The Abolition of the Juvenile Death Penalty in Roper v. Simmons

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I. INTRODUCTION .............................................................................. 473
II. THE CONTROVERSY ....................................................................... 476
A. The Trial.......................................................................................... 476
B. Post-Conviction Proceedings............................................................. 477
C. Relevant Precedent .......................................................................... 478
   1. Eighth Amendment Jurisprudence ................................................ 478
   2. Thompson v. Oklahoma................................................................. 479
   3. Stanford v. Kentucky.................................................................... 481
   4. Penry v. Lynaugh ........................................................................ 484
   5. Atkins v. Virginia......................................................................... 486
III. INTERNATIONAL INFLUENCE ......................................................... 488
   A. England and Wales ..................................................................... 489
   B. The European Union .................................................................... 491
IV. THE DECISION: ROPER V. SIMMONS ............................................ 493
   A. The Majority ................................................................................ 493
   B. Justice Stevens, Concurring.......................................................... 498
   C. Justice O'Connor, Dissenting ....................................................... 498
   D. Justice Scalia, Dissenting .............................................................. 501
V. EFFECTS OF THE COURT’S RULING .............................................. 503
   A. Nationwide Effects ...................................................................... 503
   B. Effects on Florida ........................................................................ 505
VI. CONCLUSION ................................................................................. 506

I. INTRODUCTION

In 1993, while other juniors at Fox High School were planning their careers and what colleges they were going to attend, seventeen-year-old student

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Christopher Simmons was planning a gruesome and egregious murder.\textsuperscript{1} Simmons described his plan to his friends in "chilling, callous terms" about how he wanted to find someone to burglarize, tie the victim up, and ultimately push the victim off a bridge.\textsuperscript{2} Simmons assured his friends Charles Benjamin, fifteen, and John Tessmer, sixteen, that because they were juveniles "they could 'get away with it.'"\textsuperscript{3}

In the late evening of September 8, 1993, Simmons met with his two friends; however, Tessmer dropped out of the plot and went home.\textsuperscript{4} Simmons and Benjamin continued on their mission to commit burglary, hoping to find drug money.\textsuperscript{5} At random, they picked the home of forty-six-year-old Shirley Crook.\textsuperscript{6} Finding a window cracked open, they reached in, opened it, and entered into Crook's home.\textsuperscript{7} Mrs. Crook saw a hallway light turn on and asked, "Who's there?" Simmons entered into her bedroom and "he recognized her from a previous car accident." Simmons then realized Mrs. Crook could identify them, so he panicked and "decided to kill her, so she wouldn't snitch on them." Simmons next ordered Mrs. Crook to get out of her bed.\textsuperscript{10} Then, while Benjamin stood guard, Simmons used duct tape to bind her hands as well as to cover her eyes and mouth.\textsuperscript{12} They put Mrs. Crook in her minivan, bound and gagged her, and drove around looking for a place to kill her.\textsuperscript{13} They stopped at a state park, forced her out of the van, and noticed that she had removed the tape from her arms and her mouth.\textsuperscript{14} They then proceeded to cover her entire face with duct tape as well as a towel and hog-tied her by tying her hands and feet together with electrical cable.\textsuperscript{15} They took her to the railroad trestle, forty feet above the Meramec River, kicked her off the side of a bridge, and watched her drown in the cold

\begin{enumerate}
\item Tim Rowden, \textit{Inmate Imagines His Final Walk to Execution: Simmons Hopes Court Decision Will Keep Him from Taking It for Real}, \textsc{St. Louis Post-Dispatch}, June 17, 2002, at A1 [hereinafter Rowden I].
\item Id.
\item Id.
\item Rowden I, supra note 1.
\item Id.
\item \textit{Roper}, 543 U.S. at 556.
\item Id.
\item Id.
\item Kim Bell, \textit{Woman Thrown into River Alive; Teen-agers Bound Her, Police Say}, \textsc{St. Louis Post-Dispatch}, Sept. 12, 1993, at 1D (quoting Ferguson police lieutenant).
\item Id.
\item Rowden I, supra note 1.
\item Brief for the Petitioner, \textit{supra} note 11, at 4.
\item Id.
\end{enumerate}
waters below. As a result of the burglary, Simmons and Benjamin only procured about six dollars from Mrs. Crook's purse. "It's a cheap price for a life," the local police lieutenant said.

The next day, her husband, Steven Crook, returned home from an overnight trip to find his bedroom in disarray. Steven Crook testified that when he arrived "the couple's poodle was whimpering" and "the dog [was] wrapped in duct tape on the bed in the master bedroom." Meanwhile, Simmons was busy bragging to his friends that he "killed a woman 'because the bitch seen my face.'" That same afternoon, two fishermen found Mrs. Crook's body floating in the Meramec River, three quarters of a mile downstream from the railroad trestle. The medical examiner determined that the cause of death was drowning and that Mrs. Crook was fully conscious and alive before being pushed from the bridge. He also "testified that Shirley Crook's face had been bound with duct tape with only an area for her nose visible" and was battered with "29 bruises on her body and four fractured ribs."

Shirley Crook was forty-six when she died: a wife, a mother of two, and unbeknownst to her at that time, soon to be a grandmother. Her daughter learned that she was pregnant two weeks after the murder. The murder caused great anguish among Mrs. Crook's family. Mrs. Crook's mother died of a heart attack shortly after she was murdered. A few years later, Mrs. Crook's husband also died of a heart attack. The two were high school sweethearts, and family members expressed that he never got over the agony of losing his wife.

In all likelihood, Simmons never envisioned that his actions would lead to such a great deal of controversy—not only among our nation, but also...
worldwide. This article discusses the fate of Simmons and the juvenile death penalty. Part II discusses the controversy that arose over Simmons' case, including how it reached the United States Supreme Court and the relevant precedent. Part III discusses the international community's disdain for the juvenile death penalty, including arguments made by England and the European Union in their amici curiae briefs submitted to the Court in support of Simmons. Part IV analyzes the Court's rationale for abolishing the juvenile death penalty and the reasons why the dissenters opposed the abolition. Finally, Part V illustrates the effects of the Court's decision around the nation and in Florida, specifically detailing the number of juveniles on death row at the time whose lives were spared.

II. THE CONTROVERSY

A. The Trial

Simmons was charged with burglary, kidnapping, stealing, and first-degree murder—there was little question as to his guilt. The State introduced an overwhelming weight of evidence against Simmons, including his own confession to the murder, a video-taped reenactment of the scene, along with testimony from his friend, John Tessmer, stating that Simmons had discussed the plot with him and later bragged about it. The defense did not call any witnesses. The jury found Simmons guilty and the trial proceeded to the penalty phase.

The State sought capital punishment. Family members of Simmons took the stand and testified about the close relationship they had with him and described some of the kind acts he had performed in his life, such as taking care of his two younger half-brothers. Simmons' counsel introduced mitigating factors, most significantly, his lack of any prior criminal history and his age. In response, the prosecutor used Simmons' age as a double-edged sword. He argued that it was "[q]uite the contrary" of a mitigating factor stating: "Seventeen years old. Isn't that scary? Doesn't that scare..."
you? Mitigating? Quite the contrary I submit. Quite the contrary." 39 "The jury found three statutory aggravating factors" 40 and recommended the death sentence, which the judge imposed. 41

B. Post-Conviction Proceedings

Simmons applied to the trial court for post-conviction relief alleging ineffective assistance of counsel at trial based on his counsel’s failure to introduce Simmons’ alcohol and drug usage. 42 The court found no constitutional violation and denied the motion. 43 Simmons took a consolidated appeal to the Supreme Court of Missouri, which affirmed the trial court’s denial of post-conviction relief. 44 The federal courts, specifically the United States District Court for the Eastern District of Missouri and the Court of Appeals for the Eighth Circuit, also denied Simmons’ writ of habeas corpus. 45

After these numerous post-conviction relief efforts were made, the United States Supreme Court decided Atkins v. Virginia, 46 holding that the Eighth Amendment forbids the imposition of the death penalty on mentally retarded persons. 47 Based on Atkins, Simmons filed a new motion for post-conviction relief alleging that a similar national consensus has developed against executing juveniles. 48

The Missouri Supreme Court agreed, finding that “a national consensus has developed against the execution of juvenile offenders.” 49 Based on this finding and a prediction of how the United States Supreme Court would currently decide the constitutionality of the juvenile death penalty, the Supreme

39. Id.
40. Brief for the Respondent at 5, Roper v. Simmons, 543 U.S. 551 (2005) (No. 03-633). The jury found the following three statutory aggravating factors; that the murder was: 1) “committed for the purpose of receiving money”; 2) “outrageously and wantonly vile, horrible, and inhuman” because it involved torture and depravity of the mind; and 3) “committed for the purpose of avoiding . . . a lawful arrest.” Id. at 5 (quoting MO. ANN. STAT. § 565.032(2) (West 1999)).
41. Roper, 543 U.S. at 558.
42. Id. at 558–59.
43. Id. at 559.
44. Id. (citing State v. Simmons, 944 S.W.2d 165, 169 (Mo. 1997) (en banc), cert denied, 522 U.S. 953 (1997)).
45. Id. (citing Simmons v. Bowersox, 235 F.3d 1124, 1127 (8th Cir. 2001), cert. denied, 534 U.S. 924 (2001)).
47. Id. at 321.
49. Id.
Court of Missouri "set[] aside Mr. Simmons' death sentence and re-sentence[d] him . . . to life imprisonment without eligibility for probation, parole, or release except by act of the Governor."\textsuperscript{50} In 2004, the United States Supreme Court granted certiorari to address the issue of whether a national consensus has in fact developed against imposing the death penalty on juveniles.\textsuperscript{51}

C. \textit{Relevant Precedent}

1. Eighth Amendment Jurisprudence

The Eighth Amendment of the United States Constitution contains a provision against the infliction of "cruel and unusual punishments."\textsuperscript{52} The United States Supreme Court has held that this proscription must be observed not only by the Federal Government, but also by the states through the Due Process Clause of the Fourteenth Amendment.\textsuperscript{53} The Court has acknowledged that "[t]he authors of the Eighth Amendment . . . made no attempt to define [its] contours"\textsuperscript{54} and has frequently acknowledged the difficulty in defining what constitutes "cruel and unusual."\textsuperscript{55} Although there is no precise definition of what is "cruel and unusual," the Court has sought guidance in determining whether a particular punishment is categorically prohibited by the Eighth Amendment by referring to "the evolving standards of decency that mark the progress of a maturing society."\textsuperscript{56}

To determine what the "evolving standards" are, the Court has emphasized that such an inquiry should not be based on the subjective views of the Justices, but rather on "objective factors to the maximum possible extent."\textsuperscript{57} The Court has found that laws enacted by states' legislatures provide "[t]he clearest and most reliable objective evidence of contemporary values."\textsuperscript{58} Additionally, the Court has referenced the behavior of sentencing juries.\textsuperscript{59}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{50} Id. at 413.
\item \textsuperscript{51} Roper v. Simmons, 543 U.S. 551, 555–56, 560 (2005).
\item \textsuperscript{52} U.S. CONST. amend. VIII.
\item \textsuperscript{53} E.g., Robinson v. California, 370 U.S. 660, 675 (1962) (Douglas, J., concurring).
\item \textsuperscript{54} Thompson v. Oklahoma, 487 U.S. 815, 821 (1988).
\item \textsuperscript{55} E.g., Furman v. Georgia, 408 U.S. 238, 376 (1972) (Burger, J., dissenting) ("[T]he ban on 'cruel and unusual punishments' is one of the most difficult to translate into judicially manageable terms.").
\item \textsuperscript{56} Trop v. Dulles, 356 U.S. 86, 101 (1958).
\item \textsuperscript{57} Coker v. Georgia, 433 U.S. 584, 592 (1977).
\item \textsuperscript{59} Thompson, 487 U.S. at 831.
\end{itemize}
\end{footnotesize}
This section of the article focuses on Supreme Court decisions discussing the Eighth Amendment's contours.

2. *Thompson v. Oklahoma*

In *Thompson v. Oklahoma*, the petitioner was fifteen years old when he murdered his former brother-in-law, with the help of three men, by shooting the victim and by cutting his throat, chest, and abdomen. They chained concrete blocks to his body and threw him into a river where the victim's body remained for nearly four weeks before being discovered. The petitioner was convicted of murder in the first degree and, by the jury's recommendation, was sentenced to capital punishment.

The case reached the United States Supreme Court where the Court considered whether the execution of a person who was fifteen-years-old at the time of committing a capital offense violates the constitutional prohibition against "cruel and unusual punishment." In evaluating the contours of the Eighth Amendment, guided by the "'evolving standards of decency,'" the Court looked at two societal factors in confronting the issue before it: first, relevant legislative enactments, and second, jury determinations. In assessing these factors, coupled with an independent assessment of the issue, the Court ultimately concluded "that the Eighth and Fourteenth Amendments prohibit the execution of a person who was under 16 years of age at the time of his or her offense."

Looking at the legislative enactments, the Court recognized the differences in the law "which must be accommodated in determining the rights and duties of children as compared with those of adults." The Court emphasized that in Oklahoma "a minor is not eligible to vote, to sit on a jury, to marry without parental consent, or to purchase alcohol or cigarettes." In addition, most states are also in conformance with such legislation that imposes restrictions on minors with regard to driving, gambling, and the purchase of pornographic materials. Every state has created a juvenile justice system in which most juvenile offenders are not held criminally responsi-

60. Id. at 819.
61. Id.
62. Id. at 818, 820.
63. Thompson, 487 U.S. at 820.
64. Id. at 821-22 (citations omitted).
65. Id. at 838.
66. Id. at 823.
67. Id. (footnotes omitted).
68. Thompson, 487 U.S. at 824 (citations omitted).
ble. The Court concluded that "[a]ll of this legislation is consistent with the experience of mankind, as well as the long history of our law, that the normal 15-year-old is not prepared to assume the full responsibilities of an adult." Additionally, the Court addressed state legislation concerning the death penalty, finding that "[m]ost state legislatures have not expressly confronted the question of establishing a minimum age for [its] imposition." At the time of the decision, there were nineteen states that authorized capital punishment, but had no minimum age to impose such punishment. However, the Court pointed to eighteen death penalty states that had expressly delineated an age limit to their death penalty statutes. The Court attached a particular importance to the fact that all eighteen of the these states had limited their imposition of the death penalty to those offenders who were at least the age of sixteen at the time the capital offense was committed.

The Court also looked at the behavior of sentencing juries. The Court found that, in the twentieth century, imposition of the death penalty by juries on those who were under the age of sixteen when committing the capital offense was exceedingly rare. Further demonstrating the rarity of its practice, the Court referred to Department of Justice statistics from 1982 to 1986 that showed of the 1393 offenders sentenced to death, only five of them were under sixteen years of age at the time of the offense. The Court deemed these five young offenders' sentences as "'cruel and unusual in the same way that being struck by lightning is cruel and unusual.'" Based on juries' hesitation to impose death sentences on such young individuals, the Court concluded "that the imposition of the death penalty on a 15-year-old offender is now generally abhorrent to the conscience of the community ."

In addition to legislative enactments and the behavior of juries, the Court undertook its own analysis of whether the Eighth Amendment permits the imposition of the death penalty on a fifteen-year-old offender. In making an independent judgment, the Court analyzed two pivotal concerns: first,

69. Id. at 823–24.
70. Id. at 824–25.
71. Id. at 826.
72. Id. at 826–27 (citations omitted).
73. Thompson, 487 U.S. at 829.
74. Id. (citations omitted).
75. Id. at 831.
76. See id. at 832.
77. Id. at 832–33.
78. Thompson, 487 U.S. at 833 (quoting Furman v. Georgia, 408 U.S. 238, 309 (1972) (Stewart, J., concurring)).
79. Id. at 832.
80. Id. at 833.
"whether the juvenile's culpability should be measured by the same standard as that of an adult" and, second, "whether the application of the death penalty to this class of offenders 'measurably contributes' to the social purposes that are served by the death penalty." 81

The Court found that "less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult," based on juveniles' lack of experience, education, and intelligence that impairs juveniles' ability to assess the consequences of their actions. 82 Furthermore, the multitude of reasons why juveniles are not given the same privileges and responsibilities of adults "also explain[s] why their irresponsible conduct is not as morally reprehensible as that of an adult." 83

Additionally, the Court found that the retribution and deterrence purposes of the death penalty were not served when imposed on those who committed crimes under the age of sixteen. 84 Retribution is not furthered by the execution of a fifteen-year-old offender "[g]iven the lesser culpability of the juvenile offender, the teenager's capacity for growth, and society's fiduciary obligations to its children." 85 Likewise, the Court found that the deterrent function of the death penalty was not effective when imposed on juvenile offenders. 86 The Court's reasoned that juveniles are not likely to make a cost-benefit analysis of the possibility of being executed, and, even if they do, given the extreme rareness of executing such individuals in the twentieth century, it would be unlikely that such an individual would be deterred by the possibility of such a rare sanction. 87

3. Stanford v. Kentucky

Nearly a year after deciding Thompson, the Court again addressed the constitutionality of the juvenile death penalty in Stanford v. Kentucky. 88 In Stanford, there were two consolidated cases with one ultimate issue before the Court: whether the imposition of the death penalty on an individual who commits a capital offense "at 16 or 17 years of age constitutes cruel and unusual punishment" in violation of the Eighth Amendment. 89 One of the petitioners, Kevin Stanford, was seventeen-years-old when he committed mur-
order. Stanford and an accomplice robbed a gas station, "repeatedly raped and sodomized" the twenty-year-old attendant, and then shot her at close range in the face. Stanford was convicted of first-degree murder and sentenced to death. The other petitioner, Heath Wilkins, was sixteen years old when he and an accomplice stabbed to the death a twenty-six-year-old store clerk while robbing a convenience store. Wilkins was also convicted of first-degree murder and sentenced to death.

Consistent with Thompson, the Court again assessed the ""evolving standards of decency that mark the progress of a maturing society." Writing for the majority, Justice Scalia emphasized that in making Eighth Amendment evaluations, the Court has not looked at its own independent "conceptions of decency, but to those of modern American society as a whole." As mandated by the language of the Eighth Amendment, what is cruel and unusual should not be decided by the ""subjective views of individual Justices; judgment should be informed by objective factors to the maximum possible extent." Further admonishing what an Eighth Amendment judgment should not include, Justice Scalia delineated that the conceptions of decency in other countries are not relevant—nor are public opinion polls and the views of interests groups and various professional associations.

The relevant objective indicium looked at once again to ""reflect the public attitude toward a given sanction"" were legislative enactments and the behavior of juries. The Court found that out of the thirty-seven death penalty states, only fifteen prohibited its imposition on sixteen-year-old offenders and twelve prohibited its imposition on seventeen-year-old offenders. The Court concluded that these legislative enactments did ""not establish the degree of national consensus this Court has previously thought sufficient to label a particular punishment cruel and unusual." As a benchmark,

90. Id. at 365.
91. Id.
92. Id. at 366.
93. Stanford, 492 U.S. at 366.
94. Id. at 367.
95. Id. at 369 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)).
96. Id.
97. Id. (quoting Coker v. Georgia, 433 U.S. 584, 592 (1977)).
99. Id. at 370 (quoting McCleskey v. Kemp, 481 U.S. 279, 300 (1987)).
100. Id. at 369–70.
101. Id. at 373.
102. Id. at 370.
the Court provided a summary of instances when it previously found the evidence of a national consensus sufficient to characterize a particular punishment as cruel and unusual:

In invalidating the death penalty for rape of an adult woman, we stressed that Georgia was the sole jurisdiction that authorized such a punishment. In striking down capital punishment for participation in a robbery in which an accomplice takes a life, we emphasized that only eight jurisdictions authorized similar punishment. In finding that the Eighth Amendment precludes execution of the insane and thus requires an adequate hearing on the issue of sanity, we relied upon (in addition to the common-law rule) the fact that "no State in the Union" permitted such punishment. And in striking down a life sentence without parole under a recidivist statute, we stressed that "[i]t appears that [petitioner] was treated more severely than he would have been in any other State." 104

Unlike these cases, the Court did not find a national consensus against the death penalty of sixteen and seventeen-year-old offenders because the majority of states authorized the death penalty for such offenders. 105

The Court next looked at the behavior of juries in imposing the death penalty upon sixteen or seventeen-year-old offenders. 106 While only two percent of executions between 1642 and 1986 were for crimes committed by offenders under the age of eighteen, Justice Scalia did not find these statistics sufficient. 107 Justice Scalia argued, rather than showing that prosecutors and juries felt the death sentence is categorically unacceptable for those offenders under the age of eighteen, it shows instead that they believe it should rarely be imposed. 108 Additionally, this discrepancy in treatment can be attributed to the fact that juveniles commit a far smaller percentage of capital crimes than adults. 109

The Court also responded to the petitioner's argument that because the legal age for various activities such as drinking alcoholic beverages and voting is set at the age of eighteen, the death penalty should also be set at eighteen. 110 Justice Scalia did not see the connection between these activities:

104. Id. at 371 (citations omitted).
105. See id. at 371-72.
106. Id. at 373.
107. Id. at 373-74.
109. Id.
110. Id.
It is, to begin with, absurd to think that one must be mature enough to drive carefully, to drink responsibly, or to vote intelligently, in order to be mature enough to understand that murdering another human being is profoundly wrong, and to conform one's conduct to that most minimal of all civilized standards. . . . These laws set the appropriate ages for the operation of a system that makes its determinations in gross, and that does not conduct individualized maturity tests for each driver, drinker, or voter. The criminal justice system, however, does provide individualized testing. In the realm of capital punishment in particular, "individualized consideration [is] a constitutional requirement."111

Based on the legislative enactments and the behavior of juries, the Court held that neither a historical nor a modern national consensus existed forbidding the imposition of the death penalty on an individual who committed a capital offense at the age of sixteen or seventeen.112 Accordingly, the Court concluded that such punishment was not deemed cruel and unusual and consequently did not violate the Eighth Amendment.113 Justice O'Connor concurred in the judgment of the Court, stating that "[t]he day may come when there is such general legislative rejection of the execution of 16- or 17-year-old capital murderers that a clear national consensus can be said to have developed," but that she did not believe that day had yet arrived.114

4. **Penry v. Lynaugh**

On the same day the Court decided *Stanford*, it also decided another Eighth Amendment case, *Penry v. Lynaugh*.115 In 1979 the petitioner, Johnny Penry, violently raped a Texas woman and then stabbed her to death with scissors.116 Despite the fact that Penry was mentally retarded, he was sentenced to death for his brutal crime.117 The issue before the Court was whether the Eighth Amendment categorically prohibits the imposition of the death penalty on the mentally retarded.118 Once again, to determine if there was a national consensus against such a practice, the Court looked at the
objective evidence of legislative enactments and the actions of sentencing juries.\textsuperscript{119}

First, in looking at legislative enactments, the Court noted that "[o]nly one State . . . currently bans execution of retarded persons who have been found guilty of a capital offense."\textsuperscript{120} Maryland had also adopted a similar statute to take effect that year.\textsuperscript{121} The Court found that the legislation by these two states was not sufficient evidence to amount to a national consensus against such punishment.\textsuperscript{122} To the contrary, when the Court found a national consensus against the execution of the mentally insane, no state then permitted the execution of the insane.\textsuperscript{123}

The Court also looked at the behavior of juries and likewise concluded that there was a lack of evidence, finding no facts as to the general behavior of juries in regards to sentencing mentally retarded defendants to death.\textsuperscript{124} The Court disregarded public opinion polls against the execution of the mentally retarded, recognizing that they may be ultimately expressed in legislation, which is objective indicia the Court considers in a national consensus evaluation.\textsuperscript{125}

Lastly, the Court evaluated whether the mentally retarded could act with the degree of culpability required to justify the death penalty.\textsuperscript{126} The Court admitted "that mental retardation has long been regarded as a factor that may diminish an individual's culpability for a criminal act."\textsuperscript{127} However, it recognized that the states already have procedural safeguards to protect the mentally retarded by recognizing their limited levels of culpability as a mitigating factor in death penalty statutes; for example: "'[t]he capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.'"\textsuperscript{128}

The Court refused to generalize the level of culpability of all mentally retarded people: "In light of the diverse capacities and life experiences of mentally retarded persons, it cannot be said on the record before us today that all mentally retarded people, by definition, can never act with the level

\begin{footnotes}
\footnotetext[119]{Id. at 331.}
\footnotetext[120]{Penry, 492 U.S. at 334 (citing Ga. Code Ann. § 17-7-131(j) (2004)).}
\footnotetext[121]{Id. (citation omitted); see Md. Code Ann., Crim. Law § 2-202(b)(2)(ii) (LexisNexis 2002).}
\footnotetext[122]{Penry, 492 U.S. at 334.}
\footnotetext[123]{Id. (citing Ford v. Wainwright, 477 U.S. 399, 408 n.2 (1986)).}
\footnotetext[124]{Id.}
\footnotetext[125]{Id. at 334–35.}
\footnotetext[126]{Id. at 336.}
\footnotetext[127]{Penry, 492 U.S. at 337 (citations omitted).}
\footnotetext[128]{Id. (quoting Ala. Code § 13A-5-51(6) (LexisNexis 1994)).}
\end{footnotes}
of culpability associated with the death penalty." Ultimately, the Court held that, while mental retardation may lessen a defendant’s culpability for a capital offense, according to the Eighth Amendment, mental retardation itself does not categorically preclude the execution of a person convicted of a capital offense.

5. *Atkins v. Virginia*

Thirteen years later, the Court revisited the issue of the constitutionality of executing the mentally retarded in *Atkins v. Virginia.* The petitioner, Daryl Renard Atkins, and an accomplice robbed and murdered a man, shooting him eight times with a semiautomatic handgun. The jury sentenced Atkins, a mentally retarded man, to death.

The Court took note of a “dramatic shift in the state legislative landscape that had occurred in the past 13 years,” so it granted certiorari to revisit the issue from *Penry.* The Court considered these recent and consistent legislative enactments, the reluctance of juries to impose the death penalty upon the mentally retarded, the Court’s independent assessment of penology, and the mental capacity of the mentally retarded and ultimately concluded that executing the mentally retarded violates the Eighth Amendment.

Looking at the legislative enactments since *Penry* was decided, the Court observed significant changes:

In 1990, Kentucky and Tennessee enacted statutes similar to those in Georgia and Maryland, as did New Mexico in 1991, and Arkansas, Colorado, Washington, Indiana, and Kansas in 1993 and 1994. In 1995, when New York reinstated its death penalty, it emulated the Federal Government by expressly exempting the mentally retarded. Nebraska followed suit in 1998. There appear to have been no similar enactments during the next two years, but in 2000 and 2001 six more States—South Dakota, Arizona, Connecticut, Florida, Missouri, and North Carolina—joined the procession. The Texas Legislature unanimously adopted a similar bill, and

129. *Id.* at 338–39.
130. *Id.* at 340.
132. *Id.* at 307.
133. *Id.* at 309.
134. *Id.* at 310.
135. See *id.* at 321.
bills have passed at least one house in other States, including Virginia and Nevada. 136

While only two states in 1989 had statutes prohibiting the death penalty for mentally retarded offenders, in 2002 there was a total of eighteen states with such statutes. 137 The Court found that it is not the number of states with such statutes that is significant; rather, it is the consistent direction of change, coupled with the fact that it is a time when anti-crime legislation is more popular than providing protections for criminal defendants. 138

Even in states without these statutes, the Court found evidence of a national consensus against executing mentally retarded offenders by the fact that juries hesitate to impose such punishment. 139 While states such as New Hampshire and New Jersey do not statutorily prohibit imposition of the death penalty on the mentally retarded, it has not been carried out for decades. 140 Only five states have executed an offender with an IQ below seventy since Penry was decided. 141 The Court concluded that the practice of executing the mentally retarded had "become truly unusual." 142

The Court proceeded with two additional reasons, "consistent with the [national] consensus that the mentally retarded should be categorically excluded" from receiving the death penalty: 1) the penological goals of the death penalty are not justified when applied to mentally retarded offenders; and 2) the reduced capacity of the mentally retarded make them ineligible for the death penalty. 143

The two prominent goals of the death penalty are "retribution and deterrence of capital crimes." 144 The Court found that the goal of retribution is not met when the death penalty is imposed on the mentally retarded: "[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." 145 Likewise, the Court concluded that the goal of deterrence is not met by executing the mentally retarded, finding that inherent in such persons are "cognitive and behavioral impairments" that make it unlikely that they will be able to process the

137. See id. (citations omitted).
138. Id. at 315–16.
139. See id. at 316.
140. Id.
142. Atkins, 536 U.S. at 316.
143. Id. at 318–21.
144. Id. at 319 (quoting Gregg v. Georgia, 428 U.S. 153, 183 (1976)).
145. Id.
nature and consequences of their conduct and control their conduct based upon that information.146

The Court found that the reduced capacity of the mentally retarded provides further justification against imposing the death penalty upon such individuals.147 In addition to the increased likelihood of false confessions, the mentally retarded may have trouble assisting their counsel, "and their demeanor may create an unwarranted impression of lack of remorse for their crimes."148 The Court concluded that the mentally retarded are especially prone to being wrongfully convicted.149 This case would lay the analytical framework for assessing the constitutionality of the juvenile death penalty.

III. INTERNATIONAL INFLUENCE

The case of Roper v. Simmons has generated an unusually large number of amicus briefs filed on behalf of Christopher Simmons, the Respondent, from various organizations representing international, religious, child advocacy, and professional and legal communities.150 Premised on different rea-

146. Id. at 320.
147. Atkins, 536 U.S. at 320.
148. Id. at 320–21.
149. Id. at 321.
soning and beliefs, there was clearly one shared belief amongst them all: the United States Supreme Court should prohibit the juvenile death penalty and spare the juvenile defendant’s life. While this article does not address all of the concerns included in the various amicus briefs, it will discuss some of the international issues, which caused a great deal of controversy in the actual decision by the Supreme Court.

A. England and Wales

On July 15, 2004, England submitted a brief of amici curiae in support of Simmons, urging the Court to prohibit the juvenile death penalty. England asserted that a prohibition against executing persons who were under the age of eighteen at the time of committing a crime has now reached the status of “jus cogens, a peremptory norm of international law” which is beyond the status of customary international law.

England explained that international law is relevant in the United States because “[f]rom the beginning, the laws of the United States have been informed and shaped by laws and opinions of other members of the international community.” This amici brief made note of the Founders influence by international and social thought, as well as the Court’s “recogni[tion of] the relevance of international norms when considering the permissibility of practices” under the Constitution. International law has been particularly relevant in determining the boundaries of the Eighth Amendment in defining what punishments are “cruel and unusual.” This amici brief asserted that viewing “the evolving standard[s] of decency in an isolated and insular domestic environment would be contrary to all that the drafters of the Constitution knew as essential to joining the ranks of nations.” Additionally, based on the shared values and close relationship between the United States and the United Kingdom, this amici brief asserted that the law and opinions of the

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151. See, e.g., Brief for England, supra note 150, at 3.
152. See Roper v. Simmons, 543 U.S. 551, 628 (Scalia, J., dissenting) (stating that “[a]cknowledgment of foreign approval has no place in the legal opinion of this Court”).
154. Id. at 3.
155. Id. at 5–6.
156. Id. at 6–7.
158. Id. at 7.
United Kingdom are particularly relevant in the Court's evaluation of the contours of the Eighth Amendment. Since 1948, at a time when British law still accepted the death penalty, statutory developments in England prohibited the execution of persons under the age of eighteen at the time of the offense.

Aside from British law, England asserted that the practice of executing persons who were under the age of eighteen at the time of the commission of the crime "has been rejected by every nation in the world except the United States." Hence, the prohibition of such practice is now a jus cogens norm, defined as "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." England explained that a norm must meet four requirements in order to be considered a jus cogens norm: "1) it is general international law; 2) it is accepted by a large majority of states; 3) it is immune from derogation; and 4) it has not been modified by a new norm of the same status."

This amici brief elucidated how each of these requirements has been met. First, general international law clearly prohibits the juvenile death penalty, as evidenced by "[n]umerous treaties, declarations, and pronouncements by international bodies, as well as the laws of the vast majority of nations." Second, the prohibition of the juvenile death penalty is accepted by a large majority of states. This amici brief contended every country in the world has ratified the Convention on the Rights of the Child which prohibits the juvenile death penalty, except the United States and Somalia—"a country lacking a central government." As to the third requirement for a jus cogens norm, the prohibition against the juvenile death penalty is "non-derogable," as explicitly expressed in the International Covenant, as well as

159. Id. at 8.
160. Id. at 11.
161. Id. at 12.
163. Id.
164. See id. at 13–22.
165. Id. at 13.
166. Id. at 17.
evidenced by the laws and practices of other nations. Lastly, "[a]s to the... final requirement, there is no emerging norm that contradicts the current norm. The prohibition of the juvenile death penalty enjoys near universal acceptance." The counsel for amici concluded that the uniform international rejection of the imposition of the death penalty on persons under the age of eighteen at the time of the commission of the crime is "strong evidence" that such a practice is inconsistent with the Eighth Amendment and, thus, should be deemed cruel and unusual. This amici brief reprimanded the United States, stressing that "[t]he United States cannot continue to demand compliance with human rights principles and norms abroad while it refuses to apply them in its own country." Yet these amici were not alone in their stance.

B. The European Union

On July 12, 2004, the European Union (EU) also submitted a brief of amici curiae in support of Simmons. The brief was filed on behalf of its twenty-five Member States and in the shared interest of Canada, the Council of Europe, Iceland, Liechtenstein, Mexico, New Zealand, Norway, and Switzerland. The EU asserted that there is an international consensus against imposing the death penalty upon offenders below the age of eighteen. Evidencing its argument, the EU relied upon "the practices of the overwhelming majority of nations," international law and treaties, along with international norms and standards. As a threshold matter, the EU urged that "the views of the international community [are relevant] in determining whether a [particular] punishment is cruel and unusual."
These amici found it significant that "[s]ince 1990, only eight countries reportedly executed children: Iran (8), Saudi Arabia (1), Nigeria (1), the Democratic Republic of Congo ("DRC") (1), Yemen (1), Pakistan (3), China (1) and the United States (19)." These countries have either now abolished the use of the juvenile death penalty, are in the process of doing so, or deny that they have executed juvenile offenders. This amici brief concluded that the United States presently "stands virtually alone among all the nations of the world" in imposing the death sentence for offenses committed by individuals under the age of eighteen.

These amici also commented on the fact that a considerable number of treatises, some of which have been signed or ratified by the United States, prohibit the imposition of the death penalty for offenses committed by individuals below the age of eighteen. The United Nations Convention on the Rights of the Child (CRC), ratified by roughly 192 nations, "is the most widely ratified human rights treaty in the world" and prohibits the imposition of the death penalty on juveniles. "The [United States] and Somalia are the only two nations [in the world] that have not ratified the CRC," but both countries have signed it, indicating an intent to ratify. This amici brief pointed to the Vienna Convention on the Laws of Treaties, an authoritative guide on treaty procedure, which instructs that after signing a treaty and prior to ratification, "a nation is oblig[ated] to 'refrain from acts which would defeat the object and purpose of the treaty.'" Likewise, these amici pointed to Article 6(5) of the International Covenant on Civil and Political Rights (ICCPR), which prohibits the imposition of the death penalty upon juvenile offenders. The United States "ratified [the ICCPR] in 1992 with a reservation to Article 6(5), stating that 'the United States reserves the right, subject to its Constitutional constraints, to impose'" the death penalty upon juvenile offenders. This reservation was made de-
spite the fact that Article 4(2) of the ICCPR does not permit derogation from Article 6 "even in times of public emergency, thus indicating that Article 6 is seen to be inherent to the object and purpose of the ICCPR."190 This amici brief mentioned other agreements, such as the Arab Charter on Human Rights,191 the American Convention on Human Rights,192 and the Fourth Geneva Conventions,193 that also prohibit the imposition of the death penalty on juvenile offenders.194

Lastly, these amici found that "[i]nternational norms and standards adopted by international bodies and organisations, including the United Nations, further reflect the international consensus against the death penalty for juvenile offenders."195 The counsel for these amici concluded that a national consensus exists against the imposition of the death penalty upon individuals below the age of eighteen, and the United States' position on this issue "is out of step with the international community, [presenting] both legal and diplomatic issues."196

IV. THE DECISION: ROPER V. SIMMONS

A. The Majority

On March 1, 2005, the United States Supreme Court once again confronted the issue of whether the execution of persons who were sixteen or seventeen years of age at the time of the commission of the crime violates the Eighth Amendment's prohibition of cruel and unusual punishment.197

190. Id. at 14–15; ICCPR, supra note 188, art. 4(2).
192. Brief for the European Union, supra note 150, at 19 (citing American Convention on Human Rights art. 4(5), Nov. 22, 1969, 1144 U.N.T.S. 123 [hereinafter American Convention]). The American Convention on Human Rights provides that "[c]apital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age." Id. at 19 (quoting American Convention, supra, art. 4(5)).
193. Id. at 21 (citing Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 68, Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention]). The Fourth Geneva Convention states in Article 68 that ""the death penalty may not be pronounced against a protected person who was under eighteen years of age at the time of the offence."" Id. (quoting Fourth Geneva Convention, supra, art. 68).
194. Id. at 18–21.
196. Id. at 26.
Justice Kennedy delivered the majority opinion of the Court, joined by Justices Stevens, Souter, Ginsburg, and Breyer.\textsuperscript{198} The Court rendered its decision based on objective indicium, particularly relevant legislative enactments, as well as an independent determination by the Court.\textsuperscript{199} Additionally, the Court found confirmation from the opinion of the international community.\textsuperscript{200}

Recognizing that the Eighth Amendment forbids excessive sanctions, the Court reaffirmed "the necessity of referring to 'the evolving standards of decency that mark the progress of a maturing society' to determine which punishments are so disproportionate as to be cruel and unusual."\textsuperscript{201} In a 5-4 decision, the Court overruled \textit{Stanford}, holding that society's standards have changed since that decision and the evolving standards have changed to indicate that the imposition of the death penalty on such individuals is forbidden by the Eighth and the Fourteenth Amendments.\textsuperscript{202}

The Court looked at objective indicium in determining that a national consensus has formed since \textit{Stanford} against the juvenile death penalty.\textsuperscript{203} Looking at the relevant legislative enactments, the Court relied heavily on \textit{Atkins}, outlining the similarities between the constitutionality of executing the mentally retarded and executing juvenile offenders:

\begin{quote}
When \textit{Atkins} was decided, 30 States prohibited the death penalty for the mentally retarded. This number comprised 12 that had abandoned the death penalty altogether, and 18 that maintained it but excluded the mentally retarded from its reach. By a similar calculation in this case, 30 States prohibit the juvenile death penalty, comprising 12 that have rejected the death penalty altogether and 18 that maintain it but, by express provision or judicial interpretation, exclude juveniles from its reach. \textit{Atkins} emphasized that even in the 20 States without formal prohibition, the practice of executing the mentally retarded was infrequent.\textsuperscript{204}
\end{quote}

Similarly, the practice of executing juveniles is infrequent in the states without a formal prohibition against such a practice.\textsuperscript{205} Since \textit{Stanford}, only

\begin{itemize}
\item \textsuperscript{198} \textit{Id.} at 554.
\item \textsuperscript{199} \textit{Id.} at 564.
\item \textsuperscript{200} \textit{Id.} at 575.
\item \textsuperscript{201} \textit{Id.} at 561 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)).
\item \textsuperscript{202} \textit{Roper}, 543 U.S. at 574.
\item \textsuperscript{203} \textit{Id.} at 564.
\item \textsuperscript{204} \textit{Id.} (citations omitted).
\item \textsuperscript{205} \textit{Id.}
\end{itemize}
six states have imposed the death penalty on juvenile offenders.\textsuperscript{206} Likewise, only five states executed the mentally retarded since \textit{Penry v. Lynaugh}, the predecessor case to \textit{Atkins}.\textsuperscript{207}

The Court noted that despite the striking similarities between the present case and \textit{Atkins}, there is at least one difference between the cases pertaining to evidence of a national consensus.\textsuperscript{208} During the thirteen year period between the decisions of \textit{Penry} and \textit{Atkins}, sixteen additional states prohibited the practice of executing the mentally retarded.\textsuperscript{209} "[T]he rate of abolition of the death penalty for the mentally retarded" during this period was significant.\textsuperscript{210}

To the contrary, the rate of abolishing the juvenile death penalty has been slower.\textsuperscript{211} In the fifteen intervening years since \textit{Stanford}, only five additional states have prohibited the juvenile death penalty, "four through legislative enactments and one through judicial decision."\textsuperscript{212} The Court considered this change since \textit{Stanford} significant, despite the "less dramatic" change from \textit{Penry} to \textit{Atkins}, stressing that "'[i]t is not so much the number of these States that is significant, but the consistency of the direction of change.'"\textsuperscript{213} Since \textit{Stanford}, there has been a consistent direction of change against the juvenile death penalty—\textit{with no states reinstating it}.\textsuperscript{214}

The Court concluded that, similar to \textit{Atkins}, looking at objective indicia such as "the rejection of the juvenile death penalty in the majority of States; the infrequency of its use even where it remains on the books; and the consistency in the trend toward abolition of the practice" provides evidence of a national consensus against executing such individuals.\textsuperscript{215}

The Court also made its own independent evaluation of the constitutionality of the juvenile death penalty under the Eighth Amendment.\textsuperscript{216} The Court emphasized that "the death penalty is the most severe punishment, [and therefore] the Eighth Amendment applies to it with special force."\textsuperscript{217} The imposition of the death penalty "must be limited to those offenders who

\begin{itemize}
  \item \textsuperscript{206} \textit{Id.} at 564–65.
  \item \textsuperscript{207} \textit{Roper}, 543 U.S. at 564.
  \item \textsuperscript{208} \textit{Id.} at 565.
  \item \textsuperscript{209} \textit{Id.}
  \item \textsuperscript{210} \textit{Id.}
  \item \textsuperscript{211} \textit{Id.}
  \item \textsuperscript{212} \textit{Roper}, 543 U.S. at 565 (citations omitted).
  \item \textsuperscript{213} \textit{Id.} at 566 (quoting \textit{Atkins v. Virginia}, 536 U.S. 304, 315 (2002)).
  \item \textsuperscript{214} \textit{Id.}
  \item \textsuperscript{215} \textit{Id.} at 567.
  \item \textsuperscript{216} See \textit{id.} at 567–75.
  \item \textsuperscript{217} \textit{Roper}, 543 U.S. at 568 (citing \textit{Thompson v. Oklahoma}, 487 U.S. 815, 856 (1988) (O'Connor, J., concurring in judgment)).
\end{itemize}
commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'

The Court noted three differences between juveniles and adults that categorically remove juveniles from the classification of the worst offenders. First, juveniles tend to be less mature and more irresponsible than adults. States recognize this fact and, hence, prohibit juveniles from enjoying many privileges that adults have such as "voting, serving on juries, or marrying without parental consent." Secondly, "juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure." Lastly, because juveniles go through so many changes, their character "is not as well formed as that of an adult." The Court found that "[t]hese differences render suspect any conclusion that a juvenile falls among the worst offenders."

The Court also concluded that the penological justifications for the death penalty are not served with the same force when applied to juveniles. 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 degree, by reason of youth and immaturity." Second, "[a]s for deterrence, it is unclear whether the death penalty has a significant or even measurable deterrent effect on juveniles, as counsel for the petitioner acknowledged at oral argument." Even if the death penalty were to have a deterrent effect on juveniles, the sanction of life imprisonment without the possibility of parole would also deter such persons, particularly juveniles who have their entire life ahead of them.

The petitioner argued that even if juveniles in general have a diminished level of culpability, a categorical bright-line rule barring the death penalty on any juvenile offender "is both arbitrary and unnecessary." Petitioner asserted that jurors should decide if the death penalty is appropriate for juvenile offenders on a case-by-case basis, taking into consideration mitigating

218. Id. (quoting Atkins, 536 U.S. at 319).
219. Id. at 569.
220. Id.
221. Id.
222. Roper, 543 U.S. at 569 (citing Eddings v. Oklahoma, 455 U.S. 104, 115 (1982)).
223. Id. at 570.
224. Id.
225. Id. at 571.
226. Id.
227. Roper, 543 U.S. at 571.
228. See id. at 572.
229. Id.
factors related to youth. The Court disagreed with this argument, finding that the task of deciding whether a juvenile should receive the death penalty is too difficult of an inquiry for jurors. Even expert psychologists have difficulty in distinguishing whether a juvenile offender acts due to his or her immaturity or acts a result of his or her "irreparable corruption" of character. However, the Court did acknowledge that a bright-line rule is not flawless:

Drawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules. The qualities that distinguish juveniles from adults do not disappear when an individual turns 18. By the same token, some under 18 have already attained a level of maturity some adults will never reach. ... However, a line must be drawn.

The Court found that drawing the line at eighteen is appropriate because this is where society commonly marks the line between a child and an adult.

Based on its own determination, the Court concluded that due to the diminished capacity of juveniles and the lack of penological justifications for imposing the death penalty on such offenders, the death penalty is a disproportionate punishment for juveniles. The Court pronounced "[w]hen a juvenile offender commits a heinous crime, the State can exact forfeiture of some of the most basic liberties, but the State cannot extinguish his life and his potential to attain a mature understanding of his own humanity." The Court pointed to "overwhelming weight of international opinion against the juvenile death penalty." The Court stated that "[t]he opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions." The Court found confirmation that the death penalty is excessive punishment for juveniles due to the fact "that the United States is the only country in the world" that officially continues to carry out such a sanction. Looking at international treaties and practices prohibiting the juvenile death penalty, the

230. Id.
231. See id. at 573.
232. Roper, 543 U.S. at 573.
233. Id. at 574.
234. Id.
235. See id. at 567–74.
236. Id. at 573–74.
237. Roper, 543 U.S. at 578.
238. Id.
239. Id. at 575.
Court concluded that "it is fair to say that the United States now stands alone in a world that has turned its face against the juvenile death penalty." \(^{240}\)

While looking at the international authority, the Court noted that the United States Constitution still earns the highest respect, and its doctrines remain essential to our national identity. \(^{241}\) The Court explained how looking at an international opinion does not defy the Constitution: "[i]t does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom." \(^{242}\) The Court emphasized that an international opinion is not controlling in the Court's Eighth Amendment interpretation, however it is instructive. \(^{243}\)

B. Justice Stevens, Concurring

Concurring in the judgment, Justice Stevens, joined by Justice Ginsburg agreed with the majority opinion and emphasized that interpreting the Constitution is not a static task:

> Perhaps even more important than our specific holding today is our reaffirmation of the basic principle that informs the Court's interpretation of the Eighth Amendment. If the meaning of that Amendment had been frozen when it was originally drafted, it would impose no impediment to the execution of 7-year-old children today. \(^{244}\)

Justice Stevens found it important for the Court to adjust its interpretation of the Eighth Amendment in accordance with the evolution of society. \(^{245}\) He postulated that if Alexander Hamilton were alive today, sitting with the Court, he would also join the majority in its decision. \(^{246}\)

C. Justice O'Connor, Dissenting

Justice O'Connor dissented, contending that there was a lack of evidence to support the Court's categorical prohibition against the juvenile death penalty. This was based on several points:

\[^{240}\] Id. at 577.
\[^{241}\] Id. at 578.
\[^{242}\] Roper, 543 U.S. at 578.
\[^{243}\] Id. at 575 (citing Trop v. Dulles, 356 U.S. 86, 102-03 (1958)).
\[^{244}\] Id. at 587 (Stevens, J., concurring) (citation omitted).
\[^{245}\] See id.
\[^{246}\] Id.
death penalty. Justice O'Connor asserted that neither the objective evidence of a national consensus, nor the Court's independent assessment, which she referred to as "the Court's moral proportionality analysis," supported this categorical prohibition. Finding that so little had changed since the Court's decision in Stanford, Justice O'Connor pronounced that she "would not substitute [the Court's] judgment about the moral propriety of capital punishment for 17-year-old murderers for the judgments of the Nation's legislatures," but would rather wait for a patent showing that society is against such a practice before categorically forbidding it.

Justice O'Connor pointed to the Court's decision in Thompson, in which she concurred, acknowledging that a national consensus existed against imposing the death penalty on fifteen-year-old offenders, but she "declined to adopt that conclusion as a matter of constitutional law without clearer evidentiary support." Yet again in the Court's decision of Stanford, Justice O'Connor concurred with the Court's judgment that imposing the death penalty on sixteen and seventeen-year-old offenders was not prohibited by the Eighth Amendment. Justice O'Connor concluded that there was not a national consensus against such a practice and that the "proportionality arguments," much the like the Court's arguments in Roper, "did not justify a categorical Eighth Amendment rule against capital punishment of 16- and 17-year-old offenders."

Justice O'Connor agreed that the objective evidence presented in Roper was similar to that presented in Atkins, but found that the evidence of a national consensus in Roper was weaker than the evidence in Atkins:

Most importantly, in Atkins there was significant evidence of opposition to the execution of the mentally retarded, but there was virtually no countervailing evidence of affirmative legislative support for this practice. The States that permitted such executions did so only because they had not enacted any prohibitory legislation. Here, by contrast, at least eight States have current statutes that specifically set 16 or 17 as the minimum age at which com-

248. Id.
249. Id. at 588.
250. Id. at 591 (citing Thompson v. Oklahoma, 487 U.S. 815, 849 (1988) (O'Connor, J., concurring in judgment)).
251. Id. (citing Stanford v. Kentucky, 492 U.S. 361, 381 (1989) (O'Connor, J., concurring in part and concurring in judgment)).
252. Roper, 543 U.S. at 592 (O'Connor, J., dissenting) (citing Stanford, 492 U.S. at 382 (O'Connor, J., concurring)).
mission of a capital crime can expose the offender to the death penalty. 253

Justice O'Connor found it noteworthy that of the eight states that still permitted the juvenile death penalty, five of these states had juvenile offenders on death row and four of them had executed such offenders in the past fifteen years. 254 She pointed to the fact that there were over seventy juveniles on death row at the time of the decision of Roper, adducing the actuality of "continuing public support" for upholding the juvenile death penalty. 255

Justice O'Connor also found that the proportionality argument against the juvenile death penalty to be "so flawed that it can be given little, if any, analytical weight." 256 She argued that the differences between a seventeen-year-old and young adults are not clear "enough to justify a bright-line prophylactic rule against capital punishment of the former." 257 She criticized the line drawn by the Court to be "indefensibly arbitrary," claiming that it may protect those juvenile "offenders who are mature enough to deserve the death penalty." 258 Justice O'Connor found individualized sentencing by juries to be more appropriate than a bright-line rule. 259 She pointed out that the Court provided no evidence for its argument that sentencing juries cannot ascertain the juvenile's level of maturity to give appropriate weight to mitigating factors, asserting that this task is no different than sentencing juries "giving proper effect to any other qualitative capital sentencing factor." 259

Justice O'Connor also criticized the Court for failing to admonish the Supreme Court of Missouri for not following the precedent set out by the United States Supreme Court in Stanford. 260 She stated that "[b]y affirming the lower court's judgment without so much as a slap on the hand, today's decision threatens to invite frequent and disruptive reassessments of our Eighth Amendment precedents." 261

253. Id. at 595–96 (citations omitted).
255. Id. at 596 (citing STREIB, supra note 254, at 11, 24–31).
256. Id. at 598.
258. Id. at 601–02.
259. Id. at 602–03.
260. Id. at 603–04.
261. Id. at 593–94.
ABOLITION OF THE JUVENILE DEATH PENALTY

Justice O'Connor agreed with the majority on one issue: that foreign and international law can be pertinent to Eighth Amendment evaluations. She stated that "the existence of an international consensus ... can serve to confirm the reasonableness of a consonant and genuine American consensus." Because she did not find a genuine national consensus in this case, however, she did not think that "the recent emergence of an otherwise global consensus" could replace the lack of a national consensus against the juvenile death penalty.

D. Justice Scalia, Dissenting

Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, also dissented, arguing that not only was there a lack of evidence showing the development of a national consensus against the juvenile death penalty, but moreover they discredited the modern usage of the national consensus test in general. Rather than using "the evolving standards of decency" to determine what punishments are cruel and unusual, Justice Scalia would refer to "the original meaning of the Eighth Amendment." Justice Scalia also disagreed with the Court acting as a "sole arbiter of our Nation’s moral standards" in making an independent judgment on the issue, as well as taking guidance from international opinions.

Justice Scalia scrutinized the Court’s evidence of a national consensus. He criticized the majority for counting non-death penalty states toward evidence of a national consensus against the imposition of the death penalty on sixteen and seventeen-year-olds. Justice Scalia objected to the relevancy of the twelve states that prohibit the death penalty in all cases because, in repealing the death penalty, the states did not consider the same determinative factors decided by the Court with respect to juvenile offenders, such as levels of culpability and maturity.

Justice Scalia also took issue with the Court’s reliance on the legislative changes since Stanford. He did not find the fact that only four states since Stanford have changed its laws to prohibit the juvenile death penalty signifi-

263. Id. at 604.
264. Id. at 605.
265. Id.
266. Id. at 607–11 (Scalia, J., dissenting).
267. Roper, 543 U.S. at 608 (Scalia, J., dissenting) (citation omitted).
268. Id.
269. See id.
270. Id. at 610–11.
271. Id.
272. Roper, 543 U.S. at 613 (Scalia, J., dissenting).
cant enough for the Court to take the matter out of the legislature's hands.\textsuperscript{273} Scalia contended that "[w]ords have no meaning if the views of less than 50% of death penalty States can constitute a national consensus."\textsuperscript{274}

In addition to disagreeing with the evidence of a national consensus, Justice Scalia did not find it appropriate that the Court exercised its own independent judgment in coming to the conclusion that the death penalty is an inappropriate punishment for all juveniles.\textsuperscript{275} Justice Scalia objected "to supplant[ing] the consensus of the American people with the Justices' views" asserting "that it has no foundation in law or logic."\textsuperscript{276} Justice Scalia found the Court's role in evaluating the "evolving-standards" test is solely to determine if a national moral consensus exists.\textsuperscript{277} Justice Scalia posed the question: "By what conceivable warrant can nine lawyers presume to be the authoritative conscience of the Nation?"\textsuperscript{278}

Justice Scalia further attacked the Court for exercising its own independent judgment, stating that:

Today's opinion provides a perfect example of why judges are ill equipped to make the type of legislative judgments the Court insists on making here. To support its opinion that States should be prohibited from imposing the death penalty on anyone who committed murder before age 18, the Court looks to scientific and sociological studies, picking and choosing those that support its position. It never explains why those particular studies are methodologically sound; none was ever entered into evidence or tested in an adversarial proceeding.\textsuperscript{279}

Justice Scalia observed that the Court "need not look far to find studies" showing otherwise.\textsuperscript{280} Justice Scalia also posited the fact that the legislatures are in the best position to look at the results of statistical studies in light of their own local conditions.\textsuperscript{281} Justice Scalia found it significant that even looking at the studies cited by the Court, "[n]ot one . . . opines that all individuals under 18 are unable to appreciate the nature of their crimes."\textsuperscript{282}

\begin{itemize}
\item \textsuperscript{273} \textit{Id.} at 613-14.
\item \textsuperscript{274} \textit{Id.} at 609 (citation omitted).
\item \textsuperscript{275} \textit{Id.} at 615-16.
\item \textsuperscript{276} \textit{Id.}
\item \textsuperscript{277} \textit{Roper,} 543 U.S. at 616 (Scalia, J., dissenting).
\item \textsuperscript{278} \textit{Id.}
\item \textsuperscript{279} \textit{Id.} at 616-17.
\item \textsuperscript{280} \textit{Id.} at 617.
\item \textsuperscript{281} \textit{Id.} at 618 (citing McCleskey v. Kemp, 481 U.S. 279, 319 (1987)).
\item \textsuperscript{282} \textit{Roper,} 543 U.S. at 618 (Scalia, J., dissenting).
\end{itemize}
He also disagreed with the Court's explanation for drawing the line at eighteen years old. Justice Scalia found that "[s]erving on a jury or entering into marriage also involve[s] decisions far more sophisticated than the simple decision not to take another's life." Furthermore, Justice Scalia established that, in imposing these types of age limitations, states make categorical determinations without looking at individual maturity levels. On the other hand, he asserted that the criminal justice system "provides for individualized consideration of each defendant."

Justice Scalia also rejected the Court's use of international opinions in its decision, denouncing that the "'[a]cknowledgment' of foreign approval has no place in the legal opinion of this Court unless it is part of the basis for the Court's judgment—which is surely what it parades as today." Justice Scalia explained that the fact that the President of the United States and the Senate have not entered into treaties prohibiting the juvenile death penalty only further evidences that the United States has not reached a national consensus against it.

Justice Scalia also referred to the United Nations Convention on the Rights of the Child, explaining that it not only prohibits the juvenile death penalty, but also prohibits life imprisonment of juveniles. He pointed out that if the United States is to remain consonant "with the international community, then the Court's reassurance that the death penalty is really not needed, since 'the punishment of life imprisonment without the possibility of parole is itself a severe sanction,' gives little comfort."

V. EFFECTS OF THE COURT'S RULING

A. Nationwide Effects

The United States Supreme Court's ruling in Roper spared seventy-two juvenile offenders' lives nationwide by commuting their death sentences to life imprisonment. Thirteen states at the time of the decision had juveniles

283. See id. at 619.
284. Id.
285. Id. at 620.
286. Id.
287. Roper, 543 U.S. at 628 (Scalia, J., dissenting).
288. Id. at 622–23.
290. Roper, 543 U.S. at 623 (Scalia, J., dissenting) (citation omitted).
291. Chris Tisch, Supreme Court Rules on Juvenile Death Penalty: Only Adults Can Face Execution, ST. PETERSBURG TIMES, Mar. 2, 2005, at 1A; see also Streib, supra note 254, at 11, 24–31.
on death row: Texas (28); Alabama (13); Mississippi (5); Arizona (4); Louisiana (4); North Carolina (4); Florida (3); South Carolina (3); Georgia (2); Pennsylvania (2); Virginia (1); and Nevada (1).292 The decision had the effect of invalidating laws in twenty states that permitted the juvenile death penalty.293

The implications of this ruling were immediately felt in Prince William County, Virginia, where prosecuting attorney Paul Ebert was considering trying Washington D.C. area sniper Lee Boyd Malvo on capital charges, but stated that "in light of this decision, [he] will not do so."294 Malvo was seventeen-years-old at the time of the shooting spree in 2002 and had already been convicted and sentenced to life in prison for two of the ten murders.295 Prosecutors were planning to try him in other jurisdictions in hopes of obtaining a death sentence.296 Ebert criticized the Supreme Court’s decision stating that he personally believes "‘you can’t draw a bright line between a 17-year-old and an 18-year-old.’"297 In regards to Malvo’s crimes, Ebert thought they “were meticulously planned—not the negligent act of a minor.”298

The difficulty in drawing a bright-line rule was clearly illustrated in the case of brothers Kevin and Tilmon Golphin.299 In 1997, the brothers robbed a finance company in South Carolina, stole a car, and drove off on the interstate heading north.300 They were pulled over near Fayetteville, North Carolina by Highway Patrol Trooper Ed Lowry who called for back up after realizing that they were driving a stolen vehicle.301 When Deputy David Hatchcock arrived, nineteen-year-old Tilmon Golphin shot both men with a semi-automatic rifle, seriously wounding them.302 "Then, as the men lay wounded, the 17-year-old [Kevin Golphin] took Lowry’s pistol and finished them off,

293. Id.
295. Id.
296. See id.
297. Id.
298. Id.
299. Valerie Bauman, Age Ruling Lets Older Brother Die, Other Live: Narrow Gap Between Partners in Murder Highlights Cutoff Conflict, CHARLOTTE OBSERVER, Mar. 17, 2005, at 6B.
300. Id.
301. Id.
302. Id.
shooting both officers to death at point-blank range." The brothers were adjudged guilty of murder and were both sentenced to death. However, the Court's ruling in *Roper* had the effect of releasing Kevin Golphin from death row, while his brother Tilmon Golphin will remain there for essentially the same crime.

Not all commentators favor this trend. Jordan Steiker, a death penalty expert at the University of Texas law school, suggested that the decision may lead to a judicial abolition of the death penalty in all cases. Steiker stated that "'[t]he lasting significance of this case is that it opens the door to the abolition of the death penalty judicially... If a national consensus can emerge without a majority of the death penalty states moving toward abolition, then it suggests that judicial abolition is a genuine prospect.'"  

B. Effects on Florida

Florida was one of the nineteen states that permitted the imposition of the death penalty on juvenile offenders. The ruling affected three juvenile offenders on death row in Florida whose sentences will be reduced to life in prison. Before 1994, Florida law allowed those facing life sentences to have the possibility of parole after serving twenty-five years. Two of the three juvenile offenders formerly on death row in Florida committed their crimes before a change in this law was made, so they may now become eligible for parole.

The two men are Cleo LeCroy, now forty-one-years-old, and James Bonifay, now thirty-one-years-old. In 1986, LeCroy of Palm Beach County was convicted for the murders of a young couple from Miami, John

303. *Id.*
305. *See id.*
307. *Id.*
310. Franceschina, *supra* note 306; *see* FLA. STAT. § 775.082(1) (1993), amended by FLA. STAT. § 775.082(1) (1995). In 1993, section 775.082(1) of the Florida Statutes proscribed that "[a] person who has been convicted of a capital felony shall be punished by life imprisonment and shall be required to serve no less than 25 years before becoming eligible for parole." *Id.*
312. *Id.*
and Gail Hardeman, who were camping near the Florida Everglades.\footnote{Scott Hiaasen, \textit{U.S. Supreme Court: Justices: States Can't Execute Juveniles}, MIAMI HERALD, Mar. 2, 2005, at A1.} In 1991, Bonifay misidentified Billy Wayne Coker, a clerk at an auto parts store in Pensacola, Florida, for another clerk that allegedly caused Bonifay’s cousin to get fired.\footnote{Amber Bollman, \textit{Convicted in 1991 Murder, Parole Now Possible for Bonifay}, PENSACOLA NEWS J., Mar. 2, 2005, at 4A.} Coker, the victim, had “pleaded for his life on behalf of his wife and two children” before he died.\footnote{\textit{Id}.} “But . . . Bonifay told Coker to ‘shut up’ and fired two [deadly] shots into his head.”\footnote{\textit{Id}.}

Twenty-seven-year-old Nathan Ramirez was also on death row for a crime committed as a juvenile and will no longer be executed, despite the fact that two juries decided Ramirez should receive the death penalty.\footnote{Bridget Hall Grumet, \textit{Pasco Killer Might Escape Death Row}, ST. PETE. TIMES, Mar. 2, 2005, at 1.} However, Ramirez will be incarcerated for the rest of his life without the possibility of parole because he committed the crime after the change of law in Florida.\footnote{Franceschina, \textit{supra} note 306; \textit{compare} FLA. STAT. § 775.082(1) (1993) (prescribing that “[a] person who has been convicted of a capital felony shall be punished by life imprisonment and shall be required to serve no less than 25 years before becoming eligible for parole”), \textit{with} FLA. STAT. § 775.082(1) (1995) (prescribing that a person punished by life imprisonment shall be ineligible for parole).} In 1995, Ramirez and a friend broke into the home of seventy-one-year-old widow Mildred Boroski to steal her birthday presents in Pasco County, Florida.\footnote{Grumet, \textit{supra} note 317.} They beat her miniature poodle to death with a crow bar.\footnote{\textit{Id}.} “Then they tied up the 71-year-old woman with telephone cords, raped her and drove her to a grassy field, where they shot her twice in the head with her late husband’s .38-caliber revolver.”\footnote{\textit{Id}.} As a result of the burglary, Ramirez and his friend stole “two guns, a pair of handcuffs, a ring, a cordless phone and about $30, which the teenagers used to play video games the next day.”\footnote{\textit{Id}.}

VI. CONCLUSION

Our living document, the United States Constitution, is a symphony of words that harmonize the collective conscience of our forbearers. This masterpiece is dynamic and evolving in its performance, reflecting the prevailing
wisdom of the day. No one person has the hand of change, but many have fingerprints on the documents used as a basis for rulings to be rendered.

In *Roper*, the legal system of the United States addressed a topic wrought with controversy of a multi-faceted nature. The concept of executing persons for capital crimes they committed as juveniles merited consideration at the highest level, presenting a quandary to the United States Supreme Court that legal, moral, and religious beliefs do not always coincide. When the “hands of change” were counted, the majority ruled by a 5-4 decision that capital punishment of juveniles violates the Eighth Amendment’s ban against “cruel and unusual” punishment.

The decision’s significance goes beyond abolishing the juvenile death penalty; it subjects the Eight Amendment’s “cruel and unusual” punishments clause to interpretation by the Justices based on their own subjective views. In the progeny of case law since *Thompson*, the Court has slowly veered away from the objective national consensus analysis of looking at the states legislative enactments to decide the constitutionality of a particular punishment. Instead, they have created leeway for Justices to instill their own beliefs as to what punishments are “cruel and unusual,” supported by scientific studies that endorse their individual views. As Justice Scalia noted in his dissent, there is nothing in the law that allows the Justices “to supplant the consensus of the American people” with their own personal views.

Many question whether a categorical bright-line rule was appropriate here. With the sad reality that juveniles kill, the questions become: What is the proper punishment for these juvenile murderers? Should our laws assume that no juvenile can act with the same level of culpability as that of an adult and hence the death penalty is not appropriate for all juveniles? They should not. The relationship between chronological age and levels of culpability is tenuous. There is serious doubt over whether one is less culpable at the age of seventeen years and 364 days as compared to the day he or she turns eighteen.

The majority is correct that a line must be drawn. However, the line was drawn correctly in the Court’s decision of *Thompson*, prohibiting the death penalty on those under the age of sixteen. This left the decision—of whether sixteen and seventeen year olds should be executed—to juries based on case-by-case examinations of individual defendants in the states that permitted the juvenile death penalty. This line was drawn correctly because there was a clear national consensus of support.

324. *Id.* at 578–79 (majority opinion).
325. *Id.* at 615 (Scalia, J., dissenting).
The ruling in *Roper* has left many wondering what the role of international opinion serves in our country’s legal system. What did the majority mean by stating that the international opinion provided “confirmation” of its decision? It is difficult to see where international opinion fits into the inquiry of a *national* consensus. If we change this test to an *international* consensus, we may find ourselves on a slippery slope, considering the fact that many of the countries the Court looked to for “confirmation” forbid life imprisonment for juveniles and prohibit the death penalty in all cases.327

If the ruling does not stand the test of time, relief will be delivered by the merits of each case as it progresses through the system. If one day in age can be the difference between facing capital punishment or life imprisonment, the rigidity of this line is arbitrary and bound to produce injustice.