# *Roper v. Simmons* and

# The Jurisprudence of Justice Sandra Day O'Connor.

By Masha A. Dabiza[*]

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

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

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

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

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

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

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

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

## I. Justice Sandra Day O'Connor's Personal Background

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

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

### A. Early History

¶10. Sandra Day O'Connor learned the value of hard work at an early age. She was born Sandra Day on March 26, 1930, in El Paso, Texas.[13] She grew up on an Arizona ranch without electricity or running water, 25 miles away from the nearest town.[14] Although she spent the majority of her formative years living with her grandmother and attending school in El Paso, O'Connor loved her ranch home.[15] By early childhood, she could shoot a rifle, care for livestock, repair a fence, drive a tractor, and help build a house.[16] Later, she worked on the ranch seven days a week.[17] Some commentators

believe that in these formative years she developed her rugged individualism and a sense of self-reliance—ideals which supported her future Republican principles.[18]

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

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

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

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

**B. Early record as a public figure**

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

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

political acceptability rather than more sweeping or groundbreaking governmental action."[39] Significantly, she retained this philosophy when she entered the judiciary.

¶17. After O'Connor served two years as senate majority leader, the Republican Party and Senator Goldwater urged her to run for governor of Arizona. [40] Politics did not appear to suit her. She seemed uncomfortable at political events, looking too stiff to appeal to the public.[41] Rejecting the legislature for the judiciary, she ran for office as a judge on the Maricopa County Superior Court in 1975. [42]

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

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

¶20. Although O'Connor authored 125 decisions during her brief tenure as Court of Appeals Judge, she produced almost no written record of political, ideological, or constitutional convictions.[48] Prior to her appointment to the Supreme Court, she had not participated in any landmark decisions, and in fact had never addressed sex discrimination, abortion, affirmative action, federalism, or freedom of religion.[49] She had addressed few matters related to the federal Constitution, but remained reluctant to interfere with legislative determinations in these cases. For example, she relied on legislative intent when she affirmed a lower court's denial of an equal protection claim brought by tenants affected by a dubious tax law.[50]

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

¶22. O'Connor's article suggested that she would likely side with those members of the Court (Burger, Rehnquist, and Powell) who uphold the interest of state and local governments.[53] Given that her record left open many questions during her testimony

before the Senate Judiciary committee, the article was one of the only potential indicators of her inclinations.[54] Senators often unsuccessfully brought up this article to commit O'Connor to a specific position.[55]

### C. Supreme Court Confirmation Process

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

¶24. Justice O'Connor's confirmation process was lengthy, lasting 81 days. As the Justice herself noted, Supreme Court confirmations generally take under 60 days from nomination to confirmation, with Senate hearings typically lasting only one day.[57] Her own hearings lasted three days, and contained submissions from numerous interest groups both supporting and opposing her nomination.[58] Given their length, however, the proceedings were surprisingly uncontroversial. Republicans were satisfied with her apparent conservative stance, whereas Democrats were happy with a female nominee. Both sides asked questions that began with flowery congratulations and mini-speeches about the importance of her nomination, and probed only superficially into her political stances.[59] In response, O'Connor conducted herself in accordance with her established notions of propriety – throughout the process she was formal, precise, and unwilling to offer substantive answers to any questions seeking a committed jurisprudential approach.[60] In particular, she was evasive on the abortion issue. Hiding behind Article III, she declined to share her true opinion on the matter. In response to a particularly pushy line of questioning on abortion she retorted:

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

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

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

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

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

¶29. Although she was able to fend off most questions about her views on abortion, O'Connor could not escape being subjected to the litmus test of *Brown v. Board of Education* and its suggestions about the meaning of judicial activism.[71] During the hearings, senators repeatedly asked her view of the *Brown* decision.[72] O'Connor brushed off Senator Biden's suggestion that *Brown* was a result of an activist Court responding to changes in society to overrule its own precedent in *Plessy v. Ferguson*.[73] She rejected his insistence that it was a judicial decision based on social change and not on a textual reading of the Constitution, stressing her own view that it is not "the function of the judiciary to step in and change the law because the times have changed or the social mores have changed."[74] Further, she evasively claimed that the Court reached the *Brown* decision simply "based on its research as to the true meaning of that provision – based on its research on the history" of the Fourteenth Amendment.[75]

¶30. Her explanation of *Brown* during the Hearings is telling of the way she reconciles her various jurisprudential approaches. She justified *Brown* and distinguished it from an example of judicial activism by simply redefining its jurisprudential meaning.[76] She did not view it as a fairness decision, but narrowly defined it as "a determination … by the Supreme Court that its previous interpretation of the meaning of the 14th

Amendment, insofar as the equal protection clause was concerned, had been erroneously decided previously in *Plessy*."[77] This suggests that she may not have agreed to step into the business of dictating to States what to do with their segregation laws. She did not waver in response to further questioning by Senator Leahy, solidifying her view that the Supreme Court's function is to "approach each case on the basis of the facts of the case and the law applicable to it," and that "judges are not permitted to go outside the record in resolving the issues to come before a judge."[78] She found unanimous support from the Senate for her nomination, with a vote of 99-0.[79]

## II. Justice O'Connor on the Court

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

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

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

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

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

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

¶36. To say that in the last term her vote mattered is an understatement. Of seventy-eight opinions of the Court in 2002, Justice O'Connor wrote nine.[87] Of sixty-six dissents, however, she wrote only two, fewer than any other Justice, including the Chief.[88] Even more telling, Justice O'Connor was the most likely to agree in the disposition of a case of all other justices, with 87.2% agreement.[89] Finally, her role becomes crystal clear in a breakdown of votes in 5-4 opinions by the Court.[90] In 2002, the Court handed down only fourteen 5-4 decisions.[91] Of these, Justice O'Connor was in the majority thirteen times.[92]

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

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

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

¶40. Ten years later, in *Planned Parenthood v. Casey*, she continued fine-tuning *Roe*.[99] She affirmed the "central holding" of *Roe* that the Constitution grants women the personal liberty to terminate a pregnancy.[100] She then ruled that states could not require women to consult with their husbands prior to obtaining abortions.[101] She staked out the middle ground by sustaining requirements for waiting periods and parental consent for teens, which ensured the votes of Justices Kennedy and Souter for her "undue burden" test.[102]

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

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

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

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

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

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

attribution to the accomplice of the culpability of those who killed the victims was found impermissible under the Eighth Amendment.[109]

¶46. Justice O'Connor dissented because she found the majority's opinion not supported by precedent and deemed it improper to interfere with state criteria for determining legal guilt.[110] After engaging in a full analysis of state felony murder statutes, she said that she would have deferred to legislative determinations of appropriate punishment.[111] She found that the data did not demonstrate that society has opposed the death penalty for felony murderers, but that "legislative judgments indicate that our 'evolving standards of decency' still embrace capital punishment for this crime."[112] In reaching her decision, Justice O'Connor engaged in a thorough statutory analysis of state felony murder laws to inform her conception of the evolving standards of decency in the United States.[113]

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

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

¶49. Yet, it is clear that Justice O'Connor has serious concerns about the administration of capital punishment. Only three years ago, addressing a group of women lawyers in Minnesota, Justice O'Connor said, in reference to the state's lack of death penalty laws: "Minnesota must breathe a sigh of relief every day."[119] She expressed concern that innocent people may have been executed in the United States, saying that "[s]erious questions are being raised about whether the death penalty is being fairly administered in this country."[120] She also noted that during the previous year six death row inmates were exonerated, bringing the total to ninety since 1973.[121] Towards the end of this speech, she suggested that "[p]erhaps it's time to look at minimum standards for appointed counsel in death cases and adequate compensation for appointed counsel when they are used."[122] Her statements indicate her concern with proper procedure and fairness extend to capital punishment.[123]

¶50. Justice O'Connor's statements coincided with the Innocence Protection Act, which was under consideration by a Senate committee at the time.[124] A few days before her speech, Orin Hatch, the Senate Majority leader, opposed the portions of the bill dealing with effective assistance of counsel.[125] The Act addressed the need for states to provide adequate funding to provide effective death row counsel both at trial and post-conviction.[126] Further, the Act would have guaranteed capital defendants access to DNA evidence and "put Congress on record as opposing state executions of juveniles or [the] mentally retarded."[127] Coming, as they did from a judicially conservative Justice, O'Connor's words may have been intended as a message to legislatures that they must improve the system or risk having the Court do it for them.[128]

¶51. A year following her speech, Justice O'Connor was presented with an opportunity to address the procedural flaws in death penalty advocacy in a Supreme Court case. The Court heard a case, in which it had to determine appropriate minimum standards for legal representation in death penalty cases.[129]

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

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

existing legal precedent. With this in mind, let us consider the evolution of Justice O'Connor's position on the death penalty as applied to the mentally retarded and to minors.

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

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

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

### A. Application of the Death Penalty to the Mentally Retarded

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

#### 1. *Penry v. Lynaugh* [138]

¶57. Johnny Paul Penry was on parole for rape when he raped, beat and killed 22-year-old Pamela Carpenter on October 25, 1979 at her home in Livingston, Texas.[139] Penry, previously diagnosed with mental retardation, gave two confessions to the local deputies.[140] At a later competency hearing he was estimated to have the mental age of six-and-a-half-year old by a clinical psychologist.[141] At the guilt phase of the trial, another psychiatrist again diagnosed him with brain damage and moderate retardation.[142] The testimony of various relatives also revealed that Penry never finished first grade and his mother beat him over the head during childhood by his mother.[143] The State's psychiatrists also agreed that he was a person of "extremely limited mental ability."[144] Penry's counsel objected to a number of the jury instructions, which were all overruled by the trial judge.[145] The jury found Penry guilty of capital murder and sentenced him to death.[146] The Supreme Court granted

certiorari to determine two issues: 1) whether his sentence violated the Eighth Amendment because the jury was not properly instructed to consider mitigating evidence, and 2) whether executing a mentally retarded person was cruel and unusual under the Eighth Amendment.[147]

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

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

¶60. The final part of Justice O'Connor's opinion was joined by neither the liberal or conservative Justices.[157] There, she engaged in a proportionality review of executing the mentally retarded, but did not decide whether mentally retarded people lacked the capacity to act with the necessary culpability by virtue of their mental retardation alone.[158] This portion of the opinion demonstrates her commitment to the consideration of the facts of each case and is typical in its careful drawing of boundaries around the majority opinion. Her insistence on a proportionality discussion also explains her silent concurrence with Stevens thirteen years later in *Atkins*.

2. *Atkins v. Virginia*[159]

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

¶62. Writing for a majority that included Justices O'Connor, Kennedy, Souter, Ginsburg, and Breyer, Justice Stevens found that the execution of mentally retarded

criminals "has become truly unusual, and it is fair to say that a national consensus has developed against it."[165] At the time *Atkins* was decided, eighteen states and the federal government barred applying the death penalty to mentally retarded.[166] The Court held that this was a sufficiently large number so as to "unquestionably [reflect] widespread judgment about the relative culpability of mentally retarded offenders."[167]

¶63. In addition to analyzing the national consensus, Justice Stevens engaged in a lengthy proportionality discussion, addressing Justice O'Connor's concerns in *Penry*. His discussion relied on a multitude of scientific findings by professional organizations, such as the American Psychological Association and the American Association of Mental Retardation.[168] These organizations adopted official positions against sentencing mentally retarded offenders to death.[169] He further engaged in a discussion of whether the practice of executing mentally retarded offenders accomplished the goals of the death penalty, namely retribution and deterrence.[170] Quoting *Enmund*, Stevens wrote that "'unless the imposition of the death penalty on a mentally retarded person measurably contributes to both of these goals, it is nothing more than the purposeless and needless imposition of pain and suffering, and hence an unconstitutional punishment.'"[171] Although mentally retarded offenders are not more likely to engage in criminal conduct, he found "abundant evidence that they often act on impulse rather than pursuant to a premeditated plan."[172] Since they are not capable of premeditation, he reasoned that imposing the death penalty on them could not be justified.[173] Because of their "diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or control impulses," he held that mentally retarded offenders are not deterred from committing murder by the possible consequence of being sentenced to death.[174]

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

¶65. Significantly, Justice O'Connor did not write a concurrence, likely because Justice Stevens' lengthy proportionality discussion sufficiently reflected her own thinking as set out in *Penry*. Indeed, *Atkins* clearly addresses all of the concerns she expressed in her *Penry* concurrence. The opinion must have appealed to Justice O'Connor by its

careful definition of mental retardation, the narrow language of the holding, and its reliance on scientific data; national consensus was only one factor in the holding.

## B. Application of the Death Penalty to Minors

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

### 1. *Thompson v. Oklahoma*.[183]

¶67. William Wayne Thompson, along with three older friends, brutally murdered his former brother-in-law in early 1983.[184] Thompson was tried as an adult after the trial court determined "'that there are virtually no *reasonable* prospects for rehabilitation within the juvenile system and that [he] should be held accountable for his acts as if he were an adult.'"[185] He was sentenced to death.[186]

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

¶69. In focusing on minimum age for death penalty eligibility, the plurality first considered how Oklahoma and other states treated persons under sixteen as minors for other purposes, such as voting, jury duty, driving, marriage, alcohol and tobacco consumption and juvenile court jurisdiction.[191] Because all fifty states had enacted legislation setting the maximum age for juvenile jurisdiction at sixteen, the Court reasoned that this was "consistent with the experience of mankind, as well as the long history of our law, that the normal fifteen-year old is not prepared to assume the full responsibilities of an adult."[192] Crucially, the Court noted that of the states with death penalty laws, nineteen have not set a minimum age for such sentencing eligibility, eighteen have set the age at sixteen years old, and that no states had a lower minimum eligibility.[193]

¶70. The second factor in determining evolving standards of decency was the behavior of juries in death penalty cases. Statistics indicated that a disproportionately small number of offenders sentenced to death were minors.[194] Out of a total of 82,094 persons arrested for willful criminal homicide, 1,393 were sentenced to death. [195] Of these only five, including Thompson, had been fifteen or younger at the time they committed the offense.[196] The Court concluded that application of capital punishment to these young offenders is "cruel and unusual in the same way that being struck by lightning is cruel and unusual."[197]

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

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

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

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

¶75. Regarding the legislative enactments, she maintained that although all states allowing for the death penalty either have no minimum age requirements or have laws that cut off eligibility at fifteen or younger, this does not mean that the laws reflect the true attitude of the states toward executing minors. To illustrate that states do not always

change their death penalty laws in an attempt to signal their evolving standards, Justice O'Connor reviewed the history of death penalty legislation before and after *Furman v. Georgia*.[207] She pointed out the decrease of death penalty laws before the decision, but noted the increase after it.[208] She worried that were the *Furman* Court to hold capital punishment per se unconstitutional, it would have been impermissibly stepping into legislative shoes and assuming it knew legislative purpose.[209] According to her, the reenactment of the death penalty laws by states across the country signaled that the states had no intention of scrapping the practice at any point.[210] Thus, she warned that the Supreme Court of the United States should not "substitute [its own] inevitably subjective judgment about the best age at which to draw a line . . . for the judgments of [state] legislatures."[211] Finally, she ruled Thompson's sentence unconstitutional.[212] She came to this conclusion after deciding that since Oklahoma specified no minimum age, it must not have realized that it was executing juveniles.[213]

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

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

2. *Stanford v. Kentucky*[216]

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

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

¶80. The second petitioner, Heath Wilkins, who was sixteen years old at the time, stabbed Nancy Allen to death while robbing her store.[224] Prior to the crime, he told others of his plan to rob the store and kill whoever was behind the counter because "a dead person can't talk."[225] He was specially transferred to the Missouri adult system and pled guilty to first-degree murder, armed criminal action and carrying a concealed weapon.[226] At the sentencing hearing Wilkins urged the imposition of the death

sentence along with the state.[227] Three years later, the Supreme Court granted cert "to decide whether the Eighth Amendment precludes the death penalty for individuals who commit crimes at sixteen or seventeen years of age."[228]

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

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

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

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

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

3. Recent Denials of Certioraris

¶86. For the next thirteen years, the Supreme Court did not address the issue of applying the death penalty to juveniles.[242] Then, in 2002, it was presented with and rejected a stay of execution of Toronto Patterson who was seventeen when he killed his cousin in 1995.[243] Justice Stevens, joined by Justices Breyer and Ginsburg, dissented, noting the existence of a sufficient national consensus to revisit the issue "at the earliest opportunity."[244] Justice Ginsburg joined by Justice Breyer, also penned a dissent, arguing that the Court's recent decision in *Atkins* merited a reconsideration of *Stanford*. Justice O'Connor did not make her thoughts on the matter known, and Toronto Patterson was executed by Texas later that day.[245]

¶87. Two months later, the Supreme Court twice denied the last petitions of the very same Kevin Nigel Stanford whose fate it first decided in 1989.[246] The first, an appeal from a denial of habeas relief, was rejected without comment.[247] The second, an original petition for a writ of habeas corpus again questioning the propriety of the punishment applied to juveniles, was also rejected.[248] However, this rejection prompted a vigorous dissent from Justice Stevens, joined by Justices Souter, Ginsburg and Breyer.[249] The dissenting Justices noted the unilateral legislative movement by states to exclude minors from death penalty eligibility and suggested that this move indicated the emergence of a new national consensus.[250] They concluded their dissent with an emphatic statement that "[t]he practice of executing [juveniles] is a relic of the past and is inconsistent with evolving standards of decency in a civilized society.[251] We should put an end to this shameful practice."[252]

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

4. *Simmons v. Roper*[255]

¶89. The Supreme Court of Missouri ruled that executing juveniles violates the Eighth Amendment's prohibition of cruel and unusual punishment based on four factors pulled from the United States Supreme Court's analysis in *Atkins*.[256] The high court of Missouri found a "national consensus" prohibiting the practice, and it noted that the United States Supreme Court would reach the same conclusion under *Atkins*.[257] First, it looked at nationwide legislative enactments.[258] Second, it discussed jury behavior by looking at the frequency of juvenile executions and noted, "the practice of executing those under 18 has become similarly uncommon today."[259] Third, it looked at the overwhelmingly negative national and international opinion of the juvenile death penalty, remarking that the United States was virtually alone in the world in enforcing such punishment.[260] Finally, it conducted a proportionality analysis, concluding that retribution and deterrence do not fully apply to juveniles and that their young age actually increases their risk of wrongful execution.[261] The court then held that the juvenile death penalty violated the evolving standards of decency and was thus unconstitutional.[262]

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

## IV. National Consensus Factors

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

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

### A. The legislative landscape

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

¶94. Recently, a number of states are enacting legislation prohibiting execution of offenders under eighteen. In 2004, two states joined the ranks of jurisdictions that did not permit the execution of juveniles, Wyoming and South Dakota.[269] In South Dakota, Senate Bill 182, limiting executions to adult offenders, survived a narrow vote in the House.[270] One of the rationales advanced in support of this bill was offered by Representative Casey Murschel, "adolescents do not possess the level of moral responsibility and culpability that a society expects out of adults." [271] Another jurisdiction is in the middle of a legislative process that would ban the application of capital punishment on juveniles.[272]

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

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

**B. Jury Behavior and Executions**

¶97. Although many states technically are able to impose the punishment on juveniles, few of these sentences are imposed by the majority of the states and even fewer are carried out. Only twenty-two juveniles have been executed in the United States since the reinstatement of the death penalty in 1973.[279] The number of mentally retarded defendants executed was twice as large at the time of *Atkins*.[280] Since January 1, 1973, a total of 225 juveniles have been sentenced to death.[281] Only seven states have been responsible for 164 (or 73%) of these sentences; three states have been responsible for 112, or half of all juvenile death sentences.[282] The fact that almost 75% of the death sentences have been handed down in only seven of the states indicates that the vast majority of states disapprove of sentencing juveniles to death.

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

Project, this difference reflects a fundamentally different view about the propriety of imposing the death penalty on adult versus juvenile offenders.[287]

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

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

### C. Court's Analysis

¶101. The Court's prior death penalty jurisprudence has been examined at length in section III of this Article, so this discussion will not be reproduced here. For the purpose of the national consensus analysis, it is sufficient to note that Justice O'Connor has never prominently featured this prong in her national consensus analysis.[292] O'Connor focuses more on the actions of state legislatures, and as indicated by her stance in *Atkins*, she is willing to overrule prior judicial decisions if the actions of the state legislatures contrast with the stance of the Court.[293]

## V. Predictions

¶102. Given that Justices Stevens, Breyer, Ginsburg and Souter have made clear their disapproval of the practice, any opinion written by Justice O'Connor would garner at least four votes, if only those four justices and O'Connor vote to overturn the practice. She may either author the majority opinion, or silently join in the result *a la Atkins*. Since her concerns in this arena have been made sufficiently clear in previous cases, the author of the *Simmons* opinion is almost certain to thoroughly address them in order to get a stable majority.

¶103. Predicting at the outset that she will vote to end, or at least limit application of death penalty to juveniles, this section will attempt to sort through Justice O'Connor's judicial preferences, the national consensus analysis, and the proportionality analysis to arrive at an approximation of her stance on the constitutionality of executing juveniles in

2004. While Justice O'Connor's judicial preferences tend to weigh in favor of overturning the Missouri Supreme Court's decision, both the national consensus and proportionality analysis likely to be conducted by O'Connor weigh in favor of affirming this holding. Ultimately, the emerging national consensus against executing juveniles and the proportionality analysis indicating the diminished mental capacity of juveniles will prompt Justice O'Connor to affirm the lower court's decision.

### A. Impact of O'Connor's Background

¶104. It is tempting, after a review of a jurist's life and professional engagements, to pigeonhole him or her into a predictable pattern. Thus, given her background, Justice O'Connor's life is easily classifiable with cliché terms: she is a rugged individual, a hard worker, a trailblazer in feminism, a Constitutional swing vote. She defers to procedure, values precedent almost above all else, and defers to state legislatures to do their business undisturbed by the federal courts. Referred to as an "80-percenter" by the conservatives at the time of her appointment to the high Court, she is a conventional, but unreliable adherent to the Republican Party line.[294]

¶105. Two elements of her background and judicial preference are likely to factor into Justice O'Connor's deliberation. First, O'Connor will wrestle with her reluctance to interfere with legislative determinations. Nineteen states still allow for the execution of juveniles.[295] Throughout her career as a judge, and later as a member of the Supreme Court, Justice O'Connor has emphasized the importance of judicial deference to state legislatures.[296] As she stated during her confirmation hearings, "Judges are required to avoid substituting their own view of what is desirable in a particular case for that of the legislature, the branch of government appropriately charged with making determinations of public policy."[297] This judicial preference will weigh in favor of overturning the Missouri Supreme Court's decision and allowing the state legislature to determine appropriate age limits for the death penalty.

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

### B. National Consensus

¶107. In *Simmons*, Justice O'Connor will most likely examine the existing state approaches to the practice, and find that a new national consensus has emerged. The actions of state legislatures in the wake of *Stanford* will be the primary impetus for this decision.[300] Justice O'Connor will likely not focus on public sentiment as expressed by the sentences imposed by juries. The percentage of death sentences handed down by

juries in juvenile capital cases has not altered significantly since the *Stanford* opinion, and Justice O'Connor has not focused on this issue in her previous discussions of national consensus.[301] Additionally, her desire to uphold the Court's previous decision in *Stanford* will not be sufficient to prevent her from overruling this decision, once she determines that legislative action does not mirror the Court's opinion in *Stanford*.[302]

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

¶109. Recognizing and understanding the emergence of a national consensus in the *Atkins*-line of cases is important because a similar trend is present in the juvenile death penalty line of cases. Two primary factors suggest that the comparison between cases dealing with the execution of the mentally retarded provides some guidance for the Court's likely decision in *Roper*. First, in *Stanford*, as in *Penry*, the Court held that the number of legislatures opposing a particular application of death penalty was insufficient to qualify as a national consensus.[308] Second, legislative reaction to the *Stanford* decision mirrors the reaction of legislatures to the Court's decision in *Penry*.[309] *Stanford*, like *Penry* did not result in any regressionist legislation, rather in the wake of both of these decisions, legislatures have moved in a direction indicating increased condemnation of the practice. [310]

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

¶111. The verdicts reached by juries in juvenile death penalty trials are unlikely to impact Justice O'Connor's national consensus analysis. Although the research conducted by the Capital Jury Project suggests that juries are less likely to sentence juveniles to death, this polling data will ultimately be inconsequential when Justice O'Connor conducts her national consensus analysis for two reasons.[316] First, the research conducted by the Capital Jury Project fails to present new evidence to the Court.[317] In

*Stanford*, the majority examined historical data showing that juries in juvenile death penalty cases sentenced only fifteen to thirty juveniles out of 2,106 to death.[318] The majority held that these figures did not demonstrate significant opposition to executing juveniles.[319] The research by the Capital Jury Project only examined twelve juvenile death penalty juries and the percentage of juveniles sentenced to death actually exceeds the historical percentages.[320] This new data is insufficient to alter the conclusions reached by the majority in *Stanford*.

¶112. Although she did not join the majority opinion in *Stanford*, Justice O'Connor did not take issue with this logic in her concurring opinion.[321] Rather, she focused on actions of state legislatures.[322] Justice O'Connor's national consensus analysis in both *Stanford* and in *Penry* focused almost exclusively on the actions of state legislatures.[323] Rather than examine the sentences handed down by juries or the results of national opinion polls, Justice O'Connor studied the number of legislatures that enacted statutes forbidding the type of capital punishment in question.[324] Her focus on legislative action, combined with the failure of jury studies to produce new results in the wake of the *Stanford* decision, indicates that this component of the national consensus analysis will not factor into Justice O'Connor's decision in *Roper*.

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

### C. Proportionality

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

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

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

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

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

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

¶120. Indeed, the various amicus briefs to the Court presented just such evidence. For instance, scientists have found that the brains of seventeen-year olds are not fully developed, especially as to judgment and impulse control.[344] Similarly, according to the ABA Taskforce on Youth in the Criminal Justice System, juveniles who have been accused of capital crimes are as a group even less capable as their seventeen-year-old peers, likely because of negative factors in their lives, which further stall their development and their ability to assume adequate control over their impulses.[345] As evidenced by *Wiggins*, Justice O'Connor has perhaps become willing to defer to such ABA judgments in informing her opinion on the application of the death penalty.[346]

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

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

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

¶122. Justice O'Connor will be guided by the emerging national consensus. First, although her judicial preferences indicate that she is reluctant to impose her judicial will on state legislatures, her silent concurrence in *Atkins* demonstrates that she will intercede in legislative affairs if a sufficient number of state legislatures oppose a practice.[352] The real meaning of her national consensus analysis is that it demarcates a point at which she is willing to impose a different outcome even on a legitimately promulgated law, if she feels that a contrary majoritarian opinion has evolved through a legitimate democratic process.[353] In this case, twenty-one jurisdictions oppose executing juveniles.[354]

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

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

## VI. Conclusion

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

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

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[*] B.A. University of California, Berkeley, 2001; J.D. Boalt Hall School of Law at the University of California, Berkeley, 2004. I would like to thank Professor Charles Weisselberg for his patience and insight with this project. I would also like to thank the staff of the Boalt Journal of Criminal Law for their important contributions in shaping this work.

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

[2] 492 U.S. 361 (1989).

[3] *Id.*

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

[5] *Id.* at 968.

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

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

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

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

[10] 492 U.S. 361 (1989).

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

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

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

[14] WOODS, *supra* note 11, at 9.

[15] *Id.* at 12.

[16] *Id.* at 11.

[17] *Id.* at 13.

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

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

[20] WOODS, *supra* note 11, at 16.

[21] *Id.* at 17.

[22] *Id.* at 18.

[23] *Id.* at 17.

[24] *Id.* at 20.

[25] *Id.* at 21.

[26] *Id.* at 22.

[27] *Id.* at 23.

[28] *Id*. at 25, n. 31.

[29] *Id*. at 25.

[30] SAVAGE, *supra* note 12, at 112.

[31] WOODS, *supra* note 11, at 33.

[32] *Id.* at 35.

[33] *Id.* at 37.

[34] *Id.* at 37-38.

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

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

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

[38] *Id*. at 27.

[39] *Id*.

*[40]* *Id*. at 28.

[41] WOODS, *supra* note 11, at 40.

[42] SAVAGE, *supra* note 12, at 113.

[43] *Id*.

[44] Magnuson, *supra* note 36, at 8.

[45] *Id.* at 8.

[46] VAN SICKEL, *supra* note 19, at 29

[47] *Id.*

[48] Magnuson, *supra* note 36, at 8.

[49] *Id.*

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

[51] VAN SICKEL, *supra* note 19, at 31.

[52] Sandra Day O'Connor, *Trends in the Relationship Between the Federal and State Courts from the Perspective of a State Court Judge*, 22 WM. & MARY L. REV. 801 (1981).

[53] VAN SICKEL, *supra* note 19, at 36.

[54] *Id.*

[55] *Id.*

[56] *Nomination of Judge Sandra Day O'Connor of Arizona to Serve as an Associate Justice of the Supreme Court of the United States: Hearings Before the Sen. Committee on The Judiciary*, 97th Cong. 2 (1981) [hereinafter *Hearings*] (opening statement of Sen. Thurmond, Chairman, Sen. Comm. on the Judiciary).

[57] SANDRA DAY O'CONNOR, THE MAJESTY OF THE LAW: REFLECTIONS OF A SUPREME COURT JUSTICE 23 (2003).

[58] *Hearings*, *supra* note 57.

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

[60] *Id.*

[61] *Hearings*, *supra* note 57.

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

[63] *Id.*

[64] *Id.*

[65] *Id.* at 37.

[66] *Id*. at 36.

[67] *Id*. at 37.

[68] *Id*.

[69] *Id.* at 37-38.

[70] *Id*. at 38.

[71] *Id.* at 39; s*ee* Brown, 347 U.S. 483 (1954).

[72] VAN SICKEL, *supra* note 19, at 39.

[73] *Id.*; s*ee* Plessy, 163 U.S. 537 (1896).

[74] VAN SICKEL, *supra* note 19, at 39.

[75] *Id*.

[76] *Id.*

[77] *Id*.

[78] *Id*. at 40.

[79] *Id.* at 33.

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

[81] SAVAGE, *supra* note 12, at 221.

[82] *Id*. at 225.

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

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

[85] *Id.*

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

[87] *Id.*

[88] *Id.*

[89] *Id*. at 484.

[90] *Id.* at 485.

[91] *Id.*

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

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

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

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

[96] Webster, 492 U.S. at 525-26.

[97] *Id.* at 490.

[98] *Id.*; *see* Roe, 410 U.S. 113.

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

[100] Casey, 505 U.S. at 845-46.

[101] *Id.* at 898.

[102] *Id.* at 887, 899.

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

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

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

[106] *Id*.

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

[108] *Id.* at 798.

[109] *Id.*

[110] *Id*. at 801-02.

[111] *Id.* at 825-26.

[112] *Id*. at 816, 823.

[113] *Id.* at 823.

[114] *Id.*

[115] *Id*.

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

[117] *Id*. at 150.

[118] *Id*.

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

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

[121] *Id.*

[122] *Id.*

[123] *Id.*

[124] *Id.*

[125] *Id.*

[126] *Id.*

[127] *Id.*

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

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

[130] 466 U.S. 668, 671 (1984).

[131] *Id.*

[132] *Id*. at 686.

[133] *Id*. at 687.

[134] *Id.* at 688.

[135] *Id.* at 690-91.

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

[137] *Id.* at 522-24.

[138] 492 U.S. 302 (1989).

[139] *Id.* at 307.

[140] *Id.* at 307-08.

[141] *Id.* at 308.

[142] *Id*.

[143] *Id.* at 309.

[144] *Id.*

[145] *Id.* at 310.

[146] *Id.* at 311.

[147] *Id*. at 313.

[148] *Id.* at 306.

[149] *Id.*

[150] *Id*. at 319, Part II-B.

[151] *Id*. at 335, Part IV-B.

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

[153] Penry, 492 U.S. at 330-31.

[154] *Id.*

[155] *Id.* at 334.

[156] *Id*.

[157] *Id.* at 335-40, Part IV-C.

[158] *Id*. at 338.

[159] 536 U.S. 304 (2002).

[160] *Id.* at 306.

[161] *Id.*

[162] *Id.*

[163] *Id.*

[164] *Id.*

[165] *Id*. at 316.

[166] *Id.* at 315-16.

[167] *Id*. at 317.

[168] *Id.* at 316.

[169] *Id*.

[170] *Id.* at 319.

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

[172] *Id.* at 318.

[173] *Id.*

[174] *Id.*

[175] *Id*. at 316, n.21.

[176] *Id*.

[177] *Id*. at 347-48.

[178] *Id*. at 324-25.

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

[180] 487 U.S. 815 (1988).

[181] SAVAGE, *supra* note 12, at 204.

[182] *Id*.

[183] Thompson*,* 487 U.S. 815.

[184] *Id.* at 819.

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

[186] *Id.* at 818.

[187] *Id*. at 838.

[188] *Id*. at 821 (*citing* Trop v. Dulles, 356 U.S. 86, 101(1958)).

[189] *Id.* at 822-23.

[190] *Id*. at 821-23 (*citing* Justice White to reinforce the importance of the Court's judgment independent of the other examined branches: "[t]he 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.").

[191] *Id.* at 823-25.

[192] *Id*.

[193] *Id.* at 826-29. Justice Stevens also briefly touched upon international standards of decency, stressing that no other civilized countries allowed juvenile executions. *Id.*

[194] *Id.* at 832.

[195] *Id*.

[196] *Id.*

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

[198] *Id*. at 833-38.

[199] *Id*. at 838.

[200] *Id*. at 852.

[201] *Id.* at 849.

[202] *Id*. at 848-49.

[203] *Id.* at 849.

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

[205] *Id*. at 853 (emphasis original).

[206] *Id.* at 854.

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

[208] *Thompson*, 487 U.S. at 854.

[209] *Id.*

[210] *Id.*

[211] *Id.*

[212] *Id.*

[213] *Id.*

[214] *Id*. at 852.

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

[216] 492 U.S. 361 (1989).

[217] *Id.* at 381.

[218] *Id.* at 365.

[219] *Id.* at 365-66.

[220] *Id*. at 365.

[221] *Id.*

[222] *Id.*

[223] *Id*. at 366.

[224] *Id.*

[225] *Id*.

[226] *Id.*

[227] *Id*. at 367.

[228] *Id*. at 368.

[229] *Id*. at 380.

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

[231] Stanford, 492 U.S. at 370.

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

[233] Stanford, 492 U.S. at 374.

[234] *Id.* at 375-77.

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

[236] *Id.* at 381-82.

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

[238] *Id.* at 382.

[239] *Id*. at 391-92.

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

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

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

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

[244] Patterson, 536 U.S. at 984.

[245] Liptak, *supra* note 246.

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

[247] Stanford v. Parker, 537 U.S. 831.

[248] In re Stanford, 537 U.S. 968.

[249] *Id.*

[250] *Id.*

[251] *Id.*

[252] *Id*.

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

[254] Liptak, *supra* note 246.

[255] 112 S.W.3d 397 (2003).

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

[257] *Id*. at 399.

[258] *Id.* at 407-08.

[259] *Id.* at 409.

[260] *Id*. at 410-11.

[261] *Id.* at 411-13.

[262] *Id*. at 413.

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

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

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

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

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

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

[269] *Id.*

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

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

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

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

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

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

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

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

[278] Streib, *supra* note 280.

[279] Death Penalty Information Center *at* http://www.deathpenaltyinfo.org

[280] *Id.*

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

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

[283] Gallup News Service, May 20, 2002, available at: http://www.deathpenaltyinfo.org/article.php?scid=23&did=210#Gallup-5/02

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

[285] *Id.*

[286] *Id.*

[287] *Id.*

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

[289] Houston Chronicle December 31, 2002, available at: http://www.deathpenaltyinfo.org/article.php?scid=23&did=210#Texas.

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

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

[290] *Id.*

[291] The Oklahoman, April 3, 2003, available at: http://www.deathpenaltyinfo.org/article.php?scid=23&did=210#Texas.

[292] *See* Thompson v. Oklahoma, 487 U.S. 815, 848 (1988); *see also* Stanford v. Kentucky, 492 U.S. 361, 380 (1989).

[293] *See* Atkins v. Virginia, 536 U.S. 304, 306 (2002).

[294] *See* SAVAGE, *supra* note 12, at 5.

[295] Death Penalty Information Center at: http://www.deathpenaltyinfo.org

[296] *See* VAN SICKEL, *supra* note 19, at 31; *see also, e.g.,* Stanford, 492 U.S. at 381.

[297] *Hearings, supra* note 57.

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

[299] *See* Stanford, 492 U.S. at 361.

[300] *See* Stanford, 492 U.S. at 361.

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

[302] *See* Stanford, 492 U.S. at 361.

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

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

[305] *Id.* at 304.

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

[307] Atkins, 536 U.S. at 304.

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

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

[310] Streib, *supra* note 280.

[311] *See* Atkins,

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

[313] Streib, *supra* note 280.

[314] *Id.*

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

[316] Antonio et al, *supra* note 288.

[317] *Id.*

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

[319] *Id.* at 374.

[320] *See* Antonio et at, *supra* note 288.

[321] Stanford, 492 U.S. at 380.

[322] *Id.* at 381-82.

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

[324] Penry, 492 U.S. at 337-38.

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

[326] Stanford, 492 U.S. at 381-82.

[327] Atkins, 536 U.S. at 316.

[328] Stanford, 492 U.S. at 382.

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

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

[331] Stanford, 492 U.S. at382; Penry v. Lynaugh, 492 U.S. at 337-38 (1989).

[332] Atkins, 536 U.S. at 306.

[333] *Id.*

[334] *Id* at 309.

[335] *Id.* at 317-18.

[336] *Id.* at 316.

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

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

[339] *Id.* at 119.

[340] *Id*.

[341] Atkins, 536 U.S. at 318.

[342] *Id.*

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

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

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

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

[347] VAN SICKEL, supra note 19, at 31.

[348] Thompson, 487 U.S. at 854.

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

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

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

[352] Atkins, 536 U.S. at 306.

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

[354] Death Penalty Information Center at: http://www.deathpenaltyinfo.org.

[355] Stanford, 492 U.S. at 361.

[356] Streib, *supra* note 288; s*ee* Stanford, 492 U.S at 361.