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***Roper v. Simmons* and The Jurisprudence of Justice Sandra Day O'Connor.**

By Masha A. Dabiza*

On January 26, 2004, the Supreme Court granted certiorari to determine whether the Eighth and Fourteenth Amendments prohibit capital punishment as cruel and unusual punishment for a seventeen-year old convicted of murder.¹ In effect, the Court agreed to reconsider the fifteen-year-old precedent of *Stanford v. Kentucky*.² In *Stanford*, the Court held by a 5-4 margin that the Constitution did not prohibit the execution of sixteen and seventeen-year olds.³ Since this decision, the number of states that allow the execution of juveniles has dwindled.

Most of the Justices on the Court appear committed to a position on this issue. In a recent dissent to the denial of certiorari in a juvenile death penalty case, Justice Stevens made his position on the topic clear. He wrote, “[w]e should put an end to this shameful practice.”⁴ Justices Breyer, Ginsburg, and Souter joined his dissent.⁵

Justices Scalia, Thomas, and Rehnquist are devoted to the opposite position.⁶ As usual, Justices Kennedy and O'Connor will be the swing votes.⁷ Kennedy typically votes with the conservative block on death penalty issues.⁸ Consequently, Justice O'Connor's decision will provide the deciding vote. This paper focuses on Justice O'Connor's crucial vote.

Justice O'Connor has, during the previous twenty years, attained a well-documented position as a key swing-vote justice with an individual style of jurisprudence. As such, litigants and scholars often have looked for clues in her life and record to predict how she will vote. In that tradition, this Article mines the Justice's personal history and her judicial record to search for hints of where she will fall in *Roper v. Simmons*.

Parts I and II of this Article will examine her personal and political history. Here it will also trace her early legislative and judicial career, her voting record on the Supreme Court, her public statements in certain key areas, and her resulting approach to decision-making in an effort to identify her legal philosophy. Many consider Justice O'Connor an enigma, mysterious and unpredictable in her opinions and judicial predispositions. In contrast, this Article asserts that, given her background, there is no great secret to Sandra Day O'Connor as a Justice. Her vision of the proper role of the Supreme Court drives her decision-making, demonstrating her true

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¹ *Roper v. Simmons*, 124 S. Ct. 1171 (2004).

² 492 U.S. 361 (1989).

³ *Id.*

⁴ *In re Stanford*, 537 U.S. 968, 972 (2002).

⁵ *Id.* at 968.

⁶ *See, e.g., Atkins v. Virginia*, 536 U.S. 304, 342 (2002) (Scalia, J., dissenting).

⁷ This paper will not discuss Justice Kennedy's potential vote. For inquiry into his jurisprudence, *see* Akhil Reed Amar, *Justice Kennedy and the Ideal of Equality*, 28 PAC. L.J. 515 (1997).

⁸ *See* Christopher E. Smith and Madhavi McCall, *Criminal Justice and the 2001-02 United States Supreme Court Term*, 2003 MICH. ST. DCL L. REV. 413, 423 (2003) (finding that Justice Kennedy voted 'conservative' in 81% of the cases); *see also* Victoria Ashley, *Death Penalty Redux: Justice Sandra Day O'Connor's Role on the Rehnquist Court and the Future of the Death Penalty in America*, 54 BAYLOR L. REV. 407, 424 (2002).

loyalty to judicial restraint.⁹ Simply put, she is the type of person who does everything by the book - including sitting on the bench of the Supreme Court.

Part III will address the evolution of capital punishment in the United States as it is applied to juveniles. Specifically, it will focus on the transformation of the legal landscape with respect to the application of this punishment and its treatment by the Supreme Court. This part will briefly examine the “evolving standards of decency” analysis that the Supreme Court has applied to this type of case, and will explore Justice O’Connor’s votes on death penalty cases on the high court. Finally, after examining recent capital punishment statistics, Part III concludes that a rigid application of stare decisis requires the Court to overrule *Stanford*.¹⁰

Part IV will examine the key factors that will influence the Court’s decision in *Roper v. Simmons*, with a particular focus on Justice O’Connor’s concerns. This part will analyze how Justice O’Connor might reconcile conflicting aspects of her jurisprudence to arrive at a fair result in *Simmons*. Will she defer to state legislative determinations as reflecting evolving standards of decency? Might she arrive at a narrow non-decision, opting for a case-by-case analysis? Regardless of her path to the conclusion, this paper predicts that Justice O’Connor will be the deciding vote in a decision to end to capital punishment for juveniles in the United States.

I. Justice Sandra Day O’Connor’s Personal Background

Several O’Connor biographies discuss her humble beginnings and this self-made career as a woman in the early days of breaking the glass ceiling.¹¹ These authors argue this background drove her into the arms of the liberals and caused her to become sympathetic to those in disadvantaged social classes during her tenure on the Supreme Court.¹²

A closer examination of her history paints a more accurate picture—that of a strong, determined, conservative woman who was in the right place, with the right connections, at the right time. In true Protestant tradition, her success resulted from adherence to rules and a strong work ethic. These qualities may best explain her judicial inclinations. This section will examine Justice O’Connor’s life prior to the Supreme Court, and how that past impacts her jurisprudence on the Court.

A. Early History

Sandra Day O’Connor learned the value of hard work at an early age. She was born Sandra Day on March 26, 1930, in El Paso, Texas.¹³ She grew up on an Arizona ranch without electricity or running water, 25 miles away from the nearest town.¹⁴ Although she spent the majority of her formative years living with her grandmother and attending school in El Paso, O’Connor loved her ranch home.¹⁵ By early childhood, she could shoot a rifle, care for

⁹ For example, O’Connor found affirmative action constitutional in the recent Michigan law school case because it was a “highly individualized, holistic review of each applicant’s file,” rather than a rigid formula. *Gruter v. Bollinger*, 539 U.S. 306, 322 (2003). The undergraduate points scheme, by contrast, was a “nonindividualized, mechanical” system, and thus not tailored closely enough to meet the strict scrutiny standard for constitutionally acceptable racial classifications. *Gratz v. Bollinger*, 539 US 244, 280 (2003).

¹⁰ 492 U.S. 361 (1989).

¹¹ *E.g.*, HAROLD WOODS & GERALDINE WOODS, *EQUAL JUSTICE: A BIOGRAPHY OF SANDRA DAY O’CONNOR* (1985).

¹² *E.g.*, DAVID SAVAGE, *TURNING RIGHT: THE MAKING OF THE REHNQUIST SUPREME COURT* (1992).

¹³ For purposes of clarity, this article will continue to refer to her as O’Connor, rather than her maiden name of Day, even while discussing her life prior to marriage.

¹⁴ WOODS, *supra* note 11, at 9.

¹⁵ *Id.* at 12.

livestock, repair a fence, drive a tractor, and help build a house.¹⁶ Later, she worked on the ranch seven days a week.¹⁷ Some commentators believe that in these formative years she developed her rugged individualism and a sense of self-reliance—ideals which supported her future Republican principles.¹⁸

O'Connor continued her hard work at Stanford, finishing her undergraduate and law school education in five years.¹⁹ She graduated with a bachelor's degree in economics with the highest honors.²⁰ At Stanford Law School, she was an editor of the Stanford Law Review, and a member of the Order of the Coif.²¹ At twenty-two years old, she graduated third in her law school class, two places behind her classmate, William Rehnquist.²² Soon afterward, she married her classmate, John O'Connor.²³

Unfortunately, in 1952 few law firms were hiring women. Unable to get a job in the private sector, O'Connor worked as a deputy county counsel in San Mateo, California.²⁴ When her husband moved to West Germany to work for the U.S. Army's JAG Corps, she found a job as a civilian lawyer for the Quartermaster Corps.²⁵ Upon returning to the United States in 1957, the couple settled in Phoenix, Arizona.²⁶ After briefly running her own law firm, O'Connor abandoned full time work, and stayed at home to raise her three sons.²⁷

During this time, she became deeply involved in various charitable organizations in Phoenix. She became president of the Junior League, served as an advisory board member of the Salvation Army, and volunteered at a local school.²⁸ She also participated in local politics, supporting Senator Barry Goldwater.²⁹

She reentered the workforce in 1965 “so that [her] life would be more orderly,” using her Republican Party contacts to become an Assistant Attorney General for Arizona.³⁰ In 1969, the Maricopa County Board of Supervisors appointed her to a vacant seat in the state senate.³¹ After three years in that position, she became the first female state senate majority leader.³²

B. Early record as a public figure

During her six-year tenure in the state senate, O'Connor did not have a reputation of being ideological.³³ Rather, she impressed her colleagues with her work ethic, breadth of knowledge, and commitment to procedure.³⁴

¹⁶ *Id.* at 11.

¹⁷ *Id.* at 13.

¹⁸ Beverly B. Cook, *Women as Supreme Court candidates: from Florence Allen to Sandra O'Connor*, 65 JUDICATURE 314 (1981-82).

¹⁹ ROBERT W. VAN SICKEL, NOT A PARTICULARLY DIFFERENT VOICE: THE JURISPRUDENCE OF SANDRA DAY O'CONNOR 23 (1998).

²⁰ WOODS, *supra* note 11, at 16.

²¹ *Id.* at 17.

²² *Id.* at 18.

²³ *Id.* at 17.

²⁴ *Id.* at 20.

²⁵ *Id.* at 21.

²⁶ *Id.* at 22.

²⁷ *Id.* at 23.

²⁸ *Id.* at 25, n. 31.

²⁹ *Id.* at 25.

³⁰ SAVAGE, *supra* note 12, at 112.

³¹ WOODS, *supra* note 11, at 33.

³² *Id.* at 35.

³³ *Id.* at 37.

Setting new boundaries, she strongly endorsed women's issues. She voted to repeal harmful labor laws affecting women, to make farm youth loans available to applicants of both genders, and to equalize property laws.³⁵ She also supported several contraception bills, including one bill that would have provided "wide access to contraceptives and all medically-acceptable family planning methods, information, and services."³⁶ She opposed cutting off abortion funds to the University of Arizona hospital, but supported the decisions of medical personnel who refused to assist in abortion on religious grounds.³⁷ These ambiguous positions on family planning legislation later served as ammunition for pro-life interest groups to attack her Supreme Court nomination.³⁸ One scholar noted that as a senator, O'Connor favored "political and legal change only along the margins of established doctrine or policy . . . [preferring] political acceptability rather than more sweeping or groundbreaking governmental action."³⁹ Significantly, she retained this philosophy when she entered the judiciary.

After O'Connor served two years as senate majority leader, the Republican Party and Senator Goldwater urged her to run for governor of Arizona.⁴⁰ Politics did not appear to suit her. She seemed uncomfortable at political events, looking too stiff to appeal to the public.⁴¹ Rejecting the legislature for the judiciary, she ran for office as a judge on the Maricopa County Superior Court in 1975.⁴²

A typical strict and formal approach towards attorneys, litigants, and the applicable law marked her career as a judge. She punished unprofessionalism in her courtroom, and evaded the emotional impact of the job, ruling strictly within the confines of the law. One story told of her tenure as a trial judge illustrated her formalist approach towards justice.⁴³ Faced with a single mother of two toddlers who was accused of passing \$3,500 worth of bad checks and pleading for leniency on behalf of her children, a composed Judge O'Connor sentenced the woman to ten years in prison, effectively making the children wards of the state.⁴⁴ She then went back to her chambers and cried over their plight.⁴⁵

Her reputation as an exceptional and impartial judge propelled her career. In 1978, she again declined to run for a gubernatorial position against the Democratic incumbent, Bruce Babbitt.⁴⁶ Within a year, the newly reelected Babbitt appointed her to the Arizona Court of Appeals, prompting commentators to paint his move as motivated by a desire to "neutralize" a "potentially powerful opponent."⁴⁷ Two years later, she was on President Reagan's short list for the Supreme Court.

Although O'Connor authored 125 decisions during her brief tenure as Court of Appeals Judge, she produced almost no written record of political, ideological, or constitutional

³⁴ *Id.* at 37-38.

³⁵ VAN SICKEL, *supra* note 19, at 27.

³⁶ *Id.* at 27-28, quoting Ed Magnuson, et.al., *The Brethren's First Sister: A Supreme Court Nominee - - And a Triumph for Common Sense*, TIME, July 20, 1981.

³⁷ VAN SICKEL, *supra* note 19, at 28.

³⁸ *Id.* at 27.

³⁹ *Id.*

⁴⁰ *Id.* at 28.

⁴¹ WOODS, *supra* note 11, at 40.

⁴² SAVAGE, *supra* note 12, at 113.

⁴³ *Id.*

⁴⁴ Magnuson, *supra* note 36, at 8.

⁴⁵ *Id.* at 8.

⁴⁶ VAN SICKEL, *supra* note 19, at 29

⁴⁷ *Id.*

convictions.⁴⁸ Prior to her appointment to the Supreme Court, she had not participated in any landmark decisions, and in fact had never addressed sex discrimination, abortion, affirmative action, federalism, or freedom of religion.⁴⁹ She had addressed few matters related to the federal Constitution, but remained reluctant to interfere with legislative determinations in these cases. For example, she relied on legislative intent when she affirmed a lower court's denial of an equal protection claim brought by tenants affected by a dubious tax law.⁵⁰

Her limited time on the Court of Appeals showed her continuing adherence to a strict and formalist approach. She upheld trial court decisions based on "narrow and technical" readings of the applicable law, and deferred to legislative decisions unless completely lacking in rationality.⁵¹ She expressed a strong belief in proper boundaries between state and federal powers in her 1981 article, *Trends in the Relationship Between the Federal and State Courts from the Perspective of a State Court Judge*.⁵²

O'Connor's article suggested that she would likely side with those members of the Court (Burger, Rehnquist, and Powell) who uphold the interest of state and local governments.⁵³ Given that her record left open many questions during her testimony before the Senate Judiciary committee, the article was one of the only potential indicators of her inclinations.⁵⁴ Senators often unsuccessfully brought up this article to commit O'Connor to a specific position.⁵⁵

C. Supreme Court Confirmation Process

"We seek a person of compassion – compassion which tempers with mercy the judgment of the criminal, yet recognizes the sorrow and suffering of the victim; compassion for the individual but also compassion for society in its quest for the overriding goal of equal justice under law."⁵⁶ Thus U.S. Senator Strom Thurmond opened the O'Connor confirmation ceremony in October of 1981.

Justice O'Connor's confirmation process was lengthy, lasting 81 days. As the Justice herself noted, Supreme Court confirmations generally take under 60 days from nomination to confirmation, with Senate hearings typically lasting only one day.⁵⁷ Her own hearings lasted three days, and contained submissions from numerous interest groups both supporting and opposing her nomination.⁵⁸ Given their length, however, the proceedings were surprisingly uncontroversial. Republicans were satisfied with her apparent conservative stance, whereas Democrats were happy with a female nominee. Both sides asked questions that began with

⁴⁸ Magnuson, *supra* note 36, at 8.

⁴⁹ *Id.*

⁵⁰ *J.C. Penney v. Arizona Dept. of Revenue*, 610 P.2d 471 (1980). In fact, her jurisprudential approach is best exemplified by a consistent limitation of the powers of the judicial branch to interfere with legislative determinations, unless the legislative history either indicates Congressional reliance on impermissible criteria or unconstitutional intent, or is not consistent with other state legislative resolutions.

⁵¹ VAN SICKEL

flowery congratulations and mini-speeches about the importance of her nomination, and probed only superficially into her political stances.⁵⁹ In response, O'Connor conducted herself in accordance with her established notions of propriety – throughout the process she was formal, precise, and unwilling to offer substantive answers to any questions seeking a committed jurisprudential approach.⁶⁰ In particular, she was evasive on the abortion issue. Hiding behind Article III, she declined to share her true opinion on the matter. In response to a particularly pushy line of questioning on abortion she retorted:

[P]ersonal views and philosophies . . . of a Supreme Court Justice and indeed any judge should be set aside insofar as it is possible to do that in resolving matters that come before the Court. Issues that come before the Court should be resolved based on the facts of that particular case or matter and on the law applicable to those facts. They should not be based on the personal views and ideology of the judge with regard to that particular matter or issue.⁶¹

Although not successful in obtaining any specific substantive commitment, the hearings were illustrative of O'Connor's unwavering stance on the role of the Supreme Court as to federalism, separation of powers, and social change. President Reagan appointed her for her conservatism, but the Senate Judiciary Committee questioning did not reveal information about her stances on hot-button issues like abortion and states rights. Upon closer examination, the Hearings did reveal her clear sense of the limited nature of a Supreme Court Justice's role, which she consistently abided by during her term.

Throughout the entire nomination process, Sandra Day O'Connor did what she was famous for – came into the hearings prepared, armed with her minimalist, formal approach. She read many previous confirmation hearings, and refused to go outside the boundaries of vague substantive answers, as outlined by her predecessors.⁶² Helpfully, few senators pressed her for any but the most superficial answers.⁶³ As the first female nominee, O'Connor enjoyed the limelight and the respect accorded to her. Generally, members of the Judiciary Committee rose to congratulate her for her high achievement and to observe the massive importance of the event for women's rights.⁶⁴

Senators did extensively question O'Connor about her views of the federal judiciary's relationship with state courts. Her strong respect for states' individualism was reflected in her assured defense both of states' rights and of the need to preserve the Tenth Amendment's protection of their autonomy. Throughout the hearings, she testified that her career in state government had provided her with "a greater appreciation . . . for the . . . needs of our federal system, which envisions . . . an important role for the states in that process."⁶⁵ She noted the importance of higher courts respecting state court decisions once a "full and fair adjudication has been given" to a matter.⁶⁶

⁵⁹ VAN SICKEL, *supra* note 19, at 33.

⁶⁰ *Id.*

⁶¹ *Hearings, supra* note 57.

⁶² VAN SICKEL, *supra* note 19, at 33.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 37.

⁶⁶ *Id.* at 36.

Similarly, on questions concerning separation of powers, she insisted on the importance of judicial deference to legislatures. Experience in the legislature gave her a “greater appreciation for the concept and the reality of the checks and balances of the three branches of government.”⁶⁷ She has commented: “I believe in the doctrine of judicial restraint. Cases should be decided on grounds other than constitutional grounds whenever possible.”⁶⁸ She counseled that judges should not be tempted to substitute their own views for those of legislators—the rightful makers of public policy.⁶⁹ Instead, she explained, the role of the judge was to interpret and apply legislatively enacted policy in light of the intent of the legislature.⁷⁰

Although she was able to fend off m

respect for procedure and a strong sense of the Court's limited role. She often defers to legislative choices, sparring many challenges with her belief that separation of powers requires the Court to be respectful towards legislative decisions. In addition, her commitment to enforcing the boundaries of federalism is unshakeable. Although a supporter of *Brown v. Board of Education*, she often consents to leave states alone to do what they will within democratically elected means. To top off her general reluctance to interfere in state legislative business, Justice O'Connor is a strong adherent to precedent and established legal traditions.

Some commentators have asserted that Justice O'Connor has become more liberal during her years on the Court.⁸⁰ To support this position, they offer her failure to side with the conservative wing of the Court in some key cases. However, this may be less a sign of her changing ideological allegiances than simply evidence of her nuanced, yet undeniably conservative judicial approach. She is simply bent on a minimalistic, marginalized, and individualized approach, and has little interest in making ideologically-based decisions from the bench, whether liberal or conservative.

A. The "O'Connor Effect" on the Supreme Court

Presiding over one of the more ideologically split Courts of the last half-century, Chief Justice Rehnquist has compensated by assigning opinions where the majority was wavering to the least certain member of the majority.⁸¹ This ensured a vote on the highest common denominator, as defined and worded by the most uncertain member of the would-be majority. Since the late 1980s, this voice has typically been that of Justice O'Connor, the Justice most mindful of procedure and careful interpretation, and least likely to make sweeping pronouncements.

This result indicates that "[t]he Rehnquist Court would move as far right as Sandra O'Connor was willing to go."⁸² The Harvard annual Supreme Court review shows the unpredictability of voting alignments of the Justices.⁸³ Liberal Justices vote with conservative Justices quite a bit, depending on the case and the issues at stake. Without a doubt, however, the most prominent factor visible from the statistics is Justice O'Connor's unique role.

In her autobiography, Justice O'Connor mentions being called the most powerful woman in the United States.⁸⁴ She is coy about that label, not denying it in the context of a discussion of her own role and agenda.⁸⁵ The statistics from the 2002 term prove her importance as a decision-maker and suggest her awareness of this power.⁸⁶

To say that in the last term her vote mattered is an understatement. Of seventy-eight opinions of the Court in 2002, Justice O'Connor wrote nine.⁸⁷ Of sixty-six dissents, however, she wrote only two, fewer than any other Justice, including the Chief.⁸⁸ Even more telling, Justice O'Connor was the most likely to agree in the disposition of a case of all other justices, with 87.2% agreement.⁸⁹ Finally, her role becomes crystal clear in a breakdown of votes in 5-4

⁸⁰ See VAN SICKEL, *supra* note 19, at 2.

⁸¹ SAVAGE, *supra* note 12, at 221.

⁸² *Id.* at 225.

⁸³ *Annual Supreme Court in Review*, Harvard Law Review (2002).

⁸⁴ SANDRA DAY O'CONNOR, *MAGESTY OF THE LAW: REFLECTIONS OF A SUPREME COURT JUSTICE* 195 (2003).

⁸⁵ *Id.*

⁸⁶ *Annual Supreme Court in Review*, Harvard Law Review, at 480 (2002).

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* at 484.

opinions by the Court.⁹⁰ In 2002, the Court handed down only fourteen 5-4 decisions.⁹¹ Of these, Justice O'Connor was in the majority thirteen times.⁹²

The number of opinions by other Justices that she has influenced by refusing to vote for the opinion as written is unknowable. Today she is inarguably the most important fifth justice in 4-4 split situations. Moreover, any contemporary prediction of Justice O'Connor's potential vote should not hinge on her characterization as a growing presence. Instead, her opinions tend to be predictable in her consistent pattern of voting and her unwavering occupation of a judicially conservative, though politically moderate, position.

Contrary to the modern notion of a growing 'O'Connor jurisprudence,' she did not alter her understanding of the law or "become her own woman" during her tenure on the Court.⁹³ She has written opinions consistently similar in their emphasis on legislative deference, the Supreme Court's limited role, and the value of precedent. A close examination of her voice on the Court reveals this, as measured by her presence in the majority in split opinions as noted above.

Justice O'Connor's respect for precedent also became obvious soon after her appointment. The summer before the crucial abortion case *Webster v. Reproductive Health Services* came up for argument before the Supreme Court, Washington was abuzz with the speculation that Justice O'Connor would provide the crucial fifth vote to overturn *Roe v. Wade* because of her sharp criticism of the Blackmun trimester framework.⁹⁴ The State's appeal named as one of the issues for the Court: whether "the *Roe v. Wade* trimester approach for selecting the test by which state regulation of abortion services is reviewed [should] be reconsidered and discarded."⁹⁵ Such broad phrasing, in its explicit disrespect for the Court's precedent, did not find a friend in Justice O'Connor. Although Justice O'Connor disapproved of *Roe*'s possible use as a tool to dictate proper procedure to states, she disliked questioning of the Court's precedent.⁹⁶ The resulting 5-4 decision upheld the law giving states the right to make specific abortion decisions and is a perfect illustration of Justice O'Connor's resolution of her tensions.⁹⁷ Instead of using her swing vote to place further restrictions on abortions or repeal *Roe v. Wade*, Justice O'Connor chose to lend her voice to an opinion that disregarded the Court's precedent, working around the margins to restructure the legal approach to the existing decision.⁹⁸

Ten years later, in *Planned Parenthood v. Casey*, she continued fine-tuning *Roe*.⁹⁹ She affirmed the "central holding" of *Roe* that the Constitution grants women the personal liberty to terminate a pregnancy.¹⁰⁰ She then ruled that states could not require women to consult with their husbands prior to obtaining abortions.¹⁰¹ She staked out the middle ground by sustaining

⁹⁰ *Id.* at 485.

⁹¹ *Id.*

⁹² *Id.* Justice O'Connor joined Chief Justice Rehnquist's dissent in *Green Tree Financial Corporation v. Bazzle*, 539 U.S. 444 (2003), a contract dispute case.

⁹³ See Howard Kohn, *Front and Center: On a Changing Supreme Court, Sandra Day O'Connor Has Emerged as a New Power, Especially on the Issue That Will Not Go Away: Abortion*, L.A. TIMES MAGAZINE, Apr. 18, 1993, at 14.

⁹⁴ See *Webster*, 492 U.S. 490 (1989); see also *Roe*, 410 U.S. 113 (1973).

⁹⁵ Brief for Appellant, 1989 WL 1127643 (internal citations omitted).

⁹⁶ *Webster*, 492 U.S. at 525-26.

⁹⁷ *Id.* at 490.

⁹⁸ *Id.*; see *Roe*, 410 U.S. 113.

⁹⁹ *Casey*, 505 U.S. 833 (1992); see *Roe*, 410 U.S. 113.

¹⁰⁰ *Casey*, 505 U.S. at 845-46.

¹⁰¹ *Id.* at 898.

requirements for waiting periods and parental consent for teens, which ensured the votes of Justices Kennedy and Souter for her “undue burden” test.¹⁰²

Her opinions are famous for their narrowness, as illustrated in affirmative action cases. In one case, she struck down a city program that set aside 30% of its contracting dollars for minority-owned contractors,¹⁰³ while only recently she sustained a University of Michigan affirmative action program, finding that its setting aside a place for “a critical mass of minority students” is not a quota.¹⁰⁴

Supreme Court commentators often note that Justice O’Connor is particularly concerned with the practical effects of a decision, consistently focusing on “societal balancing in her analyses in all areas of the law.”¹⁰⁵ Although she is politically conservative, she “utilizes a balancing of interests analysis based on a weighing of costs-benefit utilitarianism, or a pragmatic approach.”¹⁰⁶

Justice O’Connor combines her solid reluctance to interfere in state legislative business with a strong adherence to precedent and established legal traditions. She engages in a thorough statutory construction and a review of prior legal doctrine prior to making a decision. She also exhibits a marginalist approach in her refusal to make sweeping judicial statements, producing cautious opinions, wary of writing or joining broad decisions with unclear future implications. She places a strong emphasis on procedure, states’ rights, and avoidance of questions regarding substantive justice or fundamental rights.

B. Death Penalty Cases: Justice O’Connor’s Voting Record

Justice O’Connor has had a spotty history with respect to death penalty jurisprudence. Having opposed the death penalty as a state senator, she has generally been a supporter of the practice during her tenure on the Court. As in other arenas, however, her support of the practice has hinged on the presence of clear boundaries and democratic legislative promulgation of the punishment’s boundaries. Her approach thus far to capital punishment as applied to felony murder defendants and the mentally retarded offers insight into her likely approach toward juvenile defendants.

In March of 1982, as the end of her first term on the Supreme Court neared, O’Connor asserted her approach in her first death penalty opinion as a Justice.¹⁰⁷ The Court’s opinion, authored by Justice White, held that the Eighth Amendment does not allow imposition of the death penalty on a defendant who aids and abets a felony, in the course of a murder committed by others.¹⁰⁸ Where an accomplice does not himself kill, attempt to kill, intend that killing take place, or intend that lethal force be employed, attribution to the accomplice of the culpability of those who killed the victims was found impermissible under the Eighth Amendment.¹⁰⁹

Justice O’Connor dissented because she found the majority’s opinion not supported by precedent and deemed it improper to interfere with state criteria for determining legal guilt.¹¹⁰

¹⁰² *Id.* at 887, 899.

¹⁰³ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

¹⁰⁴ *Gruter v. Bollinger*, 539 U.S. 306, 335-36. (2003).

¹⁰⁵ Beau James Brock, *Mr. Justice Antonin Scalia: A Renaissance of Positivism and Predictability in Constitutional Adjudication*, 51 LA. L. REV. 623, 624-25 (1991).

¹⁰⁶ *Id.*

¹⁰⁷ *Enmund v. Florida*, 458 U.S. 782 (1982).

¹⁰⁸ *Id.* at 798.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 801-02.

After engaging in a full analysis of state felony murder statutes, she said that she would have deferred to legislative determinations of appropriate punishment.¹¹¹ She found that the data did not demonstrate that society has opposed the death penalty for felony murderers, but that “legislative judgments indicate that our ‘evolving standards of decency’ still embrace capital punishment for this crime.”¹¹² In reaching her decision, Justice O’Connor engaged in a thorough statutory analysis of state felony murder laws to inform her conception of the evolving standards of decency in the United States.¹¹³

Finally, she noted that the Eighth Amendment concept of proportionality consists of more than a measurement of the current standards of decency.¹¹⁴ It is also mandatory that the penalty be “proportional to the harm caused and the defendant’s blameworthiness,” a requirement she deemed the defendant to have met.¹¹⁵

Some five years later, Justice O’Connor revisited the topic, this time as the voice of the Court majority.¹¹⁶ Joined by new-Chief Justice Rehnquist, new Justice Scalia, and Justices White and Powell, Justice O’Connor again engaged in thorough state statute evaluation, finding under a proportionality analysis that the Eighth Amendment does not prohibit application of the death penalty where the defendant’s participation in a felony that resulted in murder was major and his mental state was one of reckless indifference to human life. In an approach telling of her respect for precedent, despite her own disagreement with its substance, she defended the *Enmund* holding, also based on legislative determinations by the states.¹¹⁷ The outcome was distinguished on the grounds that “[o]nly a small minority of States even authorized the death penalty in such circumstances and even within those jurisdictions the death penalty was almost never exacted for such a crime.”¹¹⁸

Yet, it is clear that Justice O’Connor has serious concerns about the administration of capital punishment. Only three years ago, addressing a group of women lawyers in Minnesota, Justice O’Connor said, in reference to the state’s lack of death penalty laws: “Minnesota must breathe a sigh of relief every day.”¹¹⁹ She expressed concern that innocent people may have been executed in the United States, saying that “[s]erious questions are being raised about whether the death penalty is being fairly administered in this country.”¹²⁰ She also noted that during the previous year six death row inmates were exonerated, bringing the total to ninety since 1973.¹²¹ Towards the end of this speech, she suggested that “[p]erhaps it’s time to look at minimum standards for appointed counsel in death cases and adequate compensation for

¹¹¹ *Id.* at 825-26.

¹¹² *Id.* at 816, 823.

¹¹³ *Id.* at 823.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Tison v. Arizona*, 481 U.S. 137 (1987).

¹¹⁷ *Id.* at 150.

¹¹⁸ *Id.*

¹¹⁹ Justice Sandra Day O’Connor, Remarks at the Meeting of the Minnesota Women Lawyers (July 2, 2001); see also Thomas F. Geraghty, *Trying to Understand America’s Death Penalty System and Why We Still Have It*, 94 J. CRIM. L. & CRIMINOLOGY 209, 217 (2003).

¹²⁰ Charles Lane, *O’Connor Expresses Death Penalty Doubt: Justice Says Innocent May Be Killed*, WASH. POST, July 4, 2001, at A1.

¹²¹ *Id.*

appointed counsel when they are used.”¹²² Her statements indicate her concern with proper procedure and fairness extend to capital punishment.¹²³

Justice O’Connor’s statements coincided with the Innocence Protection Act, which was under consideration by a Senate committee at the time.¹²⁴ A few days before her speech, Orin Hatch, the Senate Majority leader, opposed the portions of the bill dealing with effective assistance of counsel.¹²⁵ The Act addressed the need for states to provide adequate funding to provide effective death row counsel both at trial and post-conviction.¹²⁶ Further, the Act would have guaranteed capital defendants access to DNA evidence and “put Congress on record as opposing state executions of juveniles or [the] mentally retarded.”¹²⁷ Coming, as they did from a judicially conservative Justice, O’Connor’s words may have been intended as a message to legislatures that they must improve the system or risk having the Court do it for them.¹²⁸ A year following her speech, Justice O’Connor was presented with an opportunity to address the procedural flaws in death penalty advocacy in a Supreme Court case. The Court heard a case, in which it had to determine appropriate minimum standards for legal representation in death penalty cases.¹²⁹

Such standards were established twenty years ago in *Strickland v. Washington*, where the Court set minimum standards for determining whether counsel’s assistance at trial was effective.¹³⁰ At issue was the standard, widely adopted by various state and federal courts, which required that counsel provide “reasonably effective assistance.”¹³¹ In *Strickland*, Justice O’Connor, writing for the Court, did not actually opine on the propriety of this standard, holding that legal representation is ineffective if it so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.”¹³² In order to make this determination, a defendant had to show first, that counsel’s performance was substantially deficient as to not fulfill the Sixth Amendment guarantee, and second, that this performance prejudiced the defense enough as to deprive the defendant of a fair trial.¹³³ In further elucidating the bar for defective performance, Justice O’Connor declined to adopt specific guidelines, and rejected the prevailing norms of practice as reflected by the American Bar Association standards, noting that they are “guides by determining what is reasonable, but they are only guides.”¹³⁴ Shying away from detailed rules, including those outlined by the ABA, she opted for a judgment on the facts of the particular case in light of all the circumstances, asserting that a more detailed guideline would limit independence of defense counsel.¹³⁵

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ Less than a year ago, a modified version of the bill passed both houses of Congress. It provided for a grant program for states to improve their capital defense counsel systems. If a state with capital punishment chooses to accept the grant, it must meet basic standards set out in the Act. Advancing Justice Through DNA Technology Act of 2003, H.R. 108-321, 111th Cong. (2003).

¹²⁹ *Wiggins v. Smith*, 539 U.S. 510 (2003).

¹³⁰ 466 U.S. 668, 671 (1984).

¹³¹ *Id.*

¹³² *Id.* at 686.

¹³³ *Id.* at 687.

¹³⁴ *Id.* at 688.

¹³⁵ *Id.* at 690-91.

In sharp contrast to her rejection of ABA standards in *Strickland*, Justice O'Connor closely examined the standards for capital cases in *Wiggins*. Her opinion stayed within the *Strickland* bounds, expanding it to reflect a stronger role of ABA guidelines for capital defense work.¹³⁶ Her reference to the guidelines now treated them as the ultimate determinants of reasonableness of attorney conduct and included a discussion of the substantive standards of specific conduct as set out in the guidelines.¹³⁷ This shift illustrates her increased willingness to consider outside sources to construct the Court's precedent, and fine-tune the Court's evolving approach to old problems. She is clearly able to rethink and marginally shift her own positions with the passage of time, whether because of pragmatic concerns, by witnessing the impracticability of previous decisions, or because she perceives the need to adjust existing legal precedent. With this in mind, let us consider the evolution of Justice O'Connor's position on the death penalty as applied to the mentally retarded and to minors.

III. Application of Capital Punishment to the Mentally Retarded and to Minors

This section will review cases in which the Supreme Court has considered whether execution of the mentally retarded is cruel and unusual punishment in violation of the Eighth Amendment. As the Missouri Supreme Court found in *Simmons*, and appears to be evident in the following cases, the Court's reasoning in the mental retardation cases will inform its approach in addressing juveniles. The cases suggest a cautious and fragmented approach by the Court, further circumscribed by Justice O'Connor's concurrences.

Finally, this section will review cases in which the Supreme Court has considered the capital sentencing of minors, and whether it is cruel and unusual punishment in violation of the Eighth Amendment.

A. Application of the Death Penalty to the Mentally Retarded

The evolution of the Supreme Court's approach in death penalty cases involving mentally retarded defendants may help predict the Court's approach in the capital sentencing of juveniles. The analogy does not offer a precise parallel to juvenile death penalty to make for a fully informed prediction. However, it is useful insofar as it provides a window into the Court's perception of a national consensus and its treatment of defendants that it deems incapable of full responsibility for a crime. Justice O'Connor applied precisely the same guarded, deferential, and carefully consistent approach in cases challenging the death penalty for the mentally retarded as she did in other death penalty cases. The factors apparent from her reasoning in this line of cases will play a decisive role in *Simmons*, and thus bear some scrutiny here.

*1. Penry v. Lynaugh*¹³⁸

Johnny Paul Penry was on parole for rape when he raped, beat and killed 22-year-old Pamela Carpenter on October 25, 1979 at her home in Livingston, Texas.¹³⁹ Penry, previously diagnosed with mental retardation, gave two confessions to the local deputies.¹⁴⁰ At a later competency hearing he was estimated to have the mental age of six-and-a-half-year old by a

¹³⁶ *Wiggins v. Smith*, 539 U.S. 510 (2003).

¹³⁷ *Id.* at 522-24.

¹³⁸ 492 U.S. 302 (1989).

¹³⁹ *Id.* at 307.

¹⁴⁰ *Id.* at 307-08.

clinical psychologist.¹⁴¹ At the guilt phase of the trial, another psychiatrist again diagnosed him with brain damage and moderate retardation.¹⁴² The testimony of various relatives also revealed that Penry never finished first grade and his mother beat him over the head during childhood by his mother.¹⁴³ The State's psychiatrists also agreed that he was a person of "extremely limited mental ability."¹⁴⁴ Penry's counsel objected to a number of the jury instructions, which were all overruled by the trial judge.¹⁴⁵ The jury found Penry guilty of capital murder and sentenced him to death.¹⁴⁶ The Supreme Court granted certiorari to determine two issues: 1) whether his sentence violated the Eighth Amendment because the jury was not properly instructed to consider mitigating evidence, and 2) whether executing a mentally retarded person was cruel and unusual under the Eighth Amendment.¹⁴⁷

Justice O'Connor authored the Court's multi-pronged opinion. The portion of her opinion on threshold procedural issues was unanimous.¹⁴⁸ Other portions garnered the votes of the liberal bloc, composed of Justices Brennan, Marshall, Blackmun, and Stevens, while yet other portions garnered the votes of the conservative bloc, composed of Chief Justice Rehnquist, and Justices White, Scalia and Kennedy.¹⁴⁹ The liberals signed onto one portion of her opinion, agreeing that defendant's request for relief would not impermissibly impose a retroactive "new rule."¹⁵⁰

The Court also held that executing mentally retarded people convicted of capital offenses was not categorically prohibited by the Eighth Amendment, a decision that garnered the four conservative votes.¹⁵¹ Justice O'Connor again looked to a national legislative majority to determine whether it was cruel and unusual, citing to and following early guidance from *Trop v. Dulles*¹⁵² under an 'evolving standards of decency' analysis.¹⁵³ She said, "[t]he clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures."¹⁵⁴ She surveyed the nation's legislatures and found that only two states had enacted legislation barring the execution of the mentally handicapped.¹⁵⁵ She determined this was insufficient evidence to present a national consensus condemning the practice.¹⁵⁶ In this section of *Penry*, Justice O'Connor balances her reluctance to interfere in legislative business against her propensity towards individualized decisions.

The final part of Justice O'Connor's opinion was joined by neither the liberal or conservative Justices.¹⁵⁷ There, she engaged in a proportionality review of executing the

¹⁴¹ *Id.* at 308.

¹⁴² *Id.*

¹⁴³ *Id.* at 309.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 310.

¹⁴⁶ *Id.* at 311.

¹⁴⁷ *Id.* at 313.

¹⁴⁸ *Id.* at 306.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 319, Part II-B.

¹⁵¹ *Id.* at 335, Part IV-B.

¹⁵² 356 U.S. 86, 101 (1958) (plurality opinion). In *Trop*, then-Chief Justice Warren recognized the inherent vagueness of 'cruel and unusual' as a standard, but refused to define the words, instead stating that the meaning must be found in the "evolving standards of decency that mark the progress of a maturing society." *Id.*

¹⁵³ *Penry*, 492 U.S. at 330-31.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 334.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 335-40, Part IV-C.

mentally retarded, but did not decide whether mentally retarded people lacked the capacity to act with the necessary culpability by virtue of their mental retardation alone.¹⁵⁸ This portion of the opinion demonstrates her commitment to the consideration of the facts of each case and is typical in its careful drawing of boundaries around the majority opinion. Her insistence on a proportionality discussion also explains her silent concurrence with Stevens thirteen years later in *Atkins*.

2. *Atkins v. Virginia*¹⁵⁹

On April 16, 1996, Daryl Atkins and William Jones, armed with a semiautomatic handgun, abducted and robbed Eric Nesbitt.¹⁶⁰ They then drove him to an automated teller machine where cameras recorded their withdrawal of cash.¹⁶¹ Afterwards, Atkins and Jones took Nesbitt to an isolated location and shot him eight times.¹⁶² Daryl Atkins was convicted of abduction, armed robbery, and capital murder.¹⁶³ He was sentenced to death for these crimes.¹⁶⁴

Writing for a majority that included Justices O'Connor, Kennedy, Souter, Ginsburg, and Breyer, Justice Stevens found that the execution of mentally retarded criminals "has become truly unusual, and it is fair to say that a national consensus has developed against it."¹⁶⁵ At the time *Atkins* was decided, eighteen states and the federal government barred applying the death penalty to mentally retarded.¹⁶⁶ The Court held that this was a sufficiently large number so as to "unquestionably [reflect] widespread judgment about the relative culpability of mentally retarded offenders."¹⁶⁷

In addition to analyzing the national consensus, Justice Stevens engaged in a lengthy proportionality discussion, addressing Justice O'Connor's concerns in *Penry*. His discussion relied on a multitude of scientific findings by professional organizations, such as the American Psychological Association and the American Association of Mental Retardation.¹⁶⁸ These organizations adopted official positions against sentencing mentally retarded offenders to death.¹⁶⁹ He further engaged in a discussion of whether the practice of executing mentally retarded offenders accomplished the goals of the death penalty, namely retribution and deterrence.¹⁷⁰ Quoting *Enmund*, Stevens wrote that "unless the imposition of the death penalty on a mentally retarded person measurably contributes to both of these goals, it is nothing more than the purposeless and needless imposition of pain and suffering, and hence an unconstitutional punishment."¹⁷¹ Although mentally retarded offenders are not more likely to engage in criminal conduct, he found "abundant evidence that they often act on impulse rather than pursuant to a premeditated plan."¹⁷² Since they are not capable of premeditation, he reasoned that imposing

¹⁵⁸ *Id.* at 338.

¹⁵⁹ 536 U.S. 304 (2002).

¹⁶⁰ *Id.* at 306.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 316.

¹⁶⁶ *Id.* at 315-16.

¹⁶⁷ *Id.* at 317.

¹⁶⁸ *Id.* at 316.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 319.

¹⁷¹ *Id.* at 319-20. (internal citations omitted).

¹⁷² *Id.* at 318.

the death penalty on them could not be justified.¹⁷³ Because of their “diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or control impulses,” he held that mentally retarded offenders are not deterred from committing murder by the possible consequence of being sentenced to death.¹⁷⁴

Albeit in a footnote, Justice Stevens also relied on international norms to arrive at this conclusion. He cited a brief filed by the European Union in a different case that argued, “within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved.”¹⁷⁵ Justice Stevens noted that although the norms of other countries were “by no means dispositive, their consistency with the legislative evidence [lent] further support to our conclusion that there is a consensus among those who have addressed the issue.”¹⁷⁶ This provoked two vigorous dissents from Justices Scalia and Rehnquist, railing against the Court’s “Most Feeble Effort to fabricate ‘national consensus,’” and its reliance on the “irrelevant . . . practices of the ‘world community,’ whose notions of justice are (thankfully) not always those of our people.”¹⁷⁷ Justice Rehnquist said that he “fail[ed] to see . . . how the views of other countries regarding the punishment of their citizens provide any support for the court’s ultimate determination.”¹⁷⁸ Justice Thomas joined both dissents.¹⁷⁹

Significantly, Justice O’Connor did not write a concurrence, likely because Justice Stevens’ lengthy proportionality discussion sufficiently reflected her own thinking as set out in *Penry*. Indeed, *Atkins* clearly addresses all of the concerns she expressed in her *Penry* concurrence. The opinion must have appealed to Justice O’Connor by its careful definition of mental retardation, the narrow language of the holding, and its reliance on scientific data; national consensus was only one factor in the holding.

B. Application of the Death Penalty to Minors

In November 1988, the Supreme Court heard arguments in *Thompson v. Oklahoma*.¹⁸⁰ Justice O’Connor agonized for months during the Spring of 1989 about her decision in the case.¹⁸¹ At the time, Justice Blackmun said of her: “Sandra is tough. She’s conservative. She’s a state’s righter. She wants to let states decide things like this. But here was a fifteen-year old and the soft spots in her armor are children and women.”¹⁸² Within the span of a year, Justice O’Connor first sided with the liberal bloc and then with the conservatives. If *Atkins* is any indication, her concurrences will likely inform the Court’s definition of relevant issues, and drive the decision in *Simmons*.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 316, n.21.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 347-48.

¹⁷⁸ *Id.* at 324-25.

¹⁷⁹ Donald E. Childress III, *Using Comparative Constitutional Law to Resolve Domestic Constitutional Questions*, 53 DUKE L.J. 193, 196 (2003) (further discussing the “tentative division of 6-3 concerning the relevance of comparative constitutional law for resolving Eighth Amendment questions--the same split that decided *Lawrence* a year later.” See *Lawrence v. Texas*, 539 U.S. 558 (2003)).

¹⁸⁰ 487 U.S. 815 (1988).

¹⁸¹ SAVAGE, *supra* note 12, at 204.

¹⁸² *Id.*

1. *Thompson v. Oklahoma*.¹⁸³

William Wayne Thompson, along with three older friends, brutally murdered his former brother-in-law in early 1983.¹⁸⁴ Thompson was tried as an adult after the trial court determined “that there are virtually no *reasonable* prospects for rehabilitation within the juvenile system and that [he] should be held accountable for his acts as if he were an adult.”¹⁸⁵ He was sentenced to death.¹⁸⁶

The plurality of the Court, comprised of Stevens, Brennan, Marshall and Blackmun, held that the Eighth and Fourteenth Amendments prohibit the execution of a person who was under sixteen years of age at the time of his or her offense.¹⁸⁷ Justice Stevens grounded his opinion in the analysis of “evolving standards of decency that mark the progress of a maturing society.”¹⁸⁸ Stevens considered the standards of decency with regard to subjecting minors to the death penalty to consist of 1) a review of relevant state legislative enactments, 2) a review of sentencing jury behavior, and 3) the Court’s own careful consideration of “the reasons why a civilized society may accept or reject the death penalty in certain types of cases.”¹⁸⁹ This led him to conclude for the Court, “such a young person is not capable of acting with the degree of culpability that can justify the ultimate penalty.”¹⁹⁰

In focusing on minimum age for death penalty eligibility, the plurality first considered how Oklahoma and other states treated persons under sixteen as minors for other purposes, such as voting, jury duty, driving, marriage, alcohol and tobacco consumption and juvenile court jurisdiction.¹⁹¹ Because all fifty states had enacted legislation setting the maximum age for juvenile jurisdiction at sixteen, the Court reasoned that this was “consistent with the experience of mankind, as well as the long history of our law, that the normal fifteen-year old is not prepared to assume the full responsibilities of an adult.”¹⁹² Crucially, the Court noted that of the states with death penalty laws, sixteen have not set a minimum age for such sentencing eligibility, eighteen have set a minimum age of sixteen, and seven have set a minimum age of eighteen.¹⁹³

The second factor in the Court’s analysis of evolving standards of decency was the behavior of juries in death penalty cases. Statistics indicated that a disproportionately small number of offenders sentenced to death were minors.¹⁹⁴ Out of a total of 82,094 persons arrested for willful criminal homicide, 1,393 were sentenced to death.¹⁹⁵ Of these only five, including Thompson, had been fifteen or younger at the time they committed the offense.¹⁹⁶ The Court concluded that

¹⁸³ *Thompson*, 487 U.S. 815.

¹⁸⁴ *Id.* at 819.

¹⁸⁵ *Id.* at 819-20 (emphasis in original).

¹⁸⁶ *Id.* at 818.

¹⁸⁷ *Id.* at 838.

¹⁸⁸ *Id.* at 821 (citing *Trop v. Dulles*, 357 U.S. 86, 101(1958)).

¹⁸⁹ *Id.* at 822-23.

¹⁹⁰ *Id.* at 821-23 (citing Justice White to re77.84009 Tm(t)Tj10.0.40012 200.8201 Tm(citp 0 p v. Dul)Tj10.8

application of capital punishment to these young offenders is “cruel and unusual in the same way that being struck by lightning is cruel and unusual.”¹⁹⁷

As the third and final factor, the Court considered the reasons for imposing, or failing to impose, the death penalty in certain cases. The Court found two reasons the death penalty should not apply to minors younger than sixteen. First, there is a lesser amount of culpability for a crime committed by a juvenile compared to that committed by an adult. Second, application of death penalty in this context did not measurably contribute to the retribution and deterrence purposes of the criminal justice system.¹⁹⁸ Significantly, the plurality refused to “draw a line” prohibiting the execution of any person under eighteen at the time of his or her offense, and the court was content with a modest conclusion “that the Eighth and Fourteenth Amendments prohibit the execution of a person who was under sixteen at the time of his or her offense.”¹⁹⁹

In her concurrence in the result and not the holding, Justice O’Connor also relied on the “evolving standards of decency” test, composed of both relevant legislative enactments and jury behavior. She reframed the test as “whether the application of capital punishment to certain classes of defendants has been so aberrational that it can be considered unacceptable in our society.”²⁰⁰

Justice O’Connor concluded, “a national consensus forbidding the execution of any person for a crime committed before the age of sixteen very likely does exist.”²⁰¹ However, she stopped short of making such a finding “as a matter of constitutional law without better evidence.”²⁰² Instead, she engaged in a long discussion of the unambiguous ways in which a majority of state legislatures and juries have in fact indicated their rejection of the practice of executing fifteen-year olds.²⁰³ Some language stemming from her apparent lack of desire to participate in any sort of wide-ranging constitutional ruling borders on the incomprehensible.²⁰⁴

Justice O’Connor agreed that statistics about the behavior of legislatures and juries indicated a national consensus opposing capital punishment for fifteen-year olds, but they were not conclusive.²⁰⁵ She was clearly uncomfortable with what she perceived as an arbitrary cut off date of sixteen years old, calling the plurality’s judgment “inevitably subjective.”²⁰⁶ She instead preferred an individualized analysis of the person’s culpability.

Regarding the legislative enactments, she maintained that although all states allowing for the death penalty either have no minimum age requirements or have laws that cut off eligibility at fifteen or younger, this does not mean that the laws reflect the true attitude of the states toward executing minors. To illustrate that states do not always change their death penalty laws in an attempt to signal their evolving standards, Justice O’Connor reviewed the history of death penalty legislation before and after *Furman v. Georgia*.²⁰⁷ She pointed out the decrease of death

¹⁹⁷ *Id.* at 833 (citing *Furman v. Georgia*, 408 U.S. 238, 309 (1972)).

¹⁹⁸ *Id.* at 833-38.

¹⁹⁹ *Id.* at 838.

²⁰⁰ *Id.* at 852.

²⁰¹ *Id.* at 849.

²⁰² *Id.* at 848-49.

²⁰³ *Id.* at 849.

²⁰⁴ *Id.* (“Where such a large majority of the state legislatures have unambiguously outlawed capital punishment for 15-year-olds, and where no legislature in this country has affirmatively and unequivocally endorsed such a practice, strong *counterevidence* would be required to persuade me that a national consensus against this practice *does not* exist.” (emphasis added)).

²⁰⁵ *Id.* at 853 (emphasis original).

²⁰⁶ *Id.* at 854.

²⁰⁷ *Id.*; see also *Furman*, 408 U.S. 238 (1972).

penalty laws before the decision, but noted the increase after it.²⁰⁸ She worried that were the *Furman* Court to hold capital punishment per se unconstitutional, it would have been impermissibly stepping into legislative shoes and assuming it knew legislative purpose.²⁰⁹ According to her, the reenactment of the death penalty laws by states across the country signaled that the states had no intention of scrapping the practice at any point.²¹⁰ Thus, she warned that the Supreme Court of the United States should not “substitute [its own] inevitably subjective judgment about the best age at which to draw a line . . . for the judgments of [state] legislatures.”²¹¹ Finally, she ruled Thompson’s sentence unconstitutional.²¹² She came to this conclusion after deciding that since Oklahoma specified no minimum age, it must not have realized that it was executing juveniles.²¹³

Interestingly, Justice O’Connor placed more effort into fighting off the dissent than Justice Stevens did in the majority opinion, summoning a litany of legislation tending “to undercut any assumption that . . . Congress [decided] to authorize the death penalty for some fifteen-year-old felons.”²¹⁴

The day after the ruling reversed Thompson’s death sentence, the Court announced that it would hear an appeal filed by a sixteen-year old on death row.²¹⁵

2. *Stanford v. Kentucky*²¹⁶

The Court decided *Stanford* on the same day it decided in *Penry* that there was no national consensus preventing execution of the mentally retarded. Justice Scalia concluded for the *Stanford* majority that the challenged executions could proceed because it was “sufficiently clear” that no national consensus existed to forbid the imposition of the death penalty on sixteen or seventeen-year olds who committed capital crimes.²¹⁷

In *Stanford*, two juvenile cases were consolidated into one for decision before the Court.²¹⁸ Both defendants brutally killed women in order not to be recognized after committing robberies.²¹⁹ The named petitioner, Kevin Stanford, who was seventeen at the time of his crime, raped and sodomized a woman named Barbel Poore while he and a friend robbed the gas station where the woman worked.²²⁰ Afterwards they drove her to a secluded area and shot her in the head twice.²²¹ Stanford later informed a corrections officer that a friend told him that he had to kill the woman because she might otherwise recognize him.²²² Stanford was convicted of murder, sodomy, robbery and receipt of stolen property and sentenced to death and 45 years in prison.²²³

²⁰⁸ *Thompson*, 487 U.S. at 854.

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.* at 852.

²¹⁵ See SAVAGE, *supra*, note 12, at 205.

²¹⁶ 492 U.S. 361 (1989).

²¹⁷ *Id.* at 381.

²¹⁸ *Id.* at 365.

²¹⁹ *Id.* at 365-66.

²²⁰ *Id.* at 365.

²²¹ *Id.*

²²² *Id.*

²²³ *Id.* at 366.

The second petitioner, Heath Wilkins, who was sixteen years old at the time, stabbed Nancy Allen to death while robbing her store.²²⁴ Prior to the crime, he told others of his plan to rob the store and kill whoever was behind the counter because “a dead person can’t talk.”²²⁵ He was specially transferred to the Missouri adult system and pled guilty to first-degree murder, armed criminal action and carrying a concealed weapon.²²⁶ At the sentencing hearing Wilkins urged the imposition of the death sentence along with the state.²²⁷ Three years later, the Supreme Court granted cert “to decide whether the Eighth Amendment precludes the death penalty for individuals who commit crimes at sixteen or seventeen years of age.”²²⁸

Justice Scalia, writing for the majority, held that imposition of the death penalty on an individual for a crime committed at sixteen or seventeen did not violate evolving standards of decency and thus did not constitute cruel and unusual punishment under the Eighth Amendment.²²⁹ Calling state legislative enactments “the primary and most reliable indication of consensus, and expounding the *Tison* precedent, he found the number of legislatures forbidding the practice insufficient to add up to a ‘national consensus,’ because only 12 states precluded capital punishment of offenders under eighteen.²³⁰ Justice Scalia also “emphasize[d] that it is *American* conceptions of decency that are dispositive,” and to reject any relevance of the sentencing policies of other nations.²³¹

As for the jury behavior portion of the analysis, the majority found that the historical existence of only fifteen to thirty sentences for juveniles out of a total of 2,106 does *not* mean that the rarity of such sentences is illustrative of public reluctance of executing juveniles, but conversely that juries are willing to impose the punishment in rare circumstances.²³²

In a portion of the opinion not joined by Justice O’Connor, Justice Scalia similarly dismissed as irrelevant the notion that juveniles should not be executed simply because they cannot drink or vote. He stated that a juvenile’s inability to engage in these activities does not preclude him or her from realizing that it is wrong to kill someone.²³³ His final thoughts of this section are of note. He stated that laws limiting certain behaviors to persons eighteen and older make their determinations in bulk, lumping all kids together. He distinguished this with the criminal justice system, which provides individualized testing, particularly for juveniles.²³⁴ This is a marked contrast to his attack on Justice O’Connor’s individualized approach only a year

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.* at 367.

²²⁸ *Id.* at 368.

²²⁹ *Id.* at 380.

²³⁰ *Id.* at 370-73. At the time, they were: California, Colorado, Connecticut, Illinois, Maryland, Nebraska, New Hampshire, New Jersey, New Mexico, Ohio, Oregon, and Tennessee; *see also* *Tison v. Arizona*, 481 U.S. 173 (1987) (where the Court did not find national consensus condemning a practice which was only prohibited by eleven states).

²³¹ *Stanford*, 492 U.S. at 370.

²³² And, thus, oddly, the fact that the last execution of a person for a crime committed under 17 took place in 1959, only means that it is a worthy but simply rarely imposed practice. Part III touches upon the often absurd application and toothlessness of the ‘evolving standards of decency’ test. *See also* Joseph W. Goodman, *Overturing Stanford v. Kentucky: Lee Boyd Malvo and the Execution of Juvenile Offenders*, 2003 MICH. ST. D.C.L. L. REV. 389 (2003) (asserting that the ‘evolving standards of decency’ test is an empty constitutional standard as it was used in *Stanford*.)

²³³ *Stanford*, 492 U.S. at 374.

²³⁴ *Id.* at 375-77.

earlier. Surprisingly enough, the nod to Justice O'Connor failed to garner a fifth vote for this part of Scalia's opinion.

Justice O'Connor instead concurred in part and concurred in the judgment. In her concurrence, she restated her two-pronged test for a constitutional death penalty statute.²³⁵ Although she agreed with the plurality that there was no national consensus condemning the execution of sixteen- and seventeen-year olds, she indicated that the national consensus could change.²³⁶ She further objected to a lack of proportionality analysis by the Court. Justice O'Connor cited to her opinion in *Thompson* for the position that aged-based statutory classifications are "relevant to Eighth Amendment proportionality analysis."²³⁷ Although she did not believe that the cases before the Court in *Stanford* could be resolved through proportionality analysis, she restated her belief that the Court has "a constitutional obligation to conduct proportionality analysis."²³⁸

Justice Brennan, joined by Justices Marshall, Blackmun and Stevens sharply dissented. They stated that the majority inappropriately focused on pronouncements by the state legislatures in deciding constitutional questions.²³⁹ They argued that "[t]he promise of the Bill of Rights goes unfulfilled when we leave '[c]onstitutional doctrine [to] be formulated by the acts of those institutions which the Constitution is supposed to limit.'"²⁴⁰ The dissent engaged in a thorough proportionality review and found that the punishment is cruel and unusual because "juveniles so generally lack the degree of responsibility for their crimes that is a predicate for the constitutional imposition of the death penalty."²⁴¹

3. Recent Denials of Certiorari

For the next thirteen years, the Supreme Court did not address the issue of applying the death penalty to juveniles.²⁴² Then, in 2002, it was presented with and rejected a stay of execution of Toronto Patterson who was seventeen when he killed his cousin in 1995.²⁴³ Justice Stevens, joined by Justices Breyer and Ginsburg, dissented, noting the existence of a sufficient national consensus to revisit the issue "at the earliest opportunity."²⁴⁴ Justice Ginsburg joined by Justice Breyer, also penned a dissent, arguing that the Court's recent decision in *Atkins* merited a reconsideration of *Stanford*. Justice O'Connor did not make her thoughts on the matter known, and Toronto Patterson was executed by Texas later that day.²⁴⁵

²³⁵ Her requirements were first, the need to specify a minimum age at which a minor could be executed, and second the lack of a national consensus forbidding the imposition of the death penalty on people of such an age. *Id.*

²³⁶ *Id.* at 381-82.

²³⁷ *Id.* (citing *Thompson v. Oklahoma*, 487 U.S. 815, 854 (1988)).

²³⁸ *Id.* at 382.

²³⁹ *Id.* at 391-92.

²⁴⁰ *Id.* at 392 (internal citations omitted).

²⁴¹ *Id.* at 394. Interestingly, the final, disapproving word on the sentence, which so offended Justice Stevens, came from the executive branch. Last November, Kentucky Governor Patton confirmed his plans to commute Stanford's death sentence because he found the death penalty excessive punishment for crimes committed by juveniles. Andrew Wolfson, *Governor Will Spare Jefferson Killer's Life*, THE COURIER-JOURNAL, Nov. 26, 2003, at 6A. He commuted Kevin Stanford's death sentence on December 8, 2003. J. Brumberg, *Separating the Killers From the Boys*, N.Y. TIMES, Dec. 18, 2003, at A-43.

²⁴² The Court consistently denied cert to juvenile death penalty cases, but without comment. See *Beasley v. Johnson*, 534 U.S. 945 (2001); *Ex parte Pressley*, 531 U.S. 931 (2000); *Domingues v. State*, 528 U.S. 963 (1999).

²⁴³ *Patterson v. Texas*, 536 U.S. 984 (2002); see also Adam Liptak, *Justices Call for Reviewing Death Sentences for Juveniles*, N.Y. TIMES, Aug. 30, 2002, at A1 (giving background on the case).

²⁴⁴ *Patterson*, 536 U.S. at 984.

²⁴⁵ Liptak, *supra* note 246.

Two months later, the Supreme Court twice denied the last petitions of the very same Kevin Nigel Stanford whose fate it first decided in 1989.²⁴⁶ The first, an appeal from a denial of habeas relief, was rejected without comment.²⁴⁷ The second, an original petition for a writ of habeas corpus again questioning the propriety of the punishment applied to juveniles, was also rejected.²⁴⁸ However, this rejection prompted a vigorous dissent from Justice Stevens, joined by Justices Souter, Ginsburg and Breyer.²⁴⁹ The dissenting Justices noted the unilateral legislative movement by states to exclude minors from death penalty eligibility and suggested that this move indicated the emergence of a new national consensus.²⁵⁰ They concluded their dissent with an emphatic statement that “[t]he practice of executing [juveniles] is a relic of the past and is inconsistent with evolving standards of decency in a civilized society.²⁵¹ We should put an end to this shameful practice.”²⁵²

Some commentators suggest that, although it may have been ready, the Court did not grant certiorari to *Patterson* and *In re Stanford* due to the difficult procedural issues in both cases. Death penalty scholar Victor Streib observed that the Court may have refused cert in *In re Stanford* because it has historically been wary of taking up original petitions for writs of habeas corpus.²⁵³ In fact, Mr. Patterson’s own lawyer earlier made the same observation and ventured that “[a]s soon as they get a case that doesn’t have the jurisdictional questions that Patterson had, they’ll probably jump on that right quick.”²⁵⁴ The Missouri Supreme Court provided the perfect opportunity.

4. *Simmons v. Roper*²⁵⁵

The Supreme Court of Missouri ruled that executing juveniles violates the Eighth Amendment’s prohibition of cruel and unusual punishment based on four factors pulled from the United States Supreme Court’s analysis in *Atkins*.²⁵⁶ The high court of Missouri found a “national consensus” prohibiting the practice, and it noted that the United States Supreme Court would reach the same conclusion under *Atkins*.²⁵⁷ First, it looked at nationwide legislative enactments.²⁵⁸ Second, it discussed jury behavior by looking at the frequency of juvenile executions and noted, “the practice of executing those under 18 has become similarly uncommon today.”²⁵⁹ Third, it looked at the overwhelmingly negative national and international opinion of the juvenile death penalty, remarking that the United States was virtually alone in the world in enforcing such punishment.²⁶⁰ Finally, it conducted a proportionality analysis, concluding that

²⁴⁶ *Stanford v. Parker*, 266 F.3d 442 (6th Cir. 2001), *cert. denied*, 537 U.S. 831 (2002); *In re Stanford*, 537 U.S. 968 (2002).

²⁴⁷ *Stanford v. Parker*, 537 U.S. 831.

²⁴⁸ *In re Stanford*, 537 U.S. 968.

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ Victor L. Streib, *Adolescence, Mental Retardation, and the Death Penalty: the Siren Call of Atkins v. Virginia*, 33 N.M. L. REV. 183, 188 (2003).

²⁵⁴ Liptak, *supra* note 246.

²⁵⁵ 112 S.W.3d 397 (2003).

²⁵⁶ The court initially confirmed *Simmons*’ sentence, but reconsidered it after *Atkins*. *Id.*

²⁵⁷ *Id.* at 399.

²⁵⁸ *Id.* at 407-08.

²⁵⁹ *Id.* at 409.

²⁶⁰ *Id.* at 410-11.

retribution and deterrence do not fully apply to juveniles and that their young age actually increases their risk of wrongful execution.²⁶¹ The court then held that the juvenile death penalty violated the evolving standards of decency and was thus unconstitutional.²⁶²

On January 26, 2004, the Supreme Court granted certiorari to review the Missouri Supreme Court's decision setting the minimum age for death penalty in that state at eighteen.²⁶³

IV. National Consensus Factors

Justice O'Connor is not likely to criticize the "national consensus" standard in favor of developing a new constitutional analysis.²⁶⁴ Such an approach would both de-legitimize the judicial branch's independent mandate to review legislative decisions, and deemphasize the weight of state legislative actions. Further, a fair decision is easily reachable under the existing test.

Three factors have been previously deemed relevant gauges of the evolving standards of decency analysis: 1) legislative enactments, 2) jury behavior, and 3) the Court's own analysis of the propriety of the punishment. This section will evaluate the statistics relevant to such factors. Although the Supreme Court in *Stanford* allowed states to lower the age of death penalty eligibility to sixteen, not one state legislature has actually done so.²⁶⁵ Similarly, jury behavior indicates a decline in the desire to impose death sentences on juvenile offenders. The numbers presented in this section paint a clear picture that the majority of states disapprove of applying the death penalty to juveniles.

A. The legislative landscape

Today, the vast majority of United States jurisdictions either do not have death penalty laws at all or disapprove of their application to juveniles. Fourteen jurisdictions do not have death penalty as a punishment option at all.²⁶⁶ Forty jurisdictions do allow capital punishment.²⁶⁷ Of these, twenty-one death penalty jurisdictions allow application of the death penalty only to persons eighteen years or older.²⁶⁸

Recently, a number of states are enacting legislation prohibiting execution of offenders under eighteen. In 2004, two states joined the ranks of jurisdictions that did not permit the execution of juveniles, Wyoming and South Dakota.²⁶⁹ In South Dakota, Senate Bill 182,

²⁶¹ *Id.* at 411-13.

²⁶² *Id.* at 413.

²⁶³ *Roper v. Simmons*, 124 S. Ct. 1171 (2004).

²⁶⁴ See Arthur J. Goldberg & Alan M. Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1782 (1970) (arguing that a determination of whether a punishment is cruel and unusual in violation of the Eighth Amendment should not be dependent upon universal state condemnation of the punishment); see also Kyron Huigens, *Rethinking the Penalty Phrase*, 32 ARIZ. ST. L.J. 1195, 1222 (2000) (internal citations omitted) (arguing that "the Court's Eighth Amendment jurisprudence is a sham, because to hold states only to the standard of their existing practices is an empty constitutional requirement.")

²⁶⁵ See *Stanford v. Kentucky*, 492 U.S. 361, 381 (1989).

²⁶⁶ Death Penalty Information Center at <http://www.deathpenaltyinfo.org>. The fourteen jurisdictions are: Alaska, District of Columbia, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, North Dakota, Puerto Rico, Rhode Island, Vermont, West Virginia, and Wisconsin.

²⁶⁷ *Id.* Thirty-eight states, the federal civilian government, and the federal military have death penalty statutes.

²⁶⁸ *Id.* The twenty-one jurisdictions are: California, Colorado, Connecticut, Illinois, Indiana, Kansas, Maryland, Missouri, Montana, Nebraska, New Jersey, New Mexico, New York, Ohio, Oregon, South Dakota, Tennessee, Washington, Wyoming, Federal civilian government, Federal military. *Id.*

²⁶⁹ *Id.*

limiting executions to adult offenders, survived a narrow vote in the House.²⁷⁰ One of the rationales advanced in support of this bill was offered by Representative Casey Murschel, “adolescents do not possess the level of moral responsibility and culpability that a society expects out of adults.”²⁷¹ Another jurisdiction is in the middle of a legislative process that would ban the application of capital punishment on juveniles.²⁷²

While no death penalty jurisdictions have lowered their minimum age since *Stanford*, some maintain minimum ages below eighteen. Five jurisdictions, or 13% of all death penalty jurisdictions set the age at seventeen years old.²⁷³ Fourteen jurisdictions, or 35% of all death penalty jurisdictions set the age at sixteen years old.²⁷⁴

The death penalty is not applied to juveniles in 64% of all jurisdictions in the United States. Moreover, thirty-nine jurisdictions, comprising 74% all US jurisdictions set eighteen as the minimum age to prosecute juveniles as adults.²⁷⁵ Additionally, there are indications that the trend is rapidly moving in the direction of abolishing the practice of executing juveniles.²⁷⁶ Three of the states with a minimum age requirement of eighteen, raised it only within the previous year.²⁷⁷ According to Professor Streib, this is the most legislative attention to this issue since the 1980s.²⁷⁸

B. Jury Behavior and Executions

Although many states technically are able to impose the punishment on juveniles, few of these sentences are imposed by the majority of the states and even fewer are carried out. Only twenty-two juveniles have been executed in the United States since the reinstatement of the death penalty in 1973.²⁷⁹ The number of mentally retarded defendants executed was twice as large at the time of *Atkins*.²⁸⁰ Since January 1, 1973, a total of 225 juveniles have been sentenced to

²⁷⁰ In the House, 182 passed by only two votes. Available at: <http://legis.state.sd.us/sessions/2004/182.htm>.

²⁷¹ Audio available at: <http://legis.state.sd.us/sessions/2004/182.htm> (Pub. H. 182 February 24, 2004 HR vote HJ 764)

²⁷² Arkansas is now in the midst of a bi-partisan process to ban the practice. House Bill 2253.

²⁷³ Death Penalty Information Center, at <http://www.deathpenaltyinfo.org>. The five jurisdictions are: Florida (not a result of legislative enactment, but supreme court ruling), Georgia, New Hampshire, North Carolina, Texas. A bill to ban such punishment in Texas was approved in the state legislature last year but Governor Rick Perry vetoed it.

²⁷⁴ *Id.* These fourteen jurisdictions are: Alabama, Arizona, Arkansas, Delaware, Idaho, Kentucky, Louisiana, Mississippi, Nevada, Oklahoma, Pennsylvania, South Carolina, Utah, Virginia. Ten of these states have a minimum age of 16 years old in compliance with the Court’s earlier ruling in *Thompson*.

²⁷⁵ *Id.* The thirty-nine jurisdictions that set the minimum age at eighteen are Alabama, Alaska, Arizona, Arkansas, California, Colorado, Delaware, Florida, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia, Wyoming, and the District of Columbia. Pamela Ferdinand, *Seventeen an Awkward Age, N.H. Juvenile Justice Finds; In Reversal, State Moves to Raise Criminal Adulthood to 18*, WASHINGTON POST, Mar. 27, 2002 at A-03.

²⁷⁶ During 1999-2002 thirteen states considered legislation to raise the minimum age to 18. Two states, Montana and Indiana, actually succeeded in passing such legislation during this time period. Victor L. Streib, *The Juvenile Death Penalty Today: Death Sentences and Executions for Juvenile Crimes, Jan. 1 1973 – Sept. 30, 2004* at <http://www.law.onu.edu/faculty/streib/JuvDeathSept2003.htm>.

²⁷⁷ *Age Requirements for the Death Penalty and the Execution of Juveniles*, at <http://www.deathpenaltyinfo.org/article.php?scid=27&did=203#agereqs>

²⁷⁸ Streib, *supra* note 280.

²⁷⁹ Death Penalty Information Center at <http://www.deathpenaltyinfo.org>

²⁸⁰ *Id.*

death.²⁸¹ Only seven states have been responsible for 164 (or 73%) of these sentences; three states have been responsible for 112, or half of all juvenile death sentences.²⁸² The fact that almost 75% of the death sentences have been handed down in only seven of the states indicates that the vast majority of states disapprove of sentencing juveniles to death.

Polls of death penalty juries and citizens across the nation confirm that the majority of Americans are reluctant to impose the death penalty on juveniles. The most recent national public opinion poll on juvenile death sentences was conducted by Gallup in 2002. According to this poll, 69% of Americans oppose capital punishment for juvenile defendants.²⁸³ Surveys of actual death penalty juries indicate that this national sentiment is present in the courtroom during jury deliberations. The Capital Jury Project conducted a study of jurors in 353 death penalty cases.²⁸⁴ Twelve of these cases, or 2.9% of the sample size, involved juvenile defendants.²⁸⁵ The jurors surveyed imposed the death penalty in only 16.7% of the juvenile death penalty cases, 2 out of the 12 cases, as compared to 60% of the adult cases.²⁸⁶ As indicated by the Capital Jury Project, this difference reflects a fundamentally different view about the propriety of imposing the death penalty on adult versus juvenile offenders.²⁸⁷

The same pattern holds for actual executions of juveniles. Of a total of 22 juvenile executions, Texas has accounted for 13 (59%), Virginia for 3 (14%), and Oklahoma for 2 (9%).²⁸⁸ Thus, only three states account for 81% of all juvenile executions since the reinstatement of the death penalty. Even in these states, there is significant opposition to imposing the death penalty on juveniles and carrying out the sentence. In a 2002 opinion poll conducted in Texas, 42.3% opposed imposing the death penalty on a juvenile even if they were convinced that the defendant was guilty.²⁸⁹ Conversely, only 34.2% supported imposing the death penalty on the juvenile defendant under the same circumstances.²⁹⁰ Similarly, in Oklahoma, a recent poll revealed that 62.8% of residents surveyed would support a legislative ban on the execution of juvenile offenders if life without the possibility of parole was offered as a sentencing alternative.²⁹¹

The practice of allowing juveniles to be sentenced to death is in decline. Since the Supreme Court's decision in *Stanford*, state legislatures have expressed their disapproval of applying the death penalty to juveniles. The national trends show a true consensus upon which the Justices may rely in deciding the constitutionality of the juvenile death penalty in *Simmons*.

²⁸¹ See Streib, *supra* note 280, at 8.

²⁸² Texas has 57 death sentences (25% of the national total), Florida has 31 (14%), and Alabama has 24 (11%). See *id.*

²⁸³ Gallup News Service, May 20, 2002, available at:

<http://www.deathpenaltyinfo.org/article.php?scid=23&did=210#Gallup-5/02>

²⁸⁴ Michael E. Antonio, Benjamin D. Fleury-Steiner, Valerie P. Hans, and William J. Bowers "Capital Jurors as the Litmus Test of Community Conscience for the Juvenile Death Penalty." 87 *Judicature* 274 (May-June 2004), available at: <http://www.cjp.neu.edu/>.

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ *Id.*

²⁸⁸ See Streib, *supra* note 280, at 10.

²⁸⁹ Houston Chronicle December 31, 2002, available at:

<http://www.deathpenaltyinfo.org/article.php?scid=23&did=210#Texas>.

²⁸⁹ See Goodman, *supra* note 235, at 394.

²⁸⁹ See SAVAGE, *supra* note 12, at 5.

²⁹⁰ *Id.*

²⁹¹ The Oklahoman, April 3, 2003, available at:

<http://www.deathpenaltyinfo.org/article.php?scid=23&did=210#Texas>.

C. Court's Analysis

The Court's prior death penalty jurisprudence has been examined at length in section III of this Article, so this discussion will not be reproduced here. For the purpose of the national consensus analysis, it is sufficient to note that Justice O'Connor has never prominently featured this prong in her national consensus analysis.²⁹² O'Connor focuses mo

charged with making determinations of public policy.”²⁹⁷ This judicial preference will weigh in favor of overturning the Missouri Supreme Court’s decision and allowing the state legislature to determine appropriate age limits for the death penalty.

Second, O’Connor is a strong proponent of precedent, especially if overruling the precedent will require significant governmental action. As her decision in *Croson* indicates, she prefers narrow rulings that shift the existing doctrine or policy rather than decisions that fundamentally alter existing rules.²⁹⁸ In this particular case, these judicial preferences weigh in favor of overturning the Missouri Supreme Court’s decision. Upholding this decision would require the Court to explicitly overrule its decision in *Stanford* and would likely require nineteen states to drastically change their criminal statutes and procedures.²⁹⁹

B. National Consensus

In *Simmons*, Justice O’Connor will most likely examine the existing state approaches to the practice, and find that a new national consensus has emerged. The actions of state legislatures in the wake of *Stanford* will be the primary impetus for this decision.³⁰⁰ Justice O’Connor will likely not focus on public sentiment as expressed by the sentences imposed by juries. The percentage of death sentences handed down by juries in juvenile capital cases has not altered significantly since the *Stanford* opinion, and Justice O’Connor has not focused on this issue in her previous discussions of national consensus.³⁰¹ Additionally, her desire to uphold the Court’s previous decision in *Stanford* will not be sufficient to prevent her from overruling this decision, once she determines that legislative action does not mirror the Court’s opinion in *Stanford*.³⁰²

Currently, out of the jurisdictions that allow capital punishment, twenty-one do not allow the execution of juveniles.³⁰³ In *Atkins*, O’Connor sided with the Justices that held nineteen jurisdictions were sufficient to indicate a national consensus.³⁰⁴ The *Atkins* decision marked the culmination of the national consensus analysis in the mental retardation cases.³⁰⁵ Initially in *Penry*, the Court held that a national consensus opposing the execution of mentally retarded defendants did not exist.³⁰⁶ However, after shifts in stance of several legislatures, the Court found that a national consensus against this practice had evolved by the time *Atkins* was decided.³⁰⁷

Recognizing and understanding the emergence of a national consensus in the *Atkins*-line of cases is important because a similar trend is present in the juvenile death penalty line of cases. Two primary factors suggest that the comparison between cases dealing with the execution of the mentally retarded provides some guidance for the Court’s likely decision in *Roper*. First, in *Stanford*, as in *Penry*, the Court held that the number of legislatures opposing a particular

²⁹⁷ *Hearings*, *supra* note 57.

²⁹⁸ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

²⁹⁹ *See Stanford*, 492 U.S. at 361.

³⁰⁰ *See Stanford*, 492 U.S. at 361.

³⁰¹ *See id.* at 380; *See Thompson v. Oklahoma*, 487 U.S. 815, 848 (1988).

³⁰² *See Stanford*, 492 U.S. at 361.

³⁰³ Thirteen jurisdictions do not allow any executions, and twenty-one jurisdictions only allow the execution of adult defendants. Death Penalty Information Center at: <http://www.deathpenaltyinfo.org>.

³⁰⁴ *Atkins v. Virginia*, 536 U.S. 304, 306 (2002).

³⁰⁵ *Id.* at 304.

³⁰⁶ *Penry v. Lynaugh*, 492 U.S. 302 (1989).

³⁰⁷ *Atkins*, 536 U.S. at 304.

application of death penalty was insufficient to qualify as a national consensus.³⁰⁸ Second, legislative reaction to the *Stanford* decision mirrors the reaction of legislatures to the Court's decision in *Penry*.³⁰⁹ *Stanford*, like *Penry* did not result in any regressionist legislation, rather in the wake of both of these decisions, legislatures have moved in a direction indicating increased condemnation of the practice.³¹⁰

Considering her position in *Atkins*, Justice O'Connor will conclude that thirty-four jurisdictions constitute a national consensus on this issue.³¹¹ Even though Justice O'Connor's mention of *Furman* in *Thompson* potentially left the door open for an argument that legislative change and jury room behavior may not actually translate into any true national consensus, it is inapplicable here.³¹² Professor Streib points out that after *Stanford*, a similar reaction as that following *Furman* would have been a universal lowering of state death penalty age minimums from seventeen and eighteen to sixteen, in tune with the Court's explicit permission.³¹³ Instead, none of the states moved its age restrictions downward after *Stanford*, pointing to a national refusal to approve of the practice in spite of a Court-approved constitutional green light.³¹⁴ In fact, since the *Stanford* decision, seven states have raised the minimum age of execution to eighteen.³¹⁵

The verdicts reached by juries in juvenile death penalty trials are unlikely to impact Justice O'Connor's national consensus analysis. Although the research conducted by the Capital Jury Project suggests that juries are less likely to sentence juveniles to death, this polling data will ultimately be inconsequential when Justice O'Connor conducts her national consensus analysis for two reasons.³¹⁶ First, the research conducted by the Capital Jury Project fails to present new evidence to the Court.³¹⁷ In *Stanford*, the majority examined historical data showing that juries in juvenile death penalty cases sentenced only fifteen to thirty juveniles out of 2,106 to death.³¹⁸ The majority held that these figures did not demonstrate significant opposition to executing juveniles.³¹⁹ The research by the Capital Jury Project only examined twelve juvenile death penalty juries and the percentage of juveniles sentenced to death actually exceeds the historical percentages.³²⁰ This new data is insufficient to alter the conclusions reached by the majority in *Stanford*.

Although she did not join the majority opinion in *Stanford*, Justice O'Connor did not take issue with this logic in her concurring opinion.³²¹ Rather, she focused on actions of state legislatures.³²² Justice O'Connor's national consensus analysis in both *Stanford* and in *Penry*

³⁰⁸ See *Stanford v. Kentucky*, 492 U.S. 361, 370-71(1989); see also *Penry*, 492 U.S. at 334.

³⁰⁹ See *Stanford*, 492 U.S. at 361; see also *Penry*, 492 U.S. at 302.

³¹⁰ Streib, *supra* note 280.

³¹¹ See *Atkins*,

³¹² See *Thompson v. Oklahoma* 487 U.S. 815, 855 (1988) (*citing Furman v. v. Georgia*, 408 U.S. 238 (1972)).

³¹³ Streib, *supra* note 280.

³¹⁴ *Id.*

³¹⁵ Washington (1993), Kansas (1994), New York (1995), Montana (1999), Indiana (2002), South Dakota (2004), Wyoming (2004). *Id.*

³¹⁶ Antonio et al, *supra* note 288.

³¹⁷ *Id.*

³¹⁸ *Stanford v. Kentucky*, 492 U.S. 361, 373 (1989).

³¹⁹ *Id.* at 374.

³²⁰ See Antonio et al, *supra* note 288.

³²¹ *Stanford*, 492 U.S. at 380.

³²² *Id.* at 381-82.

focused almost exclusively on the actions of state legislatures.³²³ Rather than examine the sentences handed down by juries or the results of national opinion polls, Justice O'Connor studied the number of legislatures that enacted statutes forbidding the type of capital punishment in question.³²⁴ Her focus on legislative action, combined with the failure of jury studies to produce new results in the wake of the *Stanford* decision, indicates that this component of the national consensus analysis will not factor into Justice O'Connor's decision in *Roper*.

The Court's decision in *Stanford* will not prevent Justice O'Connor from ruling that the execution of juveniles is impermissible. Her background does indicate that she seeks to uphold prior decisions whenever possible; however, Justice O'Connor has indicated in her concurring opinion in *Stanford* and in her silent agreement in *Atkins* that a new national consensus is a sufficient reason to overturn a prior decision.³²⁵ In *Stanford*, Justice O'Connor stated that she concurred with the judgment of the majority because she did not believe that a national consensus existed opposing the practice.³²⁶ This is an implicit statement that her opinion on the propriety of juvenile executions would change if a national consensus arose to oppose this practice. Additionally, in *Atkins*, Justice O'Connor joined with the majority of the Court in finding that the emerging national consensus opposing the execution of the mentally retarded was sufficient to overturn the Court's prior decisions in *Penry*.³²⁷ Based on these judicial decisions, Justice O'Connor will refuse to uphold the Court's decision in *Stanford* in the face of legislative enactments banning the execution of juveniles.

C. Proportionality

The existence of a national consensus is only half of the analysis; state counting does not end it. In *Stanford*, Justice O'Connor indicated the necessity of a proportionality consideration in all decisions concerning the eligibility of an entire group for the death penalty.³²⁸ Relying on her opinion in *Thompson*, she restated her conviction that aged-based statutory classifications are "relevant to Eighth Amendment proportionality analysis."³²⁹ Unfortunately, the Missouri Supreme Court in *Simmons* ignored the proportionality element, instead focusing exclusively on the national consensus portion of *Atkins*.³³⁰

However, in order to sustain a ban on this practice, Justice O'Connor will be most interested in the proportionality prong, as is evidenced by her approach in *Stanford* and her concurrence in *Penry*.³³¹ Her silent agreement with Stevens in *Atkins* is perhaps most telling.³³² The *Atkins* opinion afforded the proportionality prong a thorough treatment, deferring to medical definitions to arrive at the conclusion that the mentally retarded, as a group, are not able to form the mental state sufficient for application of the death penalty.³³³ Justice O'Connor's reliance on such objective determinations of culpability to find mentally retarded defendants unable to ever be responsible for their own actions does not meet an exact analogue in the juvenile context.

³²³ *Id.* at 381-82; *Penry v. Lynaugh*, 492 U.S. 302, 331, 335-36 (1989).

³²⁴ *Penry*, 492 U.S. at 337-38.

³²⁵ *Stanford*, 492 U.S. at 381-82; *Atkins v. Virginia*, 536 U.S. 304, 306 (2002).

³²⁶ *Stanford*, 492 U.S. at 381-82.

³²⁷ *Atkins*, 536 U.S. at 316.

³²⁸ *Stanford*, 492 U.S. at 382.

³²⁹ *Id.* (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 854 (1988)).

³³⁰ *Simmons v. Roper*, 112 S.W.3d 397 (2003).

³³¹ *Stanford*, 492 U.S. at 382; *Penry v. Lynaugh*, 492 U.S. at 337-38 (1989).

³³² *Atkins*, 536 U.S. at 306.

³³³ *Id.*

Mental retardation is determined by a person's low IQ. Atkins recognized "significantly subaverage intellectual functioning" as measured through intelligence tests.³³⁴ Since IQ is directly related to a person's ability to form intent, it is generally not considered arbitrary, and is easily converted into a measuring stick for a defendant's culpability.³³⁵ A score under 70 shows an inability to function on a mental level of the average adult, and assures Justice O'Connor that only the intended group benefits from the protection against disproportionate assignment of blame and criminal culpability.³³⁶

A precise parallel cannot be drawn in the juvenile context, as age is merely a proxy for incapacity, and a fairly arbitrary one at that. While certainly a vast literature exists on the irresponsibility and mental incapacity of full maturity by juveniles, the resulting inability to draw a line corresponding to capacity will be a problem for Justice O'Connor.

As seen in *Thompson*, Justice O'Connor has let it be widely known that she refuses to make such a drastic decision even for fifteen-year olds.³³⁷ She has previously shown reluctance to join opinions with potentially overbroad language. For instance, during her first term, she declined to join an opinion where the majority wrote that "during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment expected of adults."³³⁸ Instead, she wrote separately, highlighting the necessity of considering the juvenile's personal history.³³⁹ She noted that the majority's approach was only partially correct because "by listing in detail some of the circumstances surrounding the petitioner's life, the Court has sought to emphasize the variety of mitigating information that may not have been considered by the trial court in deciding whether to impose the death penalty or some lesser sentence."³⁴⁰

However, that the Court in *Atkins* did use some non-objective criteria to defining mental retardation that overlaps with description of juveniles as well, and which is arguably impossible to measure.³⁴¹ Such descriptions included impulsivity, tendency to follow rather than lead, and diminished capacity to learn from experience and use reasoning and judgment.³⁴² However, largely the same analysis was used by the plurality in *Thompson*, which Justice O'Connor did not to join.³⁴³ Justice O'Connor will only find the death penalty inapplicable to juveniles if she is presented with a wealth of scientific evidence isolating concrete, objective criteria by which to measure the mental capacity of juveniles.

Indeed, the various amicus briefs to the Court presented just such evidence. For instance, scientists have found that the brains of seventeen-year olds are not fully developed, especially as to judgment and impulse control.³⁴⁴ Similarly, according to the ABA Taskforce on Youth in the Criminal Justice System, juveniles who have been accused of capital crimes are as a group even less capable as their seventeen-year-old peers, likely because of negative factors in their lives,

³³⁴ *Id.* at 309.

³³⁵ *Id.* at 317-18.

³³⁶ *Id.* at 316.

³³⁷ *Thompson v. Oklahoma*, 487 U.S. 815, 855 (1988).

³³⁸ *Eddings v. Oklahoma*, 455 U.S. 104, 116 (1982) (internal citations omitted).

³³⁹ *Id.* at 119.

³⁴⁰ *Id.*

³⁴¹ *Atkins*, 536 U.S. at 318.

³⁴² *Id.*

³⁴³ Specifically, the plurality stressed "[i]nexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult." *Thompson*, 487 U.S. 815, 835 (1988).

³⁴⁴ See e.g., Elkhonon Goldberg, *THE EXECUTIVE BRAIN: FRONTAL LOBES AND THE CIVILIZED MIND* (2001).

which further stall their development and their ability to assume adequate control over their impulses.³⁴⁵ As evidenced by *Wiggins*, Justice O'Connor has perhaps become willing to defer to such ABA judgments in informing her opinion on the application of the death penalty.³⁴⁶

D. Prevailing Factors in Justice O'Connor's Ultimate Decision

In predicting how Justice O'Connor will vote in *Roper*, it is necessary to determine whether her more global stated judicial preferences or the more focused preference for national consensus and proportionality analysis will prevail. Although the emerging national consensus opposing the execution of juveniles is likely to be the most influential consideration in Justice O'Connor's decisions, she must first overcome her squeamishness at imposing any majoritarian view onto states that have reached contrary decisions through a democratic process. She must also wrestle with her desire to adhere to precedent and craft narrow decisions within the existing boundaries of the law.

Justice O'Connor's likely proportionality analysis provides her with the option of crafting a narrow ruling. As several scholars have indicated, Justice O'Connor often seeks to craft a narrow ruling.³⁴⁷ As indicated in her *Thompson* decision, she also prefers to determine the mental culpability of juvenile defendants on a case-by-case basis.³⁴⁸ These two preferences could combine to result in a narrow opinion in which Justice O'Connor holds that the appropriateness of the death penalty for juvenile defendants must be determined on a case-by-case basis as determined by their mental state. However, as indicated by O'Connor's silent concurrence in *Atkins* she is increasingly willing to rely both on scientific studies and on less objective criteria in determining the mental culpability of a defendant.³⁴⁹ As stated above, the ABA Taskforce On Youth in the Criminal Justice System and similar groups have presented this type of evidence in various amicus briefs to the Court in *Roper*.³⁵⁰ Additionally, her focus on the national consensus analysis in prior juvenile death penalty cases, such as *Stanford*, suggest that she will avoid such a narrow decision when a national consensus opposing the execution of juveniles exists.³⁵¹

Justice O'Connor will be guided by the emerging national consensus. First, although her judicial preferences indicate that she is reluctant to impose her judicial will on state legislatures, her silent concurrence in *Atkins* demonstrates that she will intercede in legislative affairs if a sufficient number of state legislatures oppose a practice.³⁵² The real meaning of her national consensus analysis is that it demarcates a point at which she is willing to impose a different outcome even on a legitimately promulgated law, if she feels that a contrary majoritarian opinion has evolved through a legitimate democratic process.³⁵³ In this case, twenty-one jurisdictions

³⁴⁵ See e.g., American Bar Association Task Force on Youth in the Criminal Justice System, *Youth in the Criminal Justice System* 39-46 (2001).

³⁴⁶ *Wiggins v. Smith*, 539 U.S. 510 (2003).

³⁴⁷ VAN SICKEL, *supra* note 19, at 31.

³⁴⁸ *Thompson*, 487 U.S. at 854.

³⁴⁹ *Atkins v. Virginia*, 536 U.S. 304, 306 (2002).

³⁵⁰ See American Bar Association Task Force on Youth in the Criminal Justice System, *Youth in the Criminal Justice System* 39-46 (2001).

³⁵¹ *Stanford v. Kentucky*, 492 U.S. 361, 381-82 (1989).

³⁵² *Atkins*, 536 U.S. at 306.

³⁵³ Indeed, Justice O'Connor asked only one question during Oral Argument, focusing singularly on the existence of national consensus. "Isn't there about the same consensus that existed in *Atkins*? Aren't we obliged to look at that?"

oppose executing juveniles.³⁵⁴ Based on her stance in *Atkins*, this number will be sufficient to overcome her reluctance to interfere with state legislatures.

Second, the national consensus reduces the precedential value of *Stanford*.³⁵⁵ As stated above, no state legislatures lowered the minimum age of execution in the wake of *Stanford*.³⁵⁶ This statistic indicates that there is little if any societal reliance on the *Stanford* decision and suggests that Justice O'Connor will be less likely to find that precedent requires the Court to overturn the Missouri Supreme Court's decision.

VI. Conclusion

There are few potential outcomes in *Simmons*. A genuine national consensus to discontinue executing juveniles has formed among states since the Court has last looked at this issue. *Atkins* is a powerful indicator that the national consensus test has real application with the Court. Certainly, Justice O'Connor's vote with the *Atkins* majority coupled with her Oral Argument query in *Simmons* is strong evidence that she similarly takes the national consensus test seriously.

Justice O'Connor's focus on this test in prior death penalty cases indicates that the national consensus analysis will be the deciding factor in her decision. Although Justice O'Connor's more general judicial preferences and the lack of a clear, scientifically-determined culpability cut-off suggest that she may decide that the execution of juveniles should be decided on a case-by-case basis with specific focus on the mental culpability of the juvenile, the power of an emerging national consensus will cause Justice O'Connor to rule that the execution of juveniles is prohibited. This Article predicts that Justice O'Connor will join at least four other Justices to rule that executing individuals under eighteen years of age is cruel and unusual as prohibited by the Eighth Amendment.

³⁵⁴ Death Penalty Information Center at: <http://www.deathpenaltyinfo.org>.

³⁵⁵ *Stanford*, 492 U.S. at 361.

³⁵⁶ *Streib*, *supra* note 288; *see* *Stanford*, 492 U.S. at 361.