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### Aggravating Youth: Roper v. Simmons and Age Discrimination

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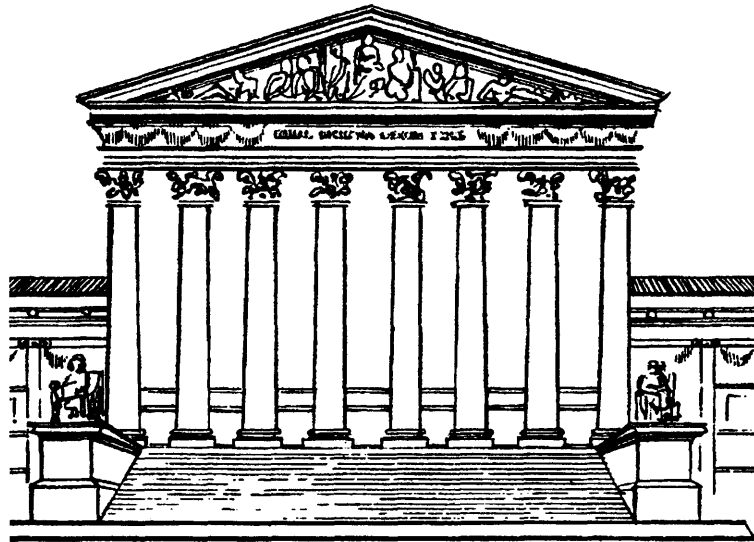
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AGGRAVATING YOUTH: ROPER V SIMMONS  
AND AGE DISCRIMINATION

*Elizabeth F. Emens*

2005  
The Supreme Court Review

THE LAW SCHOOL  
THE UNIVERSITY OF CHICAGO



2005  
The Supreme Court Review

"Judges as persons, or courts as institutions, are entitled to no greater immunity from criticism than other persons or institutions . . . [J]udges must be kept mindful of their limitations and of their ultimate public responsibility by a vigorous stream of criticism expressed with candor however blunt."

—*Felix Frankfurter*

" . . . while it is proper that people should find fault when their judges fail, it is only reasonable that they should recognize the difficulties. . . . Let them be severely brought to book, when they go wrong, but by those who will take the trouble to understand them."

—*Learned Hand*

EDITED BY  
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AGGRAVATING YOUTH: ROPER v  
SIMMONS AND AGE DISCRIMINATION

At the penalty phase of Christopher Simmons's murder trial, the prosecutor argued to the jury that Simmons's youth should be considered aggravating, rather than mitigating:

Let's look at the mitigating circumstances. . . . 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.<sup>1</sup>

The prosecutor's argument is striking. Indeed, when *Roper v Simmons*<sup>2</sup> reached the Supreme Court this Term, his argument was criticized in briefs, at oral argument, in the majority opinion, and in a dissent.<sup>3</sup> These words from the prosecutor played, I will argue,

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<sup>1</sup> Transcript of Record on Appeal (filed Dec 19, 1994) at 1156-57, *State v Simmons*, 944 SW2d 165 (Mo 1997) (en banc) (No 77269) (hereafter "TT").

<sup>2</sup> *Roper v Simmons*, 125 S Ct 1183 (2005).

<sup>3</sup> For example, Brief for Respondent at \*30, 2004 WL 1947812; Brief for NAACP Legal

a crucial role in the Court's decision that the Eighth Amendment prohibits states from executing people for crimes they committed when they were younger than eighteen.<sup>4</sup>

In the majority opinion, Justice Kennedy invokes this aspect of the prosecutor's argument to reply to Missouri's (and Justice O'Connor's) claim that juries should decide the relevance of youth on a case-by-case basis because youth is an inexact proxy for diminished culpability. Kennedy, in response, expresses his concern that juries will not be able to weigh an individual's age properly, and that the risk is thus too great that they will get it wrong, citing among other things the prosecutor's argument that youth should be an aggravating rather than a mitigating factor. He seems worried not only that juries lack the skill required to identify the cases in which youth should be treated as mitigating, but also that they will sometimes weigh youth in exactly the wrong way.

This concern seems surprising in an opinion that declares that the differences between juveniles and adults are so "marked and well understood" that we can draw a categorical rule based on age in the weighty context of the death penalty.<sup>5</sup> But, as Kennedy explains, there are numerous reasons to fear that juries may make mistakes when deciding whether the youth of a particular juvenile offender diminishes his culpability. Moreover, while sentencing someone to death incorrectly is always serious, mistakenly ending a young life may be even more so. Society justifies treating youth differently from adults in many contexts in part on the ground that youth will grow up and enter the majority class; an unwarranted execution of a young offender may undermine that system.

But it's not just the weight of the decision—whether to execute a young offender—or the potential number of errors—an unanswered empirical question—that, in Kennedy's view, requires a rule rather than a standard. Rather, the prosecutor's argument that youth is aggravating, rather than mitigating, highlights a peculiarly unacceptable type of error: the possibility of executing a young offender because a jury erred based on categorical disfavor; that is, because a jury treated a member of this vulnerable group worse

Defense Fund, et al, as Amici Curiae, at 18 n 26, 2004 WL 1636450; Transcript of Oral Argument at \*10-\*11, 2004 WL 2387647; *Simmons*, 125 S Ct at 1189, 1197; id at 1215 (O'Connor, J, dissenting).

<sup>4</sup> *Simmons*, 125 S Ct at 1200.

<sup>5</sup> Id at 1197.

precisely because he is a member of that group. To persecute when we should protect is to commit an error of great magnitude, especially in the domain of capital punishment. And so Kennedy embraces certain age-based stereotypes that mitigate culpability—that youth are more reckless, more susceptible to influence, and less formed in their characters—and uses those stereotypes to justify a prophylactic rule against executing any juveniles.

Read in its best light, Kennedy's opinion thus seems to turn on the insight that while age-based classifications are rational—they are a good proxy for various aspects of behavior—particular judgments based on age are not necessarily rational. To the contrary, our judgments based on age may be distorted, or even inverted, because of wrongheaded thoughts and, especially, feelings. In the context of death penalty sentencing, among others, we think we favor youth, and we think we should favor youth, but in reality we may disfavor youth. Kennedy's reasoning thus suggests that, in at least this context, the law must embrace a categorical rule to *align* how we treat young people under law with how we think we do and should treat them.

Kennedy's analysis of the "national consensus" question might be read to employ a similar logic. He concludes that a majority of states opposes the juvenile death penalty because he counts the states that completely outlaw the death penalty as opposing the juvenile death penalty. Justice Scalia argues in dissent that a state's general position on the death penalty does not bear on the question of whether a special rule should protect juveniles from the death penalty where it exists. Kennedy's contrary conclusion might be understood to rest in part on the very concern that animates his proportionality analysis: For a state to oppose the death penalty for adults but not for juveniles is both plausible and troubling for the same reasons that the prosecutor's argument that youth is aggravating is plausible and troubling. That is, juveniles are a less culpable included group of offenders, so if a state opposes the death penalty generally, it must (that is, it should) oppose it for juveniles. It would be normatively unacceptable, although possible, that negative attitudes toward and fear of juveniles would lead people to think juveniles deserve the death penalty when adults do not. In short, we require rules to align our legal treatment of juveniles with our favorable attitudes toward them.

This tension between the rationality of age-based classifications,

on the one hand, and unacknowledged negative attitudes toward age-based groups, on the other, links *Simmons* to a frequently overlooked aspect of age-discrimination law. In the same month it decided *Simmons*, the Court concluded in *Smith v City of Jackson*<sup>6</sup> that disparate-impact claims are available under the Age Discrimination in Employment Act (ADEA).<sup>7</sup> But *Smith* also seems to suggest that because age is rationally related to many job requirements (i.e., age is often a good proxy for ability), and because age discrimination is not motivated by dislike or intolerance (as opposed to irrational stereotyping), the statute's reasonable factors other than age (RFOA) defense swallows up most disparate-impact claims.<sup>8</sup> *Smith* may be too sanguine, however, about the reasonableness of employment decisions that have an age-related disparate impact: Recent work in social psychology suggests that we dislike older people much more than we think we do.<sup>9</sup>

Thus, the principle underlying Kennedy's proportionality analysis—which also finds its way into his national consensus reasoning—could apply to ADEA jurisprudence: Age is a rational proxy for certain characteristics, but because we often overlook our negative attitudes based on age, we should be wary of the age-based classifications and effects we create. More may be behind our apparently rational calculations in the context of age than we are willing or able to admit. We may think we have neutral or positive attitudes, but negative attitudes and stereotypes may underlie our decisions without our knowledge. Standing by itself, this claim does not demonstrate that *Simmons* was rightly decided. But it does suggest that the decision is undergirded by a coherent and plausible rationale, one that has implications for other debates about the application of antidiscrimination principles.

The following discussion proceeds in five parts. Part I introduces the crime, the precedent, and the opinions in *Simmons*. Part II examines the majority's proportionality analysis, in which the Court concludes that youth's relevance in a given case should not be left to the jury. Part III applies these themes to the dispute between Kennedy and Scalia over how, in evaluating whether a national consensus opposes the juvenile death penalty, to count the states

<sup>6</sup> *Smith v City of Jackson*, 125 S Ct 1536 (2005).

<sup>7</sup> 29 USC §§ 621–34 (2000).

<sup>8</sup> *Smith*, 125 S Ct at 1540.

<sup>9</sup> See notes 216–19 and accompanying text.

that have outlawed the death penalty altogether. Part IV speculates on how the idea of irrational judgments about rational classifications might inform the analysis of cases arising under another prophylactic legal rule based on age, the ADEA. Part V concludes.

## I. THE CASE AND ITS CONTEXT

### A. THE CONTEXT

1. *The crime.* In 1993, when Christopher Simmons was seventeen years old and a junior in high school, he murdered a neighbor, Shirley Crook. He was the apparent ringleader of a plan with two other teens to break into a house, burglarize it, and, according to some of the witnesses at trial, murder the occupants. He supposedly told his friends that they could get away with it because they were juveniles.<sup>10</sup>

At 2 a.m. on Thursday, September 9, 1993, Simmons and his two friends met at the trailer of an older neighbor;<sup>11</sup> one boy

<sup>10</sup> 125 S Ct at 1187 (“Simmons assured his friends they could ‘get away with it’ because they were minors.”); *State ex rel Simmons v Roper*, 112 SW3d 397, 419 (Mo 2003) (Price Jr., J, dissenting) (“Prior to the robbery, petitioner stated to his accomplice that they could commit a robbery and murder and get away with it because they were juveniles.”). The accounts of what Simmons supposedly said in this regard vary. See, e.g., TT at 840 (“They said that they could do it; and [Simmons] said they could do it and not get charged for it because they are juveniles, and nobody would think that juveniles would do it.” (quoting Brian Moomey, see note 11)); id at 99 (stating that Moomey will testify that he overheard Simmons saying to other teens that “nobody will think you guys are capable of this because you are juveniles” (quoting John Applebaum of the Jefferson County Prosecuting Attorney's Office)).

<sup>11</sup> 125 S Ct at 1187. The older neighbor, twenty-nine-year-old Brian Moomey, whom the neighborhood boys called “Thunder Dad,” was an ex-con at whose trailer Simmons and his friends gathered and drank and did drugs. Moomey was a key prosecution witness at Simmons's trial; he came forward to supply evidence against Simmons after he heard that the police wanted to talk with him (Moomey) in connection with the murder. Simmons's brief makes the reader wonder how much influence Moomey had over the teens, and also what role was played by the third boy who abandoned the plan at the trailer—fifteen-year-old John Tessmer, a boy who, unlike Simmons, did have a record of past offenses, who was Moomey's “best friend” and “Number One Thunder Cat” (Moomey's words), and who was the other key prosecution witness, in addition to the police who testified about Simmons's confession. Brief for Respondent at \*2–\*3 (cited in note 3). Simmons's trial counsel testified at the postconviction hearing that the “talk in the neighborhood” was that “Moomey was letting young men drink in his house and that they were doing drugs there and that he would have them commit crimes for him.” Transcript of Record on Appeal (filed July 18, 1996) at 383, *State v Simmons*, 944 SW2d 165 (Mo 1997) (en banc) (No 77269). Simmons's trial counsel also asserted that Simmons had told him that Moomey “was aware of what was going on and had helped plan it.” Id at 433. The jury clearly did not doubt that Simmons committed the murder, and the trial transcript gives one little reason to question that conclusion, but parts of the story and the testimony give one pause about Simmons's motivation to rob and then to kill and his role in planning the events.

apparently abandoned the plan, but the other two proceeded to the Crook house and opened the back door by reaching through an open window. When Shirley Crook, home alone, called out "who's there?" Simmons recognized Crook: He had been in a minor auto accident with her just after he got his license. He thought she recognized him too, and, depending on which source you consult, this moment of recognition either confirmed his resolve to kill her, or inspired him to kill her in the first place.<sup>12</sup> Simmons and his friend duct-taped her mouth and eyes and transported her by van to a nearby river, where they bound her hands and feet with electrical wire, covered her face with a towel, and threw her in the river to drown.<sup>13</sup>

On the afternoon of September 9, Shirley Crook's husband returned from traveling and reported her missing. Her body was found in the river by a fisherman that day. The police picked up Simmons at school the next day; he'd apparently bragged to friends that he'd killed Crook "because the bitch seen my face."<sup>14</sup> In less than two hours, Simmons, in tears, confessed and agreed to perform a reenactment of the crime.<sup>15</sup>

2. *The courts.* Prior to *Simmons*, the minimum age for execution under the Eighth Amendment was sixteen. In 1988, in *Thompson v Oklahoma*,<sup>16</sup> a plurality of the Court had concluded that executing individuals who had committed their crimes before the age of sixteen constituted cruel and unusual punishment under the

<sup>12</sup> 125 S Ct at 1187-88; Brief for Respondent at \*2 (cited in note 3). The prosecutor does not attempt to resolve the question of which account explains Simmons's actions; in his closing statement to the jury at the penalty phase, the prosecutor argued for the death penalty with these words: "Do it because when he broke in Shirley Crook's home, and she woke up, whatever his plans might have been before, something was solidified then, she was going to die. She was going to die because he didn't want to take the responsibility." TT at 1158.

<sup>13</sup> 125 S Ct at 1188.

<sup>14</sup> *Id.* The source for this quotation from Simmons is Brian Moomey (see note 11); TT at 842. Moomey failed to use this "bitch seen my face" expression in his initial four- to five-hour interview with the police—saying only that Simmons reported he had killed her because "she seen my face"—and explaining this omission by saying that the police officers had told him not to swear in front of them. TT at 864-69. As defense counsel drew out at trial, Moomey swore multiple times in his initial interview. TT at 866-67.

<sup>15</sup> Brief for Respondent \*2 (cited in note 3) (noting that, in order to secure Simmons's confession, the police "accused [Simmons] of lying, falsely told him [an accomplice] had confessed, and explained that he might face the death penalty and that it would be in his interest to cooperate").

<sup>16</sup> 487 US 815 (1988) (plurality opinion).

Eighth Amendment.<sup>17</sup> The plurality based its conclusion on, first, the "evolving standards of decency" reasoning, which looks principally to trends in state legislatures, as well as jury verdicts and absolute numbers of executions, and, second, its own view that executing those under the age of sixteen did not further the proper purposes of the death penalty, because young people are not as culpable and are unlikely to be deterred by a potential death sentence.<sup>18</sup> Justice O'Connor concurred in the judgment, concluding that although she thought there was a national consensus on the matter, the evidence was insufficient to rule as such. Therefore, she reasoned, a state legislature that wanted to permit executions of those under sixteen had to make a clear statement to that effect, and Oklahoma's legislature had not done so.<sup>19</sup>

The next year, the Court handed down two related decisions on the same day. In *Stanford v Kentucky*,<sup>20</sup> the Court declined to extend the reasoning in *Thompson* to sixteen- and seventeen-year-olds, holding that no national consensus supported that extension.<sup>21</sup> And in *Penry v Lynaugh*,<sup>22</sup> on similar grounds, the Court held that the Eighth Amendment did not prohibit the execution of offenders who are mentally retarded.<sup>23</sup> Also relevant to our inquiry, the Court nonetheless found Penry's death sentence unconstitutional, because Texas law did not allow the jury to consider his mental retardation as a mitigating factor. The Court famously referred to mental retardation as a "two-edged sword" for Penry: "it may diminish his blameworthiness for his crime even as it indicates that there is a probability that he will be dangerous in the future."<sup>24</sup>

In 2002, the Court partially overruled *Penry* in *Atkins v Virginia*,<sup>25</sup> concluding that the Eighth Amendment prohibits executing mentally retarded defendants. By this time, "standards of decency" had apparently "evol[ed]" sufficiently—as indicated by the

<sup>17</sup> *Id.* at 818, 838.

<sup>18</sup> *Id.* at 821-22, 824-25, 825 n 23.

<sup>19</sup> *Id.* at 848-49, 857-58.

<sup>20</sup> 492 US 361 (1989).

<sup>21</sup> *Id.* at 380.

<sup>22</sup> 492 US 302 (1989).

<sup>23</sup> *Id.* at 340.

<sup>24</sup> *Id.* at 324, 328.

<sup>25</sup> 536 US 304 (2002).



national consensus—to persuade the Court.<sup>26</sup> The Court also determined that in its own judgment, mental retardation sufficiently affected culpability and deterrability to render the imposition of the death penalty cruel and unusual.<sup>27</sup>

Inspired by *Atkins*, the Missouri Supreme Court in 2003 overturned Christopher Simmons's death sentence on the ground that *Atkins* had effectively overruled *Stanford*—because of similar national trends and diminished culpability and deterrability—and that it must therefore be unconstitutional to execute those who committed their crimes when they were under the age of eighteen.<sup>28</sup> The Supreme Court granted certiorari.

#### B. THE SIMMONS OPINIONS

1. “As every parent knows”: *Societal maturation and the special risks of youth*. Kennedy's opinion for the Court comes in two (and a half) parts. First, the trend among states indicates that standards of decency have evolved toward the conclusion that it is cruel and unusual punishment to execute those who committed their crimes before they turned eighteen.<sup>29</sup> Second, youths are different enough from adults to require a rule prohibiting their execution because they cannot be reliably classed among society's worst offenders.<sup>30</sup> As an avowed afternote, the Court adds that international law and norms support its conclusion.<sup>31</sup>

The first part relies mainly on the trend among states, which looks somewhat like the “telling” trend against executing people with mental retardation observed in *Atkins*.<sup>32</sup> As of 2005, thirty states banned the juvenile death penalty, including eighteen that specifically banned the juvenile death penalty and twelve that banned the death penalty altogether; in 2002, at the time of *Atkins*, the breakdown with regard to mental retardation had been precisely the same, including eighteen states expressly banning the

<sup>26</sup> Id at 321.

<sup>27</sup> Id at 320.

<sup>28</sup> *State ex rel Simmons v Roper*, 112 SW3d 397, 399 (Mo 2003) (en banc).

<sup>29</sup> 125 S Ct at 1192–94.

<sup>30</sup> Id at 1194–98.

<sup>31</sup> Id at 1198–1200.

<sup>32</sup> Id at 1193.

death penalty for people with mental retardation and twelve with an overall ban.<sup>33</sup>

The size of the recent shift toward banning was much greater in *Atkins*, however, largely because in 1989 more states already prohibited executing juvenile offenders than prohibited executing people with mental retardation: After 1989, the number of states banning executions of mentally retarded offenders increased from two to eighteen, whereas the number banning the juvenile death penalty increased from thirteen to eighteen.<sup>34</sup> Because the trend is not as strong as in *Atkins*, the Court makes much of the consistent direction of the trend.<sup>35</sup> That is, no state had lowered the age for death eligibility between 1989 and 2005.<sup>36</sup> Quoting the Missouri Supreme Court, the Court notes that it would be “ironic” if the juvenile death penalty was deemed constitutional because its impropriety had been recognized more widely sooner.<sup>37</sup> The Court does not address the fact that some states had enacted laws, where none had previously existed, that permitted execution of those younger than eighteen when they committed their crimes.<sup>38</sup>

The second part of the opinion focuses on three ways that juveniles differ from adults such that “juvenile offenders cannot with reliability be classified as among the worst offenders,”<sup>39</sup> those for whom society's worst punishment is reserved. First, “as every parent knows,” juveniles are comparatively immature, reckless, and irresponsible.<sup>40</sup> Second, juveniles are “more vulnerable and susceptible to negative influences and outside pressures, including peer pressure,” in part because juveniles, as legal minors, have less control over their environments.<sup>41</sup> Third, the character of juveniles

<sup>33</sup> Id at 1192.

<sup>34</sup> Id at 1193; see also note 175.

<sup>35</sup> Id (citing *Atkins*, 536 US at 315 n 18).

<sup>36</sup> Id.

<sup>37</sup> Id at 1193–94 (“In the words of the Missouri Supreme Court: ‘It would be the ultimate in irony if the very fact that the inappropriateness of the death penalty for juveniles was broadly recognized sooner than it was recognized for the mentally retarded were to become a reason to continue the execution of juveniles now that the execution of the mentally retarded has been barred.’” (quoting *State ex rel Simmons v Roper*, 112 SW3d 397, 408 n 10 (Mo 2003) (en banc))).

<sup>38</sup> See 125 S Ct at 1220 (Scalia, J, dissenting).

<sup>39</sup> Id at 1195.

<sup>40</sup> Id (citing these qualities as the reasons why juveniles may not “vot[e], serv[e] on juries, or marry[] without parental consent”).

<sup>41</sup> Id.

is “not as well formed as that of an adult” and their “personality traits” are “more transitory, less fixed.”<sup>42</sup> In addition to quoting its own past language about the nature of youth, the Court cites psychological literature on adolescent development and provides appendices detailing state laws prohibiting juveniles (defined in most cases as those under eighteen) from voting, serving on juries, and marrying without parental consent.<sup>43</sup> The Court concludes that these three differences “render suspect any conclusion that a juvenile falls among the worst offenders,” because a juvenile’s ongoing struggle to define his (or her) identity “means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character.”<sup>44</sup>

These differences indicate that “the penological justifications for the death penalty”—retribution and deterrence—apply to juveniles “with lesser force than to adults.”<sup>45</sup> The Court says that retribution isn’t proportional if “the law’s most severe penalty is imposed on [those] whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity.”<sup>46</sup> And, the Court says, there is a lack of evidence to show that juveniles are deterred by the death penalty.<sup>47</sup> Indeed, the same characteristics that make juveniles less culpable make them less deterrable.<sup>48</sup> For example, juveniles are unlikely to engage in cost-benefit analysis (the Court ignores Simmons’s comment about getting away with it because they are juveniles).<sup>49</sup> The Court nonetheless gestures in the direction of imagining what a young person’s cost-benefit analysis might look like, noting that life imprisonment may be a particularly harsh punishment for a young offender, because more of life lies ahead.<sup>50</sup>

<sup>42</sup> Id.

<sup>43</sup> Id; see notes 121–22 and accompanying text.

<sup>44</sup> Id.

<sup>45</sup> Id at 1196.

<sup>46</sup> Id.

<sup>47</sup> Id.

<sup>48</sup> Id.

<sup>49</sup> Id (“In particular, as the plurality observed in *Thompson*, “[t]he likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent.” (quoting *Thompson v Oklahoma*, 487 US 815, 837 (1988) (plurality opinion))).

<sup>50</sup> Id (arguing that “the punishment of life imprisonment without the possibility of parole is itself a severe sanction, in particular for a young person”).

The Court then entertains, without accepting, the argument that “a rare case might arise in which a juvenile offender has sufficient psychological maturity, and at the same time demonstrates sufficient depravity, to merit a sentence of death.”<sup>51</sup> Missouri argues that this possibility calls for an individualized determination by juries—properly guided to consider aggravating and mitigating circumstances—rather than a “categorical rule.”<sup>52</sup>

In a crucial passage, the Court responds that the risk is too great that a “youthful person” would be put to death “despite insufficient culpability.”<sup>53</sup> This risk apparently exists because, first, the “brutality or cold-blooded nature of any particular crime” could overpower mitigating arguments, even where they should apply, and, second, “a defendant’s youth may even be counted against him.”<sup>54</sup> On this latter point, the Court invokes the prosecutor’s argument in this case that youth is aggravating.<sup>55</sup> While acknowledging that these problems could be corrected by a rule requiring juries to attend to the mitigating force of youth, the Court mysteriously asserts that this would not address the “larger concerns.”<sup>56</sup> The Court then cites the Diagnostic and Statistical Manual’s (DSM-IV-TR) ban on diagnoses of antisocial personality disorders before age eighteen as evidence that even experts cannot reliably pick out the truly rotten individuals among those under age eighteen.<sup>57</sup> Thus, “[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.”<sup>58</sup>

The Court acknowledges that eighteen is not a perfect line; it is merely a proxy.<sup>59</sup> The Court concludes, though, that the logic

<sup>51</sup> Id at 1197.

<sup>52</sup> Id.

<sup>53</sup> Id.

<sup>54</sup> Id.

<sup>55</sup> Id.

<sup>56</sup> Id.

<sup>57</sup> Id; see American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 687, 702–06 (4th ed, text rev 2000) (hereafter “DSM-IV-TR”) (defining diagnostic criteria for antisocial personality disorder as including the following: “There is a pervasive pattern of disregard for and violation of the rights of others occurring since age 15 years, as indicated by three (or more) of the [listed criteria.] The individual is at least age 18 years”).

<sup>58</sup> 125 S Ct at 1197.

<sup>59</sup> Id at 1197–98; see text accompanying note 107.

of *Thompson* extends to those up to age eighteen, the age at which society draws many key distinctions between children and adults.<sup>60</sup>

The Court then reviews two problems with *Stanford*. First, the Court in *Stanford* failed to count states with no death penalty as states against the juvenile death penalty. Second, *Stanford* mistakenly deemed irrelevant the Court's "independent judgment" on proportionality, in defiance of precedent.<sup>61</sup>

Finally, the Court dedicates a lengthy section to showing that the international community supports its conclusion. Most notably, the Court observes that the "United States is the only country in the world that continues to give official sanction to the juvenile death penalty."<sup>62</sup> The Court explains, though, that international sources do not drive the decision, but "confirm[] our own conclusions" about our Constitution.<sup>63</sup>

2. "*Indefensibly arbitrary*": *The lack of consensus and the need for individualized determinations*. In dissent, Justice O'Connor argues that there is not a "genuine national consensus," that the Court does not even purport to find one, and that the Court's decision therefore rests on its own moral-proportionality analysis.<sup>64</sup> Though she agrees that the Constitution evolves in this area and that the Court's own judgment matters, O'Connor disagrees with the Court's independent judgment.<sup>65</sup> Specifically, she objects to the Court's use of a categorical proxy when the jury could decide the relevance of youth on a case-by-case basis: "Adolescents *as a class* are undoubtedly less mature, and therefore less culpable for their misconduct, than adults. But the Court has adduced no evidence impeaching the seemingly reasonable conclusion reached by many state legislatures: that at least *some* 17-year-old murderers

<sup>60</sup> Id at 1198.

<sup>61</sup> Id at 1192.

<sup>62</sup> Id at 1198.

<sup>63</sup> Id at 1198, 1200. Oddly, the Court never addresses the other question on which it granted certiorari: whether the Missouri Supreme Court could treat *Atkins* as overruling *Stanford*. See id at 1229 (Scalia, J, dissenting).

Justice Stevens writes separately, joined by Ginsburg, to highlight the principle that "our understanding of the Constitution does change from time to time," to observe that that principle "has been settled since John Marshall breathed life into its text," and to note that if we followed the original meaning only, then states could execute seven-year-olds. Id at 1205 (Stevens, J, concurring). (More on the last from Scalia, but with less apparent disapproval. See note 82 and accompanying text.)

<sup>64</sup> Id at 1206 (O'Connor, J, dissenting).

<sup>65</sup> Id at 1206-07 (O'Connor, J, dissenting).

are sufficiently mature to deserve the death penalty in an appropriate case."<sup>66</sup> O'Connor focuses on the differences she sees between mental retardation and juvenile delinquency. In addition to the difference in the state trends, she views mental retardation as a perfect proxy for reduced culpability and deterrability, and youth as only an imperfect one.<sup>67</sup> And, she asserts, the Court has provided no evidence that juries are incapable of assessing immaturity or treating youth as mitigating.<sup>68</sup>

O'Connor gives several reasons for rejecting the Court's claim that the differences between juveniles and adults support a categorical ban. First, the fact that juveniles are less culpable or deterrable does not mean that they are not *sufficiently* culpable or deterrable to warrant the death penalty.<sup>69</sup> There is an age that is always too young in cognitive capacities, but that age is not the cusp of adulthood.<sup>70</sup> She invokes specific facts of the case, including Simmons's reported comment that they could get away with the crime because of their youth, to show that a juvenile offender may be more "depraved" than the average murderer and may have the capacity for at least an informal cost-benefit analysis.<sup>71</sup>

Second, relying on age is "indefensibly arbitrary" because there is so much variation on both sides of the line.<sup>72</sup> In contrast, the category of mental retardation is "*defined* by precisely the characteristics which render death an excessive punishment."<sup>73</sup> Moreover, the Court in *Atkins* could and did "le[ave] to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences."<sup>74</sup> The failure of the categorical rule, on this account, makes youth a perfect case for the jury.

O'Connor concedes that the prosecutor's attempt to use Simmons's youth as an aggravating circumstance is "troubling," but

<sup>66</sup> Id at 1206 (O'Connor, J, dissenting).

<sup>67</sup> Id at 1214 (O'Connor, J, dissenting).

<sup>68</sup> Id at 1215 (O'Connor, J, dissenting).

<sup>69</sup> Id at 1212-13 (O'Connor, J, dissenting).

<sup>70</sup> Id at 1213 (O'Connor, J, dissenting).

<sup>71</sup> Id (O'Connor, J, dissenting).

<sup>72</sup> Id at 1214 (O'Connor, J, dissenting).

<sup>73</sup> Id (O'Connor, J, dissenting).

<sup>74</sup> Id at 1209 (O'Connor, J, dissenting) (quoting *Atkins v Virginia*, 536 US 304, 317 (2002) (internal quotation marks omitted)).

notes that, first, the prosecutor's statement wasn't "challenged with specificity in the lower courts and is not directly at issue here"; second, the Court presents no evidence for its claim that juries cannot weigh evidence of youth properly; and, third, the Court "fails to explain why" youth is different from other qualitative capital sentencing factors.<sup>75</sup> Ultimately, she thinks youth is mitigating, and as a legislator she would be inclined to set the age at eighteen, but thinks that inclination does not justify a categorical ban under the Constitution.<sup>76</sup>

3. "*Subjective views . . . and like minded foreigners*": *To the contrary*. Justice Scalia, joined in dissent by Rehnquist and Thomas, is predictably unimpressed by the argument that the Constitution's requirements can evolve within fifteen years, and also by the notion that the Court may rely on its own judgment rather than waiting for a firmer national consensus: "Because I do not believe that the meaning of our Eighth Amendment, any more than the meaning of other provisions of our Constitution, should be determined by the subjective views of five Members of this Court and like-minded foreigners, I dissent."<sup>77</sup>

Scalia makes three main points: (1) there is no national consensus;<sup>78</sup> (2) juvenile offenders sometimes warrant the death penalty;<sup>79</sup> and (3) international law and norms should not matter.<sup>80</sup>

First, he begins his discussion of the national-consensus issue by acknowledging, but disparaging as mistaken, the modern Eighth Amendment jurisprudence of looking to evolving standards.<sup>81</sup> (He drops a footnote to mention that the Court skipped the first step of the proper modern jurisprudence—i.e., whether this was a mode of punishment considered cruel and unusual at the nation's founding—and observes that at common law a seven-

<sup>75</sup> Id at 1215 (O'Connor, J, dissenting).

<sup>76</sup> Id at 1217. O'Connor, like Scalia after her, actually addresses the other question for certiorari, and devotes a short section to her indignation at Missouri's having taken upon itself to overrule *Stanford*. Id at 1209–10. Unlike Scalia, she agrees with the Court that international law can be relevant, though it cannot play a confirmatory role for her here because she doesn't think there's a national consensus or a convincing moral-proportionality argument. Id at 1215–16.

<sup>77</sup> Id at 1217 (Scalia, J, dissenting).

<sup>78</sup> Id at 1217–21 (Scalia, J, dissenting).

<sup>79</sup> Id at 1221–25 (Scalia, J, dissenting).

<sup>80</sup> Id at 1225–29 (Scalia, J, dissenting).

<sup>81</sup> Id at 1217 (Scalia, J, dissenting).

year-old could be executed, and there was a rebuttable presumption of incapacity to commit a capital or other felony until age fourteen.<sup>82</sup>) Then he contests the evidence of an adequate consensus here, highlighting (with O'Connor) that a few states that had no age limit before *Stanford* expressly adopted sixteen as their age limit since that case, and that Florida voters changed their constitution to override their court's decision that executing juvenile offenders violated that constitution.<sup>83</sup> He objects not only to the specific numbers cited by the Court, but also to treating states that lack the death penalty altogether as if they also must think an exception should be made for juveniles where the death penalty exists.<sup>84</sup>

In Scalia's view, a useful factor might instead be those states' laws about treating juveniles as adults for noncapital crimes: All those states without the death penalty at all (but for D.C. on life imprisonment) permit juveniles to be tried as adults. Indeed, some states actually require it for certain crimes. Thus, Scalia argues, these states do not believe that juveniles should be exempted from regular laws, or that they cannot be culpable in the way that adults can.<sup>85</sup> In general, since attitudes to the death penalty fluctuate over time, Scalia perceives a real harm from the Court's fixing in place one moment's view.<sup>86</sup>

Second, Scalia interprets the Court as implicitly saying that no juvenile could ever be culpable and deterrable enough to deserve the death penalty.<sup>87</sup> He disparages both the Court's reliance on its own view and the view itself, noting that the data on juvenile capacity and development are contradictory (and weren't put to the test of an adversarial process), and so evaluating these data is a task for legislatures, not courts.<sup>88</sup> He notes that in the context of abortion, psychological data about the cognitive maturity of juveniles have been offered to the Court as evidence that juveniles

<sup>82</sup> Id at 1218 n 1 (Scalia, J, dissenting).

<sup>83</sup> Id at 1220, 1220 n 6 (Scalia, J, dissenting); id at 1211 (O'Connor, J, dissenting).

<sup>84</sup> Id at 1218–19 (Scalia, J, dissenting).

<sup>85</sup> Id at 1219 (Scalia, J, dissenting).

<sup>86</sup> Id at 1220 (Scalia, J, dissenting).

<sup>87</sup> Id at 1221 (Scalia, J, dissenting).

<sup>88</sup> Id at 1222–23 (Scalia, J, dissenting).

should be treated like adults.<sup>89</sup> "In other words, all the Court has done today, to borrow from another context, is to look over the heads of the crowd and pick out its friends."<sup>90</sup> Rejecting the analogy to marriage, jury service, or abortion, Scalia asserts that decisions such as these are surely more complicated than the decision not to take a human life.<sup>91</sup> And he details the facts of this case and one of the terrible rape/murders described in Alabama's amicus brief to make the point that young people clearly can do terrible things.<sup>92</sup>

No constitutional rule, he thus concludes, should prevent "legislatures and juries from treating exceptional cases in an exceptional way—by determining that some murders are not just the acts of happy-go-lucky teenagers, but heinous crimes deserving of death."<sup>93</sup> Like O'Connor, Scalia is concerned about the Court's distrust of juries and ponders the slippery slope: Why, for instance, should juries be any better at properly considering the relevance of child abuse as a mitigating factor?<sup>94</sup> In addition, he finds no reason to think that no juveniles are susceptible to deterrence, and thus the Court's argument here must again depend on some mistaken absolute rule. Also like O'Connor, he cites the facts of this case to show that some youths do consider deterrence-like factors, and notes that the jury in this case may have considered Simmons's calculation that he could get away with murder relevant to its decision to impose the death penalty.<sup>95</sup>

Third, he believes that the Court must have taken "the so-called international community" into account in its decision, or the Court wouldn't have mentioned it at all.<sup>96</sup> He cites the United States's express reservation from the International Covenant on Civil and Political Rights as evidence that either the United States hasn't reached a national consensus, or it has reached the opposite

<sup>89</sup> Id (Scalia, J, dissenting) (citing Brief for American Psychological Association as Amici Curiae, *Hodgson v Minnesota*, 497 US 417 (1990) (Nos 88-805, 88-1125, 88-1309), 1989 WL 1127529).

<sup>90</sup> Id at 1223 (Scalia, J, dissenting).

<sup>91</sup> Id at 1224 (Scalia, J, dissenting).

<sup>92</sup> Id at 1223-24 (Scalia, J, dissenting) (citing Brief for Alabama, et al, as Amici Curiae, at 9-10, 2004 WL 865268).

<sup>93</sup> Id at 1224 (Scalia, J, dissenting).

<sup>94</sup> Id at 1225 (Scalia, J, dissenting).

<sup>95</sup> Id (Scalia, J, dissenting).

<sup>96</sup> Id at 1225, 1229 (Scalia, J, dissenting).

consensus as the international community.<sup>97</sup> He also criticizes the Court's apparent presumption that other countries, even horrible dictatorships, really behave as they say.<sup>98</sup> Here again he invokes the slippery slope, asking whether we must also adopt other international norms. Should life imprisonment without parole not be permitted for juveniles? Should there be less separation of church and state?<sup>99</sup>

## II. "SEVENTEEN YEARS OLD. ISN'T THAT SCARY?": THE PROPORTIONALITY ANALYSIS

The crux of the Court's decision must be its proportionality analysis, in particular, the diminished culpability discussion. Standing by itself, the less-than-"telling" trend among states cannot easily support the Court's conclusion. Even though Kennedy resolves the Denominator Dispute in favor of counting anti-death-penalty states as anti-juvenile-death-penalty (of which more later), the trend is hard to characterize as proving a "genuine national consensus."<sup>100</sup> Hence the Court's decision cannot plausibly turn on this part of the analysis. And, rightly or wrongly, the assertion that the death penalty could not possibly deter sixteen- and seventeen-year-olds falls a bit flat in a case in which the defendant reportedly urged his friends to commit murder by telling them they could get away with it because they were juveniles.<sup>101</sup> Finally, while international and comparative law may have played a role in the Court's assessment of "evolving standards of decency that mark the progress of a maturing society,"<sup>102</sup> that role was most plausibly to bolster rather than to supplant the Court's "own judgment."<sup>103</sup>

<sup>97</sup> Id at 1225-26 (Scalia, J, dissenting).

<sup>98</sup> Id at 1226 (Scalia, J, dissenting).

<sup>99</sup> Id at 1226-27. Scalia also notes his frustration that the Court did not admonish Missouri for purporting to overrule *Stanford*. Presumably with more sarcasm than sympathy, he concludes, however, that the Missouri Supreme Court's decision was somewhat understandable given that the Court's jurisprudence in this area makes it no longer the expert on the Constitution. Id at 1229.

<sup>100</sup> Id at 1206 (O'Connor, J, dissenting) ("Although the Court finds support for its decision in the fact that a majority of the States now disallow capital punishment of 17-year-old offenders, it refrains from asserting that its holding is compelled by a genuine national consensus.").

<sup>101</sup> See note 10.

<sup>102</sup> *Trop v Dulles*, 356 US 86, 100-01 (1958) (plurality opinion).

<sup>103</sup> *Roper v Simmons*, 125 S Ct at 1191. The Court's recent invocations of international and comparative law have received a great deal of attention. See, e.g., Sarah H. Cleveland,

## A. AN ABSOLUTE DIFFERENCE?

While the dissenters agree that the crux of Kennedy's opinion is the Court's own proportionality analysis, they overread that opinion, disregarding both its opacity and its subtlety. Both O'Connor and Scalia seem to read the majority as concluding that *all* juveniles are insufficiently culpable to merit the death penalty. O'Connor writes: "[T]he rule decreed by the Court rests, ultimately, on its independent moral judgment that death is a disproportionately severe punishment for any 17-year-old offender."<sup>104</sup> Similarly, Scalia observes: "Of course, the real force driving today's decision is not the actions of four state legislatures, but the Court's 'own judgment' that murderers younger than 18 can never be as morally culpable as older counterparts."<sup>105</sup>

To be sure, this reading of the Court's opinion is not without foundation. The opinion is evasive on whether juveniles are categorically different from adults and thus universally less culpable. The best support for the dissenters' reading is this observation of Kennedy's: "Certainly it can be argued, although we by no means concede the point, that a rare case might arise in which a juvenile offender has sufficient psychological maturity, and at the same time

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*Our International Constitution*, 31 Yale J Int'l L 1 (2005) (examining the recent controversy over the Court's use of international law in light of an extensive analysis of the Court's long-standing practice of invoking international law). Though not a focus of my article, a few words follow on the subject. The phrase "*evolving* standards of decency that mark the progress of a *maturing* society" seems to embrace a kind of Whiggish progress narrative in which we are becoming ever more decent over time. And while the question of which way progress lies seems indeterminate, discussions of the juvenile death penalty often seem to assume we know what progress looks like. Rather tellingly, the brief on behalf of Missouri—whose task is of course to convince the Court that evolving standards of decency do not preclude the juvenile death penalty—asserts that we do not "yet" have a national consensus on this point. Brief for Petitioner at \*21-\*22, *Roper v Simmons*, 125 S Ct 1183 (2005) (No 03-633), 2004 WL 903158; see notes 197-98 and accompanying text (quoting and discussing the relevant passage). The doctrinal metaphors of that progress narrative—evolution and maturation—may help to explain why international standards might seem relevant to the determination of our national standards of decency. Constructivist work by historians of age and of science notwithstanding, see notes 168-69 and accompanying text, we tend to think of evolution and maturation as natural processes. These metaphors therefore naturalize the progress narrative, helping to remove it from the realm of cultural difference and specificity, into a realm of inevitable and universal progress or growing up. Under this account, the "progress" of other nations toward a near-consensus on the juvenile death penalty must help to demonstrate, or to confirm (to take Kennedy at his word), that the Court's own judgment is right, that the states that have moved in this direction are right, and that the states that haven't outlawed the juvenile death penalty just haven't quite gotten there *yet* and need to be nudged along.

<sup>104</sup> 125 S Ct at 1206 (O'Connor, J, dissenting).

<sup>105</sup> Id at 1221 (Scalia, J, dissenting) (internal quotation marks omitted).

demonstrates sufficient depravity, to merit a sentence of death."<sup>106</sup> Kennedy refuses to concede that an individual juvenile might deserve the death penalty, but this is not an argument against the proposition.

Moreover, Kennedy later seems to admit the point:

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. For the reasons we have discussed, however, a line must be drawn.<sup>107</sup>

Kennedy here seems to acknowledge that youth is an imperfect proxy for diminished culpability, suggesting that his earlier comment may simply reflect an unwillingness to concede expressly a quasi-empirical point that makes his conclusion harder to defend.

## B. OF STEREOTYPES AND INDIVIDUALIZED ASSESSMENTS

Kennedy's opinion consists of a batch of generalizations—of stereotypes, in the pejorative language of antidiscrimination law—about juveniles. O'Connor's argument, perhaps unsurprisingly in light of her particularistic approach to constitutional law, instead emphasizes the need for case-by-case assessment.<sup>108</sup> Because youth is an imperfect proxy for diminished culpability, she reasons, the jury should determine in each case whether a particular individual's age mitigates his culpability. Unlike, for example, voting, where the alternatives to a blanket age-based rule would be costly and possibly invidious, death-penalty sentencing determinations always already demand individualized inquiries.<sup>109</sup> Declining the proxy in favor of an inquiry into the thing itself should therefore create little additional cost and no new harms in criminal sentencing. At first glance, then, O'Connor reasonably argues that the question of diminished culpability on account of youth should be answered by juries in individual cases.

<sup>106</sup> Id at 1197.

<sup>107</sup> Id at 1197-98.

<sup>108</sup> Cf., e.g., *Gratz v Bollinger*, 539 US 244, 280 (2003) (O'Connor, J, concurring); *Grutter v Bollinger*, 539 US 306, 335-37 (2003) (O'Connor, J).

<sup>109</sup> 125 S Ct at 1216.

Kennedy's generalizations about youth have also been criticized by a surprising source: proponents of youth liberation.<sup>110</sup> Advocates of children's rights split into two main camps: protectionists and liberationists.<sup>111</sup> Protectionists emphasize the special vulnerability of minors in order to argue for a solicitous state; liberationists, who trace their roots to mid-twentieth-century civil rights movements centered upon race and sex, seek autonomy and self-determination for young people.<sup>112</sup> Though at times adopting more familiar terms like *ageism* and *age discrimination*, which tend to evoke the struggles of older people, youth libbers have also coined more colorful terms like *ephebiphobia*—fear of youth—and *adulthood* or *adulthood*.<sup>113</sup> Though their normative goals are unlikely to capture the imagination of many adults,<sup>114</sup> youth liber-

<sup>110</sup> See, e.g., Mike Males, *Statistical Bigotry*, available at <http://www.youthtoday.org/youthtoday/Apr05/males.html> (Apr 5, 2005); Alex Koroknay-Palicz, *Supreme Court Strikes Down Juvenile Death Penalty*, available at [http://www.oneandfour.org/archives/youth\\_rights/](http://www.oneandfour.org/archives/youth_rights/) (Mar 1, 2005); id (posted comments).

<sup>111</sup> Rosalind Ekman Ladd, *Introduction*, in Rosalind Ekman Ladd, ed, *Children's Rights Re-visioned: Philosophical Readings* 1, 2 (1996).

<sup>112</sup> See, e.g., id; Martha Minow, *Rights for the Next Generation: A Feminist Approach to Children's Rights*, in *Children's Rights Re-visioned* at 42, 48 (cited in note 111).

<sup>113</sup> For example, National Youth Rights Association, *Ephebiphobia*, in The Freechild Project's Survey of North American Youth Rights, available at <http://www.freechild.org/SNAYR/Ephebiphobia.htm>. ("Ephebiphobia is defined as the fear of youth. This fear is generally based in negative stereotypes of youth, and is perpetuated by popular media (news, tv, movies) around the world. Ephebiphobia often leads to Adulthood, at its worst perpetuating the alienation of young people from society."); Mike Males, *The New Demons: Ordinary Teens*, LA Times (Apr 21, 2002) ("Ephebiphobia—extreme fear of youth—is a full-blown media panic. Images of 'ordinary' teenagers besieging grown-up havens are everywhere. . . . Today's ephebiphobia is the latest installment of a history of bogus moral panics targeting unpopular subgroups to obscure an unsettling reality: Our worst social crisis is middle-Americans' own misdirected fear."); Brian A. Dominick, *Revolution Kid Style*, in *Liberating Youth* (2d ed 1997) (with Sara Zia), available at <http://www.zmag.org/0009.htm> ("[Y]oung people must learn that adults are not what is to be fought. Instead, the ideological construct that is adulthood must be contended with. . . . For the youth liberation movement, adulthood is the chief adversary. Its agents, we must remember, are not only adults but also other young people who have internalized notions of the adult/child dichotomy and thus perpetuate disruption of class consciousness. . . . How often do we see kids who feel worthless because they are kids? And who abuse those kids who do not feel worthless as such? If we did not oppress ourselves so efficiently, we would be able to rise up and fight in unity. But alas, we cannot, because we are too busy incorporating ageism into our daily lives.").

<sup>114</sup> See, e.g., John Holt, *Escape from Childhood* 18–19 (1974) (proposing that "the rights, privileges, duties, and responsibilities of adult citizens be made available to any young person, of whatever age, who wants to make use of them" and expressly "not say[ing] that these rights and duties should be tied into one package, that if a young person wants to assume any of them he must assume them all. He should be able to pick and choose . . ."); John Harris, *The Political Status of Children*, in Keith Graham, ed, *Contemporary Political Philosophy: Radical Studies* 35, 49–51 (1982) (suggesting that we should move toward granting children "full political status"

ation arguments—whether academic philosophy or weblog posts—make some insightful points about the status of young people and draw intriguing parallels to subordination based on other traits. No less than Justice O'Connor, liberationists oppose generalizations about youth and plead for individualized judgments.

A rallying cry of this work is that stereotyping about youth artificially distinguishes individuals based on age and hinders the development and autonomy of young people.<sup>115</sup> Some youth liberation writing takes the point a step further, arguing that age-based classifications limit young people *and* adults, by pressing conformity and lifelessness on adults in the name of being "grown up."<sup>116</sup> Reminiscent of radical strands of feminist and queer politics, this form of youth liberation argument rallies around youthfulness, which it attempts to denaturalize, rather than around chronologically young age.<sup>117</sup>

But the central youth liberation critique focuses on the subordination of young people by adults, who control and stereotype them, in part through overbroad generalizations. In the words of a youth liberation classic, "By now I have come to feel that the fact of being a 'child,' of being wholly subservient and dependent,

from the age of ten); Dominick (cited in note 113) (arguing for youth liberation as a means to egalitarian anarchy); see also Judith Hughes, *The Philosopher's Child*, in *Children's Rights Re-visioned* at 15, 20–22 (cited in note 111) (noting that Holt and Harris do not adequately address the practical challenges of their proposals).

<sup>115</sup> See, e.g., Holt at 25–26 (cited in note 114) (describing "the institution of childhood" as "a Great Divide in human life" that has "made us think that the people on opposite sides of this divide, the Children and the Adults, are very different. Thus we act as if the differences between any sixteen-year-old and any twenty-two-year-old were far greater and more important than the differences between someone aged two and someone aged sixteen, or between someone aged twenty-two and someone aged seventy. . . . In short, by the institution of childhood I mean all those attitudes and feelings, and also customs and laws, that . . . make it difficult or impossible for young people to make contact with the larger society around them, and, even more, to play any kind of active, responsible, useful part in it . . .").

<sup>116</sup> See, e.g., Brian A. Dominick and Sara Zia, *Young and Oppressed*, in *Liberating Youth* (Behind Enemy Lines Publications, 1996), available at <http://www.zmag.org/0009.htm> ("Adults are expected to act 'grown up.' As their youth has been all but entirely eradicated, this is not a very high expectation. Being 'grown up' means discarding all curiosity, creativity and sense of adventure.").

<sup>117</sup> Dominick and Zia (cited in note 116) ("*Youth* is not necessarily possessed only by those who are young in age. It is a state of mind which can be attained by anyone, was once possessed by everyone, but is rarely present in anyone beyond adolescence."); see also Brian A. Dominick, *Introduction*, in *Liberating Youth* (cited in note 113) (explaining, in a new introduction to the pamphlet containing the Dominick and Zia article, that the article was originally written when the authors were seventeen and twenty, and that although the authors are now twenty and twenty-three, and "getting older all the time, . . . we both attest to feeling youthful, which is what counts. . . .").

of being seen by older people as a mixture of expensive nuisance, slave, and super-pet, does most young people more harm than good."<sup>118</sup> It is in this vein that youth libbers such as Alex Koroknay-Palicz criticize Kennedy's opinion in *Simmons* for "the argument that youth are mentally deficient and cannot be compared to adults."<sup>119</sup> More dramatically, Mike Males accuses Kennedy of "endors[ing] ugly, long-debunked 'biodeterminism' prejudices against adolescents that menace the fundamental rights of young people."<sup>120</sup>

#### C. AGE-BASED DISCRIMINATION? SIMMONS AS A PROPHYLACTIC RULE

The youth libbers' criticism, like O'Connor's, fails to recognize the curious antidiscrimination rationale that underlies Kennedy's reasoning, a rationale that comes in several steps. First, Kennedy is indeed saying that age-based classifications are rational, that is, they track certain traits relevant to culpability. On Kennedy's account, juveniles as a class are less responsible and more reckless, more susceptible to influence,<sup>121</sup> and less formed in their characters. Kennedy's account of how these characteristics of juveniles mitigate their culpability is skeletal, but the article from which Kennedy apparently draws this tripartite structure pairs each ju-

<sup>118</sup> Holt at 18 (cited in note 114).

<sup>119</sup> Koroknay-Palicz (cited in note 110); see also *id.* (criticizing Kennedy's first point about juveniles as reckless as follows: "This argument enshrined in a SCOTUS decision is a dangerous foe of any possible judicial progress for youth rights. I dispute the validity of the scientific evidence cited, and am bothered by the casual 'as any parent knows' language. No doubt Justice Kennedy draws upon the long standing prec[e]dents of 'as every husband knows' and 'as every white person knows' to build this particular case against youth. . . .").

<sup>120</sup> Males, *Statistical Bigotry* (cited in note 110).

<sup>121</sup> Interestingly, this point brings together two quite different contributing factors to vulnerability: juveniles' being easily influenced because they are constrained by their environment and lack of societal autonomy, and their being so influenced because of the impressionability of this developmental stage. The Court quotes a sentence from Laurence Steinberg and Elizabeth Scott on this point—" [A]s legal minors, [juveniles] lack the freedom that adults have to extricate themselves from a criminogenic setting" (see note 122, at 1014)—for which Steinberg and Scott in turn cite Jeffrey Fagan, *Contexts of Choice by Adolescents in Criminal Events*, in Thomas Grisso and Robert G. Schwartz, eds, *Youth on Trial: A Developmental Perspective on Juvenile Justice* 371 (2000). 125 S Ct at 1195. Rather than discussing the constraining role of law, however, Fagan may best be read to be discussing the ways that the real threat of violence for "adolescents in dangerous, potentially lethal contexts" may constrain choices by making violence rational. Fagan at 389. Regardless of source, Koroknay-Palicz notes with some optimism the Court's seeming reference to the coercive circumstances of law as a youth rights argument. See Koroknay-Palicz (cited in note 110).

venile trait with traditional bases for mitigation: (1) diminished capacity (paired with lesser decision-making abilities); (2) duress, provocation, or coercion (greater vulnerability to coercive circumstances); and (3) the lack of bad character (juveniles' unformed character).<sup>122</sup>

Second, Kennedy asserts that, despite being "marked and well understood," these differences between juveniles and adults cannot be left to juries to discern and take into account.<sup>123</sup> This objection lies at the heart of his opinion. O'Connor responds that Kennedy does not sufficiently explain why juries cannot be trusted with these decisions.<sup>124</sup> But Kennedy's reasoning supplies an answer, one both fascinating and subtle.

Kennedy suggests that juries are too likely to get it wrong, for reasons similar to those that prompt prophylactic antidiscrimination rules in other contexts. His answer to O'Connor's question—Why not let juries make individualized determinations about the mitigating effect of age?—is more illustrative than deductive, and requires some elaboration. Kennedy presents two reasons why the risk is too great that juries will fail properly to treat youth as mitigating: one more cognitive, and one more emotional, though the distinction is of course inexact. (This distinction might be analogized to the distinction in social psychology between stereotypes and attitudes.<sup>125</sup>) In other words, Kennedy is concerned that jurors will err because identifying accurately the cases in which youth mitigates an individual's culpability is such a difficult cognitive task. He also fears that jurors' emotions may prevent them from properly exercising their rational capacities and at times cause them to disfavor those whom they should favor.

The cognitive reason is embedded in Kennedy's discussion of antisocial personality disorder, which, according to the DSM-IV-

<sup>122</sup> Laurence Steinberg and Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 *Am Psychologist* 1009, 1016 (2003); see 125 S Ct at 1195–97.

<sup>123</sup> 125 S Ct at 1197 (noting "[a]n unacceptable likelihood" that the jury would err).

<sup>124</sup> *Id.* at 1212 (O'Connor, J, concurring) ("[T]he Court adduces no evidence whatsoever in support of its sweeping conclusion.").

<sup>125</sup> For example, Becca R. Levy and Mahzarin R. Banaji, *Implicit Ageism*, in Todd D. Nelson, ed, *Ageism: Stereotyping and Prejudice Against Older Persons* 49, 51 (MIT Press, 2002) (distinguishing, in a discussion of implicit attitudes toward old age, "implicit age stereotypes (also called automatic or unconscious stereotypes)" from "implicit age attitudes (also called automatic or unconscious prejudice)").



TR, psychiatrists may not diagnose in those under age eighteen.<sup>126</sup> The reason, Kennedy observes, is that it is too difficult to figure out which young people are bad to the core and which are still changing and could improve. In Kennedy's words, "It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption."<sup>127</sup>

The meaning here is not entirely clear, but Kennedy seems to suggest two overlapping possibilities: (1) it is hard to tell which young people will not be bad forever because they will improve as they grow older; and (2) it is hard to tell which young people will not be bad forever because their youth itself causes them to commit bad acts. I will return to these points shortly, but for now it is worth noting that Kennedy's observation seems to implicate both ideas. The key point here is that if experts do not have the ability to determine accurately whether a juvenile offender is among the worst of the worst, then surely juries will not be able to draw the distinctions O'Connor wants them to make.

This explanation seems unsatisfying, though, in light of Kennedy's earlier assertion that the characteristics that mitigate youths' culpability are "marked and well understood"; if this is so, why not trust juries to err on the side of mitigating? This question brings me to Kennedy's other and more fundamental reason for rejecting O'Connor's individualized approach.

Features of juvenile death penalty cases in general, and this case in particular, Kennedy reasons, suggest that jurors' feelings about the crime and the criminal may render them incapable of properly making these individualized determinations of the mitigating force of age. This argument comes in two parts. First, the vicious nature of the crimes that render someone eligible for the death penalty may cause jurors to underestimate the mitigating force of youth.<sup>128</sup> Kennedy may be thinking of his own reaction to the Alabama amicus brief, which describes in excruciating detail several hor-

<sup>126</sup> See note 57 and accompanying text.

<sup>127</sup> 125 S Ct at 1197 (citing DSM-IV-TR at 701-06 (cited in note 57)); Steinberg and Scott at 1014-16 (cited in note 122).

<sup>128</sup> 125 S Ct at 1197 ("An 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.").

rendous crimes committed by juveniles, and which he described at oral argument as "chilling."<sup>129</sup> But this fails to explain why juries would be any worse at making determinations of the mitigating force of *youth* than of any other mitigating factor in heinous death penalty cases. Perhaps Kennedy thinks that it is particularly difficult for juries to see the perpetrator of heinous acts as *young*, because, for instance, juries expect youth to be a time of innocence.<sup>130</sup> Although this might distinguish youth from other mitigating factors that juries must consider, and thus may respond to Scalia's and O'Connor's criticism, Kennedy does not directly suggest that this is his reasoning. More is needed, and this brings us to a crucial moment.

Kennedy tells us that juries may consider youth as the opposite of mitigating: as aggravating. "In some cases a defendant's youth may even be counted against him. In this very case, . . . the prosecutor argued Simmons' youth was aggravating rather than mitigating."<sup>131</sup> As noted earlier, at the penalty phase, the prosecutor argued,<sup>132</sup>

Let's look at the mitigating circumstances. . . . 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.<sup>133</sup>

This argument was not unique to *Simmons*; an article cited in Simmons's brief catalogues similar prosecutorial rhetoric in trials in other jurisdictions.<sup>134</sup>

<sup>129</sup> Oral Argument at \*33 (cited in note 3) ("Well, there were a number—a number of cases in the Alabama amicus brief, which is chilling reading—and I wish that all the people that sign on to the amicus briefs had at least read that before they sign on to them—indicates that often the 17-year-old is the ringleader." (quoting Kennedy, J)).

<sup>130</sup> A prosecutorial argument from another case, the trial of Scott Hain, seems to rely on this logic. See text accompanying note 166.

<sup>131</sup> 125 S Ct at 1197.

<sup>132</sup> At oral argument Scalia proposed that these lines did not amount to an argument that youth was aggravating, only that it was not mitigating; he criticized the Missouri solicitor for "giv[ing] that one away." Oral Argument at \*10-\*11 (cited in note 3). But Kennedy at oral argument and in the opinion, as well as the others who spoke on the matter at oral argument, clearly reads this as a suggestion that youth is aggravating, and prosecutors in other jurisdictions have made the point even more plainly. See, e.g., Ashley Dobbs, *The Use of Youth as an Aggravating Factor in Death Penalty Cases Involving Minors*, 10 *Juvenile Justice Update* (June/July 2004), at 1, 15; note 138 and accompanying text.

<sup>133</sup> TT at 1156-57.

<sup>134</sup> Dobbs at 15 (cited in note 132) (cataloguing seven other such instances, the trial transcripts of which are quoted below); Brief for Respondent at \*30 (cited in note 3).

Why would prosecutors think—and why would Kennedy agree—that this argument could persuade jurors? And so much so that even a rule requiring juries to consider youth as mitigating would not address Kennedy’s “larger concerns”?<sup>135</sup> Something in this argument extends beyond its articulation by any particular prosecutor. That is, the argument has force because its underlying logic already exists in the public consciousness and therefore resonates with jurors; it is available to jurors whether a prosecutor argues it or not. And something in it threatens to derail a juror’s impartial and appropriate *individualized* consideration of youth in the death penalty context.

One might think the prosecutor means that youth is scary because the juvenile offender will be alive longer and therefore have more time to commit future crimes, even if only in prison. This sort of argument—that youth allows more time for future dangerousness—seems to drive the youth-as-aggravating argument made by a Texas prosecutor in another recent juvenile death penalty case: “Just shows he’s got that much longer to be bad and prey on others who are weak, who are helpless, who are alone.”<sup>136</sup> Relatedly, prosecutors may present young offenders as especially dangerous by implying that they will be even larger, stronger, and scarier in the future. For example, another Texas prosecutor argued, “He’s got a[n] onset of violence at 17 years of age. He’s just now going into the violent period. You want to talk about a future forecast of dangerousness? What is the highest risk—what is the highest risk in terms of a time period? Where is it? 17 to 26. . . . What do you think we’ve got to look forward to in the next eight years?”<sup>137</sup> Another prosecutor, after reciting the horrific things done in prison by a defendant who was seventeen at the time of his crime, said, “And they want to tell you that because of his age that’s mitigating? Ladies and gentlemen of the jury, if he’s this mean at age 18, he’s going to be something in a couple of years.

<sup>135</sup> 125 S Ct at 1197.

<sup>136</sup> Closing argument transcript at 32–92, *Guillen v State*, No 73,491 (Tex Crim App 2003) (quoting Mr. Barnes); see also Dobbs at 15 (cited in note 132) (noting the name and geographic location of the prosecutor).

<sup>137</sup> Closing argument transcript at 931–32, *Beazley v State*, No 72,101 (Tex Crim App 1997) (quoting Jack Skeen, Jr., Smith County District Attorney); see also Dobbs at 15 (cited in note 132) (reporting the name of the prosecutor and the fact that Napoleon Beazley was executed on May 28, 2002).

That’s not mitigating at all. If[] anything it’s aggravating.”<sup>138</sup>

This idea of future dangerousness might be present in Simmons’s case, as the court below observed.<sup>139</sup> But the prosecutor’s invitation to the jury to “think about age” and his comment, “Seventeen years old. Isn’t that scary?” seem not only to suggest prediction, but to imply that Simmons’s youth made him more culpable.<sup>140</sup>

The prosecutor seems to be intimating that for a person to do such bad things when young must mean the person is *really* bad. That is, a youth who is capable of committing such horrific acts must be monstrous, or evil, or genetically defective.<sup>141</sup> Such a person must be off the charts of humanity, such that society is absolved of responsibility for either creating him or reforming him—indeed, even for allowing him to live. This argument appeals to a prosecutor, because it may help jurors wash their hands of this defendant and help them overcome any feeling of human sympathy, any sense of collective responsibility, for such a person. Moreover, it supplies a reason to view this individual as among the worst of the worst and therefore deserving of society’s worst punishment.<sup>142</sup> To draw on language from another context, we might call this a *minoritizing* view of aggravating youth.<sup>143</sup>

On the other hand, the prosecutor’s words may evoke something broader about teenagers. Taken alone, the words “Think about age. Seventeen years old. Isn’t that scary?” resonate more generally. There is something scary about adolescents.<sup>144</sup> The qualities

<sup>138</sup> Closing argument transcript at 118–19, *Jones v State*, No 72,500 (Tex Crim App 1999) (quoting Assistant County Attorney Kerye Ashmore); see also Dobbs at 15 (cited in note 132) (providing the prosecutor’s name and reporting Jones’s age).

<sup>139</sup> *State ex rel Simmons v Roper*, 112 SW3d 397, 413 (Mo 2003) (en banc) (“Thus, Mr. Simmons’ youth was used to suggest greater immorality and *future dangerousness* and so to provide a further reason to impose the death penalty.” (emphasis added)).

<sup>140</sup> Cf. also *id.* (“Thus, Mr. Simmons’ youth was used to suggest *greater immorality* and *future dangerousness* and so to provide a further reason to impose the death penalty.” (emphasis added)).

<sup>141</sup> Cf., e.g., Joe L. Kincheloe, *The New Childhood: Home Alone as a Way of Life*, in Henry Jenkins, ed., *The Children’s Culture Reader* 159, 164 (1998) (“[T]he appearance of evil so close to goodness and innocence [makes] the child monster that much more horrible”).

<sup>142</sup> Cf. note 163 (quoting from work representative of the superpredator panic of the 1990s).

<sup>143</sup> Cf. Eve Kosofsky Sedgwick, *Epistemology of the Closet* 85 (1990) (defining a minoritizing view of homosexuality as the view that “there is a distinct population of persons who ‘really are’ gay”).

<sup>144</sup> Stanley Hall, author of a historic two-volume work on the subject, is typically credited

of youth Kennedy describes—immature and reckless, easily influenced, and lacking in determinate character—can be frightening. Moreover, sixteen- and seventeen-year-olds—the group at issue in this case—present a special threat: they are on the verge of adulthood, with physical strength and other capacities that approximate adults', but, by most accounts, they lack adults' self-control or other-regardingness.<sup>145</sup> As Kennedy has implied by suggesting that some juvenile offenders will grow out of their criminality because adolescence itself causes their criminal behavior,<sup>146</sup> seventeen is a scary age. Indeed, more than one psychological tradition characterizes adolescence as akin to mental illness.<sup>147</sup> This we might call a *universalizing* view of youth as aggravating.<sup>148</sup>

These notions of youth as aggravating may shape jurors' willingness—indeed, their ability—to identify with an offender, di-

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with the popularization, if not the invention, of the concept of adolescence as a distinct period between puberty and adulthood. See generally G. Stanley Hall, *Adolescence* (1924); see also, e.g., Arlene Skolnick, *The Limits of Childhood: Conceptions of Child Development and Social Context*, 39 L & Contemp Probs 38, 62 (1975).

<sup>145</sup> See Skolnick at 62 (cited in note 144).

<sup>146</sup> See text accompanying note 127; see also Steinberg and Scott at 1015 (cited in note 122) ("Adolescent traits that contribute to criminal conduct are normative in adolescence, but they are not typical of adulthood."); cf. Males, *Statistical Bigotry* (cited in note 110) (arguing that the arguments on both sides in *Simmons* "could be summed up as, 'Our teens: willfully cold-blooded killers, or helplessly deranged psychopaths?'").

<sup>147</sup> See, e.g., Leslie A. Zebrowitz and Joann M. Montepare, "Too Young, Too Old": *Stigmatizing Adolescents and Elders*, in Todd F. Heatherton, et al, eds, *The Social Psychology of Stigma* 334, 340–41 (2000) (quoting Anna Freud as claiming that "[t]he adolescent manifestations come close to symptom formation of the neurotic, psychotic or dissocial disorder"). Childhood, with its unmediated expression of feeling and desire, also bears a long tradition of analogies to madness. See, e.g., Adam Phillips, *Going Sane* 93 (2005) ("Our earliest lives are lived in a state of sane madness—of intense feelings and fearfully acute sensations."). The analogy to mental illness is an interesting one, particularly in light of current efforts by some death penalty advocates to press for a rule prohibiting the death penalty for people who were "insane" at the time of their crimes. (The Court has already held that people cannot be executed when they are insane. *Ford v Wainwright*, 477 US 399, 401 (1986).) I do not develop the analogy here, but one interesting point of contrast concerns the complexity of attitudes in each area. As I discuss, part of what makes youth complicated is the combination of pervasive positive and negative attitudes. The reason that a prosecutor could say that a young person who commits terrible acts isn't really "childlike," see text accompanying note 166, is the background set of assumed characteristics of youth that are highly favorable, such as innocence and vulnerability. By contrast, though attitudes to mental illness are complicated, there is no compensating set of favorable attitudes that would make cognizable the statement by a prosecutor that a mentally ill person who does something bad couldn't possibly be mentally ill because mentally ill people are too good for such things. There may be some competing idea that mentally ill people are vulnerable and deserve state solicitude, but no highly positive set of ascriptions akin to those about youth.

<sup>148</sup> Cf. Sedgwick at 85 (cited in note 143) (defining a universalizing view of homosexuality as the view "that apparently heterosexual persons and object choices are strongly marked by same-sex influences and desires, and vice versa for apparently homosexual ones").

rectly or indirectly. In *Simmons*'s trial, as in any other, there is more than one possible point of identification. One might identify with the victim, seeing the story through her eyes, as O'Connor seems to do, when she writes of "the terror that this woman must have suffered throughout the ordeal leading to her death."<sup>149</sup> Though jurors might be unlikely to identify with *Simmons*, they might identify with him indirectly, seeing the event through his parents' eyes. This was certainly true for some of the prospective jurors who never made it onto the jury. Most notable among these was venireman Dombrowski, who had a son the age of Chris *Simmons*, and who thought it would be hard to consider the death penalty in the abstract after seeing *Simmons* and thinking of his own son.<sup>150</sup> In his words, "The only uncomfortable feeling I have presently is looking at the young man, and perhaps blinking once or twice, and perhaps seeing your son's face there."<sup>151</sup> His image of blinking and seeing his own child was echoed by another prospective juror, who said she had "grand kids that age, and like one gentleman said, yesterday, you bat your eyes a couple times, and open them and see your grandson sitting there."<sup>152</sup>

This kind of familial identification with youth is a reason that youth might seem not to need special protection, just as old age might seem not to need protecting.<sup>153</sup> This distinguishes age-based differences from racial differences, for instance. In addition to having been that age once, we all, or most all of us, have relatives that age. Many of us have children that age. We can therefore in theory empathize with a young defendant's position.

Of course, similar arguments have been made about women, and there we have seen that familial identification and an associated desire to protect do not necessarily lead to fair treatment. Moreover, parental identification can cut both ways. Just as parents can adore, admire, and identify with their children, they can also

<sup>149</sup> 125 S Ct at 1213 (O'Connor, J, dissenting).

<sup>150</sup> TT at 216 ("I have a son approximately his age, and earlier we were asked to render our attitude, and I would think it would be difficult knowing his parents were somewhere waiting for us to make a decision, and trying to equate that with my son in perhaps a similar situation. I agree it would be difficult. It could be done, but that would be my attitude."); id at 292 ("Sitting here and seeing the young man there brings out our—whatever deeper biases, or unbiases we may have.").

<sup>151</sup> Id at 293.

<sup>152</sup> Id at 472 (quoting venireman Wright).

<sup>153</sup> But see text Part IV.

resent, envy, and isolate them.<sup>154</sup> And now, when children are typically a financial drain on the family, Viviana Zelizer has argued, their value to a family is principally emotional.<sup>155</sup> If children are expected to give back, in exchange for years of financial support, emotional benefits, what happens when they do not supply that value in exchange?

As the prosecutor stated to the jury, echoing his question about the scariness of Simmons's youth, "Look at what his friends and family told you. Isn't that scary? Look at how he repaid their love. . . . Show some mercy to his family, give him death."<sup>156</sup> That is, isn't it scary that Simmons could repay his family for their generosity by committing this heinous crime, putting them through this horrible ordeal, and making them a part of such an atrocity?

Similarly, outrage at the betrayal of parental goodwill seems to fuel the anger inspired by statements, in this case and others, that the young offender thought age would let him off the hook: for instance, Simmons's supposedly telling his friends that they could get away with the crime because they are juveniles,<sup>157</sup> or a seventeen-year-old offender in Texas who announced when he was caught, "I'm a juvenile, you can't do anything to me."<sup>158</sup> Prosecutors relish

<sup>154</sup> Cf., e.g., Eve Kosofsky Sedgwick, *A Poem Is Being Written*, in *Tendencies* 177, 198–99 (1993) ("There is always a potential for a terrifying involuntariness of meaning, in the body of a child."); Steven Mintz, *Huck's Raft: A History of American Childhood* 2–3 (2004) ("Americans are deeply ambivalent about children. Adults envy young people their youth, vitality, and physical attractiveness. But they also resent children's intrusions on their time and resources and frequently fear their passions and drives. Many of the reforms that nominally have been designed to protect and assist the young were also instituted to insulate adults from children.").

<sup>155</sup> See Viviana A. Zelizer, *Pricing the Priceless Child* passim, 11 (1985) (arguing that the children's expulsion from the market at the turn of the last century was coupled with a "sacralization" of children's lives centered on their sentimental value). Zelizer concludes the study by considering whether 1980s America was witnessing a return to any greater interest in the economic usefulness of children to their families; noting the need for more research, she observes, "The notion, inherited from the early part of this century, that there is a necessarily negative correlation between the emotional and utilitarian value of children is being revised." *Id.* at 227. As Zelizer describes it, though, any such shift seems to involve adding a financial element to the familial expectations of children's emotional contributions, rather than reducing their expected emotional contribution: "The sentimental value of children may now include a new appreciation of their instrumental worth." *Id.* (noting the need, however, for more research on the lives of children, particularly those living in poverty and in single-parent families).

<sup>156</sup> TT at 1157. Cf. text accompanying note 133 (quoting the longer passage containing the words, "Think about age. Seventeen years old. Isn't that scary?").

<sup>157</sup> See note 10 and accompanying text.

<sup>158</sup> Closing argument transcript, *Guillen* at 32–92 (cited in note 136) (quoting Mr. Barnes) (raising this quotation in the same paragraph in which he argued that Guillen's youth should be aggravating rather than mitigating, see text accompanying note 136).

the chance to remind juries of such quotes at the sentencing phase, perhaps because they strike a particular chord for adults. By arrogantly invoking their youth, these young offenders seem to pay back our generosity, our willingness to come down easy on them, by turning our generosity into an excuse for their mistreatment of us. (Curiously, the arguments of the young offenders—that they will be protected by their youth from punishment—sound rather like the pro-youth-punishment arguments that conflate mitigation and excuse.<sup>159</sup>) The double-edged nature of parent-child reciprocity may further explain how youth could be understood as aggravating.

Kennedy finds this sort of prosecutorial argument or juror reasoning unacceptable. He worries that jurors will be inflamed against young offenders, will use their youth in exactly the wrong way (against them rather than for them), and will therefore fail at the difficult task of reliably distinguishing the truly incorrigible from the reparable teenagers. To avoid these errors, we must instantiate into law one generalization—of teens as less mature and therefore less culpable—to combat the potential use of another, less acceptable generalization—of teen offenders as particularly scary predators deserving of harsher punishment on account of their adolescence.

#### D. THE SOURCE OF THE PROBLEM

But why does Kennedy—and O'Connor and apparently others at oral argument—deem the treatment of youth as aggravating to be patently unacceptable (and perhaps even shocking)? One wonders why such treatment is illicit. Indeed, the constitutional status of such arguments is unclear: In a series of decisions since the early '80s, the Court has drifted toward and away (and back toward again) finding an Eighth Amendment or due process violation in the consideration of a mitigating factor as aggravating, but no holding conclusively resolves the issue.<sup>160</sup> (O'Connor may have

<sup>159</sup> Cf. Elizabeth S. Scott and Laurence Steinberg, *Blaming Youth*, 81 *Tex L Rev* 799, 800 (2003) (criticizing the common conflation of excuse and mitigation and arguing that youth should be mitigating but not a basis for excuse).

<sup>160</sup> See, e.g., *Penry v Lynaugh*, 492 US 302, 328 (1989); *Johnson v Texas*, 509 US 350, 372–73 (1993); *Graham v Collins*, 506 US 461, 475–76 (1993); *Penry v Johnson*, 532 US 782, 804 (2001) ("Penry II"); *Tennard v Dretke*, 542 US 274, 288–89 (2004); see also *Zant v Stephens*, 462 US 862, 885 (1983) (stating in dicta that if the state had "attached the 'aggravating' label to factors that are constitutionally impermissible or totally irrelevant to the sentencing process, such as for example the race, religion, or political affiliation of the defendant, or to conduct that actually should militate in favor of a lesser penalty, such

cause for frustration with Kennedy here, since they have been on opposite sides of this issue in a number of cases, most notably in *Johnson v Texas*.<sup>161</sup>)

1. *Race*. One cause for concern—though there is no indication that this was Kennedy's concern—might be the potential role of race in determining whether youth is deemed aggravating rather than mitigating. Some research suggests that race influences whether probation officers attribute juvenile criminality to internal factors such as attitude and personality rather than to external factors such as social environment, and race affects their predictions of future dangerousness and sentence recommendations.<sup>162</sup> If criminality is more likely to be deemed a personality trait of African-American juvenile offenders, then their youth would be less likely to be deemed mitigating. Indeed, the intense fears of dangerous youth typified by the superpredator panic of the '90s bore clear racial overtones.<sup>163</sup>

as perhaps the defendant's mental illness[, then] due process of law would require that the jury's decision to impose death be set aside" (internal citations omitted)).

<sup>161</sup> In *Johnson*, Kennedy and O'Connor were similarly situated as majority and dissent in a case that deemed youth adequately available to the jury to consider as mitigating even if the evidence of it came in only under a future dangerousness query. Compare *Johnson v Texas*, 509 US 350, 367, 368 (1993) (Kennedy, J) ("There is no dispute that a defendant's youth is a relevant mitigating circumstance that must be within the effective reach of a capital sentencing jury if a death sentence is to meet the requirements of *Lockett* and *Eddings*. . . . The relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuosity and recklessness that may dominate in younger years can subside. We believe that there is ample room in the assessment of future dangerousness for a juror to take account of the difficulties of youth as a mitigating force in the sentencing determination. As we recognized in *Graham*, the fact that a juror might view the evidence of youth as aggravating, as opposed to mitigating, does not mean that the rule of *Lockett* is violated. As long as the mitigating evidence is within 'the effective reach of the sentencer,' the requirements of the Eighth Amendment are satisfied." (citations omitted)); with *id* at 388 (O'Connor, J, dissenting) ("[Y]outh is more than a chronological fact.' The emotional and mental immaturity of young people may cause them to respond to events in ways that an adult would not. Because the jurors in Johnson's case could not give effect to this aspect of Johnson's youth, I would vacate Johnson's sentence and remand for resentencing." (quoting *Eddings v Oklahoma*, 455 US 104, 115 (1982))).

<sup>162</sup> See George S. Bridges and Sara Steen, *Racial Disparities in Official Assessments of Juvenile Offenders: Attributional Stereotypes as Mediating Mechanisms*, 63 *Amer Soc Rev* 554, 567 (1998).

<sup>163</sup> See, e.g., John J. Dilulio, Jr., *The Coming of the Super-Predators*, *Weekly Standard* (Nov 27, 1995) at 23, 25 ("While the trouble will be greatest in black inner-city neighborhoods, other places are also certain to have burgeoning youth-crime problems that will spill over into upscale central-city districts, inner-ring suburbs, and even the rural heartland. . . . In the extreme, moral poverty is the poverty of growing up surrounded by deviant, delinquent, and criminal adults in abusive, violence-ridden, fatherless, Godless, and jobless settings."); William J. Bennett, John J. Dilulio, and John P. Walters, *Body Count: Moral Poverty . . . and How to Win America's War Against Crime and Drugs* 28 (1996)

Simmons is white, so it is not clear whether or how race affects an argument that youth is aggravating in his case. The opinion makes no mention of race, but some of the briefs discuss it, and the role of racism could be part of the subtext in *Simmons*.<sup>164</sup> Alternatively, or additionally, Simmons's identity as a white, blond boy from the Midwest might strengthen the minoritizing vision of him as a demon child. If his life was relatively easy, if he was the boy next door, then his "badness" must come from inside rather than from his surroundings, and thus he must be monstrous or inherently evil.<sup>165</sup>

2. *Teen criminality and romantic childhood*. Relatedly, the fact that a young person has committed a serious crime may in itself cause people to view his youth as aggravating. That is, to the extent we see or want to see childhood as a time of innocence, cognitive dissonance may prompt us to reconceive a child who does terrible things as an adult. The following prosecutorial argument from another case seems to rely on this logic:

Scott Hain made the choices that took him down. He tried to claim that he was functioning like a child. . . . What about his conduct is child-like? Children don't commit rapes, assaults,

("[M]any of these super-predators grow up in places that may best be called criminogenic communities . . . . At core, the problem is that most inner-city children grow up surrounded by teenagers and adults who are themselves deviant, delinquent, or criminal. . . . The problem is not merely that so many inner-city children grow up insufficiently socialized to the norms and values of a civilized, noncriminal way of life, but that they grow up almost completely unmoralized and develop character traits that are more likely to lead them into a life of illiteracy, illicit drugs, and violent crime than into a life of literacy, intact families, and steady jobs."); see also *id* at 14 (arguing that "the nation's drug and crime problem is fueled largely by moral poverty, and put[ting] question marks over both some of the liberal litany of 'root causes' (economic poverty, lack of government-funded social programs, racism) and over some of the conservative catechism of toughness (resortlike prisons, too few executions, too much gun control)").

<sup>164</sup> See, e.g., Brief for NAACP Legal Defense Fund, et al (cited in note 3); Brief for Respondent at \*31 (cited in note 3). Cf. *Coker v Georgia*, 433 US 584, 598 (1977) (holding, without expressly mentioning race, that the Eighth Amendment prohibits the death penalty for rape of an adult woman); Jack Greenberg, *Crusaders in the Courts* 440 (1994) (explaining that efforts to combat the death penalty for rape were launched "because almost 90 percent of the 455 defendants executed for rape since 1930 were blacks convicted of raping white women" and that these efforts ultimately translated "into a full-scale attack on capital punishment, as arbitrary, cruel and unusual, and racist").

<sup>165</sup> Cf. Mike Males, *Framing Youth: Ten Myths About the Next Generation* 292-94 (1998); Kincheloe at 164 (cited in note 141). The notion of the demonic child has historic roots in, among other sources, the Calvinist doctrine of "infant depravity," which deemed the newborn doomed to sin unless the parents intervened to control him. See Skolnick at 44 (cited in note 144). Golding's *Lord of the Flies* supplies a contemporary analogue. William Golding, *Lord of the Flies* 185-87 (1959).

murder. That is not child-like. . . . In what way is he child-like?

. . . . What he is is what the evidence shows. He's vicious and sadistic. That's not child-like.<sup>166</sup>

Moreover, as noted earlier, young people at the brink of adulthood may be particularly susceptible to at least the universalizing idea of youth as aggravating. This is a period in the life span characterized by increased criminality, which is part of what makes it hard to identify those juvenile offenders whose criminal behavior reflects deeply antisocial character as opposed to something more transient.<sup>167</sup> The particularly negative associations with juveniles on the cusp of adulthood may help explain why Kennedy tends to speak of juveniles in general, rather than sixteen- and seventeen-year-olds, although no one was arguing that *Thompson* should be overturned or reinterpreted to mean that states could execute people who committed their crime at *any* age up to eighteen.

None of this squarely answers the question, though, of why Kennedy would deem the possibility of juries treating youth as aggravating as so obviously wrong as to justify a constitutional

<sup>166</sup> Closing argument transcript at 916, *Hain v State of Oklahoma*, Creek County Court; see also Dobbs at 15 (cited in note 132) (stating Scott Hain's date of execution and age at time of offense). In what seems to be similar rhetoric, at Michael Lopez's sentencing for murdering a police officer when he was seventeen, the prosecutor argued:

At the age of 17, this man, instead of going to jail, chose and wanted to put a bullet into the body of a police officer. What does that say about the capacity and the mentality and the mind of this man at the age of 17? And he ain't a boy and he ain't a child, he's a grown man, and he's been a grown man for a lot longer than some of you were. He carried a weapon with him everywhere he went. You know that. He wasn't afraid to use it that night when called upon.

Closing argument transcript at 28, *Lopez v State*, No 72,536 (Tex Crim App 2002) (quoting the prosecutor, Kelly Siegler, of Harris County); see also Dobbs at 15 (cited in note 132) (providing the prosecutor's name and reporting that Michael Lopez was sentenced to death on May 25, 1999, and listing the docket number as No 73,356). Similarly, the prosecutor of Dwayne Allen Wright argued, "This Defendant may have been seventeen years old when he was involved in all these crimes, but he was seventeen years old going on twenty seven. He has a streak of meanness that far exceeds the chronological age that he has today." Closing argument transcript at 144, *Virginia v Wright*, No 70648 (Fairfax Cty Circuit Ct, Nov 16, 1991).

<sup>167</sup> See, e.g., Terrie E. Moffitt, *Adolescent-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy*, 100 *Psychol Rev* 674, 675-79 (1993) (reviewing data on the increased prevalence and incidence of illegal behavior during adolescence, with offending rates peaking around age seventeen, and theorizing a nonobvious distinction between individuals whose antisocial behavior is limited to their adolescent years and those whose antisocial behavior is persistent over their lives); see also note 57 and accompanying text (discussing the DSM-IV-TR's limitation on diagnosis of antisocial personality disorder to those who are at least eighteen).

ban. Perhaps he simply embraces the romantic notion of childhood as a special time of innocence and vulnerability, which, as a set of historians since Philippe Ariès has been telling us in increasingly refined ways, emerged in the mid-eighteenth century, largely displacing an idea that children were just smaller, and less able, adults.<sup>168</sup> As Steven Mintz has recently argued, this romantic notion of childhood—what Mintz calls the modern view—now exists uneasily alongside a postmodern view of childhood, in which children are not seen merely as little adults, but are nonetheless deemed to have adult-like knowledge and experience and buying power.<sup>169</sup> Perhaps Kennedy clings to the modern view and wants to instantiate it into law.

3. *Inflamed jurors*. But this possible reading of Kennedy's opinion goes too far. Kennedy does present an account of three relevant differences between adults and juveniles, and uses these to create a rule under law that removes them from the individualized consideration of the jury. Ultimately, however, I think his reasoning turns at least as much on concerns about the potentially inflamed, misguided, and mistaken "discriminator"—the juror—as on the mind and emotions of the juvenile.

In particular, Kennedy is troubled by the prospect that jurors will get it wrong and, particularly, for the wrong reasons. Our ideas about youth are complicated. We think we favor youth, we think we should favor youth, but in fact we may, in some circumstances, not only not favor them but actually disfavor them. Our beliefs about how we do and should feel may not always track how we actually feel. Jurors may, of course, err by failing to treat youth (or any other mitigating factor) as appropriately mitigating. But a tendency to do the *opposite* of what is expected—to treat youth as aggravating—may inflict a harm that goes beyond the mere error. To execute a juvenile because jurors treat him *worse* on the basis of a trait that should make them treat him *better* may be perverse, or irrational, to the point of unconstitutionality.

<sup>168</sup> See, e.g., Mintz at 3-4 (cited in note 154); Hugh Cunningham, *Histories of Childhood*, 103 *Am Hist Rev* 1195, 1197-99, 1203-07 (1998); Harvey J. Graff, *Interdisciplinary Explorations in the History of Children, Adolescents, and Youth—for the Past, Present, and Future*, 85 *J Am Hist* 1538, 1539 (1999); see generally Philippe Ariès, *Centuries of Childhood: A Social History of Family Life* 411-13 (Robert Baldick transcript, 1962); cf. also note 155 and accompanying text (discussing Viviana Zelizer's thesis about recent changes in the understandings of childhood).

<sup>169</sup> Mintz at 3-4 (cited in note 154).

To the extent that we limit young people's rights and responsibilities, we justify these limitations in part by saying that youth are particularly vulnerable. To treat youth worse on the basis of their special vulnerability—a vulnerability arguably increased by the legal limitations imposed by the state<sup>170</sup>—partially undermines the justifications for treating them differently in the first place. And a jury that treats youth as aggravating enacts persecution in place of protection. In this way, the rule of *Simmons* is a prophylactic rule that aligns our treatment of this group with our expectations, that is, with how we think we feel, and how we think we should feel, about the group.<sup>171</sup>

Kennedy suggests further that a prophylactic rule is required because of the seriousness of executing a young person. At the close of his discussion of why we cannot trust juries to get it right, Kennedy tells us: "When 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."<sup>172</sup> The irreversibility of any erroneous execution is of course a common thread in arguments against the death penalty. But Kennedy is making a more particular point. *Young* people should not be prevented by execution from growing up. They cannot be prevented from growing up by negative attitudes and stereotypes against them.<sup>173</sup> This reasoning implicates another basis for society's treating youth differently from adults, a kind of rough justice rationale: Young people will all be adults some day, and so the limitations placed on them are temporary and common to everyone. Additionally, eighteen is the typical age demarcation for those legal limitations, as Kennedy's appendices show. In this light, Kennedy

<sup>170</sup> Cf. note 121.

<sup>171</sup> Cf. David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U Chi L Rev 190 (1988).

<sup>172</sup> 125 S Ct at 1197.

<sup>173</sup> An oddity here is that he speaks almost as if juveniles are being executed, despite the fact that the pace of death penalty proceedings and appeals means no juveniles are in fact being executed. See, e.g., Victor L. Streib, *Death Penalty for Children: The American Experience with Capital Punishment for Crimes Committed While Under Age Eighteen*, 36 Okla L Rev 613, 631 (1983) (noting that "[i]n]o children have been executed since 1964"). We may perhaps understand Kennedy to see executing juvenile offenders for acts committed when they were young as similar to stopping time for them at that younger age, making them no longer recognizable by the state after that point, since they are then condemned to die for their actions at that time. Alternatively, his point may simply be animated by the mere theoretical possibility of executing a minor.

may be read to say that it is perversely unjust to let some of our negative attitudes toward this class that we have partially created prevent them from graduating into the dominant group. For these reasons, among the others discussed, the risks of error are too great—both in frequency and severity—for a standard rather than a rule.

This brings me back to O'Connor's and Scalia's claims that Kennedy is saying that juveniles are categorically different, rather than saying that youth is a good proxy for certain differences. As noted earlier, Kennedy seems somewhat inconsistent, saying at one point that he will not concede that any youth is sufficiently mature and culpable to deserve death, and at another point that this categorical rule is imperfect, because of course some juveniles are more mature than adults and vice versa.<sup>174</sup> But in light of the foregoing, it seems that the different language of those two passages may be significant. In the first, Kennedy says that he won't concede that there are juveniles who are sufficiently mature *and* sufficiently depraved, and in the second, he says that only some juveniles are (at least) sufficiently mature.

At the risk of overreading, the two statements may perhaps be reconciled if we take Kennedy to be saying that even if a juvenile were mature enough to be like an adult in all respects, a juvenile simply cannot be depraved enough to warrant the death penalty, because depravity is in the mind of the judge or juror. That is, when speaking of depravity, Kennedy may be making a normative, rather than an empirical, claim: Rather than saying that no child could—as a matter of fact—ever be as mature as an adult, Kennedy is saying that no one of us should—as a matter of law—fatally judge a child to be as depraved as an adult. Even if there are a few juveniles who could be among the worst of society's offenders, jurors will make errors of unacceptable frequency and magnitude. For this reason, we cannot trust ourselves to decide that a child is culpable enough to be punished as an adult in an irreversible way that fails to permit that child ever to become an adult.

Ultimately, Kennedy is saying that youth are categorically less culpable than adults—not in the sense that they could not be as bad or as guilty, but in the sense that we are too flawed to permit ourselves to deem them to be so. We hold prejudicial stereotypes

<sup>174</sup> See text accompanying notes 106–07.

and attitudes that run directly counter to our expectations of ourselves and our proper treatment of young people, and the weighty context of ending a young life requires a prophylactic rule to align our expectations with our actions under law.

### III. "AN ACT OF NOMOLOGICAL DESPERATION": THE DENOMINATOR DISPUTE

Kennedy's conclusion that a prophylactic rule is necessary to guard against disfavoring youth also plays a subtle role in his discussion of the national consensus. Though apparently neither compelling nor dispositive, evidence of a national consensus against the juvenile death penalty must play some role in the Court's decision. For instance, had there been no shift at all since *Stanford*, or had the current spread of the states differed significantly from that in *Atkins*, or had the Court not found a majority of states to be opposed, it seems unlikely that the Court would have reached the same conclusion.<sup>175</sup> In this light the Denominator Dispute becomes important, as it determines whether even a majority of states opposes the juvenile death penalty.<sup>176</sup> As noted, this term refers to the disagreement between Kennedy and Scalia over whether to count states that ban the death penalty altogether as opposing the juvenile death penalty.

Kennedy counts states with no death penalty within the denominator, a departure from *Stanford* that Scalia calls "an act of nomological desperation."<sup>177</sup> In Scalia's view, the denominator should include only those states that permit the death penalty, because the fact that twelve states prohibit the death penalty for everyone says "nothing—absolutely nothing—about consensus that offenders under 18 deserve special immunity from such a penalty."<sup>178</sup> Kennedy, by contrast, reasons that "a State's decision

<sup>175</sup> Although the Court found a "national consensus" in *Atkins* without counting the no-death-penalty states as among the states opposed to executing people with mental retardation, the Court in *Atkins* faced a much more dramatic shift in relevant state enactments since the time of *Penry*, as the Court noted when distinguishing *Stanford*. *Atkins v Virginia*, 536 US 304, 315 n 18 (2002) ("A comparison to [*Stanford*], in which we held that there was no national consensus prohibiting the execution of juvenile offenders over age 15, is telling. Although we decided *Stanford* on the same day as *Penry*, apparently only two state legislatures have raised the threshold age for imposition of the death penalty.").

<sup>176</sup> Cf. Norman J. Finkel, *Prestidigitation, Statistical Magic, and Supreme Court Numerology in Juvenile Death Penalty Cases*, 1 Psychol Pub Pol'y & L 612, 614 (1995).

<sup>177</sup> 125 S Ct at 1219 (Scalia, J, dissenting).

<sup>178</sup> *Id* (Scalia, J, dissenting).

to bar the death penalty altogether of necessity demonstrates a judgment that the death penalty is inappropriate for all offenders, including juveniles."<sup>179</sup>

This is a puzzle, and one not much illuminated by Scalia's analogies. Writing for the majority in *Stanford*, Scalia criticized similar reasoning by the dissent by comparing it to "discerning a national consensus that wagering on cockfights is inhumane by counting within that consensus those States that bar all wagering."<sup>180</sup> He is, of course, right in his narrower point, but the analogy is flawed. A more pertinent analogy would be to counting states that ban wagering on animal fighting as opposing as inhumane wagering on cockfighting.<sup>181</sup>

In dissent in *Simmons*, Scalia's new analogy is to "including old-order Amishmen in a consumer-preference poll on the electric car."<sup>182</sup> Like the cockfighting analogy, Scalia's invocation of

<sup>179</sup> *Id* at 1198.

<sup>180</sup> *Stanford v Kentucky*, 492 US 361, 370 n 2 (1989) ("The dissent takes issue with our failure to include, among those States evidencing a consensus against executing 16- and 17-year-old offenders, the District of Columbia and the 14 States that do not authorize capital punishment. It seems to us, however, that while the number of those jurisdictions bears upon the question whether there is a consensus against capital punishment altogether, it is quite irrelevant to the specific inquiry in this case: whether there is a settled consensus in favor of punishing offenders under 18 differently from those over 18 insofar as capital punishment is concerned. The dissent's position is rather like discerning a national consensus that wagering on cockfights is inhumane by counting within that consensus those States that bar all wagering. The issue in the present case is not whether capital punishment is thought to be desirable but whether persons under 18 are thought to be specially exempt from it. With respect to that inquiry, it is no more logical to say that the capital-punishment laws of those States which prohibit capital punishment (and thus do not address age) support the dissent's position, than it would be to say that the age-of-adult-criminal-responsibility laws of those same States (which do not address capital punishment) support our position.").

<sup>181</sup> Cf. *Sanders v State*, 585 A2d 117, 138-39 (Del 1990) (describing Scalia's reasoning by analogy in *Stanford* as "opaque," and proposing that "[i]f one sought to discern a national consensus that cockfighting is inhumane, one would certainly look to States that outlaw cruelty to animals").

<sup>182</sup> 125 S Ct at 1219 (Scalia, J, dissenting) ("Consulting States that bar the death penalty concerning the necessity of making an exception to the penalty for offenders under 18 is rather like including old-order Amishmen in a consumer-preference poll on the electric car. Of course they don't like it, but that sheds no light whatever on the point at issue. . . . In repealing the death penalty, those 12 States considered none of the factors that the Court puts forth as determinative of the issue before us today—lower culpability of the young, inherent recklessness, lack of capacity for considered judgment, etc. What might be relevant, perhaps, is how many of those States permit 16- and 17-year-old offenders to be treated as adults with respect to noncapital offenses. (They all do; indeed, some even require that juveniles as young as 14 be tried as adults if they are charged with murder.) The attempt by the Court to turn its remarkable minority consensus into a faux majority by counting Amishmen is an act of nomological desperation.").



Amishmen is more amusing than illuminating. Indeed, this analogy is so far from helpful that it is quite difficult to rephrase it to parallel the question in *Simmons*. The problem with Scalia's analogies is that he posits situations in which the underlying motivations are unrelated. But that is not the case in *Simmons*. Those who oppose the death penalty always or nearly always oppose its application to juveniles, if that is the best they can get.

One way to see the problem in Scalia's approach is to consider a (hypothetical) national landscape in which nearly all states outlaw the death penalty altogether. That is, if forty-two states prohibit the death penalty, would Scalia say that the views of only the remaining eight states would determine whether there was a national consensus against the juvenile death penalty? If only two of the eight states that permitted the death penalty outlawed the juvenile death penalty, would Scalia really say that the relevant denominator is the eight states, and no national consensus opposes the juvenile death penalty because 75 percent of the *states that count* do not oppose it? This seems absurd, and I will return to it.

With regard to age-based distinctions, the Denominator Dispute, at first glance, appears to have inverted Scalia and Kennedy. Scalia, discussing moral proportionality, dismisses as irrelevant age-based distinctions in other contexts (e.g., in the majority's appendices on voting, jury service, and marriage), whereas in the Denominator Dispute he finds other contexts of age-based distinctions relevant. Specifically, he believes that knowing how legislatures have made age distinctions in criminal punishment more generally will help resolve the Dispute.<sup>183</sup> In contrast, Kennedy looks to the difference between juveniles and adults intrinsically and legally in a range of contexts to help make his proportionality argument, but in the Denominator Dispute wants to take society's views about how to treat people in general as representative of their views on how to treat juveniles.

But on closer look, Kennedy's reasoning about youth here does in fact track his reasoning in the proportionality analysis. Juveniles are a lesser included group.<sup>184</sup> That is, in a way that again elides

<sup>183</sup> This is a departure from his position in *Stanford* where he presented as comparably worthless the endeavors of looking at age in other criminal contexts and of looking at the death penalty in general. See note 180.

<sup>184</sup> 125 S Ct at 1198 ("[A] State's decision to bar the death penalty altogether of necessity demonstrates a judgment that the death penalty is inappropriate for all offenders, including juveniles.").

the distinction between the descriptive and the normative, Kennedy seems to argue that we *should* treat juveniles as less culpable than adults. States could not possibly—or rather, if they could, they shouldn't—think adults should not be given the death penalty but juveniles could. If members of any states think that people in general must not be given the death penalty, then only (descriptively or normatively) unacceptable views could lead them to say that they would permit juveniles to be executed.

To make this more vivid, imagine a state that banned the death penalty for adults, but permitted it for juveniles. (While the Court "has said repeatedly that age is not a suspect classification,"<sup>185</sup> it has reached this conclusion only in the context of cases involving old age,<sup>186</sup> and such a statute might encounter Equal Protection problems,<sup>187</sup> but this is not the question here.) Intuitively it seems unacceptable, and perhaps constitutionally so under the Eighth Amendment, to mete out the ultimate punishment to juveniles and not to adults. Fantastical as such a statutory scheme may seem, one can imagine how a state might reach that point: for example, through the kind of superpredator hype of the '90s,<sup>188</sup> combined

<sup>185</sup> *Gregory v Ashcroft*, 501 US 452, 470 (1991) (citing *Massachusetts Bd. of Retirement v Murgia*, 427 US 307, 313–14 (1976); *Vance v Bradley*, 440 US 93, 96–97 (1979); *Cleburne v Cleburne Living Center, Inc.*, 473 US 432, 441 (1985)).

<sup>186</sup> Cf. *Hedgepeth v Washington Metro. Area Transit Authority*, 386 F3d 1148, 1154 (DC Cir 2004) (Roberts, J) (noting that "the Supreme Court cases applying rational basis review to classifications based on age all involved classifications burdening the elderly" and then rejecting the argument that youth is different from old age in ways that merit granting it heightened scrutiny).

<sup>187</sup> *Ramos v Town of Vernon*, 353 F3d 171, 187 (2d Cir 2003) (striking down under the Equal Protection Clause a juvenile curfew ordinance based in part on the reasoning that restrictions on the constitutional rights of youth must aim to protect minors, to wit, "if a municipality wishes to single out minors as a group to curtail a constitutional freedom, which the minors have absent parental prohibition, then the municipality must satisfy constitutional requirements by tying their policies to the special traits, vulnerabilities, and needs of minors. . . ."); see also *Bellotti v Baird*, 443 US 622, 635 (1979) ("[A]lthough children generally are protected by the same constitutional guarantees against governmental deprivations as are adults, the State is entitled to adjust its legal system to account for children's vulnerability and their [other] needs.").

<sup>188</sup> Cf. Dilulio, Jr., *The Coming of the Super-Predators* (cited in note 163); note 163 and accompanying text; see also U.S. Department of Health and Human Services, *Youth Violence: A Report of the Surgeon General 5* (2001) (listing among the "myths about youth violence" the idea that "[a] new violent breed of young superpredators threatens the United States," and explaining that "[t]here is no evidence that young people involved in violence during the peak years of the early 1990s were more frequent or more vicious offenders than youths in earlier years. The increased lethality resulted from gun use, which has since increased dramatically. There is no scientific evidence to document the claim of increased seriousness or callousness . . .").

with several high-profile cases of terrible juvenile offenders,<sup>189</sup> and some social science literature arguing that young criminals will commit the worst crimes or that greater penalties are necessary to deter young offenders because they are more criminally prone.<sup>190</sup> Indeed, the practice of worse treatment for juveniles is not historically unprecedented, but has been the basis for reforms of the juvenile justice system over the past century.<sup>191</sup>

Such an upside-down scheme is simultaneously unimaginable and comprehensible for the same reasons that the prosecutor's youth-as-aggravating argument shocks and disturbs most who hear it, including Kennedy and, it seems, O'Connor.<sup>192</sup> That is, we think we treat youth more favorably, and think that we should so treat them in general, but we also have an inkling that the reality of adult stereotypes about and attitudes toward youth does not always track these expectations. The upside-down statute may or may not have a rational justification; the problem, as in *Simmons*, is that it might stem from some combination of false stereotyping and sheer prejudice.

My imaginary state statute is a categorical rule, but it need not be framed that way. What if instead the death penalty applied on its face to everyone, but only juveniles ever ended up being executed? Here we have disparate impact, coupled with the "inexorable zero" that may permit us to assume disparate treatment in administration.<sup>193</sup> And what if juvenile offenders in this imaginary state get the death penalty disproportionately (instead of exclusively)? The conceivable disparate impact would raise a serious question for the same reasons as the youth-as-aggravating argument.

<sup>189</sup> See generally Males at 294 (cited in note 165).

<sup>190</sup> Cf., e.g., Moin A. Yahya, *Deterring Roper's Juveniles: Why Immature Criminal Youth Require the Death Penalty More Than Adults—A Law & Economics Approach 2* (ExpressO Preprint Series Working Paper 761), available at <http://law.bepress.com/expresso/eps/761> (arguing that, if youth are present-oriented risk-lovers who cannot engage in proper cost-benefit analysis, then law and economics methodology shows that youth can still be deterred but the penalties need to be greater than for adults, and thus that the Supreme Court in *Roper* deprived the states of a valuable tool in combating juvenile crime).

<sup>191</sup> See, e.g., Minow at 54–55 (cited in note 112); Elizabeth F. Emens, Nancy W. Hall, Catherine Ross, and Edward F. Zigler, *Preventing Juvenile Delinquency: An Ecological, Developmental Approach*, in Edward F. Zigler, et al, eds, *Children, Families, and Government: Preparing for the Twenty-First Century* 308, 311 (1996).

<sup>192</sup> See note 3 and accompanying text.

<sup>193</sup> See *Yick Wo v Hopkins*, 118 US 1064 (1886); see also *Int'l Brotherhood of Teamsters v United States*, 431 US 324, 342 n 23 (1977) (quoting *United States v T.I.M.E.-D.C., Inc.*, 517 F2d 299, 315 (5th Cir 1975) (coining the phrase "inexorable zero").

Scalia thinks juveniles can be as bad as adults in some cases, so society can reasonably think them so. Kennedy thinks they are rarely as bad, and cannot possibly be worse, on the basis of youth itself, so he imposes a rule to prevent jurors from thinking otherwise.<sup>194</sup> That rule may be the logical principle underpinning Kennedy's position in the Denominator Dispute.

By way of postscript, let me return briefly to the hypothetical in which a state allows the death penalty only for juveniles. Curiously, part of what makes Scalia's position on the Denominator Dispute implausible, particularly in that hypothetical, is that it is hard to imagine a person who cares enough about treating young people the same as adults that her views on age parity would trump her views on the death penalty. But, as we've seen, some youth libbers suggest just that possibility when they critique *Simmons* for insidious generalizing about youth.<sup>195</sup> As youth libbers are not only marginal but are generally not old enough to vote, though, a state's laws presumably do not reflect such views.

Rather, it is easier to imagine a hypothetical state with the death penalty only for juveniles because of popular opinion fueled by negative attitudes to youth, than it is to imagine a state with the death penalty for deserving individuals of all ages, based in a popular embrace of youth liberation views. Though the "national consensus" inquiry into the implications of legislative action is at best complicated and at worst deeply flawed,<sup>196</sup> Kennedy's resolution of the Denominator Dispute has the virtue of consistency with the logic of his reasoning elsewhere in the opinion. As noted, it seems almost inconceivable to think, in a scenario in which only a tiny fraction of states still permitted the death penalty at all, that the question of whether the states had reached a consensus on the juvenile death penalty would turn on what percentage of the tiny remaining states still executed juveniles.

The reason for this lies in part in Kennedy's alignment rule from the proportionality analysis: That is, in imagining the scenario of widespread opposition to the death penalty, we cannot help but read into those many states Kennedy's presumption of youth as an included group—to be treated at least as favorably as adults if not

<sup>194</sup> See text Part II.

<sup>195</sup> See notes 119–20 and accompanying text.

<sup>196</sup> See Tonja Jacobi, *The Subtle Unraveling of Federalism: The Illogic of Using State Legislation as Evidence of an Evolving National Consensus*, 84 NC L Rev (forthcoming, 2006).

more so—and to read out the alternative possibility that the citizens of these many states oppose the death penalty for adults but not for minors. So widespread is the assumption that progress lies in the direction of abolishing the juvenile death penalty that the Missouri brief in *Simmons* even asserted that there is not “yet” a consensus among states against the juvenile death penalty.<sup>197</sup> If the party with the most interest in resisting the notion that progress means not executing juvenile offenders assumed, in its brief before the Court, that that point on the progress narrative will eventually arrive, then the idea of treating youth favorably presumably has wide appeal to our better selves.<sup>198</sup> In his resolution of the Denominator Dispute, Kennedy makes a judgment about acceptable views of youth by aligning our reasoning under law with how we think we do, and should, treat young people.

#### IV. “THE ENEMY OF FORTY”: NEGATIVE ATTITUDES UNDER THE ADEA

Kennedy’s concern about negative attitudes toward youth in *Simmons* has links to other areas of law in which age discrimination is expressly forbidden. Kennedy’s opinion suggests that attitudes to age are complicated, and that we need to look closely not only for stereotypes but also for prejudice, even in areas where individualized treatment might generally be expected to lead to fair outcomes. In this way, *Simmons* has implications for the Court’s conclusions this Term about a different group in a different area of law: older Americans under the ADEA.<sup>199</sup>

Consider through an antidiscrimination lens Kennedy’s conclusion that the Eighth Amendment requires in the death penalty context a

<sup>197</sup> Brief of Petitioner at \*21–\*22 (cited in note 103) (“In *Stanford*, this Court identified twelve states, out of thirty-seven that had capital punishment, that expressly excluded that penalty as an option for the seventeen-year-old offender. Today, the situation is not appreciably different. We do not yet have a pattern of lawmaking sufficient to establish a national consensus that capital punishment is ‘cruel and unusual’ when imposed on anyone ‘so much as one day under’ eighteen.” (emphasis added) (citations omitted)); see also discussion in note 103.

<sup>198</sup> Whether the word was a slip revealing underlying attitudes about progress, or an intentional attempt not to sound so out of step with contemporary attitudes, the use of “yet” here reflects something of the pervasiveness of the attitude that the abolition of the juvenile death penalty lies on the road to progress. The fact that not-“yet” would seem more surprising in an argument about attitudes to the death penalty for adults supports the idea that the juvenile death penalty is widely considered a lesser included category.

<sup>199</sup> 29 USC §§ 621–34 (2000).

rule based on a rational and acceptable proxy—under eighteen as mitigating—in order to preclude the possible use of an irrational or at least unacceptable proxy—under eighteen as aggravating. At one level, Kennedy’s reasoning might seem to resemble the reasoning supporting affirmative action. In both contexts, the state uses a prophylactic rule that favors a particular group in order to combat unfavorable stereotypes and attitudes. But on closer examination, two key differences distinguish *Simmons*’s age-based rule from typical affirmative action. First, affirmative action is usually based on concerns about a history of discrimination or pervasive negative attitudes that require rectification. By contrast, in *Simmons*, individual jurors are imagined to hold both positive and negative attitudes toward youth. Kennedy’s concern is that jurors will use the negative rather than the positive, and so he imposes a rule to take the decision out of jurors’ hands and thus compel the favorable view of youth.

Second, the *Simmons* rule forbids individualized decisions, whereas affirmative action requires them. The state, not the individual, acts affirmatively to protect the group. The state must adopt a rule to implement the favorable stereotypes and oust the unfavorable ones. Rather than being like affirmative action, the *Simmons* rule replaces an affirmative-action-type rule—the thumb-on-the-scale individualized treatment of youth as mitigating—with a categorical rule.

Perhaps the *Simmons* rule looks more like the ADEA. An age-aware statute—which prohibits discrimination against people over the age of forty<sup>200</sup> and proscribes only discrimination in favor of younger over older<sup>201</sup>—tries to prevent people from taking age into account. To prevent people from using age negatively, the statute prevents people from using age at all (subject to certain exceptions).

But the ADEA allows individual decision makers to fire individual workers, so long as they do not do so on the basis of age. Indeed, individual treatment is a core aim of the statute—to try to prevent negative age-based stereotyping from preventing accurate assessment of individual skills and abilities. This clearly distinguishes the statute from the rule in *Simmons*, which replaces individualized assessments with a categorical rule. A recent development in the Court’s interpretation of the ADEA, however, may have inched the

<sup>200</sup> 29 USC § 631(a) (2000).

<sup>201</sup> See *General Dynamics Land Systems v Cline*, 540 US 581, 584 (2004).

statute closer to a group-based rule, rather than a rule that promotes individualized consideration. In the same month that the Court handed down *Simmons*, it ruled in *Smith v City of Jackson* that plaintiffs can bring disparate-impact suits under the statute.<sup>202</sup>

The case involved a disparate-impact challenge to a police department pay plan that gave larger raises to officers with less seniority. The plan was “motivated, at least in part, by the City’s desire to bring the starting salaries of police officers up to the regional average.”<sup>203</sup> Most of the officers over forty had greater seniority and therefore received smaller pay raises, forming the basis of the disparate-impact claim.<sup>204</sup> The Fifth Circuit rejected the claim, holding that disparate-impact suits are categorically unavailable under the ADEA.<sup>205</sup> Responding to a circuit split on the question, the Supreme Court granted certiorari.<sup>206</sup> The Court concluded that disparate-impact suits are available under the ADEA, but that the plaintiffs’ claim nonetheless failed.<sup>207</sup>

*Smith* finds O’Connor once again in dissent, though here Kennedy joins her. Stevens writes for a plurality, with Scalia concurring. The opinions in *Smith* speak principally to questions of statutory interpretation and agency deference, and I do not aim here to resolve the merits of these disputes or to assert that some hidden logic drove the result. Instead, I want to use *Simmons* to highlight an overlooked normative rationale for *Smith* and a way that the decision in *Smith* might be used to combat a less obvious form of age discrimination.

The *Smith* plurality and the dissent seem to agree more than disagree. First, they agree that age-based discrimination has little or nothing to do with animus or dislike. Writing for a plurality that includes Souter, Ginsburg, and Breyer, Justice Stevens reviews the legislative history of the ADEA and notes the conclusion of the Wirtz Report that “there was little discrimination arising from dislike or intolerance of older people, but that ‘arbitrary’ discrimination did

<sup>202</sup> *Smith v City of Jackson*, 125 S Ct 1536, 1540 (2005) (plurality opinion) (Stevens, J); id at 1546 (Scalia, J, concurring in the judgment and concurring in the conclusion that the ADEA permits disparate-impact claims).

<sup>203</sup> Id at 1539.

<sup>204</sup> Id.

<sup>205</sup> *Smith v City of Jackson*, 351 F3d 183, 187 (5th Cir 2003).

<sup>206</sup> *Smith*, 125 S Ct at 1543 (citing cases).

<sup>207</sup> Id at 1540 (plurality opinion); id at 1546 (Scalia, J, concurring).

result from certain age limits.”<sup>208</sup> Similarly, O’Connor, in a dissent joined by Kennedy and Thomas, reads the Wirtz Report as finding no evidence of animus.<sup>209</sup> (Scalia, whose concurrence is grounded in an argument for agency deference, does not directly address the issue.<sup>210</sup>) The report itself seems implicitly to acknowledge some role for feelings and attitudes in age discrimination, as when it calls this “a Nation which . . . worships the whole idea of youth.”<sup>211</sup> But parts of the report support O’Connor’s more absolute assessment of its conclusions: “[In contrast to e]mployment discrimination because of race [which] is identified, in the general understanding of it, with non-employment resulting from feelings about people entirely unrelated to their ability to do the job[,<sup>212</sup> t]here is *no* significant dis-

<sup>208</sup> Id at 1540 (citing Report of the Secretary of Labor, *The Older American Worker: Age Discrimination in Employment* 22 (June 1965), reprinted in U.S. Equal Employment Opportunity Commission, *Legislative History of the Age Discrimination in Employment Act* (1981) (hereafter “Wirtz Report”).

<sup>209</sup> She writes,

[T]he Report emphasized that age discrimination is qualitatively different from the types of discrimination prohibited by Title VII of the Civil Rights Act of 1964 (i.e., race, color, religion, sex, and national origin discrimination). Most importantly—in stark contrast to the types of discrimination addressed by Title VII—the Report found no evidence that age discrimination resulted from intolerance or animus towards older workers. Rather, age discrimination was based primarily upon unfounded assumptions about the relationship between an individual’s age and her ability to perform a job. Wirtz Report 2. In addition, whereas ability is nearly always completely unrelated to the characteristics protected by Title VII, the Report found that, in some cases, “there is in fact a relationship between [an individual’s] age and his ability to perform the job.”

125 S Ct at 1553 (O’Connor, J, dissenting).

<sup>210</sup> Id at 1546–49 (Scalia, J, concurring). His concurrence in the relevant part of Stevens’s opinion, the part that mentions the Wirtz Report’s findings discussed here, suggests he agrees with this account.

<sup>211</sup> Wirtz Report at 3 (cited in note 208) (“[T]he median age of the population in the United States is going down. . . . What this means is that a Nation which already worships the whole idea of youth must approach any problem involving older people with conscious realization of the special obligation a majority assumes with respect to ‘minority group’ interests. This is, to be sure, one minority group in which we all seek, sometimes desperately, eventual membership. Discrimination against older workers remains, nevertheless, a problem which must be met by a majority who are not themselves adversely affected by it and may even be its temporary beneficiaries. The ‘discrimination’ older workers have most to fear, however, is not from any employer malice, or unthinking majority, but from the ruthless play of wholly impersonal forces—most of them part of what is properly, if sometimes too casually, called ‘progress.’”).

<sup>212</sup> Of course, this “general understanding” does not comprise all of race discrimination’s many forms. Cf., e.g., Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 Stan L Rev 317, 322 (1987) (“Traditional notions of intent do not reflect the fact that decisions about racial matters are influenced in large part by factors that can be characterized as neither intentional . . . nor unintentional.”).

crimination of this kind so far as older workers are concerned.<sup>213</sup>

Second, the Justices agree that age often tracks many job-related qualities and that the ADEA's reasonable factors other than age (RFOA) defense is therefore much broader than the bona fide occupational qualification (BFOQ) defense under Title VII.<sup>214</sup> Thus, while concluding that the statute provides for disparate-impact suits, the Court finds that the RFOA defense applies in this case, and implies that it would apply in many cases under the statute.<sup>215</sup>

Contrary to the Wirtz Report's conclusions, recent work in social psychology suggests that we do experience age-based dislike, but that we are unaware of it—that is, it is implicit rather than explicit. And, in fact, even as we grow older and our explicit attitudes to old age become more favorable, the line representing our implicit attitudes remains basically flat: Our implicit negativity does not decrease with age.<sup>216</sup> Whether we call this animus—a term often reserved for conscious dislike—these findings on implicit responses to older people involve negative *attitudes* and not just false beliefs.

While we do not know for certain that these implicit negative attitudes translate into discriminatory workplace behavior, research indicates that older job applicants receive less favorable responses than younger applicants,<sup>217</sup> and it seems plausible that negative at-

<sup>213</sup> Wirtz Report at 2 (cited in note 208) (emphasis in original). The Report identified three other types of discrimination that do affect older people: (1) rejection of older people based on "assumptions about the effect of age on their ability to do a job *when there is in fact no basis for these assumptions*" (in the Report's terminology, "arbitrary discrimination"); (2) "decisions not to employ a person for a particular job because of his age *when there is in fact a relationship between his age and his ability to perform his job*" (which "does not exist" in the context of race or religion and which should perhaps be called "something else entirely" rather than discrimination); and (3) rejection of older persons "because of programs and practices actually designed to *protect* the employment of older workers while they remain in the work force, and to provide support when they leave or are ill." Id.

<sup>214</sup> *Smith*, 125 S Ct at 1545.

<sup>215</sup> Id at 1546 (holding that granting larger raises to more junior employees was based on a reasonable factor other than age, in that it furthered the legitimate goal of retaining employees by raising salaries to match those in surrounding communities).

<sup>216</sup> Levy and Banaji at 49, 54–55 (cited in note 125) (reporting that implicit negativity remains constant while negative attitudes diminish until by age seventy-one respondents think that they hold positive attitudes to older people); Brian A. Nosek, Mahzarin R. Banaji, and Anthony G. Greenwald, *Harvesting Implicit Group Attitudes and Beliefs from a Demonstration Web Site*, 6 Group Dynamics 101, 108 (2002) (same). These studies are comparing implicit attitudes to "young" versus "old," and thus showing a strong preference for "young." This is consistent with the general feeling of favoring youth; it does not undermine the likelihood that certain subgroups of young people—affected by criminality, or race, or the cusp of adulthood—could prompt an unfavorable response. Research focused on implicit attitudes in these areas would be very useful.

<sup>217</sup> See, e.g., Mark Bendick, Jr., Charles W. Jackson, and J. Horacio Romero, *Employment*

titudes of which we are unaware could affect our decision making in ways that would be hard to anticipate, notice, or control.<sup>218</sup> At the least, these data suggest that we should be suspicious of age-based classifications, and even age-based effects, despite the apparent rationality of age-based classifications and effects.<sup>219</sup>

That is, age may track many employment-related characteristics and therefore be a rational proxy, but age-based distinctions (whether intentional or unintentional) are nonetheless not necessarily rational—rather than based in negative stereotypes or attitudes—in any given case. Likewise, if older people don't realize that or how much they disfavor their own group, then this calls into doubt the argument made by Richard Posner (among others) that employment discrimination laws on the basis of age are akin to the "mad" idea of protecting black people from employment discrimination in a society run by a dominant majority of black people.<sup>220</sup> The data on implicit attitudes trouble Posner's charges of madness. His argument assumes in-group favoritism, or at least in-group accurate individualized treatment. But, as noted, data suggest that older people's negative implicit attitudes toward older people are as strong as those held by younger people, and that these implicit attitudes remain negative even after the bearer of the attitudes turns seventy-one, the age at which our explicit attitudes to old age finally

*Discrimination Against Older Workers*, 8 J Aging & Soc Policy 25, 33–34 (1996) (reporting that in pairs of resumés with equal qualifications, resumés implying that the applicant is thirty-two received significantly more favorable responses than resumés implying that the applicant is fifty-seven); Mark Bendick, Jr., Lauren E. Brown, and Kennington Wall, *No Foot in the Door: An Experimental Study of Employment Discrimination Against Older Workers*, 10 J Aging & Soc Policy 5, 10–11 (1999) (extending the previous study beyond the initial contact stage, and finding again that pairs of younger and older applicants to the same jobs showed the younger applicants receiving more favorable responses).

<sup>218</sup> Cf. Lawrence at 349 (cited in note 212) ("[W]hen the discriminator is not aware of his prejudice . . . neither reason nor moral persuasion is likely to succeed.")

<sup>219</sup> See also Brief for AARP, et al, as Amici Curiae Supporting Petitioners at \*23–\*24, *Smith v City of Jackson*, 125 S Ct 1536 (2005) (No 03-1160), 2004 WL 1356592 (citing Levy and Banaji) (cited in note 125).

<sup>220</sup> See, e.g., Richard A. Posner, *Aging and Old Age* 320 (1995) ("It is as if the vast majority of persons who established employment policies and who made employment decisions were black, federal legislation mandated huge transfer payments from whites to blacks, and blacks occupied most high political offices in the nation. It would be mad in those circumstances to think the nation needed a law that would protect blacks from discrimination in employment. Employers—who have a direct financial stake in correctly evaluating the abilities of their employees and who for the most part are not young themselves—are unlikely to harbor either serious misconceptions about the vocational capacities of the old (so it is odd that employment should be the main area in which age discrimination is forbidden) or a generalized antipathy toward old people.")

turn from negative or neutral to mildly positive.<sup>221</sup> (Moreover, the implicit-attitude studies also call into question Posner's conclusion with regard to race, as the studies suggest that blacks show slightly negative implicit in-group attitudes.<sup>222</sup>)

These empirical findings have implications for the Court's decision in *Smith*. First, though the Court's decision was a matter of statutory interpretation, to which my discussion does not speak, these findings suggest that the conclusion the Court reached on the statutory merits—that disparate-impact suits are available under the ADEA—may also be sound as a matter of policy, at least to the extent that we think the statute should attempt to root out negative attitudes to old age.<sup>223</sup> Second, and relatedly, these data suggest that courts should be more circumspect than the Court's decision might imply when concluding that employers have satisfied the RFOA defense.

This circumspection in some way resembles the concern about age-based attitudes in *Simmons*: We may think we like children,<sup>224</sup> and we may think that our treatment of them will be fair and rational, even where it differs from our treatment of adults, but negative stereotyping and, more surprisingly, negative attitudes can enter the mix and create a need for prophylactic rules. Similarly, we might think that we like and respect older people, or at least empathize with them through contact with our parents and other relatives or through our own experiences as we grow older. But even as we age, our implicit attitudes toward old age fail to improve, suggesting a need for careful evaluation of workplace policies creating a disparate impact on older workers.

## V. CONCLUSION

In *Simmons*, Justice Kennedy confronts a difficult question: Given that being younger than eighteen is merely a proxy for diminished culpability, why not let jurors decide whether youth mit-

<sup>221</sup> Levy and Banaji at 55 (cited in note 125).

<sup>222</sup> Nozek, Banaji, and Greenwald at 106 (cited in note 216).

<sup>223</sup> This brief discussion of *Smith* does not attempt to resolve the larger normative question of the merits of the ADEA, a subject of provocative and important debate. See, e.g., Samuel Issacharoff and Erica Worth Harris, *Is Age Discrimination Really Age Discrimination? The ADEA's Unnatural Solution*, 72 NYU L Rev 780 (1997); Christine Jolls, *Hand-Tying and the Age Discrimination in Employment Act*, 74 Tex L Rev 1813 (1996).

<sup>224</sup> We may even think we "worship" them. Cf. Wirtz Report at 3 (cited in note 208); note 211 (quoting relevant passage).

igates the culpability of an individual sixteen- or seventeen-year-old offender? His subtle answer draws on psychological literature about the differences between juveniles and adults, but turns as much on concerns about the mind of the adult juror as on the distinctive traits of juveniles.

In short, the argument has three steps. First, youth is a rational proxy for diminished culpability. Second, jurors will sometimes fail to consider youth as mitigating because they may have negative stereotypes and, worse yet, negative attitudes toward youth. Indeed, they may treat youth as aggravating, thus creating a peculiarly troubling type of error: treating an individual *less favorably* on the basis of the trait, youth, that should prompt *more favorable* treatment. Third, such errors are sufficiently weighty that the Eighth Amendment requires a prophylactic rule that removes such decisions from the jury.

A concern about negative attitudes to youth also supports Kennedy's resolution of the Denominator Dispute, because Kennedy's view could not countenance a state that applied the death penalty only to juveniles; such a position would be akin to treating youth as aggravating.

This understanding of *Simmons* does not establish the rightness of Kennedy's opinion. But it does suggest that the opinion is supported by a stronger rationale than it fully articulates, a rationale that has implications for other areas of law involving the irrationality of apparently rational categories. Another case from last term, *Smith v City of Jackson*,<sup>225</sup> which held that disparate-impact claims are available under the ADEA, provides an example of a context in which negative attitudes that may corrupt individualized determinations warrant further attention.

As Kennedy's *Simmons* opinion suggests, that age is a rational proxy does not mean that people will apply that proxy rationally. The legislative history of the ADEA discussed in *Smith* highlights stereotyping to the exclusion of animus and implies that negative attitudes toward older people are not a problem. But, as *Simmons* shows, negative attitudes can arise in unexpected contexts, and recent work in social psychology supports the conclusion that we tend to dislike older people more than we think we do. Thus, courts should be on the alert for policies and decisions apparently based

<sup>225</sup> *Smith v City of Jackson*, 125 S Ct 1536 (2005).

on factors other than age that may nonetheless stem from unacknowledged negative attitudes about age.

A rhetorical flourish in the preceding Term's most significant ADEA case, *General Dynamics Land Systems v Cline*,<sup>226</sup> curiously brings together the language of dislike with the idea that youth can sometimes be the object of dislike: As Justice Souter put it, "The enemy of 40 is 30, not 50."<sup>227</sup> Of course the idea that age-based dislike can be directed at younger as well as older—or at least the idea that such dislike is a cause for concern—cuts against the holding of *Cline* that the ADEA recognizes as discrimination on the basis of age only actions favoring younger employees over their elders. But Souter's language outruns his meaning: Youth, at least to those who are no longer young, can indeed be aggravating.

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<sup>226</sup> *General Dynamics Land Systems v Cline*, 540 US 581 (2004).

<sup>227</sup> *Id.* at 591.