

News Analysis: Reshaping Capital Punishment

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After a decade of relative quiet, the Supreme Court has in the last several years fundamentally reshaped the nation's capital justice system.

It has narrowed the class of people eligible for execution, excluding juvenile offenders yesterday as it had previously the mentally retarded. It has rebuked lower courts for sending people to their deaths without adequate safeguards. And it has paid increasing attention to the international opposition to capital punishment.

"Early in the 1990's, we reached the high point in deregulating death," said Franklin E. Zimring, a law professor at the University of California, Berkeley, alluding to decisions in which the court refused to hear defendants' claims of innocence because they were raised too late. "Then there was very little from the Supreme Court through the 1990's. Now, in a whole series of substantive and procedural decisions, you have a re-regulation taking place."

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Opinions vary about where the process will end.

"The trend seems to be pushing toward the abolition of capital punishment," said Rory K. Little, a former Justice Department official who is now a professor at Hastings College of Law in San Francisco. "But it would be a mistake to predict that these decisions are leading inexorably to abolition. It could be that they cut out all the edges and leave the core that everyone is comfortable with."

Since the Supreme Court's decision banning the execution of the mentally retarded three years ago, lower courts have struggled with how to determine whether specific defendants should be removed from death row on that ground. There will be no such problem when it comes to juveniles.

All 72 men on death row for murders they committed when they were 16 or 17 will be spared their lives under the latest decision and will instead receive the harshest punishment available, typically life without the possibility of parole.

"These people will all spend the rest of their lives in prison," said Victor L. Streib, a law professor at Ohio Northern University whose studies of the juvenile death penalty were cited in yesterday's decision. "Nobody's getting out."

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[Adam Liptak on the Juvenile Death Penalty Decision](#)

The 5-4 decision erases the death sentences imposed on 72 defendants in 12 states who were juveniles at the time they killed.

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The justices ruled 5 to 4 that the Constitution bars the death penalty for crimes committed before age 18.

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The decisions in *Stanford v. Kentucky* and *Roper v. Simmons*.

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The ruling affects the 72 juvenile

Similarly, people who had faced capital prosecutions for crimes they committed as juveniles can now be sentenced, at worst, only to life terms. That group includes Lee Malvo, the teenage sniper serving a life term in Virginia. Prosecutors in Alabama and Louisiana had wanted to try Mr. Malvo on capital charges for killings there.

Supporters of the death penalty said they were braced for further, incremental attacks on the use of capital punishment - whether it should be applied to the mentally ill, older teenagers and defendants claiming racial discrimination.

"The next battle is the mentally ill," said Prof. Robert Blecker of the New York Law School. Given the decisions on the mentally retarded and on juveniles, Professor Blecker said, "it has a certain appeal."

Professor Blecker said he also expected opponents of the death penalty to try to move up the age separating juveniles from adults. In 1988, the Supreme Court set the line at age 16. Yesterday, it rose to 18.

"The interim attack may be to go after the so-called teenage death penalty, so they'll go after 19-year-olds," he said. "Then they will redefine juveniles to say it should extend to those under 21."

Richard C. Dieter, the executive director of the Death Penalty Information Center, a research group opposed to the death penalty, said he expected the role of race in capital punishment to re-emerge.

"Among the issues the Supreme Court decided around the same time as the juvenile death penalty was race and the death penalty," Mr. Dieter said, alluding to a 1987 decision holding that the disparities between whites and nonwhites at the time did not offend the Constitution. "They may be ready to take another look."

Professor Zimring said he also expected more attention on procedural safeguards.

"The areas to watch for large developments in are the adequacy of representation of counsel and harmless error," he said. Opponents of the death penalty are often critical of the quality of appointed counsel for capital defendants and the willingness of courts to overlook some prosecutorial misconduct by calling it harmless.

The extended discussion of international opposition to the juvenile death penalty in Justice Anthony M. Kennedy's majority opinion may also have broader implications, legal experts said.

"All over the world, we have been condemned for this," Professor Streib said. "We've now joined the rest of the world. Maybe the only country that still does this now is Iran."

David I. Bruck, a capital defense lawyer and the director of the Virginia Capital Case Clearinghouse at Washington and Lee University School of Law, said many Americans did not realize the strength of international sentiment on this issue.

"Had the decision gone the other way," Mr. Bruck said, "it would have been another Abu Ghraib. The outcry around the world would have been simply astounding."

offenders who remain under death sentences.

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Even beyond the debate over the juvenile death penalty, Professor Zimring said, the embarrassment of being out of step with the rest of the world on capital punishment generally may have played a significant role in the majority's decision.

"The United States and Japan are in their own small suburb of the developed world," he said, referring to the two major industrialized nations that make routine use of the death penalty. "In the last 10 years, the rest of the world's opposition to the death penalty has become tremendously important to the rest of the world. Capital punishment in Europe has become a hotter topic in Europe in 2005 than it was in 1965, when they were busy abolishing it."

Professor Blecker said that analysis was based on faulty premises.

"The problem is that when you look at the opposition of other nations," he said, "they're looking at governments and not people. Every European government which abolished the death penalty did it in the face of overwhelming political support."

In each of the last two years, juries imposed only two death sentences on juvenile offenders.

Yesterday's decision is consistent with those trends, said Joshua K. Marquis, a co-chairman of the capital litigation committee of the National District Attorneys Association.

"It's not a harbinger of the end of the death penalty," Mr. Marquis said, "but simply an indication that the Supreme Court is becoming more discriminating, as are prosecutors and juries."

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