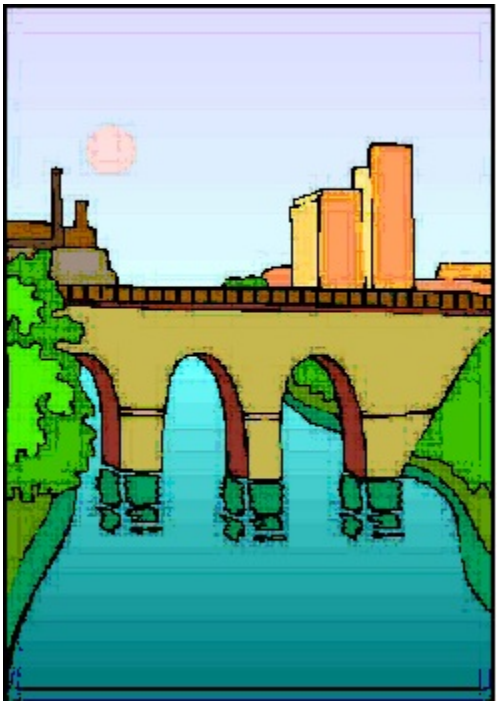

ROPER v. SIMMONS

SUPREME COURT OF THE UNITED STATES
543 U.S. 551
March 1, 2005
[5 - 4]

OPINION: Justice Kennedy/Stevens/Souter/Ginsburg/Breyer...This case requires us to address, for the second time in a decade and a half, whether it is permissible under the Eighth and Fourteenth Amendments...to execute a juvenile offender who was older than 15 but younger than 18 when he committed a capital crime. [The same proposition was rejected] in *Stanford v. Kentucky*.

...At the age of 17, when he was still a junior in high school, Christopher Simmons...committed murder. About nine months later, after he had turned 18, he was tried and sentenced to death...In chilling, callous terms [Simmons] talked about his plan, discussing it for the most part with two friends, Charles Benjamin and John Tessmer, then aged 15 and 16 respectively. Simmons proposed to commit burglary and murder by breaking and entering, tying up a victim, and throwing the victim off a bridge. Simmons assured his friends they could "get away with it" because they were minors.

The three met at about 2 a.m. on the night of the murder, but Tessmer left before the other two set out. (The State later charged Tessmer with conspiracy, but dropped the charge in exchange for his testimony against Simmons.) Simmons and Benjamin entered the home of the victim, Shirley Crook, after reaching through an open window and unlocking the back door. Simmons turned on

a hallway light. Awakened, Mrs. Crook called out, "Who's there?" In response Simmons entered Mrs. Crook's bedroom, where he recognized her from a previous car accident involving them both. Simmons later admitted this confirmed his resolve to murder her.

Using duct tape to cover her eyes and mouth and bind her hands, the two perpetrators put Mrs. Crook in her minivan and drove to a state park. They reinforced the bindings, covered her head with a towel, and walked her to a railroad trestle spanning the Meramec River. There they tied her hands and feet together with electrical wire, wrapped her whole face in duct tape and threw her from the bridge, drowning her in the waters below.

By the afternoon of September 9, Steven Crook had returned home from an overnight trip, found his bedroom in disarray, and reported his wife missing. On the same afternoon fisher-men recovered the victim's body from the river. Simmons, meanwhile, was bragging about the killing, telling friends he had killed a woman "because the bitch seen my face." The next day,... police arrested [Simmons] at his high school and took him to the police station in Fenton, Missouri...

The State charged Simmons with burglary, kidnaping, stealing, and murder in the first degree..., the jury re-turned a verdict of murder [and the State] sought the death penalty. [The Court then summarizes the aggravating and mitigating evidence.] During closing arguments, both the prosecutor and defense counsel addressed Simmons' age, which the trial judge had instructed the jurors they could consider as a miti-gating factor. Defense counsel reminded the jurors that juveniles of Simmons' age cannot drink, serve on juries, or even see certain movies, because "the legislatures have wisely decided that individuals of a certain age aren't responsible enough." Defense counsel argued that Simmons' age should make "a huge difference to the jurors in deciding just exactly what sort of punishment to make." In rebuttal, the prosecutor gave the following response: "Age, he says. Think about age. Seventeen years old. Isn't that scary? Doesn't that scare you? Mitigating? Quite the contrary I submit. Quite the contrary."

The jury recommended the death penalty...[and] the trial judge imposed...[it].

Simmons obtained new counsel, who moved in the trial court to set aside the conviction and sentence. One argument was that Simmons had received ineffective assistance at trial...The trial court found no constitutional violation by reason of ineffective assistance of counsel and denied the motion for post-conviction relief...[T]he Missouri Supreme Court affirmed. The federal courts denied Simmons' petition for a writ of habeas corpus.

After these proceedings in Simmons' case had run their course, this Court held that the Eighth and Fourteenth Amendments prohibit the execution of a mentally retarded person. *Atkins v. Virginia*[1]. **Simmons filed a new petition for state post-conviction relief, arguing that the reasoning of *Atkins* established that the Constitution prohibits the execution of a juvenile who was under 18 when the crime was committed.**

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[1]Case 8A-CUP-20 on this website.

The Missouri Supreme Court agreed [and] held that...**"a national consensus has developed against the execution of juvenile offenders**, as demonstrated by the fact that eighteen states now bar such executions for juveniles, that twelve other states bar executions altogether, that no state has lowered its age of execution below 18 since *Stanford*, that five states have legislatively or by case law raised or established the minimum age at 18, and that the imposition of the juvenile death penalty has become truly unusual over the last decade."

On this reasoning it set aside Simmons' death sentence and re-sentenced him to "life imprisonment without eligibility for probation, parole, or release except by act of the Governor." We granted certiorari and now affirm...

The prohibition against "cruel and unusual punishments," like other expansive language in the Constitution, must be interpreted according to its text, by considering history, tradition, and precedent, and with due regard for its purpose and function in the constitutional design. To implement this framework we have established the propriety and affirmed the necessity of referring to "the evolving standards of decency that mark the progress of a maturing society" to determine which punishments are so disproportionate as to be cruel and unusual.

In *Thompson v. Oklahoma,* a plurality of the Court determined that our standards of decency do not permit the execution of any offender **under the age of 16** at the time of the crime...[which is] "consistent with the views that have been expressed by respected professional organizations, by other nations that share our Anglo-American heritage, and by the leading members of the Western European community." The opinion further noted that juries imposed the death penalty on offenders under 16 with exceeding rarity; the last execution of an offender for a crime committed under the age of 16 had been carried out in 1948, 40 years prior...

The next year, in *Stanford v. Kentucky*, the Court, over a dissenting opinion joined by four Justices, referred to contemporary standards of decency in this country and concluded the Eighth and Fourteenth Amendments did not proscribe the execution of juvenile offenders over 15 but under 18. The Court noted that 22 of the 37 death penalty States permitted the death penalty for 16-year-old offenders, and, among these 37 States, 25 permitted it for 17-year-old offenders. **These numbers, in the Court's view, indicated there was no national consensus "sufficient to label a particular punishment cruel and unusual." A plurality of the Court also "emphatically rejected" the suggestion that the Court should bring its own judgment to bear on the acceptability of the juvenile death penalty**...

The beginning point is a review of objective indicia of consensus, as expressed in particular by the enactments of legislatures that have addressed the question. This data gives us essential instruction. We then must determine, in the exercise of **our own independent judgment**, whether the death penalty is a disproportionate punishment for juveniles...

There is, to be sure, at least one difference between the evidence of consensus in *Atkins* and in this

case. Impressive in *Atkins* was the rate of abolition of the death penalty for the mentally retarded. Sixteen States that permitted the execution of the mentally retarded at the time of *Penry* had prohibited the practice by the time we heard *Atkins.* By contrast, the rate of change in reducing the incidence of the juvenile death penalty, or in taking specific steps to abolish it, has been slower. Five States that allowed the juvenile death penalty at the time of *Stanford* have abandoned it in the intervening 15 years--four through legislative enactments and one through judicial decision.

Though less dramatic than the change from *Penry*[2] to *Atkins...*, we still consider the change from *Stanford* to this case to be significant. As noted in *Atkins*, with respect to the States that had abandoned the death penalty for the mentally retarded since *Penry*, "[i]t is not so much the number of these States that is significant, but the consistency of the direction of change."...The number of States that have abandoned capital punishment for juvenile offenders since *Stanford* is smaller than the number of States that abandoned capital punishment for the mentally retarded after *Penry;* yet we think the same consistency of direction of change has been demonstrated. Since *Stanford*, no State that previously prohibited capital punishment for juveniles has reinstated it...Any difference between this case and *Atkins* with respect to the pace of abolition is thus counterbalanced by the consistent direction of the change...

Petitioner cannot show national consensus in favor of capital punishment for juveniles but still resists the conclusion that any consensus exists against it. Petitioner supports this position with...the observation that when the Senate ratified the International Covenant on Civil and Political Rights (ICCPR), it did so subject to the President's proposed reservation regarding Article 6(5) of that treaty, which prohibits capital punishment for juveniles. This reservation at best provides only faint support for petitioner's argument. First, the reservation was passed in 1992; since then, five States have abandoned capital punishment for juveniles. Second, Congress considered the issue when enacting the Federal Death Penalty Act in 1994, and determined that the death penalty should not extend to juveniles. The reservation to Article 6(5) of the ICCPR provides minimal evidence that there is not now a national consensus against juvenile executions.

As in *Atkins*, the objective indicia of consensus in this case...provide sufficient evidence that today our society views juveniles...as "categorically less culpable than the average criminal."

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

Three general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders. First,..."[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions."...In recognition of the comparative immaturity and irresponsibility of juveniles, almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying

[2]Case 8A-CUP-17 on this website.

without parental consent. The second area of difference is that juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure...This is explained in part by the prevailing circumstance that juveniles have less control, or less experience with control, over their own environment...The third broad difference is that the character of a juvenile is not as well formed as that of an adult...

The susceptibility of juveniles to immature and irresponsible behavior means "their irresponsible conduct is not as morally reprehensible as that of an adult."...

In *Thompson*, a plurality of the Court recognized the import of these characteristics with respect to juveniles under 16, and relied on them to hold that the Eighth Amendment prohibited the imposition of the death penalty on juveniles below that age. We conclude the same reasoning applies to all juvenile offenders under 18...

The system is designed to consider both aggravating and mitigating circumstances, including youth, in every case. Given this Court's own insistence on individualized consideration, petitioner maintains that it is both arbitrary and unnecessary to adopt a categorical rule barring imposition of the death penalty on any offender under 18 years of age.

We disagree. The differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability...

These considerations mean *Stanford* v *Kentucky* should be deemed no longer controlling on this issue...**Our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the <u>only country in the world</u> that continues to give official sanction to the juvenile death penalty.** This reality does not become controlling, for the task of interpreting the Eighth Amendment remains our responsibility. Yet at least from the time of the Court's decision in *Trop*[3], **the Court has referred to the laws of other countries and to international authorities as instructive** for its interpretation of the Eighth Amendment's prohibition of "cruel and unusual punishments."...

Over time, from one generation to the next, the Constitution has come to earn the high respect and even, as Madison dared to hope, the veneration of the American people. The document sets forth, and rests upon, innovative principles original to the American experience, such as **federalism**; a proven balance in political mechanisms through separation of powers; specific guarantees for the accused in criminal cases; and broad provisions to secure individual freedom and preserve human dignity. These doctrines and guarantees are central to the American experience and remain essential to our present-day self-definition and national identity. Not the least of the reasons we honor the Constitution, then, is because we know it to be our own. It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain

[3]Case 8A-CUP-5 on this website.

fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.

Raw abuse of power right before your eyes. Right? Or not?

The Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed. The judgment of the Missouri Supreme Court setting aside the sentence of death imposed upon Christopher Simmons is affirmed.

CONCURRENCE: Justice Stevens/Ginsburg...If the meaning of [the Eighth] Amendment had been frozen when it was originally drafted, it would impose no impediment to the execution of **7-year-old children today**...The evolving standards of decency that have driven our construction of this critically important part of the Bill of Rights foreclose any such reading of the Amendment. In the best tradition of the common law, the pace of that evolution is a matter for continuing debate; but that our understanding of the Constitution does change from time to time has been settled since John Marshall breathed life into its text...

DISSENT: Justice O'Connor...Although the Court finds support for its decision in the fact that a majority of the States now disallow capital punishment of 17-year-old offenders, **it refrains from asserting that its holding is compelled by a genuine national consensus.** Indeed, the evidence before us fails to demonstrate conclusively that any such consensus has emerged...since we upheld the constitutionality of this practice in *Stanford v. Kentucky*.

Instead, the rule decreed by the Court rests, ultimately, on its <u>independent moral judgment</u> that death is a disproportionately severe punishment for any 17-year-old offender...[T]he Court has adduced no evidence impeaching the seemingly reasonable conclusion reached by many state legislatures: that at least *some* 17-year-old murderers are sufficiently mature to deserve the death penalty in an appropriate case. Nor has it been shown that capital sentencing juries are incapable of accurately assessing a youthful defendant's maturity or of giving due weight to the mitigating characteristics associated with youth...

Christopher Simmons' murder of Shirley Crook was premeditated, wanton, and cruel in the extreme...Whatever can be said about the comparative moral culpability of 17-year-olds as a general matter, Simmons' actions unquestionably reflect "a consciousness materially more depraved than that of...the average murderer." And Simmons' prediction that he could murder with impunity because he had not yet turned 18--though inaccurate--suggests that he *did* take into account the perceived risk of punishment in deciding whether to commit the crime. Based on this evidence, the sentencing jury certainly had reasonable grounds for concluding that, despite Simmons' youth, he "had sufficient psychological maturity" when he committed this horrific murder, and "at the same time demonstrated sufficient depravity, to merit a sentence of death."

...The proportionality issues raised by the Court clearly implicate Eighth Amendment concerns. But these concerns may properly be addressed not by means of an arbitrary, categorical age-based rule, but rather through individualized sentencing in which juries are required to give appropriate mitigating weight to the defendant's immaturity, his susceptibility to outside pressures, his cognizance of the consequences of his actions, and so forth. In that way the constitutional response can be tailored to the specific problem it is meant to remedy...

Were my office that of a legislator, rather than a judge, then I, too, would be inclined to support legislation setting a minimum age of 18 in this context. But a significant number of States, including Missouri, have decided to make the death penalty potentially available for 17-year-old capital murderers such as respondent. Without a clearer showing that a genuine national consensus forbids the execution of such offenders, **this Court should not substitute its own "inevitably subjective judgment" on how best to resolve this difficult moral question for the judgments of the Nation's democratically elected legislatures.** I respectfully dissent.

DISSENT: Justice Scalia/Rehnquist/Thomas...In urging approval of a constitution that gave life-tenured judges the power to nullify laws enacted by the people's representatives, Alexander Hamilton assured the citizens of New York that there was little risk in this, since "[t]he judiciary... has neither force nor will but merely judgment." The Federalist No. 78. But Hamilton had in mind a traditional judiciary, "bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them." Bound down, indeed. **What a mockery today's opinion makes of Hamilton's expectation, announcing the Court's conclusion that the meaning of our Constitution has changed over the past 15 years--not, mind you, that this Court's decision 15 years ago was *wrong*, but that the Constitution *has changed.*** The Court reaches this implausible result by purporting to advert, not to the original meaning of the Eighth Amendment, but to "the evolving standards of decency" of our national society. It then finds, on the flimsiest of grounds, that a national consensus which could not be perceived in our people's laws barely 15 years ago now solidly exists. Worse still, the Court says in so many words that what our people's laws say about the issue does not, in the last analysis, matter: **"[I]n the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment." THE COURT THUS PROCLAIMS ITSELF SOLE ARBITER OF OUR NATION'S MORAL STANDARDS**--and in the course of discharging that awesome responsibility purports to take guidance from the views of foreign courts and legislatures. Because I do not believe that the meaning of our Eighth Amendment, any more than the meaning of other provisions of our Constitution, should be determined by the subjective views of five Members of this Court and like-minded foreigners, I dissent.

...**The Court ignores entirely the threshold inquiry in determining whether a particular punishment complies with the Eighth Amendment: whether it is one of the "modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted." As we have noted in prior cases, the evidence is unusually clear that the Eighth Amendment was not originally understood to prohibit capital punishment for 16- and 17-year-old offenders. *Stanford v. Kentucky*. At the time the Eighth Amendment was adopted, the death**

penalty could theoretically be imposed for the crime of a 7-year-old, though there was a rebuttable presumption of incapacity to commit a capital (or other) felony until the age of 14. (4 W. Blackstone, Commentaries 23-24).

Words have no meaning if the views of <u>less than 50%</u> of death penalty States can constitute a national consensus. Our previous cases have required overwhelming opposition to a challenged practice, generally over a long period of time...

In an attempt to keep afloat its implausible assertion of national consensus, the Court throws overboard a proposition well established in our Eighth Amendment jurisprudence. "It should be observed," the Court says, "that the *Stanford* Court should have considered those States that had abandoned the death penalty altogether as part of the consensus against the juvenile death penalty...; a State's decision to bar the death penalty altogether of necessity demonstrates a judgment that the death penalty is inappropriate for all offenders, including juveniles." The insinuation that the Court's new method of counting contradicts only "the *Stanford* Court" is misleading. *None* of our cases dealing with an alleged constitutional limitation upon the death penalty has counted, as States supporting a consensus in favor of that limitation, States that have eliminated the death penalty entirely. And with good reason. **Consulting States that bar the death penalty concerning the necessity of making an exception to the penalty for offenders under 18 is rather like including old-order Amishmen in a consumer-preference poll on the electric car. Of *course* they don't like it, but that sheds no light whatever on the point at issue.** That 12 States favor *no* executions says something about consensus against the death penalty, but nothing--absolutely nothing--about consensus that offenders under 18 deserve special immunity from such a penalty. In repealing the death penalty, those 12 States considered *none* of the factors that the Court puts forth as determinative of the issue before us today--lower culpability of the young, inherent recklessness, lack of capacity for considered judgment, etc. What might be relevant, perhaps, is how many of those States permit 16- and 17-year-old offenders to be treated as adults with respect to noncapital offenses. (They all do; indeed, some even *require* that juveniles as young as 14 be tried as adults if they are charged with murder.) The attempt by the Court to turn its remarkable minority consensus into a faux majority by counting Amishmen is an act of nomological desperation...

Now, the Court says a legislative change in four States is "significant" enough to trigger a constitutional prohibition. It is amazing to think that this subtle shift in numbers can take the issue entirely off the table for legislative debate...

Relying on such narrow margins is especially inappropriate in light of the fact that a number of legislatures and voters have expressly affirmed their support for capital punishment of 16- and 17-year-old offenders since *Stanford.* Though the Court is correct that no State has lowered its death penalty age, both the Missouri and Virginia Legislatures--which, at the time of *Stanford*, had no minimum age requirement--expressly established 16 as the minimum. The people of Arizona and Florida have done the same by ballot initiative. Thus, even States that have not executed an under-18 offender in recent years unquestionably favor the possibility of capital punishment in some circumstances.

The Court's reliance on the infrequency of executions, for under-18 murderers, credits an argument that this Court considered and explicitly rejected in *Stanford.* That infrequency is explained, we accurately said, both by "the undisputed fact that a far smaller percentage of capital crimes are committed by persons under 18 than over 18" and by the fact that juries are required at sentencing to consider the offender's youth as a mitigating factor. *Eddings v. Oklahoma*. Thus, "it is not only possible, but overwhelmingly probable, that the very considerations which induce [respondent] and [his] supporters to believe that death should *never* be imposed on offenders under 18 cause prosecutors and juries to believe that it should *rarely* be imposed." *Stanford*...**Of course, the real force driving today's decision is not the actions of four state legislatures, but the Court's "<u>own judgment</u>" that murderers younger than 18 can never be as morally culpable as older counterparts...BY WHAT CONCEIVABLE WARRANT CAN NINE LAWYERS PRESUME TO BE THE AUTHORITATIVE CONSCIENCE OF THE NATION?**

...[T]he Court looks to scientific and sociological studies, picking and choosing those that support its position. It never explains why those particular studies are methodologically sound; none was ever entered into evidence or tested in an adversarial proceeding...**In other words, all the Court has done today, to borrow from another context, is to look over the heads of the crowd and pick out its friends.** *Conroy v. Aniskoff* (Scalia, J., concurring in judgment).

We need not look far to find studies contradicting the Court's conclusions. As petitioner points out, the American Psychological Association (APA), which claims in this case that scientific evidence shows persons under 18 lack the ability to take moral responsibility for their decisions, has previously taken precisely the opposite position before this very Court. In its brief in *Hodgson v. Minnesota,* the APA found a "rich body of research" showing that juveniles are mature enough to decide whether to obtain an abortion without parental involvement. The APA brief, citing psychology treatises and studies too numerous to list here, asserted: "[B]y middle adolescence (age 14-15) young people develop abilities similar to adults in reasoning about moral dilemmas, understanding social rules and laws, [and] reasoning about interpersonal relationships and interpersonal problems." Given the nuances of scientific methodology and conflicting views, **courts...are ill equipped** to determine which view of science is the right one. **Legislatures "are better qualified** to weigh and evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts."

A majority of the United States Supreme Court has concluded (1) that a 14 year old “can be mature enough” to decide to terminate the life of her fetus without so much as notifying her parents (*Bellotti v. Baird*; *Planned Parenthood v. Danforth*) and (2) that a 17 year old “can never be mature enough” to be held “as accountable” as an 18 year old for pre-meditated murder of a victim outside the womb. I didn’t make that up. Are these positions reconcilable?

...That "almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent" is patently irrelevant...As we explained in *Stanford,* it is "absurd

to think that one must be mature enough to drive carefully, to drink responsibly, or to vote intelligently, in order to be mature enough to understand that murdering another human being is profoundly wrong, and to conform one's conduct to that most minimal of all civilized standards." Serving on a jury or entering into marriage also involve decisions far more sophisticated than the simple decision not to take another's life.

Moreover, the age statutes the Court lists "set the appropriate ages for the operation of a system that makes its determinations in gross, and that does not conduct individualized maturity tests." The criminal justice system, by contrast, provides for individualized consideration of each defendant. In capital cases, this Court requires the sentencer to make an individualized determination, which includes weighing aggravating factors and mitigating factors, such as youth. In other contexts where individualized consideration is provided, we have recognized that at least some minors will be mature enough to make difficult decisions that involve moral considerations. For instance, we have struck down abortion statutes that do not allow minors deemed mature by courts to bypass parental notification provisions. It is hard to see why this context should be any different. **Whether to obtain an abortion is surely a much more complex decision for a young person than whether to kill an innocent person in cold blood.**

The Court concludes, however, that juries cannot be trusted with the delicate task of weighing a defendant's youth along with the other mitigating and aggravating factors of his crime. This startling conclusion undermines the very foundations of our capital sentencing system... This assertion is based on no evidence; to the contrary, the Court itself acknowledges that the execution of under-18 offenders is "infrequent" even in the States "without a formal prohibition on executing juveniles," suggesting that juries take seriously their responsibility to weigh youth as a mitigating factor.

Nor does the Court suggest a stopping point for its reasoning. If juries cannot make appropriate determinations in cases involving murderers under 18, in what other kinds of cases will the Court find jurors deficient? We have already held that no jury may consider whether a mentally deficient defendant can receive the death penalty, irrespective of his crime. *Atkins*. Why not take other mitigating factors, such as considerations of childhood abuse or poverty, away from juries as well? Surely jurors "overpowered" by "the brutality or cold-blooded nature" of a crime could not adequately weigh these mitigating factors either...

This is a powerful statement. Trial by jury is one of our most precious rights in this Country. Who is the Supreme Court to say that because, in their estimation, American citizens are no longer capable of making certain decisions, they will make them for us?

Though the views of our own citizens are essentially irrelevant to the Court's decision today, the views of other countries and the so-called international community take center stage. The Court begins by noting that "Article 37 of the United Nations Convention on the Rights of the Child, which every country in the world has ratified *save for the United States* and Somalia, contains an

express prohibition on capital punishment for crimes committed by juveniles under 18." The Court also discusses the International Covenant on Civil and Political Rights (ICCPR) which the **Senate ratified** only subject to a reservation that reads:

> The United States reserves the right, subject to its Constitutional restraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crime committed by persons below eighteen years of age.

Unless the Court has added to its arsenal the power to join and ratify treaties on behalf of the United States, I cannot see how this evidence favors, rather than refutes, its position. That the **Senate and the President...have declined to join and ratify treaties prohibiting execution of under-18 offenders can only suggest that *our country* has either not reached a national consensus on the question, or has reached a consensus contrary to what the Court announces**. That the reservation to the ICCPR was made in 1992 does not suggest otherwise, since the reservation still remains in place today. It is also worth noting that, in addition to barring the execution of under-18 offenders, the United Nations Convention on the Rights of the Child prohibits punishing them with life in prison without the possibility of release. If we are truly going to get in line with the international community, then the Court's reassurance that the death penalty is really not needed, since "the punishment of life imprisonment without the possibility of parole is itself a severe sanction" gives little comfort.

It is interesting that whereas the Court is not content to accept what the States of our Federal Union *say*, but insists on inquiring into what they *do* (specifically, whether they in fact *apply* the juvenile death penalty that their laws allow), the Court is quite willing to believe that every foreign nation--of whatever tyrannical political makeup and with however subservient or incompetent a court system--in fact *adheres* to a rule of no death penalty for offenders under 18. Nor does the Court inquire into how many of the countries that have the death penalty, but have forsworn (on paper at least) imposing that penalty on offenders under 18, have what no State of this country can constitutionally have: a *mandatory* death penalty for certain crimes, with no possibility of mitigation by the sentencing authority, for youth or any other reason. I suspect it is most of them. To forbid the death penalty for juveniles under such a system may be a good idea, but it says nothing about our system, in which the sentencing authority, typically a jury, always can, and almost always does, withhold the death penalty from an under-18 offender except, after considering all the circumstances, in the rare cases where it is warranted. The foreign authorities, in other words, do not even speak to the issue before us here.

More fundamentally, however, the basic premise of the Court's argument--that American law should conform to the laws of the rest of the world--ought to be rejected out of hand...The Court has been oblivious to the views of other countries when deciding how to interpret our Constitution's requirement that "Congress shall make no law respecting an establishment of religion ..." Most other countries--including those committed to religious neutrality--do not insist on the degree of separation

between church and state that this Court requires. For example,...the Netherlands, Germany, and Australia allow direct government funding of religious schools on the ground that "the state can only be truly neutral between secular and religious perspectives if it does not dominate the provision of so key a service as education, and makes it possible for people to exercise their right of religious expression within the context of public funding." England permits the teaching of religion in state schools. Even in France, which is considered "America's only rival in strictness of church-state separation," "[t]he practice of contracting for educational services provided by Catholic schools is very widespread."

And let us not forget the Court's abortion jurisprudence, which makes us one of only six countries that allow abortion on demand until the point of viability. Though the Government and *amici* in cases following *Roe v. Wade* urged the Court to follow the international community's lead, these arguments fell on deaf ears...

The Court should either profess its willingness to reconsider all these matters in light of the views of foreigners, or else it should cease putting forth foreigners' views as part of the *reasoned basis* of its decisions. To invoke alien law when it agrees with one's own thinking, and ignore it otherwise, is not reasoned decisionmaking, but sophistry.

Sophistry – deceptively subtle reasoning.

The Court responds that "[i]t does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom." To begin with, I do not believe that approval by "other nations and peoples" should buttress our commitment to American principles any more than (what should logically follow) disapproval by "other nations and peoples" should weaken that commitment. More importantly, however, the Court's statement flatly misdescribes what is going on here. Foreign sources are cited today, *not* to underscore our "fidelity" to the Constitution, our "pride in its origins," and "our own [American] heritage." To the contrary, they are cited *to set aside* the centuries-old American practice--a practice still engaged in by a large majority of the relevant States--of letting a jury of 12 citizens decide whether, in the particular case, youth should be the basis for withholding the death penalty. What these foreign sources "affirm," rather than repudiate, is **the Justices' own notion of how the world ought to be**, and their dictate that it shall be so henceforth in America. The Court's parting attempt to downplay the significance of its extensive discussion of foreign law is unconvincing...

...**[T]his is no way to run a legal system.** We must disregard the new reality that, to the extent our Eighth Amendment decisions constitute something more than a show of hands on the current Justices' current personal views about penology, they purport to be nothing more than a snapshot of American public opinion at a particular point in time (with the timeframes now shortened to a mere 15 years). We must treat these decisions just as though they represented *real* law, *real* prescriptions democratically adopted by the American people, as conclusively (rather than sequentially) construed

by this Court. Allowing lower courts to reinterpret the Eighth Amendment whenever they decide enough time has passed for a new snapshot leaves this Court's decisions without any force--especially since the "evolution" of our Eighth Amendment is no longer determined by objective criteria. **To allow lower courts to behave as we do, "updating" the Eighth Amendment as needed, destroys stability and makes our case law an unreliable basis for the designing of laws by citizens and their representatives, and for action by public officials. The result will be to crown arbitrariness with chaos.**