THE PENNSYLVANIA STATE UNIVERSITY
SCHREYER HONORS COLLEGE

DEPARTMENT OF HISTORY

THE QUESTION OF EVOLVING STANDARDS OF DECENCY AND THE MODERN CONCEPT OF AMERICAN CHILDHOOD IN THE SUPREME COURT

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SPRING 2017

A thesis
submitted in partial fulfillment
of the requirements
for baccalaureate degrees
in History and Spanish
with honors in History

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Modern Americans increasingly perceive childhood as a distinct stage of life. As a result, the legal recognition of psychological differences between juveniles and adults in a series of Supreme Court cases has rendered juveniles under the age of eighteen as less culpable during criminal sentencing. This increasingly liberal attitude in the courts towards juvenile punishment has been officially established through Eighth Amendment jurisprudence in three major Supreme Court cases: *Roper v. Simmons* (2005), *Graham v. Florida* (2010), and *Miller v. Alabama* (2012). *Roper v. Simmons* established the precedent of leniency towards juveniles by abolishing the death penalty for minors under eighteen years of age. *Graham v. Florida* and *Miller v. Alabama* followed, establishing that life imprisonment for juveniles for a homicidal crime and for a non-homicidal crime respectively are unconstitutional.

After close analysis of these landmark cases in juvenile sentencing, there is substantial evidence that the Supreme Court did not simply rely on an interpretation of the text of the Eighth Amendment’s cruel and unusual punishment clause, as elaborated in earlier jurisprudence, but instead looked towards current society’s moral opinion as a determining factor in the rulings. The Court’s majority relied on the concept of “evolving standards of decency” in society, ruling that society’s current ideas about juveniles’ place within both the nation and the world render harsh punishments typically applied to adults to be cruel and unusual for juveniles, in this sense counter to the Eighth Amendment of the Constitution.

To pinpoint society’s current attitude toward juveniles, this thesis entails a close evaluation of the amicus briefs used by the Court. The examination of amicus briefs is the central contribution of this thesis. My comparison of texts of the briefs and the majority rulings indicates that the Court’s majorities were influenced by the briefs. Sixteen out of the eighteen briefs
submitted supported the evolving standards of decency view and incorporated social science evidence. Using *Roper v. Simmons* as an example, the majority opinion echoed sources that claimed to represent society’s prevailing attitudes about juveniles, most significantly, submitted by advocacy groups, legal and medical professionals, and international human rights organizations. This thesis evaluates how these amicus briefs articulated the opinions of a number of groups within American society to place juveniles in a separate and protected class of citizens. Judging by textual comparisons, the majority on the Court responded to this action by paying greater attention to the shifting opinions of morality within society than the words of the Constitution. In doing so, the majority accepted social science evidence as a legitimate indicator of evolving standards of decency and affirmed that public opinion should be relevant in judicial rulings. The dissents in *Roper* took issue with the relevance of changing values as indicated by social scientific evidence. Briefs submitted by groups favorable to a strict constitutional basis of judgement challenged the majority’s opinion, displaying many connections to the dissents.
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Chapter 1
The Supreme Court

Introduction

Since the year 2000, there appears to be a trend towards liberalization of Eighth Amendment interpretation in the United States Supreme Court in cases involving juvenile offenders eighteen years old or younger. However, this trend does not reflect an overwhelmingly liberal Court. In fact, many decisions made by the 21st-century Supreme Court were quite conservative. Yet, in regards to juveniles and other protected classes, the Eighth Amendment’s cruel and unusual punishment clause was interpreted liberally by showing greater tolerance towards the offenders and thus imposing less rigorous punishments. Beginning with Atkins v. Virginia in 2002, the Court began this trend by establishing that the death penalty was no longer permissible for the intellectually disabled. After this, a series of juvenile punishment cases relying on similar justifications ruled against the constitutionality of the death penalty for children under eighteen years of age (Roper v. Simmons, 2005), life imprisonment without possibility of parole for non-homicidal crimes in this same age group (Graham v. Florida, 2010), and life imprisonment without possibility of parole for homicides, also with juveniles of the same age group (Miller v. Alabama, 2012). Although some members of the Court continued to push for increasing liberalization in regards to Eighth Amendment interpretation after these major juvenile punishment decisions, the Court ruled that the death penalty is still constitutional for adults in Glossip v. Gross (2015). The Supreme Court used the idea of evolving standards of
decency in order to determine if a punishment was considered “cruel and unusual” by recognizing and applying the modern concept of juveniles as a protected and distinctive class.


Setting the precedent for the Eighth Amendment categorical rules to follow, Atkins v. Virginia set the stage for the trend of liberal interpretation of the cruel and unusual punishments clause in the Supreme Court. Starting with the intellectually disabled, protection expanded to those whom the Court determined society thought should require more protection under law.

On trial for the abduction, robbery, and murder of Eric Nesbitt, two accomplices presented their case to the Virginia Supreme Court in 2000. William Jones and Daryl Atkins both confirmed most of the details in the account of the crime, except for one important detail: each stated that the other had actually committed the murder.¹ Before the trial, a forensic psychologist evaluated Atkins and concluded that because of his IQ of 59, he was mildly intellectually disabled.² Unsurprisingly, Jones’ testimony was more coherent and thus more credible than Atkins’, leading the court to rule that Atkins was in fact guilty of murder and consequently was sentenced to death.³ In the dissent, the dissenting Virginia Supreme Court justices stated that, “the imposition of the sentence of death upon a criminal defendant who has the mental age of a child between the ages of 9 and 12 is excessive”⁴ (Hassel and Koontz) These justices argued that individuals who are intellectually disabled must have less moral culpability due to the limitations

¹ Supreme Court of the United States, Atkins v. Virginia, Cornell University Law School: Legal Information Institute (June 20, 2002), 1.
² Ibid, 2-3.
³ Ibid, 2.
they face that are not shared by the rest of society. According to their opinion, a civilized society must consider these types of factors in its justice system.

In the 2002 appeal titled *Atkins v. Virginia*, the United States Supreme Court agreed with the Virginia Supreme Court’s dissent and thus overruled Virginia’s decision. The majority opinion, authored by Justice John Paul Stevens, argued that capital punishment for the intellectually disabled breaks the cruel and unusual clause of the Eighth Amendment rule against excessive punishments. The majority ruled this way due to their determination that the intellectually disabled’s disabilities in reasoning, judgment, and control of impulses cause them to not act with the same level of moral culpability as other adult offenders. Stevens reasoned that these disabilities can make capital proceedings against them unfair and unreliable (p. 1). He argued that the Eighth Amendment should be interpreted according to the moral standards of society that currently exist, not the standards that existed when the Bill of Rights was adopted because standards of decency are constantly evolving. The concept of “evolving standards of decency” was first established in Earl Warren’s majority opinion in the 1958 Supreme Court case, *Trop v. Dulles* (p. 6). Although not in any way related to juvenile punishment, this Eighth Amendment interpretation case declared that a loss of nationality as the punishment for military desertion was cruel and unusual. In this case, Justice Warren argued that “the Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society”7. These standards are most accurately determined by objective factors (p. 6-7). The

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Court in *Atkins* reaffirmed that legislation provided the most reliable objective evidence of changing, or evolving, standards.

Justice Stevens ascertained that since *Penry v. Lynaugh* (1989), a national consensus had developed against the practice of sentencing the intellectually disabled to death (p.1). After the ruling in *Penry*, which upheld the constitutionality of capital punishment for the intellectually disabled, state legislatures began to pass legislation amending the laws in their states to forbid this sentence for this class of offenders (p.9). The majority reasoned that the absence of states reinstating these executions and the consistent direction of change towards more liberal sentencing of the intellectually disabled supported the argument that a national consensus had formed against the practice between this case and the preceding one in 1989 (p.10). Furthermore, in the eighteen states that changed their laws regarding capital punishment for the intellectually disabled, the vote was overwhelmingly against the practice. Even in states where it was permitted, the death penalty in these cases was uncommon and thus unusual. Lastly, since anti-crime legislation is usually more popular than legislation protecting offenders, Stevens declared that society must now truly see the practice as morally wrong (p. 11). However, although this objective evidence of national consensus in the legislatures is important, it is not the only evidence that should be considered, Stevens concluded. He argued that the Court’s own judgment should be used to determine if there is a reason to disagree with the judgment reached by citizens and their representatives (p. 7).

In the majority opinion presented in *Atkins v. Virginia*, the Court first analyzed the characteristics of intellectual disability and how this could possibly work against these types of offenders in the justice system. The clinical definitions of intellectual disability include below average intellectual function and limitations in communication, self-care, and self-direction (p.
Therefore, “by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others” (Stevens, 13). Although there was no existing evidence presented that the intellectually disabled are more likely to engage in criminal behavior, there was evidence that they are more likely to act on impulse rather than make plans (p. 13). Furthermore, in group settings they tend to be followers (p. 13-14). To the majority, these characteristics did not exempt the intellectually disabled from the crimes they commit but they did diminish their personal moral culpability (p. 14).

In addition, Stevens determined that these limitations could specifically work against the intellectually disabled during a criminal trial by inhibiting their ability to make persuasive arguments about their mitigating circumstances and giving helpful assistance to their counsel. In addition, they make poor witnesses because their demeanor could create the impression that they lack remorse. Due to this, Stevens argued that they face a special risk of giving false confessions or facing a wrongful execution (p. 16).

The majority opinion determined that due to disabilities that present them with significant limitations, capital punishment for the intellectually disabled does not serve the penological purposes that justify the imposition of the death penalty on this class of offenders (p. 13). The two major purposes analyzed in this case were retribution, or the attempt to balance the community’s outrage or right the wrong to the victim by expressing condemnation of the crime, and deterrence, the use of this punishment to prevent possible offenders from committing that crime in the future. Retribution demands that the severity of the punishment should correlate to the culpability of the offender. The death penalty is the punishment reserved for the most serious crimes (p. 14). Since only the most deserving of punishment should be put to death, the majority
deemed that the lesser culpability of the intellectually disabled does not match the retributive purpose. In regards to deterrence, capital punishment is only effective when the crime is planned and premeditated. If it were not, the offender would not have considered the possible consequences of his or her actions. The impairments of the intellectually disabled mentioned earlier in Stevens’s argument included this inability to process information about the possibility of their execution and control their actions based on this, in addition to their likelihood to act on impulse rather than considering the consequences of their actions (p. 15).

The majority opinion in Atkins v. Virginia ruled that because the national consensus developing against capital punishment for the intellectually disabled, as shown by changing legislation, was confirmed by the independent judgments of the judiciary, the states must enforce this categorical ban against the death penalty for the intellectually disabled.

Two dissents were written in this case, the first one by Chief Justice William Rehnquist and joined by Justices Antonin Scalia and Clarence Thomas. Rehnquist started off his argument by referring to intellectually disabled offenders as “those defendants who indisputably are competent to stand trial, aware of the punishment they are about to suffer and why…” (Rehnquist, 1). Rehnquist then argued that the Court should not look past the objective evidence in order to discern standards of decency. The legislatures possess the role, given to them in the Constitution, of determining the will and moral values of the people and expressing it in the policy of their states. Due to this, specifications of punishments should only be questions for legislatures (p. 2). He argued that the majority’s argument in favor of a national consensus was faulty but purposeful because while one did not actually exist, the argument was used by the

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8 Supreme Court of the United States, Atkins v. Virginia, Cornell University Law School: Legal Information Institute (June 20 2002). Subsequent references to Justice Rehnquist’s opinion appear in the text.
majority anyway in order to defend what the majority justices believed the standard of decency should be. Even though eighteen states since 1989 passed laws prohibiting capital punishment for the intellectually disabled, nineteen other states continue to uphold it (p.1). This split, in Rehnquist’s opinion, did not constitute a national consensus. The rulings of juries also demonstrate societal values, Rehnquist continued, because due to their involvement in a case, they form a link between the community and the justice system. Therefore, legislatures and juries are the only two sources that should be used by the Court to indicate standards of decency. By design, they are better suited to come to conclusions about society and its values than the federal judiciary is (p. 3).

In his dissent, Justice Rehnquist focused on the weight that the Court put on foreign laws, the views of professional and religious organizations, and opinion polls when deciding the case. According to Rehnquist, sentencing practices of foreign countries, which overwhelmingly prohibit this punishment, should not determine the acceptance of sentencing practices in the United States. He argued that these sources are not relevant to a United States constitutional question (p. 2). In regards to the majority’s use of public opinion, Rehnquist pointed out that legislators were exposed to public opinion polls and the positions of organizations and religious groups, but had not found them persuasive enough to take any legislative action as a result (p. 5-6). Similar data was rejected for this very reason in Penry. Furthermore, any opinion poll data has uncertain foundations and many possibilities for error that could make it unreliable. Lastly, private organizations have goals of promoting the issues at hand in the way they want them to be promoted; therefore, Rehnquist asserted that they are biased and speak only for themselves (p. 6).
Justice Scalia authored the second dissent, also arguing that the majority opinion was based on the views of a majority of the justices, not society.¹ According to Scalia, the Court used the views of organizations, international opinion, and opinion polls to justify the power it assumed, even though the biases these organizations and information sources have do not make them reliable indicators of society’s morality (p. 11). Scalia concluded that in the end, the opinion of a majority of the justices was what determined the outcome of the case, a small and unrepresentative portion of society (p. 12). Scalia stated that the majority opinion displayed a “pretension to a power confined neither by the moral sentiments originally enshrined in the Eighth Amendment (its original meaning) nor even by the current moral sentiments of the American people” (Scalia, 12).

Scalia agreed with Rehnquist in that a national consensus against the practice did not in fact exist. Fewer than half of the states that once allowed this sentence had very recently enacted legislation against it. According to the dissenting justices, fewer than half is not a national consensus (p. 5). Furthermore, Scalia reasoned that the states had not had enough time to observe the consequences of these newly imposed laws to know if they wanted to keep them (p. 8). This was a temporary consensus, and the dissenters criticized the majority for relying on trends like this (p. 13). Scalia asserted that the consistency of the direction of change, the argument given in the majority opinion, was also not a good argument because change does not usually go in any other direction (p. 8). In addition, the infrequency of the sentences’ use simply showed that it is used as one mitigating factor in sentencing, as it should be. The intellectually disabled only

comprise a small percentage of society, making their sentencing for serious crimes uncommon (p. 10).

The majority rested much of its analysis on a broad interpretation of the Eighth Amendment’s prohibition of excessive punishments. In the view of the Court’s majority, excessive punishments were those that are always and everywhere considered cruel. Scalia responded that since the death penalty is not always considered cruel, permitting it for a certain class of people should not be considered unconstitutional (p. 13). Therefore, according to Scalia, if the prevailing standards of decency demonstrated a moral objection to this, it was up to the States to determine and act on these changing beliefs in society. Scalia stated that a punishment should only be considered cruel and unusual if it was considered so during the adoption of the Bill of Rights or was inconsistent with modern standards of decency as shown through objective evidence, legislation being the most significant and clear indicator (p. 3).

The majority made the judgment that juries cannot properly account for the limitations of the intellectually disabled. However, Scalia argued that this is in fact the role of the jury (p. 13). He asserted that the fact that juries continued sentencing the intellectually disabled to the death penalty shows that sometimes it was appropriate, specifically due to society’s moral outrage at the severity of the crime (p. 14).

Even though the petitioner’s intellectual disability was considered during his sentencing, the jury determined that it was not enough reason to exempt him from the death penalty due to the brutality of his crime and history of violent actions. However, through this decision, the Court decided that no one who is intellectually disabled could be sentenced to capital punishment, no matter what his or her crime (p. 3). Scalia argued, “Once the Court admits (as it does) that mental retardation does not render the offender morally blameless, there is no basis for
saying that the death penalty is *never* appropriate retribution, no matter *how* heinous the crime” (Scalia, 15). Scalia further indicated that one of the major social purposes of the death penalty that the majority did not consider was the removal of criminals from society so that they do not commit similar crimes in the future (p. 13).

Lastly, Scalia questioned in general if the characteristics of the intellectually disabled actually render them less culpable and if their intellectual disability correlate with an inability to follow the law and a greater likelihood to commit crimes (p. 14). He wrote, “In my experience, the opposite is true: being childlike generally suggests innocence rather than brutality” (Scalia, 14). According to Scalia, there is no way to accurately compare the average moral culpability of the intellectually disabled to that of the average criminal (p. 14). Culpability furthermore should not only depend on the criminal, but also the crime (p. 15). This is why juries usually have to weigh the circumstances and factors when deciding on the appropriate sentence (p. 13). In addition, even if they were less likely to be deterred from committing a crime due to the possibility of execution, this does not mean that they cannot be deterred. Scalia argued that it is adequate enough if a punishment successfully deters many; in fact, it is impossible for it to deter all (p. 15). In response to the majority’s argument that there was a risk that the intellectually disabled would be unable to show their mitigating circumstances or be effective witnesses, Scalia said, “I suppose a similar ‘special risk’ could be said to exist for just plain stupid people, inarticulate people, even ugly people” (16). Moreover, he believed that the symptoms of intellectual disability are so broad that they could be faked at no risk to the offender (p. 17).

Scalia reacted to this case by concluding, “Today’s opinion adds one more to the long list of substantive and procedural requirements impeding imposition of the death penalty imposed under this Court’s assumed power to invent a death-is-different jurisprudence” (Scalia, 16). In
his opinion, *Atkins v. Virginia* was one of the Court’s efforts to make an incremental abolition of
the death penalty (p. 17). The juvenile punishment opinions that followed would confirm this
belief to Scalia.

**Overview of the Three Juvenile Eighth Amendment Cases**

Just as the Court considered the intellectually disabled a class that should have more
protection in *Atkins v. Virginia*, similar arguments were used to advance the idea that juveniles
are a protected class as well and should be shown categorical leniency in the justice system. In
the three following juvenile punishment cases, the Court ruled to show juvenile criminals mercy
as a result of the inherent characteristics associated with age that they considered significant
and *Miller v. Alabama* (2012) established juveniles as a class of citizens not subject to the same
punishments as the average adult offender due to their age.

Christopher Simmons premeditated and carried out a murder a few months before his
eighteenth birthday. In Missouri in 1993, he and an accomplice planned a burglary and murder,
broke into the home of Shirley Cook, tied her up, and drove her to a bridge where they threw her
over the edge. Simmons told the accomplice that he thought they would get away with the crime
because they were minors (p. 1) He was reported to have bragged about the killing afterwards,
and quickly confessed to authorities (p. 1-2). His defense counsel argued that legislatures had
decided that individuals under eighteen are less able to make responsible decisions, as shown

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Institute* (March 1, 2005). This overview is provided from Justice Kennedy’s majority opinion. Subsequent
references to *Roper v. Simmons* appear in the text.
through laws determining that juveniles are not responsible enough to drink, serve on a jury, marry without parental consent, or even see certain movies. The prosecution argued that his young age actually made it more serious. Witnesses testified that he was immature, impulsive, and easily influenced (p. 4). After Simmons turned eighteen his trial was over and he was sentenced to death for his crime, despite the fact that he had no prior criminal record (p. 3). He appealed this decision, arguing that as in the case of the intellectually disabled, it is cruel and unusual to sentence a juvenile at the time of their crime to death (p. 5). *Roper v. Simmons* (2005) was a close 5-4 decision that overruled Simmons’ sentence and established that the death penalty is an unconstitutional punishment for all criminals under eighteen years of age, drawing the line at this age as society increasingly does in situations when it needs to distinguish childhood from adulthood (p. 20, 25). This landmark case furthered a liberal trend within the Supreme Court’s Eighth Amendment jurisprudence in regards to juvenile punishment. It provided an argument that was increasingly expanded on to give juveniles more protection in the eyes of the law.

Only one year after the paramount decision in *Roper*, sixteen-year-old Graham and his friends attempted to rob a restaurant in Jacksonville, Florida.  

11 Although no money was taken, one of Graham’s accomplices hit the manager on the back of the head during the attempted robbery. During Graham’s trial, where he was tried in adult court, he wrote a letter to the court emphasizing his desire to turn his life around and not commit any more crimes. The court accepted his plea agreement and Graham was given a second chance. He was only sentenced to three years of probation, with the first year in a county jail (p. 2). While still on probation, he committed a home invasion robbery in which the owner of the house was held at gunpoint. A

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second robbery was attempted later that same evening (p. 3). His probation was revoked and in combination with his earlier crimes, he was sentenced to life in prison without the possibility of release, despite lesser sentences recommended by the Florida Department of Corrections and the State (p. 4-6). Florida had abolished its parole system, eliminating the possibility that he could receive a sentence with the possibility of parole (p. 6). The trial court had ruled that Graham had thrown away the second chance he had been given and instead had displayed he was incapable of rehabilitation through his escalating pattern of criminal conduct (p. 6-7). Due to this, the court decided it was in society’s best interest to focus instead on protecting the community from his actions (p. 5). Graham challenged his sentence, claiming that the Eighth Amendment does not permit a juvenile to be sentenced to life imprisonment without the possibility of parole for a non-homicide crime (p. 6). In a 6-3 decision in 2010 Graham v. Florida set forth a categorical rule making not only capital punishment, but also life imprisonment without possibility of parole for a non-homicide crime for juveniles under the age of eighteen cruel and unusual punishment and thus unconstitutional.

Two years after Graham’s case was decided, the crime in the case, Miller v. Alabama, took place. A neighbor entered Miller’s home to make a drug deal with his mother. Miller had been in and out of foster care due to his mother’s alcoholism and addiction as well as an abusive father. Miller had attempted suicide four times in his life thus far, the first time being when he was just six years old (p. 4). Now, fourteen-year-old Miller and his friend followed the dealer, Cole Cannon, back to his trailer, where they smoked marijuana with the victim and played drinking games (p. 4-5). Cannon passed out, and Miller attempted to steal money out of his

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12 Supreme Court of the United States, Miller v. Alabama, Cornell University Law School: Legal Information Institute (June 25, 2012). This overview is provided from Justice Kagan’s majority opinion. Subsequent references to Miller v. Alabama appear in the text.
wallet. Cannon, however, woke up suddenly and grabbed Miller by the throat until Miller’s friend hit Cannon with baseball bat. The blow caused Cannon to let go of his chokehold and Miller grabbed the bat and repeatedly hit Cannon, then lit the trailer on fire to try to cover up the evidence of the crime. Cannon died from his injuries and the smoke. The District Attorney of Alabama sought removal of the case to adult court, and after a brief hearing, the juvenile court agreed to a transfer due to the nature of the crime, Miller’s mental maturity, and his prior criminal offenses (p. 5). The State of Alabama charged Miller as an adult with murder in the course of arson, a crime that carries a mandatory minimum sentence of life without parole (p. 5-6). The Supreme Court, however, ruled that mandatory sentencing of life without possibility of parole, even as punishment for a homicide, is again unconstitutional for juveniles under the Eighth Amendment.

These three cases signaled a trend towards leniency in regards to juvenile punishment. The Court saw and acted on what the majority of justices believed to be a societal trend that expressed a moral rejection of the most severe punishments towards this class of citizens.

Majority Opinions

Justice Kennedy delivered the majority opinion in Roper v. Simmons.13 In it, he noted that the Eighth Amendment states, “excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted” (Kennedy, 7). These rights stem from a precept of justice that the punishment for a crime should be proportioned to the severity of the offense (p. 6). In Kennedy’s words when deciding this case, the Court must refer to “the

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evolving standards of decency that mark the progress of a maturing society’ to determine if a punishment is ‘cruel and unusual’” (Kennedy, 6).

In 1988, *Thompson v. Oklahoma* determined that capital punishment is an unconstitutional sentence for offenders under the age of sixteen (p. 7). In this case, “the reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult” (Stevens).\(^{14}\) The lesser culpability of juveniles made the death penalty cruel and unusual for sixteen-year-olds and younger (p. 7). One year later, *Stanford v. Kentucky* questioned whether this age should be raised to eighteen, but was struck down, instead ruling that no national consensus against the practice had developed (p. 7-8). Kennedy used precedent to argue that just as *Atkins* reconsidered *Penry*, the Court reconsidered *Stanford* and determined that a national consensus against the death penalty for juveniles was parallel to the evidence shown in *Atkins* (p. 9). Since the decision in *Stanford* in 1989, thirty states prohibited the juvenile death penalty, while twelve states prohibited the death penalty altogether. In the states that permitted the juvenile death penalty, the practice was quite infrequent. Since *Stanford*, only six states had executed juvenile offenders (p. 10). Furthermore, in response to *Stanford v. Kentucky*, the Governor of Kentucky stated, “We ought not be executing people who, legally, were children”\(^{15}\) (Patton). The governor commuted Stanford’s death sentence to life imprisonment (p. 11). Therefore, Kennedy reasoned, there is evidence that society today has moved in the direction of considering juveniles as categorically less culpable than the average criminal.


\(^{15}\) Governor Paul Patton as cited in Justice Kennedy’s opinion in *Roper v. Simmons*, 11.
The death penalty, as the most severe punishment, is reserved for a narrow group of the most serious crimes and most deserving, or culpable, offenders (p. 15). With this in mind, Kennedy wrote, “Three general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders” (Kennedy, 15). The first of these inherent characteristics that the Court cited was immaturity and irresponsibility, which can result in impulsive actions and a greater likelihood to engage in reckless behavior (p. 15). As a result, the majority determined that their behavior cannot be as morally reprehensible as that of an adult, who has greater maturity and responsibility as a result of their age. The second characteristic given was juvenile’s vulnerability to outside influences and pressures and their lack of control over their surroundings, which makes it harder for them to escape a negative environment that also has a greater influence on them. The last characteristic was that their character and personality are not as well formed or fixed. Because of this, Kennedy confirmed that a crime committed by a juvenile is not necessarily evidence of an irretrievably depraved character. In addition, Kennedy believed that this indicated that there is a greater possibility that their character can be reformed (p. 16). These three factors were recognized in Thompson with respect to juveniles under sixteen, and the court now expanded this reasoning to encompass juveniles under eighteen (p. 16-17).

Next, Justice Kennedy argued that the two social purposes that justify the death penalty were not satisfied through the execution of juveniles (p. 20). Retribution was not served because the death penalty is not a proportional punishment if the offender has a diminished culpability as a result of his or her age (p. 20-21). Second, it was unclear whether capital punishment deters juveniles from committing crimes. However, it was known that juveniles are less likely to
analyze the situation and make decisions based on the possible consequences of their actions (p. 21).

Kennedy did not think it appropriate to decide the question of imposing the death penalty on a juvenile on a case-by-case basis (p. 27). Instead, he argued for the necessity of a categorical rule because the differences between youth and adults are too extensive and well understood in society to risk allowing a juvenile to receive the death penalty. The majority held that it was unlikely that the severity of any crime would call into question the youth-based arguments of lesser culpability. In fact, their youth may be counted against the offender, as it was in Simmons’ case. Psychologists cannot diagnose a patient under the age of eighteen with antisocial personality disorder because it is impossible to distinguish if their actions simply reflect immaturity or lifelong behavior (p. 19). Jurors therefore cannot determine this either, and thus they should not be given the power to decide whether or not the offender is mature enough to justify the death penalty (p. 20). In summary, “When a juvenile offender commits a heinous crime, the State can exact forfeiture of some of the most basic liberties, but the State cannot extinguish his life and his potential to attain a mature understanding of his own humanity” (Kennedy, 20).

Justice Kennedy next referred to international laws and opinions, which have been used by the Court to confirm Eighth Amendment interpretation in the past. He pointed out that the United States was the only country that continued to allow the juvenile death penalty (p. 21). Article 37 of the United Nations Convention on the Rights of the Child, ratified by every country in the world except the United States and Somalia, prohibits capital punishment for juvenile offenders younger than eighteen years of age (p. 22). It was evident to the majority that the
United States basically stood alone in a world that rejects this sentence as morally wrong (p. 23). This international consensus confirmed the Supreme Court’s conclusion (p. 24).

Justices John Paul Stevens and Ruth Bader Ginsberg joined to concur with the majority opinion and emphasized that the understanding of the Constitution changes throughout time and that evolving standards of decency aid its interpretation.16

The Court used the “death is different” argument to justify the necessity of a constitutional ban on the death penalty for juveniles. “Death is different” was an argument of death penalty jurisprudence established in 1972 with *Furman v. Georgia*, which ruled against the arbitrary and inconsistent application of the death penalty. This case emphasized that the death penalty is different from others in two major ways, finality and severity.17 However, the argument that death is different was ignored in the following cases in order to expand what constituted cruel and unusual by likening death to life imprisonment without possibility of parole.

Five years later in 2010, Justice Kennedy again authored the majority opinion in the case *Graham v. Florida*, questioning the constitutionality of life imprisonment without possibility of parole for juveniles who commit non-homicide crimes.18 Kennedy first pointed out a few facts about Graham’s background, writing that his parents were addicted to crack cocaine and that Graham himself had begun drinking and smoking at an early age (p. 1). He then detailed how in this type of case, the court must consider both the nature of the offense and the characteristics of the offender. These circumstances would help determine the offender’s culpability in an effort to

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determine proportionality (p. 9). Notably, this case involved a categorical challenge to a sentencing practice itself (p. 10). To clarify, Kennedy concluded, “The case implicates a particular type of sentence as it applies to an entire class of offenders who have committed a range of crimes” (Kennedy, 10). Therefore, the categorical approach must be used because the other proportionality approach only involves a comparison between the severity of the sentence and the crime (p. 10). In effect, Kennedy argued that age is a necessary factor in determining proportionality.

Kennedy referred to the objective evidence of legislatures to determine if there was a national consensus against this type of sentence for juveniles (p. 10). Evidence showed that thirty-seven states still permitted sentences of life without possibility of parole for juvenile non-homicide offenders. Only six states completely forbade life sentences without parole for juveniles, while seven permitted it but only for homicides. Based on this, no national consensus against the practice appeared in legislation. However, Kennedy argued that there are other measures of consensus besides legislation, one of them being sentencing practices. First, he asserted that juveniles were infrequently given this sentence (p. 11). Out of the one hundred and twenty-nine juvenile non-homicide offenders serving life without parole sentences, seventy-seven of them were in Florida, a state that no longer had a parole system. The other fifty-two were imprisoned in just ten other states. Furthermore, only twelve jurisdictions actually imposed the sentence, and when it was imposed at all, it was rare (p. 13). According to Kennedy, these statistics also included juveniles who were sentenced many years ago, arguably before public values began to change (p. 14). Kennedy wrote, “the comparison suggests that in proportion to the opportunities for imposition, life without parole sentences for juveniles convicted of non-homicide crimes is as rare as other sentencing practices found to be cruel and unusual”
(Kennedy, 14). In conclusion, the majority determined that the rarity of a sentencing practice can display that there is national consensus against it (p. 16). Kennedy argued that simply because a state allows a sentence does not mean that its courts think it is appropriate for a specific class of offenders, especially in light of the fact that many states had moved away from using juvenile court systems and instead allowed juveniles to be transferred to adult court where they are subject to harsher punishments (p. 15).

Kennedy next acknowledged that more than just national consensus was needed to determine whether this punishment is cruel and unusual. The judicial exercise of independent judgment must be used to determine the offender’s culpability by equally proportioning their crime, characteristics, and the severity of the punishment (p. 16).

Roper v. Simmons had already established that juveniles have a lessened culpability and are less deserving of the most severe punishments, in this case the death penalty. Kennedy pointed out that no recent data had been given that would require a reconsideration of Roper and the nature and behavior of juveniles. Psychological evidence continued to show that there are fundamental differences between juveniles’ and adults’ minds in which parts of the brain especially involved with behavior are still developing in juveniles. To the majority, this development also meant that juveniles are more capable of reform, thus categorically more deserving of the opportunity for parole (p. 17).

The nature of the crime was next addressed. The Court reaffirmed that offenders who do not kill or intend to kill are less deserving of the most serious punishments. Due to this, a juvenile offender who did not kill or intend to kill has doubly diminished culpability. Yet, life without parole is the second most severe penalty (p. 18). It even shares characteristics with capital punishment, because as the majority argued, “the sentence alters the offender’s life by a
forfeiture that is irrevocable” (Kennedy, 19). For a juvenile, life without parole is even more severe because due to their young age at the time of their crime, he or she would have to serve more years than an adult offender would (p. 19).

Kennedy recognized that a sentence that does not satisfy its penological justifications is by nature disproportionate to the crime. He cited the major penological goals of retribution, deterrence, incapacitation, and rehabilitation, all of which he claimed were not legitimate justifications in this case (p. 20). Roper found that retribution was not proportional if the law’s most severe penalty was imposed because retribution must be directly related to the culpability of the offender. This argument also was extended to the second most severe penalty, contending that this penalty was not justified by retribution due to juvenile’s diminished culpability (p. 20-21). The argument against deterrence was the same as that in Roper: juveniles are less likely to be deterred by a punishment, because their impulsive tendencies prove them less likely to take a punishment into consideration when making decisions, especially when that punishment is rare (p. 21). Incapacitation to prevent more criminal behavior requires the judgment that the offender has no possibility of reform and will be a danger to society for the rest of his or her life (p. 21-22). Kennedy determined that it is impossible to make this judgment due to the juveniles’ unfixed character, because one cannot determine if the juvenile’s actions are simply a sign of immaturity or evidence of settled lifelong threatening behavior (p. 22). In fact, “A life without parole sentence improperly denies juvenile a chance to demonstrate growth and maturity” (Kennedy, 22). The last goal, rehabilitation, was also preempted by a life imprisonment without parole sentence, because this sentence denies the offender the chance to reenter society (p. 22-23). According to Kennedy, this was not appropriate due to juvenile’s inherently greater capacity for reform (p. 17). Furthermore, the State does not need to guarantee freedom, but the
opportunity should be provided if the offender demonstrates increased maturity and reform during his or her sentence (p. 31-32). They should not be denied this opportunity through a judgment made about them in their youth that their indefinite character would never be fit to reenter society (p. 24).

Kennedy argued, as he does in *Roper*, that a clear line was necessary to prevent the possibility that the sentence will be imposed on a juvenile who was not “sufficiently culpable to merit that punishment” (Kennedy, 24). The existing laws allowed subjective judgments about an offender’s moral culpability and nothing prevented an offender with insufficient culpability from receiving this sentence, which would be inconsistent with the Eighth Amendment (p. 26). The majority ruled that the case-by-case approach involved too high a risk, because it was impossible for the courts always accurately to determine the few culpable offenders from the many who have capacity for change (p. 27). In addition, the characteristics of juveniles puts them at a disadvantage in criminal proceedings that could further increase the risk of a wrongful sentence, including a mistrust of adults that could contribute to a reluctance to collaborate effectively with a defense counsel, a limited understanding of the criminal justice system, and their own impulsiveness (p. 27-28). A categorical rule was necessary for the Court to avoid this risk and allow all offenders to have a chance to demonstrate maturity and reform. Kennedy believed that if there was no possibility of parole provided, there was no incentive for juveniles to reform. He argued that maturity can lead to reflection, but a lifelong prison term would simply reinforce their immaturity (p. 28).

International consensus was not irrelevant to the majority opinion’s argument. According to the majority justices, there was a global consensus against this sentencing practice (p. 29). Eleven nations permitted it, but only two had ever imposed it, one of them being the United
States. Israel, the only other nation, only imposed it on offenders convicted of homicide or attempted homicide (p. 29-30). Article 37(a) in the United Nations Convention on the Rights of the Child again prohibits this sentence (p. 30). International law was simply a confirmation of the conclusions the Supreme Court had drawn that the punishment was in fact cruel and unusual (p. 31).

Justice Stevens and Chief Justice John Roberts each wrote a concurrence. Stevens wrote a short response to Thomas’s dissent, stating that Eighth Amendment jurisprudence must be based on standards of decency or else proportionality review would no longer serve its purpose. Justice Roberts, however, authored a longer concurrence in which he agreed with the final decision, but disagreed with the establishment of a categorical rule. Roberts concluded that the sentence Graham was given was unconstitutional due to Graham’s age in combination with his crime (p. 1). However, he argued that the particular defendant and the particular crime should be considered on a case-by-case basis in order to determine constitutionality (p. 12).

Roberts looked to precedents to form his argument. The first line of precedents used the “narrow proportionality principle,” in which each case was analyzed on a case-by-case basis, comparing the gravity of the crime to the severity of the sentence (p. 2). Although the Eighth Amendment does not require this strict proportionality analysis, it still forbids disproportionate sentences. Therefore, if the Court believes that if a penalty is disproportionate, judges should compare this case with the sentences imposed in other cases as confirmation that it is or is not disproportionate (p. 3). Another line of precedents that supported the conclusion in this case were

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20 Supreme Court of the United States, Graham v. Florida (Cornell University Law School: Legal Information Institute, May 17, 2010), 10. Subsequent references to Justice Roberts appear in the text.
those that established that juveniles are generally less morally culpable than adults (p. 4).

However, Justice Roberts added that *Roper* should not be used as a basis for establishing a categorical rule, because *Roper* determined that since juveniles cannot be classified as the worst offenders, they cannot receive the penalty reserved for the worst offenders: capital punishment. Life without parole is not only reserved for the worst offenders and cannot be treated in the same way as capital punishment, because, as argued in *Roper*, death is different (p. 5).

After applying the “narrow proportionality” framework to this particular case, Roberts determined that the sentence violated the Eighth Amendment. He pointed to Graham’s lessened degree of culpability due to his age and apparent immaturity, combined with the mildness of his crime when compared with the murderers and rapists who usually received this punishment (p. 7-8). The sentence even exceeded the proposed sentence of four to thirty years. Similar cases and their sentences in differing jurisdictions confirmed the disproportionality of Graham’s case (p. 8). But, a categorical rule was both unnecessary and unwise according to Roberts. In his opinion, there was nothing inherently unconstitutional about imposing this sentence on juveniles. In fact, some offenders may be deserving of this punishment due to the gravity of their crime (p. 10). In addition, judges can never be completely perfect in determining sentences, but the entire justice system depends on their reasoned judgment in each case (p. 11). Roberts concluded, “Those under 18 years old may as a general matter have ‘diminished’ culpability relative to adults who commit the same crimes, but that does not mean that their culpability is always insufficient to justify a life sentence” (Roberts, 10).

The Court used the characteristics of juveniles to argue that life without parole for non-homicidal crimes is cruel and unusual. However, the mitigating factors that these characteristics
presented were also used to support the Court’s broadened interpretation that made this rule no longer crime specific.

*Miller v. Alabama* was the third of these major juvenile justice cases, decided in 2012. Justice Kagan wrote the majority opinion.\(^{21}\) She introduced the opinion by comparing Miller’s situation to that of another fourteen-year-old, Kuntrell Jackson, convicted of murder and sentenced to life without parole because of a transfer to adult court and then a subsequent mandatory sentence that did not allow a judge or a jury to consider the age of the offender or the nature of the crime that could have made a lesser sentence more appropriate (p. 1). This mandatory sentence went against the requirement of individualized sentencing (p. 3). Jackson’s case, *Jackson v. Norris* (2011), argued that based on *Roper* a mandatory life sentence without possibility for parole for a juvenile violated the Eighth Amendment. The Arkansas Supreme Court denied this and instead ruled that both *Roper* and *Graham* only fit their specific contexts and could not be applied in this situation (p. 3).

Kagan stated at the outset, “We therefore hold that mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment’s prohibition on ‘cruel and unusual punishments’” (Kagan, 2). To support this conclusion, she cited two lines of precedent that reflected that proportionate punishment should be viewed according to evolving standards of decency (p. 6). The first line of precedent was that of *Roper, Graham,* and *Atkins,* which all dealt with disproportionately severe sentences and classes of offenders that were categorically less culpable (p. 6-7). In addition, *Graham* recently likened life without parole to the death penalty (p. 7).

Both *Roper* and *Graham* established that children are developmentally different from adults, making it unfair to subject them to the most severe punishments (p. 8). Expanding more on this idea, “Our decisions rested not only on common sense--on what ‘any parent knows’--but on science and social science as well” (Kagan, 8). Even though *Graham* distinguished between homicide and non-homicide offenses, Kagan believed that what was said about juveniles was not crime-specific (p. 10). She reasoned that a criminal’s age must be taken into account and play a central role in determining the correct sentence and a mandatory sentence prevents this (p. 11).

The second set of precedents were *Woodson v. North Carolina* (1976) and *Lockett v. Ohio* (1978), which both prohibited mandatory imposition of capital punishment because the characteristics of the defendant and details of the crime must be considered (p. 7). In these cases, it was determined that individualized sentences were necessary because mitigating factors must be considered in these types of severe penalties (p. 13). These decisions showed the flaws of other mandatory sentences, which included life without parole for juveniles (p. 14). In summation, these two cases determined that capital punishment was too permanent to ignore any possible mitigating factors that would warrant a less severe and final penalty (p. 15).

Justice Kagan stated, “So *Graham* and *Roper* and our individualized sentencing cases alike teach that in imposing a State’s harshest penalties, a sentencer misses too much if he treats every child as an adult” (Kagan, 14-15). Considerations of the limitations of age, their inescapable family and home life, and the circumstances of the crime must occur to ensure a sentence is proportionate. Mandatory sentencing also rejected the possibility for rehabilitation that a criminal could have (p. 15).

In this case, however, a categorical bar was not imposed exempting all juveniles from receiving this sentence. Kagan made it clear that appropriate occasions for sentencing juveniles
to life without possibility of parole would be uncommon and only available in homicide cases (p. 17). She argued, “we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison” (Kagan, 17).

States like Alabama that required mandatory sentencing for certain crimes argued that individualized sentencing was not necessary, because these come under consideration when deciding whether a juvenile should be tried in adult court. Kagan pointed out that juveniles who were tried in adult court were subject to generally applicable penalty provisions without regard to their age (p. 25). Sentences were thus imposed in this way on juveniles, as if they were not juveniles. A minimum age for transfer was not set in many states (p. 24). Furthermore, many states used mandatory transfer systems for juveniles of a certain age that had committed certain crimes. Juvenile court was not an option in these cases. If it was not a mandatory transfer system, prosecutors made the decision to transfer without any standards, protocols, or considerations required (p. 25). In the states that did give transfer discretion to the judiciary, judges would only be given partial information about the offender and the circumstances of the crime. In this pretrial stage, the defendant was not entitled to the same protections and services that are available during trial (p. 26). Because many juvenile systems had pretty light punishment requirements, a judge may simply rule to transfer, because he or she thought an offender deserved a harsher penalty than would be possible in juvenile court (p. 26-27). The discretion given to judges during the transfer hearing was not sufficient (p. 27). The states also claimed that Harmelin v. Michigan (1991) precluded the holding, because the Court upheld that, “a sentence which is not otherwise cruel and unusual does not become so simply because it is mandatory.”

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Kagan rejected this argument by stating that *Harmelin* had nothing to do with children and that a sentencing rule that may be permitted for adults may not be so for children because of the differences established in *Roper* (p. 18-19). Finally, they argued that a national consensus was needed to establish a categorical rule and that many states still imposed mandatory life without parole sentences on juveniles. Kagan refuted this by stating that this decision was not a categorical rule against a penalty, but only stipulated that an offender’s youth characteristics must be considered as a mitigating factor before a penalty is decided (p. 17). Furthermore, national consensus was not any stronger in earlier Eighth Amendment cases (p. 20). Just because a juvenile was eligible for life without parole did not mean that it was deliberately endorsed by the legislatures, especially when they were transferred to a court intended to sentence adults (p. 23). Mandatory sentencing schemes violated the principle of proportionality and thus the Eighth Amendment (p. 27).

Justice Stephen Breyer authored the only concurrence in *Miller*. He focused on how under the Eighth Amendment interpretation in *Graham*, an offender needed to kill or intend to kill in order for this sentence to be mandatorily or discretionarily imposed. A juvenile who did not kill or intend to kill had doubly diminished culpability and life imprisonment without parole for non-homicide crimes broke the Eighth Amendment as established in *Graham* (p. 16). Juveniles convicted of homicide were the only ones who may constitutionally be sentenced to life without parole. Transferred intent, which is sometimes applied to adults, assumes that if an offender intended to commit a dangerous crime, that offender takes responsibility for the risk that the victim could be killed and the intent is transferred (p. 3). However, juveniles

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characteristically are often unable to consider the consequences. Therefore, transferred intent cannot be used on them (p. 4).

**Dissenting Opinions**

The dissents in all three juvenile sentencing cases attempted to prove that no national consensus existed and an unjustified categorical rule was unwisely prescribed in these three cases, holding that the majority interpreted the Eighth Amendment too broadly so that the majority justices could promote their own moral opinions, attributing their personal views instead to a broad interpretation to “evolving standards of decency”. The dissenters took account of the dissenting arguments in *Atkins*, but also argued that the comparisons between the mentally disabled and juveniles were superficial. In 2005, two justices wrote separate dissents on the ruling of *Roper v. Simmons*. Justice Sandra Day O’Connor argued that neither contemporary societal values nor the moral proportionality analysis that the Court used in the majority opinion justified the ruling.24 First, she stated that a national consensus did not exist. The fact that a majority of states no longer permitted capital punishment for juveniles under eighteen showed support, but was not conclusive. She wanted a clearer showing that society had moved against this practice because in her opinion, not much had changed since *Stanford*’s ruling (p. 1). She pointed out that the fact that there were seventy juvenile offenders currently on death row suggested that there was still some measure of support for the juvenile death penalty. Furthermore, the States had not moved uniformly to abolish the death penalty, as occurred in

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Atkins. Two states actually reaffirmed their support for the sentence since Stanford. The overall pace of legislative action against the sentence was slower than in Atkins as well (p. 10).

However, she agreed with the Court’s description of the principles that guide Eighth Amendment jurisprudence. The Supreme Court does have a constitutional obligation to judge whether the death penalty is excessive for a particular offense or class of offenders (p. 2). Since evidence of national consensus was not sufficient to abolish a punishment under the Eighth Amendment, the moral proportionality argument must play the decisive role. However, in this case the proportionality argument was too weak to support the already weak evidence of national consensus (p. 12).

O’Connor did not agree with, in her view, the independent moral judgment the majority made (p. 1). She contested that although it was evident that adolescents are less mature, less responsible, less fully formed, and thus less culpable than adults, the Court cannot dispute that many state legislatures believed that some juveniles were mature enough to deserve capital punishment, depending on the case (p. 1-2). The Court did not have any evidence that juries cannot assess and take into account a defendant’s age as a mitigating circumstance or why this would be more difficult than other sentencing assessments (p. 17). She argued that some juveniles can be just as culpable as adult offenders, and the Court further gave no evidence on the rarity of this that it claims. In addition, just because the existence of the death penalty was less likely to deter juveniles, this did not mean that it did not deter anyone. The seventeen-year-olds who had sufficient moral culpability may be deterred by the threat of capital punishment. Simmons in fact, took the risk of punishment into account when he told his accomplices that they would not get in trouble for it due to their age (p. 14). Thus, the Court failed to establish that the differences in maturity were universal and significant enough because, “Chronological age is not
an unfailing measure of psychological development” (15). There is a broad and diverse range of maturity in juveniles. Because the age-based distinction is so arbitrary, O’Connor asserted that it was possible that this categorical prohibition would protect offenders who actually were mature enough to warrant the death penalty (p. 15-16).

Justice O’Connor next compared juveniles to the intellectually disabled to further support her agreement with the majority in Atkins, but not in this case (p. 19). The characteristics that define the intellectually disabled in themselves made the death penalty excessive. Juveniles do not have inherent characteristics like this. One cannot argue that seventeen-year-olds are equivalent to the intellectually disabled, because the lesser maturity of juveniles cannot be equated with the lifelong major impairments dealt with by the intellectually disabled (p. 16). Each judgment should have weight independent of other cases because similar evidence between cases cannot be used to support a decision (p. 12).

In summary, O’Connor’s dissent argued that cases like this should be decided on a case-by-case basis in which juries respond to a defendant’s background, characteristics, and the crime they committed. The Eighth Amendment would continue guarding against the execution of those who are not morally and hence legally responsible (p. 17). She stated, “By acting so soon after our decision in Stanford, the Court both pre-empts the democratic debate through which genuine consensus might develop and simultaneously runs a considerable risk of inviting lower court reassessments of our Eighth Amendment precedents” (O’Connor, 20). Juries should instead be given the opportunity to consider the mitigating circumstance of age because the characteristics associated with youth does not justify a categorical age limit (p. 21).

O’Connor disagreed with Scalia on the weight of international consensus. Although she thought international consensus was not relevant here, because national consensus did not exist
and the proportionality argument was not justified, she believed that international consensus can be useful in confirming a solid national consensus (p. 18). The United States’ evolving standards of decency are not isolated from the values of other countries, and it should not be surprising when the values are the same (p. 19). Scalia, however, thought that international law had no place in American jurisprudence (p. 18).

Scalia’s dissent completely rejected the idea of evolving standards of decency. He argued that the decision gave so much weight to this that it rejected the original meaning of the Eighth Amendment and the framer’s expectations of the judicial branch. Because a national consensus did not exist with less than half of the states rejecting the sentence, “The Court thus proclaims itself sole arbiter of our Nation’s moral standards…” (Scalia, 1). The majority opinion disregarded what the people of their own country thought about the issue and took guidance instead from foreign law (p. 2).

Returning to the issue of national consensus, Scalia rejected the Court’s use of states that had altogether abolished the death penalty (p. 4). If these states were removed, only four states had made a legislative change. He further wondered if these four states would have voted to change their law if they knew it would lead to this decision and become irreversible in a constitutional prohibition (p. 6). Furthermore, some legislatures affirmed their support of capital punishment for sixteen and seventeen-year-olds since Stanford (p. 7). In Stanford, the Court rejected infrequency of executions as an argument, but it was now used in this case. However, infrequency could result from other factors like a lower percentage of capital crimes committed or that juries actually considered youth as a mitigating factor. In fact, the number of offenders

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under eighteen who had been sentenced to the death penalty had either stayed the same or slightly increased since *Stanford*, showing national confirmation of that decision (p. 8). Scalia’s argument attempted to prove that standards of decency had in effect not evolved since *Stanford*.

Due to this, the real determinant in the decision was the majority’s own personal judgment that juveniles under eighteen could never be as morally culpable as adults. Scalia writes, “But the Court having pronounced that the Eighth Amendment is an ever-changing reflection of ‘the evolving standards of decency’ of our society, it makes no sense for the Justices then to *prescribe* those standards rather than discern them from the practices of our people” (Scalia, 10). If this were to be true, the function of the Court would only be to identify the moral consensus of the people. However, legislatures are supposed to respond to the will of the people according to their values.

Scalia next picked apart the studies the Court used to support its decision (p. 9). He pointed out that studies done by the American Psychological Association had backed much of the majority’s opinion. However, Scalia claimed that they had previously took the opposite position in *Hodgson v. Minnesota* when they found that juveniles were mature enough to decide to obtain an abortion without parental involvement (p. 11-12). That decision argued, “[B]y middle adolescence (age 14-15) young people develop abilities similar to adults in reasoning about moral dilemmas, understanding social rules and laws, [and] reasoning about interpersonal relationships and interpersonal problems.”26 This argument took the exact opposite position of what the Court argued in *Roper*, although both cases had liberal outcomes. The studies that the Court cited in this case only concluded that juveniles were not able to take moral responsibility

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in most cases, not all (p. 12). They described juveniles as more likely to engage in risky or antisocial behavior, but murder was more than just another imprudent adolescent act, and exceptional cases should be treated in an exceptional way (p. 12-13). The fact that the minors cannot vote, serve on a jury, and marry without parental consent under the age of eighteen was not relevant, because it was established in Stanford that these decisions were more sophisticated than what should be the simple decision to not take someone else’s life (p. 13-14). Lastly, Scalia declared that legislatures were better qualified to evaluate the results of scientific studies, which can sometimes have subtle or conflicting results (p. 12).

Roper undermined the foundations of our sentencing system, according to Scalia, because the Court concluded that juries cannot be trusted to sufficiently weigh mitigating factors (p. 14). Not only was there no evidence of this, but also the infrequency of executions of juveniles proved that juries were actually weighing youth as a mitigating factor. The Court also gave no support to the idea that capital punishment for juveniles did not achieve the goals of retribution and deterrence in some cases. This was simply an extension of the generalization the Court made when it argued that youth are always not as culpable (p. 15).

Justice Scalia took a strong stance against the use of international opinion. He even pointed out that since the Senate and the President had declined to ratify the treaties referred to in the majority, this was further proof that the country had not reached national consensus on the issue (p. 17). Many differences existed between United States law and the laws of other countries (p. 21). The Court used international opinion when it was convenient to the argument they wanted to make (p. 23). Scalia wrote, “To invoke alien law when it agrees with one’s own thinking, and ignore it otherwise, is not reasoned decision making, but sophistry” (21).
In conclusion, the Eighth Amendment had been made a mirror of the changing sentiment of society about punishment. It always had the same text, but a different setting determined its interpretation. According to Justice Scalia, this was not a way to run a legal system because it was unreliable and unstable (p. 24). The evolution of the Eighth Amendment was no longer determined by objective criteria, but by what the Court decided represented the evolving standards of decency of this society (p. 24). The broadening of what constituted this objective evidence allowed the Court to rest increasingly more weight on society’s morality in the following cases.

Justice Thomas authored the most substantial dissent in *Graham v. Florida.* He also argued that national consensus did not exist in this situation (p. 16). Congress, Washington, D.C., and thirty-seven states still allowed this sentence. Judges had imposed it and juries had affirmed it (p. 1). Every jurisdiction allowed juveniles over a certain age to be transferred to adult court (p. 11). Federal law authorized the penalty (p. 12). Only five states completely prohibited this punishment specifically for juveniles (p. 11-12). Thomas wrote, “The sole fact that federal law authorizes this practice singlehandedly refutes the claim that our Nation finds it morally repugnant” (Thomas, 12). There actually was a clear consensus in favor of the penalty (p. 12). The consistency and direction of recent legislation supported this argument against national consensus, as some States had increased the severity of punishments for juveniles by passing laws that make their transfer to adult court easier, showing that society believed that some juveniles act with the same moral culpability as adults (p. 13-14). In addition, many legislatures had moved away from parole (p. 14). But, the Court believed that the rarity that life without

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parole sentences were imposed was evidence of national consensus against the sentence. However, as proved in the past, Justice Thomas reiterated that this was only evidence that there was consensus that the sentence should be imposed rarely (p. 15). An offender who committed a crime that was rare in brutality should also be given a rare sentence (p. 17). Furthermore, this rarity should be a sign that juries were taking youth as a mitigating factor and only imposing the sentence when all circumstances had been taken into account (p. 14). It was also possible that in jurisdictions where it had never been imposed, there had never been an offender who could have received it. The simple fact that it was permitted showed that people agreed with it (p. 16).

The Court thus did not conclude that the punishment was cruel and unusual but instead independently made the moral judgment of whether this sentence was proportionate to juveniles (p. 19). The Court, however, did not have this authority over legislatures, judges, and juries (p. 1). Thomas further argued that the Court interpreted the cruel and unusual clause of the Eighth Amendment incorrectly. This clause was originally understood to simply prohibit torture. However, the Court now interpreted the clause out of its original context and instead interpreted it to forbid punishments that were disproportionate to the crime (p. 3). The clause was not originally understood to require proportionality; this was an invention of the modern Court (p. 4). The other branches of government were the ones that possess this responsibility through the legislatures that authorized it, the prosecutors who sought it, and the judges and juries that imposed it under certain circumstances (p. 5). Life without possibility of parole is not in itself a cruel and unusual punishment (p. 1). Yet, the Court argued that the theory of evolving standards of decency required categorical rules to protect certain classes of offenders, even though the Framers did not intend for constitutionality to be affected by public opinion and social attitudes
The Court further believed that they could impose their independent moral judgment on how they believed standards of decency should be evolving.

Thomas also made a “death is different” argument, stating that the categorical approach was something the Court previously reserved specifically for cases dealing with capital punishment. The death penalty is uniquely severe so that it is reserved for the most deserving offenders. Due to this, capital defendants are given special protection (p. 7). The Court used to decline proportionality in all cases that were not dealing with capital punishment (p. 7-8). However, the Graham ruling destroyed this distinction because the Court was claiming that death was no longer an exceptional penalty for an exceptional crime and extended this power of categorically exempting certain offenders to the second most severe penalty (p. 7). The Eighth Amendment and its precedents, national consensus, or ideas about culpability did not justify a categorical rule, the dissent argued (p. 9). It would not prevent the likelihood of a judge or jury being swayed by the brutality of a crime that the offender was not sufficiently culpable for because the justice system is based on judges and juries determining the punishment for a guilty offender based on the evidence they are presented (p. 23). Roper was not an appropriate precedent out of the capital sentencing context (p. 26).

Thomas further remarked that the majority opinion determined that life without parole for juveniles did not serve what they determine as the sentence’s major penological goals: incapacitation, retribution, and deterrence (p. 20). However, “the Eighth Amendment does not mandate ‘any one penological theory,’ just the one on the Court approves” (Thomas, 21). The Court also believed that juveniles who commit non-homicide crimes should always have the opportunity for rehabilitation, a penological purpose not served without the possibility of parole (p. 20). In regards to retribution, the infrequency of the sentence proved that juveniles were less
culpable than adults. Furthermore, even though society treats the average juvenile as less culpable, the question in this case did not involve the average juvenile. However, the Court here ruled that no juveniles would ever be sufficiently culpable to receive this sentence (p. 21). They further used social science evidence from the American Psychological Association incorrectly. APA differentiated between adolescents who were antisocial temporarily in adolescence and those who had a lifelong pattern of antisocial behavior. The studies showed that lifelong behavior usually will set in before eighteen, showing that violence can be evidence of lifelong behavior (p. 22). There is nothing inherent about juveniles and their characteristics to prevent them from ever being morally culpable enough to receive this sentence. This sentence was permitted for juveniles who commit homicide because the Court believed that offenders who do not kill are less morally deserving than murderers. But, this is a moral and social question that should be left to the legislatures to determine (p. 24).

In conclusion, Justice Thomas thought that proportionality in this case should not be able to establish a categorical rule and even that disproportionality did not even exist in *Graham’s* case in the first place (p. 25). Some states will always treat offenders more severely than others, but the Constitution never required them to all act uniformly (p. 27). The Florida legislature authorized this sentencing practice and the judge decided to impose it (p. 28). The majority opinion “illustrates how far beyond any cognizable constitutional principle the Court has reached to ensure that its own sense of morality and retributive justice pre-empts that of the people and their representatives” (Thomas, 28-29).

*Miller v. Alabama*, the last of the three juvenile justice cases, faced the largest variety of dissents. Justice Roberts offered one of them, arguing that the Court’s role is to apply the law,
not to answer questions about morality and society. The Court must look towards objective evidence to make sure they are not simply following their own subjective beliefs. If there was consensus in social standards against a sentencing practice, it can be determined “unusual.” However, in this case, most states permitted and even frequently imposed life imprisonment without possibility of parole for murderers (p. 2). 2,500 prisoners were currently serving this sentence for murders they committed when they were juveniles (p. 1). Over 2000 of them received this sentence because it was mandatory (p. 2). Even though the Court must look to evolving standards of decency, decency does not always mean leniency (p. 2-3). Decency can be in the form of mercy towards the guilty when society comes to view a harsh punishment as unjust. Decency can also be in the form of protecting the innocent by removing those guilty of violent crimes like murder from society (p. 3). Roberts wrote, “As judges we have no basis for deciding that progress toward greater decency can move only in the direction of easing sanctions on the guilty” (Roberts, 3). Statutes establishing life without parole sentences had recently become more common; there had been increasing outcries against repeat offenders and the ineffectiveness of rehabilitation. State laws were changing to permit juvenile murderers to receive life without parole sentences (p. 3).

Justice Roberts claimed that the majority opinion tried to avoid this clear evidence in society by comparing Miller’s case to its Eighth Amendment precedents (p. 6-7). The Court alleged that Graham and Roper led to the decision instead of relying on the text of the Eighth Amendment or evidence of society’s standards in this specific case (p. 7). In Graham, the sentencing practice was rare despite opportunities to impose it, while in this case, the Court

excused the frequency of its imposition because it claimed that this results from the many statutes that existed requiring its imposition (p. 4-5). The Court was basically arguing that the sentence was unusual because so many legislatures approved it. Two statutes led jurisdictions to impose this sentence. The first allowed juveniles to be tried in adult court, and the other mandated that those convicted of murder be sentenced to life imprisonment. Even though the majority argued that the sentence was imposed inadvertently as a result of the interaction of these two statutes, this was still not evidence of society’s views (p. 5). In Roberts’s opinion, it was ridiculous to argue that the legislatures were not aware that these two statutes could interact with each other (p. 5-6). 2000 juveniles were not accidentally given this sentence without anyone thinking it through (p. 6).

Therefore, the decisions in *Graham* and *Roper* did not imply the decision in this case. *Graham* argued that death is a different penalty altogether. Homicide is in a different category from other serious crimes and should be treated differently (p. 5). Furthermore, defendants who do not commit murder are less deserving of the most severe punishments (p. 8). The two issues of *Graham* and *Miller* could not be compared (p. 7-8). *Roper* invoked special Eighth Amendment analysis, because it was a capital punishment case and argued that the death penalty was not needed to deter juvenile murderers because they could be deterred by the possibility of life imprisonment without parole (p. 8).

Roberts argued that the majority justices were overstepping their authority by moving more and more into areas that should be within the legislative role (p. 8-9). Even though this case was limited to mandatory sentencing schemes, the Court also made it clear that sentencing juveniles to life without parole should be uncommon for juveniles, moving towards next categorically overturning life without parole sentences for juveniles in general (p. 9). As seen
throughout all three of these cases, “Perhaps science and policy suggest society should show
greater mercy to young killers, giving them a greater chance to reform themselves at the risk that
they will kill again. But that is not our decision to make” (Roberts, 10).

Justice Thomas delivered the second dissent.29 He argued that the Court relied on lines of
precedent that were not consistent with the original meaning of the Eighth Amendment (p. 1).
The moral question of who deserves a certain type of punishment should be left to the
legislatures (p. 3). Thomas stated, “The Court compounds its errors by combining these lines of
precedent and extending them to reach a result that is even less legitimate than the foundation on
which it is built” (Thomas, 1). The categorical prohibition of sentencing practices due to lack of
proportionality between the culpability of the class of offenders and the severity of the penalty
existed in *Roper* and *Graham*. The logic of these cases, however, should not be extended to this
one (p. 2). The Court also relied on cases that prohibited the mandatory imposition of capital
punishment as precedents for this case (p. 4). However, since the death penalty is different from
other sentences, the requirement for individualized sentencing was unique to capital cases.
Mandatory sentences could only be prohibited when dealing with the death penalty according to
the arguments set forth in the cases that established the necessity of individualized sentencing in
capital cases (p. 7). The Court extended this in *Miller* using *Graham*’s argument that likened
juvenile life without parole sentences to capital punishment (p. 8). Yet, mandatory sentencing
schemes did not become cruel and unusual just because they were mandatory (p. 6). The Eighth
Amendment is only concerned with the character of the punishment, not how it is imposed. A
State was not constitutionally prohibited from considering that a certain crime always shows that

Institute* (June 25, 2012), 1. Subsequent references to Justice Thomas’s opinion appear in the text.
an offender’s character is deserving of a certain sentence (p. 5). Mandatory schemes also helped to eliminate jury discretion so that all defendants who committed a particular crime were treated equally. In this type of Eighth Amendment interpretation, the defendant’s age was not relevant (p. 6).

Agreeing with Roberts here, Justice Thomas argued that this case represented another example of the Court expanding its power over the States’ authority to sentence criminals by establishing categorical bans (p. 8). This becomes especially clear when the majority opinion stated that it thought the discretionary imposition of life without possibility of parole for homicide will be uncommon. The effects of this statement could cause judges to be more reluctant to impose the sentence. In a few years, the Court could then use these sentencing practices and the infrequency of this sentence’s imposition to create another categorical rule (p. 9). Similar to Roberts, Thomas believed, “The Court has, thus, gone from ‘merely’ divining the societal consensus of today to shaping the society consensus of tomorrow” (Thomas, 9). The Court had shown that it believed its morality to be above the morality of the citizens and their elected representatives, the legislature (p. 9).

The final dissent in Miller presented the more unique idea that the Court long ago abandoned the original meaning of the Eighth Amendment, Justice Samuel Alito argued.30 This occurred when they held that a punishment is considered cruel and unusual according to evolving standards of decency (p. 1). However, the basis for establishing this standard was problematic from the beginning. Alito philosophically questioned if society was actually evolving in the direction of more decency. Regardless, he believed that representatives were better able to reflect

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society’s changing morality than judges are (p. 2). Even though the Court insisted that the standards were displayed through objective evidence in the form of national consensus and not the personal views of the justices, this evidence of national consensus became weaker and weaker and began to incorporate trends in the direction of change (p. 2-3). In this case, Congress and forty-three states ruled that juvenile murderers can be sentenced to life without parole and twenty-eight states and the federal government decided that this sentence should be mandatory. However, the Court ignored and overruled all of these legislative judgments (p. 5).

Alito also pointed out that Miller, at age fourteen, was an anomaly. The majority of similar cases consisted of seventeen-year-old offenders, who committed a significant amount of brutal murders every year. Many of these seventeen-year-olds were at least as mature as the average eighteen-year-old (p. 5).

As stated earlier, Alito agreed that the majority opinion had hinted at a future categorical rule by going out of their way to say that the imposition of this sentence should be uncommon for juveniles (p. 6). Alito claimed, “What today’s decision shows is that our Eighth Amendment cases are no longer tied to any objective indicia of society’s standards” (Alito, 6). The majority would continue to do this until they brought sentencing practices in line with what they themselves believed should be the evolved standards of decency in this society.


After the three preceding cases, the Court seemed to be moving towards supporting more lenient penalties. On the contrary, *Glossip v. Gross* (2015) upheld the death penalty for adults
and proved that this leniency was unique to juveniles. In *Glossip v. Gross*, the Supreme Court ruled that it was out of the bounds of their authority and knowledge to rule on the challenge made to certain lethal injection protocols. In Eighth Amendment method-of-execution claims, a certain drug must be proved to cause more pain and must indicate an alternative and less painful method of execution. The petitioners in the case failed to establish this, in addition to the fact that a procedure for carrying out the death penalty had never been declared cruel and unusual because the most humane and practical methods known to science at that time are always used. In the majority opinion, Justice Alito argued, “Holding that the Eighth Amendment demands the elimination of essentially all risk of pain would effectively outlaw the death penalty altogether” (Alito, 4).

*Glossip* becomes significant when analyzing juvenile justice in Justice Breyer’s dissent. He argued against the majority’s ruling on method-of-execution by contending that capital punishment in itself violated the Constitution. Two concurrences were written in response to Breyer, establishing the Supreme Court’s continued approval of capital punishment for adults, even following a series of liberal cases abolishing both the death penalty and many opportunities to receive life imprisonment without possibility of parole for juveniles.

Justice Scalia delivered a strong Concurrence, joining the majority but wanting to respond to Justice Breyer on the constitutionality of the death penalty. Scalia argued that death penalty abolitionists influenced the liberal justices, especially Breyer. With no legal argument

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32 Ibid, 17.
34 Ibid, 2.
to back their opinion, they misinterpreted the text of the Constitution to prove their point by equating cruel to unreliable and unusual to its decline in use. Historically, the Eighth Amendment only prohibited punishments that increased the pain to an otherwise permissible punishment. Therefore, “It is impossible to hold unconstitutional that which the Constitution explicitly contemplates” (Scalia, 2).

Breyer claimed that the death penalty was cruel because it is unreliable. However, the convictions are reliable, not the punishment in itself. Breyer argued that wrongful convictions can occur due to community pressures during a case. Scalia pointed out that this was simply due to the nature of the crime, not the punishment that followed because the same community pressure would exist for the same crime if the offender were instead being sentenced with life without possibility of parole. In addition, it is easier for a defendant to appeal a death sentence than a life imprisonment sentence, as they get legal assistance from abolitionists and favoritism from abolitionist judges. Breyer continued to argue that the imposition of the death penalty is arbitrary. He attempted to prove this by citing a study that measured the ‘egregiousness’ of the murder conduct of two hundred fifty cases with a system of metrics. Scalia believed that egregiousness cannot be measured this way, because it is a moral judgment. Furthermore, egregiousness was only one factor that makes a sentence appropriate, and as the Court had argued in the past, there must be an individualized consideration of all mitigating circumstances.

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39 Ibid, 5-6.
41 Ibid, 3.
43 Ibid, 11.
Varying judgments are simply an inevitable consequence of jury trials and exist no matter what the sentence in question is. Breyer also argued that the death penalty was cruel because of the delays leading up to its carrying out. Offenders often must wait for long periods of time on death row. Scalia refuted this by stating that life without possibility of parole is an even lengthier period of time on death row. Breyer believed that life imprisonment serves the same penological justifications of retribution and incapacitation that the death penalty does, but the death penalty does not serve deterrence. However, Scalia noted that it seems very likely that the death penalty does deter because many statistical studies show just that. The delays that Breyer argued make the death penalty cruel are a result of all of the recently imposed restrictions on capital punishment. Many States had abolished capital punishment because of all of the restrictions, yet Breyer used this abolishment as an argument that the sentence was unusual.

Scalia concluded stating, “And time and again, a vocal minority of this Court has insisted that things have ‘changed radically,’ and has sought to replace the judgments of the People with their own standards of decency” (Scalia, 7). The moral questions should instead be left to the People to decide.

Justice Thomas also responded to Breyer. He specifically responded to Breyer’s argument that the death penalty was no longer reserved for the worst offenders. Breyer used the

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50 Ibid, 5-6.
51 Ibid, 6.
52 Ibid, 7.
proportionality principle to assert this, despite the fact that this proportionality approach was discredited by Scalia in *Harmelin v. Michigan* in 1991. Abolitionists who assigned ‘egregiousness’ scores after evaluating written summaries of the cases conducted the studies that Breyer used to support his position. However, they were not exposed to many of the factors that jurors would be when sentencing criminals. Jurors and juries make these decisions for this reason as clearly indicated in the Constitution. They are better situated to make moral judgments than legal elites. Yet, Breyer used these studies to argue that death sentences were assigned according to arbitrary factors. He further considered the locality in which the crime was committed as further evidence of arbitrariness. The Constitution clearly indicates that the cases have to be decided where the crime was committed. The results of these studies were unreliable and dehumanizing, because it is impossible accurately to quantify moral depravity, especially from this outside perspective.

Lastly, some of the most ‘egregious’ cases were granted relief because of an unfounded Eighth Amendment claim regarding the intellectually disabled, juveniles, or cases involving rape. Thomas concluded with a broad argument against the recent liberalization of Eighth Amendment jurisprudence. He wrote, “To the extent that we are ill at ease with these disparate outcomes, it seems to me that the best solution is for the Court to stop making up Eighth Amendment claims in its ceaseless quest to end the death penalty through undemocratic means” (Thomas, 10).

54 Ibid, 3.
55 Ibid, 4.
56 Ibid, 4-5.
57 Ibid, 5.
58 Ibid, 7.
Conclusion

Dissents highlighted how much the Court’s majority interpreted national consensus and the meaning of the Eighth Amendment’s cruel and unusual punishments clause very broadly, focusing on the characteristics of juveniles that they believed made this class of offenders always less culpable and thus less deserving of the harshest punishments. Evidence presented in amicus briefs of society’s evolving standards of decency confirmed this broad interpretation. The majority attempted to answer these moral and social questions in *Roper v. Simmons, Graham v. Florida*, and *Miller v. Alabama*. 
Introduction: Advocacy and Sentencing Reform for Juveniles

After analyzing the texts of the aforementioned juvenile punishment cases, it becomes clear that in these cases the Supreme Court’s majorities relied on the idea that decisions regarding the Eighth Amendment’s cruel and unusual punishment clause should be decided by recognizing and applying the “evolving standards of decency” in society. Evolving standards of decency, first established in *Trop v. Dulles* (1958), emphasized a living Constitution, where changing norms in society may contribute to how the law is interpreted. The majority opinions in the major juvenile punishment cases interpreted the Eighth Amendment according to evolving standards of decency, as suggested by their reliance on the evidence presented in the amicus briefs. Sixteen out of the eighteen amicus briefs submitted during the major juvenile punishment cases took the liberal standpoint of increased leniency towards juvenile defenders. This chapter addresses the question: How extensively did these amicus briefs influence the outcome of these cases?

Moreover, these juvenile punishment cases drew from the notion that there are legally protected classes of citizens in society, in this case, juveniles. As social values changed, more
and more groups of American citizens have been identified as protected. The Civil Rights Act of 1964 initially established this trend by arguing that African Americans were a class of citizens that required protection under the law due to their history as a legally subordinated class, in addition to the continuing racist and discriminatory attitudes towards them in society. The Act worked to enforce this class’s constitutional right to vote, gave them legal means to resist public discrimination, and worked to protect their constitutional rights as citizens. The Civil Rights Act of 1964 recognized that certain groups of people within society would require more protection than the general public as a result of historical and cultural factors, or in the case of juveniles and the intellectually disabled, their developmental characteristics. As there was resistance to this notion during the Civil Rights Movement, advocacy has continued for almost all groups who have been since recognized as protected classes. However, the dissents in the major juvenile justice cases demonstrated that not all people accept the idea that some classes have a right to special legal protection.

To decide what constitutes proportionality, or the appropriate severity of a punishment, contemporary morality within society must be determined. Legislative developments demonstrating that a growing number of states oppose the punishment, the rate of jury sentencing decisions that move away from these harsh sentences, and the rarity of prosecutors seeking the death penalty for this group of offenders suggested changing standards of punishment to the Court. The trend has apparently been driven by an emerging body of opinion that is morally against the juvenile death penalty. Furthermore, to define what exactly the

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standards of decency are at a given time, the Court uses the notion of national consensus to evaluate society’s stance. A punishment might be considered constitutionally cruel and unusual if there is a consensus in society against it.\(^{64}\) To determine these factors within society, in combination with an analysis of state legislature and jury decisions, the opinions of respected professionals, international viewpoints, and advocacy groups may be used to analyze and determine national consensus.\(^{65}\) In 1989, Stanford v. Kentucky challenged the death penalty for juveniles sixteen years of age and over.\(^{66}\) The failure of Stanford v. Kentucky to abolish the juvenile death penalty might be attributed to the fact that petitioners did not consider jury determinations, public opinion polls, interest group influences, organization views, and international attitudes as extensively as they did in other more liberal-leaning punishment cases. For example, Thompson v. Oklahoma (1988) which abolished the death penalty for juveniles under the age of sixteen, and Atkins v. Virginia (2002), abolishing the death penalty for the intellectually disabled, were both guided effectively by this type of multi-factor national analysis. In these cases, the Court found the judgment of social, professional, and advocacy organizations valuable in determining national consensus.\(^{67}\) Not surprisingly then, the Court in Stanford used an analysis of national consensus that ignored evidence from professional, business, civic, and religious organizations in addition to international opposition.\(^{68}\) Atkins, however, demonstrated a shift back to reliance on evidence such as this. By using Atkins as the precedent, Roper v.

\(^{64}\) Fagan and West, 431.
\(^{65}\) Heisler, 35.
\(^{67}\) Ibid, 40.
\(^{68}\) Ibid, 61.
Simmons (2005), Graham v. Florida (2010), and Miller v. Alabama (2012), would again rely upon this type of extra-legal evidence.⁶⁹

The majority opinions in the three twenty-first-century juvenile punishment cases -- Roper v. Simmons, Graham v. Florida, and Miller v. Alabama -- drew from sources that the justices in the majority believed accurately displayed modern society’s ideas about standards of decency when punishing juveniles. In evaluating these evolving standards, the Court identified what it considered to be a historical trend that was moving towards greater recognition of juveniles as a separate and protected class of citizens. As evidence of this societal trend, the majority referenced sixteen out of eighteen separate sources that were submitted as amicus briefs just in Roper v. Simmons. These briefs came from many differing groups in society ranging from juvenile advocates, legal professionals, medical associations, and international organizations. Amicus curiae briefs bring relevant matters in the case to the attention of the Court. Briefs can be submitted either in support of either the defendant or the plaintiff. Both the petitioner and respondent must consent to the filing of the amicus briefs. Any objections must be submitted with a statement of why that party is choosing to withhold consent.⁷₀

The majority’s use of the amicus briefs submitted by child advocacy groups, most significantly the Juvenile Law Center, displayed their recognition of active efforts in society, and specifically within the legal profession, to expand juveniles’ rights and protections. Other groups of legal professionals also submitted briefs in support of juveniles. For example, the American Bar Association, the Sentencing Project, and former Juvenile Court judges are just a few of the legal organizations with significant interest in these cases. The Court also noted the increased  

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⁶⁹ Heisler, 37.
psychological research on the brain development of juveniles through its extensive references to the information provided by the American Medical Association and the American Psychological Association. The Court even drew from worldwide opinions, as shown in the brief submitted by international advocacy organizations like Amnesty International and the European Union that also included statements from a variety of countries even outside of Europe, specifically Mexico. Over time, the number of groups submitting amicus briefs increased. The American Bar Association, American Medical Association, American Psychological Association, and the Juvenile Law Center submitted briefs for two or all three of the cases, making these groups the most consistent opinions. Furthermore, these groups all submitted their briefs on behalf of the juvenile defendants and advocating juvenile protection under the law, underlining their significance in contributing to the outcome of these major twenty-first century juvenile justice decisions. The briefs submitted in Roper v. Simmons require the most attention because the decision in Roper set the precedent of juvenile protection that would be applied and expanded on in the two cases to follow. The influence of legal professionals, a growing body of medical evidence, international consensus, as well as mounting advocacy on the issue, all influenced a majority of the Court’s justices to rule in a way that increasingly granted greater leniency and protection towards juveniles in the justice system.

Even though the majority of the groups that submitted amicus briefs took a liberal stance on the issue, this does not mean that all Americans agreed with these standards or that they should be present in legal jurisprudence. The dissenters on the Court did not consider briefs to defend their argument. Instead, the dissents challenged the basic assumption of considering these amicus briefs by arguing against the relevancy of evolving standards of decency to Eighth Amendment interpretation.
In order to determine how the amicus briefs influenced the majority opinion, *Roper v. Simmons* will be used as a case study and focus for the rest of this chapter. In this 5-4 decision, Justice Anthony Kennedy wrote the majority opinion, joined by Justices David Souter and Stephen Breyer. Justice John Paul Stevens wrote a concurrence that was joined by Justice Ruth Bader Ginsburg. Chief Justice William Rehnquist and Justices Antonin Scalia, Sandra Day O’Connor, and Clarence Thomas all dissented.71 Justice Kennedy also wrote the majority opinion in *Graham v. Florida*, making his opinion regarding juvenile punishment the most developed over time and thus perhaps the most significant. In his opinion, Kennedy specifically referenced the arguments used in briefs submitted by the American Bar Association, American Psychological and Medical Association, European Union, and the Juvenile Law Center.72

Justice Kennedy drew from these amicus briefs to argue in favor of the validity of social science, the legitimate relevant of international opinion, and the duty of the judiciary to recognize societal shifts in determining the constitutionality of the juvenile death penalty in *Roper v. Simmons*. All of these arguments were used in an attempt to prove that evolving standards of decency within society had moved towards a moral rejection of the juvenile death penalty. These four arguments were contested by the dissenting justices, demonstrating a conflict within the Court over the use of the concept of evolving standards of decency when interpreting the Eighth Amendment cruel and unusual punishments clause.

72 Denno, 381.
A total of eighteen groups submitted amicus briefs in *Roper v. Simmons*. Sixteen of the groups filed the briefs on behalf of the respondent, arguing against the juvenile death penalty. Some of the most influential of these groups included the American Bar Association, the American Medical Association, the American Psychological Association, the European Union, and the Juvenile Law Center. Each of these organizations had significant interest in the cases at hand, inspiring their involvement. In doing so, they also were promoting their own self-interest by advancing the legitimacy of their own studies as medical experts or promoting their social goals as advocates. Furthermore, the success of their arguments enhanced their prestige, as the Supreme Court used many of the arguments presented in these briefs. The paramount influence of these arguments can specifically be seen in the majority opinion in *Roper*, authored by Justice Kennedy.

The American Bar Association is the principal voluntary national membership organization of the legal profession. Its stated focus is advocating the improvement of the justice system.  


74 Ibid, 2.

75 Ibid.
typically reserved for the worst crimes done by the worst offenders. According to the American Bar Association, the execution of juvenile offenders is cruel and unusual punishment. Although the organization opposes the death penalty for juveniles, it takes no position on this penalty in general. 76

The American Medical Association is the nation’s largest professional organization of physicians and medical students, whose purpose is to promote science, medicine, and the betterment of public health. It is composed of more than 35,000 member physicians, some of whom specialize in psychiatry. 77 The association submitted an amicus brief in Roper v. Simmons, “...to describe the scientific findings of medical, psychiatric, and psychological research relevant to the legal issues under consideration.” 78

The American Psychological Association is another voluntary scientific and professional organization of mental health experts. It has been the principal association of psychologists in the United States since 1892, with a stated mission of sharing knowledge about human behavior. In looking at social science research, its members have recognized the problem of sentencing a juvenile to the death penalty and have called for an end to the practice in an amicus brief. 79 They argued, “Behavioral studies and recent neuropsychological research demonstrate that execution of those under 18 years old when their offenses were committed would not further the constitutional purposes of the death penalty and would not meet Eighth Amendment standards.” 80

76 Brief for the American Bar Association as Amicus Curiae, 3.
77 Brief for the American Medical Association as Amicus Curiae, Roper v. Simmons 543 U.S. 551 (2005), 1.
78 Ibid, 2.
79 Brief for the American Psychological Association as Amicus Curiae, Roper v. Simmons 543 U.S. 551 (2005), 1.
80 Ibid, 4.
The European Union also submitted an amicus brief representing what it determined as an international consensus against the practice of sentencing juveniles to death. The brief began with an assertion of the European Union’s values: “The European Union considers the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, to be of vital importance both nationally and in the international community.” The stated purpose in the amicus brief was to provide the Court information about international human rights norms. The Union claimed to share the moral opinion with the rest of the international community that the execution of juveniles violates the standards of human rights set forth by the United Nations. The brief was joined by Canada, Iceland, Mexico, Liechtenstein, New Zealand, Norway, and Switzerland in an effort to enforce the idea that they are representing a virtually unanimous international consensus.

By its own claim, the Juvenile Law Center is the oldest, non-profit, public interest law firm for children in the United States, advocating for children for forty years. The Juvenile Law Center has had an impact on the development of law and policy on behalf of children by using legal strategies in combination with legislative advocacy to aid children, specifically within the juvenile justice system. It strives to ensure that laws, policies, and practices are consistent with children’s developmental characteristics, in agreement with international human rights values. The Center classifies children as society’s most vulnerable as they are, “…most likely to be mislabeled, ignored, harmed, or scarred for life by systems that are supposed to help them.” In addition, the Center has often submitted amicus briefs in which its advocacy has contributed to

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82 Ibid.
83 Ibid, 3.
85 Ibid.
the rulings in *Roper v. Simmons*, *Graham v. Florida*, and *Miller v. Alabama*, the three major juvenile punishment cases previously addressed. The Juvenile Law Center’s amicus brief in *Roper v. Simmons* was submitted in combination with other organizations that work on behalf of adolescents. In its brief, the Center claimed that youth require extra protection and special care due to their immaturity. According to these juvenile advocates, adolescence is separate from adulthood in ways that are so distinct that they demand a categorical separation. Therefore, the Center argued adolescents cannot be held to the same standards of culpability as adults.

The Juvenile Law Center recognized the importance of the existence of advocacy organizations in establishing societal norms. It contended, “The consensus against the execution of juvenile offenders also is evidenced by the positions of national organizations with interest, expertise, and experience in this issue, including the ABA, the leading organization representing the legal profession.” The number of organizations working to expand the rights and protections of juveniles has escalated in recent years. These organizations work to ensure that juveniles are protected under the law according to claimed differences that render juveniles less responsible and more vulnerable. Their advocacy on behalf of children has worked to bring the discussion to the forefront in society. Appendix A of the Juvenile Law Center’s amicus brief includes the specific identities of these Amici Curiae, which include the Child Welfare league of America, the Sentencing Project, Voices for America’s Children, and Youth Advocate Program International. These groups all work towards promoting the welfare and rights of children, especially focusing on working with troubled youth who have been affected by the criminal justice system. They pay special attention to children who have been victimized, observing a link.

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86 Ibid.
87 Brief for the Juvenile Law Center as Amicus Curiae, *Roper v. Simmons* 543 U.S. 551 (2005), 1.
between mistreatment and delinquency, and then work towards treatment and rehabilitation.

Their existence emphasizes society’s more recent recognition of the need to protect and defend juveniles, a factor that in itself could have been a factor in the Supreme Court’s decision in *Roper v. Simmons*.

**Validity of Social Science**

Justice Kennedy’s opinion made the assumption that social science presents valid evidence in determining legal standards. Most of the amicus briefs used social science to argue that juveniles did not deserve the death penalty in light of developmental characteristics identified by emerging medical research. Kennedy relied heavily on this evidence to rule that these characteristics of juveniles render them less culpable than their adult counterparts.

Kennedy identified the same characteristics of juveniles that were described in the briefs. He first cited juvenile’s immaturity and irresponsibility, which can lead to impulsive actions and risky behavior.⁸⁹ The brief submitted by the American Psychological Association that adolescent immaturity invariably affects their decision-making process.⁹⁰ Studies conducted by these experts showed that adolescents perform more poorly than adults in an analysis of decision-making competence.⁹¹ Due to this, the American Psychological Association stated that delinquent behavior can be expected and even characteristic of many adolescents.⁹² Furthermore, “Behavioral studies show that late adolescents are less likely to consider alternative courses of

⁹⁰ Brief for the American Psychological Association, 2.
⁹¹ Ibid, 8.
⁹² Ibid, 2.
action, understand the perspective of others, and restrain impulses.”93 According to the brief, risk-taking is an expression of this adolescent identity, not evidence of a permanent behavior that will continue into their adulthood.94 Furthermore, the American Psychological Association emphasized the importance of their argument in legal proceedings because they have found that juveniles are also more likely to make immature decisions concerning the criminal proceedings, further exacerbating their case.95 Their immaturity can affect their decisions, attitudes, and behavior while playing the role of defendant.96

The American Medical Association made a similar argument about the adolescent brain and how it operates differently than adults.97 The American Medical Association attempted to prove that juveniles’ behavioral immaturity mirrors the studied anatomical immaturity of their brains.98 According to these medical experts, regions of the brain associated with impulse control, risk assessment, and moral reasoning in the prefrontal cortex are one of the last areas of the brain to mature, occurring after late adolescence.99 The Medical Association acknowledged that although scientists cannot scientifically measure moral insight, they can analyze measurable and identifiable characteristic attributes like immaturity, impulsivity, and vulnerability that are relevant to assessing culpability in the eyes of the law.100 Even the Juvenile Law Center drew on social science in its brief, assuming that the evidence was widely accepted and important in determining the culpability of adults. The Center’s brief argued, “In sum, in an unbroken line of decisions, involving a range of constitutional provisions, this Court has drawn firm distinctions

93 Ibid.
94 Brief for the American Psychological Association, 3.
95 Ibid, 29.
96 Ibid, 30.
97 Brief for the American Medical Association, 4.
98 Ibid, 10.
99 Ibid, 16.
100 Ibid, 3.
between minors and adults, based on well-documented and universally accepted differences in their emotional, cognitive, and developmental abilities in the critical realms of judgement and decision-making. Therefore, the Juvenile Law Center reaffirmed that juveniles’ irresponsible or impulsive behavior cannot be as morally reprehensible as an adult in the same situation. Kennedy himself wrote that these widely-recognized differences imply the lesser culpability of juveniles, thus making them less morally reprehensible when compared with adults. He also argued that a categorical rule is necessary because differences between youth and adults are too extensive and well understood to risk the chance of execution of an offender who was not morally culpable enough to deserve it. Kennedy’s majority argument was largely based on this analysis of the effects of juvenile immaturity taken from the social science evidence presented in the amicus briefs.

The next characteristic that Justice Kennedy used to make his argument was juveniles’ vulnerability to outside influences in combination with their lack of control over their surroundings. According to Kennedy, this lack of control makes it harder to escape a negative environment that may have a significant influence on an adolescent. Kennedy took this argument directly from the American Medical Association’s amicus brief. In the brief, this organization alleged that the deficiencies associated with the adolescent brain are more pronounced when in combination with other factors like stress and peer pressure, in which adolescents are more vulnerable to both. Social interactions with peers are particularly important to adolescents because they desire approval and acceptance from friends. They also are more

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101 Brief for the Juvenile Law Center, 18.
102 Ibid, 18-19.
103 Roper v. Simmons, 16.
104 Ibid, 19.
105 Ibid, 16.
likely to stick around peers who can reinforce their negative behaviors. The brief asserted that youth is the time in a person’s life when young people are most susceptible to influence and psychological damage. Images of a normal and healthy adolescent displayed the anatomical immaturity of the adolescent brain previously described. However, these medical experts pointed out that adolescents who commit capital crimes often suffer from psychological disturbances that can exacerbate their immaturity and vulnerability. Adolescents who suffer from these types of disturbances and brain trauma due to psychological damage from violence, abuse, or a stressful family life do not operate at the normal level.

The Juvenile Law Center further pointed out that many of the juveniles currently on death row have suffered brain injuries, neurological deficits, and psychiatric illness due to abuse or other traumatic life factors. These experts in dealing with children conclude that these types of impairments worsen juveniles’ already immature capacities and behavior. The American Bar Association also lists vulnerability as a trait inherent in juveniles. Kennedy’s recognition of the role of an outside environment on vulnerable youth used social science evidence as its basis.

Finally, Kennedy argued that the personality of juveniles is not fixed. This provides evidence that their behavior does not always point to an irretrievably depraved character and that juveniles particularly have a greater possibility of reforming themselves. The American Psychological Association observed that adolescent personality is not fully formed, making it impossible for psychologists reliably to determine future behavior.

106 Brief for the American Medical Association, 8.
107 Brief for the American Medical Association, 21.
110 Ibid, 21.
111 Brief for the American Bar Association, 7.
112 Roper v. Simmons, 16.
113 Brief for the American Psychological Association, 2, 16.
argued that for the last sixty years the Court has considered these existing developmental and social differences of youth in measuring their specific constitutional rights. The Court has even emphasized that youth are better suited for rehabilitation than adults are and have recognized a specific duty towards protecting juveniles. Kennedy confirmed this stance on the malleability of the juvenile personality, arguing that it makes them better candidates for rehabilitation.

Kennedy stated that psychologists cannot diagnose juveniles under eighteen years old with antisocial personality disorder. This fact was drawn directly from the American Psychological Association. Professional psychologists are unable to identify psychopathy or sociopathy among adolescents because antisocial behavior in adolescence is not permanent. According to the American Psychological Association, predictions by juries are prone to error because labeling a juvenile as a psychopath, as many juries tend to do, is impossible. Psychopathy is an adult personality feature based on behavior that is deep-seated, stable, and resistant to change, characteristics unlikely in the constantly fluctuating personality and behavior of adolescents. However, the APA brief further explained, “In a recent study...participants were considerably more likely to support a death sentence when an adolescent offender was described as psychopathic.” Even though many adolescents can display some traits that are similar to psychopathy, this behavior may be very subject to change and simply be transitory adolescent behavior. The APA argued that the sentencing process is not suited to differentiate

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114 Brief for the Juvenile Law Center, 13.
115 Brief for the Juvenile Law Center, 15.
116 Roper v. Simmons, 19.
117 Brief for the American Psychological Association, 3.
120 Ibid.
between this type of developmental adolescent behavior and enduring adult behavior as even mental professionals are unable to do this. Moreover, the American Psychological Association pointed out that the lapse of time that occurs between crime and sentencing can complicate the assessment of an adolescent defendant as they are growing and maturing at a fast rate during this stage of life. In the APA’s view, significant maturation can occur during this time period and complicate capturing the adolescent’s maturity at the time of the offense. The judge and jury will often encounter a person who is different in many relevant ways from the person who committed the crime. This eliminates the opportunity for them to accurately judge the developmental state of the individual accurately at the time of the crime. Even something like exposure to the adult corrections system, which can be quite disparaging, in between the crime and sentencing can have a significant effect on the behavior of a juvenile. Kennedy reiterated this evidence presented by the amici to argue that it is impossible to determine if juvenile irresponsibility is lifelong behavior, even for medical professionals. Jurors therefore cannot determine this either.

Kennedy next related these juvenile characteristics to the social purposes of the death penalty: retribution and deterrence. He explained that both of these purposes are not served. A punishment is not proportionate if the offender has a diminished culpability. According to Kennedy, the retributive purpose is not justified due to juveniles suspected diminished developmental capacity. The American Bar Association concluded that observations from

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121 Ibid, 23.
122 Brief for the American Psychological Association, 24.
124 Ibid, 25.
125 Roper v. Simmons, 19.
127 Ibid.
recent scientific studies showed that retribution and deterrence rationales did not apply due to juvenile's lessened moral responsibility. The American Psychological Association similarly noted that increased research on brain development brings forth new evidence against the purposes of retribution and deterrence. The American Psychological Association further believed that the death penalty, the highest degree of societal retribution, is not justified with lessened culpability as the severity of punishment should be proportional to the culpability of the offender. Kennedy also argued that it is unknown whether or not the death penalty deters juveniles, but it is known that they are generally less likely to analyze the situation and make decisions based on possible consequences. The American Bar Association wrote that research has failed to establish whether juveniles are deterred by the threat of adult punishment, and it seems unlikely that it would due to the fact that juveniles are less likely to process information about consequences and control their impulses based on the potential consequences. Kennedy’s argument against the sentence’s fulfillment of the retribution and deterrence rationales were influenced heavily by the opinions of the amici.

The American Medical Association and the American Psychological Association unsurprisingly made the strongest and most extensive arguments in favor of social science and the studies that experts in their fields have conducted regarding juvenile behavior. The European Union made no such argument using social science or even the characteristics of juveniles. All of the studies in sum reiterated that science proves that when sentencing juveniles, they are

129 Brief for the American Bar Association, 5.
130 Brief for the American Psychological Association, 13.
131 Roper v. Simmons, 21.
132 Brief for the American Bar Association, 14-15.
typically less culpable due to their inherent characteristics. This formed the basis of Kennedy’s argument that emphasized the characteristics of the criminal in determining proportionality.

**Legitimacy of International Opinion**

The majority opinion defended the legitimacy of international opinion in evaluating evolving standards of decency. Kennedy used evidence from amicus briefs dealing with international consensus in his argument. These briefs argued that the world community disagrees with the juvenile death penalty, an indication that widespread standards of decency are opposed to this penalty. In considering this international consensus, a majority of the Court’s justices questioned why the United States was still continuing these practices in the face of so much opposition.

Appendix B of the European Union brief included a Statement of Interest from the Government of Mexico. This Statement of Interest attested that Mexico shared the opinion of the European Union as a member of the international community, but also had a specific interest in the issue as three of the seventy-three juvenile offenders currently on death row in the U.S. were Mexican nationals. The Government of Mexico’s support of international customary human rights law was combined with its desire to protect the rights of their nationals who were on death row.

International opinion was useful in confirming an already existing national consensus, claimed Kennedy. According to the European Union and mentioned throughout some of the other briefs, there is an international consensus against the execution of juveniles under the age

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133 Brief for the European Union, 2a.
of eighteen.\textsuperscript{134} The American Bar Association also specifically mentioned that international consensus was something that may be looked at in determining legal standards.\textsuperscript{135}

Kennedy defended the use of international consensus by stating that it was used to confirm Eighth Amendment interpretation in past cases.\textsuperscript{136} This is reflected in the argument made by the European Union. They stated that the Supreme Court had looked towards international opinion in the past when American society itself appeared to be against a practice as well. The European Union referenced \textit{Thompson v. Oklahoma} (1988), the case that abolished the death penalty for juveniles under sixteen, as an example of this consideration of international opinion.\textsuperscript{137} Although many varying countries joined the brief, the European Union is not representative of the world and certain countries were not included.

Kennedy further attested that the U.S. and Somalia were the only countries that continued to allow juvenile death penalty.\textsuperscript{138} The American Bar Association brief also referenced this fact, indicating that the United States was the only country that openly executed juvenile offenders.\textsuperscript{139} The Juvenile Law Center presented this to the majority by stating that the world community is unanimously opposed to the harsh punishments in question here.\textsuperscript{140} The European Union brief argued that the United States’ permission of the juvenile death penalty was contrary to the practices of almost all other nations.\textsuperscript{141} The European Union argued this by citing the recent significant decrease of countries that still permitted the practice.\textsuperscript{142} The brief added

\begin{itemize}
\item \textsuperscript{134} Ibid, 6.
\item \textsuperscript{135} Brief for the American Bar Association, 20.
\item \textsuperscript{136} \textit{Roper v. Simmons}, 21.
\item \textsuperscript{137} Brief for the European Union, 7.
\item \textsuperscript{138} \textit{Roper v. Simmons}, 21.
\item \textsuperscript{139} Brief for the American Bar Association, 20-21.
\item \textsuperscript{140} Brief for the Juvenile Law Center, 20.
\item \textsuperscript{141} Brief for the European Union, 8.
\item \textsuperscript{142} Ibid, 9.
\end{itemize}
that even in countries that have continued the practice, efforts have been made towards its abolition. Due to this, the European Union charged the United States with standing virtually alone in a world that is morally against the juvenile death penalty.\textsuperscript{143} The majority echoed this exact argument, stating, “In sum, it is fair to say that the United States now stands alone in a world that has turned its face against the juvenile death penalty” (Kennedy, 23).\textsuperscript{144}

To further their argument, the European Union drew attention to the international human rights treaties that prohibit the sentencing practice. The brief focused on the United Nations Convention on the Rights of the Child, which stands against capital punishment for juveniles under eighteen. The United States signed this treaty in 1995, effectively joining it.\textsuperscript{145} Kennedy’s majority opinion referenced Article 37 of United Nations Convention on the Rights of the Child and claimed that this Convention was ratified by every country in the world.\textsuperscript{146} The European Union presented Kennedy with the evidence regarding the content of the treaty. The Union’s brief insisted that this treaty was the most widely ratified human rights treaty in the world. Its global recognition placed it at the forefront of human rights treaties.\textsuperscript{147} Kennedy acknowledged the role of the amici in providing him this treaty information.\textsuperscript{148}

The brief submitted by the European Union was entirely focused on the legitimacy of international opinion. The European Union had a significant interest in self-promotion. The Union did so by positioning themselves as part of a greater worldwide community that has recognized the immorality of this practice. In summary, the European Union believed that, “The abolition of the death penalty contributes to the enhancement of human dignity and the

\textsuperscript{143} Ibid, 11.
\textsuperscript{144} \textit{Roper v. Simmons}
\textsuperscript{145} Brief for the European Union, 12.
\textsuperscript{146} \textit{Roper v. Simmons}, 21.
\textsuperscript{147} Brief for the European Union, 12
\textsuperscript{148} \textit{Roper v. Simmons}, 22.
progressive development of human rights”\textsuperscript{149} The majority was influenced by this international consensus and asserted its legitimacy in their argument. Kennedy reasoned that evolving standards of decency in modern society were morally against the death penalty for juveniles as indicated by the international consensus.

\textbf{Societal Shifts}

The majority opinion looked to developments in law and society to expand the meaning of national consensus. The majority further implemented these societal shifts by arguing that the Judiciary should interpret the Constitution as if it is living and evolving. The amicus briefs identified societal trends granting more leniency towards juveniles in order to confirm that “evolving standards of decency” were moving away from the juvenile death penalty. Kennedy’s ruling assumed that the judicial branch had a duty to identify these shifting ideas in society and prescribe them into the law.

Kennedy asserted that there was parallel evidence of national consensus developing between \textit{Stanford} (1989) and \textit{Roper} (2005), just as had occurred between \textit{Penry} (1989) and \textit{Atkins} (2002). He argued that the majority would be reconsidering \textit{Stanford v. Kentucky}, the precedent that upheld the death penalty for juveniles over the age of fifteen, just as \textit{Atkins v. Virginia} had reconsidered \textit{Penry v. Lynaugh}. \textit{Atkins} had overruled the \textit{Penry} precedent by determining that capital punishment for the intellectually disabled was unconstitutional according to “evolving standards of decency.”\textsuperscript{150} Kennedy drew this parallel from the American

\textsuperscript{149} Brief for the European Union, 1-2.  
\textsuperscript{150} \textit{Roper v. Simmons}, 9.
Bar Association’s reference to Atkins as the precedent that should be used.\textsuperscript{151} Kennedy’s argument incorporated the same rationales that were presented in Atkins v. Virginia regarding the effectiveness of retribution and deterrence in the case of juveniles by comparing the characteristics of juveniles to that of the intellectually disabled. The brief submitted by the American Bar Association opportunistically placed juveniles in the same category as the intellectually disabled in terms of their developmental characteristics in support of a categorical ban on the death penalty for their class of citizens.\textsuperscript{152}

The second half of the argument presented by the American Bar Association addressed national consensus as informed by the measurable factors of state legislation and the rate of capital punishment imposition.\textsuperscript{153} The majority of these prosecutions were concentrated in a single state, Texas, which accounted for almost 60\% of the juvenile death penalty sentences. This concentration suggested that the penalty was not the norm for the rest of the country.\textsuperscript{154} According to the American Bar Association, the legislative developments since Stanford in 1989 constituted a national consensus that necessitated a reconsideration of evolving standards.\textsuperscript{155} The Juvenile Law Center stated that since Stanford, no legislation has eased these restrictions and many states had even adopted new restrictions or increased existing ones.\textsuperscript{156}

The basis of Kennedy’s argument was to determine these evolving standards of decency that mark the progress of a maturing society in order to form the Court’s independent judgement on the case.\textsuperscript{157} He maintained that since the decision in Stanford in 1989, thirty states prohibited

\textsuperscript{151} Brief for the American Bar Association, 4-5.
\textsuperscript{152} Brief for the American Medical Association, 23.
\textsuperscript{153} Brief for the American Bar Association, 18-19.
\textsuperscript{154} Ibid, 19.
\textsuperscript{155} Ibid, 4.
\textsuperscript{156} Juvenile Law Center, 6.
\textsuperscript{157} Roper v. Simmons, 6.
the juvenile death penalty, while twelve states prohibited the death penalty altogether. In the states that permitted the juvenile death penalty, the practice was quite infrequent. Since Stanford, only six states have executed juvenile offenders.158 Kennedy came to the same conclusions regarding national consensus that the amicus briefs did.

According to Kennedy, punishment should be proportioned to the severity of the offense.159 Therefore, the most severe penalties should be reserved for most serious crimes and thus the most culpable offenders. Kennedy reasoned that juveniles, due to their lessened legal responsibility as a result of their immaturity, cannot be classified into the category of the most deserving.160 Kennedy’s argument echoed The American Bar Association’s brief that argued that in order for an offender to deserve capital punishment, the convicted person must possess the highest degree of moral culpability. By the Bar Association’s definition, juveniles cannot be said to possess the level of moral culpability required as they have a lesser culpability than adults.161 In addition, the Juvenile Law Center’s main argument focuses on the idea that “A penalty is constitutionally disproportionate if it is out of step with contemporary societal values…”162 Kennedy repeated the arguments of the amicus briefs in arguing that juvenile capital punishment breaks the proportionality principle.

The argument made by the American Medical Association began with the statement, “The adolescent’s mind works differently from ours. Parents know it. This Court has said it. Legislatures have presumed it for decades or more. And now, new scientific evidence sheds light on the differences”.163 The brief made such broad statements referring to anyone who remembers

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158 Roper v. Simmons, 10.
159 Ibid, 6.
160 Ibid, 11.
161 Brief for the American Bar Association, 5-6.
162 Brief for the Juvenile Law Center, 4.
163 Brief for the American Medical Association, 2.
being a teenager, has been a parent, or even simply observed adolescent behavior. The AMA brief argued that anyone who has been in any of these situations (which covers everyone) would know that it is common sense that adolescents think and behave differently than adults.\textsuperscript{164} The American Psychological Association brief stated that social norms have given adolescence a special status, showing that society recognized them to not yet be mature enough to make certain decisions.\textsuperscript{165} According to APA, this observation is agreed upon across many nations and cultures, proving the inherent and characteristic nature of adolescents.\textsuperscript{166}

The Juvenile Law Center continued, “Many areas of the law have long acknowledged what society (especially parents) has long understood…”\textsuperscript{167} The American Bar Association argued that societal developments since the decision in \textit{Stanford} also showed that under evolving standards of decency, society considers the execution of juveniles cruel and unusual punishment.\textsuperscript{168} Kennedy acknowledged that after the ruling in \textit{Stanford v. Kentucky}, the Governor of Kentucky converted Kevin Stanford’s death sentence to a sentence of life imprisonment because “we ought not to be executing people who, legally, were children” (Kennedy, 11).\textsuperscript{169}

The Juvenile Law Center further emphasized the importance of societal and legal distinctions between juveniles and adults.\textsuperscript{170} Center advocates contended that the mere existence of legal restrictions on the rights and responsibilities of juveniles demonstrated that there was an accepted understanding in society of adolescents’ decreased ability to make mature judgements

\textsuperscript{164} Brief for the American Medical Association, 4.
\textsuperscript{165} Brief for the American Psychological Association, 4-5.
\textsuperscript{166} Ibid, 6.
\textsuperscript{167} Brief for the Juvenile Law Center, 6.
\textsuperscript{168} Brief for the American Bar Association, 4.
\textsuperscript{169} \textit{Roper v. Simmons}.
\textsuperscript{170} Brief for the Juvenile Law Center, 19.
and decisions. As argued, “...Increased legislative restrictions on youth’s participation in activities open to adults evidence a consensus about the incapacities and impairments of youth that make them less culpable...” According to the brief, juveniles lack some of the most fundamental rights of self-determination because society assumed them to be unable to sufficiently care for themselves. The American Bar Association articulated that age-based classifications present in this type of legislation usually use the age of eighteen. The ABA brief inferred that this is the minimum age before juveniles are capable of making rational decisions for which they are able to take responsibility for. Kennedy’s argument reflected this statement, explaining that “The age of 18 is the point where society draws the line for many purposes between childhood and adulthood” (Kennedy, 20). The American Bar Association claimed that because juveniles are less mature, less responsible, more vulnerable, and more impulsive they are not entrusted to the same privileges and responsibilities within society that adults are. The Juvenile Law Center’s further argued, “To exempt capital punishment, which imposes the harshest penalty of all--death--from society’s protection of adolescents from the mistakes of youth in virtually all other arenas, be they weighty or trivial, is illogical at best.” The majority opinion recognized these protective elements in society directed towards juveniles as legitimate evidence against the continuation of the juvenile death penalty.

According to the briefs and as I have argued, to Kennedy, changing legislation since Stanford v. Kentucky indicated that a national consensus against the practice of juvenile capital

171 Ibid, 5.
172 Brief for the Juvenile Law Center, 5.
173 Ibid, 15.
174 Brief for the American Bar Association, 8.
175 Roper v. Simmons.
176 Brief for the American Bar Association, 7-8.
177 Brief for the Juvenile Law Center, 11.
punishment had developed. The amicus briefs further argued that the differences between adults and juveniles in society were widely accepted, as shown through the legal distinctions that restricted the rights and activities of juveniles. Kennedy used these societal and legal distinctions that recognized the immaturity in juvenile decision making to make the case that the juvenile death penalty therefore does not adhere to evolving standards of decency.

Conclusion

The majority opinion in *Roper*, delivered by Justice Kennedy, reflected the positions presented by advocacy organizations in amicus briefs. The judicial process of the majority opinion in *Roper v. Simmons* thereby seemed to rely on arguments established through interest group advocacy. The success of the liberal decision in this case depended to an extent on the application of these extra-legal standards that argued that juveniles are not as responsible, and thus not as morally culpable, as adults. In order to argue this, the advocates looked to social science, international opinion, and societal developments to determine the current standards of decency. In the view of the Court’s majority, evolving standards of decency within society should help determine whether or not the punishment was cruel and unusual. As shown by the textual connections between Justice Kennedy’s opinion and the amicus briefs, the majority accepted the social science evidence, a consideration of international opinion, and overall, a duty to interpret the Eighth amendment according to shifting opinions in society.

179 Heisler, 40.
However, some would argue that this is not the Court’s duty at all. The Court is not a popularly elected representative body. Its constitutional role as the judicial branch is arguably only to apply the law, not to expand on this by making policy. Therefore, the concept of “evolving standards of decency” may not have been theirs to use to create legal standards in the first place. The dissents contested the use of evolving standards to interpret the Eighth Amendment. They were distrustful of scientific research, the consideration of international consensus, and the use of societal distinctions in legal jurisprudence. Due to this skepticism about the use of standards beyond the law, the dissenters argued that law and sentencing should not be adjusted according to a majority opinion within society.
Chapter 3

Critiques of the Majority and Reliance on Social Science

Introduction

The majority opinions of *Roper v. Simmons*, *Graham v. Florida*, and *Miller v. Alabama*, particularly Justice Kennedy’s majority opinion in *Roper*, made extensive references to the liberal amicus briefs submitted for consideration in these cases. With only two briefs submitted in support of capital punishment or life imprisonment for juveniles, and sixteen other briefs generally calling for a categorical rule against juvenile capital punishment, a majority of the justices on the Court concluded that the moral stance of society was of utmost importance in making this decision. These amici arguably took a political position that they were trying to advance regarding juvenile punishment.\(^{180}\) The Court apparently relied on the research presented by these liberal amici to support the majority judgment.\(^ {181}\)

The Court has historically split over whether its own independent judgment can be used in Eighth Amendment analysis.\(^ {182}\) By exercising independent judgment, the Court would make personal judgments based on social science findings in order to decide if these punishments were constitutional. Judicial activism allows for the justices to use their personal judgment, going beyond their traditional role of interpreting the Constitution in order to act on behalf of changing

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\(^ {181}\) Ibid, 369.

views in society. In *Stanford v. Kentucky*, the Court rejected the application of its independent judgment, ruling instead that there was no objective evidence of a modern societal consensus against the juvenile death penalty. In *Atkins* and again in *Roper*, the Court however switched course, relying on its independent conclusions to rule that society had in fact rejected the death penalty for the intellectually disabled. This independent judgment carried out by the majority in *Roper v. Simmons* was based on a deferential reliance on the social science studies provided in the amicus briefs. A broad analysis and generalized conclusions about the maturity of all juveniles led to the requirement for a categorical rule as opposed to individualized sentencing. The consideration of public sentiment also influenced the Court in order to come to its conclusions.

The majority’s relative dependence on the conclusions advanced in these liberal social science oriented briefs did not go unchallenged. In the view of legal scholar Julie Rowe, “The *Roper* Court heavily relied on purported scientific evidence and international opinion, while downplaying the lack of a national consensus against the juvenile death penalty” In doing so, the Court, in the eyes of legal scholar critics such as Rowe and the Court’s dissenters, encroached on core government processes of the legislatures and juries. These critics include Justice Scalia, the author of the major dissent in *Roper*, various legal scholars commenting

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189 Rowe, 288.
190 Ibid.
shortly after the announced Supreme Court ruling, and a selected amicus brief on the side of the petitioner submitted by the Justice for All Alliance. These critics challenged the reasoning of the Court’s majority on several grounds: its use of social science, its reliance upon international opinion, and its defining of national consensus. A good part of this chapter will focus in on the elements of the Justice for All Alliance amicus brief.

**Justice Antonin Scalia’s Originalism**

Justice Antonin Scalia was a Supreme Court Justice appointed in 1986 who adhered to the constitutional theory of originalism as opposed to judicial activism. He authored the strongest dissent in *Roper v. Simmons*. As one admirer of Scalia argued, “More than anyone on or off the Court, Justice Scalia worked to secure the rule of law by restoring originalism as the proper method for deciding cases.” As a self-declared originalist, Scalia rejected the modern concept of a “living Constitution” and the wide discretion of constitutional interpretation that this method gives to justices. He argued that to preserve the legitimacy of the law, judges must make their decisions solely based on the text of the Constitution or written laws as intended by the Framers who wrote or ratified it. The concept of “evolving standards of decency” is not compatible with originalism. In the Eighth Amendment context, as applied to juvenile punishment, Scalia maintained that the Court’s majority was moving away from a historical understanding of the amendment’s implicit meaning of “cruel and unusual punishment.”

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194 Haider, 268.
Scalia, in his dissent in *Roper v. Simmons*, rejected two features of the “liberal” jurisprudence: Supreme Court-centered discretion over sentencing and, more fundamentally, the concept of evolving standards. He claimed that in relying so much on this concept, the Court ignored the original meaning of the Eighth Amendment and overall, the constitutionally defined and limited role of the judicial branch.\(^{195}\)

**Criticisms of the Majority Opinion in *Roper v. Simmons***

The Justice for All Alliance was one out of only two organizations to submit an amicus brief in support of the petitioner. Founded in 1993, the Justice for All Alliance is an all-volunteer nonprofit organization. Its purpose is to support the victims of homicide and violent crime, while advocating for change in the criminal justice system to ensure that the rights of victims and citizens are protected.\(^{196}\) In its brief, the Justice for All Alliance argued that the Court should not establish a categorical rule against the death penalty for juveniles but instead should determine sentences on a case-by-case basis.\(^{197}\) Furthermore, the Alliance believed that if an offender’s level of maturity and the facts of the crime were to be considered, Christopher Simmons would deserve the death penalty.\(^{198}\)

*Eddings v. Oklahoma* (1982), one of the Supreme Court’s first juvenile death penalty cases, established the case-by-case basis argument.\(^{199}\) In this case, the Court ruled that judges must weigh mitigating factors like age, emotional development, and family background before

\(^{195}\) Supreme Court of the United States, *Roper v. Simmons* (Cornell University Law School: Legal Information Institute, March 1 2005), 1.

\(^{196}\) Brief for the Justice for All Alliance, 1.

\(^{197}\) Ibid, 21.

\(^{198}\) Ibid, 28; 4.

\(^{199}\) Rowe, 296; 310.
sentencing a juvenile to death.\textsuperscript{200} The Justice for All Alliance approved of this precedent, arguing that the Court had previously established individual consideration as a constitutional requirement in imposing the death sentence through this case. Therefore, the Court should abide by this precedent and not group all juveniles together as a class simply based on age, as juveniles possess varying levels of maturity.\textsuperscript{201} According to the Justice for All Alliance, the Court should “...embrace the fundamental respect for humanity underlying the Eighth Amendment that requires the Court not group juveniles together as a class but rather acknowledge that they are all different with respect to their experience, maturity, intelligence and moral culpability.”\textsuperscript{202} In arguing against a categorical rule, the brief also argued that the line should not be drawn at the arbitrary age of eighteen. According to this organization, age does not completely define one’s character, judgment, maturity, personal responsibility, or moral guilt.\textsuperscript{203} The brief went so far as to say that if they possess the moral culpability, “Fifteen, sixteen, and seventeen-year-olds can possess the requisite mental state to merit the ultimate penalty.”\textsuperscript{204}

The Justice for All Alliance used the proportionality precept in a different way from the majority. Its brief suggested that to ensure that a punishment is proportionate to the offense, the Court should focus on the moral culpability of that specific offender by considering any relevant mitigating or aggravating factors.\textsuperscript{205} The brief contends, “Yet, the Court ignored the moral culpability of the petitioner because it based its decision on its conclusion that all juveniles are less culpable than adults and therefore do not merit the death penalty.”\textsuperscript{206} According to the

\begin{flushright}
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\textsuperscript{200} Rowe, 297.  \\
\textsuperscript{201} Brief for the Justice for All Alliance, 3.  \\
\textsuperscript{202} Ibid, 2.  \\
\textsuperscript{203} Brief for the Justice for All Alliance, 20.  \\
\textsuperscript{204} Ibid, 22.  \\
\textsuperscript{205} Ibid, 2; 7.  \\
\textsuperscript{206} Ibid, 11.\end{flushright}
Justice for All Alliance, by assuming that a juvenile is always less culpable than an adult, the Court also assumed that the execution of juveniles did not fulfill its purposes of retribution and deterrence. The brief argued that this conclusion had no evidence to support it.\textsuperscript{207} The Justice for All Alliance stated, “Juveniles like Simmons, need to be deterred from committing such an egregious act for the safety of society by being properly punished.”\textsuperscript{208} Furthermore, Simmons knew it was wrong to kill, understood the consequences, and still committed a premeditated murder of an innocent woman. According to this organization, Simmons deserved his life to be taken as a result of his brutal and intentional taking of an innocent life, proving retribution. Furthermore, the Alliance reasoned that his execution would send a message deterring other juveniles.\textsuperscript{209} To the advocates in this brief, Simmons’s belief that his youth would allow him to get away with the crime was proof that the capital punishment is necessary in order to have a deterrence effect on juveniles.\textsuperscript{210}

Justice Scalia echoed these arguments in his dissent in \textit{Roper}. In the dissent, he similarly criticized the majority’s loose generalizations about the culpability of youth.\textsuperscript{211} He asserted that in claiming that the death penalty does not serve its goals of retribution and deterrence, the Court was simply extending these generalizations.\textsuperscript{212}

\begin{footnotes}
\item[207]Brief for the Justice for All Alliance, 12.
\item[208]Ibid.
\item[209]Ibid, 4.
\item[210]Ibid.
\item[211]\textit{Roper}, 15.
\item[212]Ibid.
\end{footnotes}
Acceptance of Social Science Credibility

In regards to social science, the brief submitted by the Justice for All Alliance pointed out that the elements of the social scientific evidence the Court referenced were contradictory. According to this organization, the Court interpreted evidence concerning juvenile culpability differently in two cases. The decision in *Thompson v. Oklahoma* (1988), judged juveniles under the age of sixteen to be less blameworthy as a result of their difficulty in evaluating consequences and the likelihood that their actions were motivated by emotion or peer pressure.\(^{213}\) This is the same evidence reintroduced in *Roper*. However, the majority opinion in *Stanford* rejected this argument.\(^{214}\) The Justice for All Alliance brief disputed the social science evidence, arguing that, “Juveniles can form the requisite intent to kill, and are able to both understand the consequences of their actions and conform their conduct to civilized standards. In fact, juveniles are mature enough to understand and know that murdering another person is wrong.”\(^{215}\) According to the Justice for All Alliance, juveniles are capable of understanding right from wrong and what the consequences of their actions will be.\(^{216}\)

The brief further pointed to another instance of contradictory evidence that the American Psychological Association presented. In *Hodgson v. Minnesota* (1990), the Court used evidence provided by the APA to conclude that juveniles were mature enough to decide to obtain an abortion without parental consent. In this case, the Association claimed that by age fourteen, most adolescents have developed adult like capacities. The American Psychological Association took the opposite stance in its brief for *Roper*, claiming instead that juveniles are not mature

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\(^{214}\) *Roper*, 26.

\(^{215}\) Ibid, 22.

\(^{216}\) Ibid, 3.
enough to deserve the death penalty.\textsuperscript{217} The Justice for All Alliance recognized this conflicting evidence, stating, “This conflicting testimony illustrates that studies regarding juveniles are continually fluctuating, changing, and subject to different interpretations.”\textsuperscript{218} When Scalia, in his \textit{Roper} dissent, responded to the majority’s interpretation of social science, he also argued that legislatures are better qualified than courts to evaluate the oftentimes conflicting results of social science.\textsuperscript{219} He noted the shortcomings of social science research in legal jurisprudence, arguing, “Given the nuances of scientific methodology and conflicting views, courts—which can only consider the limited evidence on the record before them—are ill equipped to determine which view of science is the rights one” (Scalia, 12).

Other critics echo similar arguments regarding the \textit{Roper} majority’s flawed reliance on social science evidence. Aliya Haider, in her 2006 article, “\textit{Roper v. Simmons}: The Role of the Science Brief,” asserts that the scientific findings of the amicus briefs were central to \textit{Roper}’s argument and that the majority author, Justice Kennedy, heavily quoted this research as uncontested evidence in the majority opinion.\textsuperscript{220} However, as one author notes in the \textit{UCLA Law Review} in 2005, “The science of human development is hardly capable of claiming inescapable empirical conclusions.”\textsuperscript{221} Furthermore, there is a debate over whether discrete stages of human development even exist. The American Psychological Association itself has admitted that adolescence is an inexact period with a wide range of behaviors. Like the Justice for All Alliance, not everyone recognizes psychological causes as a factor for all juvenile crime.\textsuperscript{222} In addition, likening juveniles to the intellectually disabled, as the majority in \textit{Roper} does, is

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\begin{itemize}
\item \textsuperscript{217} Brief for the Justice for All Alliance, 27.
\item \textsuperscript{218} Ibid.
\item \textsuperscript{219} \textit{Roper}, 12.
\item \textsuperscript{220} Haider, 369; 376.
\item \textsuperscript{221} Alford, 13.
\item \textsuperscript{222} Ibid.
\end{itemize}
arguably flawed, according to critic Julie Rowe in her article criticizing the “untimely death” of the juvenile death penalty. She notes that while the intellectually disabled all share common characteristics, juvenile characteristics are only defined by their age. Thus, as a class, they are not defined by any such specific impairments.\footnote{Rowe, 313.} Therefore, Rowe claims that since their maturity levels differ, one cannot say that no one in this class can be held accountable.\footnote{Mazingo, 287.}

Even if social science is indeed a reliable standard in justifying the legal distinction between juveniles and adults, critics nevertheless maintain that \textit{Roper} was still based on elements of inconclusive or irrelevant evidence.\footnote{Rowe, 309.} Deborah Denno, in “The Scientific Shortcomings of \textit{Roper v. Simmons},” argues that the majority accepted the reliability of the research and did not consult additional research beyond the briefs.\footnote{Denno, 384; 388.} She notices that the research that was cited in the majority opinion was also mentioned in the briefs.\footnote{Ibid, 387.} In addition, much of what was cited was based on older material that did not fully reflect the most updated credible ideas.\footnote{Ibid, 382.} Furthermore, she remarks that some of the quotes that the majority used were selected in a way that did not fully portray what the original author meant.\footnote{Denno, 386.} Denno compares the use of social science evidence in \textit{Thompson} to that of \textit{Roper}, arguing that the Court reused citations that had been offered in previous cases like \textit{Thompson v. Oklahoma}, instead of adding new social science insights. For example, the Court cited, “... one psychoanalytically oriented, decades-old book that some considered already dated when it was published”\footnote{Ibid, 295.} Furthermore, the \textit{Roper} Court did not sufficiently acknowledge any limitations of the research they used, which in Denno’s opinion

\begin{thebibliography}{99}
\bibitem{Rowe} Rowe, 313.
\bibitem{Mazingo} Mazingo, 287.
\bibitem{Rowe} Rowe, 309.
\bibitem{Denno} Denno, 384; 388.
\bibitem{Ibid} Ibid, 387.
\bibitem{Ibid} Ibid, 382.
\bibitem{Denno} Denno, 386.
\bibitem{Ibid} Ibid, 295.
\end{thebibliography}
would have made their argument more credible.\textsuperscript{231} This is especially concerning to Denno due to the rapid rate of social scientific discovery and expanding knowledge.\textsuperscript{232} She states that the \textit{Thompson} Court referenced a variety of studies while the \textit{Roper} Court did not articulate any explanation behind the studies it chose to rely on. Besides the generic citations to the amicus briefs, there was a scarcity of social science support found relevant by the majority.\textsuperscript{233} Scalia’s dissent recognizes this reuse of social science evidence from earlier cases.\textsuperscript{234} In referring to the social science evidence that the majority used, Scalia claimed, “The Court unsurprisingly finds no support for this astounding proposition, save its own case law” (Scalia, 15). In relying so heavily on the amicus briefs, the majority, these critics contend, seemingly did not add much of their own reflection or insight on the reliability the social science.\textsuperscript{235}

\textbf{International Pressure}

One of the most visible components in \textit{Roper v. Simmons} was international pressure.\textsuperscript{236} However, another intense argument also apparent in law review articles concerns whether international law should play a role in Eighth Amendment jurisprudence.\textsuperscript{237} The Justice for All Alliance made no reference to international opinion as a factor in deciding \textit{Roper v. Simmons}. A potential explanation for this comes from Scalia’s assertion that the Court only considers international opinion when it supports the argument that one party wants to make.\textsuperscript{238}

\textsuperscript{231} Denno, 394-95.  
\textsuperscript{232} Ibid, 396.  
\textsuperscript{233} Ibid, 394.  
\textsuperscript{234} \textit{Roper}, 15.  
\textsuperscript{235} Denno, 381.  
\textsuperscript{236} Rowe, 314.  
\textsuperscript{238} Rowe, 309.
dissent in *Roper*, Scalia argued that, “What these foreign sources ‘affirm,’ rather than repudiate, is the Justices’ own notion of how the world ought to be, and their diktat that is shall be so henceforth in America.”

Justice Scalia himself greatly opposed the use of international opinion in American jurisprudence. He believed that the Court should implement the Constitution according to American principles and a moral consensus of the American people. To Scalia, foreign laws should not help the Court determine the meaning of the Eighth Amendment. In his dissent, he claimed that there are many differences between the laws of the U.S. and the laws of other countries and that the Court has ignored the views of other nations in many other cases.

Legal scholar critics, such as Rowe, agree with Scalia’s stance on international opinion’s place in American legal jurisprudence. Rowe states: “The foundational principles on which the United States was built differ substantially from those of many other countries in the world; therefore, American standards should not be determined by foreign legal standards.” An additional critic of Kennedy’s use of international consensus, Robert Sinnott, argued that, “His opinion commanded local cultural practices to give way to the majoritarian beliefs of the international community.” Sinnott reasons that looking to international consensus in this case undermines the democratic processes of the United States, which is built to represent local values. In doing so, the Court declares itself the judge of the Nation’s moral standards, disregarding the legislative role. Scalia recognized this in his dissent as well, stating, “The

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239 *Roper*, 23.
240 Sinnott, 148-49.
241 *Roper*, 2.
243 Rowe, 316-17.
244 Sinnott, 153.
245 Ibid.
Court thus proclaims itself sole arbiter of our Nation’s moral standards—and in the course of discharging that awesome responsibility purports to take guidance from the views of foreign courts and legislatures.”^246 Critics point out how international opinions in *Roper* were used only to support the conclusion the Court had already come to.

**A Disputed Concept of National Consensus**

The amicus brief submitted by the Justice for All Alliance argued that although the Court reasoned that it should look to objective evidence from state legislation, the Court had not set any guidelines to determine how many states constitute a national consensus. As a result, the brief claimed, the justices’ own opinions determined what constituted a national consensus.^247 In a similar way, Scalia argued that standards of decency had not evolved according to legislative trends but instead that the majority’s personal judgment determined the decision.^248 Differing from Scalia in this respect, the Justice for All Alliance recognized the legitimacy of evolving standards of decency but argued that the national consensus analysis in this case was not reflecting society.^249 According to the Alliance, “This contradicts the purposes behind the evolving standards of decency doctrine because the decision is not based on what society deems acceptable, but rather what the justices deem appropriate.”^250 Because the Justice for All Alliance had a significant interest in protecting the rights of victims, it emphasized this viewpoint in its brief. The brief states, “The Court failed to consider society’s moral outrage at

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^246 *Roper*, 2.
^247 Brief for the Justice for All Alliance, 13.
^249 Brief for the Justice for All Alliance, 28.
^250 Ibid, 25.
petitioner’s conduct, the atrociousness of the crime, his moral culpability and the emotions of the victim’s family in its decision.” According to this perspective, American society relies on the judicial system to administer justice, not grant leniency to murderers.

In addition, other critics contested the majority’s use of infrequency of sentencing in claiming consensus. According to Alford and Rowe, all that infrequency proved was that the sentence was being appropriately recognized as only applicable in extreme cases after considering the mitigating factors of age and maturity. Scalia made this argument as well, noting that infrequency could have resulted from juries successfully doing their duty of considering youth as a mitigating factor. According to Scalia, exceptional cases should be treated exceptionally because murder is more than just an immature act. Furthermore, the fact that the Senate and the President reserved the right of states to continue the practice of sentencing juveniles to death when ratifying the International Covenant on Civil and Political Rights was evidence of federal consensus. Scalia recognized this evidence of federal consensus in his dissent as proof that the country had not reached national consensus against the practice.

Legal scholar Jason Mazingo reiterates these problems with the national consensus standard in his 2005 article “Roper v. Simmons: The Height of Hubris”, noting that the Court has not been able to define precisely what the national consensus standard is, contributing to an uncertain application. He further argues that since legislatures are the representatives of the people, they are the best way to determine national consensus. However, he has noticed that

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251 Brief for the Justice for All Alliance, 12.
252 Ibid, 18.
253 Alford, 15; Rowe, 310.
254 Roper, 8.
256 Ibid, 17.
257 Mazingo, 283.
258 Ibid, 286.
recently some justices have interpreted national consensus very broadly in considering public opinion as a factor.\textsuperscript{259} Sinnott joins this opinion in pointing out that during the sixteen years since \textit{Stanford}, little legislative change had occurred. In fact, 40\% of the states still permitted the practice.\textsuperscript{260} Due to the apparent lack of legislative national consensus in \textit{Roper}, Mazingo reasons that the Court relied on its own judgment in favor of its own concept of decency.\textsuperscript{261}

\textit{Roper} set the precedent for the two juvenile punishment cases to follow, \textit{Graham v. Florida} (2010) and \textit{Miller v. Alabama} (2012). Consequently, the majority opinion and dissents in \textit{Roper} provided a basis for similar arguments in the rest of the cases dealing with juvenile punishment. Dissenters in \textit{Roper v. Simmons, Graham v. Florida, and Miller v. Alabama} believed that, in these juvenile punishment cases, the majority justices interpreted the Eighth Amendment according to what they thought the law should be, not what it is. Mazingo remarks that, “...the Court is not concerned with the Constitutional requirements as much as with its own conceptions of decency.”\textsuperscript{262} In doing this, dissenters argued that the Court appropriated the duties of legislatures and juries. The Court made its own legislative judgments, eliminating the legislatures’ power to legislate according to the interests of their constituents.\textsuperscript{263}

Scalia strongly asserted that legislatures, not the judiciary, should respond to the will of the people and incorporate their values into law.\textsuperscript{264} Moreover, he argued that the majority undermined the foundations of the sentencing system by not trusting juries to accurately weigh mitigating factors in assessing the culpability of juveniles.\textsuperscript{265} In the past, the Court recognized

\begin{itemize}
\item \textsuperscript{259} Mazingo, 284.
\item \textsuperscript{260} Sinnott, 151.
\item \textsuperscript{261} Mazingo, 285.
\item \textsuperscript{262} Ibid, 287.
\item \textsuperscript{263} Rowe, 311.
\item \textsuperscript{264} \textit{Roper}, 10.
\item \textsuperscript{265} Ibid, 14.
\end{itemize}
the importance of deferring to legislatures and juries in dealing with the Eighth Amendment.\textsuperscript{266} According to Scalia, as a result of these juvenile punishment cases, the Eighth Amendment has become a mirror of changing sentiments in society about punishment. The same text is now interpreted differently according to setting, making it unreliable and unstable.\textsuperscript{267} In broadening what constitutes objective evidence, the Court relied instead on society’s morality, or what they prescribed to be the standards of decency. Although the preponderant liberal amicus briefs appeared to present a society where standards of decency had evolved against the practice of the juvenile death penalty, the existence of all this criticism challenges this presumed notion of unanimity.

\textsuperscript{266} Rowe, 311.
\textsuperscript{267} Roper, 24.
Conclusion

Americans seem to increasingly classify childhood as a separate age-based social category that is distinct from adulthood. Social scientific evidence on adolescent development has provoked arguments regarding children’s place within society and specifically, within the justice system. This increasingly liberal attitude towards juvenile punishment overlaps with Eighth Amendment jurisprudence in three major Supreme Court cases: *Roper v. Simmons* (2005), *Graham v. Florida* (2010), and *Miller v. Alabama* (2012). *Roper v. Simmons* established the precedent of leniency towards juveniles by abolishing the death penalty for minors under eighteen years of age. *Graham v. Florida* and *Miller v. Alabama* followed, establishing that life imprisonment for juveniles for a non-homicidal crime and mandatory life imprisonment for a homicidal crime were unconstitutional, respectively.

After close analysis of these cases concerning juvenile justice, it becomes clear that a majority of the justices on the Supreme Court did not adhere to an originalist interpretation of the text of the Eighth Amendment’s cruel and unusual punishment clause, but instead looked towards society’s classification of juveniles as a separate class as a determining factor in the rulings. The Court’s majority relied on the concept of “evolving standards of decency,” resolving that society’s current ideas about juveniles’ place within both the nation and the world rendered harsh punishments as cruel and unusual and thus against the Eighth Amendment of the
Constitution. The role of social science evidence in validating children’s place in both law and society was especially important for the Court’s majorities.

The majority opinions dealt with the social science evidence presented throughout the amicus briefs in ways that may be seen as innovative. Previous cases like Thompson v. Oklahoma in 1988 approached social science in a more measured and critical way. Stanford v. Kentucky in 1989 did not accept social science evidence as valid. However, the majority in Roper and then following in Graham and Miller, apparently accepted with less reservation the validity of the social science it was presented with, as shown by the overlapping logic in the briefs and the majority’s decision. This potentially represents a change in the way that the Court readily depends on the rapidly advancing scientific research in determining standards in society.

The majority justices in these three juvenile punishment cases found that many areas of society had recognized fundamental differences between juveniles and adults. Even confronted with the issues surrounding social science, the majority opinions looked to the evidence presented in amicus briefs to prove that evolving standards of decency indicated a societal consensus against harsh juvenile punishment.
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