

SCALIA, J., dissenting

**SUPREME COURT OF THE UNITED STATES**

No. 03–633

DONALD P. ROPER, SUPERINTENDENT, POTOSI  
CORRECTIONAL CENTER, PETITIONER *v.*  
CHRISTOPHER SIMMONS

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF  
MISSOURI

[March 1, 2005]

JUSTICE SCALIA, with whom THE CHIEF JUSTICE and JUSTICE THOMAS join, dissenting.

In urging approval of a constitution that gave life-tenured judges the power to nullify laws enacted by the people’s representatives, Alexander Hamilton assured the citizens of New York that there was little risk in this, since “[t]he judiciary . . . ha[s] neither FORCE nor WILL but merely judgment.” The Federalist No. 78, p. 465 (C. Rossiter ed. 1961). But Hamilton had in mind a traditional judiciary, “bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them.” *Id.*, at 471. Bound down, indeed. What a mockery today’s opinion makes of Hamilton’s expectation, announcing the Court’s conclusion that the meaning of our Constitution has changed over the past 15 years—not, mind you, that this Court’s decision 15 years ago was *wrong*, but that the Constitution *has changed*. The Court reaches this implausible result by purporting to advert, not to the original meaning of the Eighth Amendment, but to “the evolving standards of decency,” *ante*, at 6 (internal quotation marks omitted), of our national society. It then finds, on the flimsiest of grounds, that a national consensus which

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could not be perceived in our people's laws barely 15 years ago now solidly exists. Worse still, the Court says in so many words that what our people's laws say about the issue does not, in the last analysis, matter: "[I]n the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment." *Ante*, at 9 (internal quotation marks omitted). The Court thus proclaims itself sole arbiter of our Nation's moral standards—and in the course of discharging that awesome responsibility purports to take guidance from the views of foreign courts and legislatures. Because I do not believe that the meaning of our Eighth Amendment, any more than the meaning of other provisions of our Constitution, should be determined by the subjective views of five Members of this Court and like-minded foreigners, I dissent.

## I

In determining that capital punishment of offenders who committed murder before age 18 is "cruel and unusual" under the Eighth Amendment, the Court first considers, in accordance with our modern (though in my view mistaken) jurisprudence, whether there is a "national consensus," *ibid.* (internal quotation marks omitted), that laws allowing such executions contravene our modern "standards of decency,"<sup>1</sup> *Trop v. Dulles*, 356 U. S.

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<sup>1</sup>The Court ignores entirely the threshold inquiry in determining whether a particular punishment complies with the Eighth 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." *Ford v. Wainwright*, 477 U. S. 399, 405 (1986). As we have noted in prior cases, the evidence is unusually clear that the Eighth Amendment was not originally understood to prohibit capital punishment for 16- and 17-year-old offenders. See *Stanford v. Kentucky*, 492 U. S. 361, 368 (1989). At the time the Eighth Amendment was adopted, the death penalty could theoretically be imposed for the crime of a 7-year-old, though there was a rebuttable presumption of incapacity to commit a capital (or other) felony until the age of 14. See *ibid.* (citing 4 W. Black-

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86, 101 (1958). We have held that this determination should be based on “objective indicia that reflect the public attitude toward a given sanction”—namely, “statutes passed by society’s elected representatives.” *Stanford v. Kentucky*, 492 U. S. 361, 370 (1989) (internal quotation marks omitted). As in *Atkins v. Virginia*, 536 U. S. 304, 312 (2002), the Court dutifully recites this test and claims halfheartedly that a national consensus has emerged since our decision in *Stanford*, because 18 States—or 47% of States that permit capital punishment—now have legislation prohibiting the execution of offenders under 18, and because all of four States have adopted such legislation since *Stanford*. See *ante*, at 11.

Words have no meaning if the views of less than 50% of death penalty States can constitute a national consensus. See *Atkins, supra*, at 342–345 (SCALIA, J., dissenting). Our previous cases have required overwhelming opposition to a challenged practice, generally over a long period of time. In *Coker v. Georgia*, 433 U. S. 584, 595–596 (1977), a plurality concluded the Eighth Amendment prohibited capital punishment for rape of an adult woman where only one jurisdiction authorized such punishment. The plurality also observed that “[a]t no time in the last 50 years ha[d] a majority of States authorized death as a punishment for rape.” *Id.*, at 593. In *Ford v. Wainwright*, 477 U. S. 399, 408 (1986), we held execution of the insane unconstitutional, tracing the roots of this prohibition to the common law and noting that “no State in the union permits the execution of the insane.” In *Enmund v. Florida*, 458 U. S. 782, 792 (1982), we invalidated capital punishment imposed for participation in a robbery in which an accomplice committed murder, because 78% of all death penalty States prohibited this punishment. Even there we ex-

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stone, Commentaries \*23–\*24; 1 M. Hale, Pleas of the Crown 24–29 (1800)).

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pressed some hesitation, because the legislative judgment was “neither ‘wholly unanimous among state legislatures,’ . . . nor as compelling as the legislative judgments considered in *Coker*.” *Id.*, at 793. By contrast, agreement among 42% of death penalty States in *Stanford*, which the Court appears to believe was correctly decided at the time, *ante*, at 20, was insufficient to show a national consensus. See *Stanford, supra*, at 372.

In an attempt to keep afloat its implausible assertion of national consensus, the Court throws overboard a proposition well established in our Eighth Amendment jurisprudence. “It should be observed,” the Court says, “that the *Stanford* Court should have considered those States that had abandoned the death penalty altogether as part of the consensus against the juvenile death penalty . . . ; a State’s decision to bar the death penalty altogether of necessity demonstrates a judgment that the death penalty is inappropriate for all offenders, including juveniles.” *Ante*, at 20. The insinuation that the Court’s new method of counting contradicts only “the *Stanford* Court” is misleading. *None* of our cases dealing with an alleged constitutional limitation upon the death penalty has counted, as States supporting a consensus in favor of that limitation, States that have eliminated the death penalty entirely. See *Ford, supra*, at 408, n. 2; *Enmund, supra*, at 789; *Coker, supra*, at 594. And with good reason. Consulting States that bar the death penalty concerning the necessity of making an exception to the penalty for offenders under 18 is rather like including old-order Amishmen in a consumer-preference poll on the electric car. Of *course* they don’t like it, but that sheds no light whatever on the point at issue. That 12 States favor *no* executions says something about consensus against the death penalty, but nothing—absolutely nothing—about consensus that offenders under 18 deserve special immunity from such a penalty. In repealing the death penalty, those 12 States

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considered *none* of the factors that the Court puts forth as determinative of the issue before us today—lower culpability of the young, inherent recklessness, lack of capacity for considered judgment, etc. What might be relevant, perhaps, is how many of those States permit 16- and 17-year-old offenders to be treated as adults with respect to non-capital offenses. (They all do;<sup>2</sup> indeed, some even *require* that juveniles as young as 14 be tried as adults if they are charged with murder.<sup>3</sup>) The attempt by the Court to turn its remarkable minority consensus into a faux majority by counting Amishmen is an act of nomological desperation.

Recognizing that its national-consensus argument was weak compared with our earlier cases, the *Atkins* Court found additional support in the fact that 16 States had prohibited execution of mentally retarded individuals since *Penry v. Lynaugh*, 492 U. S. 302 (1989). *Atkins*, *supra*, at 314–316. Indeed, the *Atkins* Court distinguished *Stanford* on that very ground, explaining that “[a]lthough we decided *Stanford* on the same day as *Penry*, apparently *only two* state legislatures have raised the threshold age for imposition of the death penalty.” 536 U. S., at 315, n. 18 (emphasis added). Now, the Court says a legislative change

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<sup>2</sup>See Alaska Stat. §47.12.030 (Lexis 2002); Haw. Rev. Stat. §571–22 (1999); Iowa Code §232.45 (2003); Me. Rev. Stat. Ann., Tit. 15, §3101(4) (West 2003); Mass. Gen. Laws Ann., ch. 119, §74 (West 2003); Mich. Comp. Laws Ann. §764.27 (West 2000); Minn. Stat. §260B.125 (2002); N. D. Cent. Code §27–20–34 (Lexis Supp. 2003); R. I. Gen. Laws §14–1–7 (Lexis 2002); Vt. Stat. Ann., Tit. 33, §5516 (Lexis 2001); W. Va. Code §49–5–10 (Lexis 2004); Wis. Stat. §938.18 (2003–2004); see also National Center for Juvenile Justice, *Trying and Sentencing Juveniles as Adults: An Analysis of State Transfer and Blended Sentencing Laws 1* (Oct. 2003). The District of Columbia is the only jurisdiction without a death penalty that specifically exempts under-18 offenders from its harshest sanction—life imprisonment without parole. See D. C. Code §22–2104 (West 2001).

<sup>3</sup>See Mass. Gen. Laws Ann., ch. 119, §74 (West 2003); N. D. Cent. Code §27–20–34 (Lexis Supp. 2003); W. Va. Code §49–5–10 (Lexis 2004).

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in four States is “significant” enough to trigger a constitutional prohibition.<sup>4</sup> *Ante*, at 11. It is amazing to think that this subtle shift in numbers can take the issue entirely off the table for legislative debate.

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

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

“In 1972, when this Court heard arguments on the constitutionality of the death penalty, such statistics might have suggested that the practice had become a relic, implicitly rejected by a new societal consensus. . . . We now know that any inference of a societal consensus

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<sup>4</sup>As the Court notes, Washington State’s decision to prohibit executions of offenders under 18 was made by a judicial, not legislative, decision. *State v. Furman*, 122 Wash. 2d 440, 459, 858 P. 2d 1092, 1103 (1993), construed the State’s death penalty statute—which did not set any age limit—to apply only to persons over 18. The opinion found that construction necessary to avoid what it considered constitutional difficulties, and did not purport to reflect popular sentiment. It is irrelevant to the question of changed national consensus.

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rejecting the death penalty would have been mistaken. But had this Court then declared the existence of such a consensus, and outlawed capital punishment, legislatures would very likely not have been able to revive it. The mistaken premise of the decision would have been frozen into constitutional law, making it difficult to refute and even more difficult to reject.” *Thompson v. Oklahoma*, 487 U. S. 815, 854–855 (1988) (opinion concurring in judgment).

Relying on such narrow margins is especially inappropriate in light of the fact that a number of legislatures and voters have expressly affirmed their support for capital punishment of 16- and 17-year-old offenders since *Stanford*. Though the Court is correct that no State has lowered its death penalty age, both the Missouri and Virginia Legislatures—which, at the time of *Stanford*, had no minimum age requirement—expressly established 16 as the minimum. Mo. Rev. Stat. §565.020.2 (2000); Va. Code Ann. §18.2–10(a) (Lexis 2004). The people of Arizona<sup>5</sup> and Florida<sup>6</sup> have done the same by ballot initiative. Thus,

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<sup>5</sup>In 1996, Arizona’s Ballot Proposition 102 exposed under-18 murderers to the death penalty by automatically transferring them out of juvenile courts. The statute implementing the proposition required the county attorney to “bring a criminal prosecution against a juvenile in the same manner as an adult if the juvenile is fifteen, sixteen or seventeen years of age and is accused of . . . first degree murder.” Ariz. Rev. Stat. Ann. §13–501 (West 2001). The Arizona Supreme Court has added to this scheme a constitutional requirement that there be an individualized assessment of the juvenile’s maturity at the time of the offense. See *State v. Davolt*, 207 Ariz. 191, 214–216, 84 P. 3d 456, 479–481 (2004).

<sup>6</sup>Florida voters approved an amendment to the State Constitution, which changed the wording from “cruel or unusual” to “cruel and unusual,” Fla. Const., Art. I, §17 (2003). See Commentary to 1998 Amendment, 25B Fla. Stat. Ann., p. 180 (West 2004). This was a response to a Florida Supreme Court ruling that “cruel or unusual” excluded the death penalty for a defendant who committed murder when he was younger than 17. See *Brennan v. State*, 754 So. 2d 1, 5 (Fla. 1999). By adopting the federal constitutional language, Florida voters effectively adopted our

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

The Court's reliance on the infrequency of executions, for under-18 murderers, *ante*, at 10–11, 13, credits an argument that this Court considered and explicitly rejected in *Stanford*. That infrequency is explained, we accurately said, both by “the undisputed fact that a far smaller percentage of capital crimes are committed by persons under 18 than over 18,” 492 U. S., at 374, and by the fact that juries are required at sentencing to consider the offender's youth as a mitigating factor, see *Eddings v. Oklahoma*, 455 U. S. 104, 115–116 (1982). Thus, “it is not only possible, but overwhelmingly probable, that the very considerations which induce [respondent] and [his] supporters to believe that death should *never* be imposed on offenders under 18 cause prosecutors and juries to believe that it should *rarely* be imposed.” *Stanford, supra*, at 374.

It is, furthermore, unclear that executions of the relevant age group have decreased since we decided *Stanford*. Between 1990 and 2003, 123 of 3,599 death sentences, or 3.4%, were given to individuals who committed crimes before reaching age 18. V. Streib, *The Juvenile Death Penalty Today: Death Sentences and Executions for Juvenile Crimes, January 1, 1973–September 30, 2004*, No. 75, p. 9 (Table 3) (last updated Oct. 5, 2004), <http://www.law.onu.edu/faculty/streib/documentsJuvDeathSept302004.pdf> (all Internet materials as visited Jan. 12, 2005, and available in the Clerk of Court's case file) (hereinafter *Juvenile Death Penalty Today*). By contrast, only 2.1% of those sentenced to death between 1982 and 1988 committed the crimes when they were under 18. See *Stanford, supra*, at 373 (citing V. Streib, *Imposition of Death Sen-*

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decision in *Stanford v. Kentucky*, 492 U. S. 361 (1989). See Weaver, *Word May Allow Execution of 16-Year-Olds*, *Miami Herald*, Nov. 7, 2002, p. 7B.

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tences for Juvenile Offenses, January 1, 1982, Through April 1, 1989, p. 2 (paper for Cleveland-Marshall College of Law, April 5, 1989)). As for actual executions of under-18 offenders, they constituted 2.4% of the total executions since 1973. Juvenile Death Penalty Today 4. In *Stanford*, we noted that only 2% of the executions between 1642 and 1986 were of under-18 offenders and found that that lower number did not demonstrate a national consensus against the penalty. 492 U. S., at 373–374 (citing V. Streib, *Death Penalty for Juveniles* 55, 57 (1987)). Thus, the numbers of under-18 offenders subjected to the death penalty, though low compared with adults, have either held steady or slightly increased since *Stanford*. These statistics in no way support the action the Court takes today.

## II

Of course, the real force driving today’s decision is not the actions of four state legislatures, but the Court’s ““own judgment”” that murderers younger than 18 can never be as morally culpable as older counterparts. *Ante*, at 9 (quoting *Atkins*, 536 U. S., at 312 (in turn quoting *Coker*, 433 U. S., at 597 (plurality opinion))). The Court claims that this usurpation of the role of moral arbiter is simply a “retur[n] to the rul[e] established in decisions predating *Stanford*,” *ante*, at 9. That supposed rule—which is reflected solely in dicta and never once in a *holding* that purports to supplant the consensus of the American people with the Justices’ views<sup>7</sup>—was repudiated in *Stanford* for the very good reason that it has no foundation in law or logic. If the Eighth Amendment set forth an

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<sup>7</sup>See, e.g., *Enmund v. Florida*, 458 U. S. 782, 801 (1982) (“[W]e have no reason to disagree with th[e] judgment [of the state legislatures] for purposes of construing and applying the Eighth Amendment”); *Coker v. Georgia*, 433 U. S. 584, 597 (1977) (plurality opinion) (“[T]he legislative rejection of capital punishment for rape strongly confirms our own judgment”).

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ordinary rule of law, it would indeed be the role of this Court to say what the law is. But the Court having pronounced that the Eighth Amendment is an ever-changing reflection of “the evolving standards of decency” of our society, it makes no sense for the Justices then to *prescribe* those standards rather than discern them from the practices of our people. On the evolving-standards hypothesis, the only legitimate function of this Court is to identify a moral consensus of the American people. By what conceivable warrant can nine lawyers presume to be the authoritative conscience of the Nation?<sup>8</sup>

The reason for insistence on legislative primacy is obvious and fundamental: “[I]n a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people.” *Gregg v. Georgia*, 428 U. S. 153, 175–176 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.) (quoting *Furman v. Georgia*, 408 U. S. 238, 383 (1972) (Burger, C. J., dissenting)). For a similar reason we have, in our determination of society’s moral standards, consulted the practices of sentencing juries: Juries “maintain a link between contemporary community values and the penal system” that this Court cannot claim for itself. *Gregg, supra*, at 181 (quoting *Witherspoon v. Illinois*, 391 U. S. 510, 519, n. 15 (1968)).

Today’s opinion provides a perfect example of why judges are ill equipped to make the type of legislative judgments the Court insists on making here. To support

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<sup>8</sup>JUSTICE O’CONNOR agrees with our analysis that no national consensus exists here, *ante*, at 8–12 (dissenting opinion). She is nonetheless prepared (like the majority) to override the judgment of America’s legislatures if it contradicts her own assessment of “moral proportionality,” *ante*, at 12. She dissents here only because it does not. The votes in today’s case demonstrate that the offending of selected lawyers’ moral sentiments is not a predictable basis for law—much less a democratic one.

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its opinion that States should be prohibited from imposing the death penalty on anyone who committed murder before age 18, the Court looks to scientific and sociological studies, picking and choosing those that support its position. It never explains why those particular studies are methodologically sound; none was ever entered into evidence or tested in an adversarial proceeding. As THE CHIEF JUSTICE has explained:

“[M]ethodological and other errors can affect the reliability and validity of estimates about the opinions and attitudes of a population derived from various sampling techniques. Everything from variations in the survey methodology, such as the choice of the target population, the sampling design used, the questions asked, and the statistical analyses used to interpret the data can skew the results.” *Atkins, supra*, at 326–327 (dissenting opinion) (citing R. Groves, *Survey Errors and Survey Costs* (1989); 1 C. Turner & E. Martin, *Surveying Subjective Phenomena* (1984)).

In other words, all the Court has done today, to borrow from another context, is to look over the heads of the crowd and pick out its friends. Cf. *Conroy v. Aniskoff*, 507 U. S. 511, 519 (1993) (SCALIA, J., concurring in judgment).

We need not look far to find studies contradicting the Court’s conclusions. As petitioner points out, the American Psychological Association (APA), which claims in this case that scientific evidence shows persons under 18 lack the ability to take moral responsibility for their decisions, has previously taken precisely the opposite position before this very Court. In its brief in *Hodgson v. Minnesota*, 497 U. S. 417 (1990), the APA found a “rich body of research” showing that juveniles are mature enough to decide whether to obtain an abortion without parental involvement. Brief for APA as *Amicus Curiae*, O. T. 1989, No. 88–805 etc., p. 18. The APA brief, citing psychology treatises and studies too

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numerous to list here, asserted: “[B]y middle adolescence (age 14–15) young people develop abilities similar to adults in reasoning about moral dilemmas, understanding social rules and laws, [and] reasoning about interpersonal relationships and interpersonal problems.” *Id.*, at 19–20 (citations omitted). Given the nuances of scientific methodology and conflicting views, courts—which can only consider the limited evidence on the record before them—are ill equipped to determine which view of science is the right one. Legislatures “are better qualified to weigh and ‘evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts.” *McCleskey v. Kemp*, 481 U. S. 279, 319 (1987) (quoting *Gregg, supra*, at 186).

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

Moreover, the cited studies describe only adolescents who engage in risky or antisocial behavior, as many young people do. Murder, however, is more than just risky or antisocial behavior. It is entirely consistent to believe that young people often act impetuously and lack judgment, but, at the same time, to believe that those who commit premeditated murder are—at least sometimes—just as culpable as adults. Christopher Simmons, who was only seven months shy of his 18th birthday when he murdered Shirley Crook, described to his friends *beforehand*—“[i]n chilling, callous terms,” as the Court puts it, *ante*, at 1—the murder he planned to commit. He then broke into the home of an innocent woman, bound her with duct tape and electrical wire, and threw her off a bridge alive and con-

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scious. *Ante*, at 2. In their *amici* brief, the States of Alabama, Delaware, Oklahoma, Texas, Utah, and Virginia offer additional examples of murders committed by individuals under 18 that involve truly monstrous acts. In Alabama, two 17-year-olds, one 16-year-old, and one 19-year-old picked up a female hitchhiker, threw bottles at her, and kicked and stomped her for approximately 30 minutes until she died. They then sexually assaulted her lifeless body and, when they were finished, threw her body off a cliff. They later returned to the crime scene to mutilate her corpse. See Brief for Alabama et al. as *Amici Curiae* 9–10; see also *Loggins v. State*, 771 So. 2d 1070, 1074–1075 (Ala. Crim. App. 1999); *Duncan v. State*, 827 So. 2d 838, 840–841 (Ala. Crim. App. 1999). Other examples in the brief are equally shocking. Though these cases are assuredly the exception rather than the rule, the studies the Court cites in no way justify a constitutional imperative that prevents legislatures and juries from treating exceptional cases in an exceptional way—by determining that some murders are not just the acts of happy-go-lucky teenagers, but heinous crimes deserving of death.

That “almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent,” *ante*, at 15, is patently irrelevant—and is yet another resurrection of an argument that this Court gave a decent burial in *Stanford*. (What kind of Equal Justice under Law is it that—without so much as a “Sorry about that”—gives as the basis for sparing one person from execution arguments *explicitly rejected* in refusing to spare another?) As we explained in *Stanford*, 492 U. S., at 374, 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 civi-

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lized standards.” Serving on a jury or entering into marriage also involve decisions far more sophisticated than the simple decision not to take another’s life.

Moreover, the age statutes the Court lists “set the appropriate ages for the operation of a system that makes its determinations in gross, and that does not conduct individualized maturity tests.” *Ibid.* The criminal justice system, by contrast, provides for individualized consideration of each defendant. In capital cases, this Court requires the sentencer to make an individualized determination, which includes weighing aggravating factors and mitigating factors, such as youth. See *Eddings*, 455 U. S., at 115–117. In other contexts where individualized consideration is provided, we have recognized that at least some minors will be mature enough to make difficult decisions that involve moral considerations. For instance, we have struck down abortion statutes that do not allow minors deemed mature by courts to bypass parental notification provisions. See, e.g., *Bellotti v. Baird*, 443 U. S. 622, 643–644 (1979) (opinion of Powell, J.); *Planned Parenthood of Central Mo. v. Danforth*, 428 U. S. 52, 74–75 (1976). It is hard to see why this context should be any different. Whether to obtain an abortion is surely a much more complex decision for a young person than whether to kill an innocent person in cold blood.

The Court concludes, however, *ante*, at 18, that juries cannot be trusted with the delicate task of weighing a defendant’s youth along with the other mitigating and aggravating factors of his crime. This startling conclusion undermines the very foundations of our capital sentencing system, which entrusts juries with “mak[ing] the difficult and uniquely human judgments that defy codification and that ‘buil[d] discretion, equity, and flexibility into a legal system.’” *McCleskey*, *supra*, at 311 (quoting H. Kalven & H. Zeisel, *The American Jury* 498 (1966)). The Court says, *ante*, at 18, that juries will be unable to appreciate the

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significance of a defendant's youth when faced with details of a brutal crime. This assertion is based on no evidence; to the contrary, the Court itself acknowledges that the execution of under-18 offenders is "infrequent" even in the States "without a formal prohibition on executing juveniles," *ante*, at 10, suggesting that juries take seriously their responsibility to weigh youth as a mitigating factor.

Nor does the Court suggest a stopping point for its reasoning. If juries cannot make appropriate determinations in cases involving murderers under 18, in what other kinds of cases will the Court find jurors deficient? We have already held that no jury may consider whether a mentally deficient defendant can receive the death penalty, irrespective of his crime. See *Atkins*, 536 U. S., at 321. Why not take other mitigating factors, such as considerations of childhood abuse or poverty, away from juries as well? Surely jurors "overpower[ed]" by "the brutality or cold-blooded nature" of a crime, *ante*, at 19, could not adequately weigh these mitigating factors either.

The Court's contention that the goals of retribution and deterrence are not served by executing murderers under 18 is also transparently false. The argument that "[r]etribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished," *ante*, at 17, is simply an extension of the earlier, false generalization that youth *always* defeats culpability. The Court claims that "juveniles will be less susceptible to deterrence," *ante*, at 18, because "[t]he likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent," *ibid.* (quoting *Thompson*, 487 U. S., at 837). The Court unsurprisingly finds no support for this astounding proposition, save its own case law. The facts of this very case show the proposition to be false. Before committing the crime, Simmons encouraged his friends to join him by

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assuring them that they could “get away with it” because they were minors. *State ex rel. Simmons v. Roper*, 112 S. W. 3d 397, 419 (Mo. 2003) (Price, J., dissenting). This fact may have influenced the jury’s decision to impose capital punishment despite Simmons’ age. Because the Court refuses to entertain the possibility that its own unsubstantiated generalization about juveniles could be wrong, it ignores this evidence entirely.

## III

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

The Court begins by noting that “Article 37 of the United Nations Convention on the Rights of the Child, [1577 U. N. T. S. 3, 28 I. L. M. 1448, 1468–1470, entered into force Sept. 2, 1990], which every country in the world has ratified *save for the United States* and Somalia, contains an express prohibition on capital punishment for crimes committed by juveniles under 18.” *Ante*, at 22 (emphasis added). The Court also discusses the International Covenant on Civil and Political Rights (ICCPR), December 19, 1966, 999 U. N. T. S. 175, *ante*, at 13, 22, which the Senate ratified only subject to a reservation that reads:

“The United States reserves the right, subject to its Constitutional restraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crime committed by persons below eighteen years of age.” Senate Committee on Foreign Relations, International Covenant on Civil and Political Rights, S. Exec. Rep. No. 102–23, (1992).

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

It is interesting that whereas the Court is not content to accept what the States of our Federal Union *say*, but insists on inquiring into what they *do* (specifically, whether they in fact *apply* the juvenile death penalty that their laws allow), the Court is quite willing to believe that every foreign nation—of whatever tyrannical political makeup and with however subservient or incompetent a court system—in fact *adheres* to a rule of no death penalty for offenders under 18. Nor does the Court inquire into how many of the countries that have the death penalty, but have forsworn (on paper at least) imposing that penalty on offenders under 18, have what no State of this country can constitutionally have: a *mandatory* death penalty for certain crimes, with no possibility of mitigation by the sentencing authority, for youth or any other reason.

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I suspect it is most of them. See, *e.g.*, R. Simon & D. Blaskovich, *A Comparative Analysis of Capital Punishment: Statutes, Policies, Frequencies, and Public Attitudes the World Over* 25, 26, 29 (2002). To forbid the death penalty for juveniles under such a system may be a good idea, but it says nothing about our system, in which the sentencing authority, typically a jury, always can, and almost always does, withhold the death penalty from an under-18 offender except, after considering all the circumstances, in the rare cases where it is warranted. The foreign authorities, in other words, do not even speak to the issue before us here.

More fundamentally, however, the basic premise of the Court's argument—that American law should conform to the laws of the rest of the world—ought to be rejected out of hand. In fact the Court itself does not believe it. In many significant respects the laws of most other countries differ from our law—including not only such explicit provisions of our Constitution as the right to jury trial and grand jury indictment, but even many interpretations of the Constitution prescribed by this Court itself. The Court-pronounced exclusionary rule, for example, is distinctively American. When we adopted that rule in *Mapp v. Ohio*, 367 U. S. 643, 655 (1961), it was “unique to American Jurisprudence.” *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U. S. 388, 415 (1971) (Burger, C. J., dissenting). Since then a categorical exclusionary rule has been “universally rejected” by other countries, including those with rules prohibiting illegal searches and police misconduct, despite the fact that none of these countries “appears to have any alternative form of discipline for police that is effective in preventing search violations.” Bradley, *Mapp Goes Abroad*, 52 *Case W. Res. L. Rev.* 375, 399–400 (2001). England, for example, rarely excludes evidence found during an illegal search or seizure and has only recently begun excluding evidence from illegally obtained confessions. See C. Slob-

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gin, *Criminal Procedure: Regulation of Police Investigation* 550 (3d ed. 2002). Canada rarely excludes evidence and will only do so if admission will “bring the administration of justice into disrepute.” *Id.*, at 550–551 (internal quotation marks omitted). The European Court of Human Rights has held that introduction of illegally seized evidence does not violate the “fair trial” requirement in Article 6, §1, of the European Convention on Human Rights. See Slobogin, *supra*, at 551; Bradley, *supra*, at 377–378.

The Court has been oblivious to the views of other countries when deciding how to interpret our Constitution’s requirement that “Congress shall make no law respecting an establishment of religion. . . .” Amdt. 1. Most other countries—including those committed to religious neutrality—do not insist on the degree of separation between church and state that this Court requires. For example, whereas “we have recognized special Establishment Clause dangers where the government makes direct money payments to sectarian institutions,” *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 842 (1995) (citing cases), countries such as the Netherlands, Germany, and Australia allow direct government funding of religious schools on the ground that “the state can only be truly neutral between secular and religious perspectives if it does not dominate the provision of so key a service as education, and makes it possible for people to exercise their right of religious expression within the context of public funding.” S. Monsma & J. Soper, *The Challenge of Pluralism: Church and State in Five Democracies* 207 (1997); see also *id.*, at 67, 103, 176. England permits the teaching of religion in state schools. *Id.*, at 142. Even in France, which is considered “America’s only rival in strictness of church-state separation,” “[t]he practice of contracting for educational services provided by Catholic schools is very widespread.” C. Glenn, *The Ambiguous Embrace: Government and Faith-Based Schools*

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and Social Agencies 110 (2000).

And let us not forget the Court's abortion jurisprudence, which makes us one of only six countries that allow abortion on demand until the point of viability. See Larsen, Importing Constitutional Norms from a "Wider Civilization": *Lawrence* and the Rehnquist Court's Use of Foreign and International Law in Domestic Constitutional Interpretation, 65 Ohio St. L.J. 1283, 1320 (2004); Center for Reproductive Rights, The World's Abortion Laws (June 2004), [http://www.reproductiverights.org/pub\\_fac\\_abortion\\_laws.html](http://www.reproductiverights.org/pub_fac_abortion_laws.html). Though the Government and *amici* in cases following *Roe v. Wade*, 410 U.S. 113 (1973), urged the Court to follow the international community's lead, these arguments fell on deaf ears. See McCrudden, A Part of the Main? The Physician-Assisted Suicide Cases and Comparative Law Methodology in the United States Supreme Court, in *Law at the End of Life: The Supreme Court and Assisted Suicide* 125, 129–130 (C. Schneider ed. 2000).

The Court's special reliance on the laws of the United Kingdom is perhaps the most indefensible part of its opinion. It is of course true that we share a common history with the United Kingdom, and that we often consult English sources when asked to discern the meaning of a constitutional text written against the backdrop of 18th-century English law and legal thought. If we applied that approach today, our task would be an easy one. As we explained in *Harmelin v. Michigan*, 501 U.S. 957, 973–974 (1991), the "Cruell and Unusuall Punishments" provision of the English Declaration of Rights was originally meant to describe those punishments "'out of [the Judges'] Power'"—that is, those punishments that were not authorized by common law or statute, but that were nonetheless administered by the Crown or the Crown's judges. Under that reasoning, the death penalty for under-18 offenders would easily survive this challenge. The Court has, how-

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ever—I think wrongly—long rejected a purely originalist approach to our Eighth Amendment, and that is certainly not the approach the Court takes today. Instead, the Court undertakes the majestic task of determining (and thereby prescribing) *our* Nation’s *current* standards of decency. It is beyond comprehension why we should look, for that purpose, to a country that has developed, in the centuries since the Revolutionary War—and with increasing speed since the United Kingdom’s recent submission to the jurisprudence of European courts dominated by continental jurists—a legal, political, and social culture quite different from our own. If we took the Court’s directive seriously, we would also consider relaxing our double jeopardy prohibition, since the British Law Commission recently published a report that would significantly extend the rights of the prosecution to appeal cases where an acquittal was the result of a judge’s ruling that was legally incorrect. See Law Commission, *Double Jeopardy and Prosecution Appeals*, LAW COM No. 267, Cm 5048, p. 6, ¶1.19 (Mar. 2001); J. Spencer, *The English System in European Criminal Procedures* 142, 204, and n. 239 (M. Delmas-Marty & J. Spencer eds. 2002). We would also curtail our right to jury trial in criminal cases since, despite the jury system’s deep roots in our shared common law, England now permits all but the most serious offenders to be tried by magistrates without a jury. See D. Feldman, *England and Wales, in Criminal Procedure: A Worldwide Study* 91, 114–115 (C. Bradley ed. 1999).

The Court should either profess its willingness to reconsider all these matters in light of the views of foreigners, or else it should cease putting forth foreigners’ views as part of the *reasoned basis* of its decisions. To invoke alien law when it agrees with one’s own thinking, and ignore it otherwise, is not reasoned decisionmaking, but sophistry.<sup>9</sup>

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<sup>9</sup>JUSTICE O’CONNOR asserts that the Eighth Amendment has a “spe-

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The Court responds that “[i]t does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.” *Ante*, at 24–25. To begin with, I do not believe that approval by “other nations and peoples” should buttress our commitment to American principles any more than (what should logically follow) disapproval by “other nations and peoples” should weaken that commitment. More importantly, however, the Court’s statement flatly misdescribes what is going on here. Foreign sources are cited today, *not* to underscore our “fidelity” to the Constitution, our “pride in its origins,” and “our own [American] heritage.” To the contrary, they are cited *to set aside* the centuries-old American practice—a practice still engaged in by a large majority of the relevant States—of

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cial character,” in that it “draws its meaning directly from the maturing values of civilized society.” *Ante*, at 19. Nothing in the text reflects such a distinctive character—and we have certainly applied the “maturing values” rationale to give brave new meaning to other provisions of the Constitution, such as the Due Process Clause and the Equal Protection Clause. See, e.g., *Lawrence v. Texas*, 539 U. S. 558, 571–573 (2003); *United States v. Virginia*, 518 U. S. 515, 532–534 (1996); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U. S. 833, 847–850 (1992). JUSTICE O’CONNOR asserts that an international consensus can at least “serve to confirm the reasonableness of a consonant and genuine American consensus.” *Ante*, at 19. Surely not unless it can also demonstrate the *unreasonableness* of such a consensus. Either America’s principles are its own, or they follow the world; one cannot have it both ways. Finally, JUSTICE O’CONNOR finds it unnecessary to consult foreign law in the present case because there is “no . . . domestic consensus” to be confirmed. *Ibid.* But since she believes that the Justices can announce their own requirements of “moral proportionality” despite the absence of consensus, why would foreign law not be relevant to *that* judgment? If foreign law is powerful enough to supplant the judgment of the American people, surely it is powerful enough to change a personal assessment of moral proportionality.

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letting a jury of 12 citizens decide whether, in the particular case, youth should be the basis for withholding the death penalty. What these foreign sources “affirm,” rather than repudiate, is the Justices’ own notion of how the world ought to be, and their diktat that it shall be so henceforth in America. The Court’s parting attempt to downplay the significance of its extensive discussion of foreign law is unconvincing. “Acknowledgment” of foreign approval has no place in the legal opinion of this Court *unless it is part of the basis for the Court’s judgment*—which is surely what it parades as today.

## IV

To add insult to injury, the Court affirms the Missouri Supreme Court without even admonishing that court for its flagrant disregard of our precedent in *Stanford*. Until today, we have always held that “it is this Court’s prerogative alone to overrule one of its precedents.” *State Oil Co. v. Khan*, 522 U. S. 3, 20 (1997). That has been true even where “changes in judicial doctrine’ ha[ve] significantly undermined” our prior holding, *United States v. Hatter*, 532 U. S. 557, 567 (2001) (quoting *Hatter v. United States*, 64 F. 3d 647, 650 (CA Fed. 1995)), and even where our prior holding “appears to rest on reasons rejected in some other line of decisions,” *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U. S. 477, 484 (1989). Today, however, the Court silently approves a state-court decision that blatantly rejected controlling precedent.

One must admit that the Missouri Supreme Court’s action, and this Court’s indulgent reaction, are, in a way, understandable. In a system based upon constitutional and statutory text democratically adopted, the concept of “law” ordinarily signifies that particular words have a fixed meaning. Such law does not change, and this Court’s pronouncement of it therefore remains authoritative until (confessing our prior error) we overrule. The Court has

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purported to make of the Eighth Amendment, however, a mirror of the passing and changing sentiment of American society regarding penology. The lower courts can look into that mirror as well as we can; and what we saw 15 years ago bears no necessary relationship to what they see today. Since they are not looking at the same text, but at a different scene, why should our earlier decision control their judgment?

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