Too Young to Kill? U.S. Supreme Court Treads a Dangerous Path in *Roper v. Simmons*

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The death penalty remains an intensely divisive topic in American society. Recently, there has been a series of cases, first involving defendants with mental retardation and more recently involving juveniles, in which the U.S. Supreme Court has ruled by a five-to-four margin that the death penalty in both these classes violates the Constitution's prohibition against cruel and unusual punishment guaranteed in the Eighth Amendment. In this essay, I explore the Supreme Court's recent decision in *Roper v. Simmons*, a case involving juveniles. Besides a more general discussion of the Supreme Court's decision and the biting dissent led by Justice Scalia, I focus on the reliance on foreign authorities in the Court's decision. I submit that irrespective of the moral arguments against the death penalty, reliance on foreign authorities in interpreting the U.S. Constitution is a dangerous trend, as it has long-term sovereignty implications for the United States.

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> The judiciary. . .has. . .no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither Force nor Will, but merely judgment. . . . The Courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequences would be the substitution of their pleasure for that of the legislative body.—Alexander Hamilton, Federalist No. 78[1]

> [W]hen a strict interpretation of the Constitution, according to the fixed rules which govern the interpretation of laws, is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean.—Justice Benjamin Curtis, dissenting opinion in *Scott v. Sandford* [Ref. 2, p 321]

With the possible exception of abortion, no other subject in contemporary U.S. society gives rise to such divided opinions as the death penalty. Opponents (or abolitionists) deride it as barbaric or medieval and argue (with some evidence) that the death penalty does not reduce crime, create deterrence, or serve any other useful purpose except revenge and incapacitation. Alternatively, supporters of capital punishment claim that it is a punishment that is as acceptable as any other just punishment and advance in support of this position the fact that there is high public acceptance of capital punishment and endorsement by at least half of the state legislatures and the federal judiciary.

Of late, the abolition argument has been concentrated more on defendants whose vulnerability might make the death penalty amount to cruel and unusual punishment as defined under the Eighth Amendment[3] of the Constitution. This issue has been raised in cases of mental illness and mental retardation, and most recently, in *Roper* v. *Simmons*,[4] for juveniles. Between 1642 and 2005, 366 persons have been executed in the U.S. for crimes committed while they were juveniles; a total of about 2.3 percent of all executions. Although the absolute number is low, the emotional temperature runs high on capital punishment for young people, and it is this topic that I am going to examine in light of international law.

The Death Penalty and the Eighth Amendment

What makes a punishment cruel and unusual, and how does it apply to the death penalty? These questions were addressed in *Furman v. Georgia*,[5] which examined the constitutionality of the death penalty and summarized the basis of the Eighth Amendment

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(cruel and unusual punishment) jurisdiction. In short, it gave three criteria for a punishment to be deemed cruel and unusual:

> It was thought by the framers to be cruel and unusual.
>
> There is societal consensus that it is cruel and unusual.
>
> It is disproportionate and serves no measurable contribution to the goals of punishment.

The *Furman* court decided that under the existing rules, the death penalty was arbitrarily and capriciously given out with unlimited discretion on the sentencing authorities and that this arbitrariness was cruel and unusual in that it gave rise to disproportionate sentences. As a result of this decision, about 600 death row inmates had their sentences vacated, and states began to tighten their statutes to remove any arbitrariness factor.

The new statutes were first tested in 1975 in the case of *Gregg v. Georgia.*[6] The *Gregg* court decided by a seven-to-two margin that the death penalty statute was not a cruel and unusual punishment in Eighth Amendment terms, provided certain procedural safeguards were in place. These included the need for capital sentencing to be subject to review by the highest state court of appeals, to ensure proportionality to the gravity of the offense; in death penalty cases, the determination of guilt or innocence must be decided separately from hearings in which sentences of life imprisonment or death are decided; and the court must consider aggravating and mitigating circumstances in relation to both the crime and the offender.

By 1995, 38 states and the federal judiciary had revised their death penalty statutes authorizing death penalty for certain types of murder. Even so, concerns remained that the death penalty was inappropriate for certain types of offender (rather than offense); either those who were not fully responsible at the time of the offense, or those who would not appreciate the meaning of the punishment in terms of either retribution or deterrence. For example, in the case of *Atkins v. Virginia*,[7] the U.S. Supreme Court emphasized that the death penalty did violate the Eighth Amendment, when applied to the mentally retarded, because, as a group, they were less likely to be fully culpable, and less likely to be deterred. Absolute and final retribution is disproportionate for those who are not fully culpable, and for those who cannot understand its meaning.

History of the Juvenile Death Penalty

The first separate juvenile court was established in Chicago in 1899, in response to the perception that punishments designed for adults were unduly harsh when directed at juveniles (those aged 17 or younger who committed offenses). It recognized the developmental differences between adults and children and openly adopted a rehabilitative model rather than a purely penal model. Since then, there have been pendulum-like shifts of attitude toward juvenile justice, with the most recent sway being toward retribution, and calls for harsher sentences for more serious crimes. The rates of referral (or waiver) to adult criminal courts have increased and more juveniles are now subject to absolute sentences, such as the death penalty or life without parole.

Since 1966, the juvenile courts have had wide discretion in referring cases to adult criminal courts. However, there were concerns that this discretion was used inconsistently, and in *Kent v. U.S.*,[8] the Supreme Court ordered that the following criteria be met for waiver:

> The seriousness and type of offense and the manner in which it was committed;
>
> The sophistication and maturity of the juvenile as determined by consideration of his or her home life, environmental situation, emotional attitude, and pattern of living;
>
> The juvenile's record and history;
>
> The prospects for protecting the public and rehabilitating the juvenile.

Juveniles were thus guaranteed the same rights as adults but it also meant that they could be tried in adult courts and be subjected to the same range of punishments, including the death penalty; which was the issue in *Kent*.

The first juvenile to be executed in the United States was Thomas Granger, in the Plymouth Colony (Massachusetts) in 1642[9]; of note, he was convicted not of murder, but of bestiality. *Kent v. U.S.* was the first case in which the Supreme Court had addressed the death penalty for juveniles, although there had been calls to abolish it as unconstitutional under the Eighth Amendment since 1980. In *Eddings v. Oklahoma*,[10] the Supreme Court vacated the

death sentence, not because it considered the death penalty to be fundamentally unconstitutional, but because the trial court had failed to consider age as a mitigating factor. Justice Powell, writing for the court said:

> [Y]outh is more than a chronological fact. It is a time of life when a person may be the most susceptible to influence and psychological damage. Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults [Ref. 10, p 115].

The Supreme Court refused to hear five cases involving the juvenile death penalty between 1983 and 1985. But in *Thompson v. Oklahoma*,[11] it heard the case and vacated the death penalty with a five-to-three majority. Only four justices, however, agreed that the juvenile death penalty was unconstitutional by Eighth Amendment standards in all cases. They (Justices Powell, Blackmun, Brennan, and the well-known liberal jurist Marshall) argued that it failed the cruel and unusual punishment test because it was inconsistent with standards of decency and did not serve the two major goals of punishment (i.e., deterrence and retribution). In a dissenting opinion, Justice O'Connor (sitting on the fence, not for the first time) voted with the majority but ruled that the statute was unconstitutional because Oklahoma had not set a minimum age (Thompson was 15 when he killed his ex-brother-in-law). She also argued that sentencing a juvenile under this type of statute violated the procedural standards set out in *Gregg*, by failing to take into consideration the special care and deliberation that is required in capital cases (Ref. 11, pp 857–8).

Social Standards of Decency: Moral Relativism in the Courts?

The following year, the Supreme Court considered both *Stanford v. Kentucky*[12] and *Wilkins v. Missouri*,[13] and decided by a five-to-four plurality on both cases that juvenile death penalty was not unconstitutional in cases in which the crime was committed between ages 16 and 17. They expressly rejected in *Stanford* the third test of *Thompson*, that the death penalty was disproportionate to the seriousness of the crime and made no measurable contribution to the goals of deterrence (Ref. 12, p 377). The *Stanford* Court then considered the question of societal standards of decency, which had been raised when the Supreme Court first addressed which punishments should be considered cruel and unusual and why (*Trop v. Dulles*[14]).

In *Trop v. Dulles*,[14] the Supreme Court established that in applying punishments, the courts must give consideration to the "evolving standards of decency that mark a maturing society" (Ref. 14, p 101, plurality opinion, Chief Justice Warren), thus arguably introducing the concept of moral relativism into the courts. Both the courts and the legislature must decide what should count toward a social standard of decency and how it should count. The *Stanford* court examined the historical and judicial precedents, juror and prosecution views, public opinion, and professional views and, somewhat unique for the time, also examined international jurisprudence on this matter. All agreed that public opinion polls or professional opinion was an uncertain foundation on which to base constitutional law. How then should the courts determine the social standards that will make a punishment cruel and unusual?

Stanford was not the first case where the U.S. Supreme Court looked beyond the borders of the U.S. to find guidance in its jurisprudence. However it was certainly the first in a death penalty case, presumably because of the United States' somewhat isolated position in relation to the death penalty, compared with most other countries that share the United States' political and social values and have similar legislatures. Most European and Anglo-Saxon-speaking societies have taken the view that death penalty and life without parole are human rights issues and thus trump any state law or constitutional laws. Many countries have either banned expressly or by inaction have banned *de facto* the death penalty for juveniles who commit crimes before the age of 18. By implication, these countries suggest that social standards of decency cannot support the death penalty for juveniles.

Despite being a signatory to a number of international legal treaties that call for the abolition of the death penalty (including for juveniles) the United States has insisted on excepting itself from these provisions. In 1977, the U.S. government signed the International Covenant on Civil and Political Rights (ICCPR),[15] at the same time as *Furman*[5] and *Gregg*[6] were decided, but expressly derogated from the provision that prohibits the death penalty for juveniles who committed the crime while under the age of 18.[16] As late as 1997, the United States has resisted several calls to withdraw its objections to the ICCPR.

Roper v. Simmons: Another Look at the Juvenile Death Penalty as Unconstitutional

Christopher Simmons killed a woman when he was 17 years of age. He was tried as an adult of first-degree murder, convicted, and sentenced to death. He appealed the sentence, but the appeal was denied in 2001. Following the Supreme Court's decision in *Atkins*, Simmons appealed again in 2003, arguing that if it is disproportionate to execute those with mental retardation, the same disproportionality should apply to juveniles.

However, when the case was heard in 2003,[17] the Supreme Court of Missouri did not favor this argument. Instead, they interpreted current national data to hold that the death penalty for juvenile offenders violates the Eighth Amendment and commuted Simmons' sentence to life imprisonment. Although the court did not reach the issue under the Missouri State Constitution, but rather on federal constitutionality, *Simmons*[4] applied only in Missouri at that juncture.

On January 26, 2004, the United States Supreme Court granted *certiorari*[18] and agreed to hear the *Simmons* case, restyled as *Roper v. Simmons*.[4] Oral arguments in *Roper v. Simmons* were heard on October 13, 2004. The two matters before the Supreme Court were as follows:

> Once the Supreme Court sets the Eighth Amendment cruel and unusual standard, can a lower court subsequently reinterpret and reject that standard under evolving standards of decency?
>
> Is the death penalty for a 17-year-old offender now cruel and unusual under the Eighth Amendment's evolving standard of decency?

Herbert and Meyers[19] who analyzed the state supreme court's decision, and Scott[9] provide a detailed analysis of the case. I will not re-examine all the aspects here. The Court upheld the Supreme Court of Missouri's ruling, and Simmons' sentence of imprisonment. The crucial matter before the Supreme Court was how to assess and determine evolving standards of decency in the punishment of offenders. In my view, it is this matter that bears closer attention.

The Implications of *Roper*: Who Decides the Standards of Decency?

According to the evolving standard of decency, courts must pay attention to changes in social values over time and apply these to the interpretation of legal and ethics-related principles. Changes in values imply changes in beliefs and attitudes that are clearly expressed. What is not so clear is how the courts should deal with conflicts in values or how to evaluate the importance of different bodies of opinion. Changes in values may be identified intra- or internationally. The question then is what changes in values will count for the purposes of interpreting the U.S. Constitution.

The dissenting views in *Roper* attest to the real debate about the extent to which the U.S. Supreme Court can or should consider changing values as a matter of law. The particular objections the dissenters raised in this case were that the evolving standards of decency that the court identified in *Simmons* were based on a nonexistent national consensus and that too much reliance was put on international law in deciding U.S. Constitutional law.

Evolving Standards: Stare Decisis *and Consensus*

It is a well-known principle of jurisprudence that a precedent can be overturned only when there is evidence to suggest that the court decided wrongly in the first place or new evidence has come about that makes the previous decision wrong. This principle is what the dissenters in *Webster v. Reproductive Health Services*[20] (some of whom joined the plurality in *Roper*) wrote in 1989:

> This comes at a cost. The doctrine of *stare decisis* "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact" [474 U.S., at 265–266]. Today's decision involves the most politically divisive domestic legal issue of our time. By refusing to explain or to justify its proposed revolutionary revision in the law of abortion, and by refusing to abide not only by our precedents, but also by our canons for reconsidering those precedents, the plurality invites charges of cowardice and [492 U.S. 490, 560] illegitimacy to our door. I cannot say that these would be undeserved [Ref. 18, pp 560–1; Justice Blackmun dissenting].

The Court does not, however (beyond the most superficial treatment), deal with the issue of *stare decisis* in *Roper*. The dissenters, notably Justice Scalia, in my view make a valid point that the mathematics that the court cites to demonstrate that a national consensus has now developed that was not there 17 years earlier is barely credible. Forty-seven percent of death penalty states now ban the juvenile death penalty, as opposed to 42 percent 17 years earlier when

Stanford was decided. An increase of 5 percent that is not even mathematically a majority surely cannot be the objective index on which a precedent can be overturned. The Court points to the direction of change in the manner that the states have legislated against the death penalty or in effect banned it (by not imposing it where available), and indeed this direction is pointing toward an increasing number of states that do not want to use this form of punishment for juveniles. Justice Scalia calls it a "one-way ratchet" (Ref. 7, p 304). Whether that is a sufficient objective index of a growing national consensus is the bone of contention between the Court's opinion and the dissent.

The problem is what should count as a national consensus. Can a consensus really be equated with the number of states that endorse a position? If x is the number of states that do endorse the death penalty for juveniles and $x + 1$ is the number of states that do not, can this really be a national consensus for the purposes of establishing an evolved standard of decency? The oral arguments (and the opinion in *Atkins* (at 316)) also talked about the populations of states and the majority with which legislation was passed. In the end it was agreed that it was not all about "a nose count of Americans for and against" (Ref. 7, p 346; Justice Scalia dissenting). Justice Scalia in his current dissent thus tersely states, "[W]ords have no meaning if the views of less than 50% of death penalty states can constitute a national consensus" (Ref. 4, p 552).

Justice Kennedy, once again (as in *Lawrence v. Texas*[21]) wrote the Court's opinion, in which Justices Ginsberg, Souter, and Breyer joined. Justice Stevens, not to be outdone, wrote a separate concurring opinion. These are the five justices (in addition to Justice O'Connor) who overturned *Penry v. Lynaugh*,[22] when deciding *Atkins.*[7] They are no strangers to not following the *stare decisis* principle. *Planned Parenthood v. Casey*[23] was decided to honor precedent set in *Roe v. Wade*,[24] but *Roe* and *Casey* have been equally eroded by *Washington v. Glucksberg*,[25] which held that only fundamental rights that are deeply rooted in the nation's history and tradition qualify for anything other than rational-basis scrutiny under the doctrine of substantive due process. *Roe* and *Casey* subjected the restriction of abortion to heightened scrutiny without even attempting to establish that the freedom to abort was rooted in the nation's tradition. Similarly, in *Lawrence*,[19] the Court overturned its established principle settled in the previous decade in *Bowers v. Hardwick*,[26] without establishing that the freedom to engage in same-sex sodomy is a value deeply rooted in this nation's traditions and history. In fact, both these values were so little rooted in the nation's traditions and history that they were outlawed for more than 200 years.

Even allowing for the portion of the justices who are in the liberal camp and their proclivities for overturning the principle of *stare decisis*, what is curious in the current context (since *Lawrence* and *Atkins*) is the inconsistent way the plurality applied the principle of *stare*. It is accepted fact that *stare* is not sacrosanct and can be overturned, but the threshold of doing that must be high and the reasoning consistently applied. Justice Scalia's penchant for acerbic dissents is not a new phenomenon, but equally important is his reasoning. He points out the stark inconsistencies between the Court's choosing to preserve *Roe* in the case of *Planned Parenthood v. Casey*, and overturning *Bowers* in *Lawrence*. He said in *Casey*: "Reason finds no refuge in this jurisprudence of confusion" (Ref. 21, p 993). Even in a death penalty case, such as *Atkins* and more recently (and germane to our discussion here) in *Roper*, the plurality overturns a decision the Court had made only 17 years earlier. I will next examine whether the Court's decision and reasoning are persuasive.

> The Court also returned to the rule, established in decisions predating *Stanford*, that the Constitution contemplates that the Court's own judgment be brought to bear on the question of the acceptability of the death penalty [Ref. 4, p 9; Justice Scalia dissenting].

The Supreme Court, in its Eighth Amendment jurisprudence, declared that the Eighth Amendment is an ever-changing reflection of the evolving standards of society. Why is it then suitable for the justices to prescribe those standards rather than determine them from the practices of the nation's citizenry? Justice Scalia puts it succinctly in his dissent: "By what conceivable warrant can nine lawyers presume to be the authoritative conscience of the Nation?" (Ref. 4, p 10).

The reason for relying on legislative primacy is obvious. In a democracy, it is the legislature, not the courts that are equipped to respond to popular will and sentiments. Values, and consequently laws, change. Another barometer of society's moral value can be discerned by the sentencing practices of juries. They maintain a "link between existent moral values

and the penal system" (Ref. 6, p 181, quoting *Witherspoon v. Illinois*, 391 U.S. 510, 519, n 15 (1968)). This link is weak. Juries are required to apply the law. If the features of a crime meet the legal criteria for death, then a jury is supposed to impose the sentence, not simply to ask themselves whether they think the person deserves it based on the jurors' personal moral values. Indeed in the United States, if jurors' values are biased against the death penalty, usually they will never be seated on the jury, because one of the attorneys will reject them during jury selection. The nation's highest Court, served by nine senior judges, cannot claim to have that link. However, the proposition that legislation and legislators' votes reflect actual (factual) will and sentiment of the population is easily challenged. For example, right now most states can try youths as adults. But in the past few years, there have been convincing survey studies that show that most of the general public does not believe that youths should be punished as adults, even for serious crimes. In addition, U.S. legal history is replete with instances in which legislatures passed laws that were not supported by majorities or large minorities of the citizens they represented (e.g., laws restricting the rights of racial minorities). Legislation is often a reflection of economic power, not the will of the people. However, equally persuasive is Justice Scalia's view on legislative primacy, as elucidated in *Stanford* (Ref. 12, p 370), and quoted in his biting dissent in *Thompson*:

> "First" among these objective factors are the "statutes passed by society's elected representatives," *Stanford v. Kentucky* (internal citation omitted); because it "will rarely if ever be the case that the Members of this Court will have a better sense of the evolution in views of the American people than do their elected representatives" [Ref. 11, p 865; Justice Scalia dissenting].

Even if one grants that the U.S. Supreme Court can overturn its own precedent, it is extraordinarily rare (although by no means unheard of in the recent era of jurisprudential liberalism) that a lower court, in this case a state supreme court, can with impunity overturn what seems to them an unjust law. The Missouri Supreme Court does not so much as get an admonition from the Court, and Justice Scalia (also see his dissent in *Kansas v. Crane*[27]) says quite emphatically that this "cheapens the currency" of the Supreme Court's opinion (Ref. 25, p 416). He says, in so many words, that if you do not like our law, ignoring it might be worth a try (Ref. 25, p 424). Even Justice O'Connor concurred with this point in her separate dissent: "By affirming the lower court's judgment without so much as a slap on the hand, today's decision threatens to invite frequent and disruptive reassessments of our Eighth Amendment precedents" (Ref. 4, p 8). Justice Scalia sums it up with a characteristic polemic: "The result will be to crown arbitrariness with chaos" (Ref. 4, p 24). Somewhat reassuringly, it has been two years since *Atkins* was decided, and we have not witnessed the chaos Justice Scalia predicted. One can easily argue, therefore, that there is no need for a fuss about it, considering that it is rather admirable, in a way, that a state supreme court rebelled when it thought the U.S. Supreme Court was wrong. No great harm was done, given that the relevant party can appeal to ask the U.S. Supreme Court to tell the state to straighten up.

A further approach to examining evolving standards of decency used in *Roper v. Simmons*[4] was to provide the court with new evidence from neuropsychiatry about the structure and function of adolescent brains. Although a standard of decency refers to a norm or a social value and this research says nothing about that, brain research and other research can only influence or inform those social values, as it hopes to do with the jurors). The American Psychological Association filed an *amicus* brief,[28] setting out new research evidence that would support Simmons' contention that as a juvenile he was more like a mentally retarded person than a fully culpable adult (consistent with *Atkins*; Ref. 17, p 443), and by extension, perhaps that new standards of decency must evolve when there is new information that is germane. The APA *amicus* brief only considered juveniles as a class and did not say anything about Simmons specifically. It is easy to see why it is tempting to extrapolate the class effect to a particular case in preparing a defense. However, as discussed by Morse,[29] new evidence from neuropsychiatry may change the scientific questions that can be asked, but does not change the moral question. It is common knowledge that juveniles are different from adults in many ways, including brain function. The question is how those differences should be addressed in relation to sentencing for crime.

Another way to address national consensus is to draw on international consensus. I will examine the Supreme Court's approach to foreign legislation in more detail later, but at this point I want to note the implication that international consensus must also

include some notion of an American national consensus.

International Law and Evolving Standards of Decency

The idea that international law may influence jurisprudence in the United States might be argued by some to be alien to the concept of constitutional law, which deals with purely domestic concerns. It must be said, however, that the U.S. Supreme Court has increasingly looked beyond its borders and placed more importance on the holdings of foreign court than previously. Justice Scalia's view is that foreign legal materials can never be relevant to an interpretation of, or to the meaning[30] of, the U.S. Constitution. The Supreme Court seems to have agreed with this view. For example, in *Printz v. U.S.*,[31] in which it was decided whether the federal government could press state law officers into service to administer a federal statute that the court rejected as irrelevant (Ref. 29, p 921), Justice Breyer asserted (Ref. 29, p 976) that Switzerland, Germany, and the European Union all provide that the constituent states must themselves implement many of the laws adopted by the central federation. The court's opinion rejected that citation of foreign law, saying the following: "We think such comparative analysis inappropriate to the task of interpreting a constitution, though it was of course quite relevant to the task of writing one" (Ref. 29, p 921, n 11). In other cases, opinions for the Court have used foreign law for the purpose of interpreting the constitution.

The first such case perhaps was in 1958, a case involving the Eighth Amendment in *Trop v. Dulles.*[14] The court held that the Eighth Amendment forbids the forfeiture of citizenship because, *inter alia*, "[T]he civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime" (Ref. 14, p 102). Increasingly, there has been a reliance on foreign law in Eighth Amendment cases; in *Coker v. Georgia*,[32] a 1977 case, the court noted that "out of 60 major nations in the world surveyed in 1965, only 3 retained the death penalty for rape where death did not ensue" (Ref. 30, p 102). In the 1988 case, *Thompson v. Oklahoma*,[11] the court noted that "other nations that share our Anglo-American heritage, and the leading members of the Western European community" (Ref. 11, p 815) oppose the death penalty for a person less than 16 years old when the crime was committed. One must also remember that those countries have a blanket ban on the death penalty for offenders of any age. In *Atkins v. Virginia*,[7] decided in 2002, the Court thought it relevant to its interpretation of the U.S. Constitution that, "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved" (Ref. 7, p 304, n 21).

The Court has expanded its reliance on foreign law beyond Eighth Amendment jurisprudence. An early example is that of *Lawrence v. Texas*,[19] which sought to overturn the same-sex sodomy law in Texas. In that case, Justice Kennedy cited a decision by the European Court of Human Rights (ECHR) as evidence that same-sex sodomy is acceptable conduct or at least to show the lack of consensus on its illegality. He goes on to write that these are the "values we share with wider civilization" (Ref. 19, p 558).

There are several problems with this approach. First, it is not clear why the ECHR has unique claim to influence jurisprudence of the United States, save the passing mention of the Berger Court decision in *Bowers*. The *Bowers* decision is actually criticized by the *Lawrence* Court but the fact remains that in the Court's decision the ECHR jurisprudence was given some importance. Quite how or why "some importance" became the overriding principle is not clear to the ordinary reader. Second, although the ECHR presides over the jurisdictions of some 45 countries, it is but one court, dealing with one statute, the European Convention on Human Rights. It cannot claim to be the multijurisdiction that might give international opinion some weight; particularly not for the purposes of interpreting Eighth Amendment jurisprudence.

However, there is further evidence that the Supreme Court favors a pluralistic approach when considering evolving standards, based on its approach in *Atkins* (Ref. 7, p 304). The Court found growing international disapproval of the execution of the mentally retarded as evidence of a national consensus, even though most of the states and their legislatures, traditionally the barometer of national consensus, permitted this particular form of punishment. The court also relied on religious groups, psychologist and public opinion polls, and, of particular interest, on a foreign *amicus* brief submitted by the EU, which categorically stated, "Within the world community, the imposition of death sentence for crimes

committed by the mentally retarded is overwhelmingly disapproved" (Ref. 7, p 304, n 21). What the *Atkins* Court did not specify is the source from which its authority was derived to look at supranational jurisdiction for deciding its own domestic law. A clear elucidation and argument for relying on such authority would have been helpful, especially since only 13 years earlier the Court had expressly stated that foreign authorities must not be relied on in sentencing matters (Ref. 12, p 369). Justice Scalia wrote in a later dissent:

> We must never forget that it is a Constitution for the United States of America that we are expounding. . . . [W]here there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution" [Ref. 11, p 869; Justice Scalia dissenting].

The *Roper* Court went to extra lengths to indicate that the weight of international opinion did not control, but was important in corroborating the court's determination. It noted that the United States is the only country that gives sanction to this form of punishment to juveniles. In *Lawrence* and *Atkins*, international jurisprudence was not determinative, but helped in forming the court's own jurisprudence. International opinion was sought (and rejected) in *Stanford*. In contrast, the *Roper* Court embraced the custom of a single legal entity (albeit coalesced from many nations) and cited as evidence of an international consensus the fact that almost all the countries prohibit the death penalty for juveniles, without any explanation of why this should influence the Court's decision. Again in dissent, Scalia argued that U.S. courts have no power to enter into treaties with nations and that the judiciary is the only branch of government that cannot do so (Ref. 4, p 551). Given that neither the ICCPR nor the UNHCR has been ratified by Congress and that the ICCPR actually has a reservation or derogation[16] that has not been withdrawn, these treaties cannot be influential for the purposes of interpreting the Constitution.

The implication seems to be that international consensus should include the United States, and if the U.S. consensus does not fit with the international one, then it should change to do so. This approach mirrors that of those nations who wish to join the European Union (such as Turkey) and find that it is mandatory to drop the death penalty as a sentencing option to do so, because that is the consensus of the member states. While one can understand that the very concept "community" entails shared values to some degree,[33] nevertheless, consensus is not the same as conformity.

Citing foreign authorities to decide domestic matters is not unknown and it is no comfort that the Court noted that, "It doesn't lessen our fidelity to the constitution" (Ref. 4, pp 24–5; Justice Kennedy, writing the opinion of the Court). But as the dissent points out (Ref. 4, p 551; Justice Scalia dissenting), many of the nation's judicial practices are unique for better or for worse because the constitution guarantees it. The constitution, even at its most "living" mode has guaranteed trial by jury and rigorous due process protection. The problem of overruling a precedent is that one throws the arguments away with the decision. How else could one do away with the Court's quite emphatic pronunciation in *Stanford* that "they cannot serve to establish the first Eighth Amendment prerequisite, that the practice is accepted among our people" (Ref. 12, at 369, n 1, emphasizing that "*American* conceptions of decency . . . are dispositive" (emphasis in original)). As Justice Scalia wrote in dissent in *Roper*, "To invoke alien law when it agrees with one's own thinking, and ignore it otherwise, is not reasoned decision making, but sophistry" (Ref. 4, p 21, Justice Scalia, dissenting in part).

Conclusions

So where does all of this leave us? Can we say that there are such things as American values and Americans must decide things for themselves, no mater what other people are doing? Can we argue that the law should not change according to changing social values or that at least if it does, it should be enacted in statute and not by the Supreme Court enacting a social moment? The other argument, equally powerful in my view, is that due process is all we have and that if we give that up, justice may not be done, even if the consequences in the short term are good. The decision in *Roper* may be correct, even right, but the process is wrong. If what Justice Scalia has called in *Crane* (Ref. 24, p 425) a "jurisprudential jujitsu" or "sophistry" (*Roper*; Ref. 4, p 21) is the basis of the Court's jurisprudence in *Roper*, what will be the currency of the highest Court's decisions when posterity seeks guidance from the Court's earlier jurisprudence? The *Roper* court, quoting *Coker*, said that it can be asked to be the moral arbiter of the nation's sentiments (Ref. 30, p 604), but that rule, quoted in

dicta (and never in a holding) was emphatically rejected in *Stanford* because it has roots neither in reason nor in experience.

These are turbulent times, both for the legislature and the judiciary and even the executive branch of the government. But if the only unelected branch of government usurps the roles of the two elected branches, the most powerful democracy in the world will no longer provide leadership to the rest of the world.

George Washington,[34] in his farewell address, foresaw this danger:

> If in the opinion of the people the distribution or modification of the constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates. But let there be no change by usurpation; for though this in one instance may be the instrument of good, it is the customary weapon by which free governments are destroyed. The precedent must always greatly overbalance in permanent evil any partial or transient benefit which the use can at any time yield.

His statement could not be more true today. If Justice Blackmun were alive today, I wonder whether he would have repeated what he wrote in a dissent many years ago in *Furman*: "Although personally I may rejoice at the Court's result, I find it difficult to accept or to justify as a matter of history, of law, or of constitutional pronouncement. I fear the Court has overstepped. It has sought and has achieved an end" (Ref. 5, p 414; Justice Blackmun dissenting).

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