

LAW AND THE LIMITS OF LOGIC:

THE USE AND ABUSE OF LOGICAL FALLACIES
IN LEGAL REASONING

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INTRODUCTION

- I came to law school as a student of philosophy.
- In law school I was surprised to find that the cases we studied and the arguments made by students and professors often included logical fallacies, especially informal fallacies.
- I was bothered by the extent to which law was riddled with logical error.
 - Perhaps I shouldn't have been surprised.
 - Faulty reasoning is commonplace in every realm of human endeavor
 - Humans are fallible
 - Lawyers are cunning and crafty

Law School Course on Law and Logic

- When I began teaching, I decided to try to do something about it.

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- I began with the beliefs:
 - Logical fallacies in the law are very common.
 - The best lawyers will avoid logical error.
 - The worst lawyers will commit logical error.
 - Purpose of study: identifying the mistakes of others (calling them by name); avoiding them ourselves.

- Midway through the course I concluded that I was only half right:
 - One characteristic of the worst lawyers is how frequently they make logical errors.
 - But to my surprise, one characteristic of the best lawyers is how adept they are at making arguments that include logical fallacies.

• To my surprise:

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- Not only does the law tolerate logical error, it often actually embraces it.
- Moreover, the law does not even attempt to eliminate or root out many types of logical error.
- Many important legal rules and doctrines rest upon informal logical fallacies.

• Legal education consists largely in learning how and when to make logically fallacious arguments.

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• One important distinguishing characteristic of the very best and very worst lawyers is how adept / ill adept they are at making arguments that are logically fallacious.

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• The law's deep commitment to logical error provides important insights into the law as a social institution.

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- My Purpose Today:

- Reflect upon the character of legal reasoning.

- Not primarily to enable us to be more effective in our criticism of others.

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- Rather, I hope this will be an occasion for self-reflection.

- In what manner do I commit logical fallacies?

- Do I use them in ways that are unfair or dishonest?
- Is my effectiveness and credibility enhanced or undermined by the ways in which I commit logical errors?

FRAMEWORK / AGENDA

- I. Introduction to Informal Logical Fallacies
 - II. Case Study: *Roper v. Simmons* (USSC, 2005)
 - III. Implications: Reflect upon the significance of the prevalence of logical error for lawyers (especially appellate lawyers) and for the law as a social institution.
- | Q: How are we to differentiate between appropriate and inappropriate use of informal fallacies?

I. LOGICAL FALLACIES AND THE LAW

- A. Three Components of Legal Reasoning
- B. Rhetoric and Logical Error
- C. Formal and Informal Logical Fallacies
- D. Cataloguing Informal Fallacies

I. LOGICAL FALLACIES AND THE LAW

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A. . Three Components of Legal
Reasoning

Phronesis
(Practical Wisdom)



**Legal
Reasoning**



Techne
(Craft)



Rhetorica
(Rhetoric)

I. LOGICAL FALLACIES AND THE LAW

B. Rhetoric and Logical Error

“Logic is concerned with an argument’s soundness and not its persuasiveness. Persuasiveness is a psychological matter studied in *rhetoric*. It is a basic and lamentable fact of human nature that convincing arguments are often fallacious, and sound arguments are often unconvincing.”

-- WAYNE DAVIS, AN INTRODUCTION TO LOGIC

What is Rhetoric?

- The Art of Persuasion
- Measure of Success
 - External Measure: Victory
 - Internal Measure: Best Possible Argument (complete, lacking nothing, coherent)
- Risks / Dark Side
 - Hired Gun / Sophist / Samurai
 - Advertiser / Manipulator
 - Demagogue (convinces that his ends are yours)
 - Kant: Using others' flaws for personal gain

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Logic and Rhetoric¶

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“Logic is concerned with an argument’s soundness and not its persuasiveness. Persuasiveness is a psychological matter studied in *rhetoric*. ¶

It is a basic and lamentable fact of human nature ¶

that convincing arguments are often ¶ fallacious, and sound arguments ¶ are often unconvincing.”¶

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-- WAYNE DAVIS, AN INTRODUCTION TO LOGIC¶

Three Components of Rhetoric

- Logos / Reason ▶ Logically sound arguments
- Pathos / Emotion ▶ Logical fallacies
- Ethos / Character ▶ Practical wisdom (including knowing how and when to use logical fallacies)

I. LOGICAL FALLACIES

C. Formal and Informal Logical Fallacies

- **Formal Fallacies:** Flaw in the form of an argument; if a formal fallacy exists, conclusion does not follow from premises. Logical error in deductive arguments usually involves formal fallacies.
- **Informal Fallacies:** Mistakes of reason that make it less likely that a conclusion follows from the premises; error lies not in the form but the content of an argument. Logical error in inductive arguments usually involves informal fallacies.

I. INTRODUCTION

D. Cataloguing Informal Fallacies

- No generally accepted theory or taxonomy of informal fallacies exists; various catalogues, some with as many as eighty informal fallacies.
- Informal fallacies are detected by reference to the content rather than the form of an argument.
- Although logically flawed, informal fallacies are often persuasive and may appear sound in form.
- An argument is not necessarily invalid when it includes an informal fallacy.

Three Categories of Informal Fallacies

(S. M. Engle, *With Good Reason: An Introduction to Informal Fallacies*)

- **Fallacies of Ambiguity:** amphibology, accent, hypostatization, equivocation, division, composition, vicious abstraction.
- **Fallacies of Presumption:**
 - **Fallacies of Overlooking the Facts:** sweeping generalization, hasty generalization, bifurcation.
 - **Fallacies of Evading the Facts:** begging the question, emotive language, complex question, special pleading, personal wishes.
 - **Fallacies of Distorting the Facts:** false analogy, false cause, irrelevance, red herring, non sequitur, slippery slope, straw man, quick fix.
- **Fallacies of Relevance:** genetic fallacy, *ad hominem* argument, circumstantial *ad hominem*, *tu quoque*, poisoning the well, appeal to the masses, appeal to pity or other emotions, the appeal to authority, appeal to ignorance, appeal to terror, fear, or force.

II. CASE STUDY

Roper v. Simmons, 543 U.S. 551 (2005)

Facts:

- In 1993, Christopher Simmons, who was seventeen years old, discussed with friends the “possibility of committing a burglary and murdering someone.”
- Simmons told his friends that because they were juveniles and not legal adults they could commit a murder without suffering any serious consequences.
- On September 8, 2003, Simmons and another juvenile friend, Charlie Benjamin, entered the home of Shirley Crook, where they found her alone.
- Simmons had previously been involved in an automobile accident with Crook, and she recognized him.

- Simmons and Benjamin bound Crook's hands, taped her eyes and mouth, placed her in the back of a minivan and drove to Castlewood State Park in St. Louis County, Missouri.
- At the park, Simmons and Benjamin "hog tied" Crook's hands and feet, covered her face, and Simmons then pushed her off a railroad trestle into a river below where she drowned.
- Simmons bragged to friends at his high school about committing the crime and was arrested the following day.
- Simmons confessed and reenacted the crime for police.
- Simmons was tried, convicted of first degree murder, and sentenced to death.

Trial Court

(workshop participant ideas)

Prosecution:

- (T. Emerson): Focus on confession.
- (K. Lougee): Offer plea deal to accomplice.
- (M. Smith): Emphasize planning and premeditation.
- (K. Bronston): Evidence: get the tape in.
- (S. Payton): Dehumanize defendant. Prepare groundwork for death penalty request.
- (Patrick Ascione): Get him tried as an adult.

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Trial Court (actual arguments)

Prosecution:

• (Utilizes emotive language): Prosecutor described Simmons as a “predator” with an “evil mind.”

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• (Makes an appeal to terror or fear): Suggested that Simmons would murder again if given the opportunity because he was inherently evil.

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• (Urges jury to reject special pleading): During closing arguments, Prosecution argued, do not let Simmons “use his age as a shield to protect him.”

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Trial Court

(workshop participant ideas)

Defense:

- (L. Curtis): His age; lower expectations of minors than of adults.
- (T. Sherman): Sympathy based upon age; neuroscience about brain development.
- (J. Slotnik): Penalty different for youthful offenders; possibility of rehabilitation.
- (P. Ascione): Whether or not he is mentally competent. Insanity defense???
- (K. Thomas): Family background; abuse family life?
- (S. Payton): Anticipate death penalty phase; U.S. is alone in its practice of executing minors.
- (J. Gowans): Expert evaluation; testimony; anticipate penalty phase.

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Trial Court (actual arguments)

Defense:

- (**Utilizes** emotive language): defense counsel repeatedly described the defendant as a “kid,” even though he was only seven months away from his eighteenth birthday when he committed the crime.
- (**Engages in** special pleading): Defense counsel emphasized Simmons’ immaturity.
- (**Makes an** appel to pity): The mother of one of Simmons’ friends testified that he had a special relationship with her family, that Simmons was helpful around the house, and that she trusted Simmons with her younger children.

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Trial Court

Outcome: Simmons found guilty of first degree murder.

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Trial Court Sentencing (workshop participant ideas)

Prosecution:

- (K. Lougee): Randomness of crime; particularly senseless.
- (J. Slotnik): Cold blooded intentional murder.
- (J. Gowans): Emphasize victim suffering.
- (T. Emerson): Because he is so amoral, cannot differentiate between right and wrong, risk of recidivism is high.
- (T. Booher): How close he is to 18 years old. Emphasize adult-like behaviors.
- (L. Gray): Emphasize value of Mrs. Crooks life and the harm to her family and friends.
- (L. Eberting): Casual response; went on with life as usual; went to school; bragged about it; effect on the lives of others.

- (J. Mangum): He was recruiting others to participate. He is a danger to community; evil leadership potential.

Trial Court Sentencing (actual arguments)

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Prosecution:

- (Makes appeal to pity for victim's family):
Victim's family members testified, including husband, sister, and daughter. Husband spoke of his wife's fear of heights; daughter testified that dying in that manner must have been very painful; sister read a prayer in her testimony.

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- (Makes appeal to pity for Simmons' family):
Prosecution even argues that it was in the best interests of Simmons' family for Simmons to be executed: "Look at what [Simmons] has done to them, and they're asking you to spare his life so he can remain in prison as a constant reminder to them of the acts he did on that night. Show some mercy to [Simmons'] family, give him death."

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- (**Makes** appeal to terror): Prosecution tries to turn the youthfulness of the Defendant from a mitigating into an aggravating factor: “Let’s look at the mitigating circumstances. . . Think about age. Seventeen years old. Isn’t that scary? Doesn’t that scare you? Mitigating? On the contrary I submit. Quite the contrary.”

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Trial Court Sentencing (workshop participant ideas)

Defense:

- (M. Ball): He is young enough to be rehabilitated. Still capable of learning and growing.
- (S. Ellsworth): Attack prosecutor for being rabid and monomaniacal.
- (J. Inouye): First crime; no multiple victims.
- (J. Mangum): Youthful susceptibility to potential revenge motive. Bad luck of meeting someone who knew him; maybe he bore a grudge; acted with passion in the instant.
- (M. Ball: Has found Jesus in his jail cell.
- (K. Thomas): He needs counseling, not death. Troubled background.
- (J. Slotnik): Circumstances under which he grew up; has never had a break.

- (Emerson): Closer to being a child than an adult.
Don't allow him to vote; too young to serve in military; can't buy alcohol; can't rent a car.

Trial Court Sentencing (actual arguments)

Defense:

- (Makes appeal to pity for Simmons' family):
Defense lawyer: "I'm asking you to give a life sentence for his family. Family and friends that basically have indicated to you, and shown you that a life sentence that you render is not the same in their eyes as the death penalty . . . just the fact that he's alive makes a difference to some people."
- (Makes appeal to pity for defendant): defense counsel repeatedly described defendant as a "kid."

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Arguments Defense Failed to Make: (Basis for ineffective assistance of counsel claim)

- (Failure to make appeal to pity): defense counsel failed to include testimony of Simmons being abused as a child by his step father.

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- (Failure to make appeal to pity): defense counsel failed to include testimony of Simmons' addictions to alcohol and drugs as possible explanations for his actions.

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Trial Court Sentencing

Outcome:

- Simmons sentenced to death.
- Missouri law allows age to be considered as a mitigating factor.
- In recommending death, the jury found the following aggravating circumstances:
 - Simmons murdered Crook for the purpose of receiving money
 - Simmons murdered Crook to avoid being arrested.
 - Simmons exhibited “depravity of mind,” and the murder was “outrageously and wantonly vile, horrible and inhuman.”

State Supreme Court
First Round: Ineffective Assistance of
Counsel, Etc.
(workshop participant ideas)

Petitioner/Defendant:

- (N. Kemp): Defense lawyers failed adequately investigate his background.
- (K. Loudee): Failed to call sympathetic witnesses; failure to make effective appeal to pity.
- (K. Bronston): Failure to persuasively argue troubled background and relevant case law.
- (K. Loudee): Find something screwed up in the jury instructions.
- (S. Payton): Didn't have adequate funds to defend case.
- (J. Inouye): Failure to get expert psychiatric testimony.

(J. Mangum): Confession should have been suppressed.

(J. Gowans): Failure to argue that it is cruel and unusual to execute a minor.

State Supreme Court
First Round: Ineffective Assistance of
Counsel
(actual arguments)

Petitioner/Defendant:

- (Accuses prosecution of engaging in improper ad hominem argument) Petitioner argues that a prosecution witness, a police officer, impermissibly offered opinion about Simmons' truthfulness. When the police officer who received Simmons' confession was asked whether he believed Simmons told him everything about what he did, the officer answered, "No, I do not." Petitioner argues that this constituted an improper comment by the police officer as to Simmons' veracity.

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- (Accuses prosecution of engaging in improper ad hominem argument) Prosecution witnesses testified that Simmons planned to steal from and murder a different neighborhood resident. Petitioner argues that this evidence of prior bad acts was both irrelevant and highly prejudicial, and should have been excluded by the rule which excludes evidence of other crimes.

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- (Complains about failure of trial defense counsel to object to appeal to terror, fear, or force during prosecution’s closing argument) Petitioner raises numerous claims of ineffective assistance of trial counsel. For example, defense counsel failed to object when the prosecution in closing arguments said: “We have to take a stand and take control of our streets. [They’re our] streets, [they’re our] homes. If we can’t be protected in our homes, we can’t be protected anywhere. Do you think he wants you protected in your home?”

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- (Complains about failure of trial defense counsel to make an appeal to pity and engage in special pleading) Petitioner complains that his trial counsel was “ineffective in failing to investigate and present evidence relating to abuse Simmons suffered as a child, his alcohol and drug abuse, [and] his mental illness.”

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- (Complains of improper appeal to pity by prosecution) Simmons argues that victim impact evidence introduced by prosecution violated due process.

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- (Engages in poisoning the well): Simmons’ attorneys claimed that the State’s position “defies logic.”

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- (Makes an *ad hominem* argument): Simmons’ attorneys attempted to undermine the credibility of a witness who testified that Simmons confessed the murder to him: The Defense argued that Moomey was a “29-year-old who had served a prison sentence for burglary and assault.” The Defense also stated that, Moomey was hardly an “ideal father figure and that it was the ‘talk in the neighborhood’ that Moomey had young men commit crimes for him” in return for allowing them to “drink in his house and . . . [do] drugs there.” Defendant also argued that Moomey is not to be trusted because he “helped plan Simmons’ crime.”

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- (Engages in circumstantial *ad hominem* argument re: prosecution witness) Petitioner argues that Moomey had vested interest in testifying that Simmons confessed to him: “Moomey believed he was being investigated in connection with the murder.”

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- (Engages in circumstantial *ad hominem* argument re: another prosecution witness)
Defense counsel argued that another witness, John Tessmer, a teenage friend of Simmons who testified that Simmons “had told him of a plan to rob and murder a male neighbor,” also could not be trusted and had a vested interest to testify against Simmons: “Based on his role in the offense, Tessmer – who at the time of trial had already been in juvenile custody for threatening to kill a woman and on juvenile probation for burglary – was charged as a juvenile with conspiracy to commit murder. The charges against Tessmer were dismissed when he agreed to testify against Simmons.”

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- (Complains that the trial court erred in allowing the prosecution to make unfair appeals to fear and allowing emotive or loaded language): According to the Missouri Supreme Court, “Simmons claims that the death penalty recommended by the jury and imposed by the trial court in this case was the result of the influence of passion, prejudice, or arbitrary factors. He claims that the victim impact evidence, the prosecutor’s closing argument, and the prosecutor’s alleged assertion that Simmons’ age was an aggravating and not a mitigating factor all require a reversal of the death penalty.”
- (Simmons complains that the trial court did not allow him to make *ad hominem* arguments and circumstantial *ad hominem* arguments to impeach State witnesses): Simmons complains that the court denied him the opportunity to use prior criminal histories of some of the witnesses at trial to impeach those witnesses.

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 First Round: Ineffective Assistance of
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State Supreme Court
First Round: Ineffective Assistance of
Counsel
(actual arguments)

Appellee/State:

- (Accuses petitioner of engaging in vicious abstraction): State accuses Simmons' counsel of committing fallacy of vicious abstraction, referring to language quoted in Simmons' brief and arguing that, taken in context, the argument does not work. Deleted: v

- (Accuses petitioner of engaging in vicious abstraction): State also accuses Simmons' counsel of omitting a footnote from text quoted in their brief that would have made clear that the text was being misused in Simmons' brief. Deleted: ing

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State Supreme Court

First Round: Ineffective Assistance of Counsel, Etc.

Outcome: Conviction and Sentence are Upheld.

- (Re: *ad hominem* arguments by prosecution)
Court held that the detective's comments did not constitute an improper comment on Simmons' veracity; that the trial court has broad discretion to admit evidence relating to other bad acts and that the inclusion of such testimony did not prejudice Simmons in light of the other overwhelming evidence of his guilt.
- (Re: prosecution's appeal to terror, fear, or force)
The Court states that it is, "of course, improper for a prosecutor to suggest personal danger to the jurors or their families if the defendant should be acquitted," but concludes that the "prosecutor's statement is a vague and ill-defined, near non-sequitur" and it "does not suggest personal harm to the jurors if Simmons is acquitted."

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- (Re: failure of trial defense counsel to make an appeal to pity and engage in special pleading) The court holds that the motion court did not clearly err in denying Simmons' claims of ineffective assistance of counsel.
- | • (Re: prosecution's use of emotive language) "It is not error for a prosecutor to characterize a defendant and his criminal conduct as long as the evidence supports such a characterization."
- | • (Re: emotive language by prosecution witnesses) "Witness testimony at the sentencing phase describing the loss suffered by the victim's family does not violate due process where the statements of the witnesses do not inflame the passions of the jury beyond the passion that the facts of the crime itself inflames."
- |

- (Re: use of *ad hominem* and circumstantial *ad hominem* arguments): Court held that such arguments are permissible, within limits. Such evidence can be used if the inquiry “would demonstrate either (1) a specific interest of the witness; (2) the witness’s motivation to testify favorably for the state; or (3) that the witness testified with an expectation of leniency.” Note that these bases are more likely to allow circumstantial *ad hominem* attacks rather than direct *ad hominem* attacks.

Eighth Circuit
First Round: Ineffective Assistance of
Counsel, Etc.

Held: Affirmed Missouri Supreme
Court's holding Affirming Conviction
and Sentence.

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United States Supreme Court
First Round: Ineffective Assistance of
Counsel, Etc.

Held: Cert denied.

Missouri State Supreme Court
Second Round: Eighth Amendment

Held: Execution of individuals under eighteen years of age at the time of their capital crimes is prohibited by the Eighth Amendment's prohibition of cruel and unusual punishment.

United States Supreme Court
Second Round: Eighth Amendment

Held: Cert granted on question of whether executing someone for a crime committed while they were a minor violates the Eighth Amendment's prohibition of cruel and unusual punishment.

United States Supreme Court
Second Round: Eighth Amendment

Key Precedents:

Stanford v. Kentucky (USSC, 1989) “We discern neither a historical nor a modern societal consensus forbidding the imposition of capital punishment on any person who murders at 16 or 17 years of age. Accordingly, we conclude that such punishment does not offend the Eighth Amendment’s prohibition against cruel and unusual punishment.” 492 U.S. at 380.

Atkins v. Virginia (USSC, 2002): holding that because a national consensus existed on the matter, executing mentally handicapped individuals violated the Eight Amendment's prohibition of cruel and unusual punishment. Thus, it is unconstitutional to execute someone who is mentally retarded (bright line rule).

Question: Whether to reverse *Stanford* and extend *Atkins*.

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United States Supreme Court (actual arguments)

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Petitioner/State:

- (**Engages in use of emotive language**): The State’s statement of facts in the case are highly charged with emotional language, including vivid descriptions of Mrs. Crook being “hog-tied,” and statements of Simmons to his friends that he and his friends could kill someone and “get away with it” because they were only juveniles. The State also mentions that Simmons later “bragged” about the murder, and characterizes it as “heinous.”
- (**Engages in appeal to the masses**): “The people in many states have chosen, through their legislatures, to make capital punishment available to prosecutors and juries when they find persons guilty of committing heinous crimes at age seventeen.” Also: “Legislative activity since 1989 reflects the public’s continued acceptance of capital punishment as an available sanction for those who murder at seventeen.”

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- (**Engages in** appeal to the authority of the select few): State makes a clever argument that the court in trumping the legislature can never represent the views of the masses: “Action [by the courts] is not a statute ‘passed by society’s elected representatives.’”

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- (**Engages in** appeal to tradition): State argues that a bright-line rule against executing someone who was a minor when crime was committed would “ignore Supreme Court precedent.” Specifically the State claims that “principles of *stare decisis* argue against reversing the holding in *Stanford v. Kentucky*.”

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- (Argues against sweeping generalization/bright line rule): State argues that the court should reject “a constitutional policy of stereotyping on the basis of an offender being age sixteen or seventeen.” Instead, the court should recognize that “the abilities of individual youth differ,” and “thus, it should be up to the jury to determine the appropriate punishment.”

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- (Makes slippery slope argument) State argues that if the Supreme Court determines that juveniles are to be immune from capital punishment, then “someone will come and say [juveniles] also must be immune from, for example, life without parole.”

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- (Complains about use of red herring by Missouri Supreme Court): State argues that some “evidence cited by the Missouri Supreme Court is largely inapposite” and “problematic,” and does not ultimately “lead to the conclusion the Missouri court reached.”

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 Lerted: against use of red herring by Missouri Supreme Court): State argues that some “evidence cited by the Missouri Supreme Court is largely inapposite” and “problematic,” and does not ultimately “lead to the conclusion the Missouri court reached.”

- (Complains against vagueness in Simmons’ argument): State claims that the “inadequacy of Simmons’s case begins with undefined use of “adolescence” – a term that ‘eludes precise characterization.’” The imprecision of this definition makes a bright line rule at a specific age like eighteen problematic.

United States Supreme Court (actual arguments)

Respondent/Defendant:

- (Scrupulously avoids ~~e~~ emotive language):
Detached and clinical account of the facts: The brief begins, “On September 9, 1993, fisherman discovered the body of a woman, later identified as Shirley Crook, floating in the Meramec River, in St. Louis County, Missouri. . . . The medical examiner determined that the cause of the death was drowning. . . . After learning that Christopher Simmons and his friend Charles Benjamin may have been involved in the crime, police arrested Simmons, a 17-year-old high-school junior with no previous criminal convictions. . . .”

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- (Engages in appeal to the authority of the many):

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Respondent cites data supporting argument that there is an international consensus against executing minors.

There has been a “consistent movement by legislatures and juries away from imposition of death on juvenile offenders.”

Also: “A national – and, indeed, worldwide – consensus has developed against the execution of offenders under the age of 18.”

Heading: “The national consensus is consistent with a worldwide revulsion against the execution of juvenile offenders.”

Also: “Every country in the world, except the United States and Somalia – which has no organized government – has now ratified the CRC; none has entered a reservation to the article prohibiting the execution of juvenile offenders.”

- (Engages in an appeal to the authority of the select few): “Opinions of professional organizations and religious groups, public polling, and world opinion” are cited as evidence of a national consensus against executing those who are under the age of eighteen when they commit their crimes.

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- (Makes a sweeping generalization): Simmons’ counsel argues, “No mature adult would have thought, as Chris Simmons reportedly said, I can get away with this because I’m 17 years old, when the mandatory punishment for him would have been life in prison.” Also: “The very nature of adolescence means that adolescents are less blameworthy than adults.” Also: “As any observer of teenagers would attest, adolescents ‘exhibit a disproportionate amount of reckless behavior, sensation seeking and risk taking’ compared to adults.”

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- (Defends a bright line rule sweeping generalization prohibiting execution of minors) Simmons argues that “The maturity of individual 16- and 17-year olds, of course, varies. But because of their developmental deficits and their inherent changeability, the case-by-case consideration that suffices for adults cannot provide the reliable assessment of character and culpability that the Eighth Amendment demands.”

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“But the alternative to a bright-line rule – permitting juries to decide, case by case, whether individual juvenile offenders are sufficiently mature to deserve death – is unworkable.

- (Rejects appeal to tradition of existing precedent) Respondent argues that existing precedent permitting execution of minors should not be decisive. “The very nature of the Eighth Amendment accordingly requires that the principle of *stare decisis* yield – as it did in *Atkins* – to compelling evidence that society’s values have changed.”

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United States Supreme Court

Holding: Execution of someone for a capital crime committed while a minor violates the Eighth Amendment's prohibition of cruel and unusual punishment.

Rationale: Extends the holding of *Atkins v. Virginia*, which held that executing someone who is mentally retarded violates the Eighth Amendment, based upon changed "national consensus." Regarding execution of offenders who are minors.

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Majority Opinion:

- (Engages in appeal to the masses) The Court engages in the appeal to the authority of the many in seeking to demonstrate a national and even international consensus against the juvenile death penalty. The Court notes that, since 1990, only eight countries, including the United States, have executed juveniles, and all of those countries, excluding the United States, have now “either abolished capital punishment for juveniles or made public disavowal of the practices.”

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Note: The search for a national consensus to determine the meaning of “cruel and unusual punishment” invites, indeed requires, an appeal to the masses. The very doctrinal test utilized by the Supreme Court is an appeal to the masses.

Note: The appeal to international opinion has proven very controversial and has resulted in a very public division on the Court.

- (Makes appeal to the ages) Justice Breyer, in arguing that international opinion is relevant to a determination of whether a national consensus against executing juvenile offenders, argues that Madison and Jefferson thought foreign law relevant.

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- (Defends sweeping generalization of bright-line rule): In response to argument that a bright-line rule against executing minors might result in differential treatment of situations of equivalent moral culpability: Majority opinion recognizes that “a rare case might arise in which a juvenile offender has sufficient psychological maturity, and at the same time demonstrates sufficient depravity to merit a sentence of death.” Nevertheless, as a general rule juveniles to not have the same culpability as adults, and a bright line rule must be drawn even if it is over and under inclusive.

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- (Makes appeal to the authority of tradition): In interpreting the Eighth Amendment, the Court says that the term cruel and unusual punishment “like other expansive language in the Constitution, must be interpreted according to its text, by considering history, tradition, and precedent, and with due regard for its purpose and function in the constitutional design.”

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Note: When a court is about to do something innovative and new, they will often cite “history, tradition, and precedent” as a basis for doing it.

- (Engages in appeal to the authority of the select few) In concluding that jurors do not have the requisite skills to determine whether a juvenile offender merits the death penalty, the Court notes that according to the rules of the American Psychiatric Association, trained psychiatrists are forbidden from diagnosing individuals under the age of eighteen with antisocial personality disorders because it is difficult to distinguish the juvenile offender with “transient immaturity” from the juvenile offender “whose crime reflects irreparable corruption.” The idea here is apparently that, since trained professionals are unable to make a reliable determination, then a layman juror would most likely be unable to do so as well. Thus, the authority of the select few is used to justify a bright-line rule that serves as a sweeping generalization to protect minority offenders from the death penalty.

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- (Supports defendants' use of emotional appeals and special pleading) The Supreme Court concludes that wide latitude must be given to defendants to make such arguments. "In any capital case a defendant has wide latitude to raise as a mitigating factor 'any aspect of [his or her] character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.'"

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