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Impeachment Calls and Death Threats: Assessing Criticisms of the Death Penalty Jurisprudence of Justices Kennedy and O'Connor

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IMPEACHMENT CALLS AND DEATH THREATS: ASSESSING CRITICISMS OF THE DEATH PENALTY JURISPRUDENCE OF JUSTICES KENNEDY AND O'CONNOR

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Table of Contents

I. INTRODUCTION	1128
II. THE SUPREME COURT'S EIGHTH AMENDMENT CRUEL AND UNUSUAL PUNISHMENTS CONSTRUCT	1132
III. THE SWING OPINIONS OF JUSTICE O'CONNOR	1134
IV. JUSTICE KENNEDY AND THE EIGHTH AMENDMENT	1147
V. JUSTICE O'CONNOR AND JUSTICE KENNEDY MEET IN THE MAJORITY IN <i>ATKINS V. VIRGINIA</i>	1156
<i>A. The Evolving Standards of Decency</i>	1157
1. <i>The Legislative Evidence and Evidence of Sentencing and Execution Frequency</i>	1157
2. <i>Evidence of International Opinion and Practices</i>	1160
<i>B. The Court's "Own Judgment" on Proportionality</i>	1163
VI. JUSTICE O'CONNOR AND JUSTICE KENNEDY PART WAYS IN <i>ROPER V. SIMMONS</i>	1167
<i>A. The Evolving Standards of Decency</i>	1169
1. <i>The Legislative Evidence and Evidence of Sentencing and Execution Frequency</i>	1169
<i>a. Justice Kennedy</i>	1169
<i>b. Justice O'Connor</i>	1172
2. <i>Evidence of International Opinion and Practices</i>	1174
<i>a. Justice Kennedy</i>	1174
<i>b. Justice O'Connor</i>	1177
<i>B. The Court's "Own Judgment" on Proportionality</i>	1179
1. <i>Justice Kennedy</i>	1179
2. <i>Justice O'Connor</i>	1180
VII. CONCLUSION	1183

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I. INTRODUCTION

Controversy has been brewing around the United States Supreme Court and lower courts because of perceived biases of the justices and judges. Various groups on the right side of the political spectrum have criticized court decisions as being products of justices' and judges' personal views. They assert that the unelected justices and judges are imposing their own ideologies and political preferences on the Constitution and on the people, who have no way of removing members of the judiciary whose decisions they abhor.¹ Members of Congress have criticized Supreme Court justices and other judges for the same reason and in ways that seem to threaten the courts' independence.² Two justices of the Supreme Court have even been

1. Dana Milbank, a reporter with the Washington Post, reported on a 2005 meeting of conservative leaders called to discuss "Remedies to Judicial Tyranny." Milbank quoted constitutional lawyer Edwin Vieira at the meetings as "saying a Politburo of 'five people on the Supreme Court' has a 'revolutionary agenda' rooted in foreign law and situational ethics." Milbank also reported that "Richard Lessner of the American Conservative Union, opened the discussion by decrying a 'radical secularist relativist judiciary.'" At the same meeting, Michael P. Farris, chairman of the Home School Legal Defense Association, "said he would block judicial power by abolishing the concept of binding judicial precedents, by allowing Congress to vacate court decisions, and by impeaching judges such as Kennedy . . ." Dana Milbank, *And the Verdict on Justice Kennedy Is: Guilty*, WASHINGTONPOST.COM (Apr. 9, 2005), available at <http://www.washingtonpost.com/wp-dyn/articles/A38308-2005Apr8.html> (last visited Apr. 20, 2006); see also Sen. Rick Santorum, *Moral Capital and the Courts*, NATIONAL REVIEW ONLINE (July 18, 2005), available at <http://www.nationalreview.com/comment/santorum200507180816.asp> (last visited Apr. 20, 2006).

2. See *DeLay Slams Supreme Court Justice Kennedy*, MSNBC.COM (Apr. 20, 2005), available at <http://www.msnbc.msn.com/id/7550959/> (last visited Apr. 20, 2006) ("DeLay has called repeatedly for the House to find a way to hold the federal judiciary accountable for its decisions. 'The judiciary has become so activist and so isolated from the American people that it's our job to do that,' DeLay said."); see also Milbank, *supra* note 1 ("House Majority Leader Tom DeLay (R-Tex.) said that 'the time will come for the [federal judges] responsible for this to answer for their behavior...' [in rendering a decision with which DeLay did not agree, and] Sen. John Cornyn (R-Tex.) mused about how a perception that judges are making political decisions could lead people to 'engage in violence.'"). Comments by Senator John Cornyn have been reported as follows:

Sen. John Cornyn, a Texas Republican, . . . said last April he was troubled by what he saw as the Supreme Court becoming a 'policy maker.' 'It causes a lot of people, including me, great distress to see judges use the authority that they have been given to make raw political or ideological decisions,' he said. 'I don't know if there is a cause-and-effect connection, but we have seen some recent episodes

threatened with death because of their judicial opinions.³ This article will examine two justices' death penalty opinions,⁴ those of Justices Kennedy and O'Connor, for any evidence of such personal bias or ideology.⁵

I have previously suggested that justices' personal predilections appear to be influencing the results they reach in some cases involving the

of courthouse violence in this country. I wonder whether there may be some connection between the perception in some quarters, on some occasions, where judges are making political decisions yet are unaccountable to the public, that it builds up and builds up and builds up to the point where some people engage in violence. Certainly without any justification, but a concern that I have,' he said.

Bill Mears, *Justice Ginsburg Details Death Threat*, CNN.COM (Mar. 15, 2006), available at <http://www.cnn.com/2006/LAW/03/15/scotus.threat/index.html> (last visited Apr. 20, 2006). Justice O'Connor herself has stated that lawmakers' remarks have threatened the independence of the federal judiciary. See Nina Totenberg, *O'Connor Decries Republican Attacks on Courts*, NPR.ORG (Mar. 10, 2006), available at <http://www.npr.org/templates/story/story.php?storyId=5255712> (last visited Apr. 20, 2006) ("Justice Sandra Day O'Connor took on conservative Republican critics of the courts in a speech Thursday. She told an audience at Georgetown University that Republican proposals, and their sometimes uncivil tone, pose a danger to the independence of the judiciary . . ."). In an earlier speech she had "warned . . . that the independence of federal judges is under a greater threat from Congress than ever before in her lifetime." Blaine Harden, *O'Connor Bemoans Hill Rancor at Judges*, WASHINGTONPOST.COM (July 22, 2005), available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/07/21/AR2005072102253.html> (last visited Apr. 20, 2006).

3. See Mears, *supra* note 2 ("Supreme Court Justice Ruth Bader Ginsburg has acknowledged a specific death threat against her and her retired colleague Sandra Day O'Connor, blaming lawmakers for fueling 'the irrational fringe.'"). The person who made the threat criticized Justices O'Connor and Ginsburg for referring to international laws in their opinions. *Id.*

4. The emphasis will be on substantive challenges to the death penalty, wherein a defendant has challenged the imposition of the death sentence on him as a member of a particular class.

5. On one occasion, Justice Kennedy raised the issue himself, reportedly saying that he "could not impose his personal views" and adding that "[i]t would be highly improper . . . for a judge to allow his or her own religious views to enter into a decision respecting a constitutional matter." Daniel M. Abuhoff, *On Morality and the Law: Truth, Justice, and the American Way*, 4 CARDOZO PUB. L. POL'Y & ETHICS J. 67, 69 (2006) (quoting Jason DeParle, *In Battle to Pick Next Justice, Right Says Avoid a Kennedy*, N.Y. TIMES, June 27, 2005, at A1). Nonetheless, Justice Kennedy has at other times been accused of letting his personal views influence his decision making. See Earl M. Maltz, *Larry Kramer, Same-Sex Marriage, and the Politics of Legal Scholarship*, 38 CREIGHTON L. REV. 533, 541 (2005) (charging that "Kennedy virtually admitted that the [Lawrence v. Texas] decision rested on nothing more than the personal views of Kennedy himself and his elite acquaintances").

exemption of certain classes of offenders from the death penalty.⁶ At the very least, some of the language and reasoning used in the recent case of *Atkins v. Virginia*, exempting murderers with mental retardation from the ultimate penalty,⁷ lends itself to such criticism, whether it is in the majority or dissenting opinions. A recent case, however, which received tremendous criticism for what critics believed to be a result driven by the justices' ideology, was *Roper v. Simmons*,⁸ which exempted juveniles from the death penalty.⁹ Various aspects of the opinion roiled critics and encouraged their public dressing down of the justices in the majority. Justice Kennedy wrote the majority opinion in *Roper* and bore the brunt of the outrage; some even called for his impeachment.¹⁰

It is in light of these developments that this article examines Justice Kennedy's opinions in capital cases, in particular those like *Atkins* and *Roper* involving the application of the Eighth Amendment's cruel and

6. See Susan Raeker-Jordan, *Parsing Personal Predilections: A Fresh Look at the Supreme Court's Cruel and Unusual Death Penalty Jurisprudence*, 58 ME. L. REV. 99 (2006). For a more general discussion of situations, and the manner, in which ideology is more likely to play a role in justices' decisions, see Richard A. Posner, *Forward: A Political Court*, 119 HARV. L. REV. 31 (2005).

7. *Atkins*, 536 U.S. 304, 321 (2002).

8. 543 U.S. 551 (2005).

9. *Id.* at 578.

10. See, e.g., Gene C. Gerard, *Conservative Politics, Judicial Impeachment, and Supreme Court Justice William O. Douglas*, ZMAG.ORG (May 8, 2005), available at <http://www.zmag.org/content/showarticle.cfm?ItemID=7807> (last visited Apr. 20, 2006) ("Some of the strongest calls by conservatives for impeachment have been heaped on U.S. Supreme Court Justice Anthony Kennedy. . . . [R]ecent rulings have turned conservatives against him. . . . [E]arlier this year, he joined the court majority in ruling that it was unlawful to administer the death penalty to those under eighteen years of age."); see also Carl Hulse, *Republicans May Hasten Showdown on Judicial-Nomination Filibusters*, NYTIMES.COM (Apr. 13, 2005), available at <http://www.nytimes.com/2005/04/13/politics/13judges.html?ex=1271044800&en=c332195b6ff35ab0&ei=5090&partner=rssuserland> (last visited Apr. 20, 2006) ("As the author of the decision on executions in juvenile crime. . . . Justice Kennedy has been a target of sustained attack, with some conservatives calling for his impeachment."); Milbank, *supra* note 1 ("[The] chairman of the Home School Legal Defense Association said Kennedy 'should be the poster boy for impeachment' for citing international norms in his opinions," and "Phyllis Schlafly, doyenne of American conservatism, said Kennedy's opinion forbidding capital punishment for juveniles 'is a good ground of impeachment.'"); see also DeLay Slams Supreme Court Justice Kennedy, *supra* note 2 ("House Majority Leader Tom DeLay intensified his criticism of the federal courts . . . , singling out Supreme Court Justice Anthony Kennedy's work from the bench as 'incredibly outrageous' because he has relied on international law").

unusual punishments clause¹¹ to the execution of classes of offenders. In order to understand the role, if any, of personal ideology in Justice Kennedy's *Roper* opinion, it is also necessary to examine the earlier opinions in which he simply joined but wrote no opinion. Because the opinions in general evidence strongly-held views, containing sharp rhetoric and pointed language, a justice's joining of an opinion without concurring with some reservations suggests the justice concurs in the sharp rhetoric and pointed language as well.

Justice O'Connor is mentioned more often than Justice Kennedy as the most centrist justice, supplying the fifth vote for the majority in many close cases. Justice O'Connor joined the controversial majority opinion in *Atkins* but dissented in *Roper* with a strongly-worded denunciation of the majority opinion.¹² For that reason, she escaped the calls for impeachment leveled at Justice Kennedy following *Roper* but nonetheless was tarred with the personal ideology brush by joining the *Atkins* majority and not expressing at least some reservations, as she has done in the past.¹³ Is it ideology or personal predilections that drive her conclusions, or does she draw valid distinctions among the cases that justify the result she favors? Because she has been such a consistent swing voter in these cases and because she has been the object of death threats, this article will also examine Justice O'Connor's opinions, as well the opinions in which she simply joined, to attempt to discern whether her ideology or predilections about the death penalty have influenced her varied conclusions.

This article, therefore, in Part II will briefly introduce the Eighth Amendment construct that the Court has employed to evaluate substantive challenges to the death penalty. Because she has been on the Court longer and has more of a record in this area, Part III will examine Justice O'Connor's approach to the pre-*Atkins* Eighth Amendment cases, as evidenced by her opinions and votes. Part IV will do the same with Justice Kennedy's approach, while Part V will discuss Justices O'Connor and

11. The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. AMEND. VIII.

12. *Roper*, 543 U.S. at 557 (O'Connor, J., dissenting).

13. See *Enmund v. Florida*, 458 U.S. 782, 801 (1982) (O'Connor, J., dissenting); *Thompson v. Oklahoma*, 487 U.S. 815, 848 (1988) (O'Connor, J., concurring in the judgment); *Stanford v. Kentucky*, 492 U.S. 361, 380 (1989) (O'Connor, J., concurring in part and concurring in the judgment); *Penry v. Lynaugh*, 492 U.S. 302, 335 (1989) (opinion of O'Connor, J.).

Kennedy's votes in *Atkins* for consistency with their documented earlier approaches. Part VI will examine *Roper*, the latest Supreme Court case to apply the Eighth Amendment cruel and unusual punishments test to the execution of a class of offenders. Because Justices O'Connor and Kennedy both wrote opinions in that case, and because both of those opinions seem to conflict with some of their pronouncements or approaches in previous cases, *Roper* serves as a good case study for addressing the main question presented in this article: whether the justices are deciding cases based on their personal views or, rather, through principled and reasoned jurisprudence. Part VII concludes with thoughts concerning the justices' changing votes.

II. THE SUPREME COURT'S EIGHTH AMENDMENT CRUEL AND UNUSUAL PUNISHMENTS CONSTRUCT

The United States Supreme Court set out its Eighth Amendment cruel and unusual punishments test for the modern era in *Gregg v. Georgia*.¹⁴ In that case, a plurality first looked to what it later called "history and traditional usage."¹⁵ If the punishment was acceptable at the time of enactment of the Bill of Rights and thereafter, then it could not now be struck down on historical grounds; at least from that perspective, the punishment was accepted by society and not considered cruel and unusual. Conversely, if the punishment was not allowed at that time because considered cruel and unusual, it should be considered cruel and unusual now and not be reinstated.

But the Court did not end its inquiry there; it noted that the Court has interpreted the Eighth Amendment in a "dynamic manner"¹⁶ and has "draw[n] its meaning from the evolving standards of decency that mark the progress of a maturing society."¹⁷ This "evolving standards of decency" measurement has become the primary test of constitutionality under the

14. 428 U.S. 153 (1976) (plurality opinion). For a more detailed discussion of the Court's Eighth Amendment doctrine, see Susan Raeker-Jordan, *A Pro-Death, Self-Fulfilling Constitutional Construct: The Supreme Court's Evolving Standard of Decency for the Death Penalty*, 23 HASTINGS CONST. L.Q. 455, 458-67 (1996).

15. The Court used this phrase in *Woodson v. North Carolina*, 428 U.S. 280, 288 (1976), decided the same day as *Gregg*.

16. *Gregg*, 428 U.S. at 171 (quoting *Weems v. United States*, 217 U.S. 349, 378 (1910)).

17. *Id.* at 173 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

Eighth Amendment and more recently has been reordered as part of a larger “excessiveness” or “proportionality” assessment.¹⁸ The current standard of decency is ascertained by consulting “objective indicia that reflect the public attitude toward a given sanction.”¹⁹ The key objective indicators of the current level of societal acceptance of a penalty are legislative enactments and jury decision making.²⁰ The theory is that the people, through their representatives and the representatives’ legislative actions, demonstrate their approval of the penalty. Similarly, because the jury is considered to constitute a direct link between the justice system and society, juries’ sentencing people to death demonstrates the acceptability of the punishment to that society. While these two indicators of the standard of decency for punishment are the primary ones, the Court has also considered evidence of the international community’s acceptance of the punishment in death penalty cases.²¹

The final piece of the Court’s Eighth Amendment cruel and unusual punishment construct has been the object of some vigorous disagreement among the justices. But a majority of the justices have consistently insisted that a punishment is not only tested by objective indicators of the acceptability of the punishment; they believe “the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.”²² This “own judgment” aspect of the analysis also focuses on excessiveness and proportionality²³ and allows the Court to employ two of its own tools to

18. See *Atkins*, 536 U.S. at 311-12.

19. *Gregg*, 428 U.S. at 173.

20. *Id.* at 174 n.19, 181. In later cases, the Court has also looked to execution frequency for the level of acceptance. See, e.g., *Atkins*, 536 U.S. at 316 (2002); *Roper*, 543 U.S. at 564.

21. See *Roper*, 543 U.S. at 604 (O’Connor, J., dissenting), in which Justice O’Connor stated, “[o]ver the course of nearly half a century, the Court has consistently referred to foreign and international law as relevant to its assessment of evolving standards of decency.” Indeed, as one commentator has observed, “references to foreign and international authority in [previous death penalty] cases passed without comment from concurring and dissenting judges.” A. Mark Weisburd, *Roper and the Use of International Sources*, 45 VA. J. INT’L L. 789, 796 (2005). For discussion of the propriety of resorting to this evidence in death cases, see Harold Hongju Koh, *Paying “Decent Respect” to World Opinion on the Death Penalty*, 35 U.C. DAVIS L. REV. 1085 (2002); Elizabeth Burleson, *Juvenile Execution, Terrorist Extradition, and Supreme Court Discretion to Consider International Death Penalty Jurisprudence*, 68 ALB. L. REV. 909 (2005).

22. *Coker v. Georgia*, 433 U.S. 584, 597 (1977) (plurality opinion).

23. See *Roper*, 543 U.S. at 564, 574.

determine if a punishment exceeds what the Eighth Amendment permits. First, the Court can consider the proportionality of the punishment to the blameworthiness of the offender.²⁴ If the punishment is more severe than warranted by the offender's level of culpability, then it is disproportionate and excessive and therefore cruel and unusual.²⁵ Additionally, the Court can examine whether the punishment at issue would further the traditional goals or justifications for punishment, which in the death penalty context includes retribution and deterrence.²⁶ If the punishment would not serve retributive goals, because the offender is less blameworthy than the punishment contemplates, or if the punishment would not serve as a deterrent, then imposition of the death penalty is an unnecessary infliction of pain. It is then considered excessive and cruel and unusual.²⁷ This article will discuss in more detail which justices employ this "own judgment" portion of the Eighth Amendment analysis and under what circumstances.

In sum, the Court primarily looks to the objective evidence of legislative actions and jury sentencing to determine the "evolving standards of decency" when determining whether a punishment is cruel and unusual under the Eighth Amendment. It may also refer to international practice and foreign law to inform the conclusion on the standard of decency. Second, most justices will apply their "own judgment" to the cruel and unusual punishment question by judging the proportionality of the punishment to the blameworthiness of the offender and/or by ascertaining whether the punishment at issue furthers the goals of retribution and deterrence. Because this construct dominates the cases and embodies the principles around which the opinions are ordered, these parts of the test will be the organizing principle for the examination, in Parts V and VI, of the influence of personal views on the two justices' votes and opinions.

III. THE SWING OPINIONS OF JUSTICE O'CONNOR

Justice O'Connor was appointed by President Reagan and took her seat on the Court on September 25, 1981.²⁸ She served until she left the Court

24. *Gregg*, 428 U.S. at 187.

25. *Id.* at 173.

26. *Id.* at 183.

27. *Id.* at 173, 183.

28. See The Justices of the Supreme Court, available at <http://www.supremecourtus.gov/about/biographiescurrent.pdf> (last visited Apr. 21, 2006).

for retirement on January 31, 2006.²⁹ After Justice O'Connor joined the Court but before the latest decision regarding juveniles in *Roper v. Simmons*,³⁰ the Court decided six cases³¹ in which it applied the cruel and unusual punishments clause to the execution of classes of offenders. The cases are *Enmund v. Florida*,³² *Tison v. Arizona*,³³ *Thompson v. Oklahoma*,³⁴ *Stanford v. Kentucky*,³⁵ *Penry v. Lynaugh*,³⁶ and *Atkins v. Virginia*.³⁷

In one of her first death penalty cases, *Enmund v. Florida*, Justice O'Connor dissented³⁸ from the majority opinion, which held that it was excessive punishment and therefore cruel and unusual to execute a felony murderer who merely drove the getaway car but did not kill, attempt to kill, or intend to kill.³⁹ She took issue with various aspects of the majority's analysis but began by articulating her understanding of the Eighth Amendment analysis, which, she explained, turns on the proportionality of the penalty to the defendant's crime.⁴⁰ In her view, resort to an assessment of the contemporary standards of decency, as evidenced by objective factors of historical precedent, legislative enactments, and jury sentencing decisions, was necessary only to arrive at a proportionality determination: "The plurality's resort to objective factors [in *Coker v. Georgia*⁴¹] was no doubt an effort to derive 'from the evolving standards of decency that mark the progress of a maturing society' the meaning of the requirement of

29. *Id.*

30. 543 U.S. 551 (2005).

31. The Court also decided and applied its Eighth Amendment analysis in *Ford v. Wainwright*, 477 U.S. 399 (1986), exempting from execution people who are insane at the time of their executions. *Wainwright*, 477 U.S. at 409-10. Justice O'Connor dissented in part, stating simply that "the Eighth Amendment does not create a substantive right not to be executed while insane," and provided no further Eighth Amendment analysis that might be instructive on the issues discussed in this article. *Id.* at 427.

32. 458 U.S. 782 (1982).

33. 481 U.S. 137 (1987).

34. 487 U.S. 815 (1988).

35. 492 U.S. 361 (1989).

36. 492 U.S. 302 (1989).

37. 536 U.S. 304 (2002).

38. 458 U.S. at 802 (O'Connor, J., dissenting).

39. *Id.* at 801.

40. *Id.* at 812-13 (citing *Weems v. United States*, 217 U.S. 349, 367 (1910)).

41. 433 U.S. 584 (1977).

proportionality contained within the Eighth Amendment.”⁴² She also agreed, however, with the statement in *Coker* that “the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.”⁴³ This “own judgment” application required the Court to undertake its own proportionality assessment, considering “qualitative factors bearing on the question whether the death penalty was disproportionate.”⁴⁴ Those qualitative factors of proportion in Justice O’Connor’s view appeared to include the relationship between the “magnitude of the punishment” and not only the measure of harm to the victim but also the level of the defendant’s blameworthiness.⁴⁵ She also wrote, however, that these latter factors “turn on considerations unique to each defendant’s case” and “are reflected in this Court’s conclusion in *Lockett v. Ohio* that ‘individualized consideration [is] a constitutional requirement in imposing the death sentence.’”⁴⁶ Her approach appeared to be dichotomous. Although she agreed that the Court must employ its “own judgment” to questions about proportionality of the death sentence to certain offenders, she nonetheless abdicated that judgment by building into her test the requirement that blameworthiness and thus proportionality be decided on a case-by-case basis: individualized consideration performed by a jury.⁴⁷ Such an approach would naturally rule out categorical exemptions from the death penalty.

An inclination against categorical exemptions played out in her analysis of the blameworthiness aspect of the *Enmund* case. In examining

42. *Enmund*, 458 U.S. at 813 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

43. *Id.* at 814 (quoting *Coker*, 433 U.S. at 597).

44. *Id.*

45. *Id.* at 815. At this point, Justice O’Connor did not seem to agree with the majority that apenologicalgoals analysis was necessary to the Court’s proportionality determination. In fact, she indicated that she thought issues of deterrence and retribution were peculiarly within the province of the legislature to judge, not the Court: “[a]t their core, these conclusions are legislative judgments regarding the efficacy of capital punishment as a tool in achieving retributive justice and deterring violent crime.” *Id.* at 826 n.42. Her predominant constitutional check, then, was legislatures and juries. One could argue that she abdicated to those entities her judicial role to say what the Constitution means. See Raeker-Jordan, *supra* note 14, at 495-96.

46. 458 U.S. at 815 (citation omitted) (bracket in original).

47. See *id.* at 826 (“[B]ecause of the unique and complex mixture of facts involving a defendant’s actions, knowledge, motives, and participation during the commission of a felony murder, I believe that the factfinder is best able to assess the defendant’s blameworthiness.”)

defendant Enmund's level of blameworthiness and the amount of harm he caused, Justice O'Connor relied on the Court's decision in *Coker v. Georgia*⁴⁸ as an example of when harm caused and blameworthiness were not proportional to the sentence of death. She noted, "Critical to the holding in *Coker*, for example, was that 'in terms of moral depravity and of the injury to the person and to the public, [rape] does not compare with murder, which . . . involve[s] the unjustified taking of human life.'"⁴⁹ She argued that Enmund, by contrast, who had planned the robbery but waited in the getaway car during its commission, was "responsible" for the "unjustifiably[-]taken" lives, being one who aided and abetted the armed robbery.⁵⁰ She then proceeded to contend that "[q]uite unlike the defendant in *Coker*, [Enmund] cannot claim that the penalty imposed is 'grossly out of proportion' to the harm for which he admittedly is *at least partially responsible*."⁵¹ Rather, "[i]n contrast to the crime [of rape] in *Coker*, the petitioner's crime involves the very type of harm that this Court has held justifies the death penalty."⁵²

Her reasoning strains to reject a categorical exemption, and one senses that she simply believes people found guilty of felony murder, no matter the level of involvement, should be eligible for the death penalty. She cited to precedent from *Gregg v. Georgia*⁵³ and *Coker*, which with her own quotations, seemed to draw lines of culpability from the commission of murder on one end, justifying death, to the rape of an adult woman on the other, not justifying death. But she chose to equate a felony murderer who did not kill or have intent to kill with one who deliberately and actively took a life. The *Gregg* plurality said, "[W]hen a life has been taken deliberately by the offender, we cannot say that the punishment is *invariably* disproportionate to the crime. It is an extreme sanction, suitable to the most extreme of crimes."⁵⁴ The *Gregg* plurality suggested with this statement that sometimes death would not be proportional even when one did take a life intentionally. In other words, even the commission of murder in some cases will not be blameworthy enough for the ultimate punishment. But Justice O'Connor goes against what seems like a clear prerequisite in

48. 433 U.S. 584 (1977).

49. *Enmund*, 458 U.S. at 823-24 (quoting *Coker*, 433 U.S. at 598).

50. *Id.* at 824.

51. *Id.* (emphasis added).

52. *Id.* at 826.

53. 428 U.S. 153 (1976).

54. *Id.* at 187 (emphasis added).

Gregg that the defendant have committed the most extreme of crimes; she would allow the death penalty when a defendant was "at least partially responsible" for the death despite no involvement in that actual killing and no intent to kill.⁵⁵ Her avoidance of categorical exemptions and her insistence on individualization in every case arguably masks a preference for the death penalty. Her test of "at least partially responsible" virtually wipes out any pretense of an adherence to the requirement of proportionality.

Five years later, Justice O'Connor authored a majority opinion that again addressed the question of a categorical exemption for felony murder defendants, *Tison v. Arizona*.⁵⁶ The issue in *Tison* was "whether the Eighth Amendment prohibits the death penalty in the intermediate case of the defendant whose participation [in the felony] is major and whose mental state is one of reckless indifference to the value of human life."⁵⁷ To resolve the question, Justice O'Connor applied what she called the proportionality requirement of the Eighth Amendment, which included an analysis of state legislatures' treatment of this class of offenders.⁵⁸ Because approximately twenty-one states permitted execution for the crime of felony murder where the defendant "was a major actor in a felony in which he knew death was highly likely to occur," the Court found a consensus among American jurisdictions and society that the death penalty was not grossly excessive in these cases.⁵⁹ The majority considered neither non-death penalty states nor international treatment of this class of offenders in its evolving standards calculation, perhaps because the numbers were so close and any addition to the opposition side of the scale would have caused a tipping toward unconstitutionality.

Justice O'Connor proceeded beyond the evolving standards test, however, to complete her proportionality assessment, analyzing the culpability of the defendant who participated in a major way and exhibited reckless indifference to human life. As she has indicated before,⁶⁰ she believed that an individualized determination of culpability was required, and "[a] critical facet" of that determination "is the mental state with which the

55. *Enmund*, 458 U.S. at 824.

56. 481 U.S. 137 (1987).

57. *Id.* at 152.

58. *See id.*

59. *Id.* at 154.

60. *See Enmund*, 458 U.S. at 815 (O'Connor, J., dissenting).

defendant commits the crime.”⁶¹ She continued,

[t]his reckless indifference to the value of human life may be every bit as shocking to the moral sense as an ‘intent to kill.’ Indeed it is for this very reason that the common law and modern criminal codes alike have classified behavior such as occurred in this case along with intentional murders.⁶²

For this reason, defendants with such a mental state were culpable enough to be sentenced to death.⁶³ But her reference to “behavior such as occurred in this case” did not match what she gave as examples historically and legislatively included with intentional murders. She began the culpability discussion by observing that a simple “intent to kill” requirement as a measure of culpability is a “highly unsatisfactory means of definitively distinguishing the *most culpable and dangerous of murderers*”⁶⁴ and therefore should not be used that way. Although one could agree with her statement in the abstract, it is misleading in this context because it confused the defendants in *Tison* with actual murderers and led the reader to forget that the defendant at issue did not actually kill: actual killing was not the “behavior [that] occurred in this case.”⁶⁵

She further engaged in a sleight of hand when she elaborated on her point that an “intent to kill” mental state is not always a sufficient yardstick of culpability, listing examples of people who actually killed but who, because of varying mental states, have different levels of culpability: the person who kills in self defense; those who kill after being provoked; the person who tortures and kills with indifference to the likelihood of the victim’s death; and those who kill in the course of a robbery, desiring just the robbery but indifferent to the killing.⁶⁶ These examples illustrated the point that one can lack culpability even though possessing an intent to kill,

61. *Tison*, 481 U.S. at 156.

62. *Id.* at 157.

63. *Id.* at 157 (“[W]e hold that the reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state, a mental state that may be taken into account in making a capital sentencing judgment when that conduct causes its natural, though also not inevitable, lethal result.”).

64. *Id.* (emphasis added).

65. *Id.* at 157.

66. *See id.*

while conversely one can be extremely culpable even absent an intent to kill. But the examples again misled the reader by equating people who actually kill with the defendants at issue in *Tison* who did not kill. The misleading nature of her analysis, which employs a false comparison and therefore does not really ever measure the culpability of the defendants who did not kill, enables one to argue that the desire of Justice O'Connor and the majority is to permit the executions of bad actors who participate in felonies even though those actors do not actually kill. Consistent with her view that even someone like a get-away car driver in *Enmund* could be executed, surely someone with a worse mental state (reckless indifference as opposed to no intent to kill) and more participation in the crime is more culpable and should not be exempted categorically.

In a more general way, Justice O'Connor's approach itself made clear that she will refuse to draw a line against the executions of a class of offender. She purported to conduct an Eighth Amendment proportionality analysis under which categorical exemptions are possible but injected a requirement of individualization into the analysis and thereby managed to ensure, ultimately, the achievement of individual determinations. The approach also enables its proponent to have it both ways: in many cases, Justice O'Connor can rely on the individualization requirement to refuse to exempt a class of offenders when it is consistent with her personal view about deserts for execution. On the other hand, when she believes the execution is wrong, she can resort to the ideas of proportionality and culpability more consonant with her personal views. Further consideration of her opinions is warranted to test whether her personal views are the driving force behind her jurisprudence.

Justice O'Connor's concurrence in the judgment in *Thompson v. Oklahoma*⁶⁷ was consistent with her reluctance in *Enmund* and *Tison* to draw a bright line exempting a class of offender, that class in *Thompson* being juveniles who committed their crimes when they were under the age of sixteen. Justice O'Connor began her concurrence by agreeing in general with the plurality that society's evolving standards of decency help to indicate when someone or some class of offenders is constitutionally exempted from the punishment of death.⁶⁸ On these facts, the plurality opinion had determined that the evolving standard of decency was such as to exempt the class of fifteen-year-olds and younger from the reach of the

67. 487 U.S. 815 (1988).

68. *Id.* at 848 (O'Connor, J., concurring in the judgment).

death penalty.⁶⁹ But Justice O'Connor believed that the legislative evidence only suggested a consensus against their executions, it did not conclusively establish a consensus as a matter of constitutional law.⁷⁰ She would only reverse the defendant's death sentence on more narrow grounds and in the immediate case, not as a categorical matter, because the statute under which defendant Thompson had been sentenced did not set a minimum age and did not clearly permit the execution of juveniles of this age group.⁷¹ Had it been more clear that there was no national consensus against these executions, she would have allowed the sentence to stand even if imposed under a statute that set no minimum age. Because she saw some evidence that a consensus against these executions "very likely" existed,⁷² she could not uphold the sentence when the state had not clearly contemplated death sentences for this class.

It is noteworthy that Justice O'Connor included even non-death penalty states in her counting of jurisdictions that oppose executions of members of this class: "When one adds the[] 18 states [that have set a minimum age at sixteen or above] to the 14 that have rejected capital punishment completely. . . , it appears that almost two-thirds of the state legislatures have definitely concluded that no 15-year-old should be exposed to the threat of execution."⁷³ Although that number was not enough for her to find some consensus against the executions, she nonetheless seemed to think it important to the constitutional analysis of the standard of decency, at least at this point in time, to include the views or conceptions of decency of all states and not just of death penalty states. Their inclusion did not affect her conclusion, however, against a categorical exemption.

Turning to the proportionality analysis that is in the Court's province to conduct, Justice O'Connor agreed that "proportionality requires a nexus

69. *Id.* at 830-36.

70. *Id.* at 848-49 ("Although I believe that a national consensus forbidding the execution of any person for a crime committed before the age of 16 very likely does exist, I am reluctant to adopt this conclusion as a matter of constitutional law without better evidence than we now possess."). Eighteen states set a minimum age of sixteen or above but nineteen states had not addressed the question of minimum age in their statutes. *Id.* at 826 (plurality opinion). For this reason, Justice O'Connor thought a consensus against these juvenile executions "very likely" did exist, but the evidence was ambiguous enough that she concurred on narrower grounds. *Id.* at 849.

71. *Thompson*, 487 U.S. at 857-58.

72. *Id.* at 849.

73. *Id.* (internal citations omitted) (emphasis added).

between the punishment imposed and the defendant's blameworthiness."⁷⁴ She also agreed that juveniles are generally less culpable than adults even when committing the same crimes, but she was unwilling to agree with the plurality that all fifteen-year-olds are in every case not culpable enough to justify the penalty; she likewise did not believe every fifteen-year-old could not be deterred by the possibility of receiving the death penalty.⁷⁵

In this case, too, Justice O'Connor remained consistent with her aversion to bright-line exemptions. She granted that legislatures often draw lines where juveniles are concerned, for the very qualitative characteristics that factor into an Eighth Amendment proportionality assessment.⁷⁶ Although she professed to believe that the Court should conduct its own proportionality assessment, she nonetheless avoided the obligation, concluding that "[t]hese characteristics [of juvenile offenders] . . . vary widely among different individuals of the same age, and I would not substitute our inevitably subjective judgment about the best age at which to draw a line in the capital punishment context for the judgments of the Nation's legislatures."⁷⁷ This quotation demonstrates that at bottom, she does not believe in the Court's role in assessing the proportionality of the death penalty for a particular kind of crime or particular kind of offender. She acknowledged the lessened culpability of children under the age of sixteen, but left the crucial determination of proportionality to legislatures, the bodies that are supposed to be constrained by the Eighth Amendment, by *her* construction, interpretation, and application of the Eighth Amendment. In leaving that judgment with legislatures, she relinquished completely her role as arbiter of the constitutionality of legislative action.

The quotation is further revealing because she objected to employing her "inevitably subjective judgment" about the culpability of this group of offenders, but she had previously acknowledged that it was her responsibility to employ just that "subjective judgment" to the question of proportionality and therefore to constitutionality.⁷⁸ Her dichotomous approach can again be seen here in *Thompson*, in which she is able to assert her commitment to the Court's "own judgment" aspect of the Eighth Amendment construct but still refuse to apply it when it apparently suits her

74. *Id.* at 853 (quoting *Enmund*, 458 U.S. at 825 (O'Connor, J., dissenting)).

75. *Id.* It is not clear what Justice O'Connor's commitment to the penological goals analysis is, since she seemed to dismiss it in *Enmund*. See *supra* note 45.

76. *Thompson*, 487 U.S. at 854.

77. *Id.*

78. See *supra* notes 43-44 and accompanying text.

preference against a bright-line exemption. One is left to wonder at what point in time, with what kind of case, will her assessment of proportionality *not* merely be her “subjective judgment” about proportionality. In what magic case will that subjective judgment be transformed into Eighth Amendment absolutes? Arguably, Justice O’Connor’s preference for legislative judgments in these cases itself displays her subjective judgments about the correctness of punishments; her personal preferences are obscured by the cover of legislative policy under her purported Eighth Amendment approach.⁷⁹

In a pair of cases decided in the same term, Justice O’Connor again played a crucial swing role. In *Stanford v. Kentucky*, she provided the fifth vote to permit the execution of sixteen and seventeen-year-olds but wrote separately to concur in part and concur in the judgment.⁸⁰ She agreed with Justice Scalia, Chief Justice Rehnquist, and Justices White and Kennedy, that no national consensus could be shown from the legislative and jury decisions against executing these juvenile offenders.⁸¹ Continuing to eschew any conclusion that would exempt a whole class of offenders from the death penalty, in this case and in contrast to her concurrence in *Thompson*, Justice O’Connor here joined that part of the majority opinion that refused to consider non-death penalty states in the calculation of the evolving standard of decency.⁸² The majority stated that:

while the number of those [non-death penalty] jurisdictions bears upon the question whether there is a consensus against capital punishment altogether, it is quite irrelevant to the specific inquiry in this case: whether there is a settled consensus in favor of punishing offenders under 18 differently from those over 18 insofar as capital

79. Justice O’Connor addressed a contrary suggestion that she was influenced by sympathy for the class of offender at issue after the dissent intimated that she reached her conclusion based on the “appealing” nature of the group. *Thompson*, 487 U.S. at 858 n.* (citing *Id.* at 877 (Scalia, J., dissenting)). She dismissed that suggestion and instead insisted that her opinion was based on the “significant affirmative evidence of a national consensus forbidding the execution” of members of this class, which evidence was just short of what, in her view, would be constitutionally enough to establish a definite consensus. *Id.*

80. *Stanford*, 492 U.S. at 382 (O’Connor, J., concurring in part and concurring in the judgment).

81. *Id.* at 381-82.

82. *See id.* at 363.

punishment is concerned.⁸³

It is not clear why Justice O'Connor did not, in her separate opinion, consider non-death penalty states in the legislative nose-counting. But she did set out how she reached a somewhat different conclusion in *Stanford* than in *Thompson*. She described her approach as a "two-part standard" in these juvenile cases, stating that, first, if there is uncertainty about the existence of a national consensus against the executions, then, second, a juvenile may not be executed under a state death penalty statute that sets no minimum age.⁸⁴ Such was the case in *Thompson*, so in that case she concurred in the reversal of the particular defendant's death sentence but declined to strike down the death penalty for the entire class.⁸⁵ She distinguished *Stanford* because in *Stanford* "it is sufficiently clear that no national consensus forbids the imposition of capital punishment on 16 or 17-year-old capital murderers."⁸⁶ Even if the state legislature had not set a minimum age and had not explicitly considered executions of these juveniles, the defendants could have been executed because of the lack of a consensus against it. She agreed with the justices who decided that "a majority of the States that permit capital punishment authorize it for crimes committed at age 16 or above."⁸⁷

Her conclusion in *Stanford* seems principled and credible until one realizes that she has not been consistent and approached the evolving standard of decency question in the same way that she did in *Thompson*. If one can characterize the numbers as she did in *Stanford*, stating that "a majority of states that permit capital punishment" authorize these executions, then it is hard to challenge the evolving standard determination that there exists no consensus against the executions.⁸⁸ But if one factors the non-death penalty states into the count, which Justice O'Connor herself did in *Thompson* and the dissent did in *Stanford*, then the picture can be made to look different:

[w]hen one adds to the[] 12 States [in which those under age

83. *Id.* at 370 n.2.

84. *Id.* at 380.

85. See *Thompson v. Oklahoma*, 487 U.S. 815, 848-53, 857-59 (1988) (O'Connor, J., concurring in the judgment.)

86. *Stanford*, 492 U.S. at 381.

87. *Id.*

88. *Id.* (quoting majority).

eighteen cannot be sentenced to death] the 15 (including the District of Columbia) in which capital punishment is not authorized at all, it appears that the governments in fully 27 of the States have concluded that no one under 18 should face the death penalty. A further 3 States explicitly refuse to authorize sentences of death for those who committed their offense when under 17, making a total of 30 States that would not tolerate the execution of [someone who committed his offense at the age of 16 or younger].⁸⁹

One suspects that the addition of these states would not have made a difference to Justice O'Connor, since with even slightly stronger numbers in *Thompson* she could not find a definitive consensus showing an evolving standard against the executions. Her inconsistency in failing to consider non-death penalty states to determine a real consensus, however, raises questions about the credibility of her analysis. This credibility issue is highlighted by her own precision elsewhere in the opinion; she went to the trouble in *Stanford* not only of writing a separate opinion, but also of meticulously setting out a "two-part standard" that drew fine distinctions between two very similar cases. One wonders whether she is shielding personal preferences behind her doctrinal approach.

More troubling in that regard is the remainder of her concurrence. Justice O'Connor pointedly refused⁹⁰ to join the portion of Justice Scalia's plurality opinion that "emphatically reject[ed] [the] suggestion that the issues in this case permit [the Court] to apply '[its] own informed judgment' regarding the desirability of permitting the death penalty for crimes by 16- and 17-year olds."⁹¹ Justice O'Connor continued to insist that "beyond an assessment of the specific enactments of American legislatures, there remains a constitutional obligation imposed upon this Court to judge whether the "nexus between the punishment imposed and the defendant's blameworthiness" is proportional."⁹² She did not believe proportionality analysis could resolve these cases involving juveniles, but rather strongly affirmed that she believed proportionality analysis was a proper part of Eighth Amendment doctrine.⁹³ With this new and additional language in her proportionality analysis, Justice O'Connor revealed a stark disconnect

89. *Id.* at 384 (Brennan, J., dissenting) (internal citations omitted).

90. *Id.* at 382.

91. *Id.* at 379.

92. *Stanford*, 492 U.S. at 382 (quoting *Thomson*, 487 U.S. at 853).

93. *See id.* at 382.

between her assertions. On one hand, she claimed to believe in the propriety of the Court's using its own judgment of proportionality to test a death penalty under the Eighth Amendment. Indeed, she retorted to Justice Scalia that there is a "constitutional obligation imposed upon this Court" to make such judgments.⁹⁴ But in the next breath, she determined that some cases are not appropriate for the exercise of that "obligation"; rather, legislatures and juries are best able in those cases to make the proportionality assessment.⁹⁵ It is not clear that Justice O'Connor ever rationalizes the apparently inconsistent sentiments and approaches. We are left with the sense that, after all, it comes down to her preferences: juveniles and felony murderers may be bad enough, may be culpable enough, for a legislature to provide for and a jury to hand down the death penalty, but her jurisprudence hides her preference behind ill-distinguished situations as to when the Court's "constitutional obligation" is triggered to step in and regulate under the Eighth Amendment, and when, on the other hand, juries and state legislatures may be free of Eighth Amendment constraints over who is to die and who is not.

She continued to insist on this approach in *Penry v. Lynaugh*.⁹⁶ In *Penry*, Justice O'Connor again wrote for the majority, holding that execution of persons with mental retardation did not violate the Eighth Amendment.⁹⁷ She began by ascertaining the evolving standards of decency and found that only one state specifically excluded people with mental retardation from the reach of their death penalty.⁹⁸ Even when it added to that state the fourteen states that did not have the death penalty at all, the majority found that no national consensus existed against execution of people with mental retardation.⁹⁹ In this way, Justice O'Connor returned to including non-death penalty states in the evolving standards of decency tally, perhaps because it did not preclude her and the majority from rejecting a categorical exemption.¹⁰⁰

94. *See id.*

95. *See id.*

96. 492 U.S. 302 (1989).

97. *Id.* at 340.

98. *Id.* at 334.

99. *Id.* at 335.

100. Most of the justices in the *Penry* majority never consider non-death penalty states in the calculation. *See, e.g., Stanford*, 492 U.S. at 370 n.2 (opinion of Scalia, J.). That they did agree to the addition of the non-death penalty states in this case is not particularly noteworthy, since the addition of those states did not make any difference to the result. But

Writing a portion of her opinion only for herself, Justice O'Connor indicated the necessity for the Court to conduct a proportionality analysis of its own and to consider whether the punishment at issue for this class of offender furthered the penological goals of retribution and deterrence.¹⁰¹ Although granting that mental retardation may diminish a person's culpability for criminal acts, Justice O'Connor nonetheless decided that "[i]n light of the diverse capacities and life experiences of mentally retarded persons, it cannot be said on the record before us today that all mentally retarded people, by definition, can never act with the level of culpability associated with the death penalty."¹⁰² She emphasized that the cognitive abilities of people with mental retardation vary greatly, as do their levels of education, experiences, adaptive abilities, and abilities to live independently in society.¹⁰³ For these reasons, an individualized determination of culpability was more appropriate than a bright line drawn to exempt people with mental retardation from the death penalty.¹⁰⁴

While she reaffirmed her commitment to considering factors beyond simply the head-counting of the evolving standards of decency analysis, her additional analysis led Justice O'Connor to the same result. She ultimately concluded, and has concluded in each case, that individual determination is required, and bright line rules are inappropriate. In *Penry*, she failed again to square her purported commitment to additional judicial checks on the death penalty, which clearly contemplate bright-line drawing, with her repeated assertions that individualization is required. One could continue to argue that she has tried to have it both ways, and that she will know the case when she sees it, in which the Court's "obligation" to assess proportionality will actually have teeth, have some effect beyond the mere analytical exercise. That case may be *Atkins v. Virginia*,¹⁰⁵ and her vote in that case raises the question whether her personal views influenced her Eighth Amendment analysis regarding people with mental retardation.

IV. JUSTICE KENNEDY AND THE EIGHTH AMENDMENT

Justice Kennedy took his seat on the Court on February 18, 1988, after

their consideration of those states here, without comment, should call into question their commitment to the principles they have previously and quite strongly espoused.

101. *Penry*, 492 U.S. at 335.

102. *Id.* at 338-39.

103. *Id.*

104. *Id.* at 338, 340.

105. 536 U.S. 304 (2002).

being nominated to the Court by President Reagan.¹⁰⁶ The first death penalty case¹⁰⁷ in which Justice Kennedy participated and that applied the cruel and unusual punishments clause to the execution of classes of offenders was *Stanford v. Kentucky*.¹⁰⁸ Before he would author *Roper v. Simmons*¹⁰⁹ in 2005, he would also participate in deciding *Penry v. Lynaugh*¹¹⁰ and *Atkins v. Virginia*.¹¹¹ As with Justice O'Connor, because his votes and opinions in these cases may help to resolve the question of the extent to which his personal views may be influencing his decision making, we will examine each in turn.

Justice Scalia wrote the opinion in *Stanford v. Kentucky*, in which Justice Kennedy and Justice O'Connor joined. Although Justice O'Connor concurred in part and concurred in the judgment, she took issue with some of the plurality's Eighth Amendment approach.¹¹² Justice Kennedy simply joined Justice Scalia's entire opinion,¹¹³ including its stridently-worded denunciation of the other justices' emphasis on the Court's responsibility to apply its own judgment to the Eighth Amendment question.¹¹⁴ Because Justice Scalia's opinion was very strong and pointed in this critical respect, Justice Kennedy's wholesale signing on is revealing and useful as a contrast to his about-face in *Roper*. But in joining Justice Scalia in *Stanford* in 1989, Justice Kennedy also agreed that there existed no national consensus against the execution of sixteen and seventeen-year-olds. Although that agreement is perhaps less significant to his later *Roper* decision than his acquiescence in the "own judgment" aspect of Justice Scalia's opinion, the resolution of the consensus issue is nonetheless relevant to the larger question of personal predilection and thus in need of some analysis.

Justice Scalia and the majority determined that no legislative consensus

106. See The Justices of the Supreme Court, *supra* note 28.

107. *Thompson v. Oklahoma* was pending when Justice Kennedy took his seat on the Court, and he took no part in its consideration or in the decision. *Thompson*, 487 U.S. at 817.

108. 492 U.S. 361 (1989).

109. 543 U.S. 551 (2006). In *Thompson v. Oklahoma*, a plurality of the Court decided that execution of children fifteen years old or younger at the time of their offenses was cruel and unusual punishment in violation of the Eighth Amendment. *Thompson*, 487 U.S. 815. The case was decided several months after Justice Kennedy joined the Court, but he did not take part in the consideration of the case. *Id.* at 817.

110. 492 U.S. 302 (1989).

111. 536 U.S. 304 (2002).

112. See *supra* text accompanying notes 80, 90-93.

113. *Stanford*, 492 U.S. at 363.

114. See *id.* at 377-80.

existed against executing members of this juvenile class because only fifteen death penalty states specifically excluded sixteen-year-old offenders from the death penalty's reach and only twelve death penalty states exempted seventeen-year-old offenders.¹¹⁵ His opinion analogized this case to *Tison v. Arizona*, in which only eleven states prohibited the execution of felony murderers who participated in the crime and exhibited the requisite level of indifference to human life and in which the Court found no consensus against execution.¹¹⁶ He distinguished Stanford's case from *Coker*, *Enmund*, and *Ford*, in which a consensus was found against the executions but on much stronger grounds: all but one jurisdiction prohibited the penalty in *Coker*, all but eight jurisdictions prohibited it in *Enmund*, and all states prohibited the punishment in *Ford*.¹¹⁷ The numbers in *Stanford*, in the majority's and Kennedy's view, did not rise to the level of a national consensus. But the Court and Kennedy emphatically refused to consider non-death penalty states in the calculation of national consensus, stating that those states' opposition to capital punishment may be relevant to the larger question of a consensus against the death penalty in general but had no relevance to the narrower question about the decency of executing this class of defendants.¹¹⁸

Apart from the effect that such an approach has on the determination of the evolving standard of decency,¹¹⁹ it arguably reveals personal preferences on the death penalty.¹²⁰ The approach has the attraction for death penalty supporters of limiting the number of jurisdictions that appear to be opposed to executions, at least of a particular class. Were a justice to favor the death penalty, then he or she could make a reasoned argument

115. *Id.* at 370-71.

116. *Tison*, 481 U.S. at 154.

117. *Stanford*, 492 U.S. at 370-71.

118. *Id.* at 370 n.2 (stating that the contrary position "is rather like discerning a national consensus that wagering on cockfights is inhumane by counting within that consensus those States that bar all wagering").

119. I have criticized the calculation from this approach as being part of a jurisprudence that rigs the evolving standard of decency toward a pro-death conclusion. See Raeker-Jordan, *supra* note 14, at 546-49.

120. Indeed, we know that Justice Scalia believes in the moral acceptability of capital punishment. See Remarks of Justice Antonin Scalia on Religion, Politics, and the Death Penalty, Address at the University of Chicago Conference "A Call for Reckoning: Religion and the Death Penalty" (Jan. 25, 2002), transcript available at <http://pewforum.org/deathpenalty/resources/transcript3.php3> (last visited Apr. 27, 2006). But Justice Scalia assured listeners that "what I will have to say . . . has nothing to do with how I vote in capital cases that come before the Supreme Court." *Id.*

against counting non-death penalty states while at the same time limiting the appearance of opposition in the standard of decency. By contrast, one might believe that in order for the evolving standard to be an accurate reflection of American society's conceptions of decency, and not just of death penalty states' conceptions of decency, then non-death penalty states must be counted even in cases more narrowly involving classes of offenders. But that person in all likelihood opposes the death penalty, and although he or she can make a reasoned, and quite strong, argument that non-death penalty states should be counted,¹²¹ that approach also has the attraction of increasing the number of states in opposition to executions of certain classes, and influences the evolving standard of decency accordingly. The approach one takes on this issue, then, can reveal one's underlying personal predilections.

Those predilections may also be revealed by one's approach to the jury sentencing prong of the evolving standards of decency test. The *Stanford* majority dismissed the significance of the statistics bearing on the jury sentencing prong of the test by spinning the results to favor what appeared to be the desired outcome. The majority and Justice Kennedy initially observed that because a smaller number of juveniles commit capital crimes than do adults, the statistics showing a very small number of juvenile death sentences are not significant; logically, juveniles would have been sentenced to death and executed much less frequently than adults anyway.¹²² But the majority and Justice Kennedy went further, to establish the approach they would take to indications of jury sentencing behavior. Even granting that a "substantial discrepancy" existed between the numbers of juveniles and the numbers of adults sentenced to death, the majority would not credit that substantial discrepancy as indicating anything about jurors' aversion to death sentences: "[t]o the contrary, it is not only possible but overwhelmingly probable that the very considerations which induce petitioners . . . to believe that death should *never* be imposed on offenders under 18 cause prosecutors and juries to believe that it should *rarely* be imposed."¹²³

Despite the fact that the justices in the majority agreed that jury sentencing patterns should be relevant to the Eighth Amendment determination through the evolving standards of decency analysis, they nonetheless interpreted the data from that prong in a manner that can only be described as extremely penurious. The only argument a defendant could

121. *See id.*

122. *Stanford*, 492 U.S. at 373.

123. *Id.* at 373-74.

make under that prong is to say that the numbers are small, the group at issue is under-represented on death row, and the evolving standard of decency is against these death sentences. Still, such an argument can continually be swept aside by the majority, no matter the group at issue, with an approach that says small numbers show nothing about the evolving standard of decency. Indeed, this approach says that small numbers even demonstrate that the process is working correctly by only meting out death sentences in the very worst cases. The attraction of the approach for an adherent of the rightness of the death penalty is that it does not impugn the penalty in any case. On the contrary, the approach validates death sentences no matter what the evidence. Arguably, only someone who fully supported the death penalty would interpret the prong in this manner; one would not have to be cynical to think that the majority justices, including Justice Kennedy, desire to retain and uphold the death penalty and are doing so through their stingy interpretation of a settled rule. One's approach toward this prong of the evolving standards test clearly seems to reflect personal ideologies toward the death penalty.

Another contentious evolving standard issue in *Stanford* involved the use of international opinion evidence to ascertain the Eighth Amendment's evolving standard of decency. Justice Scalia and Justice Kennedy in the majority sharply rejected any resort to the sentencing practices of the international community to support an evolving standards determination, emphasizing that it is "*American* conceptions of decency that are dispositive" of the evolving standards of decency and that have any relevance to the Eighth Amendment assessment.¹²⁴ The majority would not consider views of the international community at all.¹²⁵ Those justices considered to be on the right side of the political spectrum, including Justice Kennedy, are the ones who objected to any consideration of this evidence.¹²⁶ One can speculate that those justices opposed use of the evidence because they favored the death penalty but the weight of

124. *Id.* at 369.

125. *Id.* at 369 n.1.

126. These justices included Justices Scalia and Kennedy. See Michael Dorf, *FindLaw Forum: Supreme Court Justices Defied Expectations*, CNN.COM, July 10, 2001, available at <http://archives.cnn.com/2001/LAW/07/columns/fl.dorf.supremecourt.07.10/> ("Conventional wisdom divides the current Justices of the United States Supreme Court into three camps. First, there are the staunchly conservative Justices: Chief Justice William Rehnquist and Justices Antonin Scalia and Clarence Thomas. Second, there are the moderately conservative 'swing' Justices, Sandra Day O'Connor and Anthony Kennedy . . .").

international opinion is against it.¹²⁷ Considering that evidence in the assessment of the evolving standard of decency would only help to tilt the standard of decency toward disapproval of the penalty. By contrast, those justices who appear to oppose capital punishment, those perceived to be the "liberal justices," support at least an examination of the views of the international community on the evolving standards question.¹²⁸ Such evidence supports a conclusion that the death penalty for a particular group is indecent because most international evidence would point against executions.¹²⁹ The United States is in a minority that retains the death penalty at all.¹³⁰ One can make a strong argument that a justice's choice of rule, whether to consider evidence of international views, is inextricably intertwined with his personal views about the death penalty.

But even assuming that personal preferences are not a factor in a judicial choice of rules, and crediting the conservative justices' legal arguments against inclusion of international views about the death penalty in the Eighth Amendment assessment, then one would assume that such a strongly-held view, as evidenced by the strongly-worded opinion in *Stanford*,¹³¹ would not change depending on the class of offender at issue. Instead, such a view would remain an aspect of a justice's Eighth Amendment jurisprudence. But if in a later case the justice used the very evidence he rejected in an earlier case, if he used that evidence to strike down a death penalty for a class of offenders, and especially if he made the switch without comment, one could argue that the change in Eighth Amendment approach was driven by personal preferences about the propriety of the death penalty in the case at issue. One might argue that the justice was not wedded to a particular rule but only to the rule that allowed him to reach the result he personally desired at the time. Again, Justice

127. The Death Penalty Information Center indicates that as of April 20, 2006, there are 123 countries that are abolitionist "in law or practice," and there are 73 retentionist countries. See Death Penalty Information Center, *Abolitionist and Retentionist Countries*, available at <http://www.deathpenaltyinfo.org/article.php?scid=30&did=140> (last visited Oct. 23, 2006) [hereinafter *Death Penalty Countries*].

128. These justices include Justices Stevens, Souter, Ginsburg, and Breyer. See Dorf, *supra* note 126 ("Conventional wisdom divides the current Justices of the United States Supreme Court into three camps . . . Finally, there are the moderately liberal Justices: John Paul Stevens, David Souter, Ruth Bader Ginsburg, and Stephen Breyer."). All have written or joined death penalty opinions that refer to international sentiment in determining the evolving standard of decency. See, e.g., *Atkins*, 536 U.S. at 304.

129. See Dorf, *supra* note 126.

130. See *Death Penalty Countries*, *supra* note 127.

131. See generally *Stanford*, 492 U.S. at 361.

Kennedy's opinion in *Roper* will be analyzed for just such a result.

Perhaps the more significant aspect of *Stanford* in which Justice Kennedy joined without caveat, is the portion that vehemently objected to the use of proportionality and the penological goals assessments in the Court's application of its "own judgment" to the question of constitutionality, under the Eighth Amendment.¹³² In the voice of Justice Scalia, but to which Justice Kennedy interposed no misgivings, the plurality declared that the Court has "limited the [Eighth] Amendment's extension to those practices contrary to the 'evolving standards of decency that mark the progress of a maturing society.' It has never been thought that this was a shorthand reference to the preferences of a majority of this Court."¹³³ Further,

[t]o say, as the dissent says, that "it is for *us* ultimately to judge whether the Eighth Amendment permits imposition of the death penalty," —and to mean that as the dissent means it, *i.e.*, that it is for *us* to judge, not on the basis of what we perceive the Eighth Amendment originally prohibited, or on the basis of what we perceive the society through its democratic processes now overwhelmingly disapproves, but on the basis of what we think "proportionate" and "measurably contributory to acceptable goals of punishment"—to say and mean that, is to replace judges of the law with a committee of philosopher-kings.¹³⁴

The plurality's objection here is crucial because it goes to the heart of some of the criticisms leveled at some justices, now including Justice Kennedy, that they have been making political, ideological decisions. Without qualification, the plurality in *Stanford*, including Justice Kennedy, rejected the Court's use of its "own judgment" in such a way that one could not doubt the sincerity of the belief behind the rejection.¹³⁵ Justice Scalia's opinion could not be clearer: he feels the proportionality and penological goals analyses are simply proxies for the expression of justices' personal views and preferences, which are masked by what appears on its face to be constitutional reasoning.¹³⁶

132. *Stanford*, 492 U.S. at 377-80. This portion of the opinion garnered only a plurality. Justice O'Connor, but not Justice Kennedy, departed from the majority at this point. See *id.* at 382.

133. *Id.* at 379 (emphasis in the original).

134. *Id.* at 379.

135. See *id.*

136. See *id.*

A justice who employed his or her "own judgment" on proportionality would be accused by this plurality of letting their personal preferences substitute for constitutional mandate. But what of the justice who seemed to wholeheartedly agree with the *Stanford* invective at the time but who later embraces the approach requiring the Court to bring its "own judgment" to bear on an alleged Eighth Amendment violation? Could a justice who once disbelieved strongly in that approach later adopt it without one word of rationale for the change? Could it be that the change in approach had nothing to do with the doctrine and all to do with the result desired in a case? If it is the latter, then the irony is rich; a justice who, as a personal preference, supported executions of juveniles would agree that the Court should not employ its "own judgment" to examine the proportionality of the death penalty or its furtherance of penological goals. Any consideration of those factors may just call the punishment into question, which is not desired. So, the justice agrees that employing those tools of analysis only masks or results in the fulfillment of personal preferences. Later, the justice now opposes the execution of juveniles or at least believes it is problematic. Because employment of the "own judgment" tools can assist in striking down the death penalty, the justice uses the tools to achieve the new preference and does not explain or justify his change in approach. No longer, apparently, is the justice troubled that the Court's proportionality or penological goals assessments may be the means to achieve a personal preference, as the *Stanford* plurality had charged.¹³⁷ Instead, it simply is not an issue. If this scenario describes what in fact played out in Justice Kennedy's opinion in *Roper v. Simmons*,¹³⁸ then the fact of his abrupt change in approach would seem to support criticisms that justices are using their judicial prerogatives regarding constitutional interpretation to achieve the results they personally desire.

Ultimately, in *Stanford*, the exclusion of both non-death penalty states' and the international community's decency evidence on the question of execution of juveniles helped the Court reach the conclusion that no consensus existed against these executions.¹³⁹ The evolving standard of decency therefore did not require that the juvenile death penalty be struck down.¹⁴⁰ Refusal to engage in a proportionality or penological goals analysis also allowed the majority to uphold juvenile executions.¹⁴¹ Justice Kennedy

137. *Stanford*, 492 U.S. at 379.

138. See generally *Roper*, 543 U.S. at 551.

139. *Stanford*, 492 U.S. at 379.

140. *Id.*

141. *Id.*

joined all aspects of the majority opinion without comment.¹⁴² More significantly, he joined an unwavering approach rejecting the “own judgment” prong of the Eighth Amendment analysis.¹⁴³ An analysis of his opinion in *Roper* will assist in deciding whether the shift he made away from all of these positions results from a change of personal views about the death penalty, or whether he explains the differences in the cases sufficiently to dispel the suspicion that personal ideology is creeping into his jurisprudence.

Justice Kennedy must also rationalize his *Roper* opinion with his vote in *Penry v. Lynaugh*.¹⁴⁴ In that case, he joined Justice Scalia, Chief Justice Rehnquist, and Justice White in an opinion that both concurred in and dissented from Justice O'Connor's opinion that refused to strike down the death penalty for people with mental retardation.¹⁴⁵ This plurality had joined Justice O'Connor in finding no legislative consensus against executing this class of offenders and, therefore, found no evolving standard of decency that would make their executions cruel and unusual.¹⁴⁶ But the plurality parted ways with Justice O'Connor when she applied her own judgment to the question of Eighth Amendment proportionality.¹⁴⁷ As in their plurality opinion in *Stanford v. Kentucky*, these justices led by Justice Scalia reiterated their complete opposition to any assessment beyond the evolving standards analysis.¹⁴⁸ Any further inquiry

has no place in our Eighth Amendment jurisprudence. “The punishment is either ‘cruel and unusual’ (*i.e.*, society has set its face against it) or it is not.” If it is not unusual, that is, if an objective examination of laws and jury determinations fails to demonstrate society's disapproval of it, the punishment is not unconstitutional even if out of accord with the theories of penology favored by the Justices of this Court.¹⁴⁹

This emphatic language, impugning the motives of the other justices, is a

142. *Id.* at 382.

143. *Id.*

144. *See generally Penry*, 492 U.S. at 302.

145. *Id.* at 350-51.

146. *Id.* at 334-35.

147. *Id.*

148. *Id.*

149. *Id.* at 351 (Scalia, J., concurring in part, dissenting in part) (quoting *Stanford v. Kentucky*, 492 U.S. 361, 378 (1989) (plurality opinion)).

direct rebuke to Justice O'Connor and the others, all of whom believed it was necessary to consider the proportionality of the punishment to the blameworthiness of the offender and whether the punishment furthered penological goals of retribution and deterrence.¹⁵⁰ Justice Kennedy joined Justice Scalia's criticism and in so doing, he sent clear signals that he had no tolerance for the rest of the Court's use of its "own judgment" in the Eighth Amendment context.¹⁵¹ A justice's departure from such a strong stance would be a drastic change, and it would raise questions about his commitment to the original position or any principled position beyond his own personal predilections. Such a change, however, came first in *Atkins v. Virginia*.¹⁵²

V. JUSTICE O'CONNOR AND JUSTICE KENNEDY MEET IN THE MAJORITY IN *ATKINS V. VIRGINIA*

Perhaps the most striking aspect of Justice O'Connor's role in *Atkins* was her failure to write separately.¹⁵³ As detailed above, she has either written the majority opinion in these cases or written separately to make clear her differences regarding the proper test and its application to the case at hand. Justice O'Connor simply joined in the majority opinion¹⁵⁴ striking down, as violative of the Eighth Amendment, executions of people with mental retardation.¹⁵⁵ In joining the majority, she broke her tradition of refusing to grant categorical exemptions from the death penalty for classes of offenders. Just as striking, Justice Kennedy joined the majority¹⁵⁶ *Atkins* as well, doing a complete turnabout in his approach to these Eighth Amendment cases. A probing analysis of the case is warranted to determine why Justices O'Connor and Kennedy either changed their approaches or changed their views since the 1989 cases of *Stanford v. Kentucky* and *Penry v. Lynaugh*.

The *Atkins* case presented the Court with an issue with which it had not dealt in thirteen years: whether a class of defendants must be exempted from the death penalty because their executions would amount to cruel and

150. *Penry*, 492 U.S. at 335.

151. *Id.* at 351.

152. *See generally Atkins*, 536 U.S. at 304.

153. *Id.* at 304.

154. *Id.* at 305.

155. *Id.* at 321.

156. *Id.*

unusual punishment under the Eighth Amendment.¹⁵⁷ This case revisited the class of people with mental retardation and implicated the same issue addressed in *Penry*.¹⁵⁸ In rejecting a categorical exemption for people with mental retardation in *Penry*, the justices had lined up as follows. On the evolving standards of decency question, Justice O'Connor, Chief Justice Rehnquist, and Justices White, Scalia, and Kennedy decided there existed no national consensus against executions of members of this class because only one state had specifically prohibited their executions.¹⁵⁹ Their majority opinion even considered non-death penalty states in the calculation and still found no consensus because only fifteen states would have prohibited capital punishment for these offenders.¹⁶⁰ Regarding the Court's "own judgment" prong of the analysis, requiring the justices to conduct their own proportionality review and consider the punishment's furtherance of penological goals, Justice O'Connor insisted on the necessity of such review and followed her pattern of insisting on individualized assessments in place of categorical exemptions.¹⁶¹ Justice Kennedy simply joined the plurality that rejected any resort to the justices' "own judgment" about proportionality or penological goals; his Eighth Amendment analysis, therefore, consisted only of the evolving standards of decency determination.¹⁶²

In *Atkins*, the majority, including Justices O'Connor and Kennedy,¹⁶³ reached a different result than in *Penry*, this time finding that executions of people with mental retardation was cruel and unusual punishment.¹⁶⁴ The majority set out what it viewed as the Eighth Amendment standards for cruel and unusual punishments which seek to identify excessive punishments through a proportionality review.¹⁶⁵

A. The Evolving Standards of Decency

1. The Legislative Evidence and Evidence of Sentencing and Execution Frequency

The Court's proportionality review began with the application of

157. *Atkins*, 536 U.S. at 306.

158. See generally *Penry*, 492 U.S. at 302.

159. *Id.* at 334.

160. *Id.*

161. *Id.*

162. *Id.*

163. See *Atkins*, 536 U.S. at 305 (including Justices Souter, Ginsburg, and Breyer in the majority).

164. *Id.* at 311.

165. *Id.*

standards of excessiveness "that currently prevail" as evidenced by the evolving standards of decency.¹⁶⁶ Objective factors are to inform that assessment to the greatest extent, and the best objective evidence is "the legislation enacted by the country's legislatures."¹⁶⁷ In that analysis, the majority found a legislative consensus against executions of people with mental retardation because a wave of states had, since *Penry*, specifically exempted that group of offenders from eligibility for the death penalty under their state statutes.¹⁶⁸ In 1989, the year *Penry* was decided, Maryland enacted a ban on these executions,¹⁶⁹ and in the thirteen years that followed, sixteen more states enacted their own bans.¹⁷⁰ The total number of states now specifically banning the execution of these offenders came to eighteen.¹⁷¹ But the Court stated that "[i]t is not so much the number of these States that is significant, but the consistency of the direction of change."¹⁷² It also noted parenthetically that in the same time period there was a "complete absence of States passing legislation reinstating the power to conduct such executions."¹⁷³ The majority did not consider non-death penalty states in its assessment of the evolving standard but found "powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal" in the large number of states prohibiting these executions in such a short span of time.¹⁷⁴ The Court noted finally that the practice of executing people with

166. *Id.* This statement was part of a larger point, which was that excessiveness "is judged not by the standards that prevailed . . . when the Bill of Rights was adopted, but rather by those that currently prevail." *Id.* The point was addressed to the dissent, which insisted:

Under our Eighth Amendment jurisprudence, a punishment is "cruel and unusual" if it falls within one of two categories: "Those modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted," and modes of punishment that are inconsistent with modern "standards of decency," as evinced by objective indicia

Id. at 339-40 (quoting *Ford v. Wainwright*, 477 U.S. 399, 405 (1986)). The distinction, however, does not appear to be significant, because even the dissenting justices have in the past acknowledged that "this Court has not confined the prohibition embodied in the Eighth Amendment to 'barbarous' methods that were generally outlawed in the 18th century," but instead has interpreted the Amendment "in a flexible and dynamic manner," looking to the evolving standards of decency. *Stanford*, 492 U.S. at 369 (quoting *Gregg v. Georgia*, 428 U.S. 153, 171 (1976)).

167. *Atkins*, 536 U.S. at 312 (quoting *Penry*, 492 U.S. at 331).

168. *Id.*

169. *Id.* at 314.

170. *Id.*

171. *Id.*

172. *Id.* at 315.

173. *Atkins*, 536 U.S. at 315-16.

174. *Id.*

mental retardation is itself uncommon, even in states that allow their executions; the practice had therefore become unusual.¹⁷⁵

Justice O'Connor's vote with the majority on these facts raises some questions. There appears to be little distinction between the evolving standards aspects of this case and of the *Thompson* case, in which Justice O'Connor saw in eighteen states a "very likely" consensus against executions of the class of children at issue there, but not enough of a consensus to ban their executions categorically.¹⁷⁶ She only reversed the defendant's sentence in that case because the state had not set a minimum age, so she could not be sure the state had contemplated the executions.¹⁷⁷ Thus, she could not sanction an execution under those circumstances.¹⁷⁸ That case seems indistinguishable from the situation in *Atkins*, where there were eighteen states in opposition, and there was nothing in the general death penalty statutes that indicated the states had contemplated executions of people with mental retardation.¹⁷⁹ Her "two-part standard" from *Thompson*, where there existed a weak showing of national consensus against the executions, did not surface in *Atkins* on nearly identical facts,¹⁸⁰ and it is difficult to see why. The lack of a separate opinion from Justice O'Connor leaves one only to speculate that her personal view of the propriety of these executions has changed.

Justice Kennedy's joining of this majority on the evolving standards question is more difficult to speculate about because he did not participate in *Thompson*,¹⁸¹ the factually closest case in this regard. Because the *Atkins* majority did not refer to non-death penalty states in its evolving standards tabulation,¹⁸² Justice Kennedy's membership in this majority is not problematic in that way. Justice Kennedy did join the majority in *Stanford*, refusing to strike down death sentences for the class of children at issue in that case, even though the numbers were not that much different from those in *Atkins*.¹⁸³ In *Stanford*, a fifteen-state ban on executing the class

175. *Id.* at 316.

176. *Thompson*, 487 U.S. at 848. The largest number of states banning certain juvenile executions in *Stanford* was fifteen, and Justice O'Connor found clearly no consensus there against the executions. *Stanford*, 492 U.S. at 382. As with Justice Kennedy's joining of the *Atkins* majority finding a consensus on only slightly higher numbers, it seems like a slim difference between the cases, but at least it is a difference and does not clearly raise the same kinds of motivation issues that the much closer comparison with *Thompson* does.

177. *Thompson*, 487 U.S. at 848.

178. *Id.*

179. *Atkins*, 536 U.S. at 314.

180. *Id.*

181. See generally *Thompson*, 487 U.S. at 815.

182. *Atkins*, 536 U.S. at 316.

183. See generally *Stanford*, 492 U.S. at 361.

members was not enough to establish a consensus,¹⁸⁴ but in *Atkins* Justice Kennedy agreed that an eighteen-state ban did establish a consensus.¹⁸⁵ It may have been just the three additional states that tipped the balance, which seems a shaky ground for a constitutional ban, or it may have been that the "consistency of the direction of change"¹⁸⁶ was persuasive to him. In any event, the change in vote on this point does not appear as indicative of a suspect change in views as the change in vote regarding other aspects of the analysis.

More suspect is his agreement here that low numbers of actual death sentences and executions for this class showed some consensus against the executions.¹⁸⁷ In *Stanford v. Kentucky*, Justice Kennedy had viewed low numbers as indicative only of jury care in sentencing but not indicative of anything that might call the propriety of the death penalty into question.¹⁸⁸ His wholesale switch of sides on this issue adds to the suspicion that he simply changed his personal view of the penalty's propriety.

2. Evidence of International Opinion and Practices

Another striking aspect of Justice O'Connor's and Justice Kennedy's votes in *Atkins* was their assent to the consideration of opinions other than American legislatures and juries.¹⁸⁹ In support of its conclusion that the practice of executing people with mental retardation "has become truly unusual, and . . . that a national consensus has developed against it," the majority looked to "additional evidence."¹⁹⁰ Specifically, the Court referred to the views of "several organizations with germane expertise," "widely diverse religious communities," "the world community," and Americans as reflected in polling data, all of whom opposed or disapproved of executions of people with mental retardation.¹⁹¹

But any resort to these indications of an evolving standard of decency under our Eighth Amendment has been opposed in no uncertain terms in at least one opinion joined by Justices O'Connor and Kennedy. In *Stanford v. Kentucky*, they joined Justice Scalia, who "emphasize[d]" in his majority opinion that "it is *American* conceptions of decency that are dispositive, rejecting the contention . . . that the sentencing practices of other countries are relevant. . . . [T]he practices of other nations . . . cannot serve to

184. *Stanford*, 492 U.S. at 382.

185. *Atkins*, 536 U.S. at 316.

186. *Id.*

187. *Id.*

188. *Stanford*, 492 U.S. at 372.

189. *Atkins*, 536 U.S. at 316.

190. *Id.* at 316 n.21.

191. *Id.*

establish the first Eighth Amendment prerequisite, that the practice is accepted among our people.”¹⁹² In her own opinion in *Penry v. Lynaugh*, addressing executions of people with mental retardation, and in which Justice Kennedy joined, Justice O’Connor stated that “[i]n discerning those ‘evolving standards,’ we have looked to objective evidence of how *our society* views a particular punishment today.”¹⁹³ She made no mention of international views or views of relevant, expert organizations.¹⁹⁴

It is unclear what motivated Justices O’Connor and Kennedy to change and accept this additional evidence, but their change of approach in *Atkins* may not be significant. The role of international opinion or practices had not been a large one in evolving standards of decency assessments.¹⁹⁵ It had only been referred to when the Court found consensus *in favor of* a categorical exemption from the death penalty.¹⁹⁶ And it had mostly been used to buttress the Court’s conclusion on the question of consensus, and then often it was relegated to a footnote.¹⁹⁷ Evidence of international opinion has not itself been used to establish the standard of decency, and *Atkins* was no exception.¹⁹⁸ In a footnote, the Court stated that

[a]dditional evidence makes it clear that the legislative judgment [exhibiting a consensus against executions of people with mental retardation] reflects a much broader social and professional consensus Although these factors are by no means dispositive, their consistency with the legislative evidence *lends further support* to our conclusion that there is a consensus among those

192. *Stanford*, 492 U.S. at 369 n.1.

193. *Penry*, 492 U.S. at 331 (emphasis added).

194. *See id.*

195. *See generally Coker*, 433 U.S. at 584.

196. *See id.* at 596 n.10 (exempting offenders who committed rape of an adult woman). *See also Edmund*, 458 U.S. at 788, 798 n.22 (exempting felony murderers who did not kill, intend to kill, or attempt to kill). In *Thompson v. Oklahoma*, plurality of the Court, not including Justice O’Connor, noted that its conclusion about the evolving standard against juvenile executions was “consistent with the views that have been expressed by respected professional organizations, by other nations that share our Anglo-American heritage, and by the leading members of the Western European community.” 487 U.S. at 830. The Court did not mention international opinion in *Ford v. Wainwright*, which exempted from the death penalty those who are insane at the time of their executions. 477 U.S. at 399.

197. *See supra* note 196.

198. *Atkins*, 536 U.S. at 316 n.21.

who have addressed the issue.¹⁹⁹

Because it has been merely supplementary evidence, whether a justice accepts its persuasive force or not may be of little import to the actual conclusion the Court reaches in any given case.

On the other hand, because the evidence of international opinion would most likely support an exemption from the death penalty, it is not relied on by those finding no warrant for an exemption. Recognition of the evidence would only call into question their conclusion denying an exemption, or at least make the question a closer one and a denial of an exemption less certain. Looked at in this way, an approach that is willing to consider international opinion in determining the evolving standard of decency is probably open to finding an exemption from the death penalty in the first instance. But the question remains whether the acceptance of the international opinion evidence is based on principles about the proper Eighth Amendment approach, or whether it comes from personal desire to find evidence in opposition to the death penalty to support an exemption under the Eighth Amendment for the class of offender at issue. Perhaps that question can be answered in part by examining whether the receptivity to international opinion evidence comes about after one has viewed the legislative evidence and found some consensus against the penalty there. If so, then use of the international opinion evidence seems more principled because then it would be used to support the consensus already ascertained from national, legislative consensus evidence. But if a justice were to rely on international opinion evidence to find an exemption from the penalty in one case, but not use it and fail to find an exemption in another case with nearly identical evidence of national consensus, then one could justifiably conclude that the consideration of the extra evidence in the first case was result-driven and based on personal preferences. The international opinion evidence would be at the ready to support an exemption.

Justice O'Connor's opinions in *Thompson v. Oklahoma* and *Penry v. Lynaugh* and her vote in *Atkins* are instructive in testing this theory. Justice O'Connor found no consensus in *Thompson*, where eighteen states banned the sentence for the class at issue.²⁰⁰ She did not consider international opinion.²⁰¹ In *Penry*, the early case addressing offenders with mental

199. *Id.* (emphasis added).

200. *Thompson*, 487 U.S. at 848.

201. *See id.*

retardation, she again found no consensus and again did not mention international practices or views.²⁰² *Atkins* was really a combination of those two previous opinions because eighteen states banned the sentence for offenders with mental retardation.²⁰³ But this time she did consider international practices in reaching the conclusion to exempt people with mental retardation.²⁰⁴ There seems to have been nothing to change her vote between *Thompson* and *Atkins*. The legislative enactments numbered the same as in *Thompson*, and the class at issue was the same as in *Penry*. Adding the perspective of the international community and other groups (in *Atkins*)²⁰⁵ to the previously-inadequate eighteen state jurisdictions (in *Thompson*)²⁰⁶ makes opposition to the penalty for this class seem that much stronger, leading to a conclusion that the exemption is warranted. Because she articulated no differences between the strength of the legislative evidence in *Thompson* and *Atkins*, and because there seems to be no difference, Justice O'Connor's willingness to add the weight of international opinion here in *Atkins* to strike down the penalty seems driven by a personal view that executions are not proper for people with mental retardation. International opinion serves to buttress that view.

Justice Kennedy's aversion to resorting to international views in prior cases seemed even stronger than Justice O'Connor's because he signed on completely to Justice Scalia's denunciation of this evidence in *Stanford v. Kentucky*.²⁰⁷ His change in this regard, with no concurring explanation, simply adds fuel to the argument that his views have changed regarding the death penalty, and consequently the test he uses has changed as well. Further analysis of the remainder of *Atkins* may help shed more light on the correctness of these tentative conclusions.

B. The Court's "Own Judgment" on Proportionality

By far the most shocking aspect of these justices joining the majority in *Atkins* was their agreement with the Court's "own judgment" about the

202. *Penry*, 492 U.S. at 335.

203. *Atkins*, 536 U.S. at 314.

204. *Id.*

205. *Id.*

206. *Thompson*, 487 U.S. at 848.

207. *Stanford*, 492 U.S. at 369.

proportionality of death sentences for people with mental retardation.²⁰⁸ Justice Kennedy's vote was probably more surprising than Justice O'Connor's and surprising for different reasons; Justice O'Connor had at least agreed in her prior opinions to the necessity of conducting additional analysis.²⁰⁹ But they joined the majority opinion that recognized "that the objective evidence, though of great importance, did not 'wholly determine' the controversy, 'for the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.'"²¹⁰

In determining by application of their own judgment whether there was any reason for the Court to disagree with the consensus exhibited by the evolving standard of decency, the Court in part considered "whether either justification that we have recognized as a basis for the death penalty applies to mentally retarded offenders."²¹¹ The Court found that the two justifications, retribution and deterrence, were not measurably served by the execution of offenders with mental retardation.²¹² It summarized its overall holding this way:

Our independent evaluation of the issue reveals no reason to disagree with the judgment of the legislatures that have recently addressed the matter and concluded that death is not a suitable punishment for a mentally retarded criminal. We are not persuaded that the execution of mentally retarded criminals will measurably advance the deterrent or the retributive purpose of the death penalty. Construing and applying the Eighth Amendment in the light of our evolving standards of decency, we therefore conclude that such punishment is excessive and that the Constitution places a substantive restriction on the State's power to take the life of a mentally retarded offender.²¹³

This quote reveals the majority's careful parsing of different aspects of its

208. See generally *Atkins*, 536 U.S. at 304.

209. See, e.g., *Penry*, 492 U.S. at 335; *Thompson*, 487 U.S. at 848.

210. *Atkins*, 536 U.S. 312 (quoting *Coker*, 433 U.S. at 597).

211. *Id.* at 318-19. This article has previously referred to this assessment as the penological goals analysis.

212. *Id.* at 321.

213. *Id.*

cruel and unusual punishments constitutional construct; it shows how the evolving standards of decency analysis fits in relation to the Court's application of its own judgment on the question of excessiveness. It also stands in stark contrast to what Justice Kennedy had agreed to in prior opinions.²¹⁴ He had consistently agreed with Justice Scalia's harsh rhetoric that equated the additional "own judgment" analysis with justices' personal "preferences," Justice Scalia stating flatly that the additional analysis reduced the Court to "a committee of philosopher-kings."²¹⁵

In addition, Justice Kennedy had agreed as well that a punishment was not cruel and unusual just because it was "out of accord with the theories of penology favored by the Justices of this Court."²¹⁶ It is difficult to square Justice Kennedy's agreement with those statements and that approach with the language and approach he joined in *Atkins*. The complete about-face raises the suspicion that Justice Kennedy has simply changed his own personal views about the correctness of the death penalty in certain cases. He certainly has not explained why a completely different test is now warranted and requires a completely different result than in *Penry*, which concerned the same class of offender but was a mere thirteen years earlier.²¹⁷

Beyond the mere fact that Justice Kennedy now ascribed to this approach to determining cruel and unusual punishments, it is also stunning that he and Justice O'Connor agreed to the content of that further analysis.²¹⁸ In conducting its independent evaluation of excessiveness, the majority found that retribution was not served because the culpability of the offender with mental retardation is diminished by the impairments characteristic of people with mental retardation.²¹⁹ Those impairments limit intellectual functioning, adaptive skills, and self-care abilities.²²⁰ As a result, the Court said,

Mentally retarded persons . . . by definition . . . 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

214. See, e.g., *Stanford*, 492 U.S. at 379.

215. *Id.*

216. *Penry*, 492 U.S. at 351 (Scalia, J., concurring in part, dissenting in part).

217. *Id.* at 304.

218. *Atkins*, 536 U.S. at 318.

219. *Id.*

220. *Id.*

reactions of others [T]here is abundant evidence that they often act on impulse rather than pursuant to a pre-meditated plan, and that in group settings they are followers rather than leaders.²²¹

This precise language used by the majority is important because it is clear that the Court attributed characteristics and traits to the entire class of people with mental retardation, with no distinctions among individuals. The Court concluded therefore that "mentally retarded persons" as a class have diminished personal culpability.²²²

But again, this language and approach is strikingly at odds with what Justice O'Connor has insisted from her first opinion in *Edmund v. Florida*, in which she stated that the Court's own judgment on proportionality must consider factors "unique to each defendant's case," and that ultimately "individualized consideration [is] a constitutional requirement in imposing the death sentence."²²³ She again referred to the "individualized determination of culpability required in capital cases" in *Tison v. Arizona*.²²⁴ Even further still, she minced no words in *Thompson v. Oklahoma* when she stated, "[t]hese characteristics [of juvenile offenders] . . . vary widely among different individuals of the same age, and I would not substitute our *inevitably subjective judgment* about the best age at which to draw a line in the capital punishment context for the judgments of the Nation's legislatures."²²⁵ In *Stanford v. Kentucky*, she cryptically asserted, without further elaboration, that the Court's own proportionality analysis could not resolve the juvenile death penalty cases at issue there.²²⁶ Most importantly, because *Penry* and *Atkins* involved the class of offenders with mental retardation, in *Penry* Justice O'Connor stated that "[i]n light of the diverse capacities and life experiences of mentally retarded persons, it cannot be said on the record before us today that all mentally retarded people, by definition, can never act with the level of culpability associated with the death penalty."²²⁷

It does not appear that anything changed "on the record before [the

221. *Id.*

222. *Id.*

223. *Edmund*, 458 U.S. at 815 (O'Connor, J., dissenting).

224. *Tison*, 481 U.S. at 156.

225. *Thompson*, 487 U.S. at 854 (O'Connor, J., concurring in the judgment)(emphasis added).

226. *Stanford*, 492 U.S. at 382 (O'Connor, J., concurring in part and concurring in the judgment).

227. *Penry*, 492 U.S. at 338-39 (opinion of O'Connor, J.).

Court]” about what was known about the traits of people with mental retardation and their consequent levels of culpability from the time of *Penry* to the *Atkins* case.²²⁸ Nonetheless, Justice O’Connor not only applied what she had condemned before as “subjective judgment” to the culpability determination, but she also specifically exempted an entire class of offenders from the reach of the death penalty.²²⁹ This exemption was based in part on the subjective “own judgment” assessment,²³⁰ when she had never used this assessment before, and when she had never before dispensed with the requirement of individualization. To complete the surprising vote, she made this switch without writing a carefully-worded opinion that could clearly distinguish *Penry* from *Atkins* in this crucial way;²³¹ she has always written either the majority opinion or her own opinion in these cases.²³² Because she gave no explanation for her different conclusion, there is nothing left for the Court observer to surmise except that Justice O’Connor simply changed her personal views about executions of people with mental retardation.

Apparently, Justice O’Connor now believed that people with mental retardation as a class were less culpable, and it was her self-labeled “inevitably subjective judgment” that led her to exempt a whole class of offenders from the death penalty. It may also be that she now believed more generally that exemptions could be made categorically and that the individualization requirement did not constrain the Court from finding disproportionately excessive punishments as to entire classes. Whether these observations of Justice O’Connor’s views are accurate, and whether the assertions that Justice Kennedy was now a convert to the view that the evolving standards of decency should not be the sole measurement of the constitutionality of a death sentence, were tested in *Roper v. Simmons*.²³³

VI. JUSTICE O’CONNOR AND JUSTICE KENNEDY PART WAYS IN *ROPER* *V. SIMMONS*

Even though they both agreed with the categorical exemption in *Atkins*

228. Indeed, in *Penry*, Justice O’Connor had cited to the same American Association on Mental Retardation classification system as did the Court in *Atkins* to describe some of the same traits of people with mental retardation. See *Penry*, 492 U.S. at 308 n.1, 338; *Atkins*, 536 U.S. at 308 n.3.

229. *Atkins*, 536 U.S. at 318-21.

230. *Id.*

231. See *id.*

232. See, e.g., *Thompson*, 487 U.S. at 848 (O’Connor, J., concurring in the judgment); *Stanford*, 492 U.S. at 382 (1989) (O’Connor, J. concurring in part and concurring in the judgment).

233. See generally *Roper*, 543 U.S. at 551.

v. *Virginia* and joined the majority, Justice O'Connor and Justice Kennedy saw things differently in *Roper v. Simmons*.²³⁴ Justice Kennedy wrote the majority opinion in *Roper*, in which the Court struck down as cruel and unusual punishment the death penalty imposed on murderers who were older than fifteen but under eighteen years of age when they committed their crimes.²³⁵ In his debut as the writer of an opinion in one of these Eighth Amendment cases, Justice Kennedy first reaffirmed that the Amendment prohibits excessive punishments, requiring that they be proportioned to the offense.²³⁶ It is proper and necessary, he wrote, to refer 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."²³⁷

Justice Kennedy then canvassed the decisions from *Thompson v. Oklahoma* through *Stanford v. Kentucky* and *Atkins v. Virginia*.²³⁸ He noted that in *Thompson*, in addition to assessing the evolving standards, the Court had applied its own judgment on the proportionality question,²³⁹ and the plurality had rejected that additional check in *Stanford*.²⁴⁰ Then, the *Atkins* Court "returned to the rule, established in decisions pre-dating *Stanford*, that the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment."²⁴¹ It is this construct that the Court would apply to the cruel and unusual punishment question regarding this class of juveniles.²⁴²

Justice O'Connor wrote a lengthy dissent,²⁴³ in which she agreed with the basic principles of Eighth Amendment analysis that Justice Kennedy articulated.²⁴⁴ But that is where the agreement ended; the two justices fundamentally disagreed on the application of both aspects of the test to the class of offender in this case.²⁴⁵ An examination of their approaches to and conclusions about the propriety of the juvenile death penalty under the Eighth Amendment construct, and of the role of personal predilections in

234. *Id.*

235. *Id.* at 578. Justice Kennedy was joined in the majority by Justices Stevens, Souter, Ginsburg, and Breyer. *Id.* at 554.

236. *Id.* at 560.

237. *Id.* at 561.

238. *Id.* at 562.

239. *Roper*, 543 U.S. at 562.

240. *Id.*

241. *Id.* at 563 (internal quotations omitted).

242. *Id.*

243. *See id.* at 587-607.

244. *See id.* at 588-90.

245. *Id.*

their conclusions, follows.

A. The Evolving Standards of Decency

1. The Legislative Evidence and Evidence of Sentencing and Execution Frequency

a. Justice Kennedy

Justice Kennedy, writing for the majority, indicated that the “beginning point” in the analysis was the objective evidence of legislative enactments, which gives the Court “essential instruction” about proportionality and the standard of decency.²⁴⁶ The legislative evidence showed in this case that society opposed executions of juveniles of the sixteen to seventeen-year-old age group.²⁴⁷ Justice Kennedy compared the evidence of consensus to the evidence in *Atkins*, when, he said, thirty states disallowed the death penalty for people with mental retardation.²⁴⁸ In that thirty, he included the eighteen death penalty states that prohibited it for those offenders and the twelve states that had abolished the death penalty altogether.²⁴⁹ In *Roper*, the numbers were “similar, and in some respects parallel.”²⁵⁰ Justice Kennedy again added to the eighteen states prohibiting these juvenile executions, the twelve non-death penalty states that do not execute anyone.²⁵¹ As in *Atkins*, he also noted that the practice of executing juveniles had become infrequent, even in those states that permitted their executions.²⁵²

First, it is noteworthy that Justice Kennedy now marshaled, for support of his conclusion, evidence from non-death penalty states, which would support a ban on the punishment for any class.²⁵³ He used this aspect of *Atkins* to support his ban on juvenile executions, even though the *Atkins* Court itself never explicitly considered the non-death penalty states or put the number at thirty.²⁵⁴ In *Atkins*, the Court only noted the eighteen death penalty states in which the penalty was banned and the “consistency of the

246. *Roper*, 543 U.S. at 564.

247. *See id.* at 568.

248. *Id.* at 564.

249. *Id.*

250. *Roper*, 543 U.S. *Roper*, 543 U.S. at 564.

251. The eighteen included states that exempted juveniles expressly in legislative enactments and states that exempted them through judicial interpretation of the states’ laws. *See id.*

252. *See id.* at 564-65.

253. *Id.*

254. *See Atkins*, 536 U.S. at 314-16.

direction of change."²⁵⁵ Certainly adding the non-death penalty states assisted in displaying a consensus, but in the past, Justice Kennedy has consistently joined opinions like *Stanford v. Kentucky*, in which the authors vociferously refused to consider non-death penalty states in the calculation.²⁵⁶ And Justice Kennedy did not just change without commenting on the evidence upon which he relied, he announced it in no uncertain terms:

It should be observed . . . 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.²⁵⁷

Either there was a principled reason for his previously refusing to consider non-death penalty states or there is not, and Justice Kennedy should be the one to supply the rationale for his change in this regard. The fact that Justice Kennedy now factored in the non-death penalty states in order to make his case for consensus, and that he has supplied no other explanation for his change of approach on this issue,²⁵⁸ supports the argument that he has changed his own mind about the propriety of the death penalty for members of this class.

Second, Justice Kennedy conceded a distinction between the objective evidence in *Atkins* and that in *Roper*.²⁵⁹ The speed of abolition of the death penalty over the thirteen-year period for people with mental retardation in *Atkins* seemed to be a significant factor in the result in that case.²⁶⁰ The Court had said, "[i]t is not so much the number of these states that is significant, but the consistency of the direction of change."²⁶¹ This "consistency of the direction of change" argument seems to have two components: first, the large number of states banning the punishment in the intervening thirteen-year period,²⁶² and second, the absence of states reinstating it for these class members in that same time period.²⁶³ As to the first component, in *Atkins*, sixteen states had abolished the death penalty for

255. *Id.*

256. *See, e.g., Stanford*, 492 U.S. at 370 n.2.

257. *Id.*

258. *See id.*

259. *Id.*

260. *Atkins*, 536 U.S. at 315.

261. *Id.*

262. *Id.*

263. *Id.*

people with mental retardation in that time frame,²⁶⁴ whereas in *Roper* only five states abandoned the death penalty for juveniles in the same thirteen-year period, and one of those was by judicial decision.²⁶⁵ Justice Kennedy dealt with this issue in a straightforward manner by observing that a good number of states had simply concluded earlier that juveniles should not be executed.²⁶⁶ Thus, the pace of abandonment of the juvenile death penalty seemed slower but was no less significant in its demonstration of consensus.²⁶⁷ As to the second component, Justice Kennedy observed, “[i]n particular [in *Atkins*] 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.”²⁶⁸ The same was true in *Roper*; no state had reinstated the juvenile death penalty.²⁶⁹ But Justice Kennedy overstated the significance of this point from *Atkins*. While it is true that the *Atkins* Court noted that no state had reinstated the death penalty for people with mental retardation after *Penry* when they could have, the *Atkins* Court made that point in a parenthetical.²⁷⁰ That apparent second thought is hardly a demonstration that the Court “found [the issue] significant” to its holding on consensus. One could argue that Justice Kennedy is reaching for similarities with *Atkins* because he wants to exempt this class as well.

Finally, Justice Kennedy relied on the infrequency of executions to find a consensus against the juvenile death penalty, but he did so in a manner inconsistent with the approach he followed in *Stanford v. Kentucky*.²⁷¹ In that case, he agreed with Justice Scalia that the infrequency of sentencing simply means jurors take their jobs seriously, and juries only impose death sentences for those crimes that are truly worthy.²⁷² In that way, Justice Scalia and Justice Kennedy essentially read this indicator of the evolving standard out of the analysis by stripping it of any meaning.²⁷³ But in *Roper*, Justice Kennedy wrote that the low rate of execution shows that society views juveniles as less culpable than adults.²⁷⁴ Thus, he actually gave content to the evidence of execution infrequency as a measure of society’s views. It is an unexplained about-face that encourages accusations of

264. *Id.* at 315-16.

265. *Roper*, 543 U.S. at 565.

266. *Id.* at 565-66.

267. *Id.* at 566-67.

268. *Id.* at 566 (emphasis added).

269. *Id.*

270. *See Atkins*, 536 U.S. at 315-16.

271. *Stanford*, 492 U.S. at 363.

272. *See supra* note 123 and accompanying text.

273. *See Raeker-Jordan, supra* note 6, at 114-15.

274. *Roper*, 543 U.S. at 566.

ideological judging of a constitutional question.

Concerning his evolving standards analysis, one could make the argument that Justice Kennedy is straining to find parallels with *Atkins*, and he changed his approach to jury decision making and execution frequency in order to strike down the juvenile death penalty. Such stretches might be seen merely as extensions of the law and raise fewer suspicions about change in personal views if the opinion were not written by Justice Kennedy, who, with an apparent purpose to uphold death sentences, previously signed on to opinions that refused to find that the standard of decency had evolved.²⁷⁵ Further analysis of the remainder of his opinion, however, is necessary to flesh out the merits of that argument.

b. Justice O'Connor

On the evolving standards of decency question, a dissenting Justice O'Connor quarreled with the majority's analysis of the evidence regarding consensus.²⁷⁶ She agreed that the objective evidence of consensus was similar to that in *Atkins*, in which she joined the majority striking down the death penalty for offenders with mental retardation, but she felt that the evidence of consensus was "marginally weaker" in *Roper*²⁷⁷ for essentially three reasons. Most important for her was the fact that there were states that explicitly allowed executions of the juveniles at issue in *Roper*, and therefore showed affirmative support for the practice, whereas there were no death penalty statutes that specifically authorized executions of people with mental retardation in *Atkins*.²⁷⁸ The explicit support for juvenile executions in some states made the evidence of opposition to juvenile executions look weaker than it did in *Atkins*, where no states supporting executions of people with mental retardation countered the opposition.²⁷⁹

In addition, she did not agree that the consistency of the direction of change supported a ban here. As for the first component of the "consistency" argument, she found the "considerably slower" pace of legislative abolition in this case significant.²⁸⁰ This slower pace stood in contrast to the "extraordinary wave" of legislative abolition preceding *Atkins*, and the "halting pace of change [here gave] reason for pause" on

275. See, e.g., *Stanford*, 492 U.S. at 363.

276. *Roper*, 543 U.S. at 588 (O'Connor, J., dissenting).

277. *Id.*

278. *Id.* at 595-96.

279. *Atkins*, 536 U.S. at 316.

280. *Roper*, 543 U.S. at 596.

the issue of a consensus against the punishment for juveniles.²⁸¹ Regarding the second component, she believed that the direction of change was made less consistent than in *Atkins* by two states reaffirming their support for executing juveniles when they enacted statutes allowing the practice.²⁸² The trend, therefore, was not exclusively toward abolition as it had been in *Atkins*.²⁸³ For all of these reasons, she could not find a definite consensus against these juvenile executions.²⁸⁴

Justice O'Connor's distinctions with *Atkins* make some sense and seem consistent with her opinion in *Thompson v. Oklahoma*. In that case she found that a consensus "very likely" existed against executions of juveniles fifteen years of age and younger, when eighteen states would explicitly not execute juveniles of that group and the remainder of death penalty states had set no minimum age.²⁸⁵ But, as here, she still could not draw a constitutional bright line exempting the class, based on the evidence presented.²⁸⁶ In addition, in her dissenting opinion in *Roper*, she explained in part how she came to join the majority in *Atkins*, and how that case was different regarding the evolving standard.²⁸⁷ Thus, Justice O'Connor argued that a consensus could more persuasively be said to exist in *Atkins* than in *Roper*, where the evidence was weaker.²⁸⁸ And she conceded that the differences were "marginal" but enough in *Roper* to "give[] reason for pause."²⁸⁹ The care with which she parsed and distinguished the consensus evidence in *Roper* seems to obviate a charge that, at least on the evolving standards of decency question, she is injecting her own personal preferences into the finding of national consensus. But perhaps that is not where her personal view, if any, influences the outcome. As she said in *Roper* in explaining her *Atkins* vote, "[i]n my view, the objective evidence of national consensus, standing alone, was insufficient to *dictate* the Court's holding in *Atkins*."²⁹⁰ Rather, the proportionality analysis in the application of the Court's "own judgment" segment of the test "played a *decisive* role"

281. *Id.* at 596-97.

282. *Id.* at 596.

283. *Id.*

284. *Id.*

285. *Thompson*, 487 U.S. at 849, 857-58. See also *supra* notes 71-72 and accompanying text.

286. *Thompson*, 487 U.S. at 848-49.

287. *Roper*, 543 U.S. at 595-97.

288. *Id.*

289. *Id.* at 597.

290. *Id.* at 598 (emphasis added).

in finding an Eighth Amendment violation.²⁹¹ An examination of her "own judgment" applied to the juvenile death penalty in *Roper* is necessary to determine if it is simply a mechanism, as Justice Kennedy at one time believed,²⁹² for justices to impose their own personal preferences on constitutional adjudication. But before that discussion, the justices' divergent treatment of international opinion evidence must be evaluated.

2. Evidence of International Opinion and Practices

a. Justice Kennedy

If any aspect of the *Roper* decision riled critics more than others, it was the portion in which a majority of the Court, led by Justice Kennedy, considered international opinion.²⁹³ The justices' reliance on or reference to international views and laws has compelled some to call for Justice Kennedy's impeachment and Justice O'Connor's death.²⁹⁴ In *Roper*, the majority concluded from the evidence of international practices and other nations' laws that the United States was the only country in the world to continue to execute people who committed their crimes as juveniles.²⁹⁵ The evidence was a further indication of a consistent and widespread understanding that "the instability and emotional imbalance of young people may often be a factor in the crime"²⁹⁶ and therefore lessen juveniles' culpability.²⁹⁷ International opinion on the juvenile death penalty supported the Court's finding that the death penalty was excessive punishment and therefore cruel and unusual under our Eighth Amendment.²⁹⁸

What appears to be overlooked in the "anti-international opinion" rhetoric, however, is the manner in which the Court treated the evidence. Justice Kennedy worded the discussion carefully:

Our determination that the death penalty is disproportionate punishment for offenders under 18 *finds confirmation* in the stark

291. *Id.*

292. *See, e.g., Stanford*, 492 U.S. at 363.

293. *Roper*, 543 U.S. at 576.

294. *See supra* notes 10 & 3, respectively.

295. *Roper*, 543 U.S. at 577 ("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.").

296. *Id.* at 578.

297. *Id.*

298. *See id.* at 575.

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 since the time of the Court's decision in *Trop [v. Dulles]*, 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."²⁹⁹

The passage attempts to make clear that the majority did not rely on international opinion for controlling authority on what our Eighth Amendment means; it referred to international opinion to buttress its own prior analysis, as it had done in *Atkins* and in other cases.³⁰⁰

Some who object to the use of international opinion evidence may nonetheless find this distinction to be an exercise in disingenuous hair-splitting. In the majority of previous cases, to make clear that resort to international opinion was not that significant to their analyses or conclusions, the justices had discussed international opinion and practices in supporting footnotes.³⁰¹ Here, by contrast, Justice Kennedy devoted three and a half pages to the topic.³⁰² Even though his words were chosen with precision in order to convey that the reference was not controlling, his emphasis on it in so many pages in the main body of the Court's opinion conveys an opposite impression. The disconnect leaves the reader feeling as if Justice Kennedy is trying to disguise his real motivation for employing the evidence.

Justice Kennedy also seemed to do more than simply buttress the Court's conclusion. He appeared to move the entire international norms and views discussion out of the evolving standard of decency calculation to stand on its own, in order to support a different and particular aspect of the Court's analysis. Specifically, international opinion appeared to buttress the Court's own conclusion on proportionality,³⁰³ which ultimately turns on the culpability of the offender.³⁰⁴ Justice Kennedy wrote that "[i]t 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

299. *Id.* at 575 (citing *Trop v. Dulles*, 356 U.S. 86, 102-03 (1958)) (emphasis added).

300. *Atkins*, 536 U.S. 316 n.21. *See also supra* notes 196-98.

301. *See supra* notes 196-99.

302. *See Roper*, 543 U.S. at 575-78.

303. *Id.* at 575.

304. *Id.* at 578.

factor in the crime.”³⁰⁵ By focusing on international views of the characteristics of youth, the majority seemed to be saying that international opinion is relevant to those things that are universal: every nation, every people, can make relevant assessments about the culpability of children, and those assessments in and of themselves have nothing to do with how we interpret the Cruel and Unusual Punishments Clause of our Eighth Amendment. Perhaps Justice Kennedy was thereby attempting to deflect a criticism in which he formerly believed, the criticism that it is “*American* conceptions of decency that are dispositive” and other nations’ views are irrelevant in that determination.³⁰⁶

But when it comes right down to it, critics may be right that whether the majority employs international views in the service of determining the evolving standard of decency or determining juveniles’ culpability for crimes, the bottom line is the Court is employing international views to ascertain whether a punishment is in the larger sense cruel and unusual under the Eighth Amendment.³⁰⁷ And Justice Kennedy is unlikely to avoid the criticism by trying to extract the offending evidence to consider it somewhat apart from the constitutional analysis, if that is in fact what he was trying to do.

The more pertinent question for the purposes of this article is whether that reference to international views reveals anything about Justice Kennedy’s personal preferences. One may not be troubled, from a doctrinal perspective, that the Court resorted to this evidence yet nonetheless be stunned that Justice Kennedy authored this aspect of the *Roper* opinion. In prior cases of this sort, he had joined with Justice Scalia in condemning the use of international opinion in ascertaining the evolving standard of decency of *American* society, which is all, they had said, that should be relevant to Eighth Amendment analysis.³⁰⁸ In his *Roper* opinion, Justice Kennedy gave no explanation for his blatant change of position. One is left to speculate that he simply has changed his personal views on the subject. That assertion can be supported with the observation that international opinion on the death penalty in any of its uses only points in one direction. The only instances in

305. *Id.* at 578 (emphasis added).

306. *See Stanford*, 492 U.S. at 369 n.1.

307. The majority apparently did not succeed in pacifying critics with its final point on this issue: “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.” *Roper*, 543 U.S. at 578.

308. *See Stanford*, 492 U.S. at 363.

previous cases where the Court has relied on international practices or foreign law were when a consensus against the death penalty was found.³⁰⁹ Because one would only refer to international opinion to support a view against executions, critics could argue that one who in the past refused on principle to use this evidence in Eighth Amendment cases would now only rely on international views when that person's personal views also now comported with international opinion. The second half of Justice Kennedy's opinion, in which the Court applies its "own judgment" on the Eighth Amendment issue, may shed more light on the role of personal preferences in his decision.

b. Justice O'Connor

As discussed in Part V.A. above, Justice O'Connor's position on the role of international opinion has seemed to depend on her resolution of the evolving standards of decency question. If she finds a consensus against a punishment, then international views play a supporting role in the exemption of the class from the penalty. If she does not find a consensus against the execution of a certain class, then she tends not to mention international opinion. In that sense, she appears to believe in using the evidence strictly to confirm the Court's independent conclusion. She said as much in *Roper*: she saw no consensus on the standard of decency, and because her own judgment did not find an unconstitutional disproportionality, she could "assign no such *confirmatory* role to the international consensus described by the Court."³¹⁰ She added, "the existence of an international consensus . . . can serve to confirm the reasonableness of a consonant and genuine American consensus."³¹¹ But there appears to be a flaw in her approach, and it arguably stems from the infusion of her personal views into the ultimate determination of exemptions from punishment, as discussed above in Part III.

To begin with, Justice O'Connor remained true to her penchant for writing separately to draw fine distinctions between her views and those of other Court members, and she did draw those fine distinctions on this issue with both the majority and the dissent.³¹² She disagreed with the dissent that international opinions played no role in Eighth Amendment decision making, and she affirmed her agreement with the majority that "[o]ver the course

309. See also *supra* notes 196-99.

310. *Roper*, 543 U.S. at 604 (O'Connor, J., dissenting).

311. *Id.* at 605.

312. See *id.* at 604-05.

of nearly half a century, the Court has consistently referred to foreign and international law as relevant to its assessment of evolving standards of decency.³¹³

But despite her recognition of history and the relevance of the evidence, she nonetheless rendered it impotent. She has only used it in an assessment of the evolving standard when it confirms her view. In *Roper*, she as much as stated that if the international evidence does not conform to her personal conclusion, then it plays no role.³¹⁴ But it will only fail to confirm her conclusion when she finds no reason for an exemption, because international opinion evidence only points in one direction, against executions. Thus, even though the evidence will always support the argument for an exemption, Justice O'Connor will never use it to find a consensus for that exemption. While simultaneously ignoring the evidence when it does not support her view, employing it when it does support her opinion, and agreeing with precedent about its relevance and applicability, Justice O'Connor betrays the influence of personal preferences in her decision making. If the argument that she personally opposes categorical exemptions from the death penalty is accurate, then in general, her ignoring of international opinions that cut in favor of exemptions supports that argument.

Cutting against the argument, however, is the reality that she nonetheless professes to believe in the relevance of international opinion.³¹⁵ If she simply wanted to decide these cases on her personal views, and she personally opposed categorical exemptions, why would she acknowledge the relevance of international opinion at all? That is a difficult question to answer. But the fact remains that her approach results in a selective use of international opinion evidence, suggesting an ulterior purpose behind the analysis. The answer may again come down to personal preferences: in that rare case in which she decides that the class is truly deserving of an exemption, then international opinion evidence is at the ready to support her conclusion. That explanation seems to have been borne out in *Atkins v. Virginia*, in which Justice O'Connor agreed with the majority that an exemption for people with mental retardation was warranted and was supported in part by reference to international views and practices.³¹⁶ But the true test of whether personal preferences are influencing justices' opinions is found in the second portion of the Court's Eighth Amendment

313. *Id.* at 604.

314. *See id.*

315. *See id.* at 604.

316. *Atkins*, 536 U.S. at 321.

analysis, to which this article now turns.

B. The Court's "Own Judgment" on Proportionality

1. Justice Kennedy

The conversion Justice Kennedy made silently in *Atkins v. Virginia*, he now made plain in his own voice. After assessing the evolving standard, "[w]e then must determine, in the exercise of our own independent judgment, whether the death penalty is a disproportionate punishment for juveniles."³¹⁷ Justice Kennedy made his new approach clear:

[T]o the extent *Stanford* was based on a rejection of the idea that this Court is required to bring its independent judgment to bear on the proportionality of the death penalty for a particular class of crimes or offenders, it suffices to note that this rejection was inconsistent with prior Eighth Amendment decisions. It is also inconsistent with the premises of our recent decision in *Atkins*.³¹⁸

His rejection of the approach he had followed with Justice Scalia, in which Justice Scalia adamantly refused to take this additional doctrinal step, was complete.³¹⁹

Justice Kennedy began his analysis by noting three characteristics about juveniles that prevent them from being classified with the worst offenders.³²⁰ Those characteristics are "a lack of maturity and an underdeveloped sense of responsibility," a vulnerability or susceptibility to "negative influences and outside pressures, including peer pressure," and an under-formed character.³²¹ Because of these traits, Justice Kennedy said, juveniles were less blameworthy or culpable than adults.³²² From there, it was a short step to the next factor in the application of the Court's "own judgment" on the proportionality question. "Once the diminished culpability of juveniles is recognized, it is evident that the penological justifications for

317. *Roper*, 543 U.S. at 564.

318. *Id.* at 574-75.

319. *Id.*

320. For criticism of the Court's reliance on certain social science evidence to support this aspect of its analysis, see Deborah W. Denno, *The Scientific Shortcomings of Roper v. Simmons*, 3 OHIO ST. J. CRIM. L. 379 (2006).

321. *Roper*, 543 U.S. at 569-70.

322. *See id.* at 570.

the death penalty apply with lesser force to them than to adults.”³²³ The penological goal of retribution was not served by imposing society’s harshest punishment on offenders with such lessened culpability due to immaturity and youth. Likewise, the same characteristics made it less likely that the penalty would have a deterrent effect on this class of juveniles.³²⁴ Justice Kennedy acknowledged the Court’s long-standing emphasis on individualization in death penalty sentencing, which would seem to argue against such categorical exemptions.³²⁵ It is a point Justice O’Connor has repeatedly made in these cases and relied on to refuse a categorical exemption.³²⁶ But in the end, Justice Kennedy wrote that “[t]he differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty [through the process of individualization,] despite insufficient culpability.”³²⁷

Of all the reversals from his prior positions, this one seems the most revealing of personal preferences at work because he gave no reason for his conversion. In addition, it was this aspect of the “liberal justices” approach that Justice Scalia, joined by Justice Kennedy, had most stridently attacked as allowing the justices simply to graft their own personal preferences onto their decision making and into the Constitution.³²⁸ Justice Kennedy’s abrupt reversal of course, particularly on this issue, raises the suspicion that his personal views have indeed changed and thereby changed the rules on which he now relied. As previously discussed, the irony is rich because he had accused others of substituting personal views for constitutional analysis.³²⁹ It now appeared he was changing course under circumstances that suggested his own personal views have effected the change. Absent some other, better explanation for the change in his choice of rule, one is left with the most obvious explanation.

2. Justice O’Connor

Justice O’Connor’s separate opinion on this point does not fare much better. She did not change the rule she employed, as Justice Kennedy did, because she has always adhered to the view that the Court had an

323. *Id.* at 571.

324. *Id.*

325. *See id.* at 572.

326. *See, e.g., Penry*, 492 U.S. at 335-40 (opinion of O’Connor, J.).

327. *Roper*, 543 U.S. at 572-73.

328. *See, e.g., Stanford*, 492 U.S. at 363.

329. *Id.*

obligation to bring its own judgment to bear on the proportionality question.³³⁰ She repeated that commitment in *Roper*,³³¹ so she cannot be accused of changing her doctrinal approach to the cases because of a change in her personal views. But her application of the “own judgment” aspect of the analysis is what raises suspicions about Justice O’Connor’s motivations. In applying her own judgment to the proportionality of the death penalty to juveniles, Justice O’Connor found it impossible to say that all juveniles, as a class, are invariably insufficiently culpable for or unable to be deterred by the death penalty.³³² She reasoned that just because they are *less* culpable and *less* able to be deterred does not mean that they are all *not sufficiently* culpable or *not* able to be deterred.³³³ Because a fact finder in an individual case could find a juvenile sufficiently culpable, she could not say executions for juveniles were constitutionally disproportionate and excessive, and therefore, she could not exempt juveniles as a class from the reach of the death penalty.³³⁴ “In short, the class of offenders exempted from capital punishment by today’s decision is too broad and too diverse to warrant a categorical prohibition.”³³⁵

With this opinion, she returned to her prior insistence that individualization is required and therefore categorical exemptions are inappropriate.³³⁶ Because she has been a staunch advocate of this position and usually refused to exempt any class from the death penalty, her consistency in this regard helps to counter a suggestion that she is changing her opinions to suit her personal views. But her consistency was interrupted with *Atkins v. Virginia*, in which she strayed from her emphasis on individualization and considered people with mental retardation less culpable and deserving of the death penalty *as a class*.³³⁷ This article argued above that her vote in *Atkins* seemed to betray her personal preferences about executions of people with mental retardation in large part because she never explained how she reached such a different conclusion on this issue than

330. See *Enmund*, 458 U.S. at 814 (O’Connor, J., dissenting).

331. See *Roper*, 543 U.S. at 590.

332. *Id.* at 599-600.

333. *Id.*

334. *Id.* at 600.

335. *Id.* at 601.

336. See *id.* at 602-03 (stating that Eighth Amendment concerns raised by the proportionality issues in the case “may properly be addressed not by means of an arbitrary, categorical age-based rule, but rather through individualized sentencing in which juries are required to give appropriate mitigating weight to the defendant’s [juvenile traits]”).

337. See *Atkins*, 536 U.S. at 353.

she had in *Penry*, which dealt with the same class of offender.³³⁸ In *Roper*, she attempted to explain her different results with respect to people with mental retardation in *Atkins* and juveniles in *Roper*,³³⁹ but the explanation rings hollow. Justice O'Connor maintained that "[m]entally retarded" offenders, as we understood them in *Atkins*, are *defined* by precisely the characteristics which render death an excessive punishment."³⁴⁰ For that reason,

a mentally retarded offender is one whose demonstrated impairments make it so highly unlikely that he is culpable to deserve the death penalty or that he could have been deterred by the threat of death, that execution is not a defensible punishment. There is no such inherent or accurate fit between an offender's chronological age and the personal limitations which the Court believes make capital punishment excessive for 17-year-old murderers.³⁴¹

At first blush, her distinction seems valid, because arguably the characteristics of people with mental retardation are in some sense immutable whereas the characteristics of juveniles are not. But most problematic is that what she says here about people with mental retardation and their culpability as a class is exactly opposite to what she said in *Penry*.³⁴²

Additionally, to say the class of people with mental retardation was *defined* in *Atkins* as having certain traits is not altogether accurate³⁴³ and therefore cannot bear the significance she puts on it. Finally, she neglects the argument that juveniles are *by definition* a certain chronological age. Juveniles have only been alive a certain amount of time in which to develop maturity, to develop the ability to withstand outside pressures, and to fully understand and appreciate the consequences of his actions as would an adult. And juveniles are all limited by time in that way, by definition, until they grow older. Her distinction of the two classes does not withstand scrutiny, and therefore her inconsistency in treating the classes differently raises suspicions that she personally has developed more sympathy over time for people with mental retardation and is willing to view them in a

338. *Penry*, 492 U.S. at 340.

339. *Roper*, 543 U.S. at 602.

340. *Id.*

341. *Id.*

342. *Penry*, 492 U.S. at 340.

343. See Raeker-Jordan, *supra* note 6, at 122-23.

certain way in order to exempt them from the most severe penalty. In different ways, then, Justices O'Connor and Kennedy appear to have let their personal views influence their decisions in Eighth Amendment cases.

VII. CONCLUSION

After surveying the Eighth Amendment death penalty opinions of Justices O'Connor and Kennedy, one can make a case that their analyses of the propriety of executions of classes of offenders are infused with their personal predilections to some extent. Of course, one can never know whether it is true, but close scrutiny of how they have voted and what they have written permits the speculation. The case can be made against Justice O'Connor because of her insufficiently explained inconsistencies in recent cases and because her general approach signals a personal aversion to exempting any offender from the death penalty. The case can be made against Justice Kennedy simply because he has made no other case for his recent and dramatic change of approach to the cases. Because the changes appear to grow out of personal preferences about the death penalty in general, an observer is left with only one conclusion about what ultimately instigated his change in course.

The instigator for this article, as indicated in the Introduction, was the popular uproar over the *Roper* decision, which generated calls for impeachment against Justice Kennedy and perhaps encouraged death threats against Justice O'Connor. The conclusion of this article, that the justices' personal views have perhaps influenced their decisions, justifies neither the calls for impeachment nor the death threats. As I have written before,³⁴⁴ the Court is populated by human beings, and whether those justices are considered liberal or conservative, it is inevitable that their views cannot be separated from their constitutional adjudication.³⁴⁵ The observations contained in this article might, however, plainly show where those personal predilections may be influencing outcomes. These observations might further encourage full, open, and honest discussion of the best way to determine the meaning of the Cruel and Unusual Punishments Clause, and hence the best way to determine the propriety of executions of classes of offenders.

344. See Raeker-Jordan, *supra* note 6, at 128.

345. See *id.* at 113-15, 124-26 (arguing that Justice Scalia's approach to the cases is influenced as much by his own personal preferences as is the approach of other justices on the Court).