 (1993).

offense—many people believed the Court would set aside Johnson's death sentence because there was no special instruction telling the jury that if you believe his youth and other factors, which do not necessarily affect your decision about future dangerousness or mitigate his blameworthiness, call for a life sentence, then you may return a sentence of life. But that was not what the Supreme Court did. What the Supreme Court said was that if the jury was able to take information into account in answering the future dangerousness issue, that was all that was required.[71] With respect to youth, the reason it is mitigating in the first place is because it is transient. The youthful qualities of lack of judgment and lack of insight pass, and when the person becomes an adult, they may not be dangerous. Therefore, the Court reasoned, the jury can take that into account and find if *this* crime was the result of youth, the person won't be a danger in the future. In the Court's view, that is all the Constitution requires.[72]

Now, the Supreme Court may buy that and may think that juries can really give full consideration to the moral culpability and blameworthiness that youth has, or other factors. But we know that juries sitting there answering the question about future dangerousness with respect to seventeen, eighteen, nineteen year-old young men, are going to answer that question yes. In fact, most of you if sitting in judgment of someone who you have convicted of a capital crime are going to answer the question: "Is this person likely to be a danger in the future," yes. But does that mean to you that this person has the moral culpability or blameworthiness that warrants society taking this person's life? Does it mean that one factor, the possibility or probability of future dangerousness overcomes the mitigating force that we all recognize is attached to horrible abuse as a child, mental illness, mental retardation? And I don't think most of us would think that the answer yes to the future dangerousness issue overcomes those other qualities. But the Supreme Court said that it could.

So when you think about whether or not death sentences are imposed on children or young adults after full consideration of all the factors that are relevant to that decision, take into account what the Supreme Court let happen in Dorsey Johnson's case. Take into account the affect that race plays when you have an all white jury deciding whether or not a young black teenager is dangerous as opposed to a young white teenager that a white jury can identify with. Those decisions, and the conse-

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71. *See id.* at 368 (stating jury only needs to consider age as a mitigating circumstance).

72. *See id.* (allowing the jury to take youth into account when assessing the mitigating circumstances).

quences of decisions like that, I suggest, should make us all question what we are becoming and what we will become as we continue to live in a society that makes these judgments and takes the lives of children without having even recognized the relevance of their youth and of the misfortunes of their childhood.

Mr. Richard Burr: I am going to take the last few minutes to sketch out at least part of the larger context in which the Supreme Court was operating.

There is a book that we discovered recently called "The Scapegoat Generation, America's War on Adolescents"[73] written by a man named Mike Males, which to me is a shocking and eye-opening book. I just want to refer to a few things that he talks about and that lead us into this larger context.

He has a very brief section in the beginning about the distortion of youth violence. Much of the political fire that has driven the Supreme Court to where it came out in these cases, and that has driven state legislatures, and even the Congress, has been the notion that young people are becoming increasingly violent and that they are to be dealt with accordingly. We do not seem to have other means to deal with them, other than to treat them as adults.

There are a few matters that relate to this that I think are important for us to know about. There is a world of information that we can't talk about but just let me highlight a little bit of this. Males writes:

> Violent youth crime is rising rapidly. Over the last decade murder is up fifty percent and violent crime arrests have doubled among juveniles. The orgy of adult outrage, shocked and self-righteous bafflement at juvenile violence is phony however. Youth violence is a straight-line result of the high and rising rates of poverty imposed on the young, a disastrous trend national and state policies have caused and exacerbated.[74]

He then looks at the data. When poverty rates are held constant across the age span, that is, you're looking at people who are in levels of poverty as defined by various standards, if that is held constant, adults in their twenty's and thirty's have the highest rates of violent crime. Teens age thirteen to nineteen and adults over age forty have unusually low rates of violence in relation to their poverty. The effects are very similar for males and females as well as for whites and nonwhites. Violent crime tends to peak around age thirty, a pattern very similar to that found in

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73. MIKE A. MALES, THE SCAPEGOAT GENERATION: AMERICA'S WAR ON ADOLESCENTS (1996).

74. *Id.* at 19.

European countries whose poverty and violence levels are much lower than the United States. Teenagers of all races then are not more violent than adults in their twenties and thirties. Teenagers just suffer higher levels of poverty.

He then talks about a study that was done in California comparing similar population groups, looking first at three urban areas that have two and a half million people in them, Fresno, Sacramento and San Bernardino, where over a year period eighty-four teenagers where victims of murder. He says that, "Officials and experts reflexively blame violent media, violent rap and rock stars, violent video games, gun availability and innate adolescent savagery for those eighty-four murders."[75] He then compares a similar population coming out of thirty-one mostly rural or suburban California counties, also with a combined population of two and a half million where for the same period of time there were zero murders.

As he says:

> Same saturation in violent media, worse given the greater subscription of wealthier families to blood spewing cable channels. Same rock and rap depravity blaring into pubescent ears. Same video screen slaughter, more among richer kids. Same guns scattered through every home and corner, more in rural counties. Same kids afflicted with presumed adolescent lunacy, 200,000 of them blood hot and hormones raging. And in a whole year not one teenager murdered anyone. . . . "A high school football game with that score would draw a more in-depth analysis."[76]

Overall, a simple statistic looms. The youth poverty rate is seventy percent higher in the three urban counties with a teen murdered every one-hundred hours than in the thirty-one mostly affluent, rural and suburban counties with no teen killings in twelve months.[77]

He then goes on to talk about poverty not being the whole story but that another critical part of the story is the abuse and violence towards children by adults. He says that there are eleven percent of children in the United States, some seven million who are victims every year of a severe violent act. That is something more than spanking or slapping. "Abused children," the study he quotes found, "were several times more likely to be violent themselves. Family violence, like other forms of violence, is correlated with the stresses of poverty but is not completely ex-

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75. *Id.* at 21.

76. *Id.*

77. *See* MIKE A. MALES, THE SCAPEGOAT GENERATION: AMERICA'S WAR ON ADOLESCENTS 19 (1996).

plained by it."[78] Then he talks about how this is so well hidden. He said that he's tried to get information about the abusive children and the violence towards children within families from the Centers for Disease Control. And he says the Centers for Disease Control who surveys the publicized and much quoted statistic that 135,000 children bring guns to school every day has issued no press releases on the pervasive in-home violence affecting youths.

In 1995 a spokeswoman for the National Commission on Child Abuse complained that it was easier to get information from the CDC on soccer goal post injuries than on the epidemic of adult violence against children in their homes.

He talks a bit about poverty and about where the lines of wealth and poverty are drawn these days. I just want to read you one section which is heavily indicting:

> In the past quarter century, American elders have made monumental progress in feathering our own aging nests. Note the present situation even before the punishing attack on young family assistance promised by both parties as Welfare reform. U[nited] S[tates] adults over age forty are richer than adults in any nation on earth other than enclaves such as Switzerland and Kuwait. We enjoy the highest real incomes and lowest poverty rates of any in U[nited] S[tates] history. U[nited] S[tates] adults enjoy the lightest tax burden of any developed nation, lower by far than any nation in the Organization for Economic Cooperation for Development. In 1990 U[nited] S[tates] tax revenue was 30 percent of our gross domestic product compared to over 40 percent among similarly situated Western nations. The U[nited] S[tates] has the highest rate of children and adolescents living in families with incomes below the poverty guidelines in the industrial world. The result of spending fewer public resources on children than any other industrial nation. In the last twenty years, U[nited] S[tates] child and youth poverty rose by sixty percent, in contrast poverty among over forty adults declined. Youths are by far our poorest age group, one in four. One in four is in poverty, twice the rate among grown-ups.[79]

Here are some other numbers. The average cost of incarcerating a juvenile for one year is between twenty-three and sixty-four thousand dollars. By contrast, one year of tuition at Harvard is $30,000. A year of a place for a child in a Head Start Program is $4,300.

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78. *Id.* at 22.
79. *Id.* at 7.

Juvenile institutions: when kids are sent to juvenile institutions, as opposed to adult prisons, study after study has recorded that the likelihood of rearrest and recidivism is far lower for kids who go to juvenile institutions and come out than for kids who go to adult prisons and come out. Yet in the Congress and in every state in the country, we are seriously considering sending thirteen and fourteen year-olds to adult prisons.

What we have lost, I think, is a sense of our responsibility for our children. Let me end with two stories; two brief images and a couple of other thoughts.

I was in New York Wednesday, meeting with a lawyer on a federal death case there. And, as I left to go from one place to another, I came to the subway station. As I happened to be arriving, there was a whole gaggle of kids coming down. They must have gotten out of school or something. They were all together. There were probably a hundred teenagers. We got to the subway stairs at about the same time and I felt nervous. I have two teenage children myself, but I felt nervous. I do not know why, they were as big as I was, a lot of them were taller, and they were just sort of wild. They were throwing stuff here and there. They were talking, singing, yelling, hollering; and I kind of quivered. I felt more relieved when we got downstairs and I could kind of move away from them. That is one instinct and impulse that I suspect most of us have experienced somewhere, somehow. We do not feel that same way in a crowd of adults because we are not wild, but we have that feeling with teenagers.

Another thing that has happened in my life recently is I have a 16 year-old daughter who is, in most ways, far older than that. She is bright, she is mature, she has good judgment, she is not impulsive. She works hard, studies hard, dances, and is anything a parent can imagine a child to be and want to be. She was staying at my apartment. I have an apartment in New Jersey. We had been talking one night, and I think we had a long discussion about Ted Kazinski. She went off to call a friend and I happened back to her bedroom and she had brought her bag over to my apartment with her stuff in it. There in the top of her bag was a stuffed bear that she had received when she was eight years old—my sixteen year-old, sophisticated daughter. And I began weeping because it hit me, more than at any time before in my life, that my daughter was a woman-child. I suspect many of us sitting here who have children, teenage children, have had some kind of experience like that. The impulse that comes from that experience is not one of fear, it is one completely the opposite. It is one of profound and unlimited compassion and love.

Those kinds of impulses somehow are getting lost. When we had a military draft in this country you could not be drafted before you were eighteen years old. That's pretty significant because what does a draft

do? The draft says that you are old enough to be required to give your life up for the common good. You are old enough to do that. That, more than any other age line, to me says something significant about how we view people and the dividing line between childhood and adulthood. We do not require children to join the war. We would not have thought, at any time in the history of this country, to require anybody younger than eighteen to be drafted; to be vulnerable to being killed for all of us.

Another thing that we do is, though the age has come down from twenty-one to eighteen, nowhere in the country do we fail to say that parents are obligated to support their children who are not yet eighteen years old. Every child under eighteen deserves, and is required to have, the support of his or her parents. There are good reasons for that, the same reasons for why we have never drafted anybody under the age of eighteen. There is a sanctuary. There is a sanctuary that we are violating, but it is a sanctuary that we all grew up in. We all grew up in a sanctuary where no matter what we did, no matter how badly we messed up, as children, nobody would take our lives for having done it. There was that kind of unconditional love and support and nurturing and caring and recognition that we as adults have a responsibility for our young. There is no other species on the planet that does what we are now doing to our young. Every species but the human species, and the human species in only a few places on the planet, protects its young and keeps its young in a sanctuary no matter what they do because they are young. That I think is the challenge. We do not have a Court that will lead but we have people who can lead. There will be a campaign starting later this Spring for the National Coalition to Abolish the Death Penalty that will call upon us to rise up as a people and say we will not kill our children anymore, no matter what they have done, because they are our children. And if we do not do that, the scapegoating that books like Males' and others talk about will overwhelm us because we will have generations and millions of children who have no hope and who are dangerous.