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"PREDICTIVE JUSTICE"?: SIMMONS V. ROPER AND THE POSSIBLE END OF THE JUVENILE DEATH PENALTY

S. Starling Marshall*

INTRODUCTION

Christopher Simmons of Missouri and Napoleon Beazley of Texas were seventeen-years-old when they committed murder. They were both convicted and sentenced to death, and they spent nearly the same amount of time on death row. As inmates the two young men expressed remorse, took part in religious activities and were model prisoners. It is these similarities, as the American Bar Association’s Juvenile Justice Center points out, which make the opposite outcomes so dramatic. On May 28, 2002, the Missouri Supreme Court granted Simmons a stay of execution and eventually overturned his death sentence. Beazley, however, on the same day Simmons was granted his stay, was executed by the state of Texas. How can such an inconsistency exist? This is an especially perplexing question when one considers that Simmons’s sentence was not overturned based on his innocence. The Missouri Supreme Court held in State ex rel. Simmons v. Roper that the juvenile death penalty was unconstitutional under the U.S. Constitution’s bar on cruel and unusual punishment. The entire Simmons decision was based on the United States Supreme Court’s decision in Atkins v. Virginia, which

* J.D. Candidate, 2005, Fordham University School of Law. I would like to thank my parents, Gail and John Marshall, for their inspiration, encouragement and insight throughout this and every other project I have ever undertaken. Finally, thanks to Michael Tarkan, my fiancé and best friend who has loved and supported me through all my endeavors.

3. Id.
4. Id.
6. Ortiz, supra note 2.
7. Simmons, 112 S.W.3d at 400.
8. Id. at 399-400.
struck down the death penalty for mentally retarded offenders as unconstitutional.\textsuperscript{10} The Simmons decision was called "unusual"\textsuperscript{11} and the Missouri court was criticized as acting on a "hunch" as to what the United States Supreme Court would do.\textsuperscript{12} On January 26, 2004 the Court granted certiorari to the case which will be heard during the Court's October 2004 term.\textsuperscript{13}

This Comment explores the reasoning employed in the Simmons and Atkins decisions and evaluates their conclusions, ultimately finding the Simmons holding to be correct despite the confusing standard laid out by the Supreme Court in Atkins. Part I provides some necessary background information regarding the United States Supreme Court's jurisprudence as it pertains to the death penalty. Part II of this Comment examines the Simmons decision in detail and its reliance on the Atkins decision. Last, Part III argues that the difficulties experienced by the Simmons court in applying the Atkins decision lay in the Supreme Court's ambiguous standard for determining the "evolving standard of decency." This part argues for an inclusive standard, and concludes that under this standard Simmons v. Roper was decided correctly.

I. THE DEATH PENALTY AND THE UNITED STATES SUPREME COURT

Commentators have noted that no matter how intensely politicians, commentators and activists argue for or against the death penalty, "[n]o other center of power in American society comes close to having the influence over the continued use of the death penalty that is wielded by a single justice of the Supreme Court."\textsuperscript{14} Challenges to the death penalty's constitutionality have been mounted virtually annually since 1972.\textsuperscript{15} Before examining these challenges, it is instructive to reflect on the Court's handling of the Eighth Amendment.\textsuperscript{16}

Part I.A. explores the key Eighth Amendment cases in order to put the death penalty jurisprudence into context. Part I.B. summarizes the Court's major death penalty cases, and, more specifically, those death penalty cases in which particular groups of offenders were excluded from capital punishment. Part I.C. examines recent Supreme Court rejections of appeals by juvenile offenders who argued that juvenile executions are unconstitutional.

\textsuperscript{10.} Id.
\textsuperscript{11.} See Hudson, supra note 1 (quoting Professor Donald J. Hall).
\textsuperscript{12.} Id. (quoting Professor Thomas Baker).
\textsuperscript{16.} See infra notes 17-36 and accompanying text.
A. Eighth Amendment Jurisprudence

The Eighth Amendment of the United States Constitution bars cruel and unusual punishment. The Cruel and Unusual Punishment Clause had been interpreted “[f]rom its adoption until the early twentieth century . . . in accordance with the original understanding of the Framers as a prohibition on ‘torturous or barbaric methods of punishment.’”

In 1910, the Supreme Court considered Weems v. United States, which presented an opportunity for the Court to expand the scope of the Clause. Weems had been convicted of fraud and sentenced to fifteen-years imprisonment under the Philippine Penal Code; he challenged the conviction claiming that this sentence constituted “cruel and unusual punishment.” The Court agreed, and struck down Weems's criminal sentence because it violated the Eighth Amendment.

Two important principles were established in Weems that have since been adhered to in Eighth Amendment jurisprudence. The first was the view that the Amendment limited not only torture but “all punishments which by their excessive length or severity are greatly disproportioned to the offenses charged.” This principle opened the door for the Court to strike down punishments which fell short of torture but were not proportionate to the crime. The other influential principle set forth in Weems concerned a battle between two manners of deriving constitutional meaning: looking solely to the Framers intent or by allowing meaning to be influenced by evolving societal standards. The majority held that “cruel and unusual punishment” was to be interpreted in a “progressive” manner, and “not fastened to the obsolete but may acquire meaning as public opinion becomes

17. U.S. Const. amend. VIII.
20. See Weems, 217 U.S. at 367-73; Foley, supra note 15, at 24 (describing the question before the Court as: “What is the nature, meaning, and scope of cruel and unusual punishment clause?”).
21. Weems, 217 U.S. at 357-60.
22. See Melusky & Pesto, supra note 14, at 87.
24. Weems, 217 U.S. at 371 (internal quotations omitted).
25. Foley, supra note 15, at 24-28. Foley explains that interpretivists are only willing to look to the meaning that the clause could have had when it was written, while non-interpretivists are willing to look at a broad range of modern realities in determining the meaning of the Constitution. Id. at 24. In describing the holding in Weems, Foley concludes that the majority represented a non-interpretivist approach. Id.
enlightened by humane justice.” This manner of interpretation allowed the phrase to evolve beyond what was likely envisaged in 1791, when it was written into the United States Constitution. The Court explained that “[t]ime works changes, brings into existence new conditions and purposes” and found that the clause “must be capable of wider application than the mischief which gave it birth.” The original enactment of the clause “constituted a response of the Founding Fathers to the primitive crudity of the past.” Since the clause had originally intended to protect against torture, this progressive interpretation meant that the clause could be read to prohibit the excessive imprisonment in Weems’s case. The Weems Court did not, however, give any guidance as to how the evolving standards were to be determined.

A progressively interpreted Cruel and Unusual Punishment Clause was central to another important Eighth Amendment case, Trop v. Dulles. Trop has been very influential in Eighth Amendment jurisprudence, and its language is often cited today. The Trop Court cited Weems, and found that the meaning of the “cruel and unusual punishment” clause was “not static” and that “[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society,” further expounding on the notion of a progressive interpretation. This idea of evolving standards “may be the benchmark against which all punishments are compared and evaluated.” The progressive interpretation in Trop included the “standards of all ‘civilized’ nations.... Thus in the Court exhibited a willingness to allow international standards of decency to influence the meaning of cruel and unusual punishment under the United States Constitution.” The Court clearly used international practice as part of its determination but still did not set a clear test to guide future cases.

Neither of these cases were death penalty cases but they are central to understanding modern Eighth Amendment challenges to

26. Weems, 217 U.S. at 378 (citations omitted); see also Foley, supra note 15, at 24.
27. See Foley, supra note 15, at 24-25.
28. Weems, 217 U.S. at 373.
30. 356 U.S. 86 (1958) (deciding that a loss of citizenship was a disproportionate punishment under the Eighth Amendment for the crime of desertion which occurred during a time of war).
31. See Foley, supra note 15, at 40.
34. See Foley, supra note 15, at 42.
36. See supra notes 21, 30 and accompanying text.
the death penalty. The Cruel and Unusual Punishment Clause has been used to challenge the death penalty on many occasions.

B. The Constitutionality of the Death Penalty

In 1972, the Supreme Court heard three cases consolidated under the name Furman v. Georgia that challenged the constitutionality of the petitioners' death sentences.37 The statutes under which the petitioners had been sentenced "enumerated many capital crimes but provided no further guidance to the sentencing authority in deciding whether to impose the death penalty."38 The petitioners argued that these death sentences were handed down by a system of arbitrarily applied capital punishment. Since 1947 the rate of execution had dropped steadily due to a hesitation on the part of the courts and increasingly aggressive appellate review.39 The abolitionist movement in the United States "simmered through the first few decades of the twentieth century, expanded in the 1930s, and became powerful in the 1950s and 1960s."40 The 1970s witnessed a reversal of the trend towards abolition.41 The divisions among the Justices in Furman clearly reflected society's atmosphere of confusion, hesitation and division.42 The opinion of the Court, written per curiam, consisted of only one paragraph and "unexpectedly"43 reversed the imposition of capital punishment on these defendants, as these punishments "constitute[d] cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments."44 In the longest death penalty decision the Supreme Court has ever issued each Justice wrote an opinion, either concurring or dissenting, delineating all the major arguments for and against capital punishment.45 Whereas Justices Brennan and Marshall wrote that the punishment of death itself

38. Ashley Rupp, Note, Death Penalty Prosecutorial Charging Decisions and County Budgetary Restrictions: Is the Death Penalty Arbitrarily Applied Based on County Funding?, 71 Fordham L. Rev. 2735, 2740 (2003). The three petitioners were all African-American; two had been convicted of rape and one of murder. Id. at 2741. There was some question as to whether Furman, one of the petitioners, was actually sane. Id. Another one of the petitioners had previously been found to be borderline mentally retarded. Id.
39. Gorecki, supra note 29, at 92. This increasing review was "largely due to a concerted action of abolitionist lawyers, especially those of the NAACP Legal Defense and Education Fund" who appealed nearly every sentence. Id.
40. Id. at 87.
41. Id. at 95. This trend was partially due to the dramatic increase in crime, among other factors. Id. at 97-113.
42. Id. at 112.
45. See, e.g., id.; see also Foley, supra note 15, at 62.
violated the Eighth Amendment, the other three Justices who joined them in the majority concluded that the death penalty was unevenly and arbitrarily applied and therefore unconstitutional. Of importance, “all nine Justices made use of empirical data” although there were many disagreements regarding the “Court’s role in reviewing empirical data and the data’s relevance to the Constitutional issues.” The data regarding the arbitrary application of capital punishment convinced some Justices that its application was unconstitutional while other justices were unswayed.

In the four years after *Furman*, thirty-five states enacted new death penalty laws hoping the Supreme Court would consider these laws more favorably than those in *Furman*. These new laws “[made] clear that capital punishment itself ha[d] not been rejected by the elected representatives of the people.” In the years prior to the pronouncement that these new laws passed constitutional muster there had been a “steep increase in punitive attitudes” in American society.

The statute under review in *Gregg v. Georgia* had “instituted bifurcated trials, required a finding of statutory aggravators, and required immediate appellate review for all capital cases.” The petitioner and a friend had picked up two hitchhikers and shot them, but at trial had claimed they did so in self-defense. The jury had convicted the pair and found that aggravating factors were present.

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47. *See id.* at 257 (noting that the death penalty laws and procedures are “pregnant with discrimination and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on ‘cruel and unusual’ punishments” (Douglas, J., concurring)); *id.* at 309-10 (“These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. . . . Petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed” (Stewart, J., concurring)); *id.* at 313 (“[T]he death penalty is exacted with great infrequency . . . and that there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not” (White, J., concurring)).
48. *See White, supra* note 43, at 4 (explaining that the concurring Justices all agreed that the death penalty as applied was unconstitutional due to the jury discretionary sentencing evidence before them).
49. *See Melusky & Pesto, supra* note 14, at 108.
51. *See Gorecki, supra* note 29, at 112.
53. *Gregg*, 428 U.S. at 166-68; Rupp, *supra* note 38, at 2744-45 (internal citations omitted).
54. *Gregg*, 428 U.S. at 159-60.
55. *Id.* at 160 (internal citations omitted). The jury found that the murder had been committed during the course of a felony and that it had been committed for pecuniary gain. *Id.*
Gregg was sentenced to death, and the new Georgia law under which he was convicted received Supreme Court approval.56 Justice Stewart wrote the judgment of the Court and an opinion on behalf of himself and Justices Powell and Stevens.57 The opinion stated that the "punishment of death [did] not invariably violate the Constitution,"58 although Stewart stated that the meaning of the cruel and unusual clause was not static.59 Stewart stated that the Court should be led by objective criteria in its determination of what the public attitude is toward a particular punishment.60 Stewart further stated that there were limits, and that "our cases... make clear that public perceptions of standards of decency with respect to criminal sanctions are not conclusive."61 Thus, Stewart stated that the Court itself must ensure that the punishment is not excessive, meaning that it has a penal justification and is proportionate to the crime.62 Stewart emphasized that the Court will not invalidate a punishment simply because it has determined that a lesser one would suffice, so long as the punishment is seen to serve its retributive and deterrent purposes.63

Stewart began investigating the penal justifications for the death penalty by recognizing the need of society to express its moral outrage and found that death is sometimes seen as the only appropriate response to a heinous crime.64 Stewart also recognized the extreme difficulty of deciphering the exact deterrent effect of the death penalty,65 resigning himself to the conclusion that "there [was] no convincing empirical evidence either supporting or refuting this view."66 Without convincing evidence to refute the Georgia legislature's assumption that the penalty had a deterrent effect, Stewart stated, the legislature would be presumed to be correct as to that specific determination.67 Finally, Stewart concluded that death was not per se disproportionate.68 This decision indicated that the death penalty was not a per se violation of the Eighth Amendment. However, subsequent cases still questioned the death penalty's constitutional application to certain offenders.

56. Gregg, 428 U.S. at 153. Only the abolitionists, Justices Brennan and Marshall, dissented. Id. at 157; see also Melusky & Pesto, supra note 14, at 108.
57. Gregg, 428 U.S. at 158.
58. Id. at 169.
59. Id. at 173.
60. Id.
61. Id.
62. Id. at 173, 183 (citing Furman, Weems and Trop).
63. Id. at 182-83.
64. Id. at 183-84.
65. Id. at 184-85.
66. Id. at 185.
67. Id. at 186-87.
68. Id. at 187.
1. Categorical Exclusion

Since determining that death can be an appropriate penalty and is not, itself, unconstitutional, the Court has gone on to exclude some groups of offenders from the possibility of the death penalty. The Court has excluded groups of defendants based on their mens rea or actus reus, but has also done so on the basis of their personal characteristics.

a. Group Exclusion from the Death Penalty

The year after Gregg, the Court determined in Coker v. Georgia that capital punishment was a disproportionate punishment for the crime of rape of an adult woman. The Court cited its own independent evaluation of the punishment for support of this conclusion, as well as the fact that Georgia was the only state at that time that authorized capital punishment for this crime.

The Court has also grouped defendants by their individual characteristics. In Thompson v. Oklahoma, the Court considered the constitutionality of capital punishment for those offenders who were age fifteen or younger at the time of their crime. The Court, in a four-one-four decision, reversed the petitioner's death sentence, and the case effectively banned executions for offenders under the age of sixteen if the state had not set a minimum age limit.

Justice Stevens, writing for himself and three other Justices who wished to exclude these young offenders from death eligibility, considered many factors in determining the current standard of decency. Stevens pointed to other Oklahoma laws that excluded youths from participating in certain activities, such as voting and drinking alcohol, as evidence that the law regularly recognizes a difference between children and adults. Although the opinion found

69. See Power, supra note 23, at 95.
70. Id.
72. Id. at 595-96 (recognizing that other jurisdictions allow for death when the victim of the rape was a child and the rapist an adult). The Court engaged in a state-counting procedure while trying to determine the public's view of the appropriateness of this punishment for rape. Id. at 596. This practice became very important in later cases regarding the "evolving standards of decency" determinations. See infra Parts I.B.1.b., I.B.1.c., II.
74. Id.
76. Thompson, 487 U.S. at 818-38.
77. Id. at 823-25. The Court introduced this inquiry by quoting Justice Powell's dissenting opinion in Goss v. Lopez, 419 U.S. 565, 590-91 (1975). "[T]here are differences which must be accommodated in determining the rights and duties of
that most state legislatures had not expressly set a minimum age for the death penalty, Stevens did not interpret this to mean that there was no consensus as to the minimum acceptable age for capital punishment.\textsuperscript{78} He asserted that it was well accepted, and indeed not disputed in this case, that “some offenders are simply too young to be put to death.”\textsuperscript{79} In determining that age, Stevens only looked to states that had adopted the death penalty and had set a minimum age.\textsuperscript{80} In narrowing his inquiry to the states that had expressly addressed the age issue in their statutes, Stevens found that each of those eighteen states had set the minimum age at sixteen.\textsuperscript{81} Stevens identified further support for his conclusion that executing sixteen-year-olds was not in conformity with the current standards of decency, including the opinions of various professional organizations,\textsuperscript{82} reluctance of juries to impose such a sentence,\textsuperscript{83} and current international practices.\textsuperscript{84}

After Justice Stevens’ inquiry into the existing consensus, he engaged in a proportionality analysis, calling into question the ability of these executions to fulfill the dual penal goals.\textsuperscript{85} Stevens found the goal of retribution in this case to be “inapplicable,” owing to “the lesser culpability of the juvenile offender, the teenager’s capacity for growth, and society’s fiduciary obligations to its children.”\textsuperscript{86} Similarly, Stevens found the deterrent effect on offenders of this age to be suspect for two reasons.\textsuperscript{87} First, it was highly unlikely that such an offender would make a cost-benefit analysis before committing such a crime.\textsuperscript{88} Second, even if these offenders were to make such a calculation, they would not be deterred because such executions are extremely rare.\textsuperscript{89} The opinion concluded that, since the practice failed to contribute to goals of capital punishment, it was “nothing more than the purposeless and needless imposition of pain and suffering,”

children as compared with those of adults. Examples of this distinction abound in our law . . . .” Thompson, 487 U.S. at 823-25. Stevens also attached a lengthy appendix to his opinion in which he tallied of state laws that exclude fifteen-year-olds from various activities. \textit{Id.} at 839-48.

\textsuperscript{78} \textit{Id.} at 826-29.
\textsuperscript{79} \textit{Id.} at 829.
\textsuperscript{80} \textit{Id.}
\textsuperscript{81} \textit{Id.}
\textsuperscript{82} \textit{Id.} at 830.
\textsuperscript{83} \textit{Id.} at 831-33.
\textsuperscript{84} \textit{Id.} at 830-31. The prohibition was found to be “consistent with the views that have been expressed by . . . other nations that share our Anglo-American heritage, and by the leading members of the Western European community.” \textit{Id.} at 830.
\textsuperscript{85} \textit{Id.} at 833-38.
\textsuperscript{86} \textit{Id.} at 836-37. Earlier, to add force to this culpability assertion, Stevens cited Supreme Court decisions in which the Court found that youth should have a special mitigating force, and concluded that “the Court has already endorsed the proposition that less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult.” \textit{Id.} at 835.
\textsuperscript{87} \textit{Id.} at 837.
\textsuperscript{88} \textit{Id.}
\textsuperscript{89} \textit{Id.}
and thus an unconstitutional punishment.”

Because the punishment was not serving a penal goal, Stevens found it to be in violation of the Eighth Amendment.

Justice O'Connor left open the question of the absolute unconstitutionality of these executions, although O'Connor did find that in the petitioner's case, the death penalty should not be imposed. O'Connor agreed that there is some age at which an offender is too young for capital punishment, and that this age should be determined by the evolving standards of decency. O'Connor decided the case on "narrower grounds" than the plurality, finding the conviction unconstitutional because Oklahoma had set no minimum age in its statute and thus had not carefully considered the question. O'Connor left open the broader Eighth Amendment question of the ultimate constitutionality of executing offenders under the age of sixteen and agreed with the plurality in vacating the sentence. In her concurrence, she stressed a desire to avoid substituting her subjective opinion for the judgment of state legislatures, which O'Connor felt had not fully addressed the issue. Pointing to the history of death penalty challenges, she found a "danger in inferring a settled societal consensus from [sentencing] statistics like those relied on in this case." O'Connor was uncomfortable coming to an absolute conclusion regarding the constitutionality of these executions because few state legislatures had fully considered the issue.

90. Id. (quoting Coker v. Georgia, 433 U.S. 584, 592 (1977)). Stevens also refused to consider petitioner's argument that executing someone under eighteen years of age was unconstitutional. Id. Stevens asserted that the Court could only decide the case at bar, and that this case dealt solely with a fifteen-year-old. Id.

91. Id.
92. Id. at 848-50 (O'Connor, J., concurring).
93. Id. at 848.
94. Id. at 849. Because O'Connor did not decide per se that fifteen years old was too young for an offender to be executed, the case does not itself explicitly bar these executions. But, as was stated earlier, this case has been interpreted to mean that sixteen is the minimum age if the state has not yet expressly set one. See supra note 75.
95. Thompson, 487 U.S. at 857.
96. Id. at 858-59.
97. Id.
98. Id. at 854. While O'Connor recognized that there was no evidence of any legislative body having carefully considered and approved the execution of fifteen-year-olds, she thought that it was also a "real obstacle in the way of concluding that a national consensus forbids this practice," that nineteen states and the federal government have laws that made such executions possible. Id. at 852. However, she disagreed with the weight the dissent placed on this fact, and acknowledged the need to look to other evidence. She emphasized that the plurality's evidence regarding execution and sentencing statistics "support[s] the inference of a national consensus opposing the death penalty for [fifteen]-year-olds, but [it is] not dispositive." Id. at 853.
99. Id. at 852.
Writing for the dissent, Justice Scalia expressed his disapproval of the evidence used by the plurality to establish a national consensus against the practice. Justice Scalia saw that a "risk of assessing evolving standards is that it is all too easy to believe that evolution has culminated in one's own views." Looking back, Scalia commented that in order "[t]o avoid this danger we have, when making such an assessment in prior cases, looked for objective signs of how today's society views a particular punishment." Although the plurality presented objective evidence, the dissent disapproved of using the rarity of these executions as a justification for finding a national consensus against the practice. The dissent looked exclusively to the legislation that addressed this issue as the real objective evidence of current societal standards. Scalia's opinion concluded that "a majority of the States for which the issue exist[ed] (the rest d[id] not have capital punishment) [were] of the view that death [was] not different insofar as the age of juvenile criminal responsibility [was] concerned." Scalia did not count the non-death penalty states, he merely counted the states that had the death penalty and had set a minimum age. He therefore found no national consensus opposing the practice, and no other reason to vacate the sentence.

b. Refusing to Exclude: Penry and Stanford

One year after the Court decided Thompson, it issued two opinions on June 26, 1989 that refused to exclude groups from capital punishment based on the personal characteristics of the offenders. In Penry v. Lynaugh, the Court rejected the contention that executing mentally retarded offenders was prohibited under the Eighth Amendment. The Court rejected the same contention with regard to offenders under the age of eighteen in Stanford v. Kentucky.

In the first case, Johnny Paul Penry had been arrested and charged with the murder and rape of Pamela Carpenter. A clinical psychologist had testified that Penry was mentally retarded and had

100. Id. at 864-65.
101. Id. at 865.
102. Id. (citations omitted).
103. Id. at 869-72.
104. Id. at 865-72.
105. Id. at 868. This disagreement between the majority and the plurality concerning the appropriate way to count the states in order to discern a "national consensus" is not one that ends with this case. See infra Parts I.B.1.b.-c.
106. Thompson, 487 U.S. at 868.
107. Id. at 877-78.
109. See Penry, 492 U.S. at 335.
111. Penry, 492 U.S. at 307.
the mental age of a six-and-a-half-year-old child, and all the life skills of a normal nine- or ten-year-old.\textsuperscript{112} Despite this testimony, a jury found him competent to stand trial.\textsuperscript{113} Later, having rejected his insanity defense, the jury found him guilty of capital murder.\textsuperscript{114} On appeal, Penry's counsel objected to the jury sentencing instructions, and ultimately the Supreme Court agreed that "the absence of instructions informing the jury that it could consider and give effect to the mitigating evidence of Penry's mental retardation" did not allow the jury to make a "'reasoned moral response' to that evidence in rendering its sentencing decision."\textsuperscript{115} Because of this limitation on the jury, his sentence was remanded.\textsuperscript{116}

Penry was not so successful with his claim that mentally retarded offenders should be categorically excluded from capital punishment under the Eighth Amendment.\textsuperscript{117} In a fragmented decision, the Court refused to prohibit the execution of these offenders.\textsuperscript{118} Justice O'Connor wrote the opinion of the Court, which consisted of only two parts: the history of the case and the decision that the holding would apply retroactively.\textsuperscript{119} The dissenting Justices joined O'Connor's analysis of cruel and unusual punishment and her decision that the holding would not constitute a "new rule."\textsuperscript{120} While Chief Justice Rehnquist, and Justices White, Scalia and Kennedy (the plurality in this case) joined her discussions of finality and "new rule" retroactivity,\textsuperscript{121} No other Justice joined O'Connor's proportionality analysis.\textsuperscript{122}

O'Connor's opinion found a total prohibition was unnecessary because the modern insanity defense would exclude those persons without any mental ability from the death penalty, while others would be judged individually based on their degrees of mental ability.\textsuperscript{123} She first examined the common law's prohibition against the punishment of "idiots," which she determined to have been those persons who "had a total lack of reason or understanding."\textsuperscript{124} As to whether a national consensus had emerged that disapproved of such executions, the Court was not convinced.\textsuperscript{125} Only two states prohibited the practice at the time and "even when added to the [fourteen] States

\begin{itemize}
  \item \textsuperscript{112} Id. at 307-08.
  \item \textsuperscript{113} Id. at 308.
  \item \textsuperscript{114} Id. at 310.
  \item \textsuperscript{115} Id. at 328 (internal citations omitted).
  \item \textsuperscript{116} Id.
  \item \textsuperscript{117} Id. at 335.
  \item \textsuperscript{118} Id.; see also Weeks, \textit{supra} note 50, at 466-68.
  \item \textsuperscript{119} \textit{Penry}, 492 U.S. at 307-13, 329-30.
  \item \textsuperscript{120} Id. at 314-28, 350-51.
  \item \textsuperscript{121} Id. at 313-14, 350-51.
  \item \textsuperscript{122} Id. at 306, 335-40.
  \item \textsuperscript{123} Id. at 333.
  \item \textsuperscript{124} Id. at 331-32.
  \item \textsuperscript{125} Id. at 333-35.
\end{itemize}
that ha[d] rejected capital punishment completely, [they] d[id] not provide sufficient evidence at [that time] ... of a national consensus."126 Therefore, O’Connor considered death penalty states that banned the practice and states that had abolished the death penalty altogether and found these sixteen states were still insufficient for a finding of a national consensus.127 This part of O’Connor’s opinion was not joined by Chief Justice Rehnquist and Justices White, Scalia and Kennedy, who similarly found there to be no national consensus against the practice.128 Their absence might be explained by that “Part’s analysis of opinion polls and the opinions of professional organizations—evidence sources [those Justices] ... specifically defined as irrelevant.”129 In other words, those Justices might have agreed with Justice O’Connor’s finding that a national consensus had not yet developed against the practice but the very consideration of these extra indicia precluded their joining her opinion.130

After stating that a consensus had not emerged against these executions, O’Connor wrote to champion the importance of a proportionality analysis.131 She concluded that there were varying degrees of mental retardation and that juries were allowed to consider the defendant’s reduced mental capacity as a mitigating factor, and thus “it cannot be said on the record before us today that all mentally retarded people, by definition, can never act with the level of culpability associated with the death penalty.”132 No other Justice joined O’Connor in this part because the dissenting Justices felt a proportionality analysis revealed that the punishment was excessive,133 while other Justices felt that a proportionality analysis was an improper inquiry.134

Justice Brennan’s dissenting opinion engaged in a proportionality analysis but concluded that the mental attributes of mentally retarded offenders always made the death penalty disproportionate for these offenders and was therefore unconstitutional.135 While he recognized that there were varying degrees of mental retardation, he concluded that all persons who qualify as mentally retarded lack the culpability

126. *Id.* at 334. Justices Brennan, Marshall, Blackmun and Stevens found this punishment unconstitutional because they found it was disproportionate. See infra notes 131-35 and accompanying text.
127. *Id.* at 334.
128. *Id.* at 306.
130. See *id.*
131. *Penry*, 492 U.S at 336-40. O’Connor has consistently insisted on the importance, and indeed indispensable nature of, a proportionality analysis in these cases. See infra notes 164-66, 200 and accompanying text.
133. See infra notes 135-37 and accompanying text.
134. See *supra* note 122; infra notes 141-43 and accompanying text.
required for the "ultimate penalty." 3

Even if there were some mentally retarded offenders who had the capacity for such culpability, Brennan was unconvinced that allowing the defendant’s mental capacity to serve as a mitigating factor would effectively ensure that only those “exceptional” mentally retarded offenders would be sentenced to death. 137

Further, Brennan found that the twin goals of punishment were not served by this practice. 138 First, because of a reduced culpability due to diminished mental capacity, the need for the most severe retribution was not present. 139 Second, as to the goal of deterrence, because these offenders had a reduced capacity for decision making and strategic thinking, they were unable to make the kind of reasoned decisions that might include contemplation of the possibility of execution. 140

Justice Scalia wrote an opinion concurring in part and dissenting in part to criticize O’Connor’s insistence on a proportionality analysis. 141 Scalia found that the punishment must both be “cruel and unusual,” and that the only true way to determine what was unusual was to look to the laws of the nation’s legislatures and jury determinations. 142 Scalia concluded that if such an examination “fail[ed] to demonstrate society’s disapproval of it, the punishment [was] not unconstitutional even if out of accord with the theories of penology favored by the Justices of this Court.” 143 Scalia found that in order for a punishment to violate the Eighth Amendment a large portion of society must disfavor it. 144

The other death penalty decision handed down that day, Stanford v. Kentucky, similarly refused to categorically exclude offenders from the death penalty. 145 The case consolidated two appeals of offenders who had been sixteen- and seventeen-years-old at the time of their crimes; the Court granted certiorari to decide whether execution of defendants under age eighteen was barred by the Eighth Amendment. 146 Justice Scalia issued the plurality opinion joined by

136. Id.
137. Id. at 346-47.
138. Id. at 348-49.
139. Id. at 348.
140. Id. at 348-49. Justice Stevens agreed that the execution of such individuals is unconstitutional, but wrote only to say that the practice should be ended for the reasons given in the Brief for The American Association on Mental Retardation. Id. at 350 (Stevens, J., concurring in part and dissenting in part).
141. Id. at 350-51.
142. Id. at 351 (citation omitted).
143. Id. (citation omitted).
144. Id. (finding that after the Court determines that a national consensus does not exist, there is no need to go further).
146. Id. at 368; see also Weeks, supra note 50, at 461-66.
Chief Justice Rehnquist and Justices White and Kennedy. While Scalia recognized that the interpretation of the meaning of "cruel and unusual" should be interpreted progressively, he denied there was a need for the Court to use its own judgment. Scalia asserted that this determination need only be guided by the objective indicia of state statutes and jury verdicts. First, Justice Scalia looked to the statutes enacted by state legislatures as indicative of the current standards of decency. Scalia's counting of the states, as in Thompson, was limited only to those states that had capital punishment. He counted fifteen states that prohibited execution under the age of seventeen and twelve states that prohibited its use for offenders under the age of eighteen. This was not a majority of the death penalty states, and Scalia was unconvinced that a national consensus against the practice existed. The opinion reviewed the other cases in which the death penalty had been struck down, and pointed out that in those cases there were far fewer states that still had the punishment than in the case at bar. In other words, the number of states disapproving of the practice had been much higher.

Scalia then turned to the evidence that the petitioners presented regarding the reluctance of juries to impose and prosecutors to seek such a sentence. This did not convince him that a standard of decency was nationally accepted, as he pointed out that fewer capital crimes were committed by this subsection of the population. Further, Scalia saw the rarity of the juvenile death penalty as evidence not that society believed it should never be imposed but that society believed the death penalty should rarely be imposed. The special circumstances of individual offenders were dealt with in these cases by

147. Stanford, 492 U.S. at 364.
148. Id. at 369-70.
149. Id.
150. Id. at 370-73.
151. See supra note 106 and accompanying text.
152. Stanford, 492 U.S. at 572.
153. Id. at 372-73. Scalia saw the petitioners as having to overcome a strong presumption in these types of cases, as "[i]t [was] not the burden of Kentucky and Missouri [the respondents in this case] . . . to establish a national consensus approving what their citizens have voted to do; rather, it [was] the 'heavy burden' of petitioners to establish a national consensus against it." Id. at 373 (internal citation omitted).
154. Id. at 371. He goes on to assert that this case is more closely analogous to Tison than Coker, Enmund or other precedent. According to Scalia, in Tison, only eleven out of all the jurisdictions forbade the punishment at issue in that case. Id. at 371-72. In the other cases, such as Coker, the jurisdictions authorizing the punishment were far fewer than the jurisdictions in question in Stanford which authorized the juvenile death penalty. Id. In those cases only a handful of states, from one to eight, inflicted the punishment. Id. at 370-71; see also supra notes 71-72 and accompanying text. It remains to be seen if Scalia would be convinced of a national consensus with anything less than the benchmarks set out in cases like Coker.
155. Stanford, 492 U.S. at 373.
156. Id. at 373-74.
157. Id. at 374.
the constitutionally required consideration of age as a mitigating factor, and Scalia saw this as adequate protection.\textsuperscript{158} Scalia next "scoffed"\textsuperscript{159} at the use of other indicia such as the international view of the practice, opinions of professional groups and opinion polls.\textsuperscript{160} Scalia’s dissent also restated that an independent evaluation by the Justices of whether penal goals were served was nothing more than a "cast[ing] loose from the historical moorings consisting of the original application of the Eighth Amendment" and a thin veil by which the Justices hid their mission to impose their own "preferences."\textsuperscript{161} Scalia acknowledged the existence of a proportionality analysis in some past cases, but explained that it had never been dispositive and had always also included a finding that state laws or jury determinations indicated society’s disapproval.\textsuperscript{162} Scalia asserted that the two methodologies, proportionality analysis and evolving standards, were in fact intertwined in that the former may only be conducted on the basis of the latter.\textsuperscript{163}

O’Connor again wrote a concurring opinion which defended the need for a proportionality analysis.\textsuperscript{164} Even though the opinion pushed for this analysis, and went so far as to say that the Court had a “constitutional obligation to conduct proportionality analysis,”\textsuperscript{165} O’Connor did not conclude that the punishments were disproportionate to the crimes.\textsuperscript{166} In fact, the opinion did not delve into the analysis except to point out disagreement with the plurality that the analysis was irrelevant, and simply directed the reader to O’Connor’s proportionality analysis in \textit{Thompson}.\textsuperscript{167} Influencing O’Connor’s opinion, as in \textit{Thompson}, was the number of state legislatures that had forbidden the practice, an indicator she found to be “the most salient statistic.”\textsuperscript{168} Unlike \textit{Thompson}, however, O’Connor found that a majority of states that allowed capital punishment permitted the execution of offenders over sixteen, and thus concluded that a national consensus had not yet developed

\textsuperscript{158} \textit{Id.} at 374-77. \\
\textsuperscript{159} Weeks, \textit{supra} note 50, at 462. \\
\textsuperscript{160} \textit{Stanford}, 492 U.S. at 377. \\
\textsuperscript{161} \textit{Id.} at 379. For a discussion of the this view as an “empty constitutional standard,” see \textit{infra} Part III. \\
\textsuperscript{162} \textit{Stanford}, 492 U.S. at 379-80. It is not clear that O’Connor or any of the other Justices who promote the use of a proportionality analysis actually do advocate its use without also finding some consensus based on state laws. \textit{See supra} note 131; \textit{infra} Part II. The disagreement may really be more about the number of states needed for a finding of a consensus, and the use of other types of indicia. \textit{See infra} Part III. \\
\textsuperscript{163} \textit{Stanford}, 492 U.S. at 380. \\
\textsuperscript{164} \textit{Id.} at 381. \\
\textsuperscript{165} \textit{Id.} at 382. \\
\textsuperscript{166} \textit{Id.} at 380-82. \\
\textsuperscript{167} \textit{Id.} at 382. \\
\textsuperscript{168} \textit{Id.} at 381-82 (quoting \textit{Thompson v. Oklahoma}, 487 U.S. 815, 849 (1988) (O’Connor, J.)).
against the practice. She anticipated that there might come a time when such a consensus would have developed and would be indicated by a "general legislative rejection of the execution of [sixteen-] or [seventeen]-year-old capital murderers," but simply did not believe that that time had come yet.

Justice Brennan, writing for the dissent, also criticized Scalia's plurality opinion for looking solely to legislative enactments and jury sentences, and emphasized that while this analysis was a proper one to conduct, it was by no means complete. Brennan asserted that Eighth Amendment inquiries must look also to whether the punishment exceeds the offender's culpability and whether it serves a "legitimate penal goal." His dissent differed from the plurality not only in the indicia it used, but also in its method of tallying the current state laws that allowed the execution of seventeen- and eighteen-year-olds.

Brennan refused to count the states that had not set a minimum age for the death penalty as approving of juvenile execution because those states had not yet considered the issue carefully. Brennan did count those states which had abolished the death penalty altogether as opposing the juvenile death penalty, and thus concluded that "27 States refuse to authorize a sentence of death in the circumstances of [seventeen-year-old] petitioner Stanford's case, and 30 would not permit [sixteen-year-old] Wilkins' execution." Further, the nineteen states that had not addressed the issue were neutral to the discussion, and only a few remaining jurisdictions explicitly allowed such executions. The dissent also found evidence of a national consensus against the practice in the rarity with which juries impose the sentence, pointing out that the practice was truly an unusual one. Next the dissent presented the opinions of many well-respected organizations which had publicly denounced the practice and pointed

169. *Id.* at 382. Here O'Connor joins Scalia in her counting method, choosing not to count those states that had rejected the death penalty entirely as having implicitly rejected the juvenile death penalty. *Id.* at 381.
170. *Id.* at 381-82.
171. *Id.* at 383.
172. *Id.*
173. *Id.* at 384-85.
174. *Id.* at 385.
175. *Id.*
176. *Id.* This difference between the majority and dissent regarding the counting of states is an issue in later cases as well.
177. *Id.* at 386-87. In pointing these statistics out, the dissent also rejects the majority's claim that this is merely evidence that the juries think that this should be a rare practice, not that it should be abolished. *Id.* at 374. The dissent points out that this argument was made in *Coker,* where Georgia argued that juries were reserving the punishment for only the most extreme cases of rape. *Id.* at 387. The Court rejected that argument and noted "simply that in the vast majority of cases, Georgia juries had not imposed the death sentence for rape." *Id.*
out that the practice was “overwhelmingly disapproved” of internationally. 178

The dissent’s proportionality analysis followed, and while Brennan recognized that the plurality did not see it as relevant, the dissent argued for its relevance by stating that the very nature of the Bill of Rights was to remove some possibilities from the hands of the political majority. 179 Allowing state legislatures to determine what is constitutionally permissible amounted, for the dissent, to handing back to the “very majorities the Framers distrusted the power to define the precise scope of protection afforded by the Bill of Rights, rather than bringing its own judgment to bear on that question, after complete analysis.” 180 In search of this “complete analysis,” the dissent determined that given the utmost severity of the death penalty this punishment was disproportionate for juvenile offenders. 181 Brennan asserted that juveniles lacked the mental capacity of older offenders, and thus were less culpable. 182 This negated the retributive penal function of the death penalty, in that it disqualified them from the ultimate punishment of death. 183 Further, the deterrent goal was not served because juveniles did not often consider the repercussions of their actions as they were “prone to ‘experiment, risk-taking, and bravado’” and “lack[ed] ‘experience, perspective, and judgment.’” 184 The dissent also highlighted the insufficiencies of merely leaving to juries the task of sorting out the most culpable juveniles, and demonstrated how that system failed in the individual cases of the two petitioners. 185

Stanford demonstrates the disagreements among the various Justices regarding the necessity of a proportionality analysis and the method by which states’ laws should be counted. It further highlights the disagreement over whether opinion polls and professional organizations should be considered when judging the evolving standards. However, “[i]n a patent rejection of the Trop approach, the Court . . . refused to consider international opinion in determining whether the execution of a seventeen-year-old was unconstitutional.” 186 These cases make it clear that the Justices placed weight on state legislative enactments and jury determinations, but confusion remained regarding the other indicia that are to be properly considered.

178. Id. at 389-90.
179. Id. at 391-92 (quoting from W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943)). For further discussion of Scalia’s standard as an empty one, see infra Part III.
180. Stanford, 492 U.S. at 392.
181. Id. at 394-405.
182. Id. at 396-97, 403.
183. Id. at 397, 403.
184. Id. at 395 (internal citations omitted).
185. Id. at 398-403.
186. Brewer, supra note 35, at 733.
c. Overturning Penry

Thirteen years after the Court decided Penry and Stanford, it overruled its decision that the execution of mentally retarded adults was not barred by the Constitution. The decision in Atkins v. Virginia hinged on whether the standards of decency had evolved since this question had last come before the Court in Penry. The majority went through the history of Eighth Amendment jurisprudence, concluding that punishments are to be proportionate and in accord with the dignity of man. They also found that inquiry into whether a punishment was excessive should be guided by objective standards; the indicia need not be unanimous but weighted heavily on one side. The Court found many states had enacted legislation banning the practice since the decision in Penry, and held that “[m]uch has changed since then.” The majority was quick to point out that it was not the number of the states they found compelling, “but the consistency of the direction of change.” Interestingly, in a footnote, the majority contrasted the changes that occurred following Penry to those after Stanford saying that, “[a]lthough we decided Stanford on the same day as Penry, apparently only two state legislatures have raised the threshold age for imposition of the death penalty.”

The majority did find that the reaction of states and their change in legislation was overwhelmingly indicative of an evolution of the standards of decency. It cited the decision in Penry, which found that two states banning the practice was insufficient for a finding of national consensus, and compared that finding to the case before them in Atkins in which nineteen states in total had abolished the death penalty for the mentally retarded. Stevens, writing for the majority, also cited one state in which the bill passed the legislature but was vetoed by the governor, and two additional states in which the bill passed one house. Last, they pointed out that the states that passed such bills did so with overwhelming majorities of their state

187. Atkins v. Virginia, 536 U.S. 304 (2002). Although the Court did not expressly overrule its reasoning in Penry, it did overrule the holding. Id. at 306-07. This case also represented a major departure for the Court from its previous Eighth Amendment holdings. See infra Part III.B.3.
188. Atkins, 536 U.S. at 311-17.
189. See id. at 311-12. Justices Stevens, O’Connor, Kennedy, Souter, Ginsburg, and Breyer composed the majority. Id. at 305.
190. Id. at 312.
191. Id. at 314.
192. Id. at 315.
193. Id. at 315 n.18. For further comparison of the two groups, see infra Parts II-III.
194. Atkins, 536 U.S. at 314-16.
195. Id. at 314-15.
196. Id. at 315 n.16.
legislatures, and that no states reinstated such executions.\textsuperscript{197} Even more convincing to the majority was that this type of legislation (protecting the rights of criminal offenders) was generally unpopular and further, in the states which allowed it, the practice was very rare.\textsuperscript{198} In this opinion, however, the majority limited its mention of the opinions of professional organizations, religions, and the international community to a footnote, though it did point out that these groups overwhelmingly rejected executions of mentally retarded offenders.\textsuperscript{199}

Stevens went on to fuse the “evolving standards” analysis with the “proportionality” analysis, as he stated that the national consensus against the practice was indicative of the public’s recognition that mentally retarded offenders had a reduced culpability and therefore that these executions did not contribute to the twin penal goals.\textsuperscript{200}

The majority bolstered the consensus found in the state laws with a proportionality analysis spelling out the other factors they suggested should be considered beyond mere state counting. Stevens wrote that, given the clinical definition of mental retardation, which includes severe mental deficiencies and lack of many other key life skills, there was serious doubt as to whether the goals of retribution and deterrence were served.\textsuperscript{201} Stevens explained that retribution of the most extreme sort was not appropriate for these offenders given their lessened culpability, as they were less able to learn from mistakes, process information, and control impulses.\textsuperscript{202} In addition, the limited mental capacity of these offenders made the likelihood that they could make reasoned decisions, which took into account the possibility of execution, highly unlikely.\textsuperscript{203}

Stevens further asserted that the procedural protections which normally guard against wrongful execution did not work as well in the case of mentally retarded offenders.\textsuperscript{204} The opinion concluded that this risk called for a categorical exclusion of these offenders as it was a grave one.\textsuperscript{205} The danger was real because of the possibility of false confessions, the offenders’ reduced ability to make a persuasive showing of mitigating factors, their inability to adequately assist their counsel or to testify as strong witnesses, and their disability being read as a lack of remorse.\textsuperscript{206} Merely allowing mental retardation to serve as

\begin{itemize}
\item \textsuperscript{197} Id. at 315-16.
\item \textsuperscript{198} Id. at 315 n.16, 316.
\item \textsuperscript{199} Id. at 316-17 n.21; cf. supra notes 82, 178.
\item \textsuperscript{200} Id. at 317-21.
\item \textsuperscript{201} Id. at 318-20.
\item \textsuperscript{202} Id. at 318.
\item \textsuperscript{203} Id. at 319-20. This is also a problem in the case of youthful offenders. See infra note 306 and accompanying text; Part III.D.5.
\item \textsuperscript{204} Atkins, 536 U.S. at 320-21.
\item \textsuperscript{205} Id.
\item \textsuperscript{206} Id.
\end{itemize}
a mitigating factor had proven, Stevens stated, "a two-edged sword" because it was often used against the defendant as an aggravating factor by prosecutors who suggested that it indicated future dangerousness.\(^{207}\) He therefore concluded that "such punishment is excessive and that the Constitution places a substantive restriction on the State's power to take the life of a mentally retarded offender."\(^{208}\)

The dissents, written by Scalia and Rehnquist, echoed earlier complaints regarding what factors should direct the analysis of current standards of decency.\(^{209}\) Rehnquist specifically emphasized his disapproval of the use of international law, organizations' stances, and opinion polls, asserting that these were not objective factors and arguing that the clearest evidence was state legislature enactments.\(^{210}\) This sentiment was reiterated in Scalia's opinion, in which he expressed his perception that the majority used these factors to parade their own personal beliefs as a newly evolved standard.\(^{211}\) Scalia also argued that this decision was not one that the courts are equipped to handle and was more appropriately made by the popularly elected legislative bodies.\(^{212}\) Scalia not only counted the states' laws differently (finding eighteen death penalty states forbidding these executions instead of the majority's twenty-one), but disapproved of the idea that the bills' popularity was indicative of the standard of decency and pointed out that all of these laws were in their infancy.\(^{213}\) He dismissed the "consistency-of-the-direction-of-the-change" argument and warned against relying on such "trends."\(^{214}\) Scalia addressed the proportionality analysis by arguing that the Eighth Amendment did not forbid excessive punishments.\(^{215}\) Scalia asserted that judges and juries were capable of properly accounting for the mental handicaps of offenders, and that the deterrent effect on individual offenders was irrelevant.\(^{216}\) Relying on his tally, Scalia concluded that with less than half (47%) of the death penalty states forbidding mentally retarded offenders' executions, there was no national consensus and thus no need to overturn Penry.\(^{217}\)

\(^{207}\) \textit{Id.} at 321.
\(^{208}\) \textit{Id.} (internal quotations omitted).
\(^{209}\) \textit{Id.} at 321-54.
\(^{210}\) \textit{Id.} at 321-28.
\(^{211}\) \textit{Id.} at 337-54.
\(^{212}\) \textit{Id.} at 342-44.
\(^{213}\) \textit{Id.}
\(^{214}\) \textit{Id.} at 345 (emphasis omitted) (internal quotation omitted).
\(^{215}\) \textit{Id.} at 349 (referring to his opinion in Harmelin v. Michigan, 501 U.S. 957, 966-90 (1991)).
\(^{216}\) \textit{Id.} at 348-52.
\(^{217}\) \textit{Id.} at 343-44, 354.
d. Overturning Stanford?: Attempts to Get Before the Court After Atkins

After Atkins, advocates saw a chance to reverse Stanford as well, and they filed petitions on behalf of juvenile offenders on death row seeking reversal of their death sentences in light of the Atkins decision. On August 28, 2002, the Court denied Toronto Patterson’s petition for stay of execution. Patterson, seventeen-years-old at the time of his crime, argued that his execution would constitute a violation of the Eighth Amendment. Although the majority did not explain its denial of the stay, Justices Stevens, Ginsburg and Breyer wrote to express their desire to hear the case. Writing the dissenting statement, Justice Stevens cited Justice Brennan’s dissent in Stanford, claiming that the reasoning in that decision was correct at that time, and was even more compelling when one considered the situation in 2002. Since the Stanford decision, Stevens wrote, the “issue ha[d] been the subject of further debate and discussion both in this country and in other civilized nations.” “Given the apparent consensus” against the practice, Stevens suggested it was time for the Court to reconsider the issue in Stanford. Ginsburg also wrote to voice her approval of Stevens’ reasoning and to express her special desire to reconsider the juvenile death penalty in light of the Court’s recent decision in Atkins.

On October 21, 2002, the Court rejected another petition requesting that it stay an execution on the grounds that juvenile executions are unconstitutional. This case, however, was more peculiar (and perhaps more compelling for the dissent) in that the petitioner was Kevin Stanford himself, one of the original offenders against whom the Court had found thirteen years earlier. This case prompted the same justices to dissent as in Patterson, but they were joined by Justice Breyer, making the decision not to stay the execution five to four. Again the majority was silent as to its reasoning, and again the dissent highlighted the similarities between juvenile executions and executions of mentally retarded offenders, which they had recently struck down in Atkins. Stevens, again writing for the dissent, argued

219. Patterson, 536 U.S. at 984-85 (Stevens, J., dissenting).
220. Brief for the Petitioner at 4-18, Patterson (No. 02-617).
221. Patterson, 536 U.S. at 984-85 (Stevens, J., dissenting).
222. Id. at 984.
223. Id.
224. Id.
225. Id. at 985 (Ginsburg, J., dissenting).
227. Id.
228. Id.
229. Id.
that the justifications laid out in Atkins apply with equal force to juveniles, with one exception: The number of states banning juvenile executions was two less than those banning executions of mentally retarded offenders.\textsuperscript{230} He did not find this discrepancy to be dispositive and went on to highlight the states that have abolished the practice, either by law or Supreme Court ruling.\textsuperscript{231} Stevens then quoted extensively from Justice Brennan's proportionality analysis in his dissent in the first Stanford, which accentuated the differences in legal treatment juveniles receive because the law considered them less mentally capable or mature than eighteen-year-old citizens.\textsuperscript{232} Stevens then added that recent neuro-scientific evidence had bolstered this assumption of incapacity.\textsuperscript{233} He concluded with an argument that a national consensus had developed against these executions.\textsuperscript{234} He pointed out that no state had lowered its eligibility age to sixteen or seventeen since the first Stanford decision, and in fact, some states had raised their minimum ages.\textsuperscript{235} Stevens found the attention being paid to these offenders amazing, due to their small numbers (2\% of the total population of death row).\textsuperscript{236} Finally, he presented opinion polls in which a majority of Americans claimed to disapprove of the juvenile death penalty as an additional indication of a national consensus against the practice.\textsuperscript{237}

As seen in the history presented in Part I, the Court has struck down the executions of mentally retarded adults,\textsuperscript{238} but—until the Simmons case discussed infra—had refused to review its decisions on juvenile executions.\textsuperscript{239} After reviewing the Supreme Court's jurisprudence regarding the Eighth Amendment and its application to the death penalty, Part II explores the Missouri state case in which the Missouri Supreme Court agreed to strike down the juvenile death penalty by deciding it was unconstitutional under the federal constitution.

\textsuperscript{230} Id.
\textsuperscript{231} Id. at 969.
\textsuperscript{232} Id. at 969-71. The quoted passages include an examination of the culpability of these offenders, concluding that "juveniles so generally lack the degree of responsibility for their crimes that is a predicate for the constitutional imposition of the death penalty that the Eighth Amendment forbids that they receive that punishment." Id. at 969 (quoting Stanford v. Kentucky, 492 U.S. 361, 394-96 (1989) (Brennan, J., dissenting)). Stevens goes on to quote Brennan's listing of all the activities which society has deemed juveniles too young to engage in because of their lack of maturity. Id. at 970.
\textsuperscript{233} Id. at 971.
\textsuperscript{234} Id.
\textsuperscript{235} Id. at 969, 972.
\textsuperscript{236} Id. at 972.
\textsuperscript{237} Id.
\textsuperscript{238} See supra notes 187-217 and accompanying text.
\textsuperscript{239} See supra notes 226-37 and accompanying text.
II. SIMMONS V. ROPER

This part examines in detail the Missouri case of Christopher Simmons which challenged the constitutionality of the juvenile death penalty. The events of September 8, 1993, as recounted by the Missouri Supreme Court in its first opinion regarding his case, present a gruesome picture of Christopher Simmons. Simmons planned the robbery and murder with his friends, thinking that his age would allow him to "get away with it." Simmons and his accomplice broke into his victim's home, bound her hands and feet and pushed her off a nearby bridge. He was convicted of first-degree murder and sentenced to death. Simmons appealed on the grounds, among others, that his Fifth Amendment rights had been violated, and his case was eventually heard by the Missouri Supreme Court. The court rejected this first appeal, finding that his confession was properly obtained and admitted into evidence, and denying his other allegations of rights violations.

On his second appeal to the Missouri Supreme Court, Simmons argued that the execution of those offenders under eighteen years of age violated the Eighth Amendment's bar on cruel and unusual punishment. At first, the court explained, Simmons did not make this argument because Stanford clearly held that these executions were constitutional. He made this argument on the second appeal because of the recent decision in Atkins v. Virginia, and wished to apply the reasoning in that case to his own. The court agreed that a national consensus had developed against these executions since Stanford, just as the U.S. Supreme Court had found a consensus against the executions in Atkins. The court concluded that the U.S. Supreme Court "would today hold [that] such executions are prohibited by the Eighth and Fourteenth Amendments."

The Missouri Supreme Court then went on to explain that it would lift the reasoning in Atkins and apply it to juvenile executions. The first hurdle in this exercise was determining whether a finding of

240. See State v. Simmons, 944 S.W.2d 165, 169-71 (Mo. 1997). This recitation of the facts is also referred to in Simmons's second appeal to the Missouri Supreme Court. See Simmons v. Roper, 112 S.W.3d 397, 399 n.1 (Mo. 2003).
241. Simmons, 944 S.W.2d at 169 (internal quotation omitted).
242. Id. at 170.
243. Id.
244. Id.
245. Id. at 172-76.
246. Id. at 177-91.
248. Id.; see also supra notes 145-63 and accompanying text.
249. Simmons, 112 S.W.3d at 399; see also supra notes 187-208 and accompanying text.
250. Simmons, 112 S.W.3d at 399.
251. Id. at 400.
252. Id. at 407.
unconstitutionality would really have any effect on the defendant because he did not raise this objection to the sentence at trial.\textsuperscript{253} The court found that the existence of a national consensus against the practice would place a "substantive restriction on the State's power to take [a] life"\textsuperscript{254} and thus would apply retroactively to the defendant,\textsuperscript{255} and, similarly, waiver rules would not apply.\textsuperscript{256}

After having established the procedural aspects of its decision, the majority went on to argue for the existence of a national consensus against the practice.\textsuperscript{257} The opinion started by tracing the history of the Eighth Amendment and its progressive interpretation as it applied to the juvenile and mentally retarded death penalties.\textsuperscript{258} Exploring Thompson, Stanford, Penry, and Atkins, the majority isolated factors that had been used in those cases to determine the existence a national consensus regarding the practice in question, or lack thereof.\textsuperscript{259} While the majority acknowledged the importance that legislative enactments played in these determinations, it also emphasized the recognition these cases gave to other factors.\textsuperscript{260} The decision traced the use of data regarding the frequency of the imposition of the penalty, opinions of professional and religious groups, international practice, and the Court's own independent analysis.\textsuperscript{261}

The majority concluded its background inquiries with a close look at Atkins, in which it emphasized Atkins resemblance to Thompson and not Stanford.\textsuperscript{262} The Missouri court divided the decision in Atkins into four parts.\textsuperscript{263} First, the court said, the Supreme Court looked to the legislative action that had been taken since Penry.\textsuperscript{264} The Missouri court strongly emphasized the language in Atkins which stressed the importance of the "consistency of the direction of the change,"\textsuperscript{265} in other words, that the number of states which had abolished the practice was not as telling as the fact that no state had reestablished the practice.\textsuperscript{266} The Simmons majority next noted Atkins' comment

\begin{itemize}
\item \textsuperscript{253} Id. at 400.
\item \textsuperscript{254} Id. (citing Atkins v. Virginia, 536 U.S. 304, 321 (2002) (quoting Ford v. Wainwright 477 U.S. 399, 405 (1986))).
\item \textsuperscript{255} Id. (citing Teague v. Lane, 489 U.S. 288 (1989)).
\item \textsuperscript{256} Id. at 400-01 (citing Teague as establishing that such a finding would "deprive the state of the power to impose the punishment of death on such a person").
\item \textsuperscript{257} Id. at 401-13.
\item \textsuperscript{258} Id. at 401-06.
\item \textsuperscript{259} Id.
\item \textsuperscript{260} Id.
\item \textsuperscript{261} Id. at 404-06.
\item \textsuperscript{262} Id. at 404.
\item \textsuperscript{263} Id.
\item \textsuperscript{264} Id.
\item \textsuperscript{265} Id. at 405 (quoting Atkins v. Virginia, 536 U.S. 304, 315 (2002)) (emphasis omitted).
\item \textsuperscript{266} Id.
\end{itemize}
that the practice had become unusual even in those states whose laws still allowed it.\textsuperscript{267} Third, the Missouri court explained that the Atkins Court found further support for its finding of a consensus against the practice in the opinions of national groups and international practices.\textsuperscript{268} Finally, the Simmons court quoted from Atkins' proportionality analysis.\textsuperscript{269}

The Simmons court then began its analysis of the juvenile death penalty using the principles it had derived from the Supreme Court cases it discussed.\textsuperscript{270} First, it addressed its ability to even consider the constitutionality of these executions, given that the current Supreme Court precedent on the matter was clear.\textsuperscript{271} The court concluded that it was not bound by Stanford because the Eighth Amendment is to be progressively interpreted, and thus, the court found it was obligated to reevaluate the state of the national consensus based on the current national conditions.\textsuperscript{272} The majority stated that "[t]his [c]ourt clearly has the authority and obligation to determine the case before it based on current—2003—standards of decency."\textsuperscript{273} The court based this authority on passages from Justice Ginsburg's dissent from denial of petition for writ in Patterson v. Texas,\textsuperscript{274} which argued for the validity of reconsideration of Stanford based on the recent decision in Atkins.\textsuperscript{275}

The Missouri court built its analysis of the constitutionality of the juvenile death penalty on the same principles that guided the Atkins approach.\textsuperscript{276} It drew four indicia from Atkins to guide its current inquiry into the existence of a national consensus:

1. the extent of legislative action against or in favor of the juvenile death penalty;
2. the frequency of the imposition of the death

\textsuperscript{267} Id.
\textsuperscript{268} Id. at 405-06.
\textsuperscript{269} Id. at 406.
\textsuperscript{270} Id. Part III of the decision was entitled, "Application of the Principles Set Out in Atkins, Thompson, Penry and Stanford to the Execution of Juveniles Today." Id.
\textsuperscript{271} Id.
\textsuperscript{272} Id. at 406-07.
\textsuperscript{273} Id. at 407.
\textsuperscript{274} Id.; see supra notes 219-25 and accompanying text. The Missouri court also quoted from Justice Stevens' dissent from the denial of petition for writ of habeas corpus in In re Stanford, which argued for reconsideration of the juvenile death penalty based on new scientific evidence regarding adolescent brain development. 537 U.S. 968, 968-72 (2002); see supra note 233 and accompanying text. The Missouri majority acknowledged its dissenting justices' argument that the fact that these cases were denied certiorari might imply that the Supreme Court would not in fact apply the Atkins approach in the way the majority suggested. Simmons, 112 S.W.3d at 407 n.6. The majority responded that denial of certiorari has been clearly established to hold "no implication whatsoever regarding the Court's views on the merits of the case which it has declined to review." Id. (quoting Maryland v. Balt. Radio Show, 338 U.S. 912, 919 (1950)). For a discussion of whether this argument adequately supports the Missouri court's authority to review Stanford see infra note 313.
\textsuperscript{275} Simmons, 112 S.W.3d at 407.
\textsuperscript{276} Id.
penalty on juveniles in modern times, and the frequency with which it is carried out even when imposed; (3) national and international opinion on the juvenile death penalty; and (4) an independent examination of whether the death penalty for juveniles violates evolving standards of decency and so is barred by the Eighth and Fourteenth Amendments.\textsuperscript{277}

The court began its inquiry with an examination of the current legislative status of the juvenile death penalty, and how it has changed since Stanford.\textsuperscript{278} While the court admitted that the change in state legislation since 1989 (the year both Stanford and Penry were decided) is not as dramatic as the one the Supreme Court noted in Atkins, it did not find it any less compelling.\textsuperscript{279} In Atkins, the Supreme Court relied on the consensus having grown from the two states that barred execution of the mentally retarded in 1989 to the eighteen states that expressly forbade the practice in 2002.\textsuperscript{280} The Missouri court noted that in the case of juveniles the change in number is not as dramatic, but is equal in consistency.\textsuperscript{281} While only five states had effectively raised their minimum age for death penalty eligibility since 1989, the Simmons court argued that there had been less progress to be made because in 1989 eleven states already banned the practice.\textsuperscript{282} This argument came as a response to footnote eighteen of Atkins which expressly distinguished the two circumstances because far fewer states had changed their laws regarding juveniles than regarding the mentally retarded since 1989.\textsuperscript{283} The Missouri court responded:

It would be the ultimate in irony if the very fact that the inappropriateness of the death penalty for juveniles was broadly recognized sooner than it was recognized for the mentally retarded were to become a reason to continue the execution of juveniles now that the execution of the mentally retarded has been barred.\textsuperscript{284}

\textsuperscript{277} Id. For further discussion of the structure of the inquiry and whether it can truly be said to be directly drawn from the Atkins decision see infra Part III.

\textsuperscript{278} Simmons, 112 S.W.3d at 407-09.

\textsuperscript{279} Id. at 407-08.

\textsuperscript{280} Id.; see also supra notes 194-99 and accompanying text.

\textsuperscript{281} Simmons, 112 S.W.3d at 407-09. In neither case have states reinstated the practice. Id. at 408.

\textsuperscript{282} Id. at 408 & n.10. Indiana and Montana legislatively raised their minimum age for execution to eighteen; Kansas and New York reinstated their death penalties in this time period but only for those eighteen or older; Washington State abolished its juvenile death penalty in a state supreme court decision. Id. at 408 nn.7-9.

\textsuperscript{283} Id. at 408 n.10.

\textsuperscript{284} Id. For further discussion of this response to Atkins's distinction between the two situations, see infra Part III. In Edmund Power's article for the Capital Defense Journal, he points out that this footnote in Atkins only mentioned that two states had raised their minimum ages, while in fact three other states had effectively done so either by reinstating capital punishment only for adults, or by abolishing the practice by court decision. See Power, supra note 23, at 101. He concludes this point by asserting that, "in 1988, the country was closer to a national consensus against the juvenile death penalty than it was to one against the execution of the mentally
The Missouri court also noted, as did the *Atkins* Court, that these legislative changes have occurred in a climate in which "law and order" legislation is far more popular than those laws that attempt to protect the rights of offenders.\textsuperscript{285} Later the court also pointed out that, given the rarity with which these executions occur, it is amazing that they received legislative attention at all—again a point that was also made in *Atkins*.\textsuperscript{286} Concluding this first of the four prongs of its analysis, the court emphasized the consistency of the change and offered the fact that many states were currently considering legislation that would abolish the practice as evidence of the trend continuing.\textsuperscript{287}

The Missouri court examined the infrequency with which juveniles were actually subjected to this punishment.\textsuperscript{288} It justified this inquiry by asserting that the *Atkins* Court found this evidence "persuasive."\textsuperscript{289} The court emphasized the rarity of these executions, noting that of the twenty-two states which theoretically allow such executions, only six have actually carried any out since *Stanford*.\textsuperscript{290} Further, of the 366 executions of this type carried out since 1642 only twenty-two of these had taken place in the modern era of the death penalty (1973-2003).\textsuperscript{291} The court concluded by comparing *Atkins* to the case at bar, citing the fact that "more mentally retarded persons than juveniles have been executed, in more states, since the death penalty was reinstated in 1976."\textsuperscript{292}

Moving on to its third inquiry, the *Simmons* court listed the various professional, social, and religious organizations that had come out in opposition to the practice of juvenile executions.\textsuperscript{293} It separately listed those organizations which had done so since *Stanford*,\textsuperscript{294} and those which had filed briefs amicus curiae in *Stanford*.\textsuperscript{295} In addition, the court listed those religious organizations that had announced their disapproval of the death penalty itself.\textsuperscript{296} It also mentioned that only a

\begin{itemize}
\item \textsuperscript{285} Simmons, 112 S.W.3d at 408. For Atkins’s similar point see supra note 198 and accompanying text.
\item \textsuperscript{286} Simmons, 112 S.W.3d at 410.
\item \textsuperscript{287} Id. at 408-09.
\item \textsuperscript{288} Id. at 409-10.
\item \textsuperscript{289} Id. at 409.
\item \textsuperscript{290} Id.
\item \textsuperscript{291} Id.
\item \textsuperscript{293} Id. at 410 n.16.
\item \textsuperscript{294} Id. at 410-11.
\item \textsuperscript{295} Id. at 410-11.
\end{itemize}
clear minority of Missourians support the death penalty for juveniles.\textsuperscript{297} While the court recognized that \textit{Stanford} had little use for these types of indicia, the court claimed to follow \textit{Atkins'} "shift back to reliance on such evidence to confirm the national consensus that evolving standards of decency proscribe imposition of the death penalty on the mentally retarded."\textsuperscript{298} While the court did not rely exclusively on such evidence, it did assert that it found the opinions of these groups, and of the international community, to be consistent with the legislative movement.\textsuperscript{299}

The court's last inquiry was an independent analysis of the appropriateness of this punishment specifically for juveniles.\textsuperscript{300} It arrived at the same conclusion as the \textit{Atkins} Court, that neither of the twin goals of punishment was served by these executions.\textsuperscript{301} The court cited the United States Supreme Court in \textit{Thompson}, as having recognized the diminished mental capacity of juveniles.\textsuperscript{302} It also quoted extensively from \textit{Thompson} to support its argument that youth, far from being merely a "chronological fact,"\textsuperscript{303} has far reaching implications which make these offenders more susceptible to outside pressure and more likely to act without full understanding of their actions.\textsuperscript{304} These facts of youth mean that these offenders act with a diminished culpability, and thus, the goal of retribution is not served by their execution.\textsuperscript{305} Second, the court found that the goal of deterrence is not served because these offenders have a reduced capacity to make reasoned decisions in which the possibility of execution might weigh, and even if it did, these executions are so infrequent that their weight would be slight.\textsuperscript{306} Last, the court examined the risk of wrongful execution as the \textit{Atkins} Court did and arrived at the same conclusion: that there is an increased risk with this group of offenders.\textsuperscript{307} The court submitted that these offenders,

\begin{itemize}
  \item \textsuperscript{297} Id. at 411.
  \item \textsuperscript{298} Id. For further discussion regarding the reliance of the Supreme Court of the United States on such evidence see \textit{infra} Part III and accompanying text.
  \item \textsuperscript{299} Simmons, 112 S.W.3d at 411.
  \item \textsuperscript{300} Id. at 411-13.
  \item \textsuperscript{301} Id.; see also supra notes 201-03 and accompanying text.
  \item \textsuperscript{302} Simmons, 112 S.W.3d at 412; see also supra notes 85-86 and accompanying text. Perhaps more current and relevant research could have been used to bolster the argument that these offenders operate with a diminished capacity for decision making. For further discussion on this point, see \textit{infra} Part III.D.5.
  \item \textsuperscript{303} Simmons, 112 S.W.3d at 412 (quoting Thompson v. Oklahoma, 487 U.S. 815, 834 (1988)).
  \item \textsuperscript{304} Id.
  \item \textsuperscript{305} Id. Although the court noted that the defendant in the case at bar was seventeen-years-old and not fifteen, as was the case in \textit{Thompson}, it found that the reasoning still applies because he is still an adolescent. \textit{Id}.
  \item \textsuperscript{306} Id. at 413. The court again found support for its argument against the deterrent effect in \textit{Thompson}. \textit{Id}.
  \item \textsuperscript{307} Id.; see also supra notes 204-08 and accompanying text.
\end{itemize}
“who have had less time to develop ties to the community, less time to perform mitigating good works, and less time to develop a stable work history” are more likely to be wrongfully sentenced to capital punishment.308 Further, these offenders are more likely to waive important rights and to give false confessions.309

The court held that youth as a mitigating factor alone has proven insufficient protection from wrongful executions, and that, in fact, this factor is often aggravating.310 The court cited Simmons’s particular case in which the prosecutor told the jury in closing arguments that if they allowed Simmons’s age to protect him from the death penalty then they were letting Simmons “win.”311 The court then quoted from the rest of the prosecutor’s argument in which he told the jury to: “Think about age. Seventeen years old. Isn’t that scary. Doesn’t that scare you? Mitigating? Quite the contrary I submit. Quite the contrary.”312

The Missouri court concluded that the United States Supreme Court, given its recent decision in Atkins, would hold that juvenile executions violate the Eighth Amendment because the standards of decency have evolved to the point where the practice is no longer acceptable.313

The state appealed the decision of the Missouri Supreme Court, and the United States Supreme Court granted certiorari in late January 2004.314 Since four Justices have already voiced their opinion that the practice of juvenile executions should end, it is unclear whether a fifth will join them when the case is decided. In fact, “the impetus to take up the issue this time may well have come from the [C]ourt’s more conservative members.”315 The outcome of this case remains to be seen, but Roper v. Simmons presents an opportunity for the Court to adopt and explain a more inclusive inquiry for determining the current standards of decency.

308. Simmons, 112 S.W.3d at 413.
309. Id.
310. Id.
311. Id. (internal quotations omitted)
312. Id.
313. Id. The concurrence in this case suggested that if these executions were not barred completely, perhaps a presumption of ineligibility for execution could be put in place to protect juveniles, and the state would have to rebut that presumption with evidence that the particular offender was exceptionally mature for his age. Id. at 415-18 (Wolff, J., concurring). The dissent objected to the holding on the grounds that the Missouri Supreme Court had no authority to overturn United States Supreme Court precedent. Id. at 418-21 (Price, J., dissenting). The dissent pointed out that Stanford was the precedent, and that its holding was clear on this issue and whether or not the majority agreed with the reasoning in that case, it was constrained constitutionally to follow it. Id. at 420. The dissent was unmoved by the petitioner’s argument that the Supreme Court “implicitly” overruled Stanford when it decided Atkins. Id. at 419-21.
Part III provides recommendations for adoption of an inclusive standard for determining “evolving standards of decency” when the case is decided by the Court.

III. CALL FOR A MORE INCLUSIVE TEST

Determining the constitutionality of a punishment should require more than a mere tallying of state laws. The inquiry the Court uses as its guide should look beyond the state counting and consider other indicia that are just as indicative of the standards of decency as state legislative actions. While the Supreme Court has discussed other factors in its cases, it has yet to fully flesh out an inclusive standard. The *Roper v. Simmons* case is an opportunity for the Court to specifically discuss a broad range of indicia and their role in Eighth Amendment tests.

*Atkins* was a major departure from previous death penalty challenges in the Supreme Court, although the decision did not appear as such. While the majority presented its decision as following the well-established “national consensus” standard, the Court in fact relied on a proportionality analysis, strengthened by some other indicia. Accordingly, the Missouri court in *Simmons* recognized the changes established in *Atkins* for an Eighth Amendment challenge of the death penalty, and attempted to apply these benchmarks to the juvenile death penalty.

Specifically, the Missouri court’s difficulties in applying *Atkins* were present because the *Atkins* majority hid its shift towards a more inclusive view of “consensus” behind the traditional method of state counting. The Supreme Court majority in the *Atkins* decision mentioned factors other than state legislative action, and conducted a proportionality analysis, but claimed that these factors were merely supplemental and served to bolster the national consensus that was found in the state laws.

At first glance, the Missouri court in *Simmons* appears to have over-emphasized the importance of certain factors in the *Atkins* decision. In fact, the Missouri court cut through the veil that the *Atkins* majority constructed around its true motivations coming to the conclusion that the *Atkins* decision seems to dictate: that the execution of juveniles violates the Eighth Amendment. This decision flowed from its finding that the practice was opposed by many states, it was an internationally condemned practice, its abolition was called for by the American public and by national organizations, and because it was a disproportionate punishment. These are all legitimate reasons for finding a practice unconstitutional and it is time for the Supreme Court to abandon the notion that tallying states is determinative in Eighth Amendment interpretation.
A. Atkins Represented a Departure from Previous Eighth Amendment Death Penalty Decisions

Although the Atkins decision employed the established "national consensus" test, the decision represented a major departure from previous Eighth Amendment jurisprudence. Atkins has been called "an [a]nomaly." Atkins marks a reformation of the objective criteria needed to establish the existence of a national consensus. This redefinition flows from the fact that "the objective indicia of a 'national consensus' relied upon by the court was nowhere near the previous benchmark required to find a sentencing practice unconstitutional." Atkins provided an idea of the number of state laws needed to form a "national consensus." The decision found that a national consensus had developed based on the fact that 47% of death penalty states rejected the practice. Previously, the Court had refused to find such a consensus when 42% of death penalty states banned the punishment in question. Although the Court has never announced a specific number which it considered to be crucial, it seems unlikely that the difference of five percent was dispositive for the majority in Atkins, especially when one considers that this group of states did not represent a majority of the death penalty states. The majority also added the states that specifically banned juvenile


318. Id. at 1007-08.


320. Stanford v. Kentucky, 492 U.S. 361, 370-71 (1989). It is also interesting to compare Atkins to other cases in which there was a finding of a national consensus against a certain punishment such as those discussed supra Part I.B.1.c. Mark Ozimek points out that it is worthwhile to note that in Ford v. Wainwright, 477 U.S. 399, 408 (1986), the Court ruled that it was unconstitutional to execute the legally insane when no death penalty State permitted such an execution and in Enmund v. Florida, 458 U.S. 782, 797 (1982), the Court ruled that it was unconstitutional to execute an accomplice to robbery whose co-conspirator took a life when only eight death penalty States permitted it.

Ozimek, supra note 316, at 682 n.332.

321. See supra Part I.

322. See Ozimek, supra note 316, at 681-82 ("Surely, the Atkins Court could not have believed that there was magic in the increase from 42% to 47%.... [T]his anomaly in death penalty jurisprudence has emerged because of the 'evolving standards of decency' doctrine."). Ozimek suggests that a more workable standard could be achieved if the analysis rested solely on a finding that a majority of death penalty states had banned the practice and had sustained that ban for a "sufficient duration." Id. at 682. Interestingly, this reformation by the Atkins Court is hardly mentioned by the Simmons court, although it seems to be the most compelling argument for the reversal of an aspect of Stanford.
executions to those that ban all executions. The same equation was used by the dissent in Stanford, with similar results. The majority in Stanford rejected this calculation, and "the Court's reliance on this number in Atkins redefines 'national consensus' within Eighth Amendment jurisprudence." The Atkins majority attempted to explain its departure by stating that "[i]t is not so much the number of these States that is significant, but the consistency of the direction of change." Justice Scalia, in his dissenting opinion in Atkins, calls this 'consistency' justification an attempt "to bolster [the majority's] embarrassingly feeble evidence of 'consensus.'"

A more plausible explanation of the majority's finding of a consensus rests in the inclusion of other factors by the Court in the Atkins decision. For example, as the Missouri court asserted, Atkins "clearly demonstrated a shift back to reliance on [the opposition of social, professional, and religious groups] to confirm the national consensus." The Atkins Court also looked to the legislative majorities by which the laws banning these executions passed, the number of states that had come very close to passing such laws, and other indicia. The Supreme Court in Atkins "not only enlarge[d] the class of evidence deemed acceptable for determining societal values, it also increase[d] the weight afforded that evidence." The Court's decision in Atkins drew its conclusions from a broad base of indicia, although it paid lip service to the traditional state counting method.

B. A More Inclusive Standard

These supplemental factors are constitutionally permissible sources of the evolving standards of decency, and the independent proportionality analysis is constitutionally required. These factors are not only permissible indicia, but also serve a desirable goal: to rest a constitutional determination on a complete examination of a variety of factors affecting the issue.

In Atkins, Justice Stevens acknowledged the Court's acceptance

324. Hughes, supra note 317, at 1003 (citing Atkins as concluding that sixty-one percent of jurisdictions would not allow the executions in question, and the Stanford dissent asserting that sixty percent would not allow juvenile executions).
325. Id.
326. Atkins, 536 U.S. at 315.
327. Id. at 344.
328. Simmons v. Roper, 112 S.W.3d 397, 411 (Mo. 2003); see also Hughes, supra note 317, at 1006 (stating that in Atkins "the Court has re-established a precedent of looking to outside sources such as opinion polls, statements of professional and religious organizations and the international community in its consensus debate").
330. But see id. at 739-40 (arguing that the precedent set by Atkins is a dangerous one because it could lead the Court to respond too quickly to short-term changes and make it difficult for state legislatures to determine if their laws fit within this more inclusive constitutional standard).
that objective evidence was not to be wholly determinative.\textsuperscript{331} Stevens quoted from the Court's decision in \textit{Coker} in which the Court noted that "the Constitution contemplate[d] that in the end our own judgment [would] be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment."\textsuperscript{332} Stevens further pointed to \textit{Enmund v. Florida}, in which the Court examined the State legislature's judgments and found "no reason to disagree with that judgment for purposes of construing and applying the Eighth Amendment."\textsuperscript{333} This quote suggests that even if a state consensus existed, the Court would not be bound by that consensus. While the Eighth Amendment may not require that legislatures choose to impose the least burdensome punishment, it does require that punishments "should be graduated and proportioned to [the] offense."\textsuperscript{334} The Court has read the "text of the Amendment to prohibit all excessive punishments, as well as cruel and unusual punishments that may or may not be excessive."\textsuperscript{335} This reading requires a determination of whether or not the punishment is proportionate to the crime, a determination which should be judged by the standards that "currently prevail."\textsuperscript{336} The majority in \textit{Atkins} stated that they will first look to the objective indicia provided by the states to determine what standards exist, but then look to whether the Court has a reason to agree or disagree. However, the \textit{Atkins} majority strained to fit the evidence provided by the state laws into their "national consensus" benchmarks in order to present the other indicia the majority lists as merely supplemental.\textsuperscript{337} While the Court's evaluation of the prevailing standards should be directed as much as possible by the objective indicia, the state laws are not the only factors which the Court may look to beyond their own judgment. Besides the objective criteria available, the Court is constitutionally bound to conduct a proportionality analysis employing the Justices' own personal assessment of the culpability of the offenders.\textsuperscript{338}

1. State Legislatures as an Inaccurate View

The actions of state legislatures are not dispositive and may even be a faulty indicator of the national climate. Even the majority in \textit{Atkins}, indirectly, spoke to the difficulties in relying solely on state legislatures in order to determine the nation's standards of decency.

\begin{itemize}
\item \textsuperscript{331} \textit{Atkins}, 536 U.S. at 312 (quoting Coker v. Georgia, 433 U.S. 584 (1977)).
\item \textsuperscript{332} \textit{Id.}
\item \textsuperscript{333} \textit{Id.} at 313 (quoting \textit{Enmund v. Florida}, 458 U.S. 782, 801 (1982)).
\item \textsuperscript{334} \textit{Id.} at 311 (quoting \textit{Weems v. United States}, 217 U.S. 349, 367 (1910)) (alteration in original).
\item \textsuperscript{335} \textit{Id.} at 311 n.7.
\item \textsuperscript{336} \textit{Id.} at 311.
\item \textsuperscript{337} \textit{See supra Part I.B.1.c.}
\item \textsuperscript{338} \textit{See infra} notes 353-56 and accompanying text.
\end{itemize}
Justice Stevens noted that bills abolishing the death penalty for mentally retarded offenders faced difficulties in the state legislatures.\textsuperscript{339} Stevens explained that the popularity of anticrime legislation and the low popular interest in offender's rights legislation posed great obstacles for these bills.\textsuperscript{340} Stevens also emphasized that the infrequency with which these offenders are actually executed posed another obstacle to the attention these bills gain, as "there [was] little need to pursue legislation barring the execution of the mentally retarded."\textsuperscript{341} Given these obstacles, the passage of these bills provided "powerful evidence" of a national consensus.\textsuperscript{342} By noting these difficulties, Justice Stevens implicitly recognized that there are many pressures at play in state legislatures that prevent them from purely reflecting the moral judgments of the majority of their constituents. Certainly for the states that have not executed a juvenile in years, undertaking the burdensome process of passing a bill may seem unnecessary for an issue that has essentially become moot.

Further complicating the clarity of this evaluation is the disagreement regarding the proper way to count these states.\textsuperscript{343} As previously mentioned, the majority in \textit{Atkins} counted the states that had explicitly passed laws excluding the mentally retarded from capital punishment, and those states which had abolished the death penalty all together. In previous cases, only the states where the death penalty was still in place had been counted because the states without the death penalty were regarded as not having directly considered the question.\textsuperscript{344} The \textit{Simmons} court asserted that five states had abolished their juvenile death penalty since the \textit{Stanford} decision, however, one of these states (Washington)\textsuperscript{345} abolished the practice by court decision. There might be a dispute as to how to count this state because the legislature would not have considered the issue, as the issue had become moot. It has even been suggested that the combined populations of the states that have rejected the practice could be considered.\textsuperscript{346} Certainly these disputes complicate objectivity and clarity of the state counting.

\begin{itemize}
\item \textsuperscript{339} Atkins v. Virginia, 536 U.S. 304, 315-16 (2002).
\item \textsuperscript{340} \textit{Id.}
\item \textsuperscript{341} \textit{Id.} at 316.
\item \textsuperscript{342} \textit{Id.}
\item \textsuperscript{343} See Banks, \textit{supra} note 18, at 355 (stating "there is disagreement on how state legislation should be analyzed").
\item \textsuperscript{344} See \textit{id.} (stating "[t]he question was whether the mentally retarded should be subject to the death penalty, not whether the death penalty in all forms should be prohibited").
\item \textsuperscript{345} See Washington v. Furman, 858 P.2d 1092 (1993).
\end{itemize}
2. The Court Has the Power to Turn Away from State Tallying

The state counting test was judicially constructed and can be amended to be more inclusive. In Trop, which established the evolving standards of decency test, Chief Justice Warren recognized the legitimacy of looking to the practices of other nations in determining the constitutional validity of a punishment.\(^{347}\) The "evolving standards of decency" did not even become "firmly ensconced in death penalty jurisprudence until the late 1980's."\(^{348}\) Although Stanford\(^ {349}\) and Penry\(^ {350}\) avoided considering factors beyond the state legislative shifts and jury sentencing practices, the Court may look to past cases such as Trop which did consider additional factors. The Court has the power to modify the reliance on state counting and expand on the inclusive indicia it considered in Atkins.

3. An Empty Standard

By looking solely to the number of states in determining what is constitutionally permissible, the Court is advancing an empty standard. While other death penalty cases have employed broader standards, Stanford was "based heavily on procedural dimensions," leaving the jurisprudence in this area void of "substantive considerations about the capacities or blameworthiness of juveniles."\(^{351}\) The Atkins decision offers an alternative approach, a more inclusive inquiry that "places primacy on substantive considerations of reduced culpability, capacity, and understanding."\(^ {352}\) The nature of the Eighth Amendment, the underlying concept of which is "nothing less than the dignity of man,"\(^ {353}\) demands a more substantive standard. The aim of the Eighth Amendment was to prohibit states from imposing certain punishments and to assure that the states' power to punish is "exercised within the limits of civilized standards."\(^ {354}\) Without an independent analysis by an independent body, exclusive reliance on state counting leads to an "empty constitutional standard," as it effectively "hands back to the very majorities the Framers distrusted the power to define the precise

\(^{347}\) Ozimek, supra note 316, at 661 (quoting Chief Justice Warren in Trop as recognizing "[t]he civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime" (citation omitted)).

\(^{348}\) Id.

\(^{349}\) See supra notes 159-63 and accompanying text.

\(^{350}\) See supra note 129 and accompanying text.

\(^{351}\) Fagan, supra note 75, at 234.

\(^{352}\) Id.

\(^{353}\) Banks, supra note 18, at 327 (citing Trop v. Dulles, 326 U.S. 86, 100-01 (1958)).

\(^{354}\) Id. (citing Trop, 326 U.S. at 100-01).
scope of protection afforded by the Bill of Rights.\textsuperscript{355} If the Eighth Amendment was meant to bar some punishments no matter what their popularity, then further analysis is necessary beyond a mere tally of states that approve or reject a particular sentencing practice.\textsuperscript{356}

D. Under an Inclusive Standard Juvenile Executions Are Constitutionally Forbidden

Under a standard that includes looking to factors such as the frequency of the practice, the international scope of the practice, the opinions of professional groups and opinion polls, the special risk of wrongful execution and a proportionality analysis, \textit{Simmons} was decided correctly by the Missouri court.\textsuperscript{357} Although the state legislative count does not represent an overwhelming majority,\textsuperscript{358}


\textsuperscript{356} Id. at 396.

\textsuperscript{357} Before addressing the accuracy with which the Missouri court applied \textit{Atkins} one must first look to whether it had the power to do so. One point that detracts from the force of the \textit{Simmons} decision is the questionable nature of the court's authority to decide the question. In fact, the state raised this issue after having lost in the Missouri Supreme Court in its petition for writ of certiorari to the U.S. Supreme Court. The first question the state posed in light of the Missouri Supreme Court's holding in \textit{Simmons} was: "[o]nce this court holds that a particular punishment is not 'cruel and unusual' and thus barred by the Eighth and Fourteenth Amendments, can a lower court reach a contrary decision based on its own analysis of evolving standards?" Petition for Writ of Certiorari at i, \textit{Simmons v. Roper}, 112 S.W.3d 397 (Mo. 2003), cert. granted, 72 U.S.L.W. 3483 (U.S. Jan. 24, 2004) (No. 03-633). The majority based its authority on the principle that the Eighth Amendment should be interpreted progressively, and thus, "this determination must be made based on the state of law and standards that existed when \textit{Stanford} was decided in 1989, and that to do otherwise is to overrule \textit{Stanford}, is simply incorrect." Simmons v. Roper, 112 S.W.3d 397, 407 (Mo. 2003) (citing Justice Ginsburg's dissent from denial of petition for writ in \textit{Patterson v. Texas}, 536 U.S. 984, 985 (2002)). The majority further cited to Justice Stevens's dissent from denial of petition for writ in \textit{In re Stanford}, 537 U.S. 968 (2002). The dissent in \textit{Simmons} pointed out that the Missouri justices are bound by Supreme Court rulings as the "supreme law of the land" and claimed that in this case, the governing precedent is \textit{Stanford}. Simmons, 112 S.W.3d at 420. Although the majority did not explicitly state that it believed \textit{Atkins} overturned \textit{Stanford} implicitly, it must subscribe to this rationale to some extent. In its summary of the case's history, the court explained that petitioner did not raise an Eighth Amendment claim in his first appeal because \textit{Stanford} was binding case law at that time. However, after the decision in \textit{Atkins} the petitioner asked the court to review his sentence in light of that decision. \textit{Id.} at 399. The Missouri court could have held that juvenile executions violated the Missouri State Constitution as its Article I, Section 21 is exactly the same as the federal Eighth Amendment. Compare Mo. Const. art. I, § 21, \textit{with} U.S. Const. amend. VIII. The court, in fact, noted that the petitioner had made an alternative argument for relief based on the Missouri Constitution's bar on cruel and unusual punishment, but did not see it necessary to address this argument because the Eighth Amendment afforded him relief. Simmons, 112 S.W.3d at 413.

\textsuperscript{358} However, the court in \textit{Simmons} called attention to the large number of states which have been considering legislation raising the age for execution. Simmons, 112 S.W.3d at 408-09. In five states, the legislation has partially passed the state
many more factors indicate that the standards of decency have evolved to a point where juvenile executions are no longer acceptable.

1. Infrequency of Practice

In the past, the Supreme Court has accepted the infrequency with which the punishment is actually carried out as one of the objective factors that may direct the inquiry into the prevailing standards of decency. As the court in Simmons pointed out, the practice of juvenile executions has become "truly unusual" in the United States. Since 1973, only seven states have actually carried out such an execution, although nineteen still allow the practice. Juveniles account for only two percent of death row inmates. This evidence of infrequency is similar to that present in Atkins.

2. International Opposition

The Missouri court correctly delineated the international opposition to the execution of juveniles. On October 9, 2003, the Inter-American Commission on Human Rights found that the United States was in violation of an international law norm when it executed Napoleon Beazley, a juvenile offender. The Commission found that "by persisting in the practice of executing offenders under age eighteen the U.S. stands alone amongst traditional developed world nations ... and has also become increasingly isolated within the entire global community." This lends force to the need to consider the legislature, and in an additional nine states it has been introduced. See Fact Sheet: The Juvenile Death Penalty, at www.ncadp.org/juvenile_fact_sheet.html (last visited Mar. 21, 2004); see also Juvenile Death Penalty: Resources and General Information, at www.abanet.org/crimjust/juvjus/resources (last visited Mar. 21, 2004). Most recently, South Dakota and Wyoming raised their minimum ages to eighteen, while in New Hampshire, a similar bill was presented in the state legislature. Press Release, National Coalition to Abolish the Death Penalty (Mar. 3, 2004), at http://www.ncadp.org/press_release_3_3_2004_juveniles.html.

See supra notes 35, 199 and accompanying text.

Simmons, 112 S.W.3d at 405.

Victor Streib, Adolescence, Mental Retardation, and the Death Penalty: The Siren Call of Atkins v. Virginia, 33 N.M. L. Rev. 183, 199 (2003) (noting also that Texas has been the only state to carry one out since 2000). Since Professor Streib's article, two states have raised their minimum ages. See supra note 358.

Streib, supra note 361, at 199; see also Hughes, supra note 317, at 1005-06. But see Atkins v. Virginia, 536 U.S. 304 (2002). In his dissent in Atkins, Justice Scalia asserts that the rarity of executions is not a compelling argument for their abolition, but rather an indication that the use of mental retardation as a mitigating factor is relegating such sentences to only extreme cases. Id. at 346-47.

Id. at 316.

See Simmons, 112 S.W.3d at 410-11.


Id. ¶ 48. The Commission went on to find the United States in violation of an international norm and the American Declaration; they recommended that the
opinion of the world community on this issue.\textsuperscript{367} In comparison to 
\textit{Atkins}, "[t]he international consensus on the juvenile issue is at least as strong as on the mental retardation issue, and more explicit in international treaty law."\textsuperscript{368} Although some object to the use of the international opinion,\textsuperscript{369} "[t]he view of the world community is both an additional objective demonstration of civilized standard and something that should influence the justices' own judgment in asking whether there is reason to disagree with the judgment reached by the citizenry and its legislators.\textsuperscript{370} Courts recognized the use of international practice as early as \textit{Trop}, and it remains an important indicator of societal norms.

3. Opinions of National Groups and Citizen Polls

The \textit{Simmons} opinion followed the shift in \textit{Atkins} back to emphasis on the opinions of professional, social and religious groups.\textsuperscript{371} Groups who oppose the execution of juveniles are similar to those that \textit{Atkins} identified as opposing the execution of mentally retarded offenders.\textsuperscript{372} The juvenile death penalty "was opposed by an enormous number of such organizations when \textit{Stanford} was decided, and that number has continued to grow" and "opposition to the death penalty for juvenile offenders can be found in nearly every organized religion in the world."\textsuperscript{373} It is notable that the American Law Institute included a prohibition of this practice in the Model Penal Code, commenting that "civilized societies will not tolerate the spectacle of the execution of children."\textsuperscript{374}

Similarly, evidence of the American public's opinion of the practice


\textsuperscript{368} Hughes, supra note 317, at 1006 (quoting Amnesty Int'l., Indecent and Internationally Illegally: The Death Penalty Against Child Offenders 5 (Sept. 2002)).

\textsuperscript{369} See supra notes 210-11 and accompanying text.

\textsuperscript{370} Goodman, supra note 355, at 398 ("[I]n fact, since 2000, the United States is the only country in the world that is known to have executed juvenile offenders." (internal quotations omitted)).

\textsuperscript{371} See Simmons v. Roper, 112 S.W.3d 397, 411 (Mo. 2003); see also Hughes, supra note 317, at 1006.

\textsuperscript{372} Compare Simmons, 112 S.W.3d at 410 (citing the condemnation of the practice by the American Psychiatric Association and various religious organizations including Christian and Jewish groups), with Atkins, 536 U.S. at 316 n.21 (citing the American Psychological Association and Christian and Jewish organizations).

\textsuperscript{373} Streib, supra note 361, at 200; see also Power, supra note 23, at 106-07.

\textsuperscript{374} Power, supra note 23, at 106.
shows overwhelming disapproval. In one recent American poll, sixty-nine percent of respondents opposed the juvenile death penalty.

4. Risk of Wrongful Execution

Both Atkins and Simmons discuss the possibility that their respective group of offenders will not be adequately protected by the normal procedural safeguards. As with mentally retarded offenders, “[t]hese ‘disturbing’ false confessions also frequently occur with juvenile suspects.” Aggravating these risks is the fact that “aggressive police tactics during interrogations of adolescents often produce confessions that later prove false.” Juveniles have also been shown to frequently waive their constitutional rights, and “[b]ecause of their underdeveloped thought processes and immaturity, they are less likely to understand their rights.” The Supreme Court has long recognized this vulnerability.

5. Proportionality Analysis

To some extent the proportionality analysis in both Atkins and Simmons turns on the examination of the offenders’ mental capacity. This aspect is important because it has implications on both the offenders’ culpability and their ability to be deterred. In Simmons, the court based its analogies between Atkins and juveniles on information from the decisions in Thompson and Stanford. New studies have shown that the teenage mind is much less developed than previously thought, and much more susceptible to impulse.


376. Hughes, supra note 317, at 1007; see also Streib, supra note 361, at 200 (noting that support for these executions has been low for a long time, receiving anywhere from 21% to 26% approval from Americans from 1936-2002).

377. See supra notes 204-06, 301-03 and accompanying text.

378. Power, supra note 23, at 113 (pointing to the false confessions of Johnny Ross, a sixteen-year-old, and Mario Hayes, a seventeen-year-old).

379. Fagan, supra note 75, at 245 (citing the case autopsies for Professors Tanenhaus and Drizin). See generally id. at 243-46.

380. See Power, supra note 23, at 112.

381. Fagan, supra note 351, at 243.

382. Id. at 243-44 (citing Gallegos v. Colorado, 370 U.S. 49 (1962); Haley v. Ohio, 332 U.S. 596 (1948)).


384. Elizabeth R. Sowell et al., Mapping Continued Brain Growth and Gray Matter Density Reduction in Dorsal Frontal Cortex: Inverse Relationships During Postadolescent Brain Maturation, J. of Neuroscience, Nov. 15, 2001, at 8819-29; see also Fagan, supra note 75, at 235 nn.156-57 (citing Elizabeth S. Scott & Lawrence Steinberg, Blaming Youth, 81 Tex. L. Rev. 799, 800 (2002); Elizabeth S. Scott et al., Evaluating Adolescent Decision Making in Legal Contexts, 19 Law & Hum. Behav. 221, 229-35 (1995); Laurence Steinberg & Elizabeth Cauffman, Maturity of Judgment
Supreme Court Justices recently took notice of this new vein of research. Jeffery Fagan, a professor of law and public health at Columbia University, wrote that the "most critical difference between adolescents and adults . . . is that teenagers are less competent decision makers than adults." In Professor Fagan's paper examining the constitutionality of the juvenile death penalty, he surveys many of these new studies. Fagan cites magnetic resonance imaging ("MRI") studies that map brain development in which researchers have concluded that "brain maturation is not complete until about age twenty-one." The brain areas that these young people have yet to fully develop help control impulses and aid in the consideration of alternatives and consequences. These are developments that Professor Fagan concludes "make people morally culpable." This reduced culpability makes the goal of retribution less applicable to this class of offenders. Additionally, social context studies show this age group to be particularly susceptible to peer pressure and impulse. After surveying the scientific evidence and social context studies, Fagan concludes that these "developmental influences . . . undermine decision-making in ways that are generally accepted as mitigating of culpability." These characteristics are "functions of age rather than characteristics of individual juveniles, and these limitations should make juveniles less culpable, as a class, than adults." The inability of juveniles to be trusted with decisions is reflected in our laws forbidding that they smoke, make contracts and vote. The law even forbids these young people from serving on the very juries such as those convicting them. Because this class of offenders has been found to have a diminished mental capacity, the twin penal goals are not served by their executions.

Further, these studies that show the immaturity of offenders highlight another consideration to be taken into account regarding the juvenile death penalty. Not only are these offenders less culpable and less likely to be deterred, but they may have a greater capacity for reform than their older counterparts given that these limitations are a

385. See supra note 233 and accompanying text.
386. See Fagan, supra note 75, at 235.
387. See id. at 234-43.
388. See id. at 239 (quoting Professor Ruben Gur).
389. Id.
390. Id. at 239-40.
391. See id. at 240-41.
392. Id. at 243 (citation omitted).
393. Power, supra note 23, at 109; see also Fagan, supra note 75, at 242 (calling for the categorical exemption of this group because these are "normal" characteristics of juveniles common to the adolescent age group).
394. See supra note 77 and accompanying text.
reflection of their age. The behavior of these offenders might “change significantly as [they] mature from adolescence to adulthood and into middle age.” The imprisonment of these offenders would no doubt be quite lengthy and would present a great opportunity for reform. Their reduced culpability, the small chance of deterrence and the possibility for reform, make execution of these offenders useless and unwarranted.

E. In Need of Clarity

The Supreme Court should directly announce this new inclusive standard and explain it fully. Although the Court has tried to ground its constitutional interpretations in objective criteria, even these factors do not provide neutral principles. State counting represents a narrow type of constitutional empiricism, but “if judges wish to be empiricists, they should fully and honestly embrace the data at their disposal.” The state tallying calculations, when considered dispositive, “cheapen[] the constitutional discourse.”

The other factors taken into account by the Court should be emphasized and explained. If the Court is making value judgments about what evidence to consider, “it is better that they should be forthrightly acknowledged than hidden under a pile of cold data.” Whatever consistency the state tallying practice had given the process of determining constitutionality is certainly lessened by the ever-changing Supreme Court requirements for a finding of national consensus and the debate over how exactly states are to be counted. State counting will still have its place in a new, broader inquiry, but “life and death should rest as well on the considerations of fairness and justice.” As prominent activist Victor Streib stated, “[t]he issue in essence is not whether the death penalty is officially authorized but whether it is acceptable to society.” More than just the number of states that allow the practice is relevant to this inquiry.

CONCLUSION

The Court’s reliance on state counting to determine the proper scope of the Eighth Amendment is too narrow to include all punishments human dignity forbids. Not only is this indicator often an inaccurate reflection of society’s standards, it is sometimes relied

396. Id. at 188.
397. Id.
399. Id.
400. Id.
401. Id. at 218.
402. Id.
403. Streib, supra note 361, at 34.
on by the Court to the exclusion of other indicia. These supplemental factors should be a part of a more inclusive Eighth Amendment standard. *Roper v. Simmons* presents an opportunity for the Court to establish and expound on the inclusive standard and use it to uphold the Missouri Supreme Court's decision finding the juvenile death penalty unconstitutional.