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A SNEAK PREVIEW INTO HOW THE COURT TOOK AWAY A STATE'S RIGHT TO EXECUTE SIXTEEN AND SEVENTEEN YEAR OLD JUVENILES: THE THREAT OF EXECUTION WILL NO LONGER SAVE AN INNOCENT VICTIM'S LIFE

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INTRODUCTION

Imagine your daughter, Elizabeth, fourteen years of age, and her best friend, Jenny, sixteen years of age, after a long day at high school decide to take a shortcut home down a railroad track through a park. While walking through the park, they are attacked by five vicious animals.[1] All gang members.[2] Elizabeth was grabbed and taken down the incline off the railroad tracks.[3] Testimony revealed that Jenny became free and could have run away but decided that she wanted to help her best friend who was crying out for help.[4]

For the next hour or so, there were never less than two males on one female. The girls were repeatedly raped orally, vaginally, and anally.[5] One of the gang members bragged about how loose and sloppy one of the girls was, and another bragged about having virgin blood on him.

Taking away these two innocent teenagers' self-esteem and innocence by raping them for over an hour was not enough for these vicious animals. These animals meticulously took Elizabeth and Jenny into an isolated area of the woods. Two of them placed a belt around their necks and pulled from each end until the belt broke.

After the belt broke, the killers used a shoelace to finish their job. One of the killers complained that, "The bitch won't die and it would have been easier to have used a gun."[6] After having her ribs kicked in and her teeth knocked out, Elizabeth was strangled to death, after crying and pleading for her life.

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1. Cantu v. State, 939 S.W.2d 627, 631 (Tex. Crim. App. 1997).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *The Murders of Jennifer Ertman and Elizabeth Pena*, *at* http://www.murdervictims.com/Voices/jeneliz.html (last visited June 20, 2005).

Should the fate of these people who disrespected the dignity of these two innocent girls be based on whether their actions were committed when they were sixteen, seventeen or one day before their eighteenth birthday? How should the United States Supreme Court decide whether states should be able to execute sixteen and seventeen year olds?

I. SUMMARY OF ARGUMENT

This article will evaluate, analyze, and criticize how the United States Supreme Court in *Roper v. Simmons* recently prohibited any state from executing a sixteen or seventeen year old.[7] Instead of drawing a categorical rule barring the imposition of capital punishment on anyone under the age of eighteen, this article will establish that the Cruel and Unusual Punishment Clause of the Eighth Amendment our forefathers created, dictated that the Court adopt a standard that provides states guidance to properly administer the ultimate punishment in a rational and consistent manner for the worst of the worst on a case by case basis. Victims suffer daily knowing their loved one was brutally raped and killed by people who intentionally, consciously and maliciously took away their right to live in a democratic society. Victims now feel a sense of injustice as a result of the United States Supreme Court in *Roper v. Simmons* prohibiting states from executing anyone under the age of eighteen. The reason victims feel a sense of injustice is because as a society, we rely on the criminal justice system to ascertain the appropriate punishment for a particular case and crime. We relied on the United States Supreme Court in *Roper v. Simmons* to link the ultimate punishment to those who are among the worst of the worst by upholding precedent which requires individual consideration as a constitutional requirement before sentencing one to death.[8] The Court ignored this precedent and based its decision on erroneous assumptions about juveniles as a class.[9] By grouping all sixteen and seventeen year olds together as a class, the Court disregarded and ignored the fact that the Respondent, Christopher Simmons, was fully responsible for having committed a deliberate premeditated murder. Furthermore, the Court failed to acknowledge the fact that juveniles are all different with respect to their experience, maturity, intelligence and moral culpability.

The Court created federal law protecting anyone under the age of eighteen from capital punishment by utilizing an arbitrary standard it created, but never defined, known as the "evolving standards of decency doctrine." This enabled the individual justices of the United States Supreme Court to use their own morality and make a decision based on their own prejudices and biases. Instead, the plurality should have em-

7. 125 S. Ct. 1183 (2005).

8. *See* Enund v. Florida, 458 U.S. 782, 798 (1982) (quoting Lockett v. Ohio, 438 U.S. 586, 605 (1978)).

9. *See Simmons*, 125 S. Ct. at 1197.

braced the factors that are reflected through state legislation and defined by the Court as what punishment amounts to cruel and unusual.

II. A CATEGORICAL RULE BASED ON AGE IS NOT DETERMINATIVE OF ONE'S MORAL CULPABILITY

The Court should not have drawn a bright line rule at the arbitrary age of eighteen because age does not define one's character, judgment, maturity, personal responsibility, or moral guilt. No one, including psychiatrists, psychologists and brain specialists, dispute that some sixteen and seventeen year olds are as mature or more mature than some of those who are eighteen and older. United States Supreme Court Justices, even the plurality in *Roper v. Simmons*, Nobel Peace Prize winners, the American Medical Association and the European Union all agree.[10] Instead, the Court's new bright line of eighteen years of age "treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass . . . ."[11] Furthermore, the Court's ruling treats sixteen and seventeen year olds as a class of animals who are incapable of making a conscious decision or who do not know or understand that it is wrong to kill someone. Such an assertion is not in fact the case. The reasoning in *Roper v. Simmons* is flawed because even though juveniles can be immature and impulsive at times that does not mean that they can not be fully responsible or morally culpable for having committed premeditated murder. Sixteen and seventeen year olds are certainly capable of understanding right from wrong and the consequences of their actions. Furthermore, they are capable of forming the requisite intent to kill to merit the death penalty. Moreover, they are capable of being deterred from forming the requisite intent to kill. All of these statements will be illustrated and supported by an analysis of *Roper v. Simmons.*

In *Roper v. Simmons*, respondent possessed the requisite intent to kill evidenced by his statements to his friends that he would "find someone to burglarize, tie the victim up, and ultimately push the victim off a bridge."[12] Christopher Simmons meticulously and methodically planned to kill Ms. Crook and in fact arranged for his friends to meet him at a particular time and location to commit murder.[13] Christopher Simmons also deliberated over killing Ms. Crook when he burglarized her home, taped her hands behind her back, taped her eyes and mouth shut, placed her in the back of the minivan and drove her from her house in Jefferson County to Castlewood State Park in St. Louis County.[14] Christopher Simmons contemplated killing her as he proceeded to torture her. He

10. *See Simmons*, 125 S. Ct. at 1186.
11. Woodson v. North Carolina, 428 U.S. 280, 304 (1976).
12. State v. Simmons, 944 S.W.2d 165, 169 (Mo. 1997).
13. *Id.* at 178.
14. *Id.* at 170.

pulled her out of the van, restrained her hands and feet, covered her head with a towel, hog-tied her hands and feet together with electrical cable, and covered her face with electrical tape.[15] He then deliberately pushed her off of the railroad trestle into the river.[16] His belief that his age would allow him to "get away with" such a heinous act shows both a reckless indifference to human life and knowledge of the consequences of his actions.[17] Yet, the plurality in *Roper v. Simmons* overlooked the fact that Simmons possessed culpability qualifying him among the worst of the worst deserving of execution by comparing general differences between those under eighteen and adults and making a generalized statement that "juvenile offenders cannot with reliability be classified among the worst offenders."[18] If the Court would have adopted the standard proposed in the Amici Curiae brief by Justice For All Alliance then it would have been possible to determine with reliability which sixteen or seventeen year olds are among the worst offenders meriting the death penalty.

III. UNITED STATES SUPREME COURT PRECEDENT MANDATING INDIVIDUAL CONSIDERATION AS A CONSTITUTIONAL REQUIREMENT BEFORE SENTENCING A JUVENILE TO DEATH DICTATES A CASE-BY-CASE ANALYSIS RATHER THAN A BRIGHT LINE RULE

Respect for humanity by treating people as unique individuals is the cornerstone underlying the Eighth Amendment. In fact, the Court and a majority of state legislatures have held that individual consideration by respecting humanity is a constitutional requirement before sentencing one to death.[19] This requires consideration of an individual's character, the record of the juvenile offender, and the circumstances of the particular offense.[20] Yet, the Court in *Simmons* ignored this precedent by failing to base its decision on the facts and moral culpability of Christopher Simmons.

The Court should have abided by this precedent and not have grouped juveniles together as a class but rather recognized that each individual defendant is different with respect to his or her maturity, intelligence, capability and moral guilt. The Court should have upheld Justice O'Connor's ruling in *Thompson v. Oklahoma*,[21] in which she stated:

> [G]ranting the premise that adolescents are generally less blameworthy than adults who commit similar crimes, it does not necessarily

15. *State v. Simmons*, 944 S.W.2d at 170.
16. *Id.*
17. *Id.* at 169.
18. Roper v. Simmons, 125 S. Ct. at 1186.
19. *See* Woodson v. North Carolina, 428 U.S. 280, 309 (1976); Edmund v. Florida, 458 U.S. 782, 798 (1982) (quoting Lockett v. Ohio, 438 U.S. 586, 605 (1978)).
20. *Id.*
21. 487 U.S. 815 (1988).

> follow that all 15-year-olds are incapable of the moral culpability that would justify the imposition of capital punishment.[22]

Juveniles as young as fifteen can form the requisite intent to kill and are able to both understand the consequences of their actions and conform their conduct to civilized standards. This is clearly illustrated by looking at the moral culpability of William Wayne Thompson, who was fifteen when he committed the brutal murder of his brother-in-law,[23] and Christopher Simmons, who was seventeen when he committed a brutal, premeditated murder.[24]

In *Thompson*, the petitioner's heinous acts reveal his culpable mental state. He shot his brother-in-law twice, cut his throat, chest and abdomen.[25] He subsequently chained his body to a concrete block and threw his body into the river so that "the fish could eat his body."[26] He clearly knew that these atrocious acts were wrong and would end up taking the life of his innocent brother-in-law.

In *Simmons*, Christopher Simmons, at age seventeen, decided he wanted to commit murder. In chilling, callous terms, he talked about his plan, discussing it for the most part with his two friends.[27] He planned to commit burglary and murder by breaking and entering into a person's home, tying up the victim, and throwing the victim off of a bridge.[28] This is exactly what Christopher Simmons did, and before he did it, he specifically told his friends that he "could get away with it," because of his age.[29]

Using duct tape to cover the eyes and mouth of the victim, the two perpetrators put Ms. Crook in her minivan and drove her to a state park.[30] There, they walked her, with a towel over her head, to a railroad trestle spanning the Meramec river.[31] They tied her hands and feet with electrical cable, bound her face completely with duct tape and pushed her, still alive, from the trestle.[32] Suspended in mid air after being shoved while blindfolded must have been horrifying for this innocent woman, especially considering her fear of heights.

Whatever can be said about the comparative moral culpability of seventeen year olds as a general matter, Simmons' actions unquestionably reflect a consciousness materially more depraved than that of the

22. Thompson v. Oklahoma, 487 U.S. 815, 817 (1988).
23. *Id.* at 815.
24. *Simmons*, 125 S. Ct. at 1184.
25. *Thompson*, 487 U.S. at 820.
26. *Id.* at 859.
27. *Simmons*, 125 S. Ct. at 1187.
28. *Id.*
29. *Id.*
30. *Id.* at 1188.
31. *Id.*
32. *Id.*

average murderer. Simmons's prediction that he could murder with impunity because he was younger than eighteen suggests that he did take into account the punishment or the perceived risk of punishment in deciding whether to commit the crime.

Based on this evidence, the sentencing jury certainly had reasonable grounds for concluding that, despite Simmons' youth, he had sufficient psychological maturity and demonstrated sufficient depravity when he committed this horrific murder to merit a sentence of death. Yet, the Justices comprising the plurality in *Roper v. Simmons* ignored these facts and instead based their decision on general differences between juveniles and adults.[33] Such a reliance on generalities clearly violates their own precedent which requires a sentencer to analyze all of the specific aggravating and mitigating circumstances of the individual offense.

The plurality in *Roper v. Simmons* made a bold statement that it distrusts a jury's ability to determine with reliability which sixteen and seventeen year olds are among the worst of the worst deserving of execution, when they had a prime example right in front of them.[34]

Consider some of the justifications for the plurality's ruling. They found that a lack of maturity and an under-developed sense of responsibility are found in youth more often than adults.[35] Adolescents are overrepresented statistically in virtually every category of reckless behavior.[36] Second, they found that juveniles are more vulnerable or susceptible to negative influences and outside pressures, such as peer pressure.[37] However, this is not true in every case, including Christopher Simmons'. Lastly, they found that the character of a juvenile is not as well formed as that of an adult.[38] They assert that personality traits of juveniles are more transitory and less fixed.[39] That may be true. However, there's no evidence linking specific characteristics of teens' brains to any legally relevant condition, such as impaired moral judgment or an inability to control murderous impulses. It is not logical to say we should excuse Christopher Simmons because other juveniles' brains may not be fully developed, when that fact was never established in his case at the trial court level. In fact, according to a prominent brain development researcher, UCLA's Elizabeth Sowell, no current research connects specific brain traits of typical teenagers to any mental or behavioral problems.[40] The

33. *Simmons*, 125 S. Ct. at 1195.
34. *Id.* at 1197.
35. *Id.* at 1195.
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.* (citing to E. ERIKSON, IDENTITY: YOUTH AND CRISIS (1968)).
40. Dudley Sharp, *Why Some "Juvenile" Murderers Should Qualify For The Death Penalty: Brain Science and Other Issues*, *at* http://www.dpinfo.com/juveniles.htm (last visited June 26, 2005).

hardest thing for neuroscientists to do is to try to bring brain research into real-life context.

IV. GOALS OF THE DEATH PENALTY

A. Deterrence

The foundation of our judicial system is based on moral culpability.[41] The Court has consistently held that punishment be directly linked to one's blameworthiness.[42] In fact, causing harm intentionally must be punished more severely than causing the same harm unintentionally. One of the rationales for imposing the death penalty - deterrence - is linked to moral culpability, because it is based on the notion that a person will not form the requisite intent to kill because of the threat of death.

The facts underlying *Simmons* is a prime example that the death penalty did in fact serve as a deterrent. Christopher Simmons would not have killed an innocent woman, if he knew he would have received the ultimate penalty, indicated by his statement to friends that he could "get away with it" because of his age.[43] He considered the perceived risk of punishment before he committed the crime and he fully understood the consequences of his actions. In the end, Christopher Simmons was correct; he persuaded the Court to wrongfully assume that, magically, because of his age or inability to vote or lawfully drink, he does not possess the requisite intent to merit the death penalty.[44]

According to Justice Scalia's dissent in *Simmons*, the fact that almost every state prohibits those who are under eighteen years of age from voting, serving on juries or marrying without parental consent is patently irrelevant and was an argument that was rejected in *Stanford v Kentucky*.[45]

> It is . . . absurd to think that one must be mature enough to drive carefully, to drink responsibly, or to vote intelligently, in order to be mature enough to understand that murdering another human being is profoundly wrong, and to conform one's conduct to that most minimal of all civilized standards.[46]

Serving on a jury or entering into a marriage involve decisions far more complicated than deciding to take a life.

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41. California v. Brown, 479 U.S. 528, 545 (1987).
42. *Id.*
43. *Simmons*, 125 S. Ct. at 1187.
44. *Id.* at 1186.
45. *Id.* at 1224; Stanford v. Kentucky, 492 U.S. 361 (1989).
46. *Simmons*, 125 S. Ct. at 1224 (Scalia, J., dissenting).

B. Retribution

Another rationale, retribution, is only served by taking the lives of those who, like Christopher Simmons, fully understand the consequences of their actions, evaluate the risk of punishment, and make the conscious decision to take another person's life. As a result of the ruling in *Roper v. Simmons*, five Justices erroneously concluded that just because you are one day younger than eighteen you are incapable of forming the requisite intent to merit the death penalty.

Mr. Pena and Mr. Ertman, the fathers of the two victims described above, have to live the rest of their lives knowing that their innocent daughters' dignity was disrespected because their killers get to breathe air as civilized human beings while their daughters were not given that same opportunity. Similarly, Purdy Mitchell has to live the rest of her life knowing that Christopher Simmons got away with taking the life of her sister by committing a pre-meditated, cold-blooded murder despite his knowledge of the consequences of his actions.

Victims like Mr. Pena, Mr. Ertman, and Purdy Mitchell will never feel a sense of justice, because the Court in both *Thompson* and *Simmons* based its decisions on an erroneous assumption about characteristics of juveniles in general, while ignoring the moral culpability of both Thompson and Simmons.

Whose dignity are we respecting by drawing a bright line rule at the arbitrary age of eighteen that enables us to ignore the foundation upon which this judicial system is based? The answer is clear once you understand how *Thompson* and *Simmons* were decided.

The plurality in *Roper v. Simmons* erroneously concluded that there was a national consensus against executing sixteen and seventeen year olds by misconstruing *Atkins v. Virginia*.[47] The plurality in *Simmons* erroneously used *Atkins* to conclude that sixteen and seventeen year olds are exempt from execution for several reasons.

For example, the Court concluded that the evidence against executing juveniles was similar to the evidence the Court relied on in *Atkins* to exempt the mentally retarded from execution.[48] In *Atkins*, thirty states barred the death penalty for the mentally retarded, and even among those states theoretically permitting such punishment, very few had carried out execution of a mentally retarded person.[49] In contrast, when *Roper v.*

47. 536 U.S. 304 (2002).
48. *Simmons*, 125 S. Ct. at 1192.
49. *Id.*

Simmons was decided, fifty percent of the states that expressly authorized juvenile executions administered it to seventeen year olds.[50]

V. THE COURT FAILED TO ACKNOWLEDGE AND CONSIDER INHERENT DIFFERENCES BETWEEN MENTALLY RETARDED INDIVIDUALS AND JUVENILES IN REACHING ITS DECISION

The fact that the execution rate among juveniles has declined over the past five years is inconclusive because the reasoning behind the statistic is unknown. The Court failed to recognize that juveniles who are sixteen and seventeen years of age are substantially different than those who are mentally retarded. In *Atkins*, the Court observed that mentally retarded persons suffer from major competence and behavioral deficits, sub-average intellectual functioning, and significant limitations in adaptive skills, such as communication, self-care, and self-direction, that become manifest before the age of eighteen.[51] Because of their impairments, they have diminished capacities to understand and process information, to communicate, and to abstract from mistakes and learn from their experiences.[52] These impairments make the goals of the death penalty nonexistent and also make capital punishment for the mentally retarded a disproportionate one because of their inability to fully understand and comprehend the consequences of their actions.[53]

These same impairments, however, simply do not exist among juveniles who are sixteen and seventeen years of age. Some sixteen and seventeen year olds are more mature and advanced than some eighteen year olds. In fact, the plurality in *Simmons* acknowledged the fact that some eighteen year olds achieve a maturity level that some adults never achieve.[54] Similarly, sixteen and seventeen year olds are not as easily manipulated into making confessions as the mentally retarded because juveniles do not suffer from the same impairments.

VI. THE COURT'S USE OF THE EVOLVING STANDARDS OF DECENCY DOCTRINE AND NATIONAL CONSENSUS ANALYSIS IGNORES PRECEDENT, THE RESPONDENT'S MORAL CULPABILITY, AND CONSTITUTES AN ARBITRARY DECISION BASED UPON ASSUMPTIONS

In order to understand how the Court reached its conclusion in *Roper v. Simmons*, we must analyze how it utilized this notion of standards of decency. The Court has decided that in determining whether the

50. Charles Lane, *5-4 Supreme Court Abolishes Juvenile Executions*, WASHINGTON POST, March 2, 2005, *available at* http://www.washingtonpost.com/wp-dyn/articles/A62584-2005Mar1.html.

51. Atkins v. Virginia, 536 U.S. 304, 305 (2002).

52. *Id.* at 318.

53. *Id.* at 318-20.

54. *Simmons*, 125 S. Ct. at 1197.

juvenile death penalty comports with contemporary standards of decency, its inquiry must start with state legislation.

The way the Court looks at state legislation is inherently arbitrary because it is inconsistent in determining which states to consider in its analysis. For example, in *Thompson* and *Stanford*, the Court only counted the number of states that explicitly set a minimum age prohibiting a juvenile from execution because it reasoned that those were the only states that considered juveniles in their determination.[55] However, the plurality in *Roper v. Simmons* included twelve states that did not explicitly set a minimum age prohibiting a juvenile for execution in its analysis.[56] By doing so, it violated both *Thompson* and *Stanford.*

The reasoning in *Roper v. Simmons* for including the twelve states makes an erroneous assumption about the decisions of legislatures. The Court included twelve states in the analysis because it erroneously assumed that those state legislatures decided that the death penalty is inappropriate for all offenders, including juveniles.[57] According to Justice Scalia's dissent, the insinuation that the Court's new method of counting contradicts only the *Stanford* court is misleading.[58] None of the cases dealing with an alleged Constitutional limitation of the death penalty has counted those states eliminating the death penalty entirely as supporting a consensus in favor of that limitation.[59] It sheds no light, whatever, on the point at issue.

The fact that twelve states have eliminated execution entirely indicates absolutely nothing about the consensus that offenders under the age of eighteen deserve special immunity from such a penalty. In fact, in repealing the death penalty, those twelve states considered none of the same factors that the Court put forth as determinative of the issue before it in *Roper v. Simmons*, which were: lower culpability of the young, inherent recklessness, and the lack of capacity for considered judgment.[60] What might be relevant, perhaps, according to Justice Scalia, is how many of those states permit sixteen and seventeen year old offenders to be treated as adults with respect to non-capital offenses.[61] They all do; some even require juveniles as young as fourteen to be tried as adults if they are charged with murder.[62] According to Justice Scalia, "[t]he attempt by the Court to turn its remarkable minority consensus into a faux majority by counting Amishmen is an act of nomological desperation."[63]

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55. *Thompson*, 487 U.S. at 827; Stanford v. Kentucky, 492 U.S. 361, 370 (1989).
56. *Simmons*, 125 S. Ct. at 1192 (Scalia, J., dissenting).
57. *Id.* at 1219.
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*

VII. THE COURT'S NATIONAL CONSENSUS ANALYSIS IS ARBITRARY BECAUSE IT FAILED TO ADOPT THE OBJECTIVE CRITERIA AND/OR GUIDELINES THAT HAVE ARISEN OUT OF STATE LEGISLATION TO RATIONALLY DECIDE HOW MANY STATES FORM A NATIONAL CONSENSUS

Relying on the number of states to conclude whether or not a national consensus exists is inherently arbitrary in and of itself. For example, in 1989, when *Stanford* was decided, the Court noted that twenty-two of the thirty-seven death penalty states permitted the death penalty for sixteen year old offenders.[64] Among those thirty-seven states, twenty-five permitted it for seventeen year old offenders and twenty-two permitted it for sixteen year old offenders.[65] These numbers, in the Court's view, indicated there was no national consensus sufficient to label a particular punishment cruel and unusual.[66]

When *Simmons* was decided, there were twenty states out of thirty-eight that imposed the death penalty upon juveniles who are seventeen years of age at the time they committed premeditated murder.[67] More than fifty percent of the states that addressed the issue authorized it. Also, the Court failed to acknowledge the fact that no states could authorize the execution of a fifteen year old after 1988, because *Thompson* expressly prohibited a state from doing so by ruling that it was cruel and unusual punishment.[68]

In *Simmons,* the United States Supreme Court failed to draw a key distinction between the execution of the mentally retarded in *Atkins* and the execution of juveniles with respect to its national consensus analysis. For instance, in *Atkins*, very few states actually executed the mentally retarded. In fact, it was rare for a state to execute a mentally retarded person even in the minority of states that authorized it.[69] In contrast, however, when *Simmons* was decided, twenty out of the thirty eight states that had given express consideration to a minimum age for the death penalty expressly authorized the execution of seventeen year olds.[70] The only difference in the number of states that authorized executing sixteen and seventeen year olds from 1989 to the time Simmons was decided, is five states.[71] Yet, the majority in *Simmons* found this to be significant.[72] It also found a recent trend toward cracking down on juvenile crime to be of importance without clarifying or establishing its

64. *Stanford*, 492 U.S. at 370-71.
65. *Id.* at 370.
66. *Id.* at 371.
67. *Simmons*, 125 S. Ct. at 1192.
68. *Thompson*, 487 U.S. at 838.
69. *Simmons*, 125 S. Ct. at 1192.
70. *Id.*
71. *Id.*
72. *Simmons*, 125 S. Ct. at 1193.

relevance to whether executing a sixteen or seventeen year old constitutes cruel and unusual punishment.[73]

The majority's erroneous assumption about the decisions of legislatures violates the reasoning in *Thompson*. In *Thompson*, the plurality based its decision that a juvenile under the age of eighteen is exempt from execution on the fact that no death penalty state that had given express consideration to a minimum age for the death penalty had set the minimum age lower than sixteen.[74] Yet, in *Roper v. Simmons*, the plurality violates this reasoning by erroneously assuming and concluding that among the twelve states that prohibit executions altogether, they all considered juveniles as part of the rule-making process.[75]

Subjective determination of the Justices that ultimately determines how many states form a national consensus contradicts the purposes behind the evolving standards of decency doctrine the United States Supreme Court created. The evolving standards of decency doctrine was adopted in 1910 by the United States Supreme Court to interpret what constitutes cruel and unusual punishment under the notion that significant changes in societal mores over time may require us to re-evaluate a prior decision.[76] However, this is impossible now, considering that the ruling in *Roper v. Simmons*, that anyone under the age of eighteen is exempt from execution, is now federal law.

The country can't change the law once the Court makes its decision. Further, the decision of what constitutes cruel and unusual punishment was supposed to be determined by society as a whole through state legislation, not by the Court becoming a sole arbiter of our nation's moral standards.[77]

Utilizing the evolving standards of decency doctrine enabled the Court to contradict itself by considering certain evidence in one landmark case but not in another. In *Thompson*, the Court considered respected professional organizations and the beliefs of other nations, including Anglo-American heritage and the Western European community, in its analysis.[78] Yet, in *Stanford*, eleven years later, the Court did not consider such evidence.[79] However, in *Roper v. Simmons*, the plurality did consider beliefs of other nations as confirmations for its conclusions and to note that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty.[80] Are beliefs of other nations really relevant? Haven't we as citizens of the

73. *Id.*
74. *Thompson*, 487 U.S. at 829.
75. *Simmons*, 125 S. Ct. at 1192.
76. Trop v. Dulles, 356 U.S. 86, 101 (1958).
77. Penry v. Lynaugh, 492 U.S. 302, 331 (1989).
78. *Thompson*, 487 U.S. at 830.
79. *Stanford*, 492 U.S. 361.
80. *Simmons*, 125 S. Ct. at 1200.

United States created our own laws and precedent? In fact, isn't it the duty of the United States Supreme Court to uphold its own precedent to create federal law?

In addition to utilizing beliefs of other nations, the plurality in *Simmons* relied on general popularity of anticrime legislation and an unsubstantiated trend in cracking down on juvenile crime to substantiate a national consensus against executing sixteen and seventeen year olds.[81] Does the general popularity of anticrime legislation or some trend in enforcing juvenile crime bear any relevance to whether executing sixteen and seventeen year olds constitutes cruel and unusual punishment? Never in the past has the Court considered such evidence in deciding whether it is constitutional to execute juveniles.

Not only has the Court considered different evidence in landmark cases concerning the execution of juveniles, it has also interpreted the same evidence concerning the frequency of juvenile executions differently. For example, in *Stanford*, the Court found the fact that the actual execution for crimes committed under the age of eighteen accounted for only two percent of the total number of executions that occurred between 1642 and 1986 to be insignificant.[82] Yet, eleven years earlier, the Court in *Thompson* found it significant that no execution of anyone under the age of sixteen had taken place since 1948, despite the prosecution having tried thousands of murder cases.[83] However, recently, the Court in *Simmons* found the infrequent practice of executing juveniles to be of importance.[84] Nobody really knows why the practice of executing juveniles is infrequent. What does that statement really mean anyway? What exactly did the Court base its statement on that executing juveniles has become infrequent? It would have been highly probative for the Court to have ascertained whether executing juveniles has become more or less frequent than when *Stanford* was decided.

The Court not only interpreted statistics regarding the frequency of juvenile executions differently in landmark cases but also inconsistently construed a juvenile's responsibility. For example, in *Thompson*, the Court relied on a juvenile being less blameworthy than an adult because he or she is "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."[85] Yet, in *Stanford*, the Court disregarded the petitioner's argument that seventeen and eighteen year olds cannot be held fully responsible for their actions.[86]

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81. *Id.* at 1193.
82. *Stanford*, 492 U.S. at 373-74.
83. *Thompson*, 487 U.S. at 832.
84. *Simmons*, 125 S. Ct. at 1185.
85. *Thompson*, 487 U.S. at 835.
86. *Stanford*, 492 U.S. at 377-78.

The plurality in *Simmons* made its decision by ignoring the threshold inquiry in determining whether a particular punishment complies with the Eight Amendment: whether it is one of the "modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted."[87] As the United States Supreme Court noted in prior cases, the evidence is clear that the Eighth Amendment was not originally understood to prohibit capital punishment for sixteen and seventeen year old offenders.[88]

VIII. SOCIETY DEEMED RESPONDENT'S EXECUTION ACCEPTABLE AS INDICATED BY THE RECENT TREND OF IMPOSING THE DEATH PENALTY ON THOSE WHO MERELY APPRECIATE THE HIGH RISK OF DEATH BUT DO NOT COMMIT THE ACT OF MURDER

The plurality in *Simmons* made an erroneous conclusion when it stated "[p]etitioner cannot show national consensus in favor of capital punishment for juveniles."[89] As was eloquently contained in large bold print in the brief of amici curiae on behalf of Justice For All Alliance, a societal national consensus exists authorizing Simmons's execution, as evidenced by the recent trend of imposing the death penalty on those who merely appreciate the high risk of death and do not actually commit the act of murder. The United States Supreme Court in *Atkins v. Virginia* specifically based its ruling of whether a national consensus exists prohibiting execution of the mentally retarded on the notion that it is not so much the number of states that is significant, but rather the consistency of the direction of change.[90] The plurality in *Roper v. Simmons* should have considered and acknowledged the fact that a societal national consensus exists to impose the death penalty on one who did not kill nor intend to kill but rather was a major participant in a felony murder.[91] The rationale for this landmark decision in *Tison v. Arizona* is that actively participating in a felony murder shows a reckless disregard for human life, a highly culpable mental state meriting the death penalty.[92]

Intending to kill, taking into account the perceived punishment for doing so, and following through with that intention, as Simmons did, is an even higher culpable mental state than participating in an act that shows a reckless disregard for human life. Therefore, society deems it acceptable to execute Simmons, who committed a deliberate, premeditated murder by taking an innocent woman out of her home, tying her up hog-tied fashion, driving her to the end of a railroad trestle and pushing her into a river down below.

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87. Ford v. Wainwright, 477 U.S. 399, 405 (1986).
88. *Stanford*, 492 U.S. at 368.
89. *Simmons*, 125 S. Ct. at 1194.
90. Atkins v. Virginia, 536 U.S. 304, 315 (2002).
91. Tison v. Arizona, 481 U.S. 137, 158 (1987).
92. *Id.* at 157-58.

It is deeply ingrained in our criminal justice system that intentional harm must be punished more severely than unintentional harm.[93] In *Tison*, the petitioner did not specifically intend to kill the victim, nor did he actually kill the victim.[94] In contrast, Christopher Simmons possessed the specific intent to kill, and did in fact kill his victim. In *Tison*, the petitioner was executed, therefore the respondent in the instant case should have been executed.

CONCLUSION

The Court's reliance on a standard it created and labeled "the evolving standards of decency doctrine," is inherently arbitrary, violates precedent and ignores the foundation upon which the judicial system is based. It has no place in American jurisprudence. Instead of grouping juveniles together as a class and drawing a bright line at the arbitrary age of eighteen, the Court in *Roper v. Simmons* should have looked at juveniles individually and respected them as human beings with unique characteristics, life experiences, personal responsibility and moral blameworthiness. Like in *Furman v. Georgia*,[95] the Court was urged to commit error, and did so by concluding that anyone under the age of eighteen is incapable of possessing the requisite mental state to merit the death penalty.[96] This is just not the case when we are dealing with sixteen and seventeen year olds. In fact, it only disrespects sixteen and seventeen year olds to characterize them as vicious animals rather than human beings with a conscience and the ability to both know it is wrong to kill and to conform their conduct to the most minimal standards of civilized society.

It is a grave injustice, not only to the victim and the victim's family, but also to society as a whole because the Court is able to disrespect the victim and the victim's family by not basing its decision on the respondent's moral culpability but rather on the Justices' individual perceptions and biases. An issue of this magnitude should not be based on the general characteristics of juveniles nor on whether the Justices decide to include twelve states in its evolving standards of decency analysis. Rather, it should be based on clear, objective criteria, which has evolved out of state legislation and can carefully and adequately aid sentencers in making a rational decision.

The United States Supreme Court had an obligation to provide the states with the clearest guidance possible. It failed to do so when it based its decision on the fact that it did not trust a jury to decide a murderer's fate by weighing all of the mitigating and aggravating factors.[97] Instead

93. *Tison*, 481 U.S. at 156.
94. *Id.* at 144.
95. 408 U.S. 238 (1972).
96. Furman, 408 U.S. at 285-87.
97. *Simmons*, 125 S. Ct. at 1197.

of undermining the very foundation of our capital sentencing system, which entrusts juries to make difficult and uniquely human judgments that deny codification and that build discretion, equity and flexibility into a legal system, it should have embraced it. What does the Court's distrust of jurors say about our judicial system as a whole? If the Justices do not trust a jury to decide a juvenile's fate, then what prevents future cases concerning other areas of law from reliance on the same rationale? Why trust a jury to make any decisions regarding a defendant's *mens rea* related to murder? Why have a jury system at all? As is evident, this kind of mentality could inevitably lead to the end of our jury system altogether.

It is surprising and unacceptable in a system that creates rules based on precedent that the plurality of *Roper v. Simmons* failed to recognize or acknowledge the fact that the Supreme Court of Missouri flagrantly violated precedent by ignoring *Stanford v. Kentucky* which authorized the execution of sixteen and seventeen year olds.[98]

The Supreme Court of Missouri was correct in its assumption that the United States Supreme Court would arbitrarily rule in Simmons' favor. There is an inherent problem with our judicial system when an issue of such magnitude concerning the Cruel and Unusual Punishment Clause under the Eighth Amendment is decided by people who are able to make their decision publicly before the case is even in front of them. In a society that relies on the judicial system to remedy wrongs and achieve justice, it is very disturbing that we respect the dignity of one who shows a conscious disregard for humanity by taking another's life, after fully understanding, evaluating and intending the consequences. Yet, at the same time, we flagrantly disrespect someone, like Jennifer Ertman, a sixteen-year-old teenager, who risked her life in an attempt to save her best friend's life, showing her respect for humanity and dignity. The Court failed to uphold justice by not linking the ultimate punishment to those who are morally culpable for having committed premeditated murder like Christopher Simmons. In doing so, it neglected the only sense of justice many families of victims feel after having their loved one taken from them. The Court extended Christopher Simmons humanity when he did not give that same respect to Shirley Crook. [99] He took away her fundamental right to live, while knowing and intending the consequences of deliberately pushing her off a railroad trestle into a river far below.

The Court was ultimately responsible for making sure that states chose the appropriate punishment for those who are morally culpable for having committed premeditated murder making them among the worst of

98. *Stanford*, 492 U.S. at 377-78.
99. *Simmons*, 125 S. Ct. at 1197.

the worst. The Court failed this responsibility by sending a message to sixteen and seventeen year olds that one can commit premeditated murder without having to suffer the ultimate consequences. The sad reality of *Roper v. Simmons*, as Justice Kennedy stated during oral argument, may be that gang members use sixteen and seventeen year olds as hit men to commit premeditated murder. The death penalty no longer serves as a deterrent for juveniles who, like Simmons, are able to rationalize the consequences of his or her actions before he or she decides to commit premeditated murder. The possibility of deterring a sixteen or seventeen year old from intentionally taking another's life and saving an innocent victim no longer exists.