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Mourning the Untimely Death of the Juvenile Death Penalty: An Examination of Roper v. Simmons and the Future of the Juvenile Justice System

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NOTE

MOURNING THE UNTIMELY DEATH OF THE JUVENILE DEATH PENALTY: AN EXAMINATION OF *ROPER v. SIMMONS* AND THE FUTURE OF THE JUVENILE JUSTICE SYSTEM

"By what conceivable warrant can nine lawyers presume to be the authoritative conscience of the Nation?"[1]

I. INTRODUCTION

Juveniles have historically committed horrific, cold, and calculated murders in this country, ending the lives of many innocent victims and destroying the lives of loved ones left behind. In 1978, seventeen-year-old Timothy Davis went to Avis Alford's store, where he sodomized and stabbed the sixty-eight-year-old seventeen times.[2] In 1989, Helen Rhodes came home with her two-year-old son to find seventeen-year-old William Thomas Knotts in her home.[3] Knotts shot Rhodes twice, took her purse, and left her son crying in his mother's blood.[4] In 1994, Kenneth Loggins and Trace Duncan, both seventeen-years-old, took Vickie Deblieux to a secluded area, threw bottles at her, stomped on her for thirty minutes until she died, played with her lifeless body, and threw her over a cliff.[5] As of 2005, these four murderers were sitting on death row.[6]

Sadly, the facts surrounding the recent U.S. Supreme Court case, *Roper v. Simmons*,[7] are just as chilling. In September of 1993, seventeen-year-old Christopher Simmons broke into Shirley Crook's home in the middle of the night after telling his friends he wanted to commit

1. Roper v. Simmons, 543 U.S. 551, 616 (2005) (Scalia, J., dissenting).
2. Davis v. State, 554 So. 2d 1094, 1096-97 (Ala. Crim. App. 1984).
3. Knotts v. State, 686 So. 2d 431, 442 (Ala. Crim. App. 1995).
4. *Id.* at 442-43.
5. Loggins v. State, 771 So. 2d 1070, 1074 (Ala. Crim. App. 1999); Duncan v. State, 827 So. 2d 838, 840-41 (Ala. Crim. App. 1999).
6. Brief of the States of Alabama et al. as Amici Curiae in Support of Petitioner at 3, 9-10, 12-13, Roper v. Simmons, 543 U.S. 551 (2005) (No. 03-633), 2004 WL 865268 [hereinafter Brief of Alabama].
7. *Roper*, 543 U.S. 551.

murder.[8] Simmons and an accomplice bound Ms. Crook's hands, wrapped her face in duct tape, drove her to a rural area, and pushed her off of a railroad trestle into the river below.[9] Ms. Crook left behind a husband and daughter, who both testified at Simmons' trial about the devastating effects of this senseless crime.[10] Simmons was sentenced to death, but the Missouri Supreme Court reversed his sentence, ruling that it was unconstitutional under the Eighth Amendment to sentence anyone under the age of eighteen to death.[11]

In *Roper*, the U.S. Supreme Court agreed with the Missouri Supreme Court and held that sentencing an offender to death who was under eighteen-years-old at the time of the crime is cruel and unusual punishment under the Eighth Amendment.[12] This case will arguably be celebrated by many respected organizations in this country, as well as the world community,[13] but the ramifications of this plurality decision may be far-reaching.

The *Roper* Court heavily relied on scientific evidence and international opinion, while ignoring the lack of a national consensus against the juvenile death penalty.[14] There is no national consensus against this practice—in fact, states are widely split.[15] Many state legislatures reserved the death penalty as an appropriate sentence when the crime was especially calculated and horrific,[16] such as Simmons' offense. In addition, the Court implied in *Roper* that juries are incapable of properly weighing mitigating factors in juvenile homicide cases.[17] As a result, the Court took the death penalty away from the discretion of legislatures and juries and interfered with core political government processes.

In its opinion, the *Roper* Court made many general conclusions about the characteristics of juveniles as a class to justify its decision

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8. *Id.* at 556; Brief for Petitioner at 3, *Roper*, 543 U.S. 551 (No. 03-633), 2004 WL 903158 [hereinafter Brief for Petitioner].

9. *Roper*, 543 U.S. at 556-57; Brief for Petitioner, *supra* note 8, at 4.

10. *Roper*, 543 U.S. at 558.

11. *Id.* at 558-60.

12. *Id.* at 578-79.

13. *See* discussion *infra* Parts II.B.3, III.B.4 and accompanying notes.

14. See *infra* Part III.B for an explanation of the Court's analysis in *Roper*.

15. *See Roper*, 543 U.S. at 564 (noting that twelve states have abandoned the death penalty and eighteen states that allow the death penalty exclude juveniles).

16. *See id.* at 588 (O'Connor, J., dissenting) (recognizing that many state legislatures concluded that the death penalty was appropriate for "at least *some* 17-year-old murderers").

17. *See id.* at 573 (majority opinion).

holding the juvenile death penalty unconstitutional.[18] As a result, *Roper* could affect the practice and philosophy of the juvenile justice system. The Court's decision in *Roper* may open the door for other sentences imposed on juvenile offenders to be deemed unconstitutional. More broadly, the United States may begin to see a shift in the philosophy and focus of the juvenile justice system back to one of rehabilitation, rather than punishment or retribution.

The purpose of this Note is to explore and explain the Court's ruling in *Roper v. Simmons* and to discuss the impact the case may have on future Eighth Amendment cases and the current juvenile justice system. Part II gives a history of the juvenile justice system in the United States and explores the development of the Court's analysis in past death penalty cases. Part III focuses on the Court's analysis in *Roper*, including both dissenting opinions. In Part IV, this Note analyzes the Court's holding in *Roper* and suggests how it may affect the juvenile justice system in the future. Part V concludes that as a result of *Roper*, states may change how juveniles are treated in the adult criminal system, and other adult sentences imposed on juveniles may be deemed unconstitutional.

II. HISTORY AND EVOLUTION OF THE JUVENILE JUSTICE SYSTEM AND THE JUVENILE DEATH PENALTY

A. History of the Juvenile Justice System—From Rehabilitation to Retribution

Over the past two centuries, the U. S. juvenile justice system has continually evolved according to current societal views about how to treat juvenile delinquents.[19] At the time of this country's founding, older adolescent offenders were frequently processed through the adult criminal court system.[20] However, social reformers in the 1800s were influential in establishing institutions for these juveniles that focused on rehabilitation instead of retribution alone.[21] Although reha-

18. *Id.* at 569-70 (noting that juveniles (1) are immature and have an "underdeveloped sense of responsibility," (2) "are more vulnerable or susceptible to . . . peer pressure," and (3) have personality traits that are "transitory").

19. *See* THOMAS J. BERNARD, THE CYCLE OF JUVENILE JUSTICE 3-4 (1992) (purporting that juvenile justice policies in this country have followed a cyclical pattern over the past two hundred years).

20. *See* David O. Brink, *Immaturity, Normative Competence, and Juvenile Transfer: How (Not) to Punish Minors for Major Crimes*, 82 TEX. L. REV. 1555, 1558-59 (2004); Jennifer Seibring Marcotte, *Death Penalty for Minors: Who Should Decide?*, 20 S. ILL. U. L.J. 621, 623 (1996).

21. *See* Brink, *supra* note 20, at 1558-59.

bilitation is still the stated purpose of most states' juvenile courts, almost all states allow juveniles of various ages to be tried in adult criminal court and receive adult sentences.[22] Today, the juvenile justice system is much different than the idealistic rehabilitative model of the 1800s.

Under the common law, children under seven-years-old were conclusively presumed to have no capacity for criminal intent.[23] A rebuttable presumption existed that children between the ages of seven and fourteen could not possess criminal intent, but juveniles over the age of fourteen were liable for any criminal act, for they were presumed to possess the requisite intent.[24] Therefore, any child over seven-years-old, if found to possess criminal intent, could be arrested, brought to trial, and punished as an adult criminal.[25] Anyone who committed homicide, including juveniles, could receive a mandatory death sentence.[26]

In the early 1800s, the United States emerged as an industrialized nation, and families increasingly abandoned their agrarian, small-town lifestyles for a more urban setting.[27] As a result, in the larger cities, groups of children began to form who were homeless, poor, and fighting for survival.[28] In response to this social problem, social reformers in 1825 instituted the first juvenile facility of its kind, the New York House of Refuge.[29] The House of Refuge sought to prevent poverty and delinquency among New York's youth by requiring the children to work eight hours a day and go to school four hours a day.[30] In the following years, many cities began to emulate New York's model, and

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22. *See id.* at 1562-63; Gordon A. Martin, Jr., *The Delinquent and the Juvenile Court: Is There Still a Place for Rehabilitation?*, 25 CONN. L. REV. 57, 62-63, 68-69 (1992).

23. Marcotte, *supra* note 20, at 622-23 (explaining that the death penalty was administered differentially, depending on the child's age) (citing WILLIAM BLACKSTONE, 4 COMMENTARIES ON THE LAW OF ENGLAND 23-24 (1792)).

24. *Id.*; *see* Eric J. Fritsch & Craig Hemmens, *An Assessment of Legislative Approaches to the Problem of Serious Juvenile Crime: A Case Study of Texas 1973-1995*, 23 AM. J. CRIM. L. 563, 566 (1996).

25. *In re* Gault, 387 U.S. 1, 16 (1967) (citing Julian Mack, *The Chancery Procedure in the Juvenile Court, in* THE CHILD, THE CLINIC, AND THE COURT 310 (1925)); Marcotte, *supra* note 20, at 623.

26. Marcotte, *supra* note 20, at 623 ("The application of the death penalty to individuals who were under the age of eighteen when they committed their crimes has historically been acceptable.").

27. BERNARD, *supra* note 19, at 46; *see also* Brink, *supra* note 20, at 1559 ("Industrialization and urbanization in the nineteenth century and the emergence of charitable organizations contributed to new ideas about the education and socialization of children . . . .").

28. BERNARD, *supra* note 19, at 47.

29. *Id.* at 62.

30. *Id.* at 63-64.

by 1868 over twenty similar organizations housed between 40,000 and 50,000 youths throughout the country.[31]

The first official juvenile court was established in 1899 in Cook County, Illinois.[32] Central to its inception were the ideals of social reformers who were appalled at the way juveniles were treated in adult court.[33] These reformers, who were mostly women, campaigned for a separate court system for juvenile offenders that focused primarily on rehabilitation.[34] In their view, juveniles were fundamentally different than adults.[35] Therefore, because juveniles were immature and vulnerable they should not be punished as adult criminals.[36] Within twenty-five years, all but two states had developed a separate court for juvenile offenders.[37] In the reformers' view, these new court systems would prevent later criminal activity by intervening earlier in a juvenile's life.[38]

In the 1960s and 1970s, the Supreme Court heard several landmark juvenile cases, granting juvenile offenders many of the same due process rights afforded adults in court.[39] Until this time, juvenile courts operated with less formality than adult courts, and juveniles had minimal procedural rights.[40] But during this era, many began to believe the juvenile courts' focus on rehabilitation was not adequate or effective because it failed to impede the rising juvenile crime rate.[41]

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31. *Id.* at 70.

32. Lanes v. State, 767 S.W.2d 789, 791 (Tex. Crim. App. 1989).

33. IRA M. SCHWARTZ, (IN)JUSTICE FOR JUVENILES 150 (1989); *see also In re* Gault, 387 U.S. 1, 15 (1967) (explaining the prevailing view at the time of society's role in administering juvenile justice).

34. *See Gault,* 387 U.S. at 15-16 ("The idea of crime and punishment was to be abandoned. The child was to be 'treated' and 'rehabilitated' and the procedures, from apprehension through institutionalization, were to be 'clinical' rather than punitive."); *Lanes*, 767 S.W.2d at 791 ("The philosophical basis of this separation was to create a system wherein juveniles were rehabilitated rather than incarcerated, protected rather than punished—the very antithesis of the adult criminal system."); BERNARD, *supra* note 19, at 85-86.

35. *See Gault*, 387 U.S. at 15-16.

36. Brink, *supra* note 20, at 1559; Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY 137, 143 (1997).

37. Alexander v. Boyd, 876 F. Supp. 773, 781 (D.S.C. 1995).

38. Scott & Grisso, *supra* note 36, at 144 ("[T]he belief was that the delinquent youth was on a path to a criminal career, from which he could be diverted, through rehabilitation, or toward which he would proceed without appropriate intervention.").

39. *See Gault*, 387 U.S. 1 (discussing juveniles' basic constitutional rights); Kent v. United States, 383 U.S. 541 (1966) (focusing on waiver of jurisdiction in juvenile court); McKeiver v. Pennsylvania, 403 U.S. 528 (1971) (focusing on juvenile court proceedings and the right to trial by jury); *see also* Brink, *supra* note 20, at 1559-60.

40. Brink, *supra* note 20, at 1559.

41. Fritsch & Hemmens, *supra* note 24, at 567 (citing M.A. BORTNER, INSIDE A JUVENILE COURT 5-7 (1982)); Scott & Grisso, *supra* note 36, at 145 ("[T]he changes grew out of mounting skepticism about the empirical premise that rehabilitation was effective with

In 1966, the Supreme Court heard *In re Gault*[42] and held that juveniles are entitled to basic constitutional due process rights, such as the right to notice of charges, the right to an attorney, the right to examine witnesses, and the right to remain silent.[43] The Court did not believe that giving due process rights to juvenile offenders would undermine the juvenile court's foundational goal of rehabilitation,[44] and the Court still found a sufficient fundamental difference between juveniles and adults to warrant upholding the institution of juvenile court.[45]

Although the decision in *Gault* was a positive step toward providing procedural safeguards to juveniles in court, juvenile courts began to take the form of adult criminal court. In response to this shift, legislators began to re-think the rehabilitative philosophy of the juvenile court.[46] If courts treated juveniles the same as adults procedurally, many felt juveniles should also be held responsible for their crimes as adults.[47]

During the 1980s and 1990s, the public became increasingly fearful as the juvenile crime rate began to rise dramatically.[48] In this post-*Gault* era, lawmakers began focusing on the specific offenses juveniles committed and the harm inflicted on victims, instead of targeting what was best for the juvenile.[49] In 1995, Professor John Dilulio added to this general fear with an article describing the coming of

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youthful offenders."); *see also* Marcotte, *supra* note 20, at 631 (noting that in the 1980s and 1990s, juvenile courts were perceived as ineffective at deterring juvenile crime).

42. *Gault*, 387 U.S. 1 (argued before the Court on December 6, 1966, and decided May 15, 1967).

43. Alexander v. Boyd, 876 F. Supp. 773, 781 (D.S.C. 1995) (citing and summarizing the holding of *Gault*).

44. Robert M. Donley, *Criminal Law—Juvenile Justice Goals in Conflict with Protection of Society*—United States v. Smith, *851 F.2d 706 (4th Cir. 1988)*, 62 TEMP. L. REV. 1341, 1343 (1989) (citing *Gault*, 387 U.S. at 17-31).

45. Janet E. Ainsworth, *Re-Imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. REV. 1083, 1113-14 (1991) (explaining the Court's disposition in *Gault*).

46. *See* JOHN C. WATKINS, JR., THE JUVENILE JUSTICE CENTURY: A SOCIOLEGAL COMMENTARY ON AMERICAN JUVENILE COURTS 88-89 (1998); Fritsch & Hemmens, *supra* note 24, at 568-69; Scott & Grisso, *supra* note 36, at 145.

47. Sharon Ongerth, Note, *Deference to the Majority: Why Isn't the Supreme Court Applying the Reasoning of* Atkins v. Virginia *to Juveniles?*, 37 LOY. L.A. L. REV. 483, 489 (2003); Scott & Grisso, *supra* note 36, at 145; *see also* Fritsch & Hemmens, *supra* note 24, at 564 ("There is an increasing trend toward handling juvenile offenders in a manner similar to their adult counterparts.").

48. Brink, *supra* note 20, at 1555.

49. *See* Scott & Grisso, *supra* note 36, at 147. *See generally* Patricia Allard & Malcolm Young, *Prosecuting Juveniles in Adult Criminal Court: Perspectives for Policymakers & Practitioners*, 2 J. FORENSIC PSYCHOL. PRAC. 65 (2002), *available at* http://www.sentencingproject.org/pdfs/2079.pdf.

"super-predators."[50] In his article, Dilulio warned that "[o]n the horizon, there[] are tens of thousands of severely morally impoverished juvenile super-predators. . . . So for as long as their youthful energies hold out, they will do what comes 'naturally': murder, rape, rob, assault, burglarize, deal deadly drugs, and get high."[51] He resolved that the only way to control this group of *super-predators* was to enact harsher "get-tough law enforcement strategies."[52] Dilulio testified before the Senate Judiciary Committee, finding an attentive audience in both the legislature and the media.[53]

An evident conflict arose between two important policies underlying society's notions of criminal justice.[54] On one hand, legislators wanted to preserve the rehabilitative nature of the juvenile justice system; but on the other hand, they wanted to protect society from dangerous criminals.[55] Instead of viewing offenders under eighteen-years-old as vulnerable, impulsive kids, many began to recognize and emphasize the violent and horrific crimes these *kids* were capable of committing.[56] Legislators enacted sentencing provisions that focused more on retribution than rehabilitation, and, as a result, the main principles of the juvenile justice system began to gradually shift toward a more retributive model.[57]

To appease society's fear, legislatures and courts increasingly relied on either judicial or statutory waivers, sending juveniles to adult court from juvenile court or requiring that juveniles who committed certain crimes be tried in adult court exclusively.[58] The term "judicial waiver" describes the process of taking a juvenile offender out of the juvenile court's jurisdiction, placing him in the jurisdiction of the regular adult criminal court, and treating the offender as if he were an adult.[59] Statutory waiver places juvenile offenders who commit cer-

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50. John J. Dilulio. *The Coming of the Super-Predators*, WKLY. STANDARD, Nov. 27, 1995, at 23, *available at* http://www.mcsm.org/predator.html.

51. *Id.*

52. *Id.*

53. Allard & Young, *supra* note 49.

54. Donley, *supra* note 44, at 1344-45.

55. *Id.*

56. *See* Marcotte, *supra* note 20, at 631 ("Trial courts are seeing and will continue to see an increasing number of violent juvenile criminals. . . . Crimes committed by juveniles are increasingly violent and increasingly sophisticated.").

57. *See* Ainsworth, *supra* note 45, at 1105 (stating that the juvenile criminal justice system's focus shifted from rehabilitation to retribution); Fritsch & Hemmens, *supra* note 24, at 569 ("State legislatures began to respond to the criticisms of the existing criminal justice system and the calls to 'get tough on crime.'"); Scott & Grisso, *supra* note 36, at 147.

58. Fritsch & Hemmens, *supra* note 24, at 569.

59. *Id.* at 570. In most cases, a juvenile offender will, before trial, attend a transfer proceeding in juvenile court where the juvenile court judge will consider a variety of factors as to

tain crimes under the adult criminal court's jurisdiction immediately, thus "bypassing the juvenile court altogether."[60] In the 1980s and 1990s, the United States saw an increase in the rate at which juveniles were transferred to adult court and a decrease in the age requirement for statutory and judicial waiver.[61]

Today, juveniles as young as fourteen-years-old may be tried as adults in regular criminal court.[62] Most states have approved tougher juvenile crime laws; by 1999, twenty-nine states had some form of mandatory transfer statute.[63] Once a juvenile offender is in adult court, sentences may be more severe,[64] and the worst offenders may be sentenced to life in prison without possibility of parole.[65] Also, until 2005, a juvenile offender found guilty of homicide was eligible for the death penalty.[66]

The juvenile justice system was born out of a desire to change the way society views and treats juvenile offenders.[67] But today, gradual changes over the years have culminated in a juvenile justice system that looks very different than it did at its inception. Its future course is yet to be determined.

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whether the accused should or should not be transferred to adult court. Brink, *supra* note 20, at 1563. The judge will usually consider the age of the offender, his or her maturity, any prior record, and the seriousness of the crime committed before making a decision regarding transfer. *Id.*; *see also* CAL. WELF. & INST. CODE § 707 (West 1998 & Supp. 2006).

60. Fritsch & Hemmens, *supra* note 24, at 579; *see, e.g.*, NEV. REV. STAT. § 62B.330 (2003). Nevada's statute provides that the following crimes are not considered delinquent acts, and the juvenile court does not have jurisdiction over a juvenile committing any of these acts: (1) murder or attempted murder, (2) sexual assault or attempted sexual assault, (3) any offense involving the use of a firearm, or (4) a felony resulting in death or serious bodily injury to the victim. *Id.*

61. Brink, *supra* note 20, at 1555. In the last twenty years, a national trend has emerged to transfer juvenile offenders to adult criminal court. "[J]uveniles are being transferred to adult court at younger ages for a broader variety of crimes." *Id.* at 1564. There is now a broad range of crimes that, if committed, will cause the juvenile to be tried in adult court. Scott & Grisso, *supra* note 36, at 149-50.

62. Fritsch & Hemmens, *supra* note 24, at 572 (stating that juveniles who are fourteen-years-old and fifteen-years-old may now be waived to adult court in a majority of states); *see, e.g.*, CAL. WELF. & INST. CODE § 602 (West 1998 & Supp. 2006); NEV. REV. STAT. § 62B.390 (2003).

63. JOHN WHITEHEAD & STEVEN LAB, JUVENILE JUSTICE 218 (4th ed. 2004).

64. Brink, *supra* note 20, at 1555.

65. LYNN COTHERN, COORDINATING COUNCIL ON JUVENILE JUSTICE & DELINQUENCY PREVENTION, JUVENILES AND THE DEATH PENALTY (Nov. 2000), *available at* http://www.ncjrs.org/ html/ojjdp/coordcouncil/cc_02.html.

66. As of March 2005, the following states allowed the death penalty for offenders under eighteen-years-old: Alabama, Arizona, Arkansas, Delaware, Florida, Georgia, Idaho, Kentucky, Louisiana, Mississippi, Missouri, Nevada, New Hampshire, North Carolina, Oklahoma, Pennsylvania, South Carolina, Texas, Utah, and Virginia. *See* Roper v. Simmons, 543 U.S. 551 app. A, at 579 (2005).

67. *See* Lanes v. State, 767 S.W.2d 789, 791 (Tex. Crim. App. 1989).

B. History of the Court's Eighth Amendment Analysis, the Juvenile Death Penalty, and Important Eighth Amendment Cases

1. History and Evolution of the Court's Analysis of Eighth Amendment Cases

To understand how the Supreme Court analyzes death penalty cases today, it is necessary to understand the evolution of the Court's framework for Eighth Amendment analysis.[68] Over the years, dissention has been prevalent among the Justices as to what is the appropriate manner to analyze an Eighth Amendment case.[69]

In 1958, in *Trop v. Dulles*, the Court crafted a defined framework for deciding whether a punishment violates the Eighth Amendment.[70] Chief Justice Warren, writing the opinion for the Court, stated the standard: "The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[71] The term "evolving standards of decency" has become a standard cited in almost every subsequent Eighth Amendment case as a basis and starting point for Eighth Amendment analysis.[72]

In 1976, the Court established, in *Gregg v. Georgia*, the proper factors to consider when determining what the evolving standards of decency are in American society.[73] The *Gregg* Court considered two specific objective indicia: actions of legislatures and actions of juries.[74] Yet the Court also found it proper to use its own judgment to determine if the sentence imposed was proportional to the crime committed.[75] In death penalty cases following *Gregg*, the Court has

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68. The text of the Eighth Amendment reads: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

69. *See* ADAM ORTIZ, AM. BAR ASS'N, CRUEL AND UNUSUAL PUNISHMENT: THE JUVENILE DEATH PENALTY: EVOLVING STANDARDS OF DECENCY 1 (2004), *available at* http://www.abanet.org/crimjust/juvjus/EvolvingStandards.pdf.

70. Trop v. Dulles, 356 U.S. 86, 99-101 (1958). Trop was convicted of desertion during World War II. *Id.* at 88. As a result, he lost his citizenship under the provisions of the Nationality Act of 1940. *Id.* The Court held that "the Eighth Amendment forbids Congress to punish by taking away citizenship." *Id.* at 103.

71. *Id.* at 101.

72. *See, e.g.*, Atkins v. Virginia, 536 U.S. 304, 311-12 (2002); Penry v. Lynaugh, 492 U.S. 302, 330-31 (1989); Stanford v. Kentucky, 492 U.S. 361, 369 (1989); Thompson v. Oklahoma, 487 U.S. 815, 821 (1988); Ford v. Wainwright, 477 U.S. 399, 406 (1986); Gregg v. Georgia, 428 U.S. 153, 173 (1976).

73. *Gregg*, 428 U.S. at 179, 181.

74. *Id.* Writing for a plurality, Justice Stewart stressed the importance of looking at "objective indicia that reflect the public attitude toward a given sanction" to avoid deciding cases subjectively. *Id.* at 173.

75. The Court concluded that looking to objective indicia alone is not sufficient in conducting a complete Eighth Amendment analysis. *Id.* The Court must also consider whether,

routinely used its *own independent judgment*, in varying degrees, to support its holdings.[76]

Although it appears the Court established clear guidelines for analyzing death penalty cases, a widely accepted standard is still lacking for determining what the evolving standards of decency are in the United States.[77] Between 1982 and 2005, the Supreme Court considered the constitutionality of the juvenile death penalty four separate times.[78] In these four cases, the Court recognized that its analysis was governed by the evolving standards of decency; however, its analysis of this standard encompassed different factors and employed differing philosophies.[79]

2. *Recent Juvenile Death Penalty Cases*

a. *Eddings v. Oklahoma*

In 1982, the Supreme Court heard one of its first juvenile death penalty cases, *Eddings v. Oklahoma*.[80] The Court did not decide whether the death penalty was a constitutional punishment for Eddings, who was sixteen years old at the time of his crime.[81] Instead, the Court overturned his death sentence because the lower court did not consider certain mitigating factors that might have influenced the

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first, the punishment serves the two penological goals of retribution and deterrence and, second, whether the punishment is proportional to the crime. *Id.* at 183, 187; *see also* Charles S. Doskow, *The Juvenile Death Penalty: The Beat Goes on*, 24 J. JUV. L. 45, 47 (2004).

76. *See, e.g.*, Coker v. Georgia, 433 U.S. 584, 597 (1977) ("These recent events evidencing the attitude of state legislatures and sentencing juries do not wholly determine this controversy, for the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.").

77. "Although there is agreement that the Court must consider objective factors, the Justices disagree as to what degree of these factors indicates a consensus (e.g., What is an appropriate number of states? Death convictions? Executions?) and how a balance is struck between these measurable indicia and the Court's judgment." ORTIZ, *supra* note 69, at 1.

78. *See* Roper v. Simmons, 543 U.S. 551 (2005); Stanford v. Kentucky, 492 U.S. 361 (1989); Thompson v. Oklahoma, 487 U.S. 815 (1988); Eddings v. Oklahoma, 455 U.S. 104 (1982).

79. *See Roper*, 543 U.S. at 560-61 (considering "objective indicia of consensus, as expressed in particular by the enactments of legislatures" and then turning to "our own independent judgment, whether the death penalty is a disproportionate punishment for juveniles"); Atkins v. Virginia, 536 U.S. 304, 311-12 (2002) (applying "objective factors: such as "contemporary values [evinced by] . . . the country's legislatures"); *Stanford*, 492 U.S. at 369 (looking to "those [standards] of modern American society as a whole); *Thompson*, 487 U.S. at 821 (stating that deciding what are the current "standards of decency" required reviewing "the work product of state legislatures and sentencing juries").

80. *Eddings*, 455 U.S. at 104.

81. *Id.* at 105, 110 n.5.

judge to impose a lesser sentence.[82] According to the Court, a judge must appropriately weigh mitigating factors such as age, emotional development, and family background before deciding whether or not to sentence a juvenile to death.[83] Importantly, the *Eddings* Court recognized that the defendant's chronological age should serve as a weighty mitigating factor, along with a bad family history and any psychological or learning impairment.[84]

b. *Thompson v. Oklahoma*

In 1988, the Court heard another juvenile death penalty case, *Thompson v. Oklahoma*.[85] Unlike in *Eddings*, the Court addressed whether it is constitutional under the Eighth Amendment to sentence a fifteen-year-old to death.[86] Along with three others, fifteen-year-old William Wayne Thompson murdered his brother-in-law in January 1983.[87] After committing the murder, Thompson admitted shooting his brother-in-law in the head, cutting his throat, and throwing his body into the river.[88] Thompson was convicted of first-degree murder and sentenced to death.[89]

The Court, after considering Thompson's case, ruled for the first time that it was a violation of the Eighth Amendment to sentence to death any person under the age of sixteen at the time of the crime.[90] Justice Stevens, writing for a plurality, first looked to objective factors such as legislative action and jury sentences to determine the evolving standards of decency in American society.[91] The Court found that states were considerably split over the minimum age a juvenile must be to receive the death penalty.[92]

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82. *Id.* at 114-15; *see also* Joseph L. Hoffmann, *On the Perils of Line-Drawing: Juveniles and the Death Penalty*, 40 HASTINGS L.J. 229, 236 (1989).

83. *Eddings*, 455 U.S. at 116.

84. *Id.* ("[T]he chronological age of a minor is itself a relevant mitigating factor of great weight . . . ."); Cothern, *supra* note 65 ("*Eddings* was important, however, because the Court held that the chronological age of a minor is a relevant mitigating factor that must be considered at sentencing.").

85. Thompson v. Oklahoma, 487 U.S. 815 (1988).

86. *Id.* at 818-19.

87. *Id.* at 819.

88. *Id.* at 860-61 (Scalia, J., dissenting).

89. *Id.* at 818 (majority opinion).

90. *Id.* at 838.

91. *Id.* at 821-23.

92. Nineteen states with the death penalty set no minimum age requirement; eighteen states with the death penalty had statutorily set the age limit at sixteen-years-old, seventeen-years-old, or eighteen-years-old; and thirteen states, plus the District of Columbia, did not statutorily allow the death penalty. *Id.* at 826-27 n.25, 829 n.30.

When the Court looked to jury determinations, the second objective indicium of the evolving standards of decency, it found the last execution of an offender under the age of sixteen occurred in 1948.[93] Based on these facts, the Court determined that "the imposition of the death penalty on a 15-year-old offender is now generally abhorrent to the conscience of the community."[94]

The Court did not rest its final determination solely on the actions of state legislatures and juries. Stating that it is ultimately for the trial court to decide whether the punishment of death is proportional to the personal culpability of a fifteen-year-old,[95] the Court then provided lengthy commentary on how juveniles, as a class, are less culpable than adults.[96] The Court found that juveniles as a class are "less mature and responsible than adults[,] . . . less able to evaluate the consequences of [their] conduct[, and] more apt to be motivated by mere emotion or peer pressure."[97] Therefore, any crime a juvenile commits cannot be as "morally reprehensible as that of an adult."[98] Thus, the Court held that inflicting capital punishment on anyone under sixteen-years-old at the time of the offense is cruel and unusual punishment under the Eighth Amendment.[99]

In his dissent, Justice Scalia disagreed with both the plurality's Eighth Amendment analysis and its conclusion.[100] Justice Scalia's main concern was with the Court's use of its own independent judgment.[101] He stressed the importance of looking primarily to objective factors, such as the actions of legislatures and sentencing juries, to avoid making wholly subjective judgments.[102] Interestingly, one year later, Justice Scalia wrote the plurality opinion for the next juvenile

93. *Id.* at 831-32.

94. *Id.* at 832.

95. *Id.* at 833. To justify the Court's position that its own judgment may be used in determining if the death sentence is proportional to the defendant's personal culpability, the Court referenced *Coker*, in which the Court stated, "[T]he Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment." *Id.* at 823 n.8 (quoting Coker v. Georgia, 433 U.S. 584, 597 (1977)).

96. *See, e.g., id.* at 835.

97. *Id.* at 834-35.

98. *Id.* at 835.

99. *Id.* at 838.

100. *Id.* at 859 (Scalia, J., dissenting).

101. *Id.* at 873 ("On its face, the phrase 'cruel *and unusual* punishments' limits the evolving standards appropriate for our consideration to those entertained by the society rather than those dictated by our personal consciences.").

102. *Id.* at 865; *see also id.* at 873 (criticizing the majority for going beyond such considerations).

death penalty case heard by the Court, which upheld the death penalty for sixteen-year-old and seventeen-year-old defendants.[103]

c. *Stanford v. Kentucky*

In 1989, the Court in *Stanford v. Kentucky* decided whether it is cruel and unusual punishment to sentence anyone to death who was sixteen-years-old or seventeen-years-old at the time of the crime.[104] Kevin Stanford was seventeen-years-old when he and an accomplice went to a gas station to commit a robbery.[105] While there, the two boys repeatedly raped and sodomized the gas station attendant, twenty-year-old Barbel Poore.[106] They drove her to a remote area where Stanford shot her in the face and the back of the head.[107] Stanford was convicted of first-degree murder.[108]

In the plurality opinion, Justice Scalia looked primarily at objective factors to determine society's standards, without giving weight to any subjective viewpoints.[109] First, Justice Scalia considered existing state statutes regarding the age at which a juvenile may be sentenced to death.[110] Once again, the states were widely split as to whether they allowed sixteen-year-old and seventeen-year-old defendants to receive the death penalty.[111] Due to the wide variety of opinions expressed by the nation's elected officials, Justice Scalia concluded that the petitioners "d[id] not establish the degree of national consensus this Court has previously thought sufficient to label a particular punishment cruel and unusual."[112] Justice Scalia then considered the number of sixteen-

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103. *See* Stanford v. Kentucky, 492 U.S. 361 (1989).
104. *Id.* at 364-65.
105. *Id.* at 365.
106. *Id.*
107. *Id.*
108. *Id.* at 366-67.
109. *Id.* at 364, 369. "In determining what standards have 'evolved,' however, we have looked not to our own conceptions of decency, but to those of modern American society as a whole." *Id.* at 369. The plurality in *Stanford* analyzed this Eighth Amendment case in the way urged by Justice Scalia in his dissenting opinion in *Thompson*. *Compare id.* at 378-79, *with* Thompson v. Oklahoma, 487 U.S. 815, 859-78 (1988) (Scalia, J., dissenting).
110. *Stanford*, 492 U.S. at 370.
111. Thirteen states did not allow for the death penalty at all; therefore, the practices of the remaining thirty-seven death penalty states were relevant for Justice Scalia's analysis. *See id.* at 370 & n.2. Of those thirty-seven states, twelve set the minimum age for the death penalty at eighteen-years-old, three set the minimum age at seventeen-years-old, and twenty-two states allowed the death penalty for individuals under seventeen-years-old. *Id.* Of those twenty-two states, nineteen set no specific age limit in their statutes and three set the age limit at sixteen-years-old. *See id.* at 370, 371 n.3.
112. *Id.* at 370-71. To highlight what Justice Scalia meant by "the degree of national consensus . . . previously thought sufficient to label a particular punishment cruel and unusual," he pointed to the Court's previous decisions in cases such as *Coker*. *Id.* at 371. For

year-old and seventeen-year-old defendants sentenced to death by juries nationwide.[113] Justice Scalia acknowledged that, historically, far fewer juveniles have been sentenced to death than adults.[114] Yet Justice Scalia pointed out this trend could be due to the fact that "a far smaller percentage of capital crimes are committed by persons under 18 than over 18."[115]

Justice Scalia did not analyze whether the punishment of death was proportional to the defendant's culpability or whether the decision was in line with international opinion.[116] Further, the plurality opinion did not consider scientific research regarding the culpability of sixteen-year-old and seventeen-year-old defendants.[117] The plurality held that the Court was obligated to analyze Eighth Amendment cases according to the evolving standards of decency.[118] However, according to Justice Scalia, that did not mean the Court may use its own personal, subjective beliefs to reach a decision.[119] Therefore, based on the lack of national consensus against imposing the death penalty on those who are sixteen-years-old or seventeen-years-old at the time of the crime, the plurality concluded that this practice was constitutional under the Eighth Amendment.[120]

The Court did not hear another juvenile death penalty case until *Roper v. Simmons* in 2005.[121] However, an influential Eighth Amendment case concerning the death penalty and mentally retarded offenders set the stage for the Court to take another look at the juvenile death penalty.[122]

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example, in *Coker*, only one state allowed the death penalty for the crime of rape. *Id*; *see also* Coker v. Georgia, 433 U.S. 584, 595-96 (1977). This comparison shows the stark contrast between what consisted of a *national consensus* in other cases as opposed to the widespread differences in juvenile death penalty statutes at the time of *Stanford*.

113. *Stanford*, 492 U.S. at 373.

114. *Id.*

115. *Id.* at 374.

116. *Id.* at 369 n.1, 379.

117. *Id.* at 378 ("The battle must be fought, then, on the field of the Eighth Amendment; and in that struggle socioscientific, ethicoscientific, or even purely scientific evidence is not an available weapon.").

118. *Id.* at 379 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)). Scalia said, "Our job is to *identify* the 'evolving standards of decency'; to determine, not what they *should* be, but what they *are*." *Id.* at 378.

119. *Id.* at 378-79.

120. *Id.* at 380.

121. Roper v. Simmons, 543 U.S. 551, 555 (2005).

122. *See* Atkins v. Virginia, 536 U.S. 304, 306-07 (2002).

3. Atkins v. Virginia—*A Launching Pad for* Roper

In the 2002 case of *Atkins v. Virginia*, the Court addressed the issue of whether it is constitutional to impose the death sentence on a mentally retarded offender.[123] Justice Stevens, writing the opinion for the Court, first looked to state statutes and jury practices to determine the current evolving standards of decency.[124] The Court found that eighteen death penalty states forbade executing mentally retarded offenders. Justice Scalia, in his dissent, noted that twelve states did not allow the death penalty under any circumstances.[125] Thus, thirty states opposed the death penalty for mentally retarded offenders. Even though the numbers did not represent an overwhelming majority, the Court stated that "[i]t is not so much the number of these States that is significant, but the consistency of the direction of change" because sixteen states had passed statutes forbidding the practice in just eleven years.[126] The majority opinion also asserted that a national consensus formed against the practice because only five states had executed mentally retarded offenders in the last sixteen years.[127]

In addition, the Court recognized many other factors supporting its conclusion, including the views of professional organizations, religious organizations, the international community, as well as nationwide public opinion polls.[128] The Court concluded that the death penalty was not appropriate because of a mentally retarded offender's lessened culpability.[129] This evidence, coupled with a national consensus against the practice, led the Court to conclude that it is unconstitutional to sentence a mentally retarded offender to death.[130]

After the Court's decision in *Atkins*, many throughout the legal and professional community speculated that the same rationale used by the Court to exclude mentally retarded offenders from the death

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123. *Id.* at 307. Daryl Renard Atkins was convicted of capital murder, abduction, and armed robbery. *Id.* at 307. Atkins and his accomplice abducted Eric Nesbitt, robbed him, took him to a remote location, and killed him by shooting him eight times. *Id.* Although a psychologist testified during the penalty phase of the trial that Atkins suffered from mild mental retardation and had an IQ of fifty-nine, the jury sentenced Atkins to death for his crime. *Id.* at 308-10. An IQ score between seventy and seventy-five is "typically considered the cut-off IQ score for the intellectual function prong of the mental retardation definition." *Id.* at 309 n.5.

124. *Id.* at 306, 311-16.

125. *See id.* at 342 (Scalia, J., dissenting).

126. *Id.* at 314-15 (majority opinion).

127. *Id.* at 316.

128. *Id.* at 316 n.21.

129. *Id.* at 319.

130. *Id.* at 321.

penalty would soon be used to exclude all juvenile offenders as well.[131] Numerous law review articles advocated the end of the juvenile death penalty, arguing that the culpability of the mentally retarded and juveniles was essentially the same.[132] Also, many professional organizations began to solidify their stance and became more vocal against the juvenile death penalty, knowing the *Atkins* decision gave their arguments more credibility.[133]

In 2003, Christopher Simmons, a defendant on death row for committing a crime at age seventeen, filed a petition for state post-conviction relief with the Missouri Supreme Court based on the premise that his sentence was unconstitutional after the Court's recent decision in *Atkins*.[134] Although the Missouri Supreme Court upheld Simmons' death sentence in 1997, it considered his case again and agreed that his sentence should be reversed on the basis of the rationale in *Atkins*.[135] The State of Missouri appealed to the U. S. Supreme Court, and the Court granted certiorari.[136] By agreeing to hear Simmons'

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131. *See, e.g.*, Jeffrey Fagan, Atkins, *Adolescence, and the Maturity Heuristic: Rationales for a Categorical Exemption for Juveniles from Capital Punishment,* 33 N.M. L. REV. 207, 207 (2003) ("The *Atkins* decision, though welcomed by both popular and legal policy audiences, naturally raises the question: what about juveniles?"); Audra M. Bogdanski, Comment, *Relying on* Atkins v. Virginia *as Precedent to Find the Juvenile Death Penalty Unconstitutional: Perpetuating Bad Precedent?*, 87 MARQ. L. REV. 603, 603 (2004) (stating that after *Atkins*, "there is . . . reason to believe that the Court will soon revisit the constitutionality of the juvenile death penalty"); Robin M. A. Weeks, Note, *Comparing Children to the Mentally Retarded: How the Decision in* Atkins v. Virginia *Will Affect the Execution of Juvenile Offenders*, 17 BYU J. PUB. L. 451, 451 (2003) (stating that the decision in *Atkins* "could soon lead to the exclusion of all juveniles from death penalty eligibility").

132. *See, e.g.*, Fagan, *supra* note 131, at 253 ("Extending the Court's *Atkins* reasoning to sentencing determinations for juveniles not only maintains the integrity of the Court's *Atkins* decision, it more importantly reduces the risk of executing children who are less than fully culpable for their crimes."); Richard Heisler, *The Kids Are Alright:* Roper v. Simmons *and the Juvenile Death Penalty After* Atkins v. Virginia, 34 SW. U. L. REV. 25, 64-64 (2004) (predicting that the Court would rule the juvenile death penalty unconstitutional due to the growing evidence that the mentally retarded and juveniles have similar psychological and emotional traits).

133. *See, e.g.*, Brief Amicus Curiae of the American Bar Ass'n in Support of the Respondent at 10-11, Roper v. Simmons, 543 U.S. 551 (2005) (No. 03-633), 2004 WL 1617399; Michael G. Kelley, Comment, *Why Should We Treat All Teen Offenders as Though They Are Mentally Retarded? An Analysis of the Constitutionality of Executing People Who Committed Their Crimes While They Were Either Sixteen or Seventeen Years Old*, 36 ARIZ. ST. L.J. 1501, 1526-27 (2004) (criticizing the views promoting a reconsideration of the juvenile death penalty and noting that "[a]dvocates of banning all teen offender executions claim that the mental retardation cases have opened the door for the United States Supreme Court to hold that executing teen offenders violates evolving standards of decency and, therefore, violates the Eighth Amendment.").

134. *Roper*, 543 U.S. at 559; State *ex rel.* Simmons v. Roper, 112 S.W.3d 397, 399 (Mo. 2003).

135. *Roper*, 543 U.S. at 559-60.

136. *Id.* at 560.

case, the Court considered the constitutionality of the juvenile death penalty for the first time in sixteen years.[137]

III. *ROPER v. SIMMONS*

A. Details of the Crime

Seventeen-year-old Christopher Simmons told his friends he wanted to murder someone, and he devised a plan regarding the best way to do so.[138] Simmons broke into the home of Shirley Crook around two o'clock a.m.[139] He forced Ms. Crook to the floor, bound her hands with duct tape, and put tape over her eyes and mouth.[140] He and his friends drove her, in her own minivan, to a state park and parked near a railroad trestle that spanned a large river.[141] At this point, the boys noticed that Ms. Crook had managed to remove some of the tape from her face, so they used her purse strap, bathrobe belt, and some electrical wire to further bind her hands and feet together.[142] After forcing her onto the railroad trestle, Simmons wrapped Ms. Crook's head entirely with duct tape and hog-tied her feet together before pushing her to her death in the river below.[143]

After Simmons was arrested, he voluntarily confessed to the murder.[144] Simmons was tried as an adult and convicted of burglary, kidnapping, stealing, and first-degree murder.[145] At the sentencing phase of the trial, the Court instructed the jury to consider Simmons' age as a mitigating factor, and Simmons ultimately received the death penalty.[146]

B. Majority Opinion

1. Eighth Amendment Analytical Framework

In *Roper*, the Court again faced the issue of whether sentencing a seventeen-year-old defendant to death conforms with the evolving

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137. *Id.* at 555.
138. *Id.* at 556; Brief for Petitioner, *supra* note 8, at 3.
139. *Roper*, 543 U.S. at 556; Brief for Petitioner, *supra* note 8, at 3-4.
140. *Roper*, 543 U.S. at 556; Brief for Petitioner, *supra* note 8, at 4.
141. *Roper*, 543 U.S. at 556-57; Brief for Petitioner, *supra* note 8, at 4.
142. Brief for Petitioner, *supra* note 8, at 4.
143. *Id.*; *Roper*, 543 U.S. at 557.
144. *Roper*, 543 U.S. at 557; Brief for Petitioner, *supra* note 8, at 5.
145. *Roper*, 543 U.S. at 557.
146. *Id.* at 558.

standards of decency and is, thus, constitutional.[147] In the plurality opinion, Justice Kennedy stated the issue would be determined by first looking to objective factors, such as state legislatures and jury determinations, and then by looking at the Court's own independent judgment.[148] Justice Kennedy essentially rejected the *Stanford* Court's analytical framework to determine the evolving standards of decency and adopted the analysis used in *Atkins*, which relied on the Court's independent judgment.[149]

2. *National Consensus*

To begin its analysis, the Court looked for a national consensus against the juvenile death penalty by looking to state legislative enactments and the actions of sentencing juries.[150] Twelve states did not allow the death penalty under any circumstance, and eighteen states that allowed the death penalty had statutorily or judicially made individuals under eighteen-years-old ineligible for the death penalty.[151] According to the Court's calculations, thirty states opposed to the death penalty for juveniles equaled the number of states in *Atkins* opposed to the death penalty for mentally retarded offenders—a number deemed sufficient to show a national consensus against the practice.[152]

Additionally, Justice Kennedy noted that the states allowing the death penalty for sixteen-year-old and seventeen-year-old defendants rarely sentenced those offenders to death.[153]

> [T]he objective indicia of consensus in this case . . . ; the infrequency of its use even where it remains on the books; and the consistency in the trend toward abolition of the practice—provide sufficient evidence that today our society views juveniles, in the words *Atkins* used respecting the mentally retarded, as "categorically less culpable than the average criminal."[154]

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147. *Id.* at 555-56, 560-61. The Court already ruled the death sentence unconstitutional for anyone under the age of sixteen in *Thompson*; therefore, in *Roper*, the Court considered exactly the same issue it had in *Stanford*. *See* Thompson v. Oklahoma, 487 U.S. 815, 818-19 (1988); Stanford v. Kentucky, 492 U.S. 361, 380 (1989).

148. *Roper*, 543 U.S. at 554, 564.

149. *See id.* at 562-64. Interestingly, Justice Kennedy joined Justice Scalia's opinion in *Stanford*, agreeing that the Court should only look to objective factors to determine the evolving standards of decency. *See Stanford*, 492 U.S. at 364, 377-79.

150. *Roper*, 543 U.S. at 564-65.

151. *Id.* at 564.

152. *Id.*

153. *Id.* Since *Stanford*, only six states had executed an offender who was either sixteen-years-old or seventeen-years-old when the offense occurred. *Id.*

154. *Id.* at 567 (quoting Atkins v. Virginia, 536 U.S. 304, 316 (2002)).

3. Proportionality Analysis

After establishing that a national consensus existed against the juvenile death penalty, Justice Kennedy engaged in a proportionality analysis.[155] The Court used its independent judgment to determine whether the imposed punishment is proportional to the defendant's culpability.[156]

The Court pointed to three main differences between juveniles and adults to illustrate why imposing the death sentence on juveniles is a disproportionate punishment.[157] First, juveniles are less mature and less responsible than adults, causing juveniles to be reckless, impetuous, and poor decision-makers.[158] Second, juveniles succumb to peer pressure and other negative influences because they are less able to control their environment.[159] Finally, because they are still growing and changing, the personality traits of a juvenile are not permanent.[160] To support these three suppositions, the Court relied on scientific and sociological studies,[161] amici briefs filed with the Court that confirm those studies,[162] psychological journals,[163] and state statutes preventing juveniles from voting, drinking, or marrying without parental consent.[164] Thus, the Court's proportionality analysis was aided by scientific research and the views of respected organizations, which strengthened the Court's resolve to exclude sixteen-year-old and seventeen-year-old defendants from the death penalty.

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155. *Id.* at 571-73.

156. *Id.* "Retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished . . . ." *Id.* at 571.

157. *Id.* at 569. "Once the diminished culpability of juveniles is recognized, it is evident that the penological justifications for the death penalty apply to them with lesser force than to adults." *Id.* at 571.

158. *Id.* at 569.

159. *Id.* "Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment." *Id.* at 570.

160. *Id.* "[A] greater possibility exists that a minor's character deficiencies will be reformed." *Id.*

161. *Id.* at 565-66.

162. *See, e.g.*, *id.* at 569; Brief for the American Psychological Ass'n, & the Missouri Psychological Ass'n as Amici Curiae Supporting Respondent at 2, *Roper*, 543 U.S. 551 (No. 03-633), 2004 WL 1636447 [hereinafter Brief for the APA in *Roper*] ("Developmentally immature decision-making, paralleled by immature neurological development, diminishes an adolescent's blameworthiness.").

163. *See Roper*, 543 U.S. at 569.

164. *Id.* (stating that these statutes illustrate that each state recognizes the immaturity and irresponsibility of juveniles).

4. *International Opinion*

As a final factor in the Court's analysis, Justice Kennedy addressed the views of the international community against the juvenile death penalty.[165] Justice Kennedy emphasized that the United States is one of the only countries in the world to allow the death penalty for offenders under the age of eighteen.[166] He mentioned that "only seven countries other than the United States have executed juvenile offenders since 1990: Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, the Democratic Republic of Congo, and China."[167] Also, the United States and Somalia are the only two United Nation Member countries not to have ratified Article 37 of the Convention on the Rights of the Child, which has a provision prohibiting the execution of juvenile offenders under age eighteen.[168] Although Justice Kennedy stated that these facts are not controlling and "the task of interpreting the Eighth Amendment remains [the Court's] responsibility," he stated "[i]t is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty."[169] He concluded that international opinion "provide[s] respected and significant confirmation" for the Court's conclusion that it is unconstitutional to impose the death sentence on an offender who is sixteen-years-old or seventeen-years-old at the time of the crime.[170]

5. *The Court's Conclusion*

The Court concluded that Simmons' death sentence was unconstitutional because it was a cruel and unusual punishment according to the Court's interpretation of the Eighth Amendment.[171] The Court found a current national consensus against executing juveniles because eighteen death penalty states set the minimum age for the death penalty at eighteen-years-old.[172] Additionally, the Court relied on scientific research, organizational views, and international opinion.[173] Although the Court's Eighth Amendment analysis did not mirror the

165. *Id.* at 575-78.
166. *Id.* at 575.
167. *Id.* at 577.
168. *Id.* at 576.
169. *Id.* at 575, 578.
170. *Id.* at 578.
171. *Id.*
172. *Id.* at 564.
173. *Id.* at 569-78.

analysis in *Stanford*, the Court's ruling effectively overruled *Stanford* and set a new standard for state legislatures to follow.[174]

C. Justice O'Connor's Dissent

Justice O'Connor disagreed with the plurality's holding for two main reasons.[175] First, she disagreed that a national consensus existed against imposing capital punishment on sixteen-year-old or seventeen-year-old defendants.[176] Justice O'Connor agreed the plurality correctly looked at objective factors, such as legislatures and juries, yet based on these factors she disagreed that a national consensus had formed.[177]

Second, she believed the plurality's proportionality analysis did not logically lead to its final conclusion.[178] Instead, Justice O'Connor accused the plurality of using its own "independent moral judgment" rather than relying on objective indicators to determine whether the death sentence was proportional to the culpability of a juvenile offender.[179] Justice O'Connor remarked, "[T]he proportionality argument against the juvenile death penalty is so flawed that it can be given little, if any, analytical weight."[180] Rather than agreeing with the plurality's sweeping conclusions that all juveniles are immature, irresponsible, and unable to control their impulses, Justice O'Connor rejected the plurality's findings that juveniles possess these characteristics.[181] Justice O'Connor argued that while it is true juveniles are generally less mature and responsible, some sixteen-year-olds and seventeen-year-olds may be sufficiently culpable to be punished as adults.[182] According to Justice O'Connor, Christopher Simmons was

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174. *Id.* at 575 ("*Stanford* should no longer control in those few pending cases or in those yet to arise.").

175. *Id.* at 587 (O'Connor, J., dissenting).

176. *Id.* at 588 ("[T]he evidence before us fails to demonstrate conclusively that any such consensus has emerged in the brief period since we upheld the constitutionality of this practice in *Stanford* . . . .").

177. *Id.* at 589-93.

178. *Id.* at 588.

179. *Id.*

180. *Id.* at 598.

181. *Id.* at 599-601. Justice O'Connor believed that categorizing all juveniles together created a class that was "too broad and too diverse to warrant a categorical prohibition." *Id.* at 601. She also predicted that by drawing an age-based line for death penalty eligibility, the Court created a line that will "quite likely . . . protect a number of offenders who are mature enough to deserve the death penalty." *Id.* at 601-02.

182. *Id.* at 599 ("The fact that juveniles are generally *less* culpable for their misconduct than adults does not necessarily mean that a 17-year-old murderer cannot be *sufficiently* culpable to merit the death penalty.").

such a juvenile because he premeditated and planned his crime and carried it out in such a cruel and calculated fashion.[183]

D. Justice Scalia's Dissent

Justice Scalia also dissented, joined by Chief Justice Rehnquist and Justice Thomas.[184] Justice Scalia described how a national consensus had not formed against the juvenile death penalty since *Stanford* and expressed disdain for the plurality's use of its own independent judgment.[185]

Although the plurality concluded there was a national consensus against the juvenile death penalty, Justice Scalia refuted this position by pointing out only forty-seven percent of death penalty states actually forbade imposing capital punishment on sixteen-year-old or seventeen-year-old defendants.[186] Also, Justice Scalia believed that relying on this "subtle shift in numbers" was short-sighted because states frequently change their statutes regarding the death penalty.[187] Furthermore, by deciding this case, the Court had taken the issue entirely away from state legislatures, preventing them from deciding what is best for their own people.[188]

Justice Scalia was primarily concerned with the plurality using its own judgment, rather than determining society's evolving standards of decency according to the actions of legislatures and juries.[189] Justice Scalia accused the plurality of "picking and choosing" whichever sociological and psychological studies best supported its position, instead of relying on "methodologically sound" studies.[190] Justice Scalia reiterated the view he expressed numerous times in prior death penalty cases (such as *Thompson* and *Stanford*) that legislatures and juries are the only trustworthy indicators of the country's moral compass.[191]

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183. *Id.* at 600.

184. *Id.* at 607 (Scalia, J., dissenting).

185. *Id.* at 608.

186. *Id.* at 609. Scalia pointed out that in the Court's previous Eighth Amendment cases, the Court required an "overwhelming opposition to a challenged practice, generally over a long period of time." *Id.*

187. *Id.* at 612.

188. *Id.*

189. *Id.* at 615-16. According to Scalia, legislatures are more qualified to weigh competing scientific studies and study the results to make an appropriate decision. *Id.* at 618. Also, juries maintain an important link with the community and should be trusted to make appropriate sentencing determinations. *Id.* at 616, 620.

190. *Id.* at 617.

191. *Id.* at 615-16; *see also* Stanford v. Kentucky, 492 U.S. 361, 378-79 (1989); Thompson v. Oklahoma, 487 U.S. 815, 865, 873 (1988) (Scalia, J., dissenting).

Justice Scalia's final disagreement with the plurality's decision stemmed from its heavy reliance on international views and opinions.[192] According to Justice Scalia, the views of foreign nations should have no bearing on the decisions of the Supreme Court.[193] Justice Scalia specifically addressed the plurality's contention that the United States is out of line with the world community because it has not ratified Article 37 of the Convention on the Rights of the Child.[194] He pointed out that Article 37 also prohibits sentencing juveniles to life in prison without possibility of parole—a sentence that is still possible for juvenile offenders in the United States.[195] Justice Scalia therefore rejected using international opinion and accused the plurality of using foreign views only to further its "own notion of how the world ought to be."[196]

IV. ANALYSIS OF *ROPER* AND ITS FUTURE RAMIFICATIONS

A. Holding Based on Inconclusive or Irrelevant Evidence

1. Lack of a National Consensus

When *Roper* was decided, there was not an overwhelming national consensus against the juvenile death penalty to conclusively hold it is a cruel and unusual punishment. Twelve states did not allow the death penalty under any circumstances; therefore, they should not have been relevant to any discussion concerning the juvenile death penalty.[197] Of the remaining thirty-eight states that support the death penalty, only eighteen set the minimum age limit for imposing the death penalty at eighteen-years-old.[198] The other twenty death penalty

192. *Roper*, 543 U.S. at 622-28 (Scalia, J., dissenting).
193. *Id.* at 623-24.
194. *Id.* at 622-23.
195. *Id.* at 623.
196. *Id.* at 628. To sum up his position, Scalia remarked, "I do not believe that the meaning of our Eighth Amendment . . . should be determined by the subjective views of five Members of this Court and like-minded foreigners." *Id.* at 608.
197. *See id.* at 564 (majority opinion). These states are Alaska, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin. *Id.* app. A, at 579. Justice Scalia has consistently stated that states that do not allow the death penalty have no place in determining whether there is a national consensus against imposing the death penalty on a certain class. *See, e.g., id.* at 610-11 (Scalia, J., dissenting); Atkins v. Virginia, 536 U.S. 304, 342 (2002) (Scalia, J., dissenting); Stanford v. Kentucky, 492 U.S. 361, 371 n.2 (1989).
198. *Roper*, 543 U.S. at 564. These states are California, Colorado, Connecticut, Illinois, Indiana, Kansas, Maryland, Montana, Nebraska, New Jersey, New Mexico, New York, Ohio, Oregon, South Dakota, Tennessee, Washington, and Wyoming. *Id.* app. A, at 579.

states either set the minimum age at sixteen-years-old, seventeen-years-old, or they did not have an express minimum age.[199] Therefore, fifty-three percent of death penalty states reserved the right to impose the death penalty on a deserving juvenile offender.

The weak consensus among states led Chief Justice Rehnquist and Justices O'Connor, Scalia, and Thomas to rightly ponder how the plurality could find a national consensus against the juvenile death penalty. Justice O'Connor recognized that "so little has changed since [the] recent decision in *Stanford*,"[200] and Scalia concluded that "[w]ords have no meaning if the views of less than 50% of death penalty States can constitute a national consensus."[201]

The decision is also alarming because *Roper* was decided only sixteen years after *Stanford*. Rather than allowing state legislatures time to fully address the issue and conduct studies concerning the juvenile death penalty, the Court "pre-empt[ed] the democratic debate through which genuine consensus might develop."[202]

The Court in *Roper* also looked at the frequency of sentencing juvenile offenders to death.[203] After determining that the practice was infrequent,[204] the Court concluded that states should not have the ability to ask jurors to decide whether a juvenile offender deserves the death penalty because juries are incapable of properly considering a juvenile's age and emotional maturity as mitigating factors.[205]

These statements, coupled with the Court's final holding in *Roper*, eliminated the important discretion and judgment of juries in capital cases. In *Eddings*, the Court established that a defendant's age must be considered as a mitigating factor, and a juvenile's fate should be decided on an individual, case-by-case basis.[206] After *Roper*, indi-

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199. *Id.* at 564, app. A, at 579. The states that set the minimum age at seventeen-years-old are New Hampshire, North Carolina, and Texas. *Id.* The states that set the minimum age at sixteen-years-old are Kentucky, Missouri, Nevada, and Virginia. *Id.* The states that set no minimum age requirement are bound by the Court's decision in *Thompson*, therefore they cannot impose the death penalty on anyone who was under sixteen-years-old at the time of the crime. These states are Alabama, Arizona, Arkansas, Delaware, Florida, Georgia, Idaho, Louisiana, Mississippi, Oklahoma, Pennsylvania, South Carolina, and Utah. *Id.* app. A, at 579.

200. *Id.* at 588 (O'Connor, J., dissenting).

201. *Id.* at 609 (Scalia, J., dissenting).

202. *Id.* at 606 (O'Connor, J., dissenting).

203. *Id.* at 564-65 (majority opinion).

204. *Id.* at 564.

205. *Id.* at 572-73.

206. Eddings v. Oklahoma, 455 U.S. 104, 116 (1982).

vidualized considerations are no longer a factor—the Court concluded that it is unlikely that any crime committed by a juvenile could ever overpower the mitigating effect of age.[207] By taking these sentencing decisions out of a jury's hands, the Court implicitly doubted American citizens' ability to weigh a body of evidence and recommend an appropriate sentence for a sixteen-year-old or seventeen-year-old defendant who kills in cold blood.[208]

The Court's conclusions regarding the actions of both legislatures and juries offend two of the country's core political institutions.[209] In the past, the Court repeatedly recognized the importance of deferring to state legislatures and juries in Eighth Amendment cases.[210] Justice Scalia recognized the tension the Court created between the judiciary and legislative branches and concluded that "[t]oday's opinion provides a perfect example of why judges are ill-equipped to make the type of legislative judgments the Court insists on making here."[211] Rather than allowing state legislatures to determine whether the juvenile death penalty is appropriate for their state, the Court eliminated their power to appropriately legislate according to the best interests of their constituents.[212] The Court also insulted the capabilities of juries by eliminating their ability to assess the culpability of juvenile offenders on an individualized basis. Even more troubling is that these functions were taken away based on a *national consensus* against the juvenile death penalty—a finding that is arguably too weak to actually exist.[213]

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207. *See Roper*, 543 U.S. at 573-74.

208. *Id.* at 573.

209. *See id.* at 620 (Scalia, J., dissenting) ("This startling conclusion undermines the very foundations of our capital sentencing system . . . .").

210. *See, e.g.*, Gregg v. Georgia, 428 U.S. 153, 175 (1976); Dennis v. United States, 341 U.S. 494, 525 (1951) (Frankfurter, J., concurring) ("Courts are not representative bodies. They are not designed to be a good reflex of a democratic society. . . . History teaches that the independence of the judiciary is jeopardized when courts . . . assume primary responsibility in choosing between competing political, economic and social pressures."); Weems v. United States, 217 U.S. 349, 379 (1910) ("The function of the legislature is primary, its exercise fortified by presumptions of right and legality, and is not to be interfered with lightly, nor by any judicial conception of their wisdom or propriety.").

211. *Roper*, 543 U.S. at 616 (Scalia, J., dissenting).

212. *Id.* at 612, 616.

213. *See id.*

2. *Use of the Court's Own Independent Judgment*

To justify its holding that the juvenile death penalty is unconstitutional, the Court announced that its "own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment"[214] and "whether the death penalty is a disproportionate punishment for juveniles."[215] The Justices have historically split on whether using independent judgment serves a proper function in the Court's Eighth Amendment analysis.[216] Regardless of whether it is proper to use independent judgment in an Eighth Amendment case, the *Roper* Court's independent proportionality analysis was contrived and inconclusive.

The Court justified its judgment by making sweeping conclusions regarding the capability and maturity of all juveniles[217]—a considerably large class of individuals in this country. Basing its conclusions on relevant scientific studies, the Court concluded that all juveniles are immature, irresponsible, incapable of controlling their environment, and susceptible to peer pressure.[218] At issue in *Roper* was the culpability of a seventeen-year old offender, yet the Court relied on scientific research about juveniles in general. The Court never adequately defined the term *juvenile* or clarified that it referred to the culpability of sixteen-year-old or seventeen-year-old defendants specifically. The Court also did not recognize that there could be a distinct or measurable difference between the culpability of a seventeen-year-old defendant and, for example, a fourteen-year-old defendant. Instead, the Court generally concluded that "the logic of *Thompson* extends to those who are under 18."[219]

The Court relied heavily on scientific research presented by many respected organizations who filed amici briefs in support of Simmons—research that supported the Court's own independent judgment

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214. *Id.* at 563-64 (majority opinion) (quoting Coker v. Georgia, 433 U.S. 584, 597 (1977)). It is also interesting to note that the Court acknowledges relying on *Atkins* for its framework for analysis and not *Stanford*, even though *Stanford* represented the prevailing consensus on the juvenile death penalty at the time of *Roper*. *See id.* at 563-64.

215. *Id.*

216. *Compare, e.g.*, Stanford v. Kentucky, 492 U.S. 361, 378 (1989) (Justice Scalia rejecting the idea that the Court should use its own informed judgment), *with* Atkins v. Virginia, 536 U.S. 304, 312 (2002) (Justice Stevens advocating that the Court's own judgment should be employed in Eighth Amendment cases).

217. *Roper*, 543 U.S. at 569-72.

218. *Id.* at 569-70.

219. *Id.* at 574.

that the death penalty is never appropriate for juveniles.[220] For example, the Court seems to have adopted many of the arguments made by the American Psychological Association (APA) in an amicus brief filed in *Roper*.[221] In this brief, the APA contended that juveniles are immature decision-makers, have immature judgment, and are not yet neurologically developed.[222] Yet in a brief filed by the APA in *Hodgson v. Minnesota*,[223] the organization claimed that "by age 14 most adolescents have developed adult-like intellectual and social capacities" and "[r]esearch in social and personality development contradicts the stereotype of adolescence as a period when young people are paralyzed by a struggle for identity, social confusion, and rebellion."[224] This conflicting testimony illustrates that studies regarding juveniles are continually fluctuating, changing, and subject to different interpretations. Therefore, Justice Scalia was justified in declaring, "all the Court has done today . . . is to look over the heads of the crowd and pick out its friends."[225]

The Court's proportionality analysis is also flawed because it likened the culpability of juveniles to the lesser culpability of the mentally retarded.[226] Juveniles, as a class, are not defined by specific impairments or genetic defects.[227] Mentally retarded offenders all share common characteristics that separate them from the general population, whereas juveniles are defined by a chronological age. Every liv-

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220. *See, e.g.*, Brief for the APA in *Roper*, *supra* note 162, at 2; Brief of the American Medical Ass'n et al. as Amici Curiae in Support of Respondent, *Roper*, 543 U.S. 551 (No. 03-633), 2004 WL 1633549; Brief Amicus Curiae of the American Bar Ass'n in Support of the Respondent, *Roper*, 543 U.S. 551 (No. 03-633), 2004 WL 1617399; Brief for the Coalition for Juvenile Justice as Amicus Curiae in Support of Respondent, *Roper*, 543 U.S. 551 (No. 03-633), 2004 WL 1628522; Brief of Juvenile Law Center et al. as Amici Curiae in Support of Respondent, *Roper*, 543 U.S. 551 (No. 03-633), 2004 WL 1660637.

221. The Court's plurality opinion in *Roper* reflects many of the same findings included in the APA's amicus brief. *Compare* Brief for the APA in *Roper*, *supra* note 162, at 2-3, *with Roper*, 543 U.S. at 569-70.

222. Brief for the APA in *Roper*, *supra* note 162, at 2.

223. Hodgson v. Minnesota, 497 U.S. 417 (1990).

224. Brief for Amici Curiae American Psychological Ass'n et al. in Support of Petitioners/Cross-Respondents in Nos. 88-1125, 88-1309 and in Support of Appellees in No. 88-805, Hodgson v. Minnesota, 497 U.S. 417 (1990) (Nos. 88-1125 & 88-1309), 1989 WL 1127529. The APA in this case argued in support of pregnant minors, claiming they have sufficient decision-making and reasoning skills to decide whether or not to have an abortion and did not need to notify their parents. *Id.*

225. *Roper*, 543 U.S. at 617 (Scalia, J., dissenting).

226. *Id.* at 567 (majority opinion) ("[T]oday our society views juveniles, in the words *Atkins* used respecting the mentally retarded, as 'categorically less culpable than the average criminal.'" (quoting Atkins v. Virginia, 536 U.S. 304, 316 (2002))).

227. *See* Hoffmann, *supra* note 82, at 274 ("In the juvenile death penalty context, chronological age is not the very characteristic that renders the death penalty necessarily inappropriate, in retributive terms, for the entire class of relevant defendants.").

ing adult on earth today has been within this *class* for eighteen years of his or her life. Therefore, it is logical to conclude that within the class of juveniles in this country, maturity levels and reasoning skills can differ considerably.[228] As Justice O'Connor concluded in her dissenting opinion, "at least *some* 17-year-old murderers are sufficiently mature to deserve the death penalty in an appropriate case."[229] Yet, the Court made a sweeping conclusion that no juvenile can ever have the requisite moral culpability to deserve the death penalty.[230]

The Court in *Roper* should have considered Simmons' own level of emotional maturity, his intelligence, and the chilling facts surrounding the murder of Shirley Crook to decide whether the death penalty was an appropriate punishment.[231] Instead, the Court used Simmons' case to unnecessarily create an age-based categorical rule exempting all minors from the death penalty.[232] As a result, any sixteen-year-old or seventeen-year-old defendant who commits a crime as horrific and devastating as Simmons will escape the ultimate punishment, no matter how emotionally mature or responsible.

3. International Opinion

One of the most prominent influences on the Court in *Roper* was the overwhelming pressure of the international community to ban the imposition of the death penalty on juvenile offenders. The European Union, former U.S. diplomats, former world leaders, and Nobel Peace Prize recipients all submitted amici briefs with the Court in support of

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228. *See id.* at 275 ("[N]ot all juveniles fit the model of the immature, easily influenced 'child' who may not, in retributive terms, deserve the death penalty."); Brief of Alabama, *supra* note 6, at 1-2 ("[S]ome 16- and 17-year-old killers most assuredly are able to distinguish right from wrong and to appreciate fully the consequences of their murderous actions.").

229. *Roper*, 543 U.S. at 588 (O'Connor, J., dissenting).

230. *Id.* at 570 (majority opinion) (quoting Thompson v. Oklahoma, 487 U.S. 815, 835 (1988)).

231. Justice O'Connor recognized that many juveniles may be sufficiently mature to know the nature of their crimes and be punished accordingly. *Id.* at 606 (O'Connor, J., dissenting) ("[T]he mitigating characteristics associated with youth do not justify an absolute age limit. A legislature can reasonably conclude, as many have, that some 17-year-old murderers are mature enough to deserve the death penalty in an appropriate case.").

232. *See id.* at 574 (majority opinion). *But see* Hoffmann, *supra* note 82, at 266 ("[T]he use of chronological age as a 'bright line,' for purposes of imposing a ban on the juvenile death penalty, will produce comparative injustice, and such injustice is constitutionally significant under the [E]ighth [A]mendment."); Warren M. Kato, Comment, *The Juvenile Death Penalty*, 18 J. Juv. L. 112, 141 (1997) ("Line-drawing based simply upon age has no place in the realm of the juvenile death penalty; it is unjust as well as unnecessary.").

Simmons, expressing their opposition to the juvenile death penalty.[233] In their briefs, the groups stressed that the United States is one of the only countries in the world to still impose the death penalty on juveniles.[234] In addition, these briefs highlight, as mentioned by the plurality, that the only other countries who have executed juveniles recently are Iran, Saudi Arabia, Nigeria, the Democratic Republic of Congo, Yemen, Pakistan, and China[235]—countries with which the United States would generally not want to be aligned for human rights standards. The brief of former U.S. diplomats clearly manifests the large amount of international pressure the Court faced, warning:

> [A]llowing Missouri to execute Christopher Simmons will diplomatically isolate the United States and hinder its foreign policy goals by alienating countries that have been American allies of long standing. . . . At this critical time in our foreign policy . . . the insistence of a few states on continuing to execute juvenile offenders should not be permitted to isolate the entire nation.[236]

The Court devoted a large portion of its plurality opinion to addressing international opinion, implying that the Court gave considerable weight to foreign views and was persuaded by international pressure.[237] The plurality stated "[i]t is proper [to] acknowledge the

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233. *See* Brief of Amici Curiae the European Union and Members of the International Community in Support of Respondent, *Roper*, 543 U.S. 551 (No. 03-633), 2004 WL 1619203 [hereinafter Brief of the European Union]; Brief of Amici Curiae Former U.S. Diplomats Morton Abramowitz et al. in Support of Respondent, *Roper*, 543 U.S. 551 (No. 03-633), 2004 WL 1636448 [hereinafter Brief of Former U.S. Diplomats]; Brief of Amici Curiae President James Earl Carter, Jr., et al. in Support of Respondent, *Roper*, 543 U.S. 551 (No. 03-633), 2004 WL 1636446 [hereinafter Brief of President James Earl Carter, Jr.].

234. *See, e.g.*, Brief of the European Union, *supra* note 233, at 11 ("[T]he United States, at present, stands virtually alone among all the nations of the world in actively carrying out death sentences for offenses committed by children."); Brief of Former U.S. Diplomats, *supra* note 233, at 6 ("[T]he current U.S. practice of executing juvenile offenders is manifestly inconsistent with global standards of decency that have been embraced by nearly every nation in the world."); Brief of President James Earl Carter, Jr., *supra* note 233, at 12 ("The practice of other countries illustrates that the death penalty for child offenders is contrary to internationally accepted standards of human rights.").

235. *See Roper*, 543 U.S. at 577; Brief of the European Union, *supra* note 233, at 8-9; Brief of Former U.S. Diplomats, *supra* note 233, at 16 ("Only a small handful of countries, each of which has been consistently criticized by the United States for severe human rights abuses, actually executes juvenile offenders . . . .").

236. Brief of Former U.S. Diplomats, *supra* note 233, at 20.

237. *Roper*, 543 U.S. at 575-78. The Court previously looked to international views to support its own conclusions in *Atkins*, *Thompson*, and *Coker*. In *Atkins* and *Coker*, however, any mention of international viewpoints was limited to footnotes. *See* Atkins v. Virginia, 536 U.S. 304, 316 n.21 (2002); Coker v. Georgia, 433 U.S. 584, 592 n.4, 596 n.10 (1977). In *Thompson*, the Court referenced countries who "share our Anglo-American heritage" and "leading members of the Western European community," limiting the discussion of these countries to one paragraph. Thompson v. Oklahoma, 487 U.S. 815, 830-31 (1988).

overwhelming weight of international opinion against the juvenile death penalty."[238] However, if the Court intended to determine the evolving standards of decency within the United States, the views of foreign nations should have no bearing on that decision. The plurality sought to support its position by acknowledging that the United States is one of only two countries not to have ratified Article 37 of the Convention on the Rights of the Child, which prohibits the juvenile death penalty.[239] Justice Scalia was rightly unpersuaded by this argument because Article 37 also calls for the prohibition of imposing life in prison without possibility of parole on juvenile offenders.[240] If the Court is willing to look at international opinion only when it supports its own subjective views, then there is no logical reason to consider it at all in an Eighth Amendment analysis.[241]

In addition, state legislatures have already pondered the appropriateness of the juvenile death penalty and instituted specific safeguards, including the requirement of individualized sentencing for murderers.[242] It is unclear whether other countries that now prohibit the juvenile death penalty ever had laws in place that required individualized consideration of each juvenile offender's case. In fact, many countries, including the entire European Union, do not allow the death penalty under any circumstances.[243] Therefore, they operate under a fundamentally different view of penology and retribution than the United States. If the Court is willing to rely on these countries' views on the juvenile death penalty, perhaps the Court will be persuaded to abolish the death penalty altogether in the future. The foundational principles on which the United States was built differ substantially

238. *Roper*, 543 U.S. at 578.

239. *Id.* at 576.

240. *Id.* at 622-23 (Scalia, J., dissenting); Convention on the Rights of the Child art. 37, Nov. 20, 1989, 1577 U.N.T.S. 3, *available at* http://www.unhchr.ch/html/menu3/b/k2crc.htm.

241. *See Roper*, 543 U.S. at 627 (Scalia, J., dissenting) ("To invoke alien law when it agrees with one's own thinking, and ignore it otherwise, is not reasoned decisionmaking, but sophistry.").

242. *See, e.g.*, Eddings v. Oklahoma, 455 U.S. 104, 106 (1982) (citing the Oklahoma death penalty statute that takes into account mitigating circumstances in determining the appropriateness of a death penalty sentence).

243. *See* Allen E. Shoenberger, *The European View of American Justice*, 36 LOY. U. CHI. L.J. 603, 603 (2005) ("[A]ll fifteen of the original European Union countries have abolished the death penalty."); European Union, EU Policy & Action on the Death Penalty, http://www.eurunion.org/legislat/DeathPenalty/deathpenhome.htm (last visited Nov. 20, 2005) (stating "[t]he European Union (EU) is *opposed to the death penalty* in all cases").

from those of many other countries in the world; therefore, American standards should not be determined by foreign legal standards.[244]

B. *Possible Ramifications of* Roper *for the Juvenile Justice System's Future*

After *Roper*, it is natural to speculate that the Court's general conclusions regarding juveniles could eventually cause the prevailing juvenile justice system philosophy to shift back to one of rehabilitation, rather than punishment or retribution. Throughout the 1990s, citizens responded to the high juvenile crime rate and fear of *super-predators* by lobbying for legislators to get tough on juvenile crime. As a result, many juveniles every year are transferred or automatically waived into adult court and sentenced as adults.[245] Juvenile court judges have wholly lost jurisdiction over juveniles who commit serious crimes and, therefore, cannot prescribe any rehabilitative treatment for these offenders.[246] The juvenile justice system, at least concerning juveniles who commit serious crimes, has arguably focused more on retribution than rehabilitation in recent history.[247]

Roper could signal an increase in the Court's willingness to prescribe appropriate sentences for juveniles. First, the country could soon see the end of sentencing juveniles to life in prison without the possibility of parole. According to a recent study by Amnesty International and Human Rights Watch, there are at least 2225 juvenile offenders serving sentences of life without parole in the United States.[248] "In 26 states, the sentence of life without parole is mandatory for anyone who is found guilty of committing first-degree murder, regardless of age."[249] According to the study, the United States is one of the only

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244. In July of 2005, the U.S. House of Representatives Subcommittee on the Constitution conducted a hearing to examine the appropriate role of foreign judgments in the interpretation of the Constitution of the United States.

> By looking to and relying on the decisions of foreign courts in the interpretation of the Constitution of the United States, the judiciary not only is undermining the vision of our Founding Fathers but is chipping away at the core principles on which this country was founded, chipping away at our Nation's sovereignty and independence.

House Resolution on the Appropriate Role of Foreign Judgments in the Interpretation of the Constitution of the United States: Hearing on H.R. Res. 97 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 109th Cong. 2 (2005).

245. *See supra* notes 58-66 and accompanying text.

246. *See supra* note 60 and accompanying text.

247. *See supra* note 57 and accompanying text.

248. Human Rights Watch, United States: Thousands of Children Sentenced to Life Without Parole (Oct. 12, 2005), http://hrw.org/english/docs/2005/10/12/usdom11835.htm.

249. *Id.*

countries in the world that imposes this sentence on juvenile offenders;[250] only twelve juveniles are currently serving this sentence in all other countries combined.[251]

The Court in *Roper* made many statements regarding the culpability of juveniles that seem to advocate for reform rather than harsh retribution.[252] The Court recognized that "[t]he personality traits of juveniles are more transitory [and] less fixed."[253] Also, "it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed."[254] By declaring that juveniles' conduct can never be as morally reprehensible as adults' conduct, the Court essentially stated that juveniles should not then be punished like adults.[255] Considering that life in prison without the possibility of parole is the harshest sentence available to adult offenders, other than the death penalty, it would be logical to conclude that the Court might view life without a parole as an *adult* punishment.

In *Roper*, the Court relied on very broad and conclusory statements about juveniles as a class to justify its position that the death penalty is a disproportionate sentence to a juvenile's personal culpability.[256] Therefore, if the Court granted certiorari to a juvenile challenging his life without parole sentence, the Court could strike down the sentence as cruel and unusual punishment in violation of the Eighth Amendment, based on its previous conclusions in *Thompson* and *Roper* that juveniles are less culpable than adults.

Because the Court relied on international opinion to abolish the juvenile death penalty, the Court could also abolish life without parole for juveniles as a result of further international pressure. Again, the United States is one of only a few countries in the world that impose this sentence on juveniles, and it is one of only two United Nation Members countries that has not ratified Article 37 of the Convention on the Rights of the Child.[257]

A second ramification on the juvenile justice system could be that state legislatures will either voluntarily change their juvenile transfer

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250. *Id.*

251. *Id.*; Lisa Bloom, *Life, Without Possibility*, COURTTV.COM (Oct. 25, 2005), http://courttv.com/people/bloom_blog/102505_juveniles_ctv.html.

252. *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 569-70 (2005).

253. *Id.* at 570.

254. *Id.*

255. *See id.* (quoting Thompson v. Oklahoma, 487 U.S. 815, 835 (1988)).

256. *See supra* Part III.B.3.

257. *See* Convention on the Rights of the Child, *supra* note 240; Bloom, *supra* note 251.

statutes, or, in an extreme case, the Supreme Court will decide that punishing juveniles as adults is always unconstitutional. In theory, if the Court's decision in *Roper* is interpreted to mean that juveniles are less culpable than adults—thus they should not be punished as adults, but rather rehabilitated—many states may reconsider how they are treating serious juvenile offenders. Rather than automatically sending juvenile offenders to adult court, perhaps juvenile courts will retain these offenders to rehabilitate them and prevent later patterns of criminal behavior. According to the Amnesty International and Human Rights Watch report, "[b]y sentencing children to life without parole, society tells them unequivocally that their lives are worthless, they are beyond repair or redemption, and any effort they may make to improve themselves is essentially futile. There is also inherent cruelty in denying a child any possibility of rehabilitation or reform."[258] If states decide to statutorily bring the focus of the juvenile justice system back to one of rehabilitation, juveniles will be sentenced to life without parole or other harsh punishments less frequently, and ideally these juveniles could be reformed to be contributing members of society.

V. CONCLUSION

Although no national consensus actually existed against the juvenile death penalty, and although some juveniles may have the requisite maturity and intelligence to understand the consequences of their actions, the U.S. Supreme Court decided in *Roper v. Simmons* that the practice of sentencing juveniles to death is unconstitutional under the Eighth Amendment. As a result, sixteen-year-old and seventeen-year-old defendants, like Simmons, who strategically plan to commit murder and do so in cold-blood, will not receive the ultimate penalty for their crime. Additionally, the Court interfered with the function of both state legislatures and sentencing juries, using its subjective views to declare what the law should be and implying that neither legislatures nor juries are competent to correctly assess the culpability of juveniles and determine appropriate sentences.

In the future, the juvenile justice system may undergo changes in both philosophy and procedure. States may begin to focus once again on the rehabilitation of juveniles, a premise upon which juvenile

258. AMNESTY INT'L & HUMAN RIGHTS WATCH, THE REST OF THEIR LIVES: LIFE WITHOUT PAROLE FOR CHILD OFFENDERS IN THE UNITED STATES 82 (2005), *available at* http://hrw.org/reports/2005/us1005/7.htm#_Toc114638421.

courts were originally established. Also, the Court may strike down as unconstitutional other *adult* punishments imposed on juvenile offenders. Whatever actual effect this decision may have, *Roper* will likely influence the fate of all future juvenile offenders, as well as shape the framework of the Court's analysis in all future Eighth Amendment cases.

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