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## THE SUPREME COURT'S INFLUENCE ON THE DEATH PENALTY IN AMERICA: A HOLLOW HOPE?

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### I. INTRODUCTION

For some time now, there has been a healthy debate as to what power the Supreme Court has to influence social change. Part of the problem in formulating the debate is definitional: what does the term social change mean? Another part of the problem is measurement: how does one measure social change? That a court can potentially be part of the process that effectuates change is assumed, though, and the question thus becomes in what context or under which conditions can it bring it about?

Case studies have shown that, for example, some of the Supreme Court's most lauded decisions in the area of social reform accomplished much less than originally thought. *Brown v. Board of Education* presents a good example.<sup>1</sup> In *The Hollow Hope*, Gerald Rosenberg makes a convincing argument that the *Brown* case was not the impetus behind the civil rights gains of the 60's and beyond, despite popular belief.<sup>2</sup> Instead, according to Rosenberg, the biggest influences on desegregation were likely the Civil Rights Act of 1964, along with other non-judicial events such as the Montgomery bus boycott. From this, Rosenberg distills a theory that the Court is usually constrained from effecting change on its own and can only do so when certain conditions are in place.<sup>3</sup> He makes a similar argument with regards to abortion and other social causes.<sup>4</sup>

Rosenberg's work is not short of critics.<sup>5</sup> One aspect of criticism is directed at the idea that Rosenberg's analysis is too broad. For example, some scholars note

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<sup>1</sup> 347 U.S. 483 (1954).

<sup>2</sup> GERALD ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE*, 42-169 (1991).

<sup>3</sup> *Id.* at 9-35.

<sup>4</sup> *Id.* at 173-265, 269-335.

<sup>5</sup> See e.g., Peter Schuck, *Book Review*, 102 YALE L.J. 1763 (1993); Neil Devins, *Judicial Matters*, 80 CAL. L. REV. 1027 (1992); Michael W. McCann, *Reform Litigation on Trial*, 17 L. & SOC. INQUIRY 715 (1992).

that while *Brown* accepted and promoted the idea that separate schools cannot be equal, it did not intend to force desegregation.<sup>6</sup> Rather, as Michael McCann phrases it, the Court chose "to make implementation voluntary."<sup>7</sup> Rosenberg, however, was attempting to respond to the public's perception of *Brown*. That is, whatever the Court intended to accomplish through *Brown*, and whatever *Brown's* relation directly or indirectly to school desegregation, most people, in hindsight, view *Brown* as, "'a revolutionary statement of race relations law' through which the Supreme Court 'blazed the trail' of civil rights."<sup>8</sup> Rosenberg's analysis, then, makes sense because he was testing whether the public was right to elevate *Brown* in such a manner and not necessarily whether the Supreme Court accomplished what they intended to accomplish.

This article analyzes whether parts of this theory hold true in regard to the Supreme Court's impact on the death penalty. In some ways, the death penalty suffers from the same misguided perception about its fate in the Supreme Court as did *Brown* and civil rights. Often, when the Court issues a broad decision which seems to substantively limit the application of the death penalty – such as excluding a certain class of persons from execution – the Court is villainized by the right and cheered by the left. Supporters of these decisions tend to exaggerate Supreme Court victories and predict they will be the beginning of the end. In essence, death penalty supporters see each such opinion as slowly chipping away at the reach and scope of the death penalty and instigating its demise.

Since the Court resumed executions after *Gregg v. Georgia*,<sup>9</sup> it has issued at least seven opinions that ostensibly limit the scope of the death penalty. And, just about after each, abolitionist rhetoric was strong. For example, following *Coker v. Georgia*,<sup>10</sup> one law review note stated that "the Court's explicit rejection of the death penalty for rape, as well as its implicit rejection of death for kidnapping and armed robbery, in terms which place great value on the life of the defendant, is welcomed by those who agree with Justices Brennan and Marshall that the death penalty is in all circumstances cruel and unusual punishment."<sup>11</sup> Following *Ford v. Wainwright*,<sup>12</sup> the ACLU said that "the ruling [was] a 'small, but substantial' win for opponents of capital punishment and said it will halt 'the medieval and barbaric spectacle of executing people who are not aware of what's happening to them.'"<sup>13</sup> After *Atkins v. Virginia*,<sup>14</sup> "Irwin Schwartz, president of the National Association of Criminal Defense Lawyers, said he believes the ruling's greater implication is ultimately the

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<sup>6</sup> Devins, *supra* note 5, at 1040 ("Brown, contrary to Rosenberg's assertions, was never intended to restructure southern school systems; instead, it was an opening salvo in a nationwide debate on race equality"); McCann, *supra* note 5, at 725-26.

<sup>7</sup> McCann, *supra* note 5, at 725.

<sup>8</sup> ROSENBERG, *supra* note 2, at 39 (citations omitted).

<sup>9</sup> 428 U.S. 153 (1976).

<sup>10</sup> 433 U.S. 584 (1977).

<sup>11</sup> Note, *Death Penalty for Rape*, 91 HARV. L. REV. 123, 128 (1977).

<sup>12</sup> 477 U.S. 399 (1986).

<sup>13</sup> *Close Vote by Supreme Court Bans Execution of the Insane*, S. F. CHRON., June 27, 1986, at 20.

<sup>14</sup> 536 U.S. 304 (2002).

end of the death penalty.”<sup>15</sup> And more recently, in response to *Roper v. Simmons*,<sup>16</sup> “[t]he National Conference of Catholic Bishops said it was ‘very encouraged’ that the court was moving towards abolishing capital punishment.”<sup>17</sup>

The responses to the Court became more emphatic over the years, as abolitionists believe that these death penalty limiting opinions<sup>18</sup> are actually resulting in the removal of a significant number of persons from death row and halting a significant number of executions. To use Rosenberg’s term, they believe the death penalty is being reformed via the “judicial path of causal influence.”<sup>19</sup> I hope to show that the reality is far from this. Despite being perceived as limiting the application of the death penalty, the death penalty limiting opinions have had little effect, nationally, on the total number or persons being put on death row yearly. Likewise, they are not putting any significant brakes on executions. Death row continues to grow and executions are becoming more frequent. Ironically, if anything, the Court is an abolitionist’s worst enemy. These opinions narrow the scope of eligible defendants thereby making the death penalty more palatable for the nation. The Court acts only to strengthen the foundations of the death penalty, making it more likely that it will continue in perpetuity. The small victories along the way for abolitionists are illusory, both in practice and in theory.

In contrast to Rosenberg, though, I do not believe that this is the result of a powerless court. Unlike other social causes, such as desegregation or abortion, the Court’s power to end executions is very real, not subject to the usual constraints or conditions.

What most distinguishes [the death penalty] from [desegregation] and [abortion] is the fact that capital punishment is regulated entirely by legal procedures in the courtroom, while education and abortion services necessarily implicate the participation of extra-legal institutions. [T]his difference underscores the Supreme Court’s relative freedom to transform the nature of capital punishment in America; the constraints on the Court that scholars have observed in the

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<sup>15</sup> Robert Greenberger, *Politics and Policy*, WALL ST. J. June 21, 2002, at A4; see Lyle Denniston, *Court Bars Execution of Mentally Retarded, Ruling Changes a 1989 Decision*, BOSTON GLOBE June 21, 2002, at A1 (“The Supreme Court yesterday barred the execution of mentally retarded murderers in a significant gain for those pursuing a widening campaign against the death penalty”); Jan Greenberg, *Executing Mentally Retarded Unconstitutional, Court Rules*, CHI. TRIB. June 21, 2002, at 1 (“The landmark ruling, just 13 years after the court said the Constitution did not ban the practice, will affect laws in 20 states that permit executions of mentally retarded offenders. It also will enable scores of Death Row inmates across the country to attack their sentences as unconstitutional”).

<sup>16</sup> 125 S. Ct. 1183 (2005).

<sup>17</sup> David Savage, *Supreme Court Bans Execution of Juveniles*, L.A. TIMES, Mar. 2, 2005, at A1.

<sup>18</sup> I use the term death penalty limiting opinions to refer to cases where the Court has ostensibly limited the application and scope of the death penalty.

<sup>19</sup> ROSENBERG, *supra* note 2, at 7.

[desegregation] and [abortion] contexts do not map well onto the distinctive terrain of the death penalty.<sup>20</sup>

Court mandated restrictions on the death penalty are unique, or at least significantly different than other social causes because, *inter alia*, they require minimal implementation. Specifically, they require, at most, passive conduct on behalf of those actors which normally carry out its mandate. Thus, they require prosecutors to refrain from seeking the death penalty when confronted with a defendant who has been categorically excluded from execution by the Supreme Court (e.g. a 15 year old); or, more on point, they require a judge to refrain from sentencing a defendant to death, or giving a jury the option, when he has been categorically excluded from execution by the Supreme Court.

Bradley Canon's terminology is helpful. Along with Charles Johnson, Canon conceived of "four populations that are concerned with the implementation or impact of judicial policies."<sup>21</sup> The four populations are the interpreting population (lower court judges), the implementing population (government agencies), the consumer population (persons directly affected by an opinion), and the secondary population (those not directly affected by opinion but who have an interest nonetheless, e.g. politicians).<sup>22</sup> Death penalty cases rely mostly on the interpreting population of lower court judges, both State and Federal. To a certain degree, they also rely on the implementing population of prosecutors in the sense that prosecutors must refrain from seeking the death penalty.<sup>23</sup>

Canon also conceptualized judicial impact by categorizing the types of reactions to policy reform.<sup>24</sup> There is direct compliance, where "members of the implementing population, who presumably would not do so otherwise, change their behavior to comply with a Court generated reform[, normally] because they have a sense of professionalism, law abidingness or they fear punishment or stigmatization[sic]."<sup>25</sup> On the other end is inspirational impact, where the Court decision helps to rally the public in demanding its implementation and thus the implementing population is pressured into acting.<sup>26</sup>

The death penalty would likely be classified as a direct impact/implementation required reform, much like, for example, *Engel v. Vitale*<sup>27</sup> and *Abington School*

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<sup>20</sup> Carol & Jordan Steiker, *Sober Second Thoughts: Reflections on Two Decades on Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 404 (1995) (addressing the scholarship of Rosenberg and others).

<sup>21</sup> Bradley Canon, *The Supreme Court and Policy Reform: The Hollow Hope Revisited in LEVERAGING THE LAW, USING THE COURT TO ACHIEVE SOCIAL CHANGE* 215, 222 (David A. Schultz, et al. 1998), citing Bradley Canon & Charles Johnson, JUDICIAL POLICIES: IMPLEMENTATION AND IMPACT (1984).

<sup>22</sup> *Id.*

<sup>23</sup> But, in the end, the interpreting population has direct oversight of the implementing population and minimizes the potential for it to actually flaunt Supreme Court mandates.

<sup>24</sup> Canon, *supra* note 21, at 223.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> 370 U.S. 421 (1962).

*Dist. v. Schempp*,<sup>28</sup> which prohibited formal prayers or Bible reading in public schools.<sup>29</sup> But, unlike those cases, where defiant administrators could continue the practice due to indirect supervision,<sup>30</sup> the death penalty cases are unlikely to meet such covert resistance since their implementation is monitored only in an open, public courtroom. Any resistance would come in the form of the interpreting population limiting the application of a given case. By excluding the mentally retarded from execution in *Atkins*, the Supreme Court left a bit of wiggle room for lower courts and executive branch agents to define mental retardation. A judge or agent who is more prone to executions may very well limit that definition as much as possible. Thus, *Atkins* would not be as effective as possible in that situation. On the other hand, there is virtually no wiggle room in cases where the need for factual findings is limited, such as in the prohibition of executing juveniles. Either someone is or is not of the age of maturity, and no court or prosecutor can skirt that prohibition.

In short, unlike a case such as *Brown*, where recalcitrant government officials and indirect supervision may have limited the impact of the court decision, the death penalty limiting cases leave few avenues for rebellion by the interpretive and implementing populations. Therefore, the impact of these cases should be felt quickly without the need for detailed or large scale planning. Ironically, they have had a very limited impact. In fact, these cases are solidifying the death penalty as part of the American criminal justice system.

Part II of this paper will give a general overview of the rise in the total number of persons on death row and the total number of executions since the Supreme Court reinstated the death penalty in 1976. Part III will explore the death penalty limiting cases which, on their face, seem like a victory for abolitionists. Instead, I hope to show that the cases resulted in only miniscule gains. Part IV will posit some reasons why this trend exists. Part V will demonstrate why these opinions may actually be strengthening the public's support for the death penalty.

## II. STATISTICAL OVERVIEW OF THE DEATH PENALTY (1972-2004)

Following *Furman v. Georgia*,<sup>31</sup> where the Supreme Court granted a constitutional moratorium on executions, the death row population dropped dramatically. In 1971, there were 642 persons on death row.<sup>32</sup> By 1973, this number declined to 134 persons,<sup>33</sup> indicating that the *Furman* decision resulted in the invalidation of 508 sentences (80%).<sup>34</sup> This would also mark the largest single

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<sup>28</sup> 374 U.S. 203 (1963).

<sup>29</sup> Canon, *supra* note 21, at 228-29.

<sup>30</sup> *Id.*

<sup>31</sup> 408 U.S. 238 (1972).

<sup>32</sup> Death Penalty Information Center, <http://www.deathpenaltyinfo.org> (last visited January 23, 2005) [hereinafter Death Penalty Information Center].

<sup>33</sup> *Id.*

<sup>34</sup> It is clear that the drop in death row inmates was not a result of any actual executions, as no one was executed in the U.S. between 1968 and 1976. See *The Espy File*,

drop in the death row population between then and now. After 1973, the death row population began to rise again, and has risen practically every year.<sup>35</sup> As of October 1, 2004, there were 3,471 persons on death row.<sup>36</sup> That means that between 1973 and 2004, 3,337 persons were added to death row at an average of about 108 persons a year.

There were no executions between 1967 and 1977.<sup>37</sup> Logically, executions resumed after the Supreme Court lifted the moratorium in *Gregg v. Georgia*.<sup>38</sup> In 1977, there was one execution and the total since has risen precipitously.<sup>39</sup> Between 1977 and January 1, 2005, there have been 944 executions<sup>40</sup> at an average of about 35 persons per year. However, if the number of executions is calculated from 1973, the year death row began to grow again the average comes out to 30.5 a year. This allows us to compare the ratio of death row inmates against executions a year. Thus, from 1973 on, there was an average of 108 persons put on death row a year compared with 30.5 executions a year, for a ratio of 3.6 death row inmates to 1 execution.

The same rates may not continue. Between 1990 and 1999, there was an increase of only 1171 death row inmates<sup>41</sup> for an average of 117 per year. Meanwhile, there were 478 executions for an average of 47.8 per year. Thus, the ratio for the 90s of death row inmates to actual executions was 2.44 to 1. But, the change in the ratio is not a result of fewer people on death row; rather, it is a product of increased executions.

As noted, the average number of people placed on death row in the 90's was 117 a year. The difference between that and the overall average dating back to 1973, 108, is only 9 persons per year, hardly a dramatic shift.<sup>42</sup> But, when one takes into account the fact that executions distort the total number of inmates put on death row, the average is actually rising more dramatically than it may seem. In 1998, for example, there were 3,452 persons on death row. By the end of 1999, there were 3,527. It would seem, then, that the total population grew only by 105. But,

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<http://www.deathpenaltyinfo.org/ESPYdate.pdf> (last visited Sept. 28, 2003) [hereinafter *The Espy File*]. Instead, the drop was a result of death sentences being reduced to terms of life imprisonment either through court orders, see, e.g., *Eaton v. Capps*, 480 F.2d 1021 (5<sup>th</sup> Cir. 1973), or executive prerogative, see, e.g., *Schick v. Reed*, 419 U.S. 256 (1974).

<sup>35</sup> In 1976, the death row population dropped by 68, from 488 to 420 (14%). See Death Penalty Information Center, *supra* note 32. In 2001, the total population of death row began to drop every year until 2004, when it rose by 97. See *id.* However, this drop is attributed to more frequent executions than anything else. See *infra* note 42 and accompanying text.

<sup>36</sup> See Death Row USA Fall 2004, a quarterly report by the Criminal Justice Project of the NAACP Legal Defense Fund, at <http://www.naacpldf.org/content/pdf/pubs/drusa/DRUSA-Winter2004.pdf> (last visited January 23, 2005) [hereinafter "Death Row USA"].

<sup>37</sup> See *The Espy File*, *supra* note 34.

<sup>38</sup> See *supra* note 9.

<sup>39</sup> See *The Espy File*, *supra* note 34.

<sup>40</sup> See Death Penalty Information Center, *supra* note 32, Fact Sheet, at <http://www.deathpenaltyinfo.org/FactSheet.pdf>.

<sup>41</sup> *Id.*

<sup>42</sup> See generally James Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2053-57 (2000).

because there were 98 executions in 1999, that means that the total population actually grew by at least 203.<sup>43</sup> Additionally, executions are becoming more frequent because both the Supreme Court and Congress have reacted to an increase in procedural protections by limiting post-conviction relief.<sup>44</sup> Thus, "it is not a dramatic new will to kill, but the monotonous quarter-century drip, drip, drip of men and women accumulating on death row and gradually exhausting their appeals, that has caused executions to rise."<sup>45</sup> Finally, the Supreme Court has been granting fewer stays of execution.<sup>46</sup> In 2002-03, the court granted stays in just 3.2% of the cases compared to 1993-94, where they granted 23.7%.<sup>47</sup>

These statistics contradict the view that certain Supreme Court decisions have been a catalyst for curtailing the death penalty. As was noted, the Supreme Court has the power to affect the death penalty. Given that, many people seem to believe that the Court has been using this power, since *Furman*, to severely limit the scope of the death penalty. The next section will examine on a case by case basis the extent to which the Supreme Court has contributed to the fight against imposing the death penalty.

### III. SPECIFIC CASES

#### A. Coker v. Georgia

Just one year after reinstating the death penalty, the Supreme Court began to lessen its reach. In *Coker v. Georgia*, a plurality of the Supreme Court "concluded that a sentence of death is grossly disproportionate and excessive punishment for the crime of rape and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment."<sup>48</sup> The rule announced was broad, especially on the heels of *Gregg*. Dissenting in part, Justice Powell noted,

The plurality . . . does not limit its holding to the case before us or to similar cases. Rather, in an opinion that ranges well beyond what is necessary, it holds that capital punishment always

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<sup>43</sup> This is derived by taking the total population of death row in 1999, subtracting the number of inmates from 1998, and then adding the number of those executed that year. The number also does not take into account persons who may have been removed from death row through clemency, appeal, or natural death. Thus, the growth in the total population may actually be higher.

<sup>44</sup> Liebman, *supra* note 42, at 2038-47.

<sup>45</sup> *Id.* at 2057.

<sup>46</sup> Joan Biskupic, *Supreme Court Granting Fewer Stays of Execution*, USA TODAY, Oct. 28, 2003, at A13.

<sup>47</sup> *Id.* The number of grants has been sporadic, but, on average, declining: 1993-94: 23.7%; 1994-95: 21.3%; 1995-96: 23.7%; 1996-97: 2.7%; 1997-98: 3.5%; 1998-99: 5.3%; 1999-00: 6.8%; 2000-01: 8.9%; 2001-02: 10.1%; 2002-03; 3.2%.

<sup>48</sup> *Coker*, 433 U.S. at 592.



regardless of the circumstances is a disproportionate penalty for the crime of rape.<sup>49</sup>

Justice Powell was concerned that there may be an appropriate situation in which to sentence a rapist to death, such as in the case of an "outrageous rape resulting in serious, lasting harm to the victim."<sup>50</sup> But, statistically, such an opportunity would have been very rare. According to the Court, Georgia was the only state that even authorized the death penalty for the rape of an adult woman at the time.<sup>51</sup> Only 5 persons were actually on death row for rape.<sup>52</sup> Thus, *Coker* resulted in the five persons on death row for rape in Georgia having their sentences commuted.<sup>53</sup> Given that there were 423 total persons on death row nationally, *Coker* impacted only 1.1% of death row inmates.<sup>54</sup>

Although it is not certain how many persons would have received a death sentence for the rape of an adult woman in Georgia had *Coker* come out differently, the number would have been relatively small. In the years leading up to *Coker*, juries imposed the death penalty in only 1 out of every 10 rape cases, or 10%.<sup>55</sup> The trend away from death can also be seen in Georgia's execution statistics. Between 1940 and 1949, Georgia executed 26 persons for the crime of rape; between 1950 and 1959, Georgia executed only 16 persons; and, between 1960 and 1969, Georgia executed just 2 persons.<sup>56</sup>

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<sup>49</sup> *Id.* at 601 (Powell, J., concurring in part, dissenting in part).

<sup>50</sup> *Id.* at 604

<sup>51</sup> *Id.* at 594 (noting that North Carolina and Louisiana had authorized the death sentence for adult rape after *Furman* but their schemes had been subsequently invalidated); *id.* at 595-596 (noting that Florida and Mississippi allowed for death sentences in cases of child rape).

<sup>52</sup> *Id.* at 596.

<sup>53</sup> It seems Georgia, at the time, also provided for the death penalty in cases of "kidnapping for ransom or where the victim is harmed, armed robbery[,], treason, and aircraft hijacking." *Gregg*, 428 U.S. at 162-163. *Coker* was extended to persons who had been sentenced to death for, at the very least, kidnapping and armed robbery. But, because those defendants had been convicted also of rape, it is not clear if *Coker* had any independent impact outside of the rape context. See, e.g., *Eberheart v. State*, 206 S.E.2d 12 (Ga. 1974), reversed by *Eberheart v. Georgia*, 433 U.S. 917 (1977) (two death sentences for rape and kidnapping reversed); *Collins v. State*, 236 S.E.2d 759, 760-761 (Ga. 1977) (death sentences for rape, armed robbery and kidnapping reversed).

<sup>54</sup> On the other hand, in terms of racial composition, *Coker* may have benefited blacks the most. Between 1930 and *Coker*, 455 persons were executed for rape. "Almost 90% of those executed were black men convicted for the rape of white women." Jack Greenberg, *Capital Punishment as a System*, 91 YALE L. J. 908, 912 (1982).

<sup>55</sup> *Coker*, 433 U.S. at 597.

<sup>56</sup> See *The Espy File*, *supra* note 34. That Georgia only executed 2 persons between 1960 and 1969 may be a bit misleading. Georgia did not execute anyone after 1964. Even so, if one takes the average executions per year, Georgia would have likely executed only 5 persons between 1960 and 1969.

B. *Enmund v. Florida*

In *Enmund v. Florida*,<sup>57</sup> the Supreme Court held that someone convicted of felony murder, but who did not actually kill the victim or intend to kill the victim, cannot be sentenced to death. *Enmund* is a complicated case, not just because of the analytical debate between the majority and the dissent as to how to classify the various state statutes and the circumstances of those on death row,<sup>58</sup> but also because *Tison v. Arizona*<sup>59</sup> modified *Enmund*. Nonetheless, if one were to take the majority at its word, then only 3 persons on death row, including *Enmund* himself, qualified to have their sentences vacated.<sup>60</sup> But there were a few others for which the Court did not account.

According to the Court, eight other jurisdictions had statutes which could potentially punish a defendant whose conduct was similar to *Enmund*'s.<sup>61</sup> As the Court noted in *Tison*, "the[se] state statutes discussed in *Enmund v. Florida* [we]re largely unchanged" following the decision.<sup>62</sup> Any impact *Enmund* had then, would depend on how these individual states interpreted the conduct of a defendant in any given case. In this regard, research shows that in these eight jurisdictions, *Enmund* was directly responsible for reversing four death sentences.<sup>63</sup> Additionally, in one case, the defendant was able to secure a writ prohibiting the state from seeking the death penalty because the facts of his case were indistinguishable from those in *Enmund*.<sup>64</sup>

Thus, at most, assuming there is no overlap between the three persons referenced by the Supreme Court and the five persons that turned up through my research,

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<sup>57</sup> 458 U.S. 782 (1982).

<sup>58</sup> Compare *id.* at 789-96, with *id.* at 818-23; see also, Norman Finkel, *Capital Felony-Murder, Objective Indicia, and Community Sentiment*, 32 ARIZ. L.R. 819, 833 (1990)

<sup>59</sup> 481 U.S. 137 (1987).

<sup>60</sup> *Enmund*, 458 U.S. at 795.

<sup>61</sup> *Id.* at 792. The States were California, Florida, Georgia, Mississippi, Nevada, South Carolina, Tennessee, and Wyoming.

<sup>62</sup> *Tison*, 458 U.S. at 152 n.4.

<sup>63</sup> I only looked at cases between 1982 and 1987, the year in which *Tison* was decided, with the understanding that *Tison* limited *Enmund*'s scope and, in effect, approved of the state statutes then on the books and the manner in which those states interpreted their reach. In order to find these cases, I Shepardized the *Enmund* case on Westlaw. Then, I narrowed the citing references to the cases in the eight jurisdictions between 1982 and 1987. That, in turn, produced 122 cases. Of those, the following cases were directly affected by *Enmund*: *Brumbley v. State*, 453 So. 2d 381 (Fla. 1984) (remanded for resentencing and subsequently defendant's name was not found on the list of persons on death row or those that have been executed); *Foster v. State*, 436 So. 2d 56 (Fla. 1983) (same); *Bullock v. State*, 525 So. 2d 764 (Miss 1987) (sentence vacated after remand from Supreme Court); and *Pinkton v. State*, 481 So. 2d 306 (Miss. 1985) (remanded for resentencing and subsequently defendant's name was not found on the list of persons on death row or those that have been executed). *Enmund* had no impact in Georgia, Mississippi, Nevada, South Carolina, Tennessee, and Wyoming. That is, no sentences were reversed or commuted in these states because of *Enmund*.

<sup>64</sup> See *Carlos v. Superior Court*, 35 Cal. 3d. 135 (1983).

eight people's sentences were vacated as a result of *Edmund*. In 1982, the year *Edmund* was decided, there were a total of 1,050 persons on death row.<sup>65</sup> Thus, *Edmund* directly affected, at most, just 0.7% of death row inmates.

Moreover, whatever inroad *Edmund* made was limited by *Tison*. In *Tison*, the defendant argued that *Edmund* prohibited his death sentence because he did not "intend to kill" the victim.<sup>66</sup> The Supreme Court accepted *Tison's* proffer.<sup>67</sup> Instead of affirming under *Edmund* though, the Court held that major participation in a crime, as opposed to minor participation—like in *Edmund*—could counterbalance a lack of intent subjecting a defendant to the death penalty.<sup>68</sup> Therefore, *Edmund's* legacy was swiftly limited and its lasting effects were extremely minimized. In essence, *Tison* validated the few state statutes which potentially could have been unconstitutionally applied under *Edmund*, and thus could have resulted in more commuted sentences.

### C. Ford v. Wainwright

In *Ford v. Wainwright* the Supreme Court held that "[t]he Eighth Amendment prohibits the State from inflicting the penalty of death upon a prisoner who is insane."<sup>69</sup> *Ford* provides the least satisfying victory of any death penalty case. According to the plurality, "no State in the Union permit[ed] the execution of the insane."<sup>70</sup> The only real issue in *Ford* was whether or not the petitioner was entitled to a hearing in order to establish his mental state. Thus, *Ford* did not result directly in anyone's removal from death row and it did not prevent any executions. Instead, it merely confirmed states' existing practices and placed some procedural requirements designed to assure compliance.<sup>71</sup>

The first half of the Court's opinion reads like a broad victory for death penalty abolitionists but the decision resulted in no direct benefits for anyone on death row. The class of persons protected was already sheltered under the law of every state. Instead, *Ford* created an indirect impact by allowing persons to use procedures that were not otherwise available. These procedures do not translate into automatically vacated sentences; it only provides for the possibility. Consequently, more often than not, *Ford* petitions are filed in vain.<sup>72</sup> It seems the only real winner after the *Ford* case was Alvin Bernard Ford himself. He was not executed and is not currently on death row.<sup>73</sup>

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<sup>65</sup> Death Penalty Information Center, *supra* note 32.

<sup>66</sup> *Tison*, 481 U.S. at 150.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 159.

<sup>69</sup> 477 U.S. 399 (1986).

<sup>70</sup> *Id.* at 408.

<sup>71</sup> Even the dissent noted that "[s]ince no State sanctions execution of the insane, the real battle being fought in this case is over what procedures must accompany the inquiry into sanity." *Id.* at 435 (Rehnquist, J., dissenting).

<sup>72</sup> See, e.g., *State v. Scott*, 748 N.E.2d 11 (Ohio 2001) (petitioner properly sentenced to death even though he suffered from chronic undifferentiated schizophrenia).

<sup>73</sup> See *Death Row USA*, *supra* note 36.

D. *Thompson v. Oklahoma*

In *Thompson v. Oklahoma*,<sup>74</sup> a plurality of the Court held it unconstitutional to execute a person who was 15 years old when the crime was committed. The plurality noted that many states explicitly provided for a minimum age of 16 in their death penalty statutes. Other states provided no age at all.<sup>75</sup> These statutes thereby left open the possibility that states would sentence a 15 year old to death. Thus the potential impact of *Thompson* was great. However, the statistics once again reveal the Court's limited impact.

When *Thompson* was decided, there were three other 15 year olds on death row beside *Thompson*.<sup>76</sup> The four sentences were reversed thereby impacting just 0.18% of the 2,124 total inmates on death row that year. Additionally, as noted, *Thompson* was a plurality opinion. It was not then apparent what exactly the opinion prohibited. Following *Thompson*, two 15 year olds were sentenced to death. One of those sentences was vacated in light of *Thompson*;<sup>77</sup> the other state relied on its own constitution.<sup>78</sup> Thus, only one person benefited prospectively from *Thompson's* holding.

But *Thompson* had little impact primarily because the trend in the nation was clearly heading away from executing 15 year olds. In total, 13 juveniles under 16 were sentenced to death between 1974 and 2003.<sup>79</sup> Seven of them had their sentences reversed before *Thompson*.<sup>80</sup> Indeed, there had not even been a 15 year old executed since executions resumed in 1977.<sup>81</sup> It is unlikely, then, that a 15 year old would have been executed even if *Thompson* had never been decided.

E. *Atkins v. Virginia*

In *Atkins v. Virginia*,<sup>82</sup> the Supreme Court held that it was unconstitutional to execute the mentally retarded and overruled its previous decision, *Penry v. Lynaugh*.<sup>83</sup> If one read Justice Scalia's blistering dissent, it might seem like the sky

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<sup>74</sup> 487 U.S. 815 (1988).

<sup>75</sup> *Id.* at 826.

<sup>76</sup> See Victor Streib, *The Juvenile Death Penalty Today* at <http://www.law.onu.edu/faculty/streib/documents/JuvDeathSept302004.pdf>. (last visited July 10, 2005) [hereinafter *The Juvenile Death Penalty Today*]. The Supreme Court noted that between 1982 and 1986 five 15 year olds were sentenced to death. *Thompson*, 487 U.S. 815. at 833-834. However, two of them had their sentences reversed before *Thompson* and were no longer on death row. See *id.* One 15 year old was sentenced in 1987, and thus was on death row despite the Supreme Court's ignorance of that fact. *Id.*

<sup>77</sup> See, e.g., *Flowers v. State*, 586 So. 2d 978 (Ala. Crim. App. 1991).

<sup>78</sup> See, e.g., *Alan v. State*, 636 So. 2d 494 (Fla. 1994).

<sup>79</sup> See *The Juvenile Death Penalty Today*, *supra* note 76.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> 536 U.S. 304 (2002).

<sup>83</sup> 492 U.S. 302 (1989).

was falling. According to Scalia, *Atkins* added "one more to the long list of substantive and procedural requirements impeding imposition of the death penalty."<sup>84</sup>

Not only was *Atkins* a blow to the death penalty, but – according to Scalia – implementing it would place a tremendous burden on the entire system:

This newest invention promises to be more effective than any of the others in turning the process of capital trial into a game. One need only read the definitions of mental retardation adopted by the American Association of Mental Retardation and the American Psychiatric Association . . . to realize that the symptoms of this condition can readily be feigned.<sup>85</sup>

Scalia's concern is well founded. The Court did not define the term "mentally retarded." Since *Atkins*, states are struggling to come up with a definition, given the realm of possibilities.<sup>86</sup>

Scalia was also concerned about opening the floodgate to litigation. He noted, "The mere pendency of the present case has brought us petitions by death row inmates claiming for the first time, after multiple habeas petitions, that they are retarded."<sup>87</sup> Newspapers also reported an increase in litigation.<sup>88</sup> One expert stated that "death row inmates who can make an 'arguable claim' for retardation are likely to make it, regardless of whether they can document a history of retardation."<sup>89</sup> But once again, statistics show that even if the most generous estimates are accurate, *Atkins'* impact has been negligible thus far. The important thing to realize is that increased litigation does not translate into vacated sentences. It places a burden on the courts, no doubt; but it guarantees nothing in the way of actually decreasing the number of persons on death row.

A more accurate analysis is that *Atkins* "may not affect as many people as the headlines suggest."<sup>90</sup> It is not clear how many people on death row will qualify as mentally retarded under their state's definition. One estimate is that 10% of death-

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<sup>84</sup> *Atkins*, 536 U.S. at 352 (Scalia, J., dissenting).

<sup>85</sup> *Id.* at 353.

<sup>86</sup> See generally Alexis Dowling, *Post-Atkins Problems Enforcing the Supreme Court's Ban on Executing the Mentally Retarded*, 33 SETON HALL L. REV. 733 (2003); Jennifer J. Van-Dulmen Krantz, *The Changing Face of the Death Penalty in America: The Strengths and Weaknesses of Atkins v. Virginia and Policy Considerations for States Reacting to the Supreme Court's Eighth Amendment Interpretation*, 24 HAMLINE J. PUB. L. & POL'Y 185 (2002).

<sup>87</sup> *Atkins*, 536 U.S. at 353-4.

<sup>88</sup> See Stuart Ditzen, *Suddenly, prisons full of 'retarded'*, PHILA. INQ., Sept. 28, 2003, at A1 [hereinafter *Prisons full of 'retarded'*].

<sup>89</sup> *Id.*, quoting Richard C. Dieter, Executive Director of the Death Penalty Information Center.

<sup>90</sup> van-Dulmen Krantz, *supra* note 86, at 213, quoting Paul Duggan, *New Rulings Don't Fling Open Death Row Doors* WASH. POST, June 27, 2002 at A2, quoting Stephen Bright, director of the Southern Center for Human Rights.

row inmates are now seeking relief under *Atkins*.<sup>91</sup> Even assuming they are all successful, that still affects only 10% of death row inmates. Certainly, however, not all of the inmates' appeals will be granted.<sup>92</sup>

Moreover, the majority noted that even among the states which allowed the execution of the mentally retarded, "only five ha[d] executed offenders possessing a known IQ less than 70 since. . . *Penry*."<sup>93</sup> The dissent added that between 1984 and 2000, 35 people with IQ's under 70 were executed.<sup>94</sup> They account for just 3.9% of the total 877 executions during that time. Thus, the trend was shifting away from executing the mentally retarded.

Furthermore, very little has changed since *Atkins* in the jurisdictions that actually had executed persons with an IQ less than 70 – Alabama, Louisiana, South Carolina, Texas and Virginia.<sup>95</sup> Of those cases, only one defendant succeeded in making a claim of mental retardation.<sup>96</sup> That is not to say it will not eventually happen; some of the cases were remanded for further hearings.<sup>97</sup> However, most of the cases found that the record did not support any claim of mental retardation.<sup>98</sup> Thus, for now, the average percentage of persons being released in light of *Atkins* is virtually 0.0% (1 out of the current 3,504 persons on death row).

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<sup>91</sup> See *Prisons full of 'retarded,' supra* note 88; Bill Rankin, *Ruling Could Speed Execution of 10 Inmates*, ATL. J.-CONST., Oct. 8, 2003, at C3 (noting that 10 out of 113 inmates on Georgia's death row are claiming mental retardation).

<sup>92</sup> Compare *In re Johnson*, 334 F.3d 403 (5th Cir. 2003) (defendant failed to make a sufficient showing of retardation to even warrant an evidentiary hearing) with *State v. Grell*, 66 P.3d 1234 (Ariz. 2003) (remanded for rehearing on mental retardation claim) and *Johnson v. State*, 102 S.W.3d 535 (Mo. 2003) (same); Compare and contrast *Head v. Hill*, 587 S.E.2d 613 (Ga. 2003) (claimants must prove retardation beyond a reasonable doubt), with *Franklin v. Maynard*, 588 S.E.2d 604 (S.C. 2003) (claimants must prove retardation by a preponderance of the evidence).

<sup>93</sup> *Atkins*, 536 U.S. at 316

<sup>94</sup> *Id.* at 346-47 (Scalia, J., dissenting).

<sup>95</sup> *Id.* at 316 n. 20.

<sup>96</sup> *Ex parte Modden*, at <http://www.cca.courts.state.tx.us/opinions/HTMLopinionInfo.asp?OpinionID=12462> (Tex. Crim. App. 2003) (last visited June 3, 2004) (affirming trial court's findings that defendant is mentally retarded).

<sup>97</sup> *Clemons v. State*, No. CR-01-1355, 2003 WL 22047260 (Ala. Crim. App. Aug. 29, 2003); *Woods v. State*, 891 So. 2d 398 (Ala. Crim. App. 2003); *State v. Tate*, 851 So. 2d 921 (La. 2003); *State v. Dunn*, 831 So. 2d 862 (La. 2002); *State v. Williams*, 831 So. 2d 835 (La. 2002).

<sup>98</sup> *In Re Campbell*, 82 Fed. Appx. 349 (5th Cir. 2003); *Yeomans v. State*, 898 So. 2d 878 (Ala. Crim. App. 2004); *McGowan v. State*, No. CR-95-1775, 2003 WL 22928607 (Ala. Crim. App. Dec. 12, 2003); *Stallworth v. State*, 868 So. 2d 1128 (aff'd after second remand); *Lewis v. State*, 889 So. 2d 623 (Ala. Crim. App. 2003); *Boyd v. State*, No. CR-02-0037, 2003 WL 22220330 (Ala. Crim. App. Sept. 26, 2003); *Lee v. State*, 898 So. 2d 790 (Ala. Crim. App. 2003); *Peraita v. State*, 897 So. 2d 1161 (Ala. Crim. App. 2003); *Ex parte Smith*, No. 1010267, 2003 WL 1145475 (Ala. Mar. 14, 2003); *Ex parte Perkins*, 851 So. 2d 453 (Ala. 2002); *Ex parte Johnson*, No. 36139-04, 2003 WL 21715265 (Tex. Crim. App. June 6, 2003); *Ex parte Williams*, No. 43907-02 2003 WL 1787634 (Tex. Crim. App. Feb. 26, 2003).

F. *Ring v. Arizona*

In *Ring v. Arizona*,<sup>99</sup> the Supreme Court extended *Apprendi v. New Jersey*<sup>100</sup> to capital cases by requiring juries, not judges, to determine any aggravating factors which eventually lead to the imposition of a death sentence. *Ring* is unlike the other cases so far discussed. *Ring* altered a procedure for determining who gets sentenced to death and did not protect a certain class of persons. In this respect, *Ring* is on par with myriad opinions concerning death penalty procedures. I include *Ring* nonetheless for two reasons. Firstly, the dissent in *Ring* took the majority to task for the number of death row inmates that would benefit from this ruling. Secondly, *Ring*'s impact could have been greater than any of the other cases already discussed if, unlike the typical procedural case, it was applied retroactively.<sup>101</sup>

As noted, the central holding in *Ring* was that juries, not judges, had to find beyond a reasonable doubt any aggravating factors which lead to the imposition of the death penalty. Justice O'Connor's dissent seemed more worried about court dockets than substantive law. It is worth quoting her concerns at length:

There are 168 prisoners on death row in these States each of whom is now likely to challenge his or her death sentence. I believe many of these challenges will ultimately be unsuccessful . . . Nonetheless, the need to evaluate these claims will greatly burden the courts in [Arizona, Colorado, Idaho, Montana, and Nebraska]. In addition, I fear that the prisoners on death row in Alabama, Delaware, Florida, and Indiana, which the Court identifies as having hybrid sentencing schemes in which the jury renders an advisory verdict but the judge makes the ultimate sentencing determination may also seize on today's decision to challenge their sentences. There are 529 prisoners on death row in these States.<sup>102</sup>

According to Justice O'Connor, there were potentially eight states besides Arizona affected by *Ring*; four whose sentencing schemes were identical to Arizona's – Colorado, Idaho, Montana and Nebraska – and four who had hybrid schemes potentially invalid under *Ring* – Alabama, Delaware, Florida, and Indiana.<sup>103</sup> These states combined had a total of 697 prisoners on death row,<sup>104</sup> about 19% of the 2002 national total (3,692). This was the greatest number of persons possible who could have had their death sentences reversed because of

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<sup>99</sup> 536 U.S. 584 (2002).

<sup>100</sup> 530 U.S. 466 (2000).

<sup>101</sup> This question does not usually arise in the other cases so far discussed. Those cases "prohibit[] a certain category of punishment for a class of defendants because of their status or offense," and are thus applied retroactively. *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989).

<sup>102</sup> *Ring*, 536 U.S. at 620-21 (O'Connor, J., dissenting) (citations omitted).

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 621.

*Ring*. Once again, the cases since *Ring* have show just how overblown the estimates were.

Immediately following *Ring*, the first issue to be answered was whether it would invalidate the hybrid schemes of Alabama, Delaware, Florida, and Indiana. Each state on its own had rejected challenges under *Ring*.<sup>105</sup> That eliminated 529 death row inmates as possible beneficiaries of *Ring*. Additionally, there were some jurisdictions not mentioned in *Ring* which were still affected by it. *Ring* resulted in the reversal of one death sentence in Nevada and one in Missouri.<sup>106</sup> In Nevada, while the death sentence was vacated, it was remanded for a new penalty hearing;<sup>107</sup> in Missouri, the defendant was resentenced to life without the possibility of parole and the Court noted that five other inmates would be treated likewise.<sup>108</sup> Thus, because the four hybrid schemes discussed by the Supreme Court remained unaffected, but if the six inmates in Missouri were added to the list of those impacted by *Ring*, that would have still only affected a maximum of 174 death row inmates, or 4.7% of the 2002 national total (3,692).

Even then, *Ring* would only have had an impact if it were applied retroactively. Only the Court of Appeals for the Ninth Circuit and the Missouri Supreme Court had ruled that it should have been applied retroactively.<sup>109</sup> In contrast, the tenth and eleventh circuits, along with the Nebraska Supreme Court had ruled that *Ring* should not have been applied retroactively.<sup>110</sup> If that had stood, *Ring* would have reached just the 160 persons on death row in the jurisdictions covered by the ninth circuit – Arizona, Idaho and Montana – and Missouri.<sup>111</sup> That would have been only 4.3% of the 2002 total. And even if *Ring* was applied retroactively, “challenges [may] ultimately [have been] unsuccessful, either because the prisoners [would have been] unable to satisfy the standards of harmless error or plain error review, or because, having completed their direct appeals, they [would have been] barred from taking advantage of [*Ring*’s] holding on federal collateral review.”<sup>112</sup> Finally, even were an inmate to have had his sentence reversed, he would not have been automatically immune from receiving the death penalty. There would still

<sup>105</sup> See *Lee v. State*, 898 So. 2d 790 (Ala. Crim. App. 2003); *Brice v. State*, 815 A.2d 314 (Del. 2003) (new statutory scheme complies with *Ring*); *Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002), cert. denied 123 S.Ct. 662 (2002); *Wrinkles v. State*, 776 N.E.2d 905 (Ind. 2003) (finding no *Ring* violation in case at bar but not reaching issue of whether entire scheme is suspect).

<sup>106</sup> See *Johnson v. State*, 59 P.3d 450 (Nev. 2002); *State v. Whitfield*, 107 S.W.3d 253 (Mo. 2003).

<sup>107</sup> *Johnson*, 59 P.3d at 463.

<sup>108</sup> *Whitfield*, 107 S.W.2d at 269 n.17.

<sup>109</sup> *Summerlin v. Stewart*, 341 F.3d 1082 (9th Cir. 2003); *Whitfield*, 107 S.W.3d 253. *Summerlin* in effect overruled two state court decisions to the contrary. See *State v. Towery*, 64 P.3d 828 (Ariz. 2003); *Colwell v. State*, 59 P.3d 463 (Nev. 2002).

<sup>110</sup> *Turner v. Crosby*, 339 F.3d 1247 (11th Cir. 2003); *Cannon v. Mullin*, 297 F.3d 989 (10th Cir. 2002); *State v. Lotter*, 664 N.W.2d 892 (Neb. 2003). Additionally, the eighth circuit, which has jurisdiction over Nebraska, has stated in dicta that *Ring* is not retroactive. See *Moore v. Kinney*, 320 F.3d 767, 771 (8th Cir. 2003).

<sup>111</sup> See The Death Penalty Information Center, *supra* note 32.

<sup>112</sup> *Ring*, 536 U.S. at 621 (O'Connor, J., dissenting)



have remained the possibility that he would have been resentenced to death under new, constitutional procedures.<sup>113</sup>

*Ring's* potential impact was overinflated. And nothing confirmed that more than when the Supreme Court, just two years later, settled the debate. In *Schriro v. Summerlin*,<sup>114</sup> the Court held that *Ring* would not be applied retroactively. The majority, joined by the worrisome *Ring* dissenter, Justice O'Connor, held that *Ring* was not retroactive because it announced a new procedural rule that was not a watershed rule of criminal procedure. In one case, the Court established that the 697 prisoners who may have benefited from *Ring* would not. *Ring* could have immediately helped about 19% of death row. Instead, it helped none.

It is a little more difficult to measure what sort of impact *Ring* will have prospectively. That is, now that at least five jurisdictions must change their sentencing schemes, will a substantial number of persons be spared the death penalty in those jurisdictions? Logically, because every other death penalty state had schemes where juries imposed sentences, and, because every other death penalty state has persons on death row, it is difficult to conclude that no jury will ever sentence a defendant to death post-*Ring*. The real debate seems to be whether juries are more likely to sentence someone to death than judges. There are valid points on both sides.<sup>115</sup> Yet whatever the answer, one thing is clear – *Ring* may burden courts, but it will not likely register a change in the total number of persons on death row and the total number of executions.

#### G. *Roper v. Simmons*

In *Roper v. Simmons*,<sup>116</sup> the Supreme Court overruled another case from 1989, *Stanford v. Kentucky*,<sup>117</sup> and held that executing anyone who committed their crime before they were 18 [hereinafter “juvenile”] was unconstitutional.<sup>118</sup> Once again, the statistics show that overturning *Stanford* will have minimal impact on all of death row.

As of September 30, 2004, approximately 2% of the total number of persons on death row are juveniles, or 72 individuals.<sup>119</sup> Since 1973, there have been 22 juvenile executions, constituting 2.6% of the total executions during this period.<sup>120</sup> More importantly, the trend moved away from sentencing juveniles. Since

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<sup>113</sup> See *Johnson*, 59 P.3d at 463.

<sup>114</sup> 542 U.S. 348 (2004).

<sup>115</sup> See *Summerlin*, 341 F.3d at 1110-1116 (jury more likely to be accurate); *Summerlin*, 341 F.3d at 1129-31 (Rawlinson, J., dissenting) (noting that juries are more likely to be arbitrary and influenced by extenuating circumstances); Ingrid Holewinski, “*Inherently Arbitrary and Capricious*”: An Empirical Analysis of Variations Among State Death Penalty Statutes, 12 CORNELL J.L. & PUB. POL’Y 231, 240-41 (2002) (noting that the impact of *Ring* is simply unclear).

<sup>116</sup> 125 S. Ct. 1183 (2005).

<sup>117</sup> 492 U.S. 361 (1989).

<sup>118</sup> 125 S. Ct. at 1200.

<sup>119</sup> See *Juvenile Death Penalty Today*, *supra* note 76.

<sup>120</sup> *Id.*

*Stanford*, five states barred the execution of juveniles.<sup>121</sup> Additionally, other states considered legislation to raise the minimum age of execution to 18.<sup>122</sup> Since *Stanford*, of the states that allowed for juvenile executions, only six did so, three of which were in the last 10 years.<sup>123</sup> Indeed, even, the Governor of Kentucky commuted Kevin Stanford's, the petitioner in *Stanford*, sentence.

Of course, it is possible to interpret these statistics, not as a trend away from executing juveniles, but as indicating that it is a punishment "rarely" imposed.<sup>124</sup> Justice Scalia argued that "the numbers of under-18 offenders subjected to the death penalty, though low compared with adults, have either held steady or slightly increased since *Stanford*."<sup>125</sup> *Roper*, however, was concerned with how these numbers compared to previous statistics for this one class. When compared to the statistics concerning the death penalty on a national scale, juveniles are a statistically insignificant class.

#### H. Conclusion

Taking these cases together, one can see just what sort of overall impact they have on the death penalty. With the earlier cases, we can see the actual number of persons directly affected by the Court and what percentage of the total population of death row they made up. Moreover, we can trace the trends at the time and note that even had the Court not acted, in all likelihood, the persons which were saved under their rulings would have been eventually spared anyway. So, for example, a 15 year old was not likely to be executed regardless of *Thompson*. That the trends show the nation slowly moving away from such practices demonstrates how little prospective impact these Court decisions have.

With the more recent cases, we can only speculate for now what their full impact will be. At the high end, a case like *Ring* could have theoretically reversed 697 sentences, or 18% of death row. But, the reality is that *Ring*, *Atkins* and *Roper* will not likely have such a strong impact, as common sense and the few appellate cases since those decisions show.

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<sup>121</sup> *Roper*, 125 S. Ct. at 1189 (2005).

<sup>122</sup> *State ex. rel. Simmons*, 112 S.W.3d 397, 409 (Mo. 2003).

<sup>123</sup> *Roper*, 125 S. Ct. at 1189 (2005).

<sup>124</sup> *Id.* (Scalia, J. dissenting).

<sup>125</sup> *Id.*

**IMPACT OF DEATH PENALTY LIMITING COURT DECISIONS**

Case	Date	Death Row Population (At time of Case)	Number of Persons Taken Off Death Row	%
<i>Coker v. Georgia</i>	1977	423	5	1.1%
<i>Enmund v. Florida</i>	1982	1,050	8	0.7%
<i>Ford v. Wainwright</i>	1986	1,781	0	0.0%
<i>Thompson v. Oklahoma</i>	1988	2,124	4	0.18%
<i>Atkins v. Virginia</i> (Maximum Estimated Impact)	2002	3,692	~	10%
<i>Atkins v. Virginia</i> (Current Rate of Reversal)	2002	3,692	1	~0.0%
<i>Ring v. Arizona</i> (Maximum Potential Impact)	2002	3,692	697	18%
<i>Ring v. Arizona</i> (Actual Impact)	2002	3,692	0	0.0%
<i>Roper v. Simmons</i>	2005	3,471	72	2%

## IV. WHY IS THIS SO?

A. *The Cruel and Unusual Test*

The biggest reason these cases have had no major impact on death row is that the legal tests they use to invalidate certain aspects of death penalty schemes only goes into effect when a large majority of States are already onboard. The argument normally advanced against the death penalty is that it violates the Eighth Amendment because it is cruel and unusual. In order to be cruel and unusual, the Court has held that a punishment must either be barbaric or disproportional.<sup>126</sup> The Court has definitively found that the punishment of death itself is not a barbaric act or disproportional.<sup>127</sup> But, as the previous section demonstrates, at times, applying the death to certain persons or in response to certain situations may be unconstitutional.

To find a punishment disproportional, the Court relies on objective factors.<sup>128</sup> The “clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country’s legislatures.”<sup>129</sup> If there is a national consensus against a certain punishment, then there is a strong likelihood that the punishment is disproportional. The Court usually finds a national consensus exists when a large majority of states, at least in practice, act a certain way. Similarly, to find a punishment barbaric, the Court looks to “‘evolving standards of decency that mark the progress of a maturing society.’ [and] takes into account objective evidence of contemporary values before determining whether a particular punishment comports with the fundamental human dignity that the [Eighth] Amendment protects.”<sup>130</sup>

In *Coker*, there was a consensus against applying the death penalty for the crime of rape when only one state did so. In *Enmund*, only eight states could possibly sentence a person to death in similar circumstances and even then it was rarely done. In *Ford*, no states sanctioned the execution of the insane. In *Thompson*, 19 states could potentially execute a person under 16 but, in practice, it had only happened five times in the previous four years. In *Atkins*, 20 states permitted the execution of the mentally retarded, though only five had been executed since *Penry*. In short, the tests for invalidating a practice as cruel and unusual, by definition, have an extremely limited reach. The Court is unlikely to invalidate a punishment under these theories unless the punishment is practically in nonuse.

For example, in *Atkins*, the Court noted that the only states that had actually executed the mentally retarded since *Penry* were Alabama, Texas, Louisiana, South

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<sup>126</sup> *Gregg*, 428 U.S. at 169-174.

<sup>127</sup> *Id.* at 177-87.

<sup>128</sup> *Atkins*, 536 U.S. at 311.

<sup>129</sup> *Id.*, quoting *Penry*, 492 U.S., at 331.

<sup>130</sup> *Ford*, 477 U.S. at 406 (citations omitted).

Carolina, and Virginia.<sup>131</sup> But, in total, those executions comprised just 5.2% of the total number of executions during that time; and the number was dropping.<sup>132</sup>

### B. *Non-retroactivity*

The notion of non-retroactivity was already discussed in the section concerning *Ring v. Arizona*. There is no need to repeat the discussion, other than to note that procedural cases often have the ability to reach more persons than cases which make ineligible entire classes of person. However, because procedural rules tend not to be applied retroactively, those cases fail to invalidate death sentences improperly obtained.

### C. *Geography*

The article has so far been focused on the Supreme Court's reach over a national issue. When discussing the death penalty, such a characterization can be a bit misleading. The death penalty is actually very regionalized. At the end of 2004, California and Texas alone held approximately 30% of the nations' death row inmates. The South (consisting of Alabama, Arkansas, Georgia, Florida, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee and Virginia) holds about another 38.5%.

The same disproportional percentages apply to executions. Texas alone has executed nearly 35% of those executed nationwide since 1976. The South has executed another 36.6%. Virginia alone has executed 61% of persons on its own death row – the highest percentage in the country.<sup>133</sup> In contrast, “the five death penalty states in the Northeast have executed just three people – all of them ‘volunteers’ in Pennsylvania who wanted to die.”<sup>134</sup> California “has executed just 10 [out of 625 inmates] since 1976, two of them volunteers.”<sup>135</sup>

These numbers are extremely relevant because they put into perspective the notion that the Court opinions impact the national death penalty statistics. In reality, the death penalty is not a national epidemic. Large death rows and numerous executions are found in only discrete locales. Second, because of this phenomenon, a Court opinion cannot impact the national statistics unless it impacts states like Texas or regions like the South. For example, *Ring* has the potential to

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<sup>131</sup> *Atkins*, 536 U.S. at 316 n.20.

<sup>132</sup> The Virginia and Texas Legislatures were both in the process of passing bills outlawing the practice before *Atkins*. *Id.* at 315 nn.16 & 17.

<sup>133</sup> Frank Green, *Chance of Execution Slim in Some States*, TIMES DISPATCH, Oct. 27, 2003, at A1 [hereinafter *Chance of Execution Slim*]; see also Frank Green, ‘My Life . . . is on the Line’; Death Penalty is more Likely to be Carried out in Virginia than it is in any other State, TIMES DISPATCH, Oct. 26, 2003, at A1 (noting that the second highest execution rate is Missouri, with 32% and the third highest are Delaware and Texas, with 28%).

<sup>134</sup> *Chance of Execution Slim*, *supra* note 133.

<sup>135</sup> *Id.* California executed one more person in 2005. See *California Executes Double Murdered*, at <http://www.cnn.com/2005/LAW/01/19/california.no.mercy.ap/> (last visited Jan., 23 2005).

impact, prospectively, a great many number of persons on death row. But neither Texas, Virginia, California, nor virtually any Southern State were affected by it; only Alabama and Florida were theoretically affected by *Ring* and, as noted, even that is unlikely (because they are hybrid schemes).

## V. STRENGTHENING THE DEATH PENALTY

The previous sections show why the death penalty limiting cases--while victories for the individual defendants--were not resounding blows for the death penalty on a national scale. This section will demonstrate that beyond that, these cases actually make the death penalty generally more attractive to the public.

"From the early 1980s through the mid-1990s, support for capital punishment reached record highs. Public support for the death penalty is still strong, but between 1996 and 2000 it declined significantly from the extraordinary levels that we saw just a few years ago."<sup>136</sup> There are many possible explanations for this, such as low crime rates, recent public attention concerning exonerations of innocent people on death row, and exposure to the arbitrariness and inconsistencies of the death penalty.<sup>137</sup> Recently, moratoriums have offered a new third option as opposed to merely supporting or opposing the death penalty. "A moratorium is an especially attractive choice in the death penalty debate because it does not require people to move to the enemy camp or even to give up their old position."<sup>138</sup> Although it is possible that this drop is just temporary, one source states that "A Gallup Poll taken in May [2003] found 74 percent of Americans in favor of the death penalty for killers – the most support for the death penalty since 1995."<sup>139</sup> In May 2004, support still hovered around 71%.<sup>140</sup>

Continuing public support for the death penalty is relevant primarily because it shows that even though there are constant opinions ostensibly limiting the application of the death penalty, public opinion remains unfazed. That is, one could argue that these cases raise salient issues that expose possible weaknesses in death penalty implementation. Thus, someone who supports the death penalty, but is ignorant of the fact that it is used on mentally retarded persons or juveniles, might change his opinion if the Court addresses the issue on a national scale. But this is not the effect of the cases discussed for several reasons.

Empirical studies tend to show that the public is generally unaware of Supreme Court opinions.<sup>141</sup> Granted, certain cases are more visible than others, e.g. abortion,

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<sup>136</sup> Samuel R. Gross & Phoebe C. Ellsworth, *Second Thoughts: Americans' Views on the Death Penalty at the Turn of the Century*, in *BEYOND REPAIR? AMERICA'S DEATH PENALTY 7* (Stephen P. Garvey ed., 2003) [hereinafter *Second Thoughts*]; see also Samuel R. Gross, *Update: American Public Opinion on the Death Penalty—it's Getting Personal*, 83 CORNELL L. REV. 1448 (1998) [hereinafter *Update*].

<sup>137</sup> *Second Thoughts*, *supra*, note 136.

<sup>138</sup> *Id.* at 47.

<sup>139</sup> *Chance of Execution Slim*, *supra* note 133.

<sup>140</sup> See <http://www.pollingreport.com/crime.html> (last visited Jan. 23, 2005).

<sup>141</sup> See generally Charles Franklin & Liane Kosaki, *Media, Knowledge, and Public Evaluations of the Supreme Court*, in *CONTEMPLATING COURTS* 352 (Lee Epstein, ed. 1995).

and they in turn create a greater awareness.<sup>142</sup> Yet, as far as the death penalty is concerned, media coverage and individual awareness tend to be low.<sup>143</sup> Even if one assumes that the public is fully informed that would only support the idea of the Supreme Court solidifying public support for the death penalty because of the manner in which the Court addresses it.<sup>144</sup>

The cases discussed do not really have the ability to rally the public against the death penalty since they were all limitations on the death penalty. Someone who opposed the execution of the mentally retarded was appeased, not angered, by *Atkins*. If anything, it is cases which uphold practices that the public may find abhorrent that would have the potential to sway public opinion. Arguably, that was the effect of *Perry*, which eventually led to most states banning the practice of executing the mentally retarded, which in turn led the Court to overturn *Atkins*.<sup>145</sup>

However, even some of the cases which uphold abhorrent practices do not sway the public. When the Court upholds a potentially unpopular practice, e.g. the executions of juveniles ages 16 and 17, such a small minority of States actually acts in this "offensive" manner that there is little room for influence. For example, despite *Stanford*, only 22 juveniles had actually been executed since 1977. The average person who supports the death penalty overall, but not for older juveniles, and was aware of the Supreme Court's stance, could still be unwavering in his support of the death penalty because there was no real threat that his positions would be compromised.

The available data supports this hypothesis (or, at the very least, does not refute it). The relevant dates of the cases discussed are, in order, 1977 (*Coker*), 1982 (*Enmund*), 1986 (*Ford*), 1988 (*Thompson*), 1989 (*Stanford*), and 2002 (*Atkins* and *Ring*). Support for the death penalty grew in the late 70's and 80's.<sup>146</sup> This support continues to grow today, when these cases are being decided.<sup>147</sup> Indeed, because of the posture of these cases, the Court invalidated aspects of the death penalty only after the public had expressed disdain. Once again, *Atkins* is a good example. By the time it was decided, despite general support for the death penalty, "consistent majorities continue[d] to oppose the death penalty for mentally retarded defendants."<sup>148</sup>

Therefore, these cases serve to solidify public support. The Court continues to appease the public in its decisions and thereby affirms a general support of the

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<sup>142</sup> *Id.* at 356-366.

<sup>143</sup> *Id.*

<sup>144</sup> See Gregory Caldeira, *Court and Public Opinion*, in *THE AMERICAN COURTS A CRITICAL ASSESSMENT* 312 (John Gates & Charles Johnson, eds. 1991) ("The Supreme Court probably shapes aggregate distributions of public opinion, at least in some highly visible instances, and can move parts of the public depending upon the differential impact of the decision.").

<sup>145</sup> See *Atkins*, 536 U.S. at 314; Jonathon Bing, *Protecting the Mentally Retarded from Capital Punishment: State Efforts Since Perry and Recommendations for the Future*, 22 N.Y.U. REV. L. & SOC. CHANGE 59, 64 (1996).

<sup>146</sup> *Second Thoughts*, *supra* note 136, at 9-10.

<sup>147</sup> *Chance of Execution Slim*, *supra* note 133.

<sup>148</sup> *Update*, *supra* note 136, at 1466-67.

death penalty. Since there are certain categories of people or certain types of crimes that the public does not find worthy of the death penalty, were the Court to allow those practices to continue, perhaps the public would start to change their minds. Currently, the public need not waiver in support of the death penalty because the portions of it they may find repulsive are no longer a part of the system. Consequently, the Court leaves intact the death penalty policy that the public wants. The irony is apparent: public support for the death penalty would likely begin to turn if the Court avoided death penalty cases all together or continually affirmed state practices.

Furthermore, as noted, a recent survey shows public support back up to 74%.<sup>149</sup> It may simply be coincidence, but support for the death penalty grew steadily throughout the 70's and 80's, when the court was most active in striking down portions of the death penalty. Then, during the hiatus of decisions, public support dropped precipitously after peaking in 1995.<sup>150</sup> Yet, following *Atkins* and *Ring*, support is back up. Perhaps there is some merit to the idea that the Supreme Court strengthens the overall support of the death penalty by striking down fringe practices. This factor alone is not decisive. Rather, it may contribute to the explanations regarding the public's opinion fluctuations.

In short, the effect of these death penalty limiting cases is counterintuitive. Abolitionists cheer any inroads they can make into limiting the death penalty. Upon further review, these cheers are misplaced. Every legal limitation on the death penalty results in practically expanding its reach. When the Supreme Court issues a death penalty limiting opinion, it is merely acting in a reactionary manner to an already established majority practice. It is not, all of a sudden, a victory for abolitionists. It is a sign that that individual battle has been won. But it is also a sign that the overall fight against the death penalty is now more difficult to win.

## VI. CONCLUSION

Recently, one troubling aspect of the death penalty has been giving the public pause: the idea that innocent people are being executed.<sup>151</sup> This is the impetus behind some statewide moratoriums and seemingly one of the reasons for the public's slight decline in overall support for the death penalty.<sup>152</sup> Two observations should be made about this. First, the sudden surge of evidence regarding innocent people on death row is not a result of any death penalty limiting cases. The few cases that have reached the Court seem to downplay the seriousness.<sup>153</sup> Due to the Court's unwillingness to get involved, much like the path of the mentally retarded,

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<sup>149</sup> *Chance of Executions Slim*, *supra* note 133.

<sup>150</sup> See *Second Thoughts*, *supra* note 136, at 9-10.

<sup>151</sup> See *id.* at 28-31; Ken Armstrong & Steve Mills, "Until I Can be Sure": How the Threat of Executing the Innocent has Transformed the Death Penalty Debate, in *BEYOND REPAIR? AMERICA'S DEATH PENALTY* 94 (Stephen P. Garvey ed., 2003)

<sup>152</sup> *Id.*

<sup>153</sup> See *Herrera v. Collins*, 506 U.S. 390 (1993) (holding that claim of "actual innocence" is not a proper basis for habeas corpus review).



the current awareness about innocence on death row has been spurred by lawyers and Governors.<sup>154</sup>

Second, and more important, eliminating – or at the very least, severely limiting – the execution of innocent people is a theoretic possibility.<sup>155</sup> This possibility emphasizes the overwhelming burden the Supreme Court has placed on abolishing the death penalty. As noted, by eliminating the fringe practices generally unsupported by the public and making the process nearly error-free little would hinder the public's support (outside of a moral shift of opinion).

In 2000, Illinois Governor George Ryan “imposed a moratorium on executions.”<sup>156</sup> The moratorium was one of the few that actually went into effect. Other attempts were vetoed in Nebraska<sup>157</sup> and Maryland.<sup>158</sup> Nevertheless, it “changed the shape of the national debate over capital punishment.”<sup>159</sup> But what immediately impacted death row was not the moratorium itself, or anything that any court – especially the Supreme Court – did. Rather it was what Governor Ryan did just before leaving office.

Just before leaving office in January 2003, Governor Ryan commuted every death sentence for every remaining Illinois inmate – a total of 164 persons – to life without parole.<sup>160</sup> The day before, he had granted four pardons and commuted three sentences to 40-year terms.<sup>161</sup> Therefore, Governor Ryan was directly responsible for taking 171 persons off of death row, or 4.6% of the 2002 total of 3,692. In terms of impact, Governor Ryan's actions easily surpassed the combined totals from the death penalty limiting cases to date. Only *Atkins* could potentially outdo Governor Ryan's action, but, that is unlikely.

While the Court is not powerless to impact death row, despite popular belief, it is not using that power. Rather, the handful of cases that are thought to be groundbreaking are far from that. The Court is in fact helping to mold a death penalty that is more palatable to the masses. The only real public outcry over the death penalty today seems to be wrongful convictions. However, as procedures get

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<sup>154</sup> See *Second Thoughts*, *supra*, note 136, at 21-24; BARRY SCHECK, PETER NEUFELD, & JIM DWYER, *ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED* (2001).

<sup>155</sup> See Jean Blackerby, *Life After Death Row: Preventing Wrongful Capital Convictions and Restoring Innocence After Conviction*, 56 VAND. L. REV. 1179, 1208-1215 (2003) (discussing various procedures that could lead to fewer wrongful convictions); Scott Greenberger, *Panel Offers Death Penalty Plan. State Would use Standard of 'No Doubt,'* BOSTON GLOBE, May 3, 2004, at A1 (“Massachusetts [is attempting to] create a capital punishment system that is ‘as infallible as humanly possible’ by narrowly defining the eligible crimes and requiring the use of DNA or other scientific evidence.”).

<sup>156</sup> *Second Thoughts*, *supra* note 136, at 23.

<sup>157</sup> *Id.*

<sup>158</sup> Blackerby, *supra* note 155, at 1209.

<sup>159</sup> *Second Thoughts*, *supra* note 136, at 23.

<sup>160</sup> See Maurice Possley and Steve Mills, *Clemency for all Ryan commutes 164 death sentences to life in prison without parole 'There is no honorable way to kill,' he says*, CHI. TRIB. January 12, 2003 1, at 1.

<sup>161</sup> *Id.*

put in place which purport to eliminate, if not limit, wrongful capital convictions, there is nothing standing in the way of public support for the death penalty.

Despite public perception, the death penalty limiting cases are not bringing about change with respect to the death penalty. Governors and lawyers are stimulating the change. Governor Ryan's actions are exemplary. The Court itself, however, through these reactionary opinions, is not a bastion of hope for abolitionists. Far from it; the death penalty limiting opinions are, ironically, the death penalty's biggest booster.

Thus, this article should serve as a wake-up call to abolitionists. Repeated victories at the Supreme Court should not transition into complacency. Though it is understandable to believe the illusion that progress is being made, now, more than ever, resistance and public awareness are needed to quash the death penalty.

