Ohio Northern University Law Review

Volume 38 | Issue 2 Article 11

Thompson v. Oklahomaand The Judicial Search for Constitutional Traditionin Celebration of Victor Streib

Harry F. Tepker

Thompson v. Oklahoma and The Judicial Search for Constitutional Tradition in Celebration of Victor Streib

HARRY F. TEPKER*

Wayne Thompson was a fifteen-year-old boy who murdered his threatening and abusive ex-brother-in-law. He was a "child" as a matter of Oklahoma statutory law, but the District Attorney of Grady County, Oklahoma sought to have him tried "as if" he was an adult.[1] The prosecutor's petition was granted.[2] The boy was tried, convicted, and sentenced to death.[3] The Oklahoma Court of Criminal Appeals affirmed the conviction and the sentence.[4]

Wayne was one of a few persons on death row for committing a crime while still a child under state law when he was invited as a guest on "The Oprah Winfrey Show," along with his mother.[5] As a guest of Oprah, Professor Victor Streib of Cleveland State University spoke with Wayne before I did. Questioned by Oprah herself, Wayne and his mother described the facts of the murder in general terms.[6] Wayne's mother, the late Dorothy Thompson, made a stronger and more humane plea for Wayne than his trial attorney. She described the beatings and brutality of Wayne, Wayne's sister (Keene's ex-wife), and herself.[7] Ms. Winfrey listened and concluded: "So your opinion is that it [the murder] was mostly . . . a case of family self-defense."[8] Wayne's mother answered, "That's right."[9] She only confirmed what the prosecution had proved and admitted; the facts proved motive and guilt, but they also proved mitigating circumstances, though

* Professor of Law, Calvert Chair of Law and Associate Dean for Scholarship and Enrichment, University of Oklahoma.

1. Wayne had been certified to stand trial "as if he were an adult" under a separate certification process for persons under age sixteen. Brief of Petitioner at 2-3 Thompson v. Oklahoma, 487 U.S. 815 (1988) (No. 86-6169) [hereinafter *Pet. Br. U.S.*]. He was not certified to be an adult under processes governing cases involving sixteen and seventeen year olds. *Id.*
2. *Id.* at 3.
3. Thompson v. State (*Thompson I*), 724 P.2d 780, 782 (Okla. Crim. App. 1986).
4. *Id.*
5. Transcript 8646, "Juveniles on Death Row," The Oprah Winfrey Show (Nov. 24, 1986).
6. *Id.* at 2-5.
7. *Id.*
8. *Id.* at 4.
9. *Id.*

defense counsel's argument in closing was weak and did not discuss the issue of age.[10]

Getting the case. At the time of the interview, Wayne was not represented. Al Schay, director of the Oklahoma Indigent Defender System ("OIDS") had represented Wayne before the Oklahoma Court of Criminal Appeals, which rejected all his arguments.[11] At the time, Oklahoma law barred OIDS from taking the case to the Supreme Court of the United States. Despite diligent efforts by OIDS to attract one of the usual crusaders against capital punishment tradition in America, all—inexplicably—passed on the opportunity to represent Wayne, perhaps because the Court had only recently turned down a plea on behalf of a mentally-retarded juvenile.[12] As a desperate last resort, they walked across the hall at the University of Oklahoma Law Center, which also houses the College of Law, and asked me to take the case. I was not their first, or second, or third choice—for good reason.

As a professor at the University of Oklahoma, I had heard of the "baby case." I knew it posed an important constitutional law question, but I knew little of the facts and less of the proceedings below. I gave the matter very careful consideration, for all of a few seconds, and agreed on the spot. Arguing a case before the Supreme Court was a life-time (or at least career-long) dream, and I didn't want to say no, despite some realities. It was my first criminal case, my first death penalty case, my first Supreme Court case as first chair, my first case in Oklahoma, my first case since joining the University of Oklahoma law faculty, and my first case for an indigent client. Every condemned man deserves better.

I needed help. Thankfully, Victor Streib was ready, willing, and able to help, after talking with Al Schay. He was then and now the foremost national authority on capital punishment of juveniles. He prepared the first draft of the brief on the merits, but in a more accurate, broader sense, he was a co-creator of all briefs of all parties. He had gathered all of the facts necessary to assess what American jurisdictions did and why. He developed and organized the facts essential to evaluating the general and specific traditions relevant to the case. Everyone began with his work. Everyone relied on his research. So would the Supreme Court, when it decided the case. Ms. Winfrey had chosen well when she invited Professor Streib to

10. Transcript 8646, *supra* note 5, at 4; *Pet. Br. U.S.*, *supra* note 1, at 3-9.
11. *See Thompson I*, 724 P.2d at 786.
12. *See* Woods v. Florida, 479 U.S. 954 (1986).

speak on her show. My client and I were extremely fortunate to have his assistance.

The crime. Wayne's motive for the crime—as described by the prosecution—was to protect his family from continuing violence by Charles Keene.[13] Keene had assaulted Wayne's mother and sister.[14] He had kidnapped Wayne's nephew. He had threatened to drop Wayne's nephew head first from a roof. He had assaulted Wayne and he had taught him paint sniffing.[15]

> On the afternoon of January 22, Anthony Mann, Danny Mann, and Vicky Keene visited Charles Keene at his former wife's trailer in order "to talk some sense into Charles." In Mrs. Keene's words, they were "trying to talk him into leaving . . . [to] get out of our lives." They had no success. According to testimony of Mrs. Keene and Danny Mann, Charles Keene was "messed up" from paint sniffing. When Vicky Keene asked Charles Keene for her car keys so that he could not take her car away, Charles said the keys were in the car.
>
> While Mrs. Keene looked on, in Danny Mann's words, "we said 'Charles, you're going to give us the keys or we're going to get them from you.' So we started kind of easing forward toward him . . ." Keene grabbed a knife, which Anthony Mann knocked from his hand. The two men grabbed Keene, held and searched him, took the car keys and were leaving when Keene again picked up the knife and tried to stab Danny Mann. Mrs. Keene observed her brothers running out of the trailer. She also saw Keene, butcher knife in hand, before he closed the trailer door. The Manns and Mrs. Keene then reported the incident to the local sheriff, but they were told that nothing could be done.
>
> The trailer incident was one of many episodes in a violent and tragic matrimonial conflict between the Keenes. The two were married for seven years, but had been divorced approximately two years before Keene's death. When called as a prosecution witness at the defendant's trial, Mrs. Keene stated that being married to and living with Charles was a nightmare. Despite the divorce and

13. *Pet. Br. U.S.*, *supra* note 1, at 3-4.
14. *Id.*
15. *Id.* at 4-5.

> despite her wishes, he often stayed in his ex-wife's home. When she "would call the law out there [,] they wouldn't do nothing" about Keene's presence. Mrs. Keene said that Keene had beaten her many times and had shot at her.[16]

According to the report of Dr. Helen Klein, a clinical psychologist who testified for the prosecution, the boy "described Charles Keene, his deceased brother-in-law, as an 'unemployed glue sniffer,' who 'beat up on me all the time . . . when I was younger he kicked me.'" Keene also started the boy "sniffing" paint.[17]

In the early morning of January 23, Wayne, acting in concert with at least one other,[18] killed Keene. After the crime, Thompson returned to Dorothy Thompson's home.[19] "The boy was wet from the chest down."[20] "He was visibly shaken and was crying."[21] "The boy's mother was hugging him and trying to calm him."[22] He confessed in the arms of his mother; "Charles was dead and Vicky didn't have to worry about him anymore."[23] "Later, apparently after the boy had changed clothes, he was still upset and crying."[24]

A portrait of Wayne Thompson—an accused fifteen-year-old boy—appeared in the psychological report of Dr. Helen Klein, a prosecution witness:

> During the initial stage of the interview, he attempted to portray himself as macho, tough and cavalier. This facade tended to dissipate as his anxiety abated.
>
> . . . .
>
> Wayne is the sixth of eight children, his father is a truck driver and his mother a housewife. Wayne said he was in special education classes and had entered the l0th grade before dropping out of school in the fall of 1982. Wayne said he had sniffed paint for approximately seven months last year, but quit of his own volition.

---

16. *Id.*
17. *Id*. at 5.
18. Three others were convicted of the crime. One was Anthony Mann, Wayne's half-brother. Wayne testified he did assist the kidnapping and beating of Charles Keene, but he tried to stop the murder. One of the others was subsequently retried and acquitted.
19. *Pet. Br. U.S.*, *supra* note 1, at 6.
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *Pet. Br. U.S.*, *supra* note 1, at 6.

. . . .

> Individuals who obtain MMPI [Minnesota Multiphasic Personality Inventory] profiles similar to Wayne's typically are described as hyperactive, restless and indecisive, and as persons who may keep people at a distance (emotional alienation) and show poor social judgment. A profile such as that obtained by Wayne must be interpreted with caution as it suggests the possible effect of a response set which may have led to exaggeration or distortion of his current status. Such a profile reveals the possible presence of a desire to appear independent of social ties and to "fake bad," i.e., to exaggerate symptomatology.
>
> Rorschach test data support the MMPI data in that test results are indicative of a person whose entire focus is external. He is excitable, hostile, and is responsive to the external world to the extent he cannot organize his inner experience. He has a stereotypical, concrete view of the world and demonstrates little ability to organize or to conceptualize his experience beyond that. Wayne does not have enough ego to handle or to control his impulses and therefore tends to act them out.[25]

This was the *prosecution's* evidence.

Wayne never denied or minimized his guilt. At all times after the conviction, Wayne acknowledged his guilt. Indeed, after the Supreme Court of the United States took his case to resolve a constitutional issue respecting the death penalty, and shortly before oral argument in his case, Mr. Thompson testified under oath about his own guilt as a defense witness for another person who was also accused of the crime. He waived his rights against self-incrimination; he testified against the advice of counsel; he testified as to his guilt, solely because he believed it was his moral duty to accept his guilt and to verify the innocence of another; and, of course, he did so at a time when it was in his self-interest to be silent.

The brief for petitioner. The briefs for petitioner were the product of a team effort. I was lead counsel and made all final decisions. All blame for shortcomings was mine. Professor Streib drafted the arguments focusing on the Eighth Amendment. A colleague at Oklahoma University at the time, Kevin W. Saunders (a brilliant scholar) helped prepare arguments about the

25. *Id*. at 8-9.

prosecutor's use of inflammatory photographs. The Legal Defense Fund, Inc., led by Professor Anthony Amsterdam of New York University and Richard Burr, orchestrated briefs amici curiae and offered a steady stream of suggestions. The final product was an attempt to provide a range of possible theories and possible judicial holdings that would save my client's life. We also wanted to argue on behalf of a broader community that hoped for a landmark decision creating an age limit on the death penalty. It was, put simply, a compromise.

First, "the execution of a person who was a child of fifteen at the time of the crime is cruel and unusual punishment."[26] Government "condemnation of children makes no measurable contribution to legitimate goals of punishment."[27] It "violates contemporary standards of decency . . . ."[28] The conclusion was verified by existing patterns of state law. Here, Professor Streib's research was indispensable. Also, the objective rejection by American jurisdictions of capital punishment for crimes of childhood was mirrored in "an emerging consensus of international law and opinion . . . ."[29]

Finally, in this case, we emphasized that Oklahoma was guilty of an impulsive and unreasoning treatment of Wayne's case: "Execution of this person for a crime committed at age fifteen would be cruel and unusual punishment because the Oklahoma courts failed to give careful, particularized consideration to the character and background of the accused boy."[30] An objective of this last element of the "narrow" age issue was to offer an alternative to a defined, absolute age limit, similar to the course adopted by the court in *Eddings v. Oklahoma*:[31]

> The Eighth Amendment requires that a sentencing court give careful, particularized consideration to the character and background of the defendant in order to assess the fundamental justice of the death penalty. This principle mandates that no child be sentenced to die unless the sentencing court finds that the child is morally culpable to the same degree as an adult and that the child is beyond all hope of rehabilitation.[32]

---

26. *Id.* at 14-39.
27. *Id.* at 16-22.
28. *Id*. at 25-26.
29. *Pet. Br. U.S.*, *supra* note 1, at 26-28.
30. *Id*. 30-39.
31. 455 U.S. 104 (1982).
32. *Pet. Br. U.S.*, *supra* note 1, at 34.

The second basic argument of the brief was that "the reliability of the sentencing process in this case was undermined by the admission of highly inflammatory photographic evidence that prejudiced the defendant's right to fair, full jury consideration of all mitigating circumstances, including age."[33] Challenging evidentiary rulings of a trial court was a long shot, but the argument served a purpose: it illustrated how a prosecutor could prevent "a reasoned moral response to the defendant's background, character and crime."[34] We wanted to ensure that the Justices, particularly Justice Sandra Day O'Connor, knew that the condemnation of Wayne Thompson was one of many tragic cases in which "mere sympathy or emotion"[35] governed the outcome of the sentencing proceeding.

Finally, we reserved our fondest hope for last. The "broad" age issue was whether the Court had power to define a minimum age limit. "To vindicate American traditions of special treatment of juvenile offenders, this court must prevent the execution of persons for crimes committed below a specified age."[36] We emphasized the inadequacy of then-current judicial standards to assess age as a mitigating circumstance on a case-by-case basis.[37]

The reply brief for the petitioner. One month after our brief was filed, Lewis Powell retired.[38] Ronald Reagan nominated Robert Bork as his successor.[39] It was a shock. It appeared that the intellectual and ideological balance on the Court would tip sharply. Judge Bork was a well-known advocate of "originalism" as a philosophy of judging. Lewis Powell had been one of the "pragmatic men of the center" as Vincent Blasi put it in an analysis of the Burger Court's activism: "That activism has not been inspired by a commitment to fundamental constitutional principles or noble political ideals, but rather by the belief that modest injections of logic and compassion by disinterested, sensible judges can serve as a counterforce to

33. *Id.* at 40-45.

34. Sumner v. Shuman, 483 U.S. 66, 76 n.5 (1987); California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring); *Pet. Br. U.S.*, *supra* note 1, at 43; Reply Brief of Petitioner at 13 Thompson v. Oklahoma, 487 U.S. 815 (1988) (No. 86-6169) [hereinafter *Rep. Brief. Pet. U.S.*].

35. *Brown*, 479 U.S. at 841.

36. *Pet. Br. U.S.*, *supra* note 1, at 46-49.

37. *Id*.

38. *Biography of Justice Lewis F. Powell, Jr.*, AMERICAN INNS OF COURT, http://www.innsof court.org/Content/InnContent.aspx?Id=713 (last visited March 19, 2012) (noting that Justice Powell retired on June 26, 1987).

39. Jason Manning, *The Bork Nomination*, THE EIGHTIES CLUB, http://eightiesclub.tripod.com/id 320.htm (last visited Mar. 21, 2012).

some of the excesses and irrationalities of contemporary governmental decision-making."[40] And

> [i]n the last analysis, the distinctive hallmark of the new centrist activism has been the powerful aversion to making fundamental value choices. The Burger Court has been interventionist without question . . . . But the Court's efforts have been inspired almost exclusively by discrete, pragmatic judgments regarding how a moderate, sensible judicial accommodation might help to resolve a potentially divisive public controversy.[41]

Our brief on the merits had targeted that the Justices needed to form a coalition of five. As did most attorneys offering advice, we assumed Justices Brennan, Marshall, Stevens and Blackmun would vote to set aside the death sentence on this case, though not necessarily because of a judicially-imposed age limit. The usual suspect for a fifth vote was that Justice Lewis Powell might have helped to engineer a grant of certiorari.[42] Though Justice Blackmun had voted to uphold the death sentence in *Eddings*, many were aware of Justice Brennan's "assiduous courtship" of Blackmun, and thought the *Thompson* case would be an occasion to measure Brennan's persuasion.[43] But with Powell's retirement, all eyes—especially mine—turned hopefully to Sandra Day O'Connor.

I hoped Sandra Day O'Connor would prove to be a "pragmatic woman of the center," using and adapting Professor Blasi's terminology.[44] She had

---

40. Vincent Blasi, *The Rootless Activism of the Burger Court*, *in* THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T 211 (Vincent Blasi ed., 1983).

41. Vincent Blasi, *The Court as an Instrument of Change*, *in* LA COUR SUPREME DES ESTATS-UNIS: POURVOIRS ET EVOLUTION HISTORIQUE 69 (Christian Lerat ed., 2004).

42. In the history of the term and the Thompson case, Justice Brennan's clerks report that

> [t]he year prior, several Justices had considered granting a cert to entertain a challenge to the death penalty brought by a defendant who was approximately 17 and a half years old at the time of the murder; those favoring a grant, however, had decided against taking the case on the advice of LFP [Justice Powell], who thought a younger defendant would make a more sympathetic petitioner.

"*Thompson v. Oklahoma*, No. 86-6169," in October Term 1987, William J. Brennan Term History at 47-48 [hereinafter WJB OT '87 History]. The term histories were prepared by Justice Brennan's clerks and remained confidential until released to Stephen Wermiel as part of preparation of the book, SETH STERN & STEPHEN WERMIEL, JUSTICE BRENNAN: LIBERAL CHAMPION (2010). The clerk histories are discussed at pages 465-66, 550. Permission to quote from the term history was granted by William J. Brennan IV and transmitted to the author by Professor Wermiel.

43. *See* STERN & WERMIEL, *supra* note 42, at 383, 495 (noting Brennan's efforts and their success).

44. THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T, *supra* note 40, at 249 (describing Justice O'Connor as having "a moderate, pragmatic approach to judging").

been on the court for seven years when she cast her vote in *Thompson*.[45] The most hopeful element of her writings on the issue of capital punishment was an insistence that a death sentence be "a reasoned moral response to the defendant's background, character and crime . . . ."[46] The idea was highlighted in our brief on the merits; we sought to underscore and reinforce the argument in the reply brief by linking two themes. First, the state had truncated the inquiry into youth as a mitigating circumstance in Wayne's case. Second, the incoherent and impulsive proceedings represented why an age limit was needed to respect and reinforce an unquestioned tradition that the law ought to treat juveniles differently, decently, and with restraint. And it attempted to build this link with quotations from Justices Powell and O'Connor:

> Even when horrifyingly brutal crimes are the focus for inquiry, Respondent Oklahoma assumes a burden of proof it cannot carry. While it is true that Petitioner cannot rely on clear-cut precedents to justify a minimum chronological age, Oklahoma cannot rely on any precedent to argue—as it does—that in this undefined class of particularly brutal murders, youth, chronological age and emotional immaturity are of no special relevance to the fundamental questions of moral guilt, personal responsibility and retributive justice. As Justice Powell wrote:
>
> > Where a capital defendant's chronological immaturity is compounded by "serious emotional problems, . . . a neglectful, sometimes even violent, family background, . . . [and] mental and emotional development . . . at a level several years below his chronological age," . . . the relevance of this information to the defendant's culpability and thus to the sentencing body, is particularly acute. The Constitution requires that a capital sentencing system reflect this difference in criminal responsibility between children and adults.[47]
>
> Yet, in some cases, the brutal nature of the crime—or perhaps the inflammatory nature of the evidence—will often be enough to

45. *Sandra Day O'Connor*, THE OYEZ PROJECT, http://www.oyez.org/justices/sandra_day_oconnor (last visited Mar. 18, 2012) (noting that Justice O'Connor joined the Court in 1981); *Thompson*, 487 U.S. at 815 (this case was decided in 1988).

46. *Brown*, 479 U.S. at 545 (O'Connor, J., concurring) (emphasis omitted).

47. *Rep. Brief. Pet. U.S.*, *supra* note 34, at 10-11 (quoting Burger v. Kemp, 483 U.S. 776, 821-22 (1987) (Powell, J., dissenting)).

> prevent "a reasoned moral response to the defendant's background, character and crime." In such tragic cases, "mere sympathy or emotion," will all too frequently govern the outcome of the sentencing proceeding. When the facts respecting moral guilt of condemned children and adolescents are collected, as they have been by Amici American Society for Adolescent Psychiatry and American Orthopsychiatric Association, there is good reason to condemn the sensitivity, the objectivity, the fairness and the justice of a case-by-case assessment of youth as mitigating circumstance—particularly when the crimes are the most horrifying. When a murder is particularly brutal, the reality is that the undeniable tradition of more careful, more sensitive consideration of youthful offenders cannot be vindicated except by means of a minimum chronological age.[48]

Oral Argument. On November 8, 1987, the case came before eight sitting Justices[49] for oral argument. Victor Streib appeared, received, and certainly deserved one of the quill pens given to attorneys appearing before the Supreme Court of the United States. Justice Brennan's clerks recalled: "Oral argument, in addition to being among the most crowded and perhaps the most solemn of the year, was noteworthy for high level of participation by the Justices, all eight of whom asked questions . . . ."[50]

Arguing for the petitioner, my introduction sought to summarize and emphasize the facts and theories upon which we placed our hopes:

> In this case Oklahoma has decided that a fifteen year old boy lost his moral entitlement to live because he committed a brutal murder, the killing of the ex-husband of his sister.
>
> According to the prosecution evidence the motive for this murder was revenge, revenge for the ex-husband's abuse of the boy's sister. This case comes before this Court on Certiorari to the Oklahoma Court of Criminal Appeals. Petitioner asked this Court to vacate the sentence of Death, but not the judgment that Wayne Thompson was guilty; and not the judgment that he deserves punishment.

---

48. *Id.* at 11-13 (internal citations omitted).

49. The United States Senate voted against Judge Bork's appointment. Manning, *supra* note 39. *Thompson v. Oklahoma* was argued before eight Justices. The ninth seat was vacant.

50. WJB OT '87 History, *supra* note 42, at 48.

> Two basic issues in this case relate to one fundamental principle: the principle that Youth bears on the fundamental justice of the Death Penalty and emotion and prejudice do not.
>
> First, does this principle require a minimum chronological age, or at least standards and instructions that tell the sentencing authority that their examination of non-adulthood should not be truncated? Second, did introduction of inflammatory photographs of the murder victim's decomposing remains undermine the reliability of this Death sentencing process?
>
> Wayne Thompson was still a child under state law when he shot and killed the ex-husband of his sister. According to the prosecution's most incriminating evidence, the boy on the night of the murder shortly after the crime, confessed to his mother and explained to her that his . . . sister "would not have to worry about her ex-husband any more."
>
> Wayne was certified to stand trial as if he were an adult. The jury was told that he was an adult. The jury was instructed that Youth is a relevant mitigating circumstance they could consider, but they were not told that Youth is a relevant mitigating circumstance of great weight. They were told that they could decide for themselves what were and were not mitigating circumstances. These were the instructions before the jury that sentenced Wayne to death.
>
> Under these circumstances and in a very real sense, this case comes before the Court presenting this Court with the first opportunity to decide whether or not Wayne Thompson was too young to be condemned to death. We submit under the circumstances of this case, as well as under circumstances generally applicable to a class of children and adolescents, it is most inappropriate under the Eighth Amendment, under the prohibition against cruel and unusual punishment, to inflict the Death Sentence.
>
> . . . .
>
> . . . We submit that these factors, these reasons for treating Youth in a special way are compelling in this particular circumstance: first children and adolescents are simply too inexperienced to be judged by the same standards applicable to

> adults. They have not been around long enough to formulate the understanding, the capacity for self-control, to be judged by standards according to adults. The question is not merely whether they know the difference between right or wrong, but whether they have the experience to apply those standards, to resist the stress, the trauma, the difficulties—of particularly difficult occasions.
>
> We submit that, in addition to that, it is quite plain that children, adolescents, are far more vulnerable to volatile, impulsive, self-destructive behavior, and this, recognized by this Court in the past, is grounds for treating Youth, youths, in a different manner, particularly when the punishment is Death.[51]

There were three moments of great significance in the oral arguments, all related to inquiries by Justice Scalia, who had—in a few years of service—developed a reputation as the Court's most aggressive interrogator.

First, Justice Scalia revealed his odd way of counting statutes to determine whether there was a tradition or an objective rejection of capital punishment for crimes of childhood. He ignored states that had abolished the death penalty. Their views did not count.

Repeating an argument first advanced in the reply brief, I pointed out that "60 percent of the jurisdictions in this country, encompassing 70 percent of the population, would not tolerate this execution."[52] One would think that this fact would be relevant and probative on whether the boy's death sentence was rare and, therefore, "unusual," the term used in the Eighth Amendment's text. Chief Justice Rehnquist interjected: "That is, 60 percent of the jurisdictions which provide for capital punishment?"[53] The answer was "[n]o. That is 60 percent of the states total. It is approximately half of the states that retain the Death Penalty, establish minimum lines that would not allow this execution."[54]

The Chief pressed further to establish that half of the states retaining the death penalty would permit the execution. I offered a correction:

> Half of them allow the potential for it, although I might add, if one takes into account the more general question of whether Youth bears upon the fundamental justice of the Death Penalty, Oklahoma

---

51. Transcript of Record at 3-5, *Thompson*, 487 U.S. 815 (No. 86-6169, Nov. 9, 1987) [hereinafter *Official Transcript*].

52. *Id.* at 7.

53. *Id.* at 7-8.

54. *Id.* at 8.

> is one of only three states that has neither a minimum line nor any special legislative declaration that Youth is a mitigating circumstance. And it is—the only one of those three states to have someone on Death Row who is a juvenile. [55]

Justice Scalia took up the line of argument. He announced that "the relevant statistic" was only the percentage of states that have capital punishment but do not allow executions at a certain age. He explained: "it is, of course, irrelevant with respect to those jurisdictions that have chosen not to impose capital punishment at all."[56] I responded:

> Although I must suggest that when we are considering the nature of the Death Penalty in considering the judgment of the Young, to throw out those states that have decided the Death Penalty process is uncertain enough, or illogical enough, or perhaps too cruel, out of the calculation of what are evolving standards of decency, is to not inquire into what the consensus really is.[57]

Justice Scalia had the last word on the subject:

> We really have no idea what they would think about Youth as a factor, had they chosen capital punishment: they simply have not chosen capital punishment . . . . So it really says nothing about whether if they did have it they would consider that Youth is a factor that would render it absolutely intolerable.[58]

The Court heard the data and the argument but there was no persuading Justice Scalia, so I changed the subject to international law and traditions. My hope was to show this execution would be abhorred by the world. I am not certain, but I believe I was the lucky human being to be the first to try out this argument in front of Justice Scalia. The Court has used international opinion and international law in order to assess what are evolving society's standards of decency. Justice Scalia did not appreciate the method: "We would not have capital punishment at all if we were to be bound by that, would we not."[59]

---

55. *Id.*
56. *Official Transcript*, *supra* note 51, at 15.
57. *Id.*
58. *Id.* at 15-16.
59. *Id.* at 16.

I expressed doubt about his speculation. Foreign rejection of the death penalty per se was hardly universal or even arguably close to it. In any event, our argument was not a broad challenge to the death penalty:

> What I am suggesting is that 80 nations reject this kind of executions, and 40 of those nations retain the Death Penalty. If you add to that the practice of the nations in terms of the rarity of these kinds of executions, the clear statements that appear in the International Covenant of Human Rights, and the American Convention of Human Rights, it becomes very clear that there is an objective rejection of execution of children, and Wayne Thompson was a child under the laws of Oklahoma.[60]

I did not know then that the Soviet Union had sent a representative accompanied by a State Department official to observe the oral argument. The Soviets were trying to use the juvenile capital punishment issue as a talking point to resist United States criticisms about Soviet human rights abuses.[61]

Justice Scalia would amplify his views in his *Thompson* dissenting opinion[62] and in his majority opinion a year later in *Stanford v. Kentucky*.[63] The issue would arise again in *Roper v. Simmons*,[64] and it would generate a wave of conservative criticism of using "foreign law" to decide American cases.[65]

The most significant moment of the oral arguments came when I was sitting down. Arguing for Oklahoma, David Lee, Deputy Attorney General, made a candid, humane and pragmatic admission. Specifically, in the words of Justice Brennan's clerks, he conceded

> the Eighth Amendment authorized the Court to establish a minimum age below which persons convicted of capital crimes could never be executed . . . . This concession infuriated [Justice

60. *Id.* at 16-17.

61. David K. Shipler, *Washington Talk: Soviet-American Relations; A Pre-Summit Push on Emigration*, N.Y. TIMES, Nov. 10, 1987, http://www.nytimes.com/1987/11/10/us/washington-talk-soviet-american-relations-a-pre-summit-push-on-emigration.html?pagewanted=all&src=pm.

62. *Thompson*, 487 U.S. at 859 (Scalia, J., dissenting).

63. Stanford v. Kentucky, 492 U.S. 361 (1989); *see also, e.g.*, RALPH A. ROSSUM, ANTONIN SCALIA'S JURISPRUDENCE: TEXT AND TRADITION 48-49, 192-94 (2006) (summarizing Justice Scalia's analysis of tradition in *Thompson* and *Stanford*).

64. 543 U.S. 551 (2005).

65. *See* Harry F. Tepker, *Tradition & The Abolition of Capital Punishment for Juvenile Crime*, 59 OKLA. L. REV. 809, 810-11 (2006).

> Scalia], who first asked counsel if he really meant what he had said and then challenged him to defend such a line.[66]

Mr. Lee had argued *Eddings v. Oklahoma* years before.[67] Under questioning, he had conceded that execution of a boy for a crime committed at age ten was cruel and unusual punishment in violation of the Eighth Amendment.[68] He remembered that concession. He thought he would be asked again. He was ready, and for the record, I think his answers were right.

Justice Blackmun asked, "[S]uppose Thompson had been ten years old?"[69] Mr. Lee responded:

> Justice Stevens asked that question of me in the *Eddings* case in 1981 and I told him at that time in my view it would be a violation of the Eighth Amendment to impose the Death penalty on an individual that is ten years of age.[70]

Lee reaffirmed his view: "That would obviously be too young."[71] And now, he was on a slippery slope. Next question: "What about 12? . . . . Then you see, what I am going to do is I am going up the ladder—where would you draw the line?"[72]

Lee attempted escape: "We do not think that this Court should decide in advance what that minimum age should be."[73] The Court should look at the issue case by case.[74] The Justices, skeptical of the *Thompson* death sentence, would not give up. A Justice asked, "But you would say that any ten-year-old, no matter where he is, may not be executed?"[75] Mr. Lee was candid: "I think that there would be common and unanimous agreement among all people that that would be too young for an individual to receive the Death penalty. However, we think the country is divided with regard to the minimum age with imposing of the Death sentence."[76]

---

66. WJB OT '87 History, *supra* note 42, at 48.

67. 455 U.S. 104, 105 (1982). Ironically, I had arranged a moot court at the University of Oklahoma College of Law to help Deputy Attorney General Lee prepare for the *Eddings* oral argument in 1982.

68. Transcript of Oral Argument at 26, *Eddings*, 455 U.S. 104 (No. 80-5727).

69. Transcript of Oral Argument at 24, *Thompson*, 487 U.S. 815 (No. 86-6169).

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. Transcript of Oral Argument, *Thompson*, *supra* note 69, at 24.

75. *Id.*

76. *Id.* at 25.

After a brief digression about how many young persons were on death row and after making his argument that Wayne's past had been violent, the Justices dragged Mr. Lee back to his concession.[77] Another Justice, William Brennan, I believe, pressed:

> Mr. Lee, may I ask you, when you conceded that the execution of a ten-year-old for murder would be unconstitutional, are you resting that on a violation of the "cruel and unusual punishment" clause of the Eighth Amendment?
> [Mr. Lee]: Yes, Your Honor, I think that would violate anybody's sense of decency under the Eighth Amendment.[78]

Lee conceded "this Court is going to be the arbiter as . . . what does constitute a situation that would violate the consensus of the public in this country that an execution of a person of a particularly young age would be unconstitutional."[79] Here Mr. Lee went a step too far for Justice Scalia.

Justice Scalia began to throw roadblocks in Mr. Lee's effort to preserve a broad discretion. He showed his dismay that Lee had "accepted" that the Court could define an age limit derived from the Eighth Amendment.[80] All that remained for decision, Justice Scalia complained, was the appropriate age limit.[81] Justice Scalia then pushed Lee into a corner: "[D]o not argue to us why a rule of constitutional law establishing a chronological age is bad, because you have accepted a rule of constitutional law that uses a chronological age, have you not?"[82] Justice Thurgood Marshall asked what line Mr. Lee would draw.[83] Mr. Lee responded:

> If there was any bright line, and I have thought about this for six years since *Eddings*, and of course I thought about it before *Eddings*, if I had to pick a particular bright line, if there was a case directly before this Court, if there is any bright line, Age 14 is the age of common law age incapacity, and this Court in two previous cases, the *Gault* case and the *Ford* case, which you yourself wrote, Justice Marshall, you used the common law as the guideline for, in that particular case, for the imposition of the Death Penalty on somebody who was insane.

---

77. *Id.* at 25-26.
78. *Id.* at 26.
79. Transcript of Oral Argument, *Thompson*, *supra* note 69, at 28.
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.* at 32.

> Also, Blackstone, in his Commentaries on page 23, which we have cited in our brief, pointed out that from seven to 14 is the common law age of presumed incapacity.[84]

Justice Marshall, who usually was silent during oral argument, responded: "I would say that our educational system and our government and everything else has sure progressed from Blackstone. Has it not?"[85] Mr. Lee admitted: "Well, yes, Your Honor."[86]

Still later, Justice Scalia gave Mr. Lee a very hard time when he tried to argue for a broad state discretion: "You are really—it seems to me that you are arguing two different lines: your argument you are now supporting says that there cannot be any minimum age."[87] Lee attempted to return to his view that "the states should—are the proper entity to decide, what the minimum age should be, is all I am saying."[88] Justice Scalia offered one more sarcastic sign of his fury: "Above ten, anyway?"[89]

One point underscores the unfairness of Justice Scalia's treatment of Mr. Lee. When Justice Scalia announced his own considered view in his dissenting opinion, he made the exact same concession as did Lee.[90] There was a bottom somewhere. In Scalia's words, after he also referred to Blackstone's treatment of the age of responsibility at common law: "Doubtless, at some age, a line does exist—as it has always existed in the common law . . . below which a juvenile can *never* be considered fully responsible for murder."[91]

Justice Brennan's clerks reported, "[s]pirits ran high in chambers following oral argument . . . ."[92] First among the reasons for good cheer was the concession.[93] They also perceived "the apparent receptivity of the Justices to various petitioner's arguments . . . ."[94] Still, eyes were focusing on Sandra Day O'Connor. Of course, her clerk was "under a 'gag rule' . . . ."[95] Still, "there was considerable optimism that the Court might even set the minimum age at 18."[96]

---

84. Transcript of Oral Argument, *Thompson*, *supra* note 69, at 32; *see* In re Gault, 387 U.S. 1, 16 (1967); *see also* Ford v. Wainwright, 477 U.S. 399, 406 (1986).
85. Transcript of Oral Argument, *Thompson*, *supra* note 69, at 32.
86. *Id.*
87. *Id.* at 34-35.
88. *Id.* at 35.
89. *Id.*
90. *See Thompson*, 487 U.S. at 872 (1988) (Scalia, J., dissenting).
91. *Id.*
92. WJB OT '87 History, *supra* note 42, at 48.
93. *Id.* at 48-49.
94. *Id.* at 49.
95. *Id.*
96. *Id.*

Our team was also satisfied, though worried. Justice O'Connor had offered little sign of her inclinations to us. Still, we had said what we hoped. There was little of the after-the-fact, "Oh, I wish I had said . . ." second-guessing. We would not know what was happening for a long time. Elapsed time between oral argument on November 9 and the decision's announcement was the longest for any case of the term; the Court decided the case on the last scheduled day of the October 1987 Term, June 29, 1988.[97]

The conference of the Justices. At the conference on Friday after the oral argument, the Chief Justice, Justices White, and Scalia announced their intent to affirm Oklahoma's judgment.[98] The Chief noted that the state had "conceded" a line existed, but he thought it "[h]ard to lay down a def[inite] rule."[99] Justice Brennan noted his usual views opposing all death sentences, and his preference for drawing a line at age eighteen.[100] He said he could "go lower," presumably to decide this case.[101] Justices White, Marshall, and Blackmun announced their votes, but none of Blackmun's notes record anything said.[102]

Justice Stevens voted to set aside Oklahoma's death penalty on age-related issues, but he was not persuaded by the argument that the inflammatory photographs undermined the reliability of Oklahoma's sentencing.[103] He followed the classic view that the Court should decide only what it needed to.[104] Executions for crimes at this age had already all but disappeared. The sanction served no deterrent purpose. It was not necessary to address an age limit of eighteen, because Wayne was fifteen at the time of the crime: "That is all we need to decide. The Court should hold 15 is too young."[105] Because Justice Stevens would not reach the

97. *Thompson*, 487 U.S. 815 (the case was decided on June 29, 1988).

98. Harry A. Blackmun Papers, Manuscript Division, Library of Congress, Box 502, Contents #86-6169, Thompson v. Oklahoma [hereinafter Blackmun Conference Notes].

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. Blackmun Conference Notes, *supra* note 98.

104. *Id.*

105. *Id.* Justice Stevens's notes read:

alm no 15 yr old elec
no need as a deterrent
no go to 18 in this case
this one is 15
that is all we need to decide
hold 15 is too young.

photos issue, he, not Justice Brennan, was the senior Justice for the eventual coalition of four Justices, and he reserved the writing of the opinion for himself.[106]

The case turned on the votes of the two junior Justices: Sandra Day O'Connor and Antonin Scalia.[107] Blackmun's notes are revealing about the Justices' thinking—and their debt to Victor Streib.[108]

Justice O'Connor said she was personally opposed to the death penalty.[109] But though Blackmun's notes in this case don't say, the implication was that she would not vote her personal views. She continued, relying on the information that Victor Streib had gathered and disseminated: execution of persons for crimes committed at age fifteen or younger had all but disappeared. She took note that the United States had ratified the Geneva Convention.[110] She came to the conclusion that the Eighth Amendment barred execution of persons under age sixteen.[111]

O'Connor's vote would decide the case, if she did not change her mind.[112] Justice Scalia had only an opportunity to dissent.[113] Interestingly, he began as did Justice O'Connor, discussing his personal views: that he "would place at 18 or 21 if I had to on my personal views."[114] He interpreted the rarity of juvenile executions only as proof that juries were doing their jobs.[115]

> [Justice Brennan] returned from Conference that Friday morning elated: the Court had voted 5 -3 to reverse the conviction on the ground that the execution of anyone who committed a capital crime while under the age of 16 was unconstitutional.[116]

---

106. WJB OT '87 History, *supra* note 42, at 49.
107. *See id.* at 49-50.
108. *See* Blackmun Conference Notes, *supra* note 98.
109. *Id.*
110. *Id.*
111. *Id.* Justice O'Connor's notes read:

Only 12 < 15 exec since 1900
none since 1940
3 on death row.

112. WJB OT '87 History, *supra* note 42, at 49-50.
113. *See* Blackmun Conference Notes, *supra* note 98 (drawing the conclusion that only three of the Justices were voting with Scalia).
114. *Id.*
115. *Id.*
116. WJB OT '87 History, *supra* note 42, at 49. The conviction was not at issue; only the death sentence.

But the consensus and result were fragile. After Justice Stevens circulated his draft opinion, Justice O'Connor wrote a memorandum, which the Brennan clerks characterized as "cryptic."[117] It was brief: "This is a difficult case for me. I am still not at rest on it and will not make a final decision until I see the dissenting opinion."[118] Ten days prior to the scheduled end of Term, she declined to announce her vote, even when pressed by fellow Justices.[119]

The decision of the Court: The opinion of Justice Stevens. Justices Brennan, Marshall, and Blackmun joined Justice Stevens to conclude that execution of Wayne Thompson for murder would violate the constitutional prohibition against the infliction of "cruel and unusual punishments" because he was only fifteen years old at the time of his offense.[120] It was the first time any American court had struck down a death sentence on constitutional grounds because the accused was too young at the time of the crime.[121]

The Court noted that the Eighth Amendment, though "a categorical prohibition against the infliction of cruel and unusual punishments," offered no definition or rules to "define the contours of that category. [The authors of the Eighth Amendment] delegated that task to future generations of judges, who have been guided by the 'evolving standards of decency that mark the progress of a maturing society.'"[122] The Justices honored and cited Justice Powell's arguments to define the general traditions at stake in the case, stating:

> Justice Powell has repeatedly reminded us of the importance of "the experience of mankind, as well as the long history of our law, recognizing that there *are* differences which must be accommodated in determining the rights and duties of children as compared with those of adults. Examples of this distinction abound in our law: in contracts, in torts, in criminal law and procedure, in

117. *Id.*
118. *Id.*
119. *Id.* at 50.
120. *See Thompson*, 487 U.S. at 818, 838 (plurality opinion).
121. *See* Neelum Arya, *Using Graham v. Florida to Challenge Juvenile Transfer Laws*, 71 LA. L. REV. 99 (2010) (stating rule of treating juveniles differently in regards to the death penalty was first established in *Thompson*).
122. *See Thompson*, 487 U.S. at 821 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion)).

> criminal sanctions and rehabilitation, and in the right to vote and to hold office."[123]

Despite considerable diversity in state law, there was "complete or near unanimity among all 50 States and the District of Columbia in treating a person under 16 as a minor for several important purposes."[124] The Justices took advantage of the Mr. Lee's concession—and Justice Scalia's.[125] They noted that state statutes offered an arguably ambiguous pattern, so that "our current standards of decency would still tolerate the execution of 10-year-old children. We think it self-evident that such an argument is unacceptable; indeed, no such argument has been advanced in this case."[126]

From this point of judicial consensus, the Court turned to more contested ways of discovering the relevant legal traditions. But one specific statistic seemed to weigh heavily as a rejoinder to the view of the dissent:

> When we confine our attention to the 18 States that have expressly established a minimum age in their death penalty statutes, we find that all of them require that the defendant have attained at least the age of 16 at the time of the capital offense.
>
> The conclusion that it would offend civilized standards of decency to execute a person who was less than 16 years old at the time of his or her offense is consistent with the views that have been expressed by respected professional organizations, by other nations that share our Anglo-American heritage, and by the leading members of the Western European community.[127]

In short, a specific point of near unanimity among those jurisdictions making a conscious choice was reinforced by relevant, albeit general, traditions.

The Court relied heavily on the "second societal factor"—the behavior of juries—and the academic work of Professor Streib.[128] Their conclusion, despite the ambiguity of the "statistics," was that Wayne Thompson was one of a handful of unfortunate boys that "received sentences that are 'cruel

123. *Id.* at 823 (quoting Goss v. Lopez, 419 U.S. 565, 590-91 (1975) (Powell, J., dissenting)).
124. *Id*. at 824.
125. *Id.* at 828 n.28.
126. *Id.* at 828.
127. *See Thompson*, 487 U.S. at 829-30.
128. *Id.* at 832 nn. 36-37.

and unusual in the same way that being struck by lightning is cruel and unusual.'"[129]

In a final section of the Stevens opinion, the Justices rendered their own judgment about the justice of a death sentence for a boy's crime committed at age fifteen:

> [W]e are not persuaded that the imposition of the death penalty for offenses committed by persons under 16 years of age has made, or can be expected to make, any measurable contribution to the goals that capital punishment is intended to achieve. It is, therefore, "nothing more than the purposeless and needless imposition of pain and suffering," and thus an unconstitutional punishment.[130]

The Justices declined to "'draw a line' that would prohibit the execution of any person who was under the age of 18 at the time of the offense."[131] They decided only the case before them: "[W]e do so by concluding that the Eighth and Fourteenth Amendments prohibit the execution of a person who was under 16 years of age at the time of his or her offense."[132]

The concurring opinion of Justice O'Connor. Justice Blackmun has been quoted as saying: "'Sandra's tough. She's conservative. She's a state's righter. She wants to let states decide things like this. . . . but here was a 15-year old, and the soft spots in her armor . . . are children and women.'"[133] She had changed her mind since she announced agreement with a line at age sixteen at the conference, but she also could not tolerate remanding the case for Oklahoma's justice. In the account of *Thompson* in unpublished Clerk's History, Justice Brennan's clerks thought her concurrence was strange.[134] In the published dissenting opinion, Justice Scalia—injudiciously—labeled her opinion a "loose cannon."[135]

Justice O'Connor began by noting that

> [t]he plurality and dissent agree on two fundamental propositions: that there is some age below which a juvenile's crimes can never be constitutionally punished by death, and that our precedents require us to locate this age in light of the "evolving

129. *Id*. at 833 (quoting Furman v. Georgia, 408 U.S. 238, 309 (Stewart, J., concurring)).
130. *Id.* at 838 (quoting Coker v. Georgia, 433 U.S. 584, 592 (1977)).
131. *Id.*
132. *Thompson*, 487 U.S. at 838.
133. DAVID G. SAVAGE, TURNING RIGHT: THE MAKING OF THE REHNQUIST SUPREME COURT 204 (1992).
134. WJB OT '87 History, *supra* note 42, at 50.
135. *See Thompson*, 487 U.S. at 877 (Scalia, J., dissenting).

> standards of decency that mark the progress of a maturing society."[136]

She had noticed that Justice Scalia had accepted Mr. Lee's candid and humane concession as a starting point for analysis.[137] She thought the evidence "about the relevant social consensus" was persuasive.[138] "[A] national consensus forbidding the execution of any person for a crime committed before the age of 16 very likely does exist . . . ."[139] But she was not certain and was "reluctant to adopt this conclusion as a matter of constitutional law without better evidence than we now possess."[140] She wanted to define a rule only "when better evidence is available . . . ."[141] She explicitly refused to count statutes as Justice Scalia thought logic required:

> The most salient statistic that bears on this case is that every single American legislature that has expressly set a minimum age for capital punishment has set that age at 16 or above. See ante at 829, and n. 30. When one adds these 18 States to the 14 that have rejected capital punishment completely, see ante at 826, and n. 25, it appears that almost two-thirds of the state legislatures have definitely concluded that no 15-year-old should be exposed to the threat of execution. See also ante at 829, n. 29 (pointing out that an additional two States with death penalty statutes on their books seem to have abandoned capital punishment in practice). Where such a large majority of the state legislatures have unambiguously outlawed capital punishment for 15-year-olds, and where no legislature in this country has affirmatively and unequivocally endorsed such a practice, strong counterevidence would be required to persuade me that a national consensus against this practice does not exist.[142]

Professor Streib's evidence and the approach to counting statutes in petitioner's reply brief had effect.[143] Almost all of Justice O'Connor's opinion seemed to target Justice Scalia's dissent as wrong and wrong-headed; she said much less about the opinion of Justice Stevens:

---

136. *Id.* at 848 (O'Connor, J., concurring) (quoting *Trop*, 356 U.S. at 101).
137. *Id*. at 848-49.
138. *Id.* at 848.
139. *Id.* at 848-49.
140. *Thompson*, 487 U.S. at 849 (O'Connor, J., concurring).
141. *Id.*
142. *Id*.
143. *See Rep. Brief. Pet. U.S.*, *supra* note 34, at 1-3.

> If we could be sure that each of these 19 state legislatures had deliberately chosen to authorize capital punishment for crimes committed at the age of 15, one could hardly suppose that there is a settled national consensus opposing such a practice. In fact, however, the statistics relied on by the dissent may be quite misleading. When a legislature provides for some 15-year-olds to be processed through the adult criminal justice system, and capital punishment is available for adults in that jurisdiction, the death penalty becomes at least theoretically applicable to such defendants. This is how petitioner was rendered death eligible, and the same possibility appears to exist in 18 other States. . . . As the plurality points out, however, it does not necessarily follow that the legislatures in those jurisdictions have deliberately concluded that it would be appropriate to impose capital punishment on 15-year-olds (or on even younger defendants who may be tried as adults in some jurisdictions).[144]

In short, Justice O'Connor thought that, at a minimum, the execution of a boy for a crime of childhood ought to be the result of a conscious legislative choice.[145] Oklahoma, like many states, had extended adult or "as if he were an adult" jurisdiction, without drawing a minimum line for eligibility for a death sentence.[146] It was impossible to know if such states had even considered the impact and justice of capital punishment for crimes of childhood. In Justice O'Connor's words, "there is no indication that any legislative body in this country has rendered a considered judgment approving the imposition of capital punishment on juveniles who were below the age of 16 at the time of the offense."[147]

Still, Justice O'Connor "would not substitute our inevitably subjective judgment about the best age at which to draw a line in the capital punishment context for the judgments of the Nation's legislatures."[148] To do so might "conceivably reflect an error similar to the one we were urged to make in *Furman*."[149]

> The day may come when we must decide whether a legislature may deliberately and unequivocally resolve upon a policy authorizing

144. *Thompson*, 487 U.S. at 850 (O'Connor, J., concurring) (citations omitted).
145. *Id.* at 849-50.
146. *Id.* at 818-21, 826-29 (plurality opinion).
147. *Id.* at 852 (O'Connor, J., concurring).
148. *Id.* at 854 (citing Enmund v. Florida, 458 U.S. 782, 826 n.42 (1982) (O'Connor, J., dissenting)).
149. *Thompson*, 487 U.S. at 855 (O'Connor, J., concurring).

> capital punishment for crimes committed at the age of 15. In that event, we shall have to decide the *Eighth Amendment* issue that divides the plurality and the dissent in this case, and we shall have to evaluate the evidence of societal standards of decency that is available to us at that time. In my view, however, we need not and should not decide the question today.[150]

Justice O'Connor understood the issues, the evidence, the injustice of executions for crimes of childhood, and the irrationalities of the criminal justice system.[151] Her restraint was a reflection of her judicial philosophy shared by the pragmatic Justices of the center, as was her narrowly-crafted holding:

> In the peculiar circumstances we face today . . . the Oklahoma statutes have presented this Court with a result that is of very dubious constitutionality, and they have done so without the earmarks of careful consideration that we have required for other kinds of decisions leading to the death penalty. In this unique situation, I am prepared to conclude that petitioner and others who were below the age of 16 at the time of their offense may not be executed under the authority of a capital punishment statute that specifies no minimum age at which the commission of a capital crime can lead to the offender's execution.[152]

Justice O'Connor admitted her conclusion was "itself unusual."[153] Perhaps because Justice Scalia had spent time and energy to attract her to his opinion, perhaps because he saw her principle as "new," he defamed her analysis as a "loose cannon."[154] Actually, she crafted a rationale so narrow

---

150. *Id.*
151. *Id.*
152. *Id.* at 857-58.
153. *Id.* at 858.
154. *Thompson*, 487 U.S. at 877 (Scalia, J., dissenting). Specifically, he thought Justice O'Connor's concurrence did

> not fulfill its promise of arriving at a more 'narrow conclusion' than the plurality, and avoiding an "unnecessarily broad" constitutional holding . . . . To the contrary, I think it hoists on to the deck of our *Eighth Amendment* jurisprudence the loose cannon of a brand new principle. If the concurrence's view were adopted, henceforth a finding of national consensus would no longer be required to invalidate state action in the area of capital punishment. All that would be needed is uncertainty regarding the existence of a national consensus, whereupon various protective requirements could be imposed, even to the point of specifying the process of legislation.

Id. (citations omitted).

it was not likely to "misfire"—or fire at all in subsequent cases. She sought only to "avoid unnecessary, or unnecessarily broad, constitutional adjudication" while still ensuring that Wayne Thompson would live.[155]

Tradition, Justice Scalia's dissent, and Professor Streib's scholarship. *Thompson v. Oklahoma* was once a landmark decision on capital punishment, but its significance has been limited by *Stanford v. Kentucky* and eclipsed by *Roper v. Simmons*.[156] *Thompson* still remains an important, illustrative chapter in a longer, more complicated debate about whether national tradition is a legitimate basis for interpreting ambiguous constitutional text.

"Level of generality is destiny in interpretive disputes . . . ."[157] This is especially so in contests over American constitutional traditions. Even in cases focusing on explicit textual restrictions on majority power, Justice Scalia consistently urges that abstract judicial tests "ought to be crafted so as to reflect—those constant and unbroken national traditions that embody the people's understanding of ambiguous constitutional texts."[158] And so: "'[W]hen a practice not expressly prohibited by the text . . . bears the endorsement of a long tradition of open, widespread, and unchallenged use that dates back to the beginning of the Republic, we have no proper basis for striking it down.'"[159] Of course, there are few specific government policies that are "expressly prohibited." The debate is about open-ended phrases and general prohibitions that are explicit—and ambiguous.[160]

When litigants point to a tradition in support of unenumerated rights, such as privacy or parental autonomy, Scalia opposes generalizing.[161] Judges must focus analysis on "the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified."[162]

> Because . . . general traditions provide such imprecise guidance, they permit judges to dictate rather than discern the society's views.

155. *Id.* at 858 (O'Connor, J., concurring).

156. *See Roper*, 543 U.S. at 561-62, 568 (discussing the Court's past interpretation of cruel and unusual punishment and use of "evolving standards of decency" in *Thompson v. Oklahoma* and *Stanford v. Kentucky*).

157. Thomas More Law Ctr. v. Obama, 651 F.3d 529, 560 (6th Cir. 2011) (Sutton, J., concurring).

158. United States v. Virginia, 518 U.S. 515, 568 (1996) (Scalia, J., dissenting) (emphasis omitted).

159. *Id.* (quoting Rutan v. Republican Party of Ill, 497 U.S. 62, 95 (1990) (Scalia, J., dissenting)).

160. *Id.*

161. *Id.*

162. Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989) (plurality opinion). Only Chief Justice Rehnquist joined Justice Scalia's footnote 6, which proposed a "specific tradition" test. *Id.* at 113.

> . . . . Although assuredly having the virtue (if it be that) of leaving judges free to decide as they think best . . . a rule of law that binds neither by text nor by any particular, identifiable tradition, is no rule of law at all.[163]

The issue of the juvenile death penalty and the Eighth Amendment cases is, therefore, one of many examples of controversy over judicial searches for cultural presuppositions, customs, mores and verifiable legal traditions. One might think that less proof of tradition, or at least less specific proof, might suffice when interpreting text that seems to be an explicit mandate for using tradition. After all, the phrase "cruel and unusual" seems plainly to require an assessment—by someone—of whether a particular punishment is harsh and inhumane (based on someone's moral judgment).[164] The word "unusual" is, if anything, clearer: it seems to refer to punishments that are "rare," "freakishly rare," "unheard of," or—at least—not common or ordinary.[165] "[W]hat is 'unusual' refers to infrequency at a point in time—and times change."[166]

The Framers and ratifiers knew all this and hesitated before ratification.[167] Noah Webster, an advocate of a national constitution and author of America's first great dictionary, complained: "'Unless you can, in every possible instance, previously define the words excessive and unusual — . . . any restriction of . . . power by a general indefinite expression, is a nullity—mere formal nonsense.'"[168] The legislative history of the words negates any idea that the framers intended a fixed meaning. The Congress

---

163. *Id.* at 127.

164. *See, e.g.*, WEBSTER'S NEW COLLEGIATE DICTIONARY (1976) (defining "cruel" as "disposed to inflict pain or suffering" or "devoid of humane feelings" or "causing or conducive to injury, grief, or pain" or "unrelieved by leniency"); RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 321 (Laurence Urdang & Stuart Berg Flexner eds., College ed. 1968) (defining "cruel" as "willfully or knowingly causing pain or distress to others," or "enjoying the pain or distress of others," or "rigid; stern; unrelentingly severe"); THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 437 (4th ed. 2000) (defining "cruel" as "[d]isposed to inflict pain or suffering" or "causing suffering; painful."); POCKET OXFORD DICTIONARY OF CURRENT ENGLISH (8th ed. 1992) (defining "cruel" as "causing pain or suffering, esp., deliberately" or "harsh, severe").

165. *See, e.g*, WEBSTER'S NEW COLLEGIATE DICTIONARY, *supra* note 164 (defining "unusual" as "uncommon" or "rare"); THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, *supra* note 164, at 1888 (defining "unusual" as "[n]ot . . . common, or ordinary"); POCKET OXFORD DICTIONARY OF CURRENT ENGLISH, *supra* note 164 (defining "unusual" as "remarkable"); RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE, *supra* note 164, at 1442 (defining "unusual" as "not . . . common, or ordinary; . . . exceptional").

166. *See* Tepker, *supra* note 65, at 815.

167. *See id.*

168. *Id.* at 814 (quoting Noah Webster, *Reply to the Pennsylvania Minority: "America,"* DAILY ADVERTISER (N.Y.), Dec. 31, 1787, *reprinted in* 1 THE DEBATE ON THE CONSTITUTION 553, 559 (Bernard Bailyn ed., 1993)).

proposing the Eighth Amendment as part of the Bill of Rights heard objections to the words on grounds that "'the import of them is too indefinite.'"[169] All seem to have understood that the clause's objective was "'to express a great deal of humanity,'"[170] but specifics were lacking. It is not surprising to see courts embracing the view that the original understanding was that the amendment would require an evolving and tradition-based judicial analysis. Justice O'Connor's words in *Roper* are representative of original understandings, original fears, and a dominant interpretation on the Supreme Court:

> It is by now beyond serious dispute that the Eighth Amendment's prohibition of "cruel and unusual punishments" is not a static command. Its mandate would be little more than a dead letter today if it barred only those sanctions—like the execution of children under the age of seven—that civilized society had already repudiated in 1791.[171]

Additionally, there is no genuine alternative to assessing national tradition: "[B]ecause '[t]he basic concept underlying the *Eighth Amendment* is nothing less than the dignity of man,' the Amendment 'must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.'"[172]

Justice Scalia has admitted that perhaps the Eighth Amendment's text has "evolutionary content."[173] But he does not allow a different approach for an explicit textual restriction, as opposed to the more controversial and problematic "substantive due process" line of cases.[174] Even when the text embraces an evolving moral standard, Justice Scalia cannot endorse the long, well-established judicial consensus to "the 'evolving standards of decency that mark the progress of a maturing society.'"[175]

---

169. Tepker, *supra* note 65, at 815 (quoting 1 ANNALS OF CONG. 782 (Joseph Gales ed., 1834) (statement of Rep. Smith)). This phrase is also quoted in Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CALIF. L. REV. 839, 842 (1969); Weems v. United States, 217 U.S. 349, 368-69 (1910); *Furman*, 408 U.S. at 243-45 (Douglas, J., concurring); *Id.* at 262-63 (Brennan, J., concurring).

170. Tepker, *supra* note 65, at 815 (quoting 1 ANNALS OF CONG. 782 (Joseph Gales ed., 1834) (statement of Rep. Livermore)).

171. *Roper*, 543 U.S. at 589 (O'Connor, J., dissenting).

172. *Id*. (quoting *Trop*, 356 U.S. at 100-01 (plurality opinion)).

173. *See, e.g*., Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862, 864 (1989).

174. *See Thompson*, 487 U.S. at 874-77 (Scalia, J., dissenting).

175. *Id.* at 821 (plurality opinion) (quoting *Trop*, 356 U.S. at 101).

> [T]he risk of assessing evolving standards is that it is all too easy to believe that evolution has culminated in one's own views. To avoid this danger, we have, when making such an assessment in prior cases, looked for objective signs of how today's society views a particular punishment.[176]

In short, Justice Scalia wants specific evidence of a specific tradition approach, and only one type of evidence will do: statute counts. Justice Scalia relies almost exclusively on a count of state statutes.[177]

> The most reliable objective signs consist of the legislation that the society has enacted. It will rarely, if ever, be the case that the Members of this Court will have a better sense of the evolution in views of the American people than do their elected representatives.[178]

In Scalia's analysis, what states permit—and what they theoretically might do—is all that matters.[179] To bolster the impression that executing children is not to be compared with discarded punishments like flogging and branding, he ignores whether the states have made an explicit decision (demonstrating conscious legislative choice) or an implicit one (when the legislative motive was ambiguous).[180] It does not even matter whether the states actually use the power they theoretically preserve. And of course, states that ban capital punishment altogether must be ignored, because we do not know what they would do if they were to adopt a death penalty.[181] Evidently law, logic, constitutional text, original understanding, precedent—and facts, thanks to Victor Streib—do not command Justice Scalia's view of history or tradition.

Victor Streib did more than any other scholar to uncover the facts to reveal the realities and resonance of the nation's tradition of decent restraint in criminal judgments of children. We have, as Justice Marshall said in oral argument in *Thompson*, come a long way since Blackstone.[182] We have also

176. *Id.* at 865 (Scalia, J., dissenting) (citations omitted).
177. *Id.* at 867-70.
178. *Id*. at 865.
179. *See Thompson*, 487 U.S. at 867-70 (Scalia, J., dissenting).
180. *Compare, e.g.*, *id.* at 826 (plurality opinion) (rejecting the contention there is no chronological age at which the imposition of capital punishment is unconstitutional), *and id.* at 829 n.24 (rejecting focusing upon the minimum age required before a juvenile is waived from juvenile court to criminal court), *with id.* at 850-53 (O'Connor, J., concurring) (implying that if a state legislature were to conclude, explicitly, that execution of juveniles under sixteen were appropriate, the result would be different).
181. *Roper*, 543 U.S. at 610-11 (Scalia, J., dissenting).
182. Transcript of Oral Argument, *Thompson*, *supra* note 69, at 32.

progressed: flogging and branding were not historically considered "cruel" and "unusual."[183] It is the judicial assessment of tradition—a realistic, well-informed and humane assessment—that is possible because Victor Streib made so significant a difference. As the saying goes, everyone, particularly Supreme Court Justices, are entitled to their own opinions; no one is entitled to their own facts. And Victor Streib supplied the facts. His data helped define the battleground. The patterns, their ambiguities, and significance left the parties free to assess the national tradition on both a specific and a general level. The opponents of the juvenile death penalty were able to show broader traditions, as well as patterns in the statute counts that persuaded Justices Blackmun, Stevens, Powell, and—most influentially—Sandra Day O'Connor that there was a real, reliable tradition to be weighed. As in other contexts, these Justices "of the center" did not insist on universality, incontrovertibility, or a principle developed so comprehensively by democratic processes that judicial rulings were beside the point.

Justice Scalia has lost his quest for specificity, at least for now. *Planned Parenthood v. Casey*[184] explicitly rejects his "specific tradition" test for substantive due process cases.[185] The Court's most recent analyses of the cruel and unusual punishment clause, especially *Roper v. Simmons*, also adopt an approach that rejects his method. In *Roper*, the Court cites both specific evidence and general traditions to assess America's "evolving standards of decency."[186] The opinion notes and reflects a general tradition that juveniles, like the mentally retarded, are "'categorically less culpable than the average criminal.'"[187] The opinion of Justice Kennedy left a lot to be desired. It is easily caricatured and mocked.[188] But it underscores the significance of *Thompson* and subsequent cases. For quite some time and in a variety of contexts, the Justices have thought it essential to

---

183. *See Furman*, 408 U.S. at 287; *id.* at 384 (Burger, C.J., dissenting).
184. 505 U.S. 833 (1992).
185. *Id.* at 847.

> It is also tempting, for the same reason, to suppose that the Due Process Clause protects only those practices, defined at the most specific level, that were protected against government interference by other rules of law when the Fourteenth Amendment was ratified. [*See*] Michael H. v. Gerald D., 491 U.S. 110, 127-128, n.6 (1989) (opinion of [Scalia], J.). But such a view would be inconsistent with our law.

Id.

186. *Roper*, 543 U.S. at 561-69; *see also* Graham v. Florida, 130 S. Ct. 2011, 2021 (2010).
187. *Roper*, 543 U.S. at 568 (quoting Atkins v. Virginia, 536 U.S. 304, 316 (2002)).
188. *See* Tepker, *supra* note 65, at 809, 814-15.

> immerse themselves in the tradition of our society and of kindred societies that have gone before, in history and the sediment of history which is law, and . . . in the thought and the vision of the philosophers and the poets. The Justices will then be fit to extract "fundamental presuppositions" from their deepest selves, but in fact from the evolving morality of our tradition.[189]

Victor Strieb's work on capital punishment of juveniles marked the emotional, intellectual and moral progress of a nation. His research helped attorneys, judges, and justices resist the passions of those would resurrect a nineteenth- or eighteenth-century version of justice, morality, and constitutional law. His scholarship helped show that consulting tradition—humanely and wisely—can recognize our nation's real constitutional progress and verify our nation's honest claim to be in the vanguard of the fight for human rights.

189. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 236 (1962).