Journal of Criminal Law and Criminology

Volume 96
Issue 3 *Spring*

Article 5

Spring 2006

Roper v. Simmons: The Collision of National Consensus and Proportionality Review

Wayne Myers

0091-4169/06/9603-0947
THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY
Vol. 96, No. 3

Printed in U.S.A.

ROPER V. SIMMONS: THE COLLISION OF NATIONAL CONSENSUS AND PROPORTIONALITY REVIEW

I. INTRODUCTION

In 1989, the Supreme Court held in *Stanford v. Kentucky* that imposing the death penalty on criminals who were under the age of eighteen at the time of their crime did not violate the Eighth Amendment's prohibition against cruel and unusual punishment.[1] The Court ruled that determining whether a punishment was cruel or unusual demanded an inquiry into the "evolving standards of decency" in society at that particular moment in time toward the punishment in question.[2] Thus, for example, while drawing and quartering, beheading, or burning people alive were not always considered cruel and unusual punishments, today our standards of decency hold such sentences are no longer a socially acceptable form of punishment.[3] In *Stanford*, the Court found that the standards of decency in 1989 did not indicate a clear national consensus against executing capital offenders for crimes committed while the offender was under the age of eighteen.[4] Accordingly, the *Stanford* Court held that the individual states retained discretion whether to permit the death penalty for juvenile capital offenders.[5] However, the Court's framework implicitly left open the possibility that an evolution in American society's standards of decency could render its 1989 determinations moot, thereby triggering Eighth Amendment protections for juvenile offenders facing a death sentence if

[1] 492 U.S. 361, 366 (1989). Stanford, age seventeen, was convicted of murder, sodomy, robbery, and the receipt of stolen property, and sentenced to death under a Kentucky law allowing the death penalty for juveniles convicted of class A felonies.

[2] *Id.* at 369.

[3] *See* Wilkerson v. Utah, 99 U.S. 130, 135-36 (1878) ("[I]t is safe to affirm that punishments of torture, such as those mentioned by the commentator referred to, and all others in the same line of unnecessary cruelty, are forbidden by that amendment to the Constitution.").

[4] *Stanford*, 492 U.S. at 380.

[5] *Id.*

such a punishment were found to be cruel and unusual in light of American society's ever-evolving standards of decency.[6]

In 2004, Christopher Simmons, sentenced to death for a first degree murder committed at age seventeen, challenged his death sentence on precisely those grounds, arguing that the standards of decency in American society had evolved to the point that a national consensus existed against executing a criminal for crimes he committed while under the age of eighteen, and that therefore his death sentence was cruel and unusual punishment in violation of the Eighth Amendment.[7] Simmons relied upon the Supreme Court's 2002 decision in *Atkins v. Virginia* that the Eighth Amendment prohibits the execution of mentally retarded persons because such persons categorically lack the mental culpability to be held fully accountable for their criminal actions, and, therefore, imposing the death penalty, the punishment reserved only for the most culpable of offenders, is cruel and unusual.[8] Analogously, Simmons argued that minors under the age of eighteen should not be held fully accountable for their crimes because, like mentally retarded persons, they had not reached full intellectual maturity and therefore did not possess the requisite culpability necessary to justify the imposition of the death penalty.

Undoubtedly, the *Roper* decision is a logical outgrowth of the Supreme Court's landmark decision in *Atkins*. *Atkins* restricted the autonomy of the states to make individualized determinations of culpability for mentally retarded persons, instead declaring that mentally retarded persons, as a class, were entitled to the presumption that they lacked the necessary level of criminal culpability for a state to impose the death penalty. The Court's decision was rooted in two central findings. First, the Court found that the indicia of national consensus indicated that the majority of American society did not approve of executing the mentally retarded.[9] Second, the Court found that the death penalty was inherently disproportionate for mentally retarded persons because their cognitive impairments made them less than fully accountable for their actions.[10] Unsurprisingly, *Roper* extends this line of reasoning to the juvenile death penalty, holding that the immaturity and imperfect intellectual development of sixteen and seventeen-year-olds, similar to the cognitive impairments of mentally retarded persons in *Atkins*, prevents them from having sufficient

---

[6] *Id.*

[7] Roper v. Simmons, 543 U.S. 551, 559-60 (2005).

[8] 536 U.S. 304, 321 (2002).

[9] *Id.* at 316.

[10] *Id.* at 318.

responsibility for their actions to warrant the death penalty.[11] *Roper* also contends that the indicia of national consensus show that American society no longer approves of the death penalty for juvenile offenders.[12] Accordingly, the *Roper* decision is consistent with the reasoning of *Atkins*.

However, although *Roper* follows in the footsteps of *Atkins*, it does not mean the precedent set in *Atkins* ought to have been continued. In deciding *Roper*, the Court once again undermines the legitimacy and competency of the American jury system and continues to tread on state autonomy by making broad prohibitions against the death penalty for entire classes of citizens. Exceeding the scope of *Atkins*, the *Roper* court delves into the comparatively murkier issues regarding the culpability of mentally astute seventeen-year-olds, and permanently removes the question of a juvenile's ultimate accountability from the dominion of the states.

In addition to usurping state autonomy, the *Roper* decision is problematic because it is based on an unconvincing measure of what constitutes a national consensus. Moreover, the Court forwardly adopts the view that its independent judgment is essential to determine the acceptability of a particular punishment under the Eighth Amendment.[13] These developments are a fundamental alteration of Eighth Amendment jurisprudence, undercutting the centrality of a national consensus established in *Stanford* and reaffirmed in *Atkins*. This Note argues that *Roper*, while internally consistent with *Atkins*, illustrates the Court's willingness to continue chipping away at the role of states and juries in criminal sentencing proceedings by reducing the threshold necessary to establish a national consensus and focusing Eighth Amendment jurisprudence on the Justices' subjective judgment regarding the bounds of acceptable punishment.

II. HISTORICAL EVOLUTION OF THE EIGHTH AMENDMENT

A. THE BEGINNING OF MODERN EIGHTH AMENDMENT JURISPRUDENCE: *WEEMS V. UNITED STATES*

The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[14] The origins of modern Eighth Amendment jurisprudence can

---

[11] *Roper*, 543 U.S. at 570-71.

[12] *Id.* at 567.

[13] *Id.* at 563-64.

[14] U.S. CONST. amend. VIII.

be traced to *Weems v. United States*, where the Supreme Court held it was cruel and unusual punishment to punish a man convicted of falsifying government documents to a sentence of "twelve years and one day, a chain at the ankle and wrist of the offender, hard and painful labor, no assistance from friend or relative, no marital authority or parental rights or rights of property, no participation even in the family council."[15] The Court speculated that because of the Eighth Amendment's vagueness, it "may be therefore progressive, and is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice."[16] The Court further explained that the Eighth Amendment reflected an underlying belief that a punishment must be "graduated and proportioned to the offense."[17] The Court ultimately concluded that the fact that there was no difference in the punishment for falsifying public documents resulting in small thefts and the punishment for falsifying public documents resulting in large thefts made the twelve-year sentence excessive and unusually severe, because the sentence did not proportionally serve the government's interest in preventing the falsification of documents.[18]

B. EVOLVING STANDARDS OF DECENCY: *TROP V. DULLES*

Several decades later, the Supreme Court held in *Trop v. Dulles* that it was cruel and unusual punishment to revoke the citizenship of military deserters.[19] The majority explained:

> While the state has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards. Fines, imprisonment and even execution may be imposed depending upon the enormity of the crime, but any technique outside the bounds of these traditional penalties is constitutionally suspect.[20]

Coining a phrase that continues to dominate today's Eighth Amendment jurisprudence, the Court declared, "[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[21] The Court determined that revoking an individual's citizenship would subject that individual to a lifetime of banishment and statelessness, a fate that was universally condemned by the views of the civilized nations of the world and permitted only in two other

---

[15] 217 U.S. 349, 366 (1910).
[16] *Id.* at 378.
[17] *Id.* at 366-67.
[18] *Id.* at 380.
[19] 356 U.S. 86, 101 (1958).
[20] *Id.* at 100.
[21] *Id.* at 101.

nations.[22] Based on these findings, the Court concluded that the Eighth Amendment prohibited Congress from revoking a person's citizenship.[23]

C. A TWO-PRONG TEST EMERGES: *GREGG V. GEORGIA*

A more definitive framework evolved several years later in *Gregg v. Georgia*, where the Court affirmed the death sentence of a man convicted of first-degree murder.[24] A two-pronged test was announced to determine whether a punishment was acceptable under the Eighth Amendment.[25] First, the Court examined modern standards of decency to evaluate whether there was a national consensus against the death penalty.[26] The Court explained that the Eighth Amendment's prohibition of cruel and unusual punishment did not apply only to punishments prohibited in the eighteenth century, but that the "[a]mendment has been interpreted in a flexible and dynamic manner."[27] Recycling language from *Trop*, the Court stated that the "Eighth Amendment must draw its meaning from the evolving standards of decency which mark the progress of a maturing society."[28] This determination "requires that the court look to the objective indicia which reflect the public attitude toward a given sanction."[29] The Court found that contemporary society had endorsed the death penalty as illustrated by thirty-five state laws that provided for it.[30]

Second, the Court declared that a penalty must "accord with the dignity of man" which was construed to prohibit excessive punishments.[31] An excessive punishment is one that leads to "unnecessary and wanton infliction of pain" or is "grossly out of proportion to the severity of the crime."[32] The Court determined that it must execute its independent judgment as to whether a punishment was excessive and therefore violated the dignity of man. The Court found that although the death penalty is an extreme sanction, it was suitable for first degree murderers because they had committed the most extreme of crimes.[33] The Court also explained that

---

[22] *Id.* at 103. The two nations permitting revocations of citizenship were the Philippines and Turkey. *Id.*

[23] *Id.*

[24] 428 U.S. 153 (1976).

[25] *Id.* at 173.

[26] *Id.* at 172-73.

[27] *Id.* at 171.

[28] *Id.* at 173.

[29] *Id.*

[30] *Id.* at 179-80.

[31] *Id.* at 173.

[32] *Id.*

[33] *Id.* at 182-83.

the death penalty was not "so totally without penological justification that it results in the gratuitous infliction of suffering."[34] Accordingly, the Court found that the death penalty was not inherently disproportionate for the crime of murder, and therefore did not intrinsically constitute cruel and unusual punishment.

D. RAPE AND THE DEATH PENALTY: *COKER V. GEORGIA*

Later in 1977, however, in *Coker v. Georgia*, the Supreme Court held that imposing the death penalty for rape was a grossly disproportionate and excessive punishment forbidden by the Eighth Amendment.[35] The Court determined that there was a national consensus against imposing the death penalty for rape.[36] Before *Furman v. Georgia* required the states to revise their death penalty statutes to prevent arbitrary imposition of the death penalty,[37] sixteen states had laws permitting the death penalty for rape.[38] At the time, nineteen other states had laws allowing the death penalty, but not for rape.[39] However, after *Furman*, only Georgia, Louisiana, and North Carolina passed revised laws permitting the death penalty for rape.[40] The Court ascribed significance to the fact that only those states that previously had laws permitting the death penalty for rape had decided to resurrect the practice.[41] Eventually, the death penalty statutes in Louisiana and North Carolina were struck down for requiring a mandatory death penalty.[42] In their new death penalty statutes, Louisiana and North Carolina chose not to permit the death penalty for rape, leaving Georgia as the only state with a law allowing the death penalty for rape.[43] Based on this background, the Court concluded "[t]he current judgment with respect to the death penalty for rape is not wholly unanimous among state legislatures, but it obviously weighs very heavily on the side of rejecting capital punishment as a suitable penalty for raping an adult woman."[44] The Court also cited the fact that juries had very rarely imposed the death penalty for rapists as evidence of growing disapproval for the practice.[45]

---

[34] *Id.*
[35] 433 U.S. 584 (1977).
[36] *Id.* at 596.
[37] Furman v. Georgia, 408 U.S. 238 (1972).
[38] *Coker*, 433 U.S. at 593.
[39] *Id.* at 595.
[40] *Id.* at 594.
[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] *Id.* at 595.
[45] *Id.* at 596-97.

E. THE JUVENILE DEATH PENALTY: *THOMPSON V. OKLAHOMA* AND *STANFORD V. KENTUCKY*

In *Thompson v. Oklahoma*, the Court, with a concurring vote from Justice O'Connor, set aside a death penalty imposed on a fifteen-year-old murderer.[46] The plurality concluded that executing persons who were less than sixteen at the time of their crime was cruel and unusual punishment because no death penalty state that had expressly considered the issue permitted the death penalty for individuals under age sixteen,[47] no person under sixteen had been sentenced to death in over forty years,[48] and numerous professional organizations and many other nations felt juvenile executions were uncivilized.[49] The *Thompson* plurality stressed that "[t]he reasons why juveniles are not trusted with privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult."[50]

However, Justice O'Connor, the decisive vote, explained there was not a clear indication of a national consensus against executing fifteen-year-olds.[51] Rather, her concurrence was based on the

> considerable risk that the Oklahoma Legislature either did not realize that its actions would have the effect of rendering fifteen year-old defendants death eligible or did not give the question the serious consideration that would have been reflected in the explicit choice of some minimum age for death eligibility.[52]

Justice O'Connor explained that even if most adolescents are "generally less blameworthy than adults who commit similar crimes—it does not necessarily follow that all fifteen-year-olds are incapable of the moral culpability that would justify the imposition of capital punishment."[53] Thus, Justice O'Connor voted with the plurality *only* because the state had not expressly considered whether the death penalty was acceptable for fifteen-year-olds, explicitly noting that the ultimate moral issue of the age for death penalty eligibility ought to "be addressed in the first instance by those best suited to do so, the people's elected representatives."[54]

One year later, the Court in *Stanford v. Kentucky* affirmed a death sentence for an offender convicted of first degree murder at age seventeen,

---

[46] 487 U.S. 815, 838 (1988) (plurality opinion).
[47] *Id.* at 826 (plurality opinion).
[48] *Id.* at 831-32 (plurality opinion).
[49] *Id.* at 830 (plurality opinion).
[50] *Id.* at 835 (O'Connor, J., concurring).
[51] *Id.* at 848-49 (O'Connor, J., concurring).
[52] *Id.* at 857 (O'Connor, J., concurring).
[53] *Id.* at 853 (O'Connor, J., concurring).
[54] *Id.* at 858-59 (O'Connor, J., concurring).

finding that the Eighth Amendment did not prohibit the execution of sixteen and seventeen-year-olds.[55] Comporting with the framework established in *Gregg v. Georgia*, a plurality of the Court, led by Justice Scalia, found there was no national consensus prohibiting the execution of sixteen or seventeen-year-olds.[56] The Court explained that the proper indication of a national consensus was to look strictly at statutes "passed by society's elected representatives."[57] The Court further explained that the threshold for a national consensus was high, requiring a state's practice to be a significant outlier from the rest of the nation.[58] Finding that a majority of death penalty states permitted capital punishment for those sixteen and above, the plurality declared that the high threshold was not met.[59] Additionally, the plurality claimed that little significance could be placed on statistics indicating that juries were reluctant to impose the death penalty on sixteen and seventeen-year-olds; arguing instead that these statistics showed only that juries felt the juvenile death penalty should *rarely* be imposed.[60] The plurality also discounted the relevance of laws establishing eighteen as the legal age of adulthood and its accompanying responsibilities on two grounds. First, the plurality argued that responsibilities like voting and jury duty are far more complex than the basic understanding not to kill people.[61] Second, the plurality contended that laws restricting privileges to those eighteen and older reflected only a broad determination that juveniles are frequently too immature to handle certain responsibilities, but that these generalized determinations are distinct from the individualized considerations of maturity one receives in a criminal jury trial.[62] The plurality explained "[i]t is our job to identify the evolving standards of decency; to determine, not what they should be, but what they are."[63] The plurality also discounted the weight that should be attached to the "so-called proportionality analysis," noting that "we have never invalidated a punishment on this basis alone" and that "all of our cases condemning a punishment under this mode of analysis also found that the objective indicators of state laws or jury determinations evidenced a societal consensus against that penalty."[64]

---

[55] 492 U.S. 361, 380 (1989) (plurality opinion).

[56] *Id.* at 373 (plurality opinion).

[57] *Id.* at 370 (plurality opinion).

[58] *Id.* at 370-71 (plurality opinion).

[59] *Id.* at 371-72 (plurality opinion).

[60] *Id.* at 373-74 (plurality opinion).

[61] *Id.* at 374 (plurality opinion).

[62] *Id.* at 374-75 (plurality opinion).

[63] *Id.* at 378 (plurality opinion).

[64] *Id.* at 379 (plurality opinion).

F. MENTALLY HANDICAPPED AND THE DEATH PENALTY: *PENRY V. LYNAUGH* AND *ATKINS V. VIRGINIA*

Following this trend, several years later the Court held in *Penry v. Lynaugh* that it was not cruel and unusual to execute mentally retarded persons because the objective indicia did not clearly establish that such persons are uniformly unable to understand the wrongfulness of their actions.[65] The Court found that there was no national consensus against executions of the mentally retarded, which were prohibited only by the Federal Government and by one state that otherwise permitted the death penalty.[66] The Court further noted that the individual culpability of mentally retarded defendants was always determined at trial, and that an individualized inquiry was best able to account for the widely varying ranges of intelligence and culpability among mentally retarded defendants.[67]

However, over a decade later, the Court overturned *Penry*, ruling that it was now cruel and unusual to impose a death sentence on mentally retarded persons.[68] The Court maintained that a national consensus was still centrally important to its decision, but explained that it was not wholly determinative.[69] Instead, the Court held that in deciding whether punishment is cruel and unusual, the Court must use its own judgment to see if "there is reason to disagree with the judgment reached by the citizenry and its legislators."[70] The Court found a national consensus because, since *Penry*, eighteen states had enacted laws prohibiting execution of mentally retarded offenders[71] and only five mentally retarded persons had been convicted during that period.[72] The Court also referenced the viewpoints of many private organizations and foreign nations, which overwhelmingly disapproved of the practice.[73] The Court further argued that the death penalty for mentally retarded persons did not fulfill its penological goal of retribution, noting "[i]f the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution."[74] Additionally, the Court found that the

---

[65] 492 U.S. 302, 338 (1989).

[66] *Id.* at 334.

[67] *Id.* at 340.

[68] Atkins v. Virginia, 536 U.S. 304, 321 (2002).

[69] *Id.* at 312.

[70] *Id.* at 313.

[71] *Id.* at 314-15.

[72] *Id.* at 316.

[73] *Id.*

[74] *Id.* at 319.

death penalty failed to deter mentally retarded persons from committing murders because their mental disability prevented them from understanding the actions that flow from their behavior.[75] Therefore, the Court concluded that it was cruel and unusual to execute mentally retarded persons because there was a national consensus against the practice, and the practice itself did not relate to the goals of deterrence and retribution, the two principles on which the Court had affirmed the death penalty in *Gregg*.[76]

III. *ROPER V. SIMMONS*: FACTUAL AND PROCEDURAL BACKGROUND

A. FACTUAL BACKGROUND

1. Simmons' Crime

At age seventeen, while a junior in high school, Christopher Simmons committed a capital murder.[77] Before the murder, Simmons told his friends that he wanted to kill someone and that he believed he could "get away with it" because he was a minor.[78] Simmons was able to convince two of his friends, fifteen-year-old Charles Benjamin and sixteen-year-old John Tessmer, to accompany him in a plot to break into a home, kidnap a victim, and then kill the victim by throwing him or her over a bridge into a body of water so that he or she would drown.[79]

On the night of the murder, the three rendezvoused at two in the morning.[80] However, Tessmer ended up leaving before Simmons and Benjamin set out to commit the crimes.[81] Shortly after Tessmer departed, Simmons and Benjamin proceeded to break into the home of Shirley Crook by reaching into an open window and unlocking the back door to her house.[82] The two entered the home, and Simmons turned on a hallway light, which awakened Mrs. Crook.[83] Simmons and Benjamin entered Mrs. Crook's bedroom, where they used duct tape to cover Mrs. Crook's mouth and eyes and bind her hands.[84] The two then placed Mrs. Crook in her

---

[75] *Id.*
[76] *See, e.g.*, Gregg v. Georgia 428 U.S. 153, 183 (1976).
[77] Roper v. Simmons, 543 U.S. 551, 556 (2005).
[78] *Id.*
[79] *Id.*
[80] *Id.*
[81] *Id.*
[82] *Id.*
[83] *Id.*
[84] *Id.*

minivan and drove to a nearby state park.[85] The perpetrators reinforced the bindings around Mrs. Crook's hands, covered her head with a towel, and walked her to a bridge.[86] Simmons and Benjamin then tied Mrs. Crook's hands with electric wire, wrapped her entire face in duct tape, and threw her over the bridge, where she drowned in the water below.[87] The next day, Mrs. Crook's husband returned home from an overnight trip to find his bedroom in disarray and reported that his wife was missing.[88] Later that afternoon, the body of Mrs. Crook was found along the river.[89] On the same day, Simmons had been "bragging about the murder, telling his friends that he had killed a woman 'because the bitch seen my face.'"[90]

2. Simmons' Conviction

The following day, police arrested Simmons at his high school after receiving information that he had been involved in the murder.[91] Simmons waived his right to an attorney and confessed to the murder within two hours, going so far as to perform a videotaped reenactment of the crime.[92] The State of Missouri charged Simmons with burglary, kidnapping, stealing, and first degree murder.[93] Simmons was tried as an adult because, at age seventeen, he was outside the criminal jurisdiction of Missouri's juvenile court system.[94] Simmons was convicted based on the confession and the videotaped reenactment of the crime, as well as the testimony from Simmons' accomplice Tessmer that the three had premeditated the murder.[95]

B. PROCEDURAL HISTORY

1. The Penalty Stage

At the penalty stage, the State of Missouri sought the death penalty on the grounds that the murder was committed for money, the perpetrators attempted to prevent their lawful arrest by killing the victim, and that the

---

[85] *Id.*
[86] *Id.* at 556-57.
[87] *Id.* at 557.
[88] *Id.*
[89] *Id.*
[90] *Id.*
[91] *Id.*
[92] *Id.*
[93] *Id.*
[94] *Id.*
[95] *Id.* at 556-57.

crime was outrageously and wantonly vile, horrible, and inhuman.[96] The State also introduced testimony from Mrs. Crook's husband, daughter, and two sisters, who shared with the jury how the murder had devastated their lives.[97]

In mitigation, Simmons' lawyer introduced testimony from state juvenile officers that Simmons' had no prior convictions or criminal charges.[98] Additionally, family friends and family members pleaded for mercy on Simmons behalf, describing their close relationship with him.[99] Simmons' mother testified that he was a responsible and loving young man, who often took care of his grandmother and two younger half brothers.[100] During closing arguments, Simmons' lawyer argued that juveniles of Simmons' age could not drink, serve on juries, or watch certain movies because "the legislatures have wisely decided that individuals of a certain age aren't responsible enough."[101] Simmons' lawyer further argued that Simmons' age should make "a huge difference to [the jurors] in deciding just exactly what sort of punishment to make."[102] The prosecutor responded: "Age, he says. Think about age. Seventeen years old. Isn't that scary? Doesn't that scare you? Mitigating? Quite the contrary I submit. Quite the contrary."[103]

The judge instructed the jury that they could consider Simmons' age as a mitigating factor in determining his punishment.[104] Nevertheless, the jury recommended the death penalty after finding that the State had proved each of the three statutory aggravating factors.[105] The judge accepted the jury's recommendation and imposed the death penalty.[106]

2. Post-Conviction Motions

After the verdict and sentencing stage, Simmons obtained a new lawyer, who moved in the trial court to set aside the conviction on the grounds that Simmons had received ineffective counsel at trial.[107] The new

---

[96] *Id.* at 557.
[97] *Id.* at 558.
[98] *Id.*
[99] *Id.*
[100] *Id.*
[101] *Id.*
[102] *Id.*
[103] *Id.*
[104] *Id.*
[105] *Id.*
[106] *Id.*
[107] *Id.*

lawyer introduced testimony from Simmons' trial attorney, Simmons' friends and neighbors, and clinical psychologists, generally supporting the finding that Simmons was "very immature," "very impulsive," and "very susceptible to being manipulated or influenced."[108] The psychological experts testified that Simmons came from a difficult home environment and that he had suffered from dramatic changes in behavior and poor performance at school.[109] Nevertheless, the Missouri Supreme Court affirmed the trial court's denial of the motion on the grounds that there was no constitutional violation by reason of ineffective counsel.[110] Simmons' appeal for federal habeas corpus was subsequently denied.[111]

However, the following year the United States Supreme Court held in *Atkins v. Virginia* that the Eighth Amendment prohibited the execution of mentally retarded persons because such persons categorically lacked the necessary mental culpability.[112] Simmons filed a new petition, arguing that *Atkins* established that the Constitution similarly prohibited the execution of a juvenile who was under eighteen when the crime was committed.[113] The Missouri Supreme Court agreed, holding that since *Stanford v. Kentucky*,

> a national consensus has developed against the execution of juvenile offenders, as demonstrated by the fact that eighteen states now bar such executions for juveniles, that twelve other states bar executions altogether, that no state has lowered its age of execution below eighteen since *Stanford*, that five states have legislatively or by case law raised or established the minimum age at eighteen, and that the imposition of the juvenile death penalty has become truly unusual over the last decade.[114]

Accordingly, the Missouri Supreme Court set aside Simmons' death sentence and sentenced him to "life imprisonment without eligibility for probation, parole, or release except by act of the Governor."[115] The State of Missouri appealed the decision, and the United States Supreme Court granted certiorari.[116]

---

[108] *Id.* at 558-59.

[109] *Id.* at 559.

[110] *Id.*

[111] *Id.*

[112] 536 U.S. 304, 321 (2002).

[113] *Roper*, 543 U.S. at 559.

[114] *Id.* at 559-60 (quoting State *ex rel.* Simmons v. Roper, 112 S.W.3d 397, 399 (Mo. 2003), *aff'd*, 543 U.S. 551 (2005)).

[115] *Id.* at 560 (quoting *Roper*, 112 S.W.3d at 413).

[116] *Id.*

IV. THE UNITED STATES SUPREME COURT: *ROPER V. SIMMONS*

A. THE MAJORITY OPINION

In a five-to-four decision, Justice Kennedy, writing for the majority, affirmed the decision of the Missouri Supreme Court, holding that the execution of individuals who were under eighteen years of age at the time of their capital crimes is prohibited by the Eighth Amendment.[117] The decision directly overturned *Stanford v. Kentucky*, which had held that executing an individual for crimes committed at sixteen or seventeen years of age did not violate the evolving standards of decency and thus did not constitute cruel and unusual punishment under the Eighth Amendment.[118]

At the outset, Justice Kennedy explained that the Eighth Amendment "guarantees individuals the right not to be subjected to excessive sanctions," a right which is based on the basic "precept of justice that punishment should be graduated and proportioned to [the] offense."[119] This guarantee "reaffirms the duty of the government to respect the dignity of all persons."[120] The majority began its analysis by affirming the Missouri Supreme Court's reliance on the "evolving standards of decency" framework to evaluate whether a punishment is so disproportionate to the crime to be cruel and unusual, thereby violating the Eighth Amendment.[121]

The majority traced the wavering historical application of the Eighth Amendment's prohibition on cruel and unusual punishment.[122] The majority first explained that its recent holding in *Atkins v. Virginia*, that the Eighth Amendment prohibited the execution of the mentally retarded, resulted, in part, from an evolution in society's standards of decency.[123] Thus, *Penry v. Lynaugh*, which had previously held mentally retarded persons could be executed because there was no national consensus prohibiting such executions, was directly overturned in *Atkins* in part because the "objective indicia of society's standards, as expressed in legislative enactments and state practice with respect to executions of the mentally retarded" signaled that executing mentally retarded offenders had "become truly unusual, and it is fair to say that a national consensus has developed against it."[124]

---

[117] *Id.* at 578-88 (joined by Stevens, Ginsburg, Breyer, and Souter, JJ.).

[118] *Id.* at 574-75.

[119] *Id.* at 560.

[120] *Id.*

[121] *Id.* at 560-61.

[122] *Id.* at 561-64.

[123] *Id.* at 561.

[124] *Id.* at 562-63 (citing Atkins v. Virginia, 536 U.S. 304, 314-16 (2002)).

However, Justice Kennedy also explained that the Court's decision in *Atkins* did not end with the question of whether a national consensus existed, but also rejected the position previously taken in *Stanford*, that the Court's independent judgment had no bearing on the acceptability of a particular punishment under the Eighth Amendment.[125] Instead, the majority "returned to the rule, established in decisions predating *Stanford*, that 'the Constitution contemplates that in the end our judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.'"[126] Thus, Justice Kennedy explained that the Court in *Atkins* was authorized to make the independent determination that "the impairments of mentally retarded offenders make it less defensible to impose the death penalty as retribution for past crimes and less likely that the death penalty will have a real deterrent effect."[127]

Having set the stage for reconsideration of juvenile death sentences, the majority summarized by explaining that although indicia of a national consensus provided the Court with an essential instruction, the question of whether the data supported the existence of a national consensus was no longer the exclusive inquiry.[128] Rather, after determining whether a national consensus existed, the Court must then determine, "in the exercise of our own independent judgment, whether the death penalty is a disproportionate punishment for juveniles."[129]

1. Evidence of a National Consensus

The majority began by explaining that the factors it would use in determining whether a national consensus against the juvenile death penalty existed would parallel the factors used in its examination of a national consensus against executing mentally retarded persons in *Atkins*.[130] First, the majority noted that a total of thirty states did not permit the juvenile death penalty, of which eighteen permitted the death penalty for adults but not juveniles, and twelve that categorically abolished the death penalty.[131] The numerical breakdown of states prohibiting the juvenile death penalty was identical to that in *Atkins*, where eighteen states permitted the death penalty but not for mentally retarded persons, and twelve states abolished

---

[125] *Id.* at 563.
[126] *Id.* (quoting *Atkins*, 536 U.S. at 314).
[127] *Id.*
[128] *Id.* at 564.
[129] *Id.*
[130] *Id.*
[131] *Id.*

the death penalty entirely.[132] Second, the majority found that among the remaining twenty states without formal prohibitions against executing juveniles, the practice was infrequent—only six states had executed prisoners for crimes committed as juveniles since *Stanford*, and over the previous ten years, only Oklahoma, Texas, and Virginia actually did so.[133] Again, the infrequent number of times the death sentence was actually imposed on juveniles was comparable to that in *Atkins*, where only five states had actually executed mentally retarded persons since *Penry*.[134] Lastly, however, the majority recognized a divergence from *Atkins* in terms of the number of states that had restricted juvenile executions.[135] In the buildup to *Atkins*, eighteen states affirmatively prohibited execution of the mentally retarded.[136] Yet, only five states had imposed restraints on juvenile executions since the practice was upheld in *Penry*.[137] Unlike in *Atkins*, where thirty-six percent of states (eighteen out of fifty) proactively prohibited the punishment, only ten percent of states (five out of fifty) did so in the buildup to *Roper*, a cumulative reduction of twenty-six percent.

Nevertheless, the majority found that the change in five states' laws was significant enough to indicate a new consensus regarding society's standards of decency towards the juvenile death penalty.[138] The majority placed great importance on the consistent direction of change, noting that "[i]t is not so much the number of these States that is significant, but the consistency of the direction of the change."[139] Thus, the general trend in prohibiting juvenile death sentences, coupled with the fact that no state had affirmatively reauthorized juvenile death sentences, carried "special force" in light of the general popularity of anticrime legislation and the trend of cracking down on juvenile crime.[140] The majority thus concluded that the slower rate of change was counterbalanced by its consistent direction.[141] The majority further suggested that the slower rate of change concerning the juvenile death penalty could be explained because at the time *Stanford* was decided, twelve states already prohibited execution of juveniles under eighteen, and fifteen states had prohibited execution of juveniles under

---

[132] *Id.*
[133] *Id.* at 564-65.
[134] *Id.*
[135] *Id.* at 565.
[136] *Id.*
[137] *Id.*
[138] *Id.* at 565-66.
[139] *Id.* at 566 (citing Atkins v. Virginia, 536 U.S. 304, 325 (2002)).
[140] *Id.*
[141] *Id.*

seventeen, implying that there was less room for change to occur.[142] The majority also observed that the Senate had ratified the International Covenant on Civil and Political Rights only because of a ban on the juvenile death penalty was expressly excluded.[143] However, the majority found the treaty alone did not provide a clear indication of consensus.[144]

Ultimately, the majority concluded that the infrequent use of the juvenile death penalty where it still existed, coupled with its rejection in a majority of states, and the consistent trend towards abolition of the juvenile death penalty cumulatively provided enough evidence that the modern standard of decency in American society was moving away from the execution of juveniles because they are "categorically less culpable than the average criminal."[145]

2. Independent Analysis of Whether the Juvenile Death Penalty Is Disproportionate

The majority then proceeded to the next stage of its inquiry, exercising its independent judgment to determine whether the death penalty is inherently disproportionate to even the most heinous offense committed by a juvenile.[146] The majority reiterated the principle from *Atkins* that "capital punishment must be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'"[147] Prior to *Roper*, under the Court's earlier precedent, the death penalty could not be imposed even for some of the most severe crimes,[148] and under no circumstances could juveniles under sixteen years of age, the insane, and the mentally retarded be sentenced to death.[149] Even for the limited and well-defined set of crimes for which the death penalty might be appropriate, a defendant has "wide latitude to raise as a mitigating factor 'any aspect of his or her

---

[142] *Id.*

[143] *Id.* at 567. The majority explained that the Senate's prior actions did not prove the absence of a national consensus against juvenile executions on two grounds. *Id.* The majority relied on the fact five states had abandoned the juvenile death penalty since the time of that treaty, as well as the Federal Death Penalty Act's determination in 1994 that the death penalty should not extend to juveniles. *Id.*

[144] *Id.*

[145] *Id.* (quoting Atkins v. Virginia, 536 U.S. 304, 316 (2002)).

[146] *Id.* at 548.

[147] *Id.* at 568 (quoting *Atkins*, 536 U.S. at 319).

[148] *See id.* at 568. These crimes include rape and attempted murder. *Id.*

[149] *Id.*

character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.'"[150]

The majority found three key differences between individuals under eighteen and adults, which demonstrate that "juvenile offenders cannot with reliability be classified among the worst offenders."[151] First, the majority cited to scientific and sociological studies that confirm what every parent knows: "[A] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions."[152] Referencing studies that found that "adolescents are overrepresented statistically in virtually every category of reckless behavior,"[153] the majority concluded that it is because of juveniles' comparative immaturity that almost every state prohibits persons under eighteen from voting, serving on juries, or marrying.[154] Second, the majority found that "juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure," because they do not control their own environment.[155] Finally, according to the majority, "the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed."[156] On account of these differences, the majority found that it is unlikely that juveniles fall among the worst offenders.[157] Citing various studies that juveniles' tendency to engage in risky and antisocial behaviors is often fleeting, the majority concluded that "[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed."[158]

Based on its finding that juveniles have diminished culpability, the majority argued the two penological justifications for the death penalty—retribution and deterrence—apply to juveniles with lesser force.[159] First, "[r]etribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial

---

[150] *Id.* (quoting Lockett v. Ohio, 438 U.S. 586, 604 (1978)).

[151] *Id.*

[152] *Id.* at 569 (quoting Johnson v. Texas, 509 U.S. 350, 367 (1993)).

[153] *Id.* (quoting Jeffrey Arnett, *Reckless Behavior in Adolescents: A Developmental Perspective*, 12 DEVELOPMENTAL REV. 339 (1992)).

[154] *Id.*

[155] *Id.*

[156] *Id.* at 570.

[157] *Id.*

[158] *Id.* at 569.

[159] *Id.* at 571.

degree, by reason of youth and immaturity."[160] Second, while looking to the question of deterrence, although the Court generally leaves to legislatures "the assessment of the efficacy of criminal penalty schemes,"[161] "the absence of evidence of deterrent effect is of special concern because the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence."[162] The majority also noted that life imprisonment for a young person is a sufficiently severe sanction to obtain the desired deterrent effect.[163]

Although the majority recognized the "rare case" where a juvenile may have sufficient psychological maturity and depravity to merit a death sentence, it dismissed the argument that jurors should be allowed to consider mitigating arguments related to youth on a case-by-case basis.[164] Instead, the majority concluded that the "differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability."[165] The majority, citing American Psychological Association rules prohibiting diagnosis of anti-social personality disorder in those under age eighteen, expressed concern that even expert psychologists may not be able to "differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption."[166] Thus, because professional guidelines limit psychiatrists from diagnosing anti-social personality disorder in juveniles under eighteen, the majority concluded "that states should refrain from asking jurors to issue a far graver condemnation – that a juvenile offender merits the death penalty."[167]

Recognizing the problems with drawing a categorical line at age eighteen, the majority explained that, although the qualities that distinguish juveniles from adults do not disappear when an individual turns eighteen, and although some individuals under eighteen may have sufficient maturity that other adults will never reach, a line must nevertheless be drawn because of the indisputable differences between juveniles and adults.[168] Thus, because "[t]he age of [eighteen] is the point where society draws the

---

[160] *Id.*
[161] *Id.*
[162] *Id.*
[163] *Id.* at 572.
[164] *Id.*
[165] *Id.* at 572-73.
[166] *Id.* at 573.
[167] *Id.*
[168] *Id.* at 573-74.

line for many purposes between childhood and adulthood," it is also the age at which the line for death penalty eligibility should rest.[169]

B. STEVENS' AND GINSBURG'S CONCURRENCE

In a short concurrence, Justice Stevens, joined by Justice Ginsburg, used the case as an opportunity to reaffirm the "basic principle" that the Eighth Amendment must be viewed through an evolutionary framework, and applied as a mirror of the times.[170] Otherwise, warned Justice Stevens, adopting a strict constructionist reading of the Eighth Amendment would mean that executions of seven-year-olds would be acceptable today.[171] Stevens argued that this is evidence that the meaning of the Constitution changes with time.[172]

C. THE DISSENTING OPINIONS

1. Justice O'Connor's Dissent

Although Justice O'Connor agreed with the legal framework and general Eighth Amendment principles relied upon by the Court,[173] she disagreed with the Court's application of those principles in this case, proclaiming that "[n]either the objective evidence of contemporary societal values, nor the Court's moral proportionality analysis, nor the two in tandem suffice to justify this ruling."[174] O'Connor also explicitly affirmed her view from *Atkins* that "beyond assessing the actions of legislatures and juries, the Court has a constitutional obligation to judge for itself whether capital punishment is a proportionate response to the defendant's blameworthiness."[175]

a. National Consensus

O'Connor first examined whether a national consensus truly existed in this case, and found that the "objective evidence of national consensus is

---

[169] *Id.* at 574.

[170] *Id.* at 587 (Stevens, J., concurring).

[171] *Id.* (Stevens, J., concurring). At the time the Eighth Amendment was ratified, the common law established "the rebuttable presumption of incapacity to commit any felony at the age of [fourteen], and theoretically permitted capital punishment to be imposed on anyone over the age of [seven]." Stanford v. Kentucky, 492 U.S. 361, 368 (1989).

[172] *Roper*, 543 U.S. at 587 (Stevens, J., concurring).

[173] *Id.* at 588-89 (O'Connor, J., dissenting).

[174] *Id.* at 587 (O'Connor, J., dissenting).

[175] *Id.* at 592 (O'Connor, J., dissenting).

marginally weaker here."[176] Unlike in *Atkins*, where the state laws indicated zero affirmative legislative support for the practice of executing mentally retarded persons, here eight states specifically set the age for death penalty eligibility at sixteen or seventeen in their laws.[177] This legislative agenda, combined with the facts that 1) five of these eight states currently had juvenile offenders on death row, 2) four of these eight states had executed juvenile offenders within the past fifteen years, and 3) over seventy juvenile offenders were on death row, cumulatively suggested "some measure of continuing public support for the availability of the death penalty for [seventeen]-year-old capital murderers."[178] O'Connor was also troubled by the absence of the "extraordinary wave of legislative action leading up to our decision in *Atkins*," concluding that the "halting pace of change gives reason for pause."[179] O'Connor concluded that "[h]ere, as in *Atkins*, the objective evidence of a national consensus is weaker than in most prior cases in which the Court has struck down a particular punishment under the Eighth Amendment."[180] However, O'Connor indicated that the absence of a clear national consensus is not dispositive and that the Court's independent proportionality analysis is the proper decisive factor.[181]

b. Independent Analysis of Whether the Juvenile Death Penalty Is Disproportionate

O'Connor argued that "the proportionality argument against the juvenile death penalty is so flawed that it can be given little, if any, analytical weight—it proves too weak to resolve the lingering ambiguities in the objective evidence of legislative consensus or to justify the Court's categorical rule."[182] Although O'Connor recognized that it is "beyond cavil that juveniles as a class are generally less mature, less responsible, and less fully formed than adults, and that these differences bear on juveniles' comparative moral culpability," she claimed that these differences fail to

---

[176] *Id.* at 595 (O'Connor, J., dissenting).

[177] *Id.* at 596-97 (O'Connor, J., dissenting). Of the states with statutes specifically setting the age for death penalty eligibility at sixteen or seventeen, four had passed statutes within the previous two years (Texas in 2003, Virginia in 2003, North Carolina in 2003, and Nevada in 2003) and the remaining states had statutes passed within the previous nine years. (New Hampshire in 1996, Missouri in 1999, and Kentucky in 1999). *See id.* at 579-80 (O'Connor, J., dissenting) (Appendix A).

[178] *Id.* at 596 (O'Connor, J., dissenting).

[179] *Id.* at 597 (O'Connor, J., dissenting).

[180] *Id.* (O'Connor, J., dissenting).

[181] *Id.* at 598 (O'Connor, J., dissenting).

[182] *Id.* (O'Connor, J., dissenting).

support the categorical rule that no sixteen or seventeen-year-olds may be morally accountable for their actions.[183]

O'Connor contended that the majority provided no support for its "sweeping conclusion" that it is only in "rare" cases that a seventeen-year-old might be sufficiently mature and depraved to warrant the death penalty.[184] O'Connor claimed that simply because most seventeen-year-olds may not be sufficiently mature to warrant the death penalty, it does not follow that all seventeen-year-olds are so immature that the death penalty is inherently disproportionate.[185] Likewise, the deterrent effect of the death penalty for at least some seventeen-year-olds offenders cannot be dismissed.[186] Furthermore, although there is some age at which no offender can be deemed to have the cognitive and emotional maturity to warrant the death penalty, the case of seventeen-year-olds is "at the margins" and thus it "follows that a legislature may reasonably conclude that at least *some* [seventeen]-year-olds can act with sufficient moral culpability, and can be sufficiently deterred by the threat of execution, that capital punishment may be warranted."[187] Accordingly, the jury was entitled to find that, despite Simmons' youth, he had sufficient maturity to warrant the death penalty based on the extreme cruelty of the crime and the fact he felt he could "get away with it" because he was not yet eighteen-years-old.[188] According to O'Connor, the "class of offenders exempted from capital punishment by today's decision is too broad and too diverse to warrant a categorical prohibition."[189] For O'Connor, the decision would protect many sixteen and seventeen-year-old offenders who are mature enough to warrant the death penalty.[190] O'Connor also distinguished mentally retarded persons from immature seventeen-year-olds, arguing that although seventeen-year-olds may be less mature than adults on average, it "defies common sense to suggest [seventeen]-year-olds as a class are somehow equivalent to mentally retarded persons with regard to culpability or susceptibility to deterrence."[191]

---

[183] *Id.* at 599 (O'Connor, J., dissenting).

[184] *Id.* (O'Connor, J., dissenting).

[185] *Id.* at 599-600 (O'Connor, J., dissenting).

[186] *Id.* (O'Connor, J., dissenting).

[187] *Id.* at 600 (O'Connor, J., dissenting).

[188] *Id.* (O'Connor, J., dissenting).

[189] *Id.* at 601 (O'Connor, J., dissenting).

[190] *Id.* at 601-02 (O'Connor, J., dissenting).

[191] *Id.* at 602 (O'Connor, J., dissenting). Justice O'Connor argued that a mentally retarded person is "by definition" a person who lacks the basic cognitive skills to be held fully culpable for their actions. *Id.* (O'Connor, J., dissenting). A juvenile, on the other hand, may on average be less mature than an adult, but that "lesser maturity simply cannot be

O'Connor also criticized the majority for providing zero evidence that sentencing juries cannot "accurately evaluate a youthful offender's maturity or give appropriate weight to the mitigating characteristics related to youth."[192] Noting that the majority failed to explain why this duty is different from any other capital sentencing factor, O'Connor explained "I would not be so quick to conclude that the constitutional safeguards, the sentencing juries, and the trial judges upon which we place so much reliance in all capital cases are inadequate in this narrow context."[193]

2. Justice Scalia's Dissent

a. National Consensus

Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, began his dissent by delineating the modern (although, in his opinion, erroneous[194]) framework of Eighth Amendment jurisprudence, which he viewed as looking at whether there is a "national consensus" that laws allowing certain punishments violate contemporary "standards of decency."[195] Scalia argued that the majority's case for a national consensus, consisting of eighteen states, or forty-seven percent of all death penalty

---

equated with the major, lifelong impairments suffered by the mentally retarded." *Id.* (O'Connor, J., dissenting). O'Connor contended "[t]here is no such inherent or accurate fit between an offender's chronological age and the personal limitations which the Court believes make capital punishment excessive for [seventeen]-year-old murderers." *Id.* (O'Connor, J., dissenting).

[192] *Id.* at 603 (O'Connor, J., dissenting).

[193] *Id.* at 603-04 (O'Connor, J., dissenting).

[194] In a footnote, Justice Scalia proffered his view that the sole inquiry for determining whether a punishment is cruel and unusual is whether it is one of the "modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted." *Id.* at 609 n.1 (Scalia, J., dissenting) (quoting Ford v. Wainwright, 477 U.S. 399, 405 (1986)). Scalia also criticized the majority's failure to reprimand the Missouri Supreme Court for independently reevaluating the precedent established in *Stanford*, but suggested the flawed framework of the Court's Eighth Amendment jurisprudence explained the insubordination:

> The lower courts can look into that mirror as well as we can; and what we saw [fifteen] years ago bears no necessary relationship to what they see today. Since they are not looking at the same text, but a different scene, why should our earlier decision control their judgment?

Id. at 629 (Scalia, J., dissenting).

For Scalia, the entire scheme of modern Eighth Amendment jurisprudence illustrates the fundamental problems with the theory that the meaning of laws evolve over time, because the practice "destroys stability and makes our case law an unreliable basis for the designing of laws by citizens and their representatives, and for action by public officials." *Id.* at 630 (Scalia, J., dissenting).

[195] *Id.* at 608-09 (Scalia, J., dissenting).

states, against the juvenile death penalty is inadequate under the Court's precedent.[196] "Words have no meaning if the views of less than [fifty percent] of death penalty States can constitute a national consensus."[197] Scalia explained that "[o]ur previous cases have required overwhelming opposition to a challenged practice, generally over a long period of time."[198] These indicia were based on "objective indicia that reflect the public attitude toward a given sanction" in the form of "statutes passed by society's elected representatives."[199]

According to Scalia, the majority's attempt to incorporate the views of non-death penalty states was a "new method of counting" akin to "including old-order Amishmen in a consumer-preference poll on the electric car."[200] Scalia argued that the majority's reliance on the views of the twelve states prohibiting all capital punishment is misplaced because a state's general prohibition against the death penalty does not speak to the question of whether those states adopt the view that juveniles are so immature and reckless as to justify a categorical rule against their execution.[201] "That [twelve] States favor *no* executions says something about consensus against the death penalty, but nothing—absolutely nothing—about consensus that offenders under [eighteen] deserve special immunity from such a penalty."[202] Scalia posited that these twelve states do not adopt the views regarding juvenile culpability ascribed to them by the majority because all twelve permitted juveniles to be treated as adults for non-capital offenses.[203]

Justice Scalia also attacked the more nuanced indicia of consensus relied upon by the majority.[204] First, Scalia noted that only four states actually changed their laws to prohibit juvenile executions post-*Stanford*, unlike the sixteen states which changed their laws in the buildup to *Atkins*.[205] Second, two states that were supposedly members of the consensus against the juvenile death penalty, Missouri and Virginia, actually passed legislation after *Stanford* establishing sixteen as the age for death penalty eligibility, and Florida and Arizona (which were also in the consensus against the death penalty according to the majority) passed ballot

---

[196] *Id.* at 608-10 (Scalia, J., dissenting).

[197] *Id.* at 609 (Scalia, J., dissenting).

[198] *Id.* (Scalia, J., dissenting).

[199] *Id.* (Scalia, J., dissenting) (quoting Stanford v. Kentucky, 492 U.S. 361, 370 (1989)).

[200] *Id.* at 610-11 (Scalia, J., dissenting).

[201] *Id.* (Scalia, J., dissenting).

[202] *Id.* at 611 (Scalia, J., dissenting).

[203] *Id.* (Scalia, J., dissenting).

[204] *Id.* (Scalia, J., dissenting).

[205] *Id.* at 609 (Scalia, J., dissenting).

initiatives to the same effect.[206] This legislative action, said Scalia, is direct evidence of popular support for capital punishment of sixteen and seventeen-year-olds since *Stanford*.[207] Third, Scalia claimed that the infrequency of juvenile executions reflects jurors' reluctance to impose the death penalty on juveniles, but does not signify society's disavowal of the practice as the majority claims.[208] Finally, Scalia attacked the majority's assertion that the number of juvenile executions had dropped over recent years by presenting statistical evidence that juvenile executions have actually held steady or increased when adjusted for the total number of all executions.[209] Thus, Justice Scalia found no substantive evidence for the majority's "implausible assertion of national consensus," noting that all the Court had done was to flagrantly bolster its own position while ignoring contrarian evidence, or to "look over the heads of the crowd and pick out its friends."[210]

b. Independent Analysis of Whether the Juvenile Death Penalty Is Disproportionate

Justice Scalia then turned to what he considers "the real force driving today's decision," the majority's independent judgment that the death penalty for juveniles is inherently disproportionate.[211] Justice Scalia argued that the majority's purported pre-*Stanford* standard, which allowed the Court to execute its independent judgment about whether a punishment is proportionate, was unsound because no prior case law had ever held that the Court's judgment could be used to supplant a national consensus.[212] Scalia claimed that the notion of independent judicial review is fundamentally incompatible with the Court's jurisprudence that the Eighth Amendment is "an ever-changing reflection of the 'evolving standards of decency,'" noting "it makes no sense for the Justices then to *prescribe* those standards rather than discern them from the practices of our people."[213] Scalia also argued

---

[206] *Id.* at 613-14 (Scalia, J., dissenting). The *Roper* majority included Missouri and Virginia in its national consensus because neither state *lowered* the age required for death penalty eligibility. *See id.* at 613 (Scalia, J., dissenting). According to Scalia, for the majority, change was defined to reflect only those laws explicitly reducing the age for death penalty eligibility, excluding laws that altered but nevertheless reinforced support for the juvenile death penalty. *Id.* (Scalia, J., dissenting).

[207] *Id.* (Scalia, J., dissenting).

[208] *Id.* at 614 (Scalia, J., dissenting).

[209] *Id.* (Scalia, J., dissenting).

[210] *Id.* at 617 (Scalia, J., dissenting).

[211] *Id.* at 615 (Scalia, J., dissenting).

[212] *Id.* at 615-16 (Scalia, J., dissenting).

[213] *Id.* at 616 (Scalia, J., dissenting).

that the majority's decision is illustrative of the fact that reliance on sociological and scientific data is prone to bias and self-selection.[214] For example, Scalia referred to the American Psychological Association's claim that scientific evidence shows persons under eighteen lack the ability to take moral responsibility for their decisions, yet presented another statement from the American Psychological Association, in a previous case before the Supreme Court, where the group claimed that scientific research showed that juveniles *were* mature enough to make moral decisions such as whether to obtain an abortion without parental involvement.[215] Justice Scalia claimed that this inconsistency is illustrative of the fact that courts are inherently ill-suited to determine which scientific data to believe, and thus, these decisions ought to be left to the legislature.[216] Scalia further noted, notwithstanding his concerns regarding the potential problems with the studies' methodology,[217] the conclusions of the studies offered by the majority only indicate that *on average* persons under eighteen are unable to take full moral responsibility for their actions.[218] For Scalia, this broad conclusion does not justify the Court's finding that legislatures and juries cannot treat exceptional cases with exceptional punishment, particularly where there is a finding of sufficient maturity and culpability, as was the case with Christopher Simmons' pre-meditated murder.[219]

Scalia also contended that the majority cannot put much weight in the fact that juveniles under eighteen are not treated as full adults by society. For Justice Scalia, the basic understanding that killing another person is wrong is much less sophisticated than making the decision to get married or serving on a jury.[220] Moreover, Scalia noted that the Court has found juveniles competent to make moral decisions in the context of abortion,

---

[214] *Id.* at 617 (Scalia, J., dissenting).

[215] *Id.* (Scalia, J., dissenting).

[216] *Id.* at 617-18 (Scalia, J., dissenting).

[217] Justice Scalia is concerned that the studies relied upon by the majority were never tested in an adversarial proceeding or otherwise proven to be methodologically sound. Justice Scalia cites the view of Chief Justice Rehnquist, explaining that:

> [M]ethodological and other errors can affect the reliability and validity of estimates about the opinions and attitudes of a population derived from various sampling techniques. Everything from variations in the survey methodology, such as the choice of the target population, the sampling design used, the questions asked, and the statistical analyses used to interpret the data can skew the results.

Id. at 617 (Scalia, J., dissenting) (quoting Atkins v. Virginia, 536 U.S. 304, 326-27 (2002) (Rehnquist, C.J., dissenting)).

[218] *Id.* at 617-18 (Scalia, J., dissenting).

[219] *Id.* at 619 (Scalia, J., dissenting).

[220] *Id.* (Scalia, J., dissenting).

which is surely a more nuanced moral question than knowing whether it is wrong to kill a person.[221]

Scalia also expressed doubt that juries cannot be trusted to impartially weigh a defendant's youth in sentencing proceedings due to the heinous nature of a crime.[222] According to Scalia, there is no evidence to support the majority's contention that juries are unable to adequately incorporate youth into their sentencing decisions.[223] In fact, the comparatively lower number of juvenile death sentences is a testament to the fact that juries employ significant restraint in sentencing juveniles to death.[224] Scalia further argued that there is no logical stopping point to the majority's line of reasoning because if juries are unable to reasonably account for age, then the same general bias would also prevent a fair evaluation of the mitigating effects of poverty, childhood abuse, or other similar factors.[225] Under such a reading, the Eighth Amendment would require removing almost all sentencing discretion from biased jurors.[226]

Justice Scalia argued that *Roper* was a perfect example that the deterrence rationale works in the case of juveniles because part of the reason Simmons committed the crime was because he thought he could "get away with it" due to his young age.[227] Moreover, Scalia argued that the majority's conclusion that retribution is inherently disproportionate puts the carriage before the horse, so to speak, because it assumes away the underlying question of whether the offender may have sufficient culpability to warrant the death penalty, as undoubtedly some offenders do.[228] Justice Scalia ultimately concluded that the majority simply interjected its "own judgment that murderers younger than [eighteen] can never be as morally culpable as older counterparts."[229]

V. ANALYSIS

The decision in *Roper* is flawed for two reasons. First, the Court's rationale for a national consensus is significantly weaker than in all of its previous cases. Second, the Court's interjection of its subjective judgment becomes the overriding variable in determining what constitutes cruel and

---

[221] *Id.* at 620 (Scalia, J., dissenting).

[222] *Id.* at 620-21 (Scalia, J., dissenting).

[223] *Id.* (Scalia, J., dissenting).

[224] *Id.* (Scalia, J., dissenting).

[225] *Id.* at 621 (Scalia, J., dissenting); *see supra* Part IV.B.

[226] *Id.* (Scalia, J., dissenting).

[227] *Id.* (Scalia, J., dissenting).

[228] *Id.* (Scalia, J., dissenting).

[229] *Id.* at 615 (Scalia, J., dissenting).

unusual punishment. Combined, these developments effectively obliterate any cognizable foundation for interpreting the scope of the Eighth Amendment's prohibition against cruel and unusual punishment.

A. THE CONSENSUS CONUNDRUM

Although *Roper* appears to comport with the general framework of prior Eighth Amendment jurisprudence by focusing on whether there is a national consensus against the juvenile death penalty, the decision breaks from earlier cases by dramatically lowering the threshold of proof previously demanded by the Court to establish such a consensus. As in prior cases, the *Roper* majority purports to focus its inquiry on the objective indicia of society's standards, such as legislative enactments and state practice. However, the evidence relied upon by the majority in *Roper* supporting its contention that there was a national consensus against the juvenile death penalty was significantly less forceful than in virtually all of its previous cases. The Court's consensus analysis focused on three issues: state enactment, frequency of punishment, and the direction of change among state laws. Ultimately, however, the majority's reasoning fails to demonstrate a clear consensus against the juvenile death penalty.

1. State Enactments

First, the Court placed significance on the fact that thirty states did not permit the juvenile death penalty. However, as Justice Scalia explained in his dissent, this "majority" was misleading because twelve of those thirty states banned the death penalty entirely. Accordingly, it could not be presumed that those twelve states adopted the view that persons under eighteen were inherently less culpable for their crimes.[230] Scalia argued that because all twelve of the non-death penalty states permit or require juvenile offenders to be treated as adults for non-capital offenses, it followed that they did not share the beliefs ascribed to them by the majority that all sixteen and seventeen-year-olds have lower culpability, are inherently reckless, and possess a lack of capacity for considered judgment.[231]

---

[230] *Id.* at 610-11 (Scalia, J., dissenting). In *Stanford*, Scalia explained that counting death penalty states is "rather like discerning a national consensus that wagering on cockfights is inhumane by counting within that consensus those States that bar all wagering." Stanford v. Kentucky, 492 U.S. 361, 371 (1989).

[231] Every non-death penalty jurisdiction except for the District of Columbia permits seventeen year-olds (and frequently those younger than seventeen) accused of a felony to be tried as adults. *See, e.g.*, ALASKA STAT. § 47.12.030 (LexisNexis 2002) (permitting sixteen-year-olds to be tried as adults); HAW. REV. STAT. § 571-22 (1999) (permitting sixteen-year-

Moreover, of states with the death penalty, only forty-seven percent banned the death sentence for juveniles, putting anti-juvenile death penalty states in the minority among death penalty states. Nevertheless, the majority found that the fact that twelve states barred all death sentences constituted evidence that the citizens of those states believed imposing the death penalty on juveniles was cruel and unusual. Nowhere, however, does the majority elucidate how a state's general prohibition against the death penalty equates with the view that juveniles, as a class, are particularly ill-suited for the death penalty on account of their immaturity. Indeed, as Justice Scalia aptly points out, "*[n]one* of our cases dealing with an alleged constitutional limitation upon the death penalty has counted, as States supporting a consensus in favor of that limitation, States that have eliminated the death penalty entirely."[232] Based on the fact that all twelve of the non-death penalty states permit seventeen-year-olds (and often persons younger than seventeen) to be tried as adults for felony offenses and sanctioned with the state's most severe penalty, it is clear that these states do not believe that juveniles are never deserving of the most severe penalties. The fact that these states do not permit the death penalty illustrates only a belief concerning the upward bound of acceptable punishment for *all* offenders. The objective indicia, as expressed through legislative enactments, clearly reflect the view of these twelve states that juveniles *are* sometimes sufficiently culpable to warrant the most severe punishment available.[233] Nevertheless, the *Roper* majority interpreted the

olds to be tried as adults); IOWA CODE § 232.45 (2003) (permitting fourteen-year-olds to be tried as adults); ME. REV. STAT. ANN. tit. 15, § 3101(4) (West 2003) (permitting juveniles under eighteen to be tried as adults); MASS. GEN. LAWS ANN. ch. 119, § 74 (West 2003) (permitting seventeen-year-olds to be tried as adults); MICH. COMP. LAWS ANN. § 764.27 (West 2000) (permitting seventeen-year-olds to be tried as adults); MINN. STAT. § 260B.125 (2002) (permitting fourteen-year-olds to be tried as adults); N.D. CENT. CODE § 27-20-34 (2003) (permitting fourteen-year-olds to be tried as adults); R.I. GEN. LAWS § 14-1-7 (2002) (permitting sixteen-year-olds to be tried as adults); VT. STAT. ANN. tit. 33, § 5516 (2001) (permitting fourteen-year-olds to be tried as adults); W. VA. CODE § 49-5-10 (2004) (permitting fourteen-year-olds to be tried as adults); WIS. STAT. § 938.18 (2003-2004) (permitting fourteen-year-olds to be tried as adults). More importantly, however, every state in the nation exposes juveniles to the risk of being subjected to the state's harshest adult criminal sanctions. *See* NAT'L CTR. FOR JUVENILE JUSTICE, TRYING AND SENTENCING JUVENILES AS ADULTS: AN ANALYSIS OF STATE TRANSFER AND BLENDED SENTENCING LAWS (2003), *available at* http://ncjj.servehttp.com/NCJJWebsite/pdf/transferbulletin.pdf. Alaska, Minnesota, North Dakota, and Rhode Island *mandate* adult sentencing for juveniles tried as adults. *Id.*

[232] *Roper*, 543 U.S. at 610 (Scalia, J., dissenting).

[233] *See supra* note 231.

twelve states prohibition of the death penalty as an indication that juveniles *never* deserve the most severe punishment available.[234]

Thus, for the first time, the Court in *Roper* concluded that a state could be presumed to oppose a specific practice despite the absence of laws that directly prohibited the practice in question.[235] This development is disturbing because it empowers the Court to extrapolate viewpoints not firmly rooted in the "objective indicia of contemporary values," such as legislative enactments and state practice.[236] Indeed, this trend undermines the central reason why the Court looks to objective indicia to measure consensus: to obtain an accurate depiction of society's views towards a punishment. If state laws are interpreted as fast and loose as in *Roper*, those laws are no longer an accurate indication of consensus towards a punishment, and the entire Eighth Amendment national consensus scheme is fundamentally a hollow inquiry.

2. Frequency of the Punishment

Second, the majority claimed that the practice of executing juveniles had become infrequent because only six states had executed prisoners for crimes committed as juveniles since *Stanford*, and this was proof of a consensus against the juvenile death penalty. However, prior cases uncovering a national consensus always involved a severe and pronounced decrease in the frequency of the punishment. For example, in *Atkins*, the Court observed that only five mentally retarded individuals had been executed since the practice had been affirmed in *Penry*.[237] In *Roper*, on the other hand, there was no substantive statistical evidence pointing to a decrease in the imposition of the death penalty towards juveniles. Indeed, the number of juvenile offenders subjected to the death penalty had actually slightly increased since *Stanford*.[238] Additionally, unlike in prior cases such as *Atkins* and *Coker v. Georgia* (where the number of offenders sentenced to the punishment and states that permitted the punishment could simultaneously be counted on one hand), there were "currently over seventy juvenile offenders on death row in twelve different states (thirteen including

---

[234] In *Atkins*, on the other hand, the laws of the thirty states prohibiting the execution of the mentally retarded were explicit recognitions of the belief mentally retarded persons were less deserving of the death penalty. *See* Atkins v. Virginia, 536 U.S. 304, 316 (2002).

[235] In *Atkins*, the state laws were directly on point, specifically prohibiting the execution of mentally retarded persons. *Id.* at 313-15.

[236] *Id.* at 324 (Rehnquist, C.J., dissenting).

[237] *Id.* at 316.

[238] Roper v. Simmons, 543 U.S. 531, 615 (2005) (Scalia, J., dissenting) (noting that juveniles constituted 2.0% of all executions at the time of *Stanford* and 2.4% of all executions at the time of *Roper*).

the respondent)."[239] Nevertheless, the majority concluded that the practice of executing prisoners for crimes committed as juveniles was "infrequent."[240] Accordingly, the threshold for the Court to determine that a particular punishment was infrequent was dramatically shortened in *Roper*, and now appears to demand significantly less quantitative proof than in earlier decisions.

Another problem with relying on frequency as a measurement of consensus is that the limited number of death penalty sentences for juveniles may be a reflection of a juror's tendency to see youth as a mitigating factor, and their feelings that the death penalty should be imposed only on the most culpable juveniles. Indeed, the reason the Court looked at the frequency of a punishment's imposition was because the jury "is a significant and reliable objective index of contemporary values because it is so directly involved."[241] The possibility that a jury may selectively impose the juvenile death penalty only in rare instances where it has made a determination that a juvenile is *especially* depraved makes it difficult to separate from a more generalized trend that society inherently disapproves of the juvenile death penalty. Thus, although it would appear that frequency would only be instructive where there is a clear indication that the punishment is truly unusual, as in *Atkins*, the *Roper* majority nevertheless found it to be substantive proof of a national consensus.

3. Consistent Direction of Change

Finally, the majority put weight on the consistent direction of change in the laws of the states towards abolishing the juvenile death penalty. The majority argued that the trend towards prohibiting the juvenile death penalty was evidenced by the fact that five states had abandoned the

---

[239] Gregg v. Georgia, 428 U.S. 153, 181 (1976). Alabama, with fourteen juveniles on death row, and Texas, with twenty-nine juveniles on death row, account for over half of all juveniles on death row. *See* Victor Streib, *The Juvenile Death Penalty Today: Death Sentences and Executions for Juvenile Crimes, January 1, 1973-December 31, 2004*, Jan. 31, 2005, at 4, http://www.law.onu.edu/faculty/streib/documents/JuvDeathDec2004.pdf (last updated Jan. 31, 2005). However, the remaining number of juvenile death sentences was well distributed among the remaining states with the juvenile death penalty. *Id.* (Arizona: four, Florida: three, Georgia: two, Louisiana: four, Mississippi: five, Nevada: one, North Carolina: four, Pennsylvania: two, South Carolina: three, Virginia: one).

[240] Prior to *Roper*, it appeared a practice was infrequent if, as in *Coker*, only six individuals within one state have received the sentence. Coker v. Georgia, 433 U.S. 584, 596 (1977). However, after *Roper*, it appears that a practice is infrequent even if twenty-two individuals across six states have had their sentence carried out. Streib, *supra* note 239, at 4. It is unclear at what point or on what grounds the Court will determine that a practice remains frequent.

[241] *Gregg*, 428 U.S. at 181.

practice since it was upheld in *Stanford* fifteen years earlier.[242] In *Roper*, the direct indicators of a national consensus were weak in comparison to *Atkins*, which had pushed the envelope in arguing that a consensus was formed by only eighteen states passing laws prohibiting execution of the mentally retarded.[243] In *Roper*, a mere five states had prohibited the juvenile death penalty since *Stanford*. However, for the majority, the main issue was "not so much the number of these States that [was] significant, but . . . the direction of change."[244] The majority emphasized the fact that no state that previously permitted the juvenile death penalty had reinstated it, and that no state had *lowered* the age for death penalty eligibility. However, the majority overlooked the four states that had expressly reaffirmed their support for the juvenile death penalty through legislation and votes expressly setting the age for death penalty eligibility at sixteen.[245] This situation was distinct from *Atkins*, where there was "virtually no countervailing evidence of affirmative legislative *support* for this practice."[246]

The majority's inquiry in *Roper* failed to fully examine the landscape of society's attitudes and the states' legislative enactments on the question of the juvenile death penalty. Nevertheless, the majority reasoned that the slower pace of abolition of the juvenile death penalty was counterbalanced by the consistent direction of the change. *Roper* significantly cuts back on the weight of the criteria that the Court previously demanded to establish a national consensus, finding that only five states changing course in their laws signified an evolution in society's standards of decency, while

---

[242] Four states abandoned the practice by legislation, one state by judicial opinion. Scalia argued that the accurate number for a national consensus should actually be *four* states because the prohibition of the juvenile death penalty in the fifth state, Washington, was simply a judicial decision that attempted to avoid constitutional issues by construing the law narrowly, and did not purport to reflect popular sentiment. *See Roper*, 543 U.S. at 612 (Scalia, J., dissenting).

[243] *Atkins* was weaker compared to its precedent cases because its consensus majority consisted of only eighteen states that had abolished the death penalty for the mentally retarded. Atkins v. Virginia, 536 U.S. 304, 314 (2002). Earlier cases, such as *Stanford*, had found that even twenty-seven out of thirty-seven states banning the execution of seventeen-year-olds was insufficient to establish a national consensus. *See* Stanford v. Kentucky, 492 U.S. 361, 370-71 (1989).

[244] *Stanford*, 492 U.S. at 566 (quoting *Atkins*, 536 U.S. at 315).

[245] It appears the Court interpreted "change" narrowly to reflect only those laws explicitly *reducing* the age for death penalty eligibility, excluding laws that altered but nevertheless reinforced support for the juvenile death penalty. Accordingly, states that previously had no minimum age for death eligibility and after *Stanford* formally established sixteen as the minimum age for death eligibility were not included in its calculus.

[246] *Roper*, 543 U.S. at 594 (O'Connor, J., dissenting).

simultaneously ignoring actions taken by other states moving in the opposite direction.

Cumulatively, the evidence of a national consensus was significantly weaker in *Roper* than in previous Eighth Amendment cases. Post-*Roper*, it is now necessary only to convince the Court that a combination of three weakened indicia exists. First, the Court may be convinced of a national consensus if a majority of state laws suggest disavowal of a particular form of punishment, even if the punishment is generally prohibited for some broader purpose other than its cruelty or unusualness. Second, the Court will consider the frequency with which a given punishment is used, with the new benchmark that a practice permitted in eight states and imposed over seventy times is nevertheless infrequent. Third, as long as some measurement of a change in the direction of state laws is consistent, the Court will view it as an indication of a national consensus, even if as few as two or three states are responsible for the change.

By shrinking the indicia necessary to mount a claim that standards of decency have evolved, *Roper* removes the major substantive obstacle that has traditionally put a temporal distance between Eighth Amendment cases. The decision makes it increasingly likely that the Eighth Amendment will continue to accelerate in its development, both in terms of the frequency with which cases are litigated and the mechanisms used to measure society's evolving standards. The lowered threshold will result in instability in the law because questions of national consensus will be reconsidered more frequently due to the lower burden of proof necessary to initiate a claim that a given punishment has exceeded modern standards. Indeed, the three indicia used in *Roper* to signify a national consensus could be met exceedingly quickly; in *Roper*, the changes in state laws relied upon by Simmons occurred entirely within the previous five years. Theoretically, Eighth Amendment law could be changing as frequently as the Court can be persuaded that standards of decency have shifted.

4. Problems with the National Consensus Framework

a. Sloppy Social Science

A major criticism of the Court's national consensus framework is the Court's reliance on imprecise and incomplete gauges to measure society's standards of decency.[247] In *Roper*, the Court's objective indicia of

[247] Norman J. Finkel, *Is Justice Just Us? A Symposium on the Use of Social Science to Inform the Substantive Criminal Law: Commonsense Justice, Culpability, and Punishment*, 28 HOFSTRA L. REV. 669, 682 (2000).

consensus looked only to legislative enactments and jury decisions. However, according to Professor Norman Finkel, "[i]n the end, the Supreme Court's social science analysis does not withstand social science scrutiny."[248] Indeed, "[t]he Supreme Court's social science analysis in these death penalty cases takes on the appearance of a food fight, where the Justices hammer one another in footnotes hurling accusations of prestidigitation, statistical magic, and numerology."[249] Finkel suggests that a truly objective analysis, which is allegedly what the Court proposes, "requires that the social scientist gather, categorize, and analyze all relevant data that bear on the question at bar."[250] This inquiry would expand to opinion polls, mock juries, and anything that might produce useful data to measure social consensus.[251] "There is no defense, on social science grounds, for an a priori restriction of the data and the gauges that produce data."[252]

The first indicator relied upon by the Court, state laws, are admittedly *not* an unfettered reflection of society's views.[253] It is true that "legislative enactments may reflect community sentiment, perceived community sentiment, perceived Supreme Court sentiment, or some confluence of all of those influences."[254] Thus, although legislators do not "weigh all political winds equally,"[255] lawmakers are politically accountable and, for constitutional purposes, are presumed to represent the views of the citizenry. The Court's reliance on legislative enactments is rooted in the democratic presumption that the legislature ultimately expresses the will of the people. As Justice Rehnquist explained in *Atkins*, "[t]he reason we ascribe primacy to legislative enactments follows from the constitutional role legislatures play in expressing the policy of a State. 'In a democratic society, legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people.'"[256] Thus, although the laws of the states are inevitably politically filtered, they are an appropriate indication of society's views because they are objectively measurable.

It is also correct that jury decisions, the second indicator relied upon by the Court, are not a perfect representation of community sentiment

---

[248] *Id.*

[249] Norman J. Finkel, *Prestidigitation, Statistical Magic, and the Supreme Court Numerology in Juvenile Death Penalty Cases*, 1 PSYCHOL. PUB. POL'Y & L. 612, 623 (1995).

[250] *Id.*

[251] *Id.*

[252] *Id.*

[253] *Id.*

[254] *Id.* at 622.

[255] *Id.*

[256] Atkins v. Virginia, 536 U.S. 304, 323 (2002) (Rehnquist, C.J., dissenting).

because, in the aggregate, jury decisions do not elicit the conclusion that age was the key variable leading in a jury's decision regarding the death penalty.[257] Nevertheless, jury decisions can be used to answer the basic question for which the Court uses the data, which is whether the juvenile death penalty is frequently imposed in proportion to its historical use, adjusted relative to overall death sentences. The numbers alone objectively quantify the frequency of a given punishment, which goes directly to the issue of whether it is falling out of favor within society.

Putting aside the question of whether the Court's national consensus framework is the proper way to interpret the Eighth Amendment, the fact remains that this framework is not going to disappear. Operating under the modern framework, the flawed gauges relied upon by the Court are the best and only objective indicia that can be independently evaluated by the Court, without reducing Eighth Amendment jurisprudence to a battlefield of social science methodologies. The Court is correct to exclude other available indicia of consensus, such as opinion polls and mock studies.[258] The intricacies of these other gauges, and even more comprehensive (and therefore sophisticated) analyses of the two sanctioned indicia, put the Court in the position of having to select among competing social science methodologies. The two indicators relied upon by the Court—legislative enactments and jury decision data—are not proclaimed to withstand an onslaught of social science criticism. Rather, these indicators are employed because they are the *only* unambiguous indicators of consensus that can be objectively measured without forcing the Court to delve into the realm of academic refereeing for which it is so ill-qualified.[259]

b. Devolving Standards of Decency

An overlooked issue in the Court's Eighth Amendment framework is that it is not necessarily the case that a maturing society will always progressively mature in its standards of decency.[260] None of the Court's

---

[257] Finkel, *supra* note 249, at 622-23.

[258] *Id.* at 623. Fluid indicators such as polls and mock studies are open to dispute regarding methodology, as well as the potential for bias. For example, imagine the public outcry if the Court cited a Fox News poll and ignored a competing CNN poll reaching a different conclusion. Clearly, the Court has no unique sensory apparatus enabling it to make conclusive judgments regarding the accuracy and impartiality of polls and other fluid measurements of public opinion.

[259] *See supra* note 217.

[260] *See* Emily Marie Moeller, *Devolving Standards of Decency: Using the Death Penalty to Punish Child Rapists*, 102 DICK. L. REV. 621 (1996); Consuelo Alden Vasquez, *Prometheus Rebound by the Devolving Standards of Decency: The Resurrection of the Chain Gang*, 11 ST. JOHN'S J. LEGAL COMMENT. 221 (1995).

Eighth Amendment cases suggests that standards of decency have a ratcheting effect, such that they can evolve but never devolve. However, the Court's continued reliance on a national consensus scheme overlooks the likelihood that society's standards of decency may devolve. For example, in 1995, Louisiana passed a law permitting the death penalty for anyone convicted of raping a child under age twelve.[261] The law directly challenged the Supreme Court's holding in *Coker v. Georgia* that a death sentence was a disproportionate punishment for the crime of rape, and therefore cruel and unusual in violation of the Eighth Amendment.[262] Nevertheless, the following year, the Louisiana Supreme Court upheld the law as constitutional, affirming the death sentence of two men convicted for raping five-year-olds.[263] The Louisiana Supreme Court found that capital punishment was justified for child rapists, because of the appalling nature of raping a child and the harm inflicted upon the child and society.[264] The Louisiana Supreme Court recognized:

> While Louisiana is the only state that permits the death penalty for the rape of a child less than twelve, it is difficult to believe that it will remain alone in punishing rape by death if the years ahead demonstrate a drastic reduction in the incidence of child rape, an increase in cooperation by rape victims in the apprehension and prosecution of rapists, and a greater confidence in the role of law on the part of the people. This experience will be a consideration for this and other states' legislatures.[265]

The Louisiana law has not yet worked its way to the Supreme Court. However, if it does, the law seems unlikely to survive the national consensus prong of the Court's modern Eighth Amendment test because Louisiana, as the sole state advocating the death penalty for child rapists, will remain outside what the Court has previously deemed to be the national consensus.

Any state that takes the first step in passing a new law is by definition outside whatever the Court most recently found to be the current national consensus. Therefore, a maverick state, such as Louisiana, is immediately forced to rebut the presumption that the practice violates established Eighth Amendment precedent. Even if a majority of states and society overwhelmingly support the restoration of a given punishment, it would be virtually impossible for the states to make a coordinated effort to bring a given punishment back into the mainstream before it would be struck down as outside the national consensus. As the Louisiana Supreme Court noted,

---

[261] LA. REV. STAT. ANN. § 14:42(c) (1997).

[262] 433 U.S. 584, 592 (1977).

[263] State v. Wilson, 685 So. 2d 1063 (La. 1996).

[264] *Id.* at 1070.

[265] *Id.* at 1073.

"[i]f no state could pass a law without other states passing the same or similar law, new laws could never be passed."[266]

This dilemma demonstrates the finality of a finding by the Supreme Court that a given punishment is cruel and unusual. Even if society reconsiders its standards or if the Court was incorrect in its assessment of society's standards, a previous finding of a national consensus against a given punishment will override the accurate modern standards. As Justice O'Connor explained in *Thompson v. Oklahoma*, when the Court considered the constitutionality of the death penalty in *Furman v. Georgia*, "any inference of a societal consensus rejecting the death penalty would have been mistaken."[267] Indeed, if the Court had prematurely "declared the existence of such a consensus, and outlawed capital punishment, legislatures would very likely not have been able to revive it. The mistaken premise of the decision would have been frozen into constitutional law, making it difficult to refute and even more difficult to reject."[268]

Deference to yesterday's standards of decency is inconsistent with the framework relied upon by the Court. In the words of Professor Finkel, "[c]urrent is key, because society's standards evolve, and current community sentiment is central in the Court's Eighth Amendment jurisprudence."[269] As the Louisiana Supreme Court correctly recognized, the purposes for which the Court affirmed the death penalty—deterrence and retribution—would likely be furthered by Louisiana's child rape death penalty law.[270] Accordingly, because the death penalty is constitutionally permissible, under the Court's Eighth Amendment jurisprudence, it should be permitted in those instances where it makes a measurable contribution to the goals it purports to accomplish and where it is within the realm of punishments not deemed cruel and unusual by society. If the Court's framework opts to look at society to determine standards of decency, then those modern standards ought to be brought to bear, even if they constitute a step backwards in the eyes of the Justices.

Thus, it appears, rather ironically, that modern standards of decency do not necessarily reflect modern society's viewpoints, but more likely mirror the highest standards held by society in any *preceding* time period.

---

[266] *Id.* at 1069.

[267] Thompson v. Oklahoma, 487 U.S. 815, 855 (1988) (O'Connor, J., concurring). After *Furman* invalidated the death penalty in 1972 because of problems with its arbitrary imposition, thirty-eight states revised their death penalty laws to conform to the Court's mandate in *Furman*, and once again permitted the death penalty. *Id.* (O'Connor, J., concurring)

[268] *Id.* (O'Connor, J., concurring).

[269] Finkel, *supra* note 249, at 617.

[270] *Wilson*, 685 So. 2d at 1073.

Because the Court is no longer bound to the principle laid out in *Coker* that "judgment should be informed by objective factors to the maximum possible extent,"[271] it is increasingly likely that the decisions of a majority of the Court will eternally condemn punishments as cruel and unusual, permanently limiting the means with which society can decide to punish those convicted of the most heinous crimes. Arguably, the reduced threshold for a national consensus in *Roper* could mean that the indicia would reflect a devolving standard of decency quicker than before. However, it is unlikely that the Court will view "evolving standards of decency" as a two-way street. Once a punishment is deemed to be outside the consensus, even numerous states moving in the opposite direction will face an uphill battle in proving that the trend will continue. Additionally, a reemerging punishment will likely be imposed infrequently for particularly rare and egregious crimes, making it particularly difficult for a state to refute the Court's construct that infrequency is indicative of unpopularity.[272] For example, most Louisiana jurors may choose not to execute all child rapists, just like most juries did not choose to execute juvenile murderers, even if the state laws permitted it. Finally, and most critically, the Court's independent judgment will also likely overwhelm any signs of a national consensus suggesting devolving standards. Indeed, it appears that in *Roper,* the majority selectively utilized the national consensus analysis only so long as it was useful to support its independent findings of proportionality. As evidenced in *Roper*, the question of proportionality is truly the driving force behind the Court's decision.

B. PROPORTIONALITY ANALYSIS

The *Roper* Court broke significantly from its decision in *Stanford* by explicitly utilizing its independent judgment to conclude that the juvenile death penalty is cruel and unusual. In *Stanford*, the Court explained that while "several of our cases have engaged in so-called 'proportionality' analysis . . . we have never invalidated a punishment on this basis alone."[273] Rather, it was only when objective indicia invalidated a punishment that this inquiry was brought to light.[274] The view that the Court's independent judgment should not be determinative was expressed in earlier cases such as *Coker*, where the Court held that "Eighth Amendment judgments should not

---

[271] Coker v. Georgia, 433 U.S. 584, 592 (1977).

[272] The rare imposition of the juvenile death penalty is not necessarily an indication that the practice lacks popular support, but may instead be linked to the low number of offenders deemed fit for such a severe punishment.

[273] Stanford v. Kentucky, 492 U.S. 361, 363 (1989).

[274] *Id.*

be, or appear to be, merely the subjective views of individual Justices; judgment should be informed by objective factors to the maximum extent possible."[275] According to Justice Scalia, proportionality review and national consensus must be the same inquiry, because looking at anything other than the views of society would "replace judges of the law with a committee of philosopher-kings."[276]

Nevertheless, in *Atkins*, the Court departed from this view, taking the position that "in cases involving a consensus, our own judgment is 'brought to bear' by asking whether there is reason to disagree with the judgment reached by the citizenry and its legislators."[277] The *Atkins* Court supplemented its finding of a national consensus against executing mentally retarded persons with its own independent judgment that the deficiencies of mentally retarded persons diminish their personal culpability. This impairment, argued the *Atkins* Court, undermined the likelihood that the death penalty serves the goals of deterrence or retribution for such offenders, making their execution cruel and unusual.[278]

In *Roper*, the majority similarly concluded that there is a national consensus against the juvenile death penalty, and likewise supplemented this finding with its own conclusions that the death penalty is inappropriate for juvenile offenders due to their diminished culpability on account of their immaturity. However, whereas in *Atkins* the Court casually introduced the role of the Court's independent judgment, the *Roper* majority explicitly stated that it is rejecting the view in *Stanford* that the Court's independent judgment was irrelevant on the grounds that this view was inconsistent with prior Eighth Amendment cases such as *Thompson* and *Coker*.[279] The real significance, however, is not the forwardness of the *Roper* Court in disavowing the view in *Stanford*, but rather the fact that the majority's independent judgments played the critical role in the decision. Compared to previous cases, including *Atkins*, the case for a national consensus in *Roper* was woefully inadequate.[280] As the dissenters properly recognized, the true impetus of the decision is the majority's independent moral judgment that juveniles have diminished culpability compared to offenders age eighteen and older.[281]

---

[275] *Coker*, 433 U.S. at 592.

[276] *Stanford*, 492 U.S. at 379.

[277] Atkins v. Virginia, 536 U.S. 304, 312 (2002).

[278] *Id.* at 320.

[279] Roper v. Simmons, 543 U.S. 551, 574 (2005).

[280] *See supra* Part III.A.

[281] *Roper*, 543 U.S. at 615 (Scalia, J., dissenting).

Roper made the categorical rule that the death penalty may never be imposed on an offender under age eighteen.[282] Although the majority also purported that this finding is based on a national consensus, as explained above, the indicia relied upon by the majority remain unconvincing compared to its earlier cases.[283] Thus, it appears the decision is truly based on the majority's finding that "the differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability."[284] Under *Stanford*, and even to a significant extent under *Atkins*, the Court was limited to striking down only those punishments for which it could present a plausible case of a national consensus opposing the practice. However, in *Roper*, the majority showed that evidence of a national consensus could be satisfied simply by cherry-picking the favorable indicia, essentially making the inquiry a pretext for the subjective moral judgment of the Justices. The critical problem with the Court granting itself the power to execute its independent moral judgment is that it puts the entire meaning of what is cruel and unusual in the hands of the Justices. Thus, if a majority of the Court believes, based on their own moral judgment, that it is disproportionate punishment to execute an offender, then the death penalty itself could be declared unconstitutional so long as it was accompanied by a facade of a corresponding trend in the indicia of a national consensus. Without a genuine national consensus or at least some other grounding principle, the meaning of the Eighth Amendment changes with "a show of hands of the current Justices' personal views about penology."[285]

The majority cited three principal reasons for its independent judgment that juveniles are less culpable than adults. First, the majority claimed juveniles often lack the maturity of adults, leading to poor decision-making and high risk behavior.[286] Second, juveniles are uniquely susceptible to negative influences.[287] Third, the character of juveniles is less formed than adults, increasing the likelihood for reformation.[288] These findings are far from earth shattering, consisting of everyday understandings of youthful indiscretions. The first, and principal, problem with the majority's reliance on these findings is that they are ultimately generalizations. Indeed, as Justice O'Connor explained, these findings "fail to establish that the

---

[282] *Id.* at 588-89.

[283] *See supra* Part III.A.

[284] *Roper*, 543 U.S. at 572-73.

[285] *Id.* at 629 (Scalia, J., dissenting).

[286] *Id.* at 569.

[287] *Id.*

[288] *Id.*

differences in maturity between seventeen-year-olds and young 'adults' are both universal enough and significant enough to justify a bright-line prophylactic rule against capital punishment of the former."[289] Thus, while these findings may show *most* juveniles are too immature to have full accountability, they do not illustrate that *all* juveniles are too immature for full accountability.

The second problem with the majority's findings is that the scientific and sociological justifications for its position do not provide a complete or unbiased survey of the scientific and sociological data available. As Justice Scalia noted, the American Psychological Association, on whose views and studies the majority relies, found that juveniles lack the moral maturity to be fully culpable for premeditated murder, but sufficiently mature to make individual judgments about abortion.[290] Insofar as this is an inconsistency, it illustrates why the Court is "ill equipped to make the type of legislative judgments the Court insists on making here."[291] Quite worrisome is the majority's failure to explain why certain studies were relied upon more heavily than others, and its failure to adequately test the methodology and reliability of the studies on which it relies. Indeed, the majority's deference to the American Psychological Association permitted the meaning of the Eighth Amendment to be driven by the uncontested findings of third party organizations and their politicized amicus briefs. Revealingly, the majority recognized its limited understanding of these issues, using the language "as we understand it" as a qualifier when attempting to explain the relevance of the American Psychological Association's refusal to diagnose persons under age eighteen with personality disorders. Surely, constitutional law should not be based on such imperfect, untested, and ambiguous grounds. As Scalia notes, "[g]iven the nuances of scientific methodology and conflicting views, courts—which can only consider the limited evidence on the record before them—are ill equipped to determine which view of science is the right one."[292]

---

[289] *Id.* at 601 (O'Connor, J., dissenting).

[290] *Id.* at 617 (Scalia, J., dissenting).

[291] *Id.* at 616 (Scalia, J., dissenting).

[292] *Id.* at 618 (Scalia, J., dissenting). To my knowledge, no contrary amicus briefs were presented containing scientific evidence that juveniles are as competent as adults regarding decision making capacity. However, the associations filing amicus briefs in *Roper* had the benefit of their respective organizational backing. Undoubtedly, the views expressed in the amicus briefs did not represent the beliefs of all their respective members. Nor did the briefs present an unbiased review of all the academic literature on the topic of juvenile cognitive development. Rather, the briefs advocated an official position adopted by these organizations for undisclosed reasons. The dissenting members of these organizations would not have been provided the official backing of the organization to commission competing amicus briefs. Thus, the absence of competing amicus briefs regarding the cognitive

According to Judge Posner:

> The Justices in the majority should not have relied on a psychological literature that they mistakenly believed showed that persons under eighteen are incapable of mature moral reflection. The studies . . . do not support a categorical exclusion of sixteen and seventeen year-olds from the ranks of the mature. At most, the studies demonstrate a need for careful inquiry into the maturity of a young person charged with capital murder.[293]

Bringing Scalia's concern to light, Judge Posner aptly noted that the majority conveniently failed to cite a study concluding that adolescents "may be just as competent as adults at a number of aspects of decision making about risky behavior."[294] Moreover, the Steinberg-Scott study, cited by the *Roper* majority to support the claim that developmental differences between juveniles and adults prohibit reliably making determinations about the character of sixteen and seventeen-year-olds,[295] admitted "at this point, the connection between neurobiological and psychological evidence of age differences in decision-making capacity is indirect and suggestive."[296] The study further noted that "[r]ecent evidence on age differences in the processing of emotionally arousing information supports the hypothesis that adolescents may tend to respond to threats more viscerally and emotionally than adults, but far more research on this topic is needed."[297] Judge Posner is correct that "[t]he Steinberg-Scott study, coauthored by law professor Elizabeth Scott, is an advocacy article" as evidenced by the fact it makes the ultimate policy conclusion that the Court should abolish the juvenile death penalty.[298] The underlying intersections between bias, advocacy, and science demonstrate the inherent difficulty in separating fact from favorable spin. Surely, however, scientific studies garnering policy conclusion and amicus briefs prepared by lawyers cannot legitimately masquerade as unbiased and accurate scientific fact.

In another puzzling twist, the majority relied upon a study finding that "[a]dolescents, as a group, are overrepresented in virtually every category of reckless behavior, although recklessness does not necessarily

---

capacity of juveniles is just as likely to be the result of the associations internal politicking as it is the result of a lack of scientific evidence refuting the associations official position.

[293] Richard Posner, *Foreword: A Political Court*, 119 HARV. L. REV. 31, 64 (2005).

[294] *Id.* at 65 (citing Lita Furby & Ruth Beyth-Marom, *Risk Taking in Adolescence: A Decision-Making Perspective*, 12 DEVELOPMENTAL REV. 1, 36 (1992)).

[295] *Roper*, 543 U.S. at 569.

[296] Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1014 (2003).

[297] *Id.*

[298] Posner, *supra* note 293, at 65.

characterize all adolescents, and recklessness varies in degree."[299] The majority seized upon the former point, but gleaned over the qualifier that not all adolescents are reckless and that adolescent recklessness often varies in degree.[300] If not all adolescents are reckless, it cannot be presumed that an adolescent involved in a capital murder necessarily suffers from recklessness as a result of youth. Nevertheless, the majority offered the study as scientific proof justifying its prophylactic rule prohibiting a jury from ever concluding a juvenile is sufficiently culpable to warrant the death penalty. While the majority recognized that in some rare cases juveniles may be sufficiently culpable to warrant the death penalty, it failed to substantiate its assumption that only in rare cases are juveniles not inherently reckless, one of the three factors purportedly reducing juvenile culpability. The tendency of a court to overemphasize complimentary findings and overlook unhelpful ones illustrates why the Court should avoid meddling in the realm of scientific studies.

The majority also inflated the significance of juvenile immaturity by trying to compare it to mental retardation for purposes of diminished culpability.[301] In her dissent, Justice O'Connor correctly argued that comparing the incapacities of mentally retarded persons to the immaturity of sixteen and seventeen-year-olds is misleading, noting that "[s]eventeen-year-olds may, on average, be less mature than adults, but that lesser maturity simply cannot be equated with the major, lifelong impairments suffered by the mentally retarded."[302] The intellectual abilities of an average sixteen or seventeen-year-old are often advanced enough to study Shakespeare and understand complex high school mathematics. On the other hand, mental retardation is characterized by significantly sub-average intellectual functioning, coupled with multiple limitations in basic skills such as communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work.[303] The level of a mentally retarded person's disability is clinically measured by equating their intellectual abilities with the capacity of children under the age of twelve.[304] For example, Atkins was found to have the mental capacity of a child between the ages of nine and twelve.[305] The

---

[299] *Roper*, 543 U.S. at 569 (citing Arnett, *supra* note 153).

[300] *Id.*

[301] *Id.* at 568-69.

[302] *Id.* at 602 (O'Connor, J., dissenting). *See also supra* note 191.

[303] MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 5 (10th ed. 2002).

[304] KAPLAN & SADOCK'S COMPREHENSIVE TEXTBOOK OF PSYCHIATRY 2598 (Benjamin J. Sadock & Virginia A. Sadock eds., 7th ed. 2000).

[305] Atkins v. Virginia, 536 U.S. 304, 308-09 (2002).

poor judgment allegedly linked to the anatomical underdevelopment of the brains of sixteen and seventeen-year-olds cannot fairly be likened to the "substantial limitations [of the mentally retarded] not shared by the general population."[306] The vast differences in cognitive ability between a mentally retarded individual and a non-retarded individual are far greater than the subtle and varying differences in intellect and judgment between a sixteen or seventeen-year-old and those of an eighteen-year-old.

After *Roper*, it appears that little stands in the way for a majority of the Court to conclude persons with poor educational backgrounds or other similar social incapacities should be afforded heightened protections against findings of ultimate culpability by a jury. As Justice Scalia noted, the majority did not suggest a stopping point for its reasoning. "Why not take other mitigating factors, such as considerations of childhood abuse or poverty, away from juries as well? Surely jurors 'overpowered by 'the brutality or cold-blooded nature' of a crime' . . . could not adequately weigh these mitigating factors either."[307] One possible stopping point is that limitations on the criminal culpability of juveniles and the mentally retarded can be scientifically linked to anatomical impairments relating to brain function. Factors like childhood abuse or poverty, on the other hand, are not physiologically linked to brain impairments, but are the result of environmental influences. However, as science progresses, it is possible that physicians will eventually be able to pinpoint physiological differences in the brains of individuals raised in abusive or impoverished environments. If human consciousness, and therefore culpability, can be reduced to brain physiology, then mitigating mental conditions caused by environmental factors, such as abuse or poverty, may be fundamentally indistinguishable from mitigating mental conditions caused by genetic or developmental factors, such as retardation or being seventeen-years-old. Certainly, a mentally retarded person is no more culpable if her retardation was brought about by being dropped as a baby rather than some genetic defect. If culpability is reduced for offenders with anatomical brain differences, culpability should be reduced regardless of the source of the physical impairment, environmental or genetic. Thus, if the physiological brain differences of the abused and impoverished, like those of juveniles, eventually become "too marked and well understood,"[308] then presumably under *Roper* the Court must also remove these mitigating factors from the

---

[306] *Id.* at 310.

[307] *Roper*, 543 U.S. at 621 (Scalia, J., dissenting). In determining culpability, the horrible nature of a crime would seem to suggest a jury should *properly* discount the weight of a mitigating factor. Yet, the majority is inexplicably concerned by this precise possibility.

[308] *Id.* at 572.

realm of the jury in order to prevent an impoverished or abused individual from "receiving the death penalty despite insufficient culpability."[309] After *Roper*, nothing stands in the way of the Court from removing death penalty eligibility for any offender with an accepted mitigating mental condition because of the risk that the condition may be overlooked by a jury due to the brutal nature of a crime.

This brings to bear the central defect in the majority's proportionality analysis: its complete failure to support the contention that a jury cannot adequately account for youth as a mitigating factor in sentencing decisions. The majority found "[a]n unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death."[310] However, as Scalia noted, "[t]his startling conclusion undermines the very foundations of our capital sentencing system, which entrusts juries with making the difficult and uniquely human judgments that defy codification and that build discretion, equity and flexibility into a legal system."[311] Nowhere does the majority substantiate its finding that the jury system cannot adequately account for a youthful offender's immaturity or "why this duty should be so different from, or so much more difficult than, that of assessing and giving proper effect to any other qualitative capital sentencing factor."[312] The majority's only support for its position is that the American Psychological Association refrains from diagnosing personality disorders in persons under eighteen, and therefore it would be cruel and unusual for lay jurors to condemn a juvenile to death when medical professionals are unwilling to diagnose them with a particular condition.[313] Of course, this reasoning does

---

[309] *Id.* at 573.

[310] *Id.* at 573.

[311] *Id.* at 620 (Scalia, J., dissenting).

[312] *Id.* at 603 (O'Connor, J., dissenting).

[313] *Id.* at 573. The American Psychological Association refuses to diagnose persons under eighteen with personality disorders because juvenile immaturity purportedly prevents psychiatrists from accurately evaluating if a juvenile's anti-social behavior is temporary. *Id.* Assuming the policy of the American Psychological Association is sound, the question remains how relevant reformation really is in the context of capital offenses where the punishments are for the remainder of the offender's natural life. The *Roper* majority's concern is that juveniles may be executed for anti-social behavior resulting from adolescent immaturity, thereby making the death penalty disproportionate because of their less than full culpability. Of course, the majority's rule gives culpable juveniles a free pass not afforded to other defendants with temporary or permanent mitigating cognitive impairments, but who are still forced to carry the burden of proving their impairment. One possible compromise, unexplored in this article, would be to postpone juvenile sentencing decisions regarding the

not explain why a jury cannot adequately consider the rationale of the American Psychological Association in refusing to diagnose juveniles with personality disorders or consider the individualized diagnosis of a juvenile in making its determination of culpability. Indeed, the majority's logic essentially permits the current policies of the American Psychological Association to dictate the meaning of the Eighth Amendment without an in-depth examination of its justifications for concluding that sixteen and seventeen-year-olds are categorically less culpable than eighteen-year-olds.

Justice O'Connor is correct that simply because most seventeen-year-olds are not sufficiently culpable to warrant the death penalty, it does not follow that a seventeen-year-old cannot *ever* be culpable enough to warrant the death penalty.[314] Simmons' pre-meditated murder suggests the level of depravity necessary to warrant the death penalty because the crime reflects "a consciousness materially more 'depraved' than that of . . . the average murderer."[315] However, the *Roper* decision permanently removes the question of ultimate accountability from jurors, ensuring that even if Simmons was sufficiently culpable, he would not receive the death penalty because of the majority's fear that a jury might impose the sentence on some other undeserving juvenile. The question remains unanswered why this risk does not apply equally to adult death sentences, where other mitigating factors may also be ignored by zealous jurors. Moreover, the majority fails to justify the necessity for its balancing act in light of its own acknowledgement that the juvenile death penalty is infrequently imposed, which suggests jurors "take seriously their responsibility to weigh youth as a mitigating factor."[316]

Unlike mentally retarded persons and other adults who lack the capacity to understand the wrongfulness of their actions, a juvenile *can* possess the intellectual sophistication to understand right from wrong and that murdering another human is both immoral and illegal. There is simply no justification for why a juvenile offender's moral culpability should not be examined on an individualized basis. The case of Lee Malvo, the seventeen-year-old murderer who participated in the Washington, D.C. sniper shootings, illustrates that individualized determinations of juvenile culpability work in practice. Malvo was sentenced to life in prison because

---

death penalty until the defendant is old enough to accurately determine if their behavior resulted from adolescent immaturity or instead stemmed from a medically diagnosable personality disorder. If, after reaching maturity, a juvenile is still depraved, the majority's concern would seemingly be satisfactorily addressed.

[314] *Id.* at 599 (O'Connor, J., dissenting).

[315] *Id.* at 601 (O'Connor, J., dissenting) (quoting Atkins v. Virginia, 536 U.S. 304, 319 (2002)).

[316] *Id.* at 620-21 (Scalia, J., dissenting).

the jury found that he suffered from a troubled past and was manipulated by his adult accomplice, John Muhammad, and therefore was not fully accountable for his actions.[317] Despite the brutal and cold-natured element of the crimes, the jury was able to conclude that Malvo did not deserve the death penalty.[318] However, the jury in *Roper* found that Christopher Simmons was fully accountable for his actions because he independently planned and carried out a horrendous murder, bragged about it, and deviously assumed he would get away with it because of his age.[319] The *Roper* jury found, despite evidence of Simmons youth, troubled childhood and susceptibility to manipulation, that he possessed the maturity, intelligence, sophistication, and moral culpability to warrant the death penalty.[320] The differences between the outcomes in these cases show that juveniles, like adults, are not all the same. The moral culpability of juvenile is not interchangeable based solely on chronological age, and the *Roper* Court is wrong to use age as a proxy for an individual's culpability.[321]

---

[317] *Jury Sharply Split In Sparing Sniper Malvo*, CNN.com, Dec. 24, 2003, http://www.cnn.com/2003/LAW/12/24/sprj.dcsp.malvo.trial/ (last visited April 22, 2006).

[318] *Id.*

[319] *Roper*, 543 U.S. at 555.

[320] *Id.*

[321] *Thompson* set a rule that no one under the age of sixteen may be executed because of the risk that state legislatures did not explicitly consider that fifteen-year-olds could be death penalty eligible when they passed their death penalty statutes. Thompson v. Oklahoma, 487 U.S. 815, 857 (1988). However, *Thompson* implicitly suggested that so long as a legislature explicitly considered permitting executions of juveniles younger than sixteen, such executions would be allowable. *See id.* At common law, there was a rebuttable presumption of incapacity to commit a felony at age fourteen, but a child as young as seven could be convicted of a criminal offense and thus subjected to death if found to know the difference between right and wrong. Etta J. Mullin, *At What Age Should They Die? The United States Supreme Court Decision with Respect to Juvenile Offenders and the Death Penalty,* Stanford v. Kentucky *and* Wilkins v. Missouri, 16 T. MARSHALL L. REV 161, 163 (1990). However, the youngest juvenile ever executed in the United States was George Stinney, a fourteen-year-old executed in South Carolina in 1944. Connie de la Vega & Jennifer Brown, *Can a United States Treaty Reservation Provide a Sanctuary for the Juvenile Death Penalty?*, 32 U.S.F. L. REV. 735, 736 (1998). Although it is plausible that a juvenile younger than fourteen might have been subjected to the death penalty prior to *Roper*, empirically the possibility seems remote. Admittedly, under the Court's pre-*Roper* framework whereby society alone defined the contours of permissible punishment, the possibility existed that society might permit executing a seven-year-old. Common sense dictates of course that the political process and public opinion would stand in the way of allowing seven-year-olds to be executed, just as these forces would prevent the repeal of the Fourteenth Amendment. The remote risks of a runaway majority are simply the unavoidable perils of living in a democracy.

VI. CONCLUSION

After *Roper*, the threshold to achieve a national consensus is so reduced that the entire inquiry becomes functionally irrelevant to the Court's decision-making process. In its place emerges proportionality review, which is ultimately a subjective determination made by the Justices about whether the punishment fits the crime. The Eighth Amendment is now cut loose from any grounding principles, and lurks behind a fundamentally meaningless national consensus analysis. Looming in the shadows is the question of how the Court will resolve the inevitable case where its proportionality review renders a conclusion irreconcilable with any credible facade of a national consensus.

Wayne Myers