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Constitutional Law: Elimination of the Juvenile Death Penalty—Substituting Moral Judgment for a True National Consensus

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CONSTITUTIONAL LAW: ELIMINATION OF THE JUVENILE DEATH PENALTY—SUBSTITUTING MORAL JUDGMENT FOR A TRUE NATIONAL CONSENSUS

Roper v. Simmons, 125 S. Ct. 1183 (2005)

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Respondent was convicted of first-degree murder for the torturous abduction and drowning of a woman[1] and was sentenced to death upon the recommendation of the jury.[2] Respondent committed these brutal acts as a seventeen year-old high school student.[3] Despite his age, Respondent was tried as an adult for his crimes.[4] Respondent challenged the ruling, contending that recent Supreme Court jurisprudence[5] established that execution of juvenile offenders amounted to cruel and unusual punishment under the Eighth Amendment.[6] The Missouri Supreme Court set aside the sentence,[7] holding that a national consensus had developed in opposition to the execution of juvenile offenders.[8] The Supreme Court granted

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* This Comment is dedicated to my grandfather, Morris Wernick, a man whose passion for life I strive to emulate. I thank him for giving me strong lineage and the determination to live life to the fullest.

1. Roper v. Simmons, 125 S. Ct. 1183, 1188 (2005). Respondent Christopher Simmons, with the help of his friend Charles Benjamin, entered the home of Shirley Crook, abducted her, and threw her off a bridge with her feet and hands bound together, drowning her in the river below. *Id.* at 1187-88.

2. State *ex rel.* Simmons v. Roper, 112 S.W.3d 397, 399 (Mo. 2003).

3. *Roper*, 125 S. Ct. at 1187.

4. *Id.* at 1188. Missouri state law gives jurisdiction to juvenile courts over children who have violated a state law or municipal ordinance prior to attaining the age of seventeen years. *Id.* (citing MO. REV. STAT. §§ 211.021, 211.031 (2000)). The court did instruct the jury that Respondent's age could be used as a mitigating factor in the penalty phase. *Id.* at 1188.

5. *Id.* at 1189. The Supreme Court held in *Atkins v. Virginia* that execution of mentally retarded persons amounted to cruel and unusual punishment under the Eighth Amendment. 536 U.S. 304, 321 (2002). Simmons argued that the reasoning behind *Atkins* should apply equally to the instant case. *Roper*, 125 S. Ct. at 1189.

6. *Roper*, 125 S. Ct. at 1190. The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

7. *Roper*, 125 S. Ct. at 1189. The Missouri Supreme Court re-sentenced Simmons to "life imprisonment without eligibility for probation, parole, or release except by act of the Governor." *State ex rel. Simmons*, 112 S.W.3d at 413. Simmons had previously made a motion in the trial court, unsuccessfully, to set aside the conviction sentence on the grounds of ineffective assistance at trial. *Roper*, 125 S. Ct. at 1189. On his first consolidated appeal of both the conviction and the denial of postconviction relief, the Missouri Supreme Court affirmed the lower court's rulings. *State ex rel. Simmons*, 112 S.W.3d at 399.

8. *Roper*, 125 S. Ct. at 1189.

certiorari,[9] and in affirming the decision, HELD, that the Eighth Amendment prohibits the imposition of capital punishment on offenders under the age of eighteen at the time of offense.[10]

The Eighth Amendment explicitly prohibits the imposition of cruel and unusual punishment on criminal offenders.[11] In addition to those acts considered cruel and unusual at the time of adoption of the Bill of Rights,[12] the Supreme Court measures the challenged punishment against "the evolving standards of decency that mark the progress of a maturing society."[13] The Court relies foremost on well-established, objective indicia of consensus.[14] While the Court has ruled that the death penalty itself is not unconstitutional[15] on a number of occasions, the Court has found the death penalty to be cruel and unusual punishment for certain crimes or as imposed on particular offenders.[16] As more challenges to the use of capital punishment have arisen, the Court has increasingly shown its willingness to introduce its own moral judgment in interpreting contemporary standards of decency.[17]

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9. Roper v. Simmons, 540 U.S. 1160, 1160 (2004). In light of the *Atkins* decision, the Court was compelled to reconsider the issue of whether the death penalty is a disproportionate punishment for juveniles. *See Roper*, 125 S. Ct. at 1192.

10. *Roper*, 125 S. Ct. at 1200. The Court also held that the Fourteenth Amendment was violated by imposing the death penalty on juveniles. *Id.*

11. U.S. CONST. amend. VIII. This amendment precludes not only barbaric punishments, but also those punishments found to be "'excessive' in relation to the crime committed." Coker v. Georgia, 433 U.S. 584, 592 (1977) (plurality opinion) (holding that the death penalty is excessive punishment for the rape of an adult woman).

12. *See* Ford v. Wainwright, 477 U.S. 399, 405-06 (1986) (explaining that, at a minimum, those acts considered cruel and unusual at the time the Bill of Rights was adopted are prohibited by the Eighth Amendment). Acts considered cruel and unusual in 1789 included those practices condemned under the common law of England. *Id.* at 406.

13. Trop v. Dulles, 356 U.S. 84, 100-01 (1958) (holding that denationalization violated the Eighth Amendment when used as a punishment).

14. *See Roper*, 125 S. Ct. at 1192 (explaining that a preliminary review of objective indicia of consensus provides the Court "essential instructions"). In determining whether a consensus exists against the imposition of certain punishment, the Court leans primarily on the actions of state legislatures. *Id.* Additional objective indicia of consensus include sentencing practices of juries and the existence of a trend toward the elimination of a particular practice. *Id.* at 1194.

15. *Coker*, 433 U.S. at 591, 592 (plurality opinion) (citing Gregg v. Georgia, 428 U.S. 153, 206-07 (1976) (holding that imposition of the death penalty under the Georgia statutory system did not violate the Eighth Amendment because it was neither a purposeless imposition of pain and suffering nor a punishment severely disproportionate to the crime committed)).

16. *See Roper*, 125 S. Ct. at 1218 (Scalia, J., dissenting) (surveying previous Supreme Court cases in which the Court held that capital punishment was unconstitutional).

17. *See id.* at 1190-92 (majority opinion) (discussing previous cases in which the independent judgment of the Court was brought to bear on the suitability of the death penalty). The Court has further broadened its analysis of cruel and unusual punishment in recent cases to include the views of the international community. *See id.* at 1198-1200.

In *Coker v. Georgia*,[18] the Court first articulated its reliance on independent moral judgment in addressing the suitability of the death penalty.[19] In *Coker*, the Court considered whether the death penalty is cruel and unusual punishment for the rape of an adult woman.[20] Petitioner, having escaped from a local correctional facility, entered the home of an adult woman and forcibly raped her at knifepoint.[21] Petitioner was convicted and sentenced to death by electrocution.[22] On appeal, the Court reversed, holding that the death penalty for the crime of rape of an adult woman is a disproportionate and excessive punishment and is prohibited under the Eighth Amendment.[23]

A plurality of the Court determined that broad legislative rejection[24] of imposition of the death penalty for rape confirmed the independent judgment of the plurality.[25] The plurality reasoned that rape should not be punished by death because, unlike murder, it does not involve "the unjustified taking of human life."[26] The dissent argued that the Court, in considering its own moral judgment, extended its traditionally limited role.[27] While recognizing the primacy of objective factors,[28] the plurality

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18. 433 U.S. 584 (1977) (plurality opinion).

19. *See id.* at 597. The Court asserted that "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." *Id.*

20. *Id.* at 592.

21. *Id.* at 587.

22. *Id.* at 591. The trial court instructed the jury that in sentencing, it could consider whether the offender had a prior record of conviction for a capital felony and whether the offender was simultaneously committing a separate capital felony. *Id.* at 587-88. The jury found both aggravating circumstances were present during the crime. *Id.* at 591.

23. *Id.* at 592.

24. *Id.* at 595-96. The Court found that Georgia was the only jurisdiction authorizing the death penalty as punishment for the crime of rape of an adult woman. *Id.* Though sixteen states and the federal government authorized capital punishment for the crime as of 1971, only Georgia, North Carolina, and Louisiana maintained the death penalty in their revised statutes after *Furman v. Georgia*. 408 U.S. 238, 369 (1972) (holding that the death penalty is unconstitutional when applied arbitrarily and striking down all the death penalty statutes then existing in the states). The latter two had their statutes struck down because the death penalty was mandatory for all offenders. *Id.*

25. *Id.* at 597.

26. *Id.* at 598.

27. *Id.* at 604 (Burger, C.J., dissenting). Language in earlier cases refers to the enhanced deference owed to state legislatures where criminal punishment is concerned, as "'these are peculiarly questions of legislative policy.'" *Id.* at 613 n.8 (emphasis omitted) (quoting Gore v. United States, 357 U.S. 386, 393 (1958)). According to the dissent, the simple fact that Georgia and two other states were the only states at that time that authorized the death penalty for the crime of rape should not detract from the deference afforded to legislative judgment. *Id.* at 616.

28. *See id.* at 592 (majority opinion) (explaining that objective factors should be relied upon to the greatest possible extent). "Eighth Amendment judgments should not be, or appear to be, merely the subjective views of individual Justices; judgment should be informed by objective factors to the maximum possible extent." *Id.*

insisted on giving credence to its own judgment in determining when a punishment is cruel and unusual under the Eighth Amendment.[29]

In *Stanford v. Kentucky*,[30] a plurality of the Court explicitly rejected the idea that its own independent judgment was relevant in the acceptability of the imposition of capital punishment on juvenile offenders who were sixteen and seventeen years of age at the time of the offense.[31] In two separate instances, petitioners committed brutal killings while participating in a robbery.[32] Both petitioners were tried as adults, convicted of murder, and sentenced to death.[33] Petitioners appealed the conviction, arguing that "'evolving standards of decency'" prohibited the death penalty for all juvenile offenders.[34] In denying the appeals, the plurality refused to consider its own judgment and held that petitioners failed to establish a national consensus against imposition of the death penalty.[35]

The plurality in *Stanford* strongly rejected any notion that its job involved shaping the contours of contemporary standards of decency.[36] Rather, the Court suggested that the best evidence of American societal conceptions of what constitutes cruel and unusual punishment lies in state statutes[37] and, to a lesser degree, the sentencing practices of juries.[38] The

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29. *See id.* at 612-13 (Burger, C.J., dissenting) (arguing that the Court departed from precedent by making itself the ultimate arbiter of contemporary standards).

30. 492 U.S. 361 (1989).

31. *Id.* at 378 (plurality opinion). The Court had already prohibited the death penalty for juvenile offenders under the age of sixteen. *See* Thompson v. Oklahoma, 487 U.S. 815, 838 (1988) (holding that such punishment was cruel and unconstitutional).

32. *Stanford*, 492 U.S. at 365-68 (majority opinion). The Court consolidated two murder cases in which the petitioners were under the age of eighteen at the time of the crime. *Id.* at 364-65. Petitioner Kevin Stanford was seventeen years and four months of age when he raped and killed a gasoline station attendant during the commission of a robbery. *Id.* at 365. Petitioner Heath Wilkins was sixteen years and six months of age when he stabbed a saleswoman to death in a convenience store while robbing the store. *Id.* at 366.

33. *Id.* at 365-67.

34. *Id.* at 369 (quoting Trop v. Dulles, 365 U.S. 86, 100-01 (1958)).

35. *Id.* at 380 (plurality opinion). The Court noted that petitioners face a heavy burden in attacking the legislative judgments of state representatives. *Id.* at 373 (majority opinion) (citing Gregg v. Georgia, 428 U.S. 153, 175 (1976)). Petitioners failed to meet their heavy burden of establishing a national consensus against the death penalty because a majority of states that authorized the death penalty at that time permitted the execution of juvenile offenders sixteen years of age and older. *Stanford*, 492 U.S. at 373.

36. *Id.* at 378 (plurality opinion). The plurality reemphasized that the role of the Court is not to interpret what the "'evolving standards of decency' . . . *should* be, but what they *are*." *Id.* (quoting Trop v. Dulles, 356 U.S. 86, 100-01 (1958)).

37. *Id.* at 370. "'[F]irst' among the 'objective indicia that reflect the public attitude toward a given sanction' are statutes passed by society's elected representatives." *Id.* (quoting McCleskey v. Kemp, 481 U.S. 279, 300 (1987)).

38. *See id.* at 373-74 (discussing the reluctance of juries to impose death sentences on minors).

dissent argued that the Eighth Amendment was designed to protect fundamental rights from the power of popular decision-making,[39] and it called on the Court to employ its own judgment as ultimate arbiter.[40] The Court disagreed, stating that the Eighth Amendment was intended to protect individuals from the will of the Court as well as majoritarian politics.[41] Thus, in *Stanford*, the Court declined to rely on its own judgment and upheld petitioners' convictions and sentences.[42]

Thirteen years later in *Atkins v. Virginia*,[43] the Court once again leaned on its own moral judgment to determine whether the execution of mentally retarded offenders amounted to cruel and unusual punishment under the Eighth Amendment.[44] Petitioner had robbed and killed a man for no apparent reason.[45] Despite expert testimony regarding lack of mental capacity,[46] petitioner was convicted of capital murder and sentenced to death.[47] The Supreme Court of Virginia affirmed the imposition of the death penalty.[48] However, on certiorari, the Court reversed, concluding that "'evolving standards of decency'" had turned against imposition of the death penalty for mentally retarded criminals.[49]

The Court in *Atkins* stated that in cases in which there exists objective evidence of a national consensus against the death penalty, the Court

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39. *See id.* at 391-92 (Brennan, J., dissenting). "[T]he very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities . . . and to establish them as legal principles to be applied by the courts." *Id.* (quoting W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943)).

40. *Stanford*, 492 U.S. at 391 (Brennan, J., dissenting) (citing Coker v. Georgia, 433 U.S. 584, 604 n.2 (1977) (Powell, J., concurring in the judgment in part and dissenting in part)).

41. *Stanford*, 492 U.S. at 379 (plurality opinion). The Court posited that by allowing justices to pass judgment personally on the desires of the American public, the Court no longer acts as judges of the law, but something more akin to "philosopher-kings." *Id.*

42. *Id.* at 378-80.

43. 536 U.S. 304 (2002).

44. *See id.* at 313; *see also id.* at 348 (Scalia, J., dissenting) (arguing that the underlying rationale for the Court's decision stemmed from its own moral judgment).

45. *Id.* at 307 (majority opinion). Petitioner Daryl Renard Atkins, along with William Jones, abducted Eric Nesbitt at gunpoint, robbed him of his personal belongings, forced him to withdraw additional cash, and then shot him eight times after driving him to an isolated area. *Id.*

46. *Id.* at 308. A forensic psychologist had evaluated petitioner and determined that his full-scale IQ was 59, qualifying him as mentally retarded. *Id.* at 309, 309 n.5.

47. *Id.* at 308-09.

48. *Id.* at 310. The Supreme Court of Virginia relied on the Court's decision just thirteen years earlier in *Penry v. Lynaugh*, 492 U.S. 302 (1989) (holding that mentally retarded offenders were not exempt from the death penalty because of their mental capacity). *Atkins*, 536 U.S. at 310.

49. *Atkins*, 536 U.S. at 321 (quoting Ford v. Wainwright, 477 U.S. 399, 406 (1986)). The Court announced that contemporary standards had significantly evolved in the intervening thirteen years since the Court last considered the issue, as evidenced by the fact that since 1989 sixteen states had affirmatively exempted the mentally retarded from capital punishment and the practice had become unusual even in states permitting it. *Id.* at 314-16.

imparts its own judgment to determine whether there may be reason to deviate from the judgment of state legislatures.[50] Despite argument from the dissent that prisoners could easily feign mental retardation,[51] the Court reasoned that because of inherent mental deficiencies, imposing the death penalty on mentally retarded offenders serves neither of the social goals of deterrence and retribution.[52] Thus, as in *Coker*, the Court considered its own moral judgment in abolishing the death penalty for mentally retarded offenders.[53]

Explicitly rejecting *Stanford*, the instant Court applied the *Atkins* analysis for determining whether the Eighth Amendment precludes imposition of the death penalty on juvenile offenders.[54] In proclaiming that "penological justifications for the death penalty" do not apply to juvenile offenders,[55] the instant Court held that execution of juvenile offenders was inconsistent with evolving standards of decency.[56] Unlike the Court in *Stanford*, the instant Court embraced its role in defining contemporary standards and reaffirmed the notion that cruel and unusual punishment is a concept subject to re-interpretation.[57]

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50. *Id.* at 313.

51. *Id.* at 353 (Scalia, J., dissenting).

52. *See id.* at 318-19 (majority opinion). Since mentally retarded offenders who commit murder do so with lesser culpability than other murderers by nature of the difference in mental capacity, the goal of retribution would be better served by reserving the death penalty for those murderers exhibiting heightened depravity of mind. *Id.* at 319. Also, the cognitive and behavioral impairments that define mentally retarded individuals make them less aware and responsive to the possible punishment of death, and therefore imposing the death penalty would not further the goal of deterrence. *Id.* at 319-20.

53. *See id.* at 321 (referring to "'evolving standards of decency'" in applying the Eighth Amendment) (quoting Ford v. Wainwright, 477 U.S. 399, 406 (1986)).

54. Roper v. Simmons, 125 S. Ct. 1183, 1198 (2005). The Court asserted that *Stanford* was inconsistent with *Coker* in that the *Stanford* Court should have considered its independent judgment on the "proportionality of the death penalty" to the crime and to the group of offenders being considered. *Id.* In addition, the Court once again pointed to the rejection of the death penalty within the international community as "significant confirmation" for its determination that the death penalty amounted to cruel and unusual punishment for juvenile offenders. *See id.* at 1198-1200 (discussing the "stark reality" that only the U.S. continues to give official sanction to the death penalty). For criticism of the inclusion of international law in Eighth Amendment analysis, see Transcript of Discussion Between U.S. Supreme Court Justices Antonin Scalia and Stephen Breyer—American University Washington College of Law, Jan. 13, 2005, *available at* http://domino.american.edu/AU/media/mediarel.nsf/0/1F2F7DC4757FD01E85256F890068E6E0?OpenDocument.

55. *See Roper*, 125 S. Ct. at 1196. Citing research on the diminished culpability of juveniles, the Court posited "that the penological justifications for the death penalty apply to [juveniles] with lesser force than to adults." *Id.*

56. *Id.* at 1194. "A majority of States have rejected the imposition of the death penalty on juvenile offenders under 18, and we now hold this is required by the Eighth Amendment." *Id.*

57. *Compare* Stanford v. Kentucky, 492 U.S. 361, 378-79 (1989), *with Roper*, 125 S. Ct. at

The instant Court began its analysis by evaluating the current status of juvenile offenders within state statutes and courtrooms.[58] The instant Court identified thirty states that precluded the death penalty for juvenile offenders, including twelve states that explicitly rejected the death penalty altogether and eighteen of thirty-eight states that authorized the death penalty by statute.[59] Even in the states that had not abolished the death penalty by statute, the instant Court found evidence that juries rarely imposed the death sentence on juvenile offenders.[60] The instant Court stated that while only five states had taken affirmative action to abolish the juvenile death penalty since *Stanford*, the consistent direction of the change is significant.[61]

In addition to objective indicia of national consensus, the Court considered the proportionality of the death penalty for juvenile offenders.[62] The instant Court stated that because capital punishment entails the ultimate penalty of death, it must be limited to the most severely depraved criminals.[63] The instant Court identified three major differences between juveniles and adults that demonstrate diminished culpability in juvenile offenders.[64] Based on these differences, the instant Court dismissed the idea that juveniles could be among the worst offenders in society.[65] While youth is considered a mitigating factor in sentencing guidelines, the instant Court stated that juries are too likely swayed by evidence of the brutal nature of murder to adequately consider mitigating arguments.[66] Thus, the

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58. *Roper*, 125 S. Ct. at 1192-93.

59. *Id.* at 1192.

60. *Id.* Since *Stanford*, only six states had executed offenders who had committed murder while under the age of eighteen. *Id.* (citing VICTOR L. STREIB, THE JUVENILE DEATH PENALTY TODAY: DEATH SENTENCES AND EXECUTIONS FOR JUVENILE CRIMES, JANUARY 1, 1973-FEBRUARY 28, 2005, 15-23 (2005), http://www.law.onu.edu/faculty/streib/documents/juvdeath.pdf).

61. *Roper*, 125 S. Ct. at 1193. While the change in state statutes prohibiting the death penalty for juvenile offenders over a fifteen-year period was not nearly as significant as that between *Penry* and *Atkins* over a twelve-year period, the instant Court reasoned that the impropriety of executing juveniles had already achieved a longstanding recognition. *Id.*

62. *See id.* at 1194-98 (discussing the differences between juveniles and adult offenders and why these differences prevent juveniles from falling into the "'narrow category'" of "extreme culpability") (quoting Atkins v. Virginia, 536 U.S. 304, 319 (2002)).

63. *Id.* at 1194 (citing *Atkins*, 536 U.S. at 319).

64. *Id.* at 1195. The first major difference noted was a lack of maturity and sense of responsibility in juveniles. *Id.* The second major difference discussed was a vulnerability to negative influences predicated on a lack of financial and legal freedom to escape from negative environments. *Id.* Third, the instant Court noted that juveniles still have a transitory personality and undefined character. *Id.* Thus, the Court reasoned that the social purposes of the death penalty—retribution and deterrence—are without merit when applied to juveniles. *Id.* at 1196.

65. *Id.* at 1195.

66. *Id.* at 1197. The instant Court acknowledged that the risk of bias could be corrected by the creation of a rule of evidence ensuring that the youth factor was not overlooked by the jury, but nevertheless insisted that a categorical bar against the death penalty is necessary given the Court's

instant Court's own judgment confirmed its findings of a national consensus against the execution of juvenile offenders.[67]

In a thorough dissent, Justice O'Connor agreed with the instant Court's inclusion of its own independent judgment, but concluded that no genuine national consensus exists to support a categorical bar against the execution of juvenile offenders.[68] In distinguishing the instant case from *Atkins*, Justice O'Connor stated that while objective indicia of consensus were weak in both cases, the moral proportionality argument in *Atkins* provided compelling evidence[69] to overcome the "lingering ambiguities" of national consensus.[70] Justice O'Connor argued that the instant Court erred in substituting its moral weight for the legislative judgments of roughly half of the states in the Union.[71]

Joined by Justice Thomas and Chief Justice Rehnquist, Justice Scalia wrote a dissent chastising the instant Court for imposing its own views on the juvenile death penalty in overruling *Stanford*.[72] Justice Scalia argued that the Supreme Court should not play a role in defining evolving standards where those standards are readily discernable from state statutes.[73] Justice Scalia suggested that the objective evidence offered by the instant Court failed to demonstrate a true national consensus against the execution of juvenile offenders.[74] Furthermore, Justice Scalia argued that subtle changes in public approval in the fifteen years since *Stanford* do not warrant a categorical bar on imposing the death penalty on juvenile offenders, considering that support for the death penalty has surged and waned throughout history.[75]

"larger concerns." *Id.*

67. *See id.* at 1194.

68. *Id.* at 1206 (O'Connor, J., dissenting).

69. *See id.* at 1214 (explaining that diminished culpability in mentally retarded offenders is always present because of inherent mental impairments that define the condition of the group, while the culpability of juveniles may differ depending on the maturity level of the individual).

70. *Id.* at 1212. While the moral proportionality argument in *Atkins* decisively bolstered the findings of a national consensus against the death penalty, Justice O'Connor argued that "the proportionality argument [in the instant case] is so flawed that it can be given little, if any, analytical weight—it proves too weak to resolve the lingering ambiguities in the objective evidence of legislative consensus." *Id.*

71. *Id.* at 1211.

72. *See id.* at 1217 (Scalia, J., dissenting) ("[T]he Court says in so many words that what our people's laws say about the issue does not . . . matter."). Justice Scalia argued that the Eighth Amendment does not give the Court the responsibility of "sole arbiter" of the nation's moral standards. *Id.*

73. *Id.* at 1222.

74. *Id.* at 1218. Scalia argued that eighteen states with legislation against the execution of juvenile offenders did not constitute a national consensus. *Id.* Historically, the Court has required "overwhelming opposition to a challenged practice" over many years. *Id.*

75. *Id.* at 1220. Scalia discussed recent legislation in four states prohibiting the death

In relying foremost on its own independent judgment, the instant Court has expanded its role in Eighth Amendment jurisprudence.[76] Consequently, the instant Court has diminished the primacy of objective indicia of consensus in defining contemporary standards of decency.[77] Purporting to follow *Atkins*,[78] the instant Court has reached beyond its traditional role as interpreter of evolving standards of decency, asserting its willingness to revisit questions of cruel and unusual punishment in light of the views of the majority.[79]

The instant Court has departed from precedent by downplaying the absence of overwhelming opposition to the imposition of a particular punishment.[80] Unlike *Coker*, where every state except one had abolished the death penalty for rape,[81] the instant Court relied on evidence of legislation prohibiting the juvenile death penalty in a debatable majority of states to demonstrate a national consensus against its use.[82] In addition,

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penalty was significant. *Id.*; *see also* Thompson v. Oklahoma, 487 U.S. 815, 854-55 (1988) (O'Connor, J., concurring) (discussing the revival of the death penalty in state statutes after 1972).

76. *See Roper*, 125 S. Ct. at 1198; *see also id.* at 1206 (O'Connor, J., dissenting) (arguing that the rule announced by the instant Court ultimately is based on the Court's own subjective views).

77. *See id.* at 1218 (Scalia, J., dissenting).

78. *See id.* at 1192 (majority opinion). However, while a wave of legislation was passed barring the execution of mentally retarded offenders in the thirteen years between *Penry* and *Atkins*, *see* Atkins v. Virginia, 536 U.S. 304, 314-16 (2002), only five states (four by statute and one by judicial decree) took specific steps to abolish the juvenile death penalty in the fifteen years between *Stanford* and the instant case. *Roper*, 125 S. Ct. at 1193.

79. *See Roper*, 125 S. Ct. at 1217 (Scalia, J., dissenting) (arguing that the Court, by invoking its own moral judgment, has deemed itself the sole arbitrator of the Nation's moral standards). Justice Scalia went as far as to call the Court's opinion a mockery of Alexander Hamilton's expectations of a traditional judiciary, "'bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them.'" *Id.* (quoting THE FEDERALIST No. 78, at 471 (Alexander Hamilton) (C. Rossiter ed., 1961)).

80. *See Roper*, 125 S. Ct. at 1192-93. Justice Scalia pointed out that in previous cases, including *Coker*, where the death penalty was deemed cruel and unusual as applied to certain crimes or groups of offenders, the Court cited unanimous or near-unanimous rejection by the states. *Id.* at 1218 (Scalia, J., dissenting). Conversely, forty-two percent of death penalty states objecting to its imposition on juvenile offenders by statute was not convincing in *Stanford*. Stanford v. Kentucky, 492 U.S. 361, 370-71 (1989).

81. *See* Coker v. Georgia, 433 U.S. 584, 593-94 (1977).

82. *See Roper*, 125 S. Ct. at 1218 (Scalia, J., dissenting). Even including states that have abandoned the death penalty altogether, only sixty percent of states form the so-called consensus. *See id.* at 1192 (majority opinion). Considering the ebbs and flows in popular support of the death penalty throughout American history, inferring a national consensus from this evidence is problematic. Should support for execution of juvenile offenders gain momentum in the future, the categorical bar against its implementation would be incredibly difficult to remove. *See* 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, 480-81 (2003) (discussing what could occur if society evolves backwards). "The main problem seems to be that traditional analysis of the evolving standards of decency does not leave room for regression." *Id.*

the instant Court conceded that the evidence in the instant case was not as strong as in *Atkins*.[83] Thus, the instant Court has broadened the concept of a national consensus in defining contemporary standards of decency.[84]

In holding that execution of juvenile offenders is cruel and unusual punishment without strong evidence of a national consensus, the instant Court has elevated the importance of moral proportionality analysis over objective indicia of consensus in determining contemporary standards.[85] While *Coker* and its progeny acknowledge the importance of independent moral judgment,[86] *Coker* requires that objective indicia of consensus be given maximum weight in deciding whether punishment is cruel and unusual.[87] The instant Court ignored this overt limitation, substituting its own judgment in place of profound evidence of a national consensus.[88]

In openly rejecting *Stanford*,[89] the instant Court emphasized the moral proportionality argument used in *Atkins* to establish a categorical bar against the imposition of the death penalty on juvenile offenders.[90] The Court in *Atkins* found an unyielding connection, by definition, between mental retardation and diminished culpability.[91] However, the instant Court asserted that juveniles cannot be among the worst offenders because

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at 481.

83. *See Roper*, 125 S. Ct. at 1193 (referring to the change as "less dramatic" but nevertheless significant). While the total number of states prohibiting execution of juveniles was equivalent to the number of states prohibiting the execution of the mentally retarded when *Atkins* was decided, the instant Court observed that the rate of abolition of the death penalty for mentally retarded offenders was much higher than in the instant case. *Id.*

84. *See id.* at 1192-93.

85. *See supra* note 54 and accompanying text.

86. *See Coker*, 433 U.S. at 597; *see also* Atkins v. Virginia, 536 U.S. 304, 313 (2002) (describing the use of independent judgment to determine whether reason exists to disagree with the decision reached by the legislature and public).

87. *See Coker*, 433 U.S. at 592. Furthermore, *Stanford* and *Gregg* placed the burden of proof on the offender to demonstrate an overwhelming national consensus against the imposition of the death penalty on juvenile offenders. *See* Stanford v. Kentucky, 492 U.S. 361, 371 (1989); Gregg v. Georgia, 428 U.S. 153, 175 (1976). The instant Court transferred the burden of proof to the state to demonstrate the existence of a national consensus in favor of capital punishment. *See Roper*, 125 S. Ct. at 1194 (citing the state's failure to show national consensus in favor of juvenile execution). This change has a significant effect in the instant case considering the number of states still authorizing the juvenile death penalty. *See id.* at 1200 (providing a list of states allowing the execution of juveniles).

88. *See id.* at 1222 (Scalia, J., dissenting) (arguing that a court is limited to identifying a moral consensus among the public); *see also Stanford*, 492 U.S. at 378 (finding that the Court has no authority under the Eighth Amendment to substitute its own beliefs for society's uncertainty).

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

90. *See Roper*, 125 S. Ct. at 1197. Capital punishment must be reserved for those individuals whose actions fall within "'a narrow category of the most serious crimes'" and who demonstrate a culpability making them "'the most deserving of execution.'" *See id.* at 1194 (quoting *Atkins*, 536 U.S. at 319).

91. *See Atkins*, 536 U.S. at 319.

they are, on average, more susceptible to irresponsible behavior, negative influences, and evolving personality traits.[92] Surely, capital punishment should be reserved for the most deserving of offenders who have committed heinous crimes.[93] Yet, the instant Court has removed juveniles from that class regardless of the maturity and depravity demonstrated by a particular offender.[94]

The instant Court rejected the ability of sentencing juries to account for age as a mitigating factor.[95] While the Court in *Stanford* found that the criminal justice systems among the states provide for individualized sentencing procedures for juvenile offenders,[96] the instant Court decided that juries can no longer be trusted to avoid the prejudicial impact of emotional evidence.[97] The instant Court acknowledged that bias could be corrected by special jury instructions,[98] but nevertheless chose to eliminate the risk altogether.[99] Thus, the instant Court used its own moral judgment to override the legislatures of roughly half the states that authorize juries to impose the death penalty.[100]

Additionally, by leaning so heavily on the subjective views of its nine members, the instant Court has expanded the notion that the Eighth Amendment is open to constant re-interpretation.[101] For example, the

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92. *See Roper*, 125 S. Ct. at 1195. The instant Court does not claim that the differences between adults and juveniles are always present, but rather that juveniles are merely more susceptible to these characteristics that lead to diminished culpability. *See id.* (discussing the transitory recklessness of juveniles).

93. *See* David McCord, *Imagining a Retributivist Alternative to Capital Punishment*, 50 FLA. L. REV. 1, 34 (1998) (stating that in accordance with society's retributive impulse, the death penalty "vindicates the expressive need to separate highest condemnation offenses from the mass of less heinous crimes").

94. *Roper*, 125 S. Ct. at 1197. The instant Court drew a line at eighteen despite admission that "[t]he qualities that distinguish juveniles from adults do not disappear when an individual turns 18. By the same token, some under 18 have already attained a level of maturity some adults will never reach." *Id.* For example, Justice Scalia convincingly stated that the petitioner in the instant case demonstrated heightened depravity of mind and culpability through his callous descriptions of "the murder he planned to commit." *Id.* at 1223 (Scalia, J., dissenting).

95. *See id.* at 1197 (arguing that juries would be swayed by the brutality of the crime and thereby give less weight to mitigating factors).

96. Stanford v. Kentucky, 492 U.S. 361, 374-76 (1989).

97. *See Roper*, 125 S. Ct. at 1197; *but cf. id.* at 1224 (Scalia, J., dissenting) (arguing that the fact that juries rarely choose to execute juvenile offenders is a sign that juries do have the ability to take age into account as a mitigating factor).

98. *See id.* at 1197 (majority opinion).

99. *See id.* (explaining that such a solution would not address the Court's "larger concerns").

100. *See id.* at 1198; *see also id.* at 1206 (O'Connor, J., dissenting).

101. While the Court has long looked to "evolving standards" of decency in deciding Eighth Amendment challenges, constant re-interpretation undermines the system of stare decises, subjects the law to trends in public opinion, and ignores the history of support for the death penalty. *See* Thompson v. Oklahoma, 487 U.S. 815, 854-55 (1988) (O'Connor, J., concurring) (discussing the

instant Court relied on certain sociological studies to support its opinion regarding diminished culpability of juveniles while ignoring conflicting studies.[102] The instant Court could have easily emphasized the conflicting evidence to argue that chronological age is not inherently determinative of mental capacity.[103] Thus, the instant Court has opened the door further for future challenges to the death penalty by other groups of offenders who have found support in a corner of academia sympathetic to their plight.

In moving from objective to subjective criteria, the instant Court has expanded the scope of *Atkins* by substituting its own moral judgment for a true national consensus against the juvenile death penalty. While *Coker* establishes the legitimacy of the Court's independent judgment as a significant factor in Eighth Amendment jurisprudence,[104] the instant Court's analysis merely confirmed the viewpoints of a majority of its members.[105] This disregard for objective indicia of consensus has chipped away at traditional deference to state legislatures[106] and has created an Eighth Amendment subject to the beliefs of individual justices.[107]

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danger of inferring a settled societal consensus regarding the death penalty).

102. *See Roper*, 125 S. Ct. at 1222 (Scalia, J., dissenting) (explaining the highly discriminatory fashion in which the Court chose its statistics). "In other words, all the Court has done today, to borrow from another context, is to look over the heads of the crowd and pick out its friends." *Id.* at 1223 (citing Conroy v. Aniskoff, 507 U.S. 511, 519 (1993) (Scalia, J., concurring in the judgment)).

103. *See id.* at 1223 (describing studies contradicting the Court's conclusions).

104. *See* Coker v. Georgia, 433 U.S. 584, 597 (1977) (plurality opinion).

105. *See Roper*, 125 S. Ct. at 1198; *see also id.* at 1206 (O'Connor, J., dissenting).

106. *See id.* at 1222 (Scalia, J., dissenting) (arguing that legislatures are best suited to respond to moral values regarding criminal punishment because they are comprised of democratically elected representatives).

107. *See id.* at 1230 (positing that Eighth Amendment decisions have become little more than a "show of hands" reflecting current justices' ideology).