

## Majority Opinion, *Roper v. Simmons*

**J**ustice Kennedy delivered the opinion of the Court.

This case requires us to address, for the second time in a decade and a half, whether it is permissible under the Eighth and Fourteenth Amendments to the Constitution of the United States to execute a juvenile offender who was older than 15 but younger than 18 when he committed a capital crime. In *Stanford v. Kentucky*, 492 U.S. 361, 106 L. Ed. 2d 306, 109 S. Ct. 2969 (1989), a divided Court rejected the proposition that the Constitution bars capital punishment for juvenile offenders in this age group. We reconsider the question. . . .

### I

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The provision is applicable to the States through the Fourteenth Amendment. As the Court explained in *Atkins*, the Eighth Amendment guarantees individuals the right not to be subjected to excessive sanctions. The right flows from the basic "precept of justice that punishment for crime should be graduated and proportioned to [the] offense." By protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons.

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

In *Thompson v. Oklahoma*, a plurality of the Court determined that our standards of decency do not permit the execution of any offender under the age of 16 at the time of the crime. The plurality opinion explained that no death penalty State that had given express consideration to a minimum age for the death penalty had set the age lower than 16. The plurality also observed that "[t]he conclusion that it would offend civilized standards of decency to execute a person who was less than 16 years old at the time of his or her



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

## II

### A

The evidence of national consensus against the death penalty for juveniles is similar, and in some respects parallel, to the evidence *Atkins* held sufficient to demonstrate a national consensus against the death penalty for the mentally retarded. When *Atkins* was decided, 30 States prohibited the death penalty for the mentally retarded. This number comprised 12 that had abandoned the death penalty altogether, and 18 that maintained it but excluded the mentally retarded from its reach. By a similar calculation in this case, 30 States prohibit the juvenile death penalty, comprising 12 that have rejected the death penalty altogether and 18 that maintain it but, by express provision or judicial interpretation, exclude juveniles from its reach. *Atkins* emphasized that even in the 20 States without formal prohibition, the practice of executing the mentally retarded was infrequent. Since *Penry*, only five States had executed offenders known to have an IQ under 70. In the present case, too, even in the 20 States without a formal prohibition on executing juveniles, the practice is infrequent. Since *Stanford*, six States have executed prisoners for crimes committed as juveniles. In the past 10 years, only three have done so: Oklahoma, Texas, and Virginia. In December 2003, the Governor of Kentucky decided to spare the life of Kevin Stanford and commuted his sentence to one of life imprisonment without parole, with the declaration that "[w]e ought not be executing people who, legally, were children." By this act the Governor ensured Kentucky would not add itself to the list of States that have executed juveniles within the last 10 years even by the execution of the very defendant whose death sentence the Court had upheld in *Stanford v. Kentucky*.

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

Though less dramatic than the change from *Penry* to *Atkins* ("telling," to borrow the word *Atkins* used to describe this difference), we still consider the change from *Stanford* to this case to be significant. As noted in *Atkins*, with

respect to the States that had abandoned the death penalty for the mentally retarded since *Penry*, "[i]t is not so much the number of these States that is significant, but the consistency of the direction of change." In particular we found it significant that, in the wake of *Penry*, no State that had already prohibited the execution of the mentally retarded had passed legislation to reinstate the penalty. The number of States that have abandoned capital punishment for juvenile offenders since *Stanford* is smaller than the number of States that abandoned capital punishment for the mentally retarded after *Penry*; yet we think the same consistency of direction of change has been demonstrated. Since *Stanford*, no State that previously prohibited capital punishment for juveniles has reinstated it. This fact, coupled with the trend toward abolition of the juvenile death penalty, carries special force in light of the general popularity of anticrime legislation, and in light of the particular trend in recent years toward cracking down on juvenile crime in other respects. Any difference between this case and *Atkins* with respect to the pace of abolition is thus counterbalanced by the consistent direction of the change. . . .

As in *Atkins*, the objective indicia of consensus in this case—the rejection of the juvenile death penalty in the majority of States; the infrequency of its use even where it remains on the books; and the consistency in the trend toward abolition of the practice—provide sufficient evidence that today our society views juveniles, in the words *Atkins* used respecting the mentally retarded, as "categorically less culpable than the average criminal."

## B

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

Because the death penalty is the most severe punishment, the Eighth Amendment applies to it with special force. Capital punishment must be limited to those offenders who commit "a narrow category of the most serious crimes" and whose extreme culpability makes them "the most deserving of execution." This principle is implemented throughout the capital sentencing process. States must give narrow and precise definition to the aggravating factors that can result in a capital sentence. In any capital case a defendant has wide latitude to raise as a mitigating factor "any aspect of [his or her] character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." There are a number of crimes that beyond question are severe in absolute terms, yet the death penalty may not be imposed for their commission. The death penalty may not be imposed on certain classes of offenders, such as juveniles under 16, the insane, and the mentally retarded, no matter how heinous the crime. These rules vindicate the underlying principle that the death penalty is reserved for a narrow category of crimes and offenders.

Three general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders. First, as any parent knows and as the scientific and sociological

studies  
and an  
than in  
often re  
noted th  
egory of  
irrespon  
of age fr

Th  
suscepti  
sure. ("[  
of life w  
ical dan  
juvenile  
environ

Th  
formed  
tory, les

Th  
among  
irrespon  
reprehe  
lack of  
greater  
ences ir  
define t  
nous cri  
acter. Fr  
a minor  
characte  
mitigati  
transien  
domina

Or  
that the  
lesser fo  
served t  
prospec  
culpabil  
sanctior  
offende  
follow f  
an att  
the bala  
with a  
most se  
is dimir

ishment...?

the mentally  
States that is  
particular we  
ready prohibi-  
on to reinstate  
al punishment  
of States that  
Penry; yet we  
demonstrated.  
ishment for  
ward abolition  
general popu-  
rend in recent  
ts. Any differ-  
olition is thus

ase—the rejec-  
ie infrequency  
istency in the  
nce that today  
g the mentally  
al.”

th penalty on  
by the Eighth

nt, the Eighth  
it must be lim-  
e most serious  
st deserving of  
ital sentencing  
ggravating fac-  
defendant has  
her] character  
lefendant prof-  
nber of crimes  
h penalty may  
ot be imposed  
nsane, and the  
s vindicate the  
arrow category

adults demon-  
ied among the  
nd sociological

studies respondent and his *amici* cite tend to confirm, “[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.” It has been noted that “adolescents are overrepresented statistically in virtually every category of reckless behavior.” In recognition of the comparative immaturity and irresponsibility of juveniles, almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent.

The second area of difference is that juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure. (“[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage”). This is explained in part by the prevailing circumstance that juveniles have less control, or less experience with control, over their own environment.

The third broad difference is that the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed.

These differences render suspect any conclusion that a juvenile falls among the worst offenders. The susceptibility of juveniles to immature and irresponsible behavior means “their irresponsible conduct is not as morally reprehensible as that of an adult.” Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment. The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character. From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor’s character deficiencies will be reformed. Indeed, “[t]he relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuosity and recklessness that may dominate in younger years can subside.”

Once the diminished culpability of juveniles is recognized, it is evident that the penological justifications for the death penalty apply to them with lesser force than to adults. We have held there are two distinct social purposes served by the death penalty: “retribution and deterrence of capital crimes by prospective offenders.” As for retribution, we remarked in *Atkins* that “[i]f the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution.” The same conclusions follow from the lesser culpability of the juvenile offender. Whether viewed as an attempt to express the community’s moral outrage or as an attempt to right the balance for the wrong to the victim, the case for retribution is not as strong with a minor as with an adult. Retribution is not proportional if the law’s most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity.

As for deterrence, it is unclear whether the death penalty has a significant or even measurable deterrent effect on juveniles, as counsel for the petitioner acknowledged at oral argument. In general we leave to legislatures the assessment of the efficacy of various criminal penalty schemes. Here, however, the absence of evidence of deterrent effect is of special concern because the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence. In particular, as the plurality observed in *Thompson*, "[t]he likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent." To the extent the juvenile death penalty might have residual deterrent effect, it is worth noting that the punishment of life imprisonment without the possibility of parole is itself a severe sanction, in particular for a young person.

In concluding that neither retribution nor deterrence provides adequate justification for imposing the death penalty on juvenile offenders, we cannot deny or overlook the brutal crimes too many juvenile offenders have committed. Certainly it can be argued, although we by no means concede the point, that a rare case might arise in which a juvenile offender has sufficient psychological maturity, and at the same time demonstrates sufficient depravity, to merit a sentence of death. Indeed, this possibility is the linchpin of one contention pressed by petitioner and his *amici*. They assert that even assuming the truth of the observations we have made about juveniles' diminished culpability in general, jurors nonetheless should be allowed to consider mitigating arguments related to youth on a case-by-case basis, and in some cases to impose the death penalty if justified. A central feature of death penalty sentencing is a particular assessment of the circumstances of the crime and the characteristics of the offender. The system is designed to consider both aggravating and mitigating circumstances, including youth, in every case. Given this Court's own insistence on individualized consideration, petitioner maintains that it is both arbitrary and unnecessary to adopt a categorical rule barring imposition of the death penalty on any offender under 18 years of age.

We disagree. The differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability. An unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death. In some cases a defendant's youth may even be counted against him. In this very case, as we noted above, the prosecutor argued Simmons' youth was aggravating rather than mitigating. While this sort of overreaching could be corrected by a particular rule to ensure that the mitigating force of youth is not overlooked, that would not address our larger concerns.

It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption. As we understand it, this difficulty underlies the rule forbidding psychiatrists from

diagno  
disorde  
ized by  
ing of c  
observi  
under  
should  
a juver  
mits a  
libertie  
mature

D  
always  
from a  
some u  
reach.  
plurali  
*Thomp*  
has no  
under  
poses t  
the lin

### III

Our de  
for offe  
States i  
to the j  
task of  
least fr  
laws of  
interpr  
punish

A  
Nation  
world l  
prohib  
No rati  
execut  
signific

R  
test, th  
juvenil  
the De  
tries ha  
avowal

has a significant or the petitioner itures the assess- re, however, the ecause the same s suggest as well lar, as the plural- fender has made the possibility of extent the juve- orth noting that of parole is itself

rovides adequate rders, we cannot rs have commit- nced the point, ufficient psycho- ent depravity, to hpin of one con- ven assuming the ished culpability mitigating argu- e cases to impose ty sentencing is a he characteristics avating and miti- this Court's own ins that it is both imposition of the

ult offenders are person to receive ptable likelihood ular crime would er of course, even bility, and lack of ith. In some cases is very case, as we ggravating rather rorrected by a part overlooked, that

tiate between the sient immaturity, ble corruption. As psychiatrists from

diagnosing any patient under 18 as having antisocial personality disorder, a disorder also referred to as psychopathy or sociopathy, and which is characterized by callousness, cynicism, and contempt for the feelings, rights, and suffering of others. If trained psychiatrists with the advantage of clinical testing and observation refrain, despite diagnostic expertise, from assessing any juvenile under 18 as having antisocial personality disorder, we conclude that States should refrain from asking jurors to issue a far graver condemnation—that a juvenile offender merits the death penalty. 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.

Drawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules. The qualities that distinguish juveniles from adults do not disappear when an individual turns 18. By the same token, some under 18 have already attained a level of maturity some adults will never reach. For the reasons we have discussed, however, a line must be drawn. The plurality opinion in *Thompson* drew the line at 16. In the intervening years the *Thompson* plurality's conclusion that offenders under 16 may not be executed has not been challenged. The logic of *Thompson* extends to those who are under 18. The age of 18 is the point where society draws the line for many purposes between childhood and adulthood. It is, we conclude, the age at which the line for death eligibility ought to rest. . . .

### III

Our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty. This reality does not become controlling, for the task of interpreting the Eighth Amendment remains our responsibility. Yet at least from the time of the Court's decision in *Trop*, the Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of "cruel and unusual punishments." . . .

As respondent and a number of *amici* emphasize, Article 37 of the United Nations Convention on the Rights of the Child, which every country in the world has ratified save for the United States and Somalia, contains an express prohibition on capital punishment for crimes committed by juveniles under 18. No ratifying country has entered a reservation to the provision prohibiting the execution of juvenile offenders. Parallel prohibitions are contained in other significant international covenants.

Respondent and his *amici* have submitted, and petitioner does not contest, that only seven countries other than the United States have executed juvenile offenders since 1990: Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, the Democratic Republic of Congo, and China. Since then each of these countries has either abolished capital punishment for juveniles or made public disavowal of the practice. Brief for Respondent 49–50. 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.

Though the international covenants prohibiting the juvenile death penalty are of more recent date, it is instructive to note that the United Kingdom abolished the juvenile death penalty before these covenants came into being. The United Kingdom's experience bears particular relevance here in light of the historic ties between our countries and in light of the Eighth Amendment's own origins. The Amendment was modeled on a parallel provision in the English Declaration of Rights of 1689, which provided: "[E]xcessive Bail ought not to be required nor excessive Fines imposed; nor cruel and unusual Punishments inflicted." As of now, the United Kingdom has abolished the death penalty in its entirety; but, decades before it took this step, it recognized the disproportionate nature of the juvenile death penalty; and it abolished that penalty as a separate matter.

It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty, resting in large part on the understanding that the instability and emotional imbalance of young people may often be a factor in the crime. The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.

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



**Antonin E.**

## Dissent

**J**ustice Scalia dissenting.

In urging power to nullify Hamilton's assurance since "[t]he judiciary But Hamilton has and precedents ticular case that today's opinion conclusion that 15 years—not, I that the Constitution purporting to a but to "the evc finds, on the flie be perceived in still, the Court's issue does not, I be brought to t under the Eight our Nation's mo responsibility p legislatures. Bec ment, any mor should be deter and like-minded

**I**

In determining before age 18 is first considers, I jurisprudence, such executions that this deter

Supreme Court of

Antonin E. Scalia



## Dissenting Opinion, *Roper v. Simmons*

**J**ustice Scalia, with whom the Chief Justice and Justice Thomas join, dissenting.

In urging approval of a Constitution that gave life-tenured judges the power to nullify laws enacted by the people's representatives, Alexander Hamilton assured the citizens of New York that there was little risk in this, since "[t]he judiciary . . . ha[s] neither FORCE nor WILL but merely judgment." But Hamilton had in mind a traditional judiciary, "bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them." Bound down, indeed. What a mockery today's opinion makes of Hamilton's expectation, announcing the Court's conclusion that the meaning of our Constitution has changed over the past 15 years—not, mind you, that this Court's decision 15 years ago was *wrong*, but that the Constitution *has changed*. The Court reaches this implausible result by purporting to advert, not to the original meaning of the Eighth Amendment, but to "the evolving standards of decency," of our national society. It then finds, on the flimsiest of grounds, that a national consensus which could not be perceived in our people's laws barely 15 years ago now solidly exists. Worse still, the Court says in so many words that what our people's laws say about the issue does not, in the last analysis, matter: "[I]n the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment." The Court thus proclaims itself sole arbiter of our Nation's moral standards—and in the course of discharging that awesome responsibility purports to take guidance from the views of foreign courts and legislatures. Because I do not believe that the meaning of our Eighth Amendment, any more than the meaning of other provisions of our Constitution, should be determined by the subjective views of five Members of this Court and like-minded foreigners, I dissent.

**I**

In determining that capital punishment of offenders who committed murder before age 18 is "cruel and unusual" under the Eighth Amendment, the Court first considers, in accordance with our modern (though in my view mistaken) jurisprudence, whether there is a "national consensus," that laws allowing such executions contravene our modern "standards of decency." We have held that this determination should be based on "objective indicia that reflect the

Supreme Court of the United States, March 1, 2005.

public attitude toward a given sanction"—namely, "statutes passed by society's elected representatives." As in *Atkins v. Virginia*, the Court dutifully recites this test and claims halfheartedly that a national consensus has emerged since our decision in *Stanford*, because 18 States—or 47% of States that permit capital punishment—now have legislation prohibiting the execution of offenders under 18, and because all of four States have adopted such legislation since *Stanford*.

Words have no meaning if the views of less than 50% of death penalty States can constitute a national consensus. Our previous cases have required overwhelming opposition to a challenged practice, generally over a long period of time. In *Coker v. Georgia*, a plurality concluded the Eighth Amendment prohibited capital punishment for rape of an adult woman where only one jurisdiction authorized such punishment. The plurality also observed that "[a]t no time in the last 50 years ha[d] a majority of States authorized death as a punishment for rape." In *Ford v. Wainwright*, we held execution of the insane unconstitutional, tracing the roots of this prohibition to the common law and noting that "no State in the union permits the execution of the insane." In *Enmund v. Florida*, we invalidated capital punishment imposed for participation in a robbery in which an accomplice committed murder, because 78% of all death penalty States prohibited this punishment. Even there we expressed some hesitation, because the legislative judgment was "neither 'wholly unanimous among state legislatures,' . . . nor as compelling as the legislative judgments considered in *Coker*." By contrast, agreement among 42% of death penalty States in *Stanford*, which the Court appears to believe was correctly decided at the time, was insufficient to show a national consensus.

In an attempt to keep afloat its implausible assertion of national consensus, the Court throws overboard a proposition well established in our Eighth Amendment jurisprudence. "It should be observed," the Court says, "that the *Stanford* Court should have considered those States that had abandoned the death penalty altogether as part of the consensus against the juvenile death penalty . . . ; a State's decision to bar the death penalty altogether of necessity demonstrates a judgment that the death penalty is inappropriate for all offenders, including juveniles." The insinuation that the Court's new method of counting contradicts only "the *Stanford* Court" is misleading. None of our cases dealing with an alleged constitutional limitation upon the death penalty has counted, as States supporting a consensus in favor of that limitation, States that have eliminated the death penalty entirely. And with good reason. Consulting States that bar the death penalty concerning the necessity of making an exception to the penalty for offenders under 18 is rather like including old-order Amishmen in a consumer-preference poll on the electric car. Of course they don't like it, but that sheds no light whatever on the point at issue. That 12 States favor no executions says something about consensus against the death penalty, but nothing—absolutely nothing—about consensus that offenders under 18 deserve special immunity from such a penalty. In repealing the death penalty, those 12 States considered none of the factors that the Court puts forth as determinative of the issue before us today—lower culpability of the young, inherent recklessness, lack of capacity for considered judgment, etc. What might be

relevant, perhaps offenders to be do; indeed, so if they are charitable minority of nomological

Recognizing with our earlier that 16 States in *Penry v. Lynaugh*, ground, explain *Penry*, apparent imposition of the four States is "so amazing to this off the table for

I also doubt laws in those few would (by the pre legislative support throughout our

"The history of setting a settlement in this case. I think the death penalty. . . the trend there since the 1950s and punishment in 19

"In light of the reality of the practice the practice consensus. rejecting the Court's rejection of capital punishment to revive it into common law difficult to

Relying on the fact that a majority support for capital punishment. Though the majority age, both in *Stanford*, had no minimum. The

passed by society's dutifully recites this emerged since our that permit capital ution of offenders h legislation since

% of death penalty ases have required erally over a long he Eighth Amend- woman where only / also observed that uthorized death as ution of the insane e common law and of the insane." In

posed for participa- ler, because 78% of there we expressed ther 'wholly unani- he legislative judg- ong 42% of death lieve was correctly nsensus.

of national consen- shed in our Eighth ourt says, "that the ad abandoned the the juvenile death ltogether of neces- appropriate for all ourt's new method eading. None of our n the death penalty at limitation, States good reason. Con- necessity of making r like including old- ectric car. Of course point at issue. That us against the death that offenders under ig the death penalty, t puts forth as deter- he young, inherent tc. What might be

relevant, perhaps, is how many of those States permit 16- and 17-year-old offenders to be treated as adults with respect to noncapital offenses. (They all do; indeed, some even *require* that juveniles as young as 14 be tried as adults if they are charged with murder.) The attempt by the Court to turn its remarkable minority consensus into a faux majority by counting Amishmen is an act of nomological desperation.

Recognizing that its national-consensus argument was weak compared with our earlier cases, the *Atkins* Court found additional support in the fact that 16 States had prohibited execution of mentally retarded individuals since *Penry v. Lynaugh*. Indeed, the *Atkins* Court distinguished *Stanford* on that very ground, explaining that "[a]lthough we decided *Stanford* on the same day as *Penry*, apparently *only two* state legislatures have raised the threshold age for imposition of the death penalty." Now, the Court says a legislative change in four States is "significant" enough to trigger a constitutional prohibition. It is amazing to think that this subtle shift in numbers can take the issue entirely off the table for legislative debate.

I also doubt whether many of the legislators who voted to change the laws in those four States would have done so if they had known their decision would (by the pronouncement of this Court) be rendered irreversible. After all, legislative support for capital punishment, in any form, has surged and ebbed throughout our Nation's history. As Justice O'Connor has explained:

"The history of the death penalty instructs that there is danger in inferring a settled societal consensus from statistics like those relied on in this case. In 1846, Michigan became the first State to abolish the death penalty. . . . In succeeding decades, other American States continued the trend towards abolition. . . . Later, and particularly after World War II, there ensued a steady and dramatic decline in executions. . . . In the 1950s and 1960s, more States abolished or radically restricted capital punishment, and executions ceased completely for several years beginning in 1968. . . .

"In 1972, when this Court heard arguments on the constitutionality of the death penalty, such statistics might have suggested that the practice had become a relic, implicitly rejected by a new societal consensus. . . . We now know that any inference of a societal consensus rejecting the death penalty would have been mistaken. But had this Court then declared the existence of such a consensus, and outlawed capital punishment, legislatures would very likely not have been able to revive it. The mistaken premise of the decision would have been frozen into constitutional law, making it difficult to refute and even more difficult to reject."

Relying on such narrow margins is especially inappropriate in light of the fact that a number of legislatures and voters have expressly affirmed their support for capital punishment of 16- and 17-year-old offenders since *Stanford*. Though the Court is correct that no State has lowered its death penalty age, both the Missouri and Virginia Legislatures—which, at the time of *Stanford*, had no minimum age requirement—expressly established 16 as the minimum. The people of Arizona and Florida have done the same by ballot

initiative. Thus, even States that have not executed an under-18 offender in recent years unquestionably favor the possibility of capital punishment in some circumstances.

The Court's reliance on the infrequency of executions, for under-18 murderers, credits an argument that this Court considered and explicitly rejected in *Stanford*. That infrequency is explained, we accurately said, both by "the undisputed fact that a far smaller percentage of capital crimes are committed by persons under 18 than over 18," and by the fact that juries are required at sentencing to consider the offender's youth as a mitigating factor. Thus, "it is not only possible, but overwhelmingly probable, that the very considerations which induce [respondent] and [his] supporters to believe that death should never be imposed on offenders under 18 cause prosecutors and juries to believe that it should rarely be imposed."

It is, furthermore, unclear that executions of the relevant age group have decreased since we decided *Stanford*. Between 1990 and 2003, 123 of 3,599 death sentences, or 3.4%, were given to individuals who committed crimes before reaching age 18. By contrast, only 2.1% of those sentenced to death between 1982 and 1988 committed the crimes when they were under 18. As for actual executions of under-18 offenders, they constituted 2.4% of the total executions since 1973. In *Stanford*, we noted that only 2% of the executions between 1642 and 1986 were of under-18 offenders and found that lower number did not demonstrate a national consensus against the penalty. Thus, the numbers of under-18 offenders subjected to the death penalty, though low compared with adults, have either held steady or slightly increased since *Stanford*. These statistics in no way support the action the Court takes today.

## II

Of course, the real force driving today's decision is not the actions of four state legislatures, but the Court's "own judgment" that murderers younger than 18 can never be as morally culpable as older counterparts. The Court claims that this usurpation of the role of moral arbiter is simply a "retur[n] to the rul[e] established in decisions predating *Stanford*." That supposed rule—which is reflected solely in dicta and never once in a *holding* that purports to supplant the consensus of the American people with the justices' views—was repudiated in *Stanford* for the very good reason that it has no foundation in law or logic. If the Eighth Amendment set forth an ordinary rule of law, it would indeed be the role of this Court to say what the law is. 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. On the evolving-standards hypothesis, the only legitimate function of this Court is to identify a moral consensus of the American people. By what conceivable warrant can nine lawyers presume to be the authoritative conscience of the Nation?

The reason for insistence on legislative primacy is obvious and fundamental: "[I]n a democratic society legislatures, not courts, are constituted to

respond to the  
a similar reason  
consulted the pr  
contemporary co  
not claim for its

Today's op  
to make the typ  
support its opin  
penalty on any  
scientific and so  
position. It nev  
sound; none w  
ceeding. As the

"[M]ethod  
of estimate  
from vario  
survey me  
sampling c  
used to int

In other v  
context, is to l

We need  
sions. As petit  
which claims i  
the ability to t  
precisely the o  
*Minnesota*, the  
are mature en  
tal involvement  
numerous to l  
people develop  
understanding  
tionships and  
odology and c  
evidence on th  
of science is th  
uate the result  
with a flexibili

Even put  
Court offer sc  
for murderers  
*most cases*, pe  
actions. Not c  
unable to app

Moreove  
risky or antis

8 offender in  
inishment in

nder-18 mur-  
icly rejected  
both by "the  
re committed  
re required at  
r. Thus, "it is  
onsiderations  
death should  
ies to believe

ie group have  
123 of 3,599  
nitted crimes  
ced to death  
under 18. As  
% of the total  
ie executions  
d that lower  
enalty. Thus,  
; though low  
ed since *Stan-*  
; today.

. of four state  
ounger than  
Court claims  
tur[n] to the  
rule—which  
s to supplant  
is repudiated  
law or logic.  
ld indeed be  
pronounced  
he evolving  
ustices then  
ctices of our  
function of  
le. By what  
ritative con-

and funda-  
nstituted to

respond to the will and consequently the moral values of the people.'" For a similar reason we have, in our determination of society's moral standards, consulted the practices of sentencing juries: Juries "'maintain a link between contemporary community values and the penal system'" that this Court cannot claim for itself.

Today's opinion provides a perfect example of why judges are ill equipped to make the type of legislative judgments the Court insists on making here. To support its opinion that States should be prohibited from imposing the death penalty on anyone who committed murder before age 18, the Court looks to scientific and sociological studies, picking and choosing those that support its position. It never explains why those particular studies are methodologically sound; none was ever entered into evidence or tested in an adversarial proceeding. As the Chief Justice has explained:

"[M]ethodological and other errors can affect the reliability and validity of estimates about the opinions and attitudes of a population derived from various sampling techniques. Everything from variations in the survey methodology, such as the choice of the target population, the sampling design used, the questions asked, and the statistical analyses used to interpret the data can skew the results."

In other words, all the Court has done today, to borrow from another context, is to look over the heads of the crowd and pick out its friends.

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

Even putting aside questions of methodology, the studies cited by the Court offer scant support for a categorical prohibition of the death penalty for murderers under 18. At most, these studies conclude that, *on average*, or *in most cases*, persons under 18 are unable to take moral responsibility for their actions. Not one of the cited studies opines that all individuals under 18 are unable to appreciate the nature of their crimes.

Moreover, the cited studies describe only adolescents who engage in risky or antisocial behavior, as many young people do. Murder, however, is

more than just risky or antisocial behavior. It is entirely consistent to believe that young people often act impetuously and lack judgment, but, at the same time, to believe that those who commit premeditated murder are—at least sometimes—just as culpable as adults. Christopher Simmons, who was only seven months shy of his 18th birthday when he murdered Shirley Crook, described to his friends *beforehand*—“[i]n chilling, callous terms,” as the Court puts it—the murder he planned to commit. He then broke into the home of an innocent woman, bound her with duct tape and electrical wire, and threw her off a bridge alive and conscious. In their *amici* brief, the States of Alabama, Delaware, Oklahoma, Texas, Utah, and Virginia offer additional examples of murders committed by individuals under 18 that involve truly monstrous acts. In Alabama, two 17-year-olds, one 16-year-old, and one 19-year-old picked up a female hitchhiker, threw bottles at her, and kicked and stomped her for approximately 30 minutes until she died. They then sexually assaulted her lifeless body and, when they were finished, threw her body off a cliff. They later returned to the crime scene to mutilate her corpse. Other examples in the brief are equally shocking. Though these cases are assuredly the exception rather than the rule, the studies the Court cites in no way justify a constitutional imperative that prevents legislatures and juries from treating exceptional cases in an exceptional way—by determining that some murders are not just the acts of happy-go-lucky teenagers, but heinous crimes deserving of death.

That “almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent,” is patently irrelevant—and is yet another resurrection of an argument that this Court gave a decent burial in *Stanford*. (What kind of Equal Justice under Law is it that—without so much as a “Sorry about that”—gives as the basis for sparing one person from execution arguments *explicitly rejected* in refusing to spare another?) As we explained in *Stanford*, it is “absurd to think that one must be mature enough to drive carefully, to drink responsibly, or to vote intelligently, in order to be mature enough to understand that murdering another human being is profoundly wrong, and to conform one’s conduct to that most minimal of all civilized standards.” Serving on a jury or entering into marriage also involve decisions far more sophisticated than the simple decision not to take another’s life.

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

much more com-  
cent person in c

The Court  
delicate task of  
ing and aggrav-  
mines the very l  
juries with “ma-  
codification and  
system.” The C  
cance of a defer  
assertion is base  
edges that the  
States “without  
that juries take  
factor.

Nor does t  
cannot make ap  
18, in what oth  
already held th  
ant can receive  
mitigating facto  
from juries as v  
blooded nature  
tors either.

The Court  
not served by e  
argument that  
alty is imposed  
is simply an ex  
defeats culpabil  
to deterrence,”  
the kind of cos  
of execution is  
prisingly finds  
law. The facts c  
mitting the cri  
them that they  
may have influ  
Simmons’ age.  
own unsubstan  
this evidence ei

### III

Though the vie  
decision today,  
community tak

tent to believe  
ut, at the same  
er are—at least  
who was only  
Shirley Crook,  
s," as the Court  
to the home of  
vire, and threw  
tes of Alabama,  
al examples of  
uly monstrous  
ne 19-year-old  
d and stomped  
ually assaulted  
ody off a cliff.  
a. Other exam-  
e assuredly the  
io way justify a  
s from treating  
some murders  
crimes deserv-

rs of age from  
nt," is patently  
that this Court  
under Law is it  
asis for sparing  
fusing to spare  
at one must be  
te intelligently,  
another human  
that most mini-  
to marriage also  
ion not to take

iate ages for the  
, and that does  
tice system, by  
endant. In capi-  
ialized determi-  
tigating factors,  
deration is pro-  
mature enough  
or instance, we  
deemed mature  
to see why this  
tion is surely a

much more complex decision for a young person than whether to kill an innocent person in cold blood.

The Court concludes, however, that juries cannot be trusted with the delicate task of weighing a defendant's youth along with the other mitigating and aggravating factors of his crime. This startling conclusion undermines the very foundations of our capital sentencing system, which entrusts juries with "mak[ing] the difficult and uniquely human judgments that defy codification and that 'buil[d] discretion, equity, and flexibility into a legal system.'" The Court says that juries will be unable to appreciate the significance of a defendant's youth when faced with details of a brutal crime. This assertion is based on no evidence; to the contrary, the Court itself acknowledges that the execution of under-18 offenders is "infrequent" even in the States "without a formal prohibition on executing juveniles," suggesting that juries take seriously their responsibility to weigh youth as a mitigating factor.

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

The Court's contention that the goals of retribution and deterrence are not served by executing murderers under 18 is also transparently false. The argument that "[r]etribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished," is simply an extension of the earlier, false generalization that youth *always* defeats culpability. The Court claims that "juveniles will be less susceptible to deterrence," because "[t]he likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent." The Court unsurprisingly finds no support for this astounding proposition, save its own case law. The facts of this very case show the proposition to be false. Before committing the crime, Simmons encouraged his friends to join him by assuring them that they could "get away with it" because they were minors. This fact may have influenced the jury's decision to impose capital punishment despite Simmons' age. Because the Court refuses to entertain the possibility that its own unsubstantiated generalization about juveniles could be wrong, it ignores this evidence entirely.

### III

Though the views of our own citizens are essentially irrelevant to the Court's decision today, the views of other countries and the so-called international community take center stage.

The Court begins by noting that "Article 37 of the United Nations Convention on the Rights of the Child, which every country in the world has ratified *save for the United States* and Somalia, contains an express prohibition on capital punishment for crimes committed by juveniles under 18." . . .

Unless the Court has added to its arsenal the power to join and ratify treaties on behalf of the United States, I cannot see how this evidence favors, rather than refutes, its position. That the Senate and the President—those actors our Constitution empowers to enter into treaties, see Art. II, § 2—have declined to join and ratify treaties prohibiting execution of under-18 offenders can only suggest that *our country* has either not reached a national consensus on the question, or has reached a consensus contrary to what the Court announces. That the reservation to the ICCPR was made in 1992 does not suggest otherwise, since the reservation still remains in place today. It is also worth noting that, in addition to barring the execution of under-18 offenders, the United Nations Convention on the Rights of the Child prohibits punishing them with life in prison without the possibility of release. If we are truly going to get in line with the international community, then the Court's reassurance that the death penalty is really not needed, since "the punishment of life imprisonment without the possibility of parole is itself a severe sanction," gives little comfort.

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

More fundamentally, however, the basic premise of the Court's argument—that American law should conform to the laws of the rest of the world—ought to be rejected out of hand. In fact the Court itself does not believe it. In many significant respects the laws of most other countries differ from our law—including not only such explicit provisions of our Constitution as the right to jury trial and grand jury indictment, but even many interpretations of the Constitution prescribed by this Court itself. . . .

The Court has been oblivious to the views of other countries when deciding how to interpret our Constitution's requirement that "Congress shall make

no law respecting including those co of separation betw

And let us n us one of only six viability. . . .

The Court's : haps the most ind a common history lish sources when ten against the bac applied that appr comprehension w developed, in the speed since the U European courts do culture quite differ we would also co British Law Comm extend the rights c result of a judge's i

The Court sl matters in light of foreigners' views a law when it agree reasoned decisions

The Court re tution or our pride certain fundamen the centrality of t begin with, I do i should buttress ou should logically fo weaken that comm flatly misdescribes to underscore our and "our own [Arr the centuries-old majority of the rel in the particular c penalty. What the justices' own noti shall be so hencef the significance o "Acknowledgment this Court *unless* i what it parades as

no law respecting an establishment of religion. . . ." Most other countries—including those committed to religious neutrality—do not insist on the degree of separation between church and state that this Court requires. . . .

And let us not forget the Court's abortion jurisprudence, which makes us one of only six countries that allow abortion on demand until the point of viability. . . .

The Court's special reliance on the laws of the United Kingdom is perhaps the most indefensible part of its opinion. It is of course true that we share a common history with the United Kingdom, and that we often consult English sources when asked to discern the meaning of a constitutional text written against the backdrop of 18th-century English law and legal thought. If we applied that approach today, our task would be an easy one. . . . It is beyond comprehension why we should look, for that purpose, to a country that has developed, in the centuries since the Revolutionary War—and with increasing speed since the United Kingdom's recent submission to the jurisprudence of European courts dominated by continental jurists—a legal, political, and social culture quite different from our own. If we took the Court's directive seriously, we would also consider relaxing our double jeopardy prohibition, since the British Law Commission recently published a report that would significantly extend the rights of the prosecution to appeal cases where an acquittal was the result of a judge's ruling that was legally incorrect. . . .

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

The Court responds that "[i]t does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom." To begin with, I do not believe that approval by "other nations and peoples" should buttress our commitment to American principles any more than (what should logically follow) disapproval by "other nations and peoples" should weaken that commitment. More importantly, however, the Court's statement flatly misdescribes what is going on here. Foreign sources are cited today, *not* to underscore our "fidelity" to the Constitution, our "pride in its origins," and "our own [American] heritage." To the contrary, they are cited to *set aside* the centuries-old American practice—a practice still engaged in by a large majority of the relevant States—of letting a jury of 12 citizens decide whether, in the particular case, youth should be the basis for withholding the death penalty. What these foreign sources "affirm," rather than repudiate, is the justices' own notion of how the world ought to be, and their diktat that it shall be so henceforth in America. The Court's parting attempt to downplay the significance of its extensive discussion of foreign law is unconvincing. "Acknowledgment" of foreign approval has no place in the legal opinion of this Court *unless it is part of the basis for the Court's judgment*—which is surely what it parades as today.

## IV

To add insult to injury, the Court affirms the Missouri Supreme Court without even admonishing that court for its flagrant disregard of our precedent in *Stanford*. Until today, we have always held that "it is this Court's prerogative alone to overrule one of its precedents." That has been true even where "'changes in judicial doctrine' ha[ve] significantly undermined" our prior holding, and even where our prior holding "appears to rest on reasons rejected in some other line of decisions." Today, however, the Court silently approves a state-court decision that blatantly rejected controlling precedent.

One must admit that the Missouri Supreme Court's action, and this Court's indulgent reaction, are, in a way, understandable. In a system based upon constitutional and statutory text democratically adopted, the concept of "law" ordinarily signifies that particular words have a fixed meaning. Such law does not change, and this Court's pronouncement of it therefore remains authoritative until (confessing our prior error) we overrule. The Court has purported to make of the Eighth Amendment, however, a mirror of the passing and changing sentiment of American society regarding penology. The lower courts can look into that mirror as well as we can; and what we saw 15 years ago bears no necessary relationship to what they see today. Since they are not looking at the same text, but at a different scene, why should our earlier decision control their judgment?

However sound philosophically, this is no way to run a legal system. We must disregard the new reality that, to the extent our Eighth Amendment decisions constitute something more than a show of hands on the current justices' current personal views about penology, they purport to be nothing more than a snapshot of American public opinion at a particular point in time (with the timeframes now shortened to a mere 15 years). We must treat these decisions just as though they represented *real law*, *real* prescriptions democratically adopted by the American people, as conclusively (rather than sequentially) construed by this Court. Allowing lower courts to reinterpret the Eighth Amendment whenever they decide enough time has passed for a new snapshot leaves this Court's decisions without any force—especially since the "evolution" of our Eighth Amendment is no longer determined by objective criteria. To allow lower courts to behave as we do, "updating" the Eighth Amendment as needed, destroys stability and makes our case law an unreliable basis for the designing of laws by citizens and their representatives, and for action by public officials. The result will be to crown arbitrariness with chaos.