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An Examination of the Perceptions of the Supreme Court Held by Legal Professionals Through a Consideration of Oral Arguments

Jesse Miller

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AN EXAMINATION OF THE PERCEPTIONS OF THE SUPREME COURT HELD BY LEGAL PRO

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AN EXAMINATION OF THE PERCEPTIONS OF THE SUPREME COURT
HELD BY LEGAL PROFESSIONALS THROUGH A CONSIDERATION OF

ORAL ARGUMENTS

A Master Thesis

Submitted to the Faculty

of

American Public University

by

Jesse Miller

In Partial Fulfillment of the

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of

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Charles Town, WV

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DEDICATION

For inspiring in me the confidence required to undertake such an endeavor, the following work is dedicated to my mother.

ACKNOWLEDGEMENTS

Many thanks are owed to the professors of the political science department that helped me reach this point. The time that each of them invested in my education is greatly appreciated.

ABSTRACT OF THE THESIS

AN EXAMINATION OF THE PERCEPTIONS OF THE SUPREME COURT HELD BY
LEGAL PROFESSIONALS THROUGH A CONSIDERATION OF ORAL ARGUMENTS

by

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American Public University System, 2016

Charles Town, West Virginia

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In considerations of judicial behavior, studies of the Supreme Court have long been reliant on the votes cast by justices as a source of quantifiable information. This work seeks to establish oral arguments as an alternative source of useful quantifiable data that can be used to further academic understandings of models of judicial behavior. Through an analysis of the arguments presented by legal professionals in three oral proceedings contextualized in relation to an earlier ruling of the Court in which the ideological predispositions of the majority of the justices was made known, this paper attempts to discern if legal professionals more commonly think of individual justice as driven by policy preferences or legal factors.

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INTRODUCTION

In simplest terms, this paper is a test of two competing theories of judicial behavior. In that regard it is not unique. As a subsequent section of this introduction will explain, judicial behavior has been a subject of interest to political scientists for well over fifty years. However, the grand majority of works that have been conducted in an effort to explore the aforementioned conflict have maintained common threads in the form of the source from which their data was derived and the subjects they consider. It is the intent of this work to distance itself from those staples of judicial analysis. Therefore, it is not the goal of testing the aforementioned theories against each other that leaves this research divergent from its predecessors, but rather the methods that are employed in achieving that objective.

About this Research

This paper considers the predominant theory of judicial behavior advanced by political scientists against the model most commonly embraced by legal professionals by considering oral arguments and the actions of the attorneys involved in them. Through written opinions of the Court and transcripts of oral arguments, this work considers the relationship between a justice's perceivable susceptibility to arguments and the number of instances that like arguments are advanced in an effort to appeal to that susceptibility. In doing so, this work investigates the possibility that attorneys tasked to argue cases before the Justices of the Supreme Court may be aware of potential swing votes on specific issues and may in turn make more concerted efforts to entice them than are made in relation to the less flexible members of the bench.

Problem

Since C. Herman Pritchett published his studies of the Supreme Court in 1941, a general adherence to the core argument advanced by them has been common in the field of political

science. After conducting a thorough consideration of the votes of Supreme Court justices over a period of time, Pritchett put forward that the justices of the Supreme Court were prone to voting their own policy preferences in the grand majority of instances in which doing so proved feasible (Pritchett 1941, 890). At the time, Pritchett's findings must have seemed sensational. Prior to his assertions the generally accepted notion was that justices were stalwart defenders of the law, acting principally in response to legal factors (Smithey 2011, 735). In contemporary times, works supporting the ideas first presented by Pritchett are no longer exciting departures from a widely held belief in legal objectivism. Rather, a substantial number of political scientists concerned with judicial behavior now subscribe to the idea that it is policy preference, not legal factors, that play the most important role in the votes that justices cast (Smithey 2011, 738).

Though political scientists widely agree that the ideas conveyed by Pritchett have substantial merit, most legal professionals would likely dispute the issue. In Supreme Court decisions, old legal tomes are often dusted off and referenced, mentions to past cases from which precedent was derived are generously peppered in, and the Constitution and its authors' intentions are frequently cited. Other institutions concerned strictly with legal matters tend to dwell on these factors as well. Law review articles are particularly fond of discussing precedent in explaining the actions of the justices and institutions that teach law focus heavily on the aforementioned legal factors (Clayton 1999, 15).

In light of the clear disagreement that exists in the opinions of judicial scholars and legal practitioners, efforts to test the validity of the idea that justices are more agents of preference than precedent have become fairly commonplace. Unfortunately, the opportunities to consider these theories against one another through quantifiable criteria are somewhat limited in that

beyond actual votes cast, few measurable indicia of the Supreme Court's dealings are readily available for public consumption.

Intent

This work seeks to advance the study of judicial behavior by constructing a manner of considering the validity of the above-related concepts of judicial behavior through a novel consideration of oral arguments as a form of measurable data. Herein, arguments advanced by legal professionals involved in oral arguments will be considered in relation to past opinions of the Court in an effort to determine if involved parties seek to offer information in a fashion that suggests indifference to the discernable policy preferences of the justices, or if they tend to advance arguments that are specifically geared toward swaying members of the Court by appealing to those partialities.

Research Question and Hypothesis

In pursuance of the above-related intent, the following question served as a starting point for the research to be conducted:

What impact does a Supreme Court Justice who separates him or herself from the ideological blocs in a split decision have on the oral arguments in cases of a similar nature that are brought before the Court while he or she remains on the bench?

In order to explore the research question, this work was advanced under the assumption that the justices' personal policy preferences are indeed the most important factor in judicial decision making and that, despite their supposed obedience to the tenets of legal objectivism, attorneys are sensitive to those preferences. As such, this work posits that in instances in which prior opinions have demonstrated a clear ideological divide among the justices of the Supreme Court, oral arguments are likely to be tailored in an effort to sway the least firmly entrenched

member of the bench. In an effort to test this thesis, the following hypothesis has been established:

In Supreme Court decisions split on ideological lines in which one justice authors a separate opinion concurring with the majority only in part, if the content of each of the written opinions is compared to oral arguments heard in later cases of a similar nature in which the individual that authored the separate opinion is involved, then a clear focus on points made by the justice who wrote the opinion concurring only in part will be detectable in comparison to the focus given to the points advanced by the ideological blocs.

BACKGROUND

As has been stated in the introductory section of this work, a great deal of research has been conducted in relation to judicial behavior. Much of that work was considered in arriving at the stated intent of this paper. Here, the scholarly building blocks from which this paper was derived are covered in an effort to more clearly relate how they factor into the research being conducted. To that end, this section will briefly cover the models of judicial behavior to be tested, the nature of existing work on the category of judicial proceedings that this work proposes to use as its basis for data creation, and how this work expects the data created from those proceedings to prove relevant.

Pritchett and the Attitudinalists

As related earlier in this paper, the core concept of Pritchett's work, that the individual preferences of justices have more impact on their decision making than strictly legal factors, has been widely embraced by judicial scholars; in large part, so too have the methods that Pritchett used in conducting his research. In his study of the Roosevelt Court, Pritchett utilized the voting behavior of the justices to create measurable data. Specifically, Pritchett considered dissenting votes among blocs of justices that could not adequately be explained by legal factors. He decided on this mode of investigation on the grounds that dissenting votes stood as the "only indications of disagreement among the justices normally made public" (Pritchett 1948, 68).

In the years following Pritchett's study of the Supreme Court, many fine academic works have been produced using similar tactics, often to similar ends. In 1993, Jeffery Segal and Harry Spaeth conducted an analysis of Supreme Court decision making on much the same lines as Pritchett and reached much the same conclusion, noting that "Rehnquist votes the way he does because he is extremely conservative; Marshall voted the way he did because he is extremely

liberal” (65). In 2003, the authors revisited their work to relate further examples of voting behavior that bolstered the idea that Pritchett first measured in 1941; that “it is the primary attitudes of the majority of the Court which becomes private law” (890).

Legal Professionals and Objectivism

As indicated to in the introductory section of this work, a chief detractor from the ideas initially presented by Pritchett and since championed by judicial scholars adherent to the attitudinal model of judicial behavior exists in the form of legal professionals. This truth is evident in the reading of any decision of the Supreme Court. In their writings, the justices “routinely behave as if the law and legal institutions matter greatly” (Clayton, 1999, 15). In relation to other legal professionals, such as attorneys, “stare decisis and mechanical jurisprudence” are perceived as the controlling factor in Supreme Court decision making (Gibson and Caldeira 2009, 8). As a result, it has been identified that such individuals may “hold near-absolute apolitical perceptions” of the Supreme Court (Bartels, Johnston, and Mark 2015, 761).

The Study of Oral Arguments

In the Supreme Court, and indeed American courts in general, the deliberative process is a private matter (Rehnquist 1977, 559). In fact, very little of what the courts do is actually available for public inspection (Relin 1990, 23). In deliberative terms, the exception is found in oral arguments. In these proceedings, the representation for both the petitioner and the respondent are given an opportunity to present their client’s case to the justices in an evenly divided hour-long question and answer session.

The study of oral arguments has proven to be a valid method of detecting truths about the Supreme Court and academic studies built around oral arguments have been written with a myriad of intents in mind. Some studies have held that the proceedings can prove to be useful as

predictors. One work found a link between the emotional attitudes of the justices during oral arguments and the votes that they ultimately cast in the related case (Black, Treul, Johnson, and Goldman 2011); another found that increased scrutiny from the bench directed at one side of an oral argument indicated a higher probability that the more thoroughly dissected side would lose (Johnson, Black, Goldman, and Treul 2009). Other studies have sought to determine if and when oral arguments might actually influence judicial decision making. It has been suggested that the relative importance of a case to the justices hearing it may impact the effectiveness of oral proceedings (McAtee and McGuire 2007). Further examples abound but need not be related here in order to convey that much can be learned from the minimalistic window into the Court's deliberative process that is provided by way of oral arguments.

Oral Arguments as a Test for the Attitudinal Model

This work seeks to consider the ideas presented by the attitudinal model against those advanced by legal professionals. Though this end is the same as the one sought by Pritchett and later by other attitudinal scholars like Segal and Spaeth, the means used to pursue it will vary greatly. In place of votes cast, this work will rely on an analysis of oral arguments for its quantifiable data and instead of considering the actions of the justices its focus will be on the attorneys that argue points before them.

It is the contention of this work that under specific circumstances where the ideological leanings of the justices in relation to a given subject can be identified, potentially exploitable divergences from specific issue-related preferences may also be detectable. Under those circumstances, interested parties may well be able to discern not only which justices could feasibly be swayed from supporting one side of an ideological argument to the other, but also which arguments are most likely to motivate those justices to do so. Such behavior exhibited by

legal counsel at oral arguments would surely belie the idea that attorneys see objective legal factors as the dispositive factor in the decision-making process of the country's nine highest jurists. To the contrary, focus on the least resolute justice would demonstrate that attorneys are to some extent aware that the majority of justices are unlikely to be swayed from their previously exhibited policy preferences regardless of relevant objective legal factors.

As this work exclusively considers actions taken by attorneys, one might reasonably ask how a consideration that does not directly address any actions taken by the justices themselves could possibly prove to be informative as an examination of judicial behavior; the answer is twofold. First, as related above, it is generally accepted that attorneys, like other legal professionals, hold to legal objectivism (Gibson and Caldeira 2009, 8). As such, a clear indication that an adherence to legal objectivism among attorneys is a matter of superficiality would draw into question the level of obligation that other legal professionals maintain for the concept. Second, in academic work it has been identified that, while acting in a professional capacity, the decision-making process of people is influenced by personal factors. It has been posited that the justices of the Supreme Court are unlikely to stand as unique in relation to the rest of humanity in this regard (Baum 2006, 50). In that the great majority of justices have themselves been graduates of legal institutions, it seems doubly unlikely that they would stand as entirely unique in relation to the attorneys that argue before them. Therefore, this work holds that information related to behavior that is applicable to attorneys in legal settings should be thought of as pertinent in considerations of legal professionals at large.

LIMITATIONS

During the course of this research, some clear limitations were noted. Primarily, these limitations can be categorized into three groups; scope, issues with transcription, and qualitative elements. Each is briefly related below.

Scope

As will be elaborated on later, the examination in this work will be conducted within the framework of a total of three Supreme Court cases. In examining such a finite amount of data, any implications related to judicial behavior uncovered through this study will need to be the subject of future research in order to establish if the findings are unique to the set of cases under examination or evident in the majority of case sets that bear similar hallmarks to those herein considered.

Issues with Transcription

The oral argument transcripts used for this work were created using audio recordings of the proceedings. For the purpose of gathering useful quantitative data, these transcriptions proved imperfect. There are points in the audio recordings at which what is being said is either inaudible or unintelligible, there are frequent uses of words that demonstrate no substantive advancement of a point (i.e. stammering or abandoning an introductory clause), and there are instances in which it is unclear how many words should actually be counted (i.e. abbreviated references to earlier casework, or requested repetitions of information presented). Steps have been taken to alleviate the potential for the problems that could feasibly present as a result of the issues detailed here and are elaborated on thoroughly in the methodology section of this work.

Qualitative Elements

To the extent possible, this research has focused on quantitative elements. However, in working with language, qualitative interpretation is inescapable. A large portion of what is conducted in this research is a comparative analysis of the language used by attorneys during oral arguments against the words selected by the justices for their written opinions in the case from the set that proceeded those arguments. Given the qualitative nature of this portion of the analysis, it is possible that deference to the writings of a particular bloc or justice on the part of an individual at argument cataloged in this work could be interpreted differently by a different researcher. As will be explained at length during the methodology section, every effort has been taken to avoid this issue to the extent possible.

Additionally, there are considerations that may reveal the actual intent of statements made during oral arguments that are better suited to consideration from a psychological perspective than that of a political scientist. For example, it has been suggested that during oral arguments, points which seem to advance a particular idea can be presented in a combative or otherwise hostile manner that might infer that the speaker is actually attempting to rebuke the argument (Shullman 2004, 272). The author of this work has no formal education in the field of psychology and as a result, this study does not delve into such possibilities.

LITERATURE REVIEW

The investigation proposed in the introduction of this work has been conducted using three cases heard by the Supreme Court in the latter half of the 1980s as a framework. Though the actual analysis conducted in this work is confined to three cases, four are briefly covered in this review: *Ford v. Wainwright*, 1986; *Thompson v. Oklahoma*, 1988; *Penry v. Lynaugh*, 1989; and *Stanford v. Kentucky*, 1989. The latter three cases serve as the subject matter considered in the actual comparative analysis of this work. The first is used only in an effort to establish that a clear swing vote on the Court should have been obvious from an attitudinalist perspective. Here, a brief recounting of the facts in each case and the questions posed to the Court by those cases will be conducted in order to relate the significant commonalities that exist in them. Afterward, in order to make the rationale for the selection of this specific case set clear, a consideration of the justices involved in the case set and the voting blocs that developed among those justices will be required.

Ford v. Wainwright, 1986

In 1974, after being convicted of first-degree murder, Alvin Bernard Ford was sentenced to death in Florida. Ford displayed no indication of insanity at the time of his crime. Nor did he show any signs of mental insufficiency at any stage of his trial. However, while on death row, Ford's mental state deteriorated (*Ford v. Wainwright* 1986, 402).

In adhering to the letter of Florida's procedural standards, the State administered a competency hearing and determined that although Ford was indeed insane, the extent of his condition did not prohibit the State from carrying out his sentence. Ford's legal counsel petitioned the State Court to consider Ford's competency but the request was not granted. In a continued effort to have the issue of Ford's sanity considered with more scrutiny, Ford's counsel

filed a writ of habeas corpus with the Federal District Court. That writ was also declined. The Court of Appeals agreed to temporarily delay Ford's execution in order to consider the merit of his claim but ultimately affirmed the District Court's decision to deny Ford's writ. The Supreme Court then granted certiorari in order to consider whether the Eighth Amendment prohibited the execution of the insane and whether the District Court was wrong in declining the opportunity to consider Ford's claim (*Ford v. Wainwright* 1986, 404-405).

Thompson v. Oklahoma, 1988

Having committed a capital offense at age 15, William Wayne Thompson was tried as an adult for the murder of his former brother-in-law, convicted, and sentenced to death. During the course of his trial in the District Court, the prosecutor introduced photographs that graphically displayed the decomposed remains of Thompson's victim. The photographs were later determined by the Court of Criminal Appeals to be inflammatory and of little evidentiary value. Though it was determined that the introduction of the photographs at Thompson's trial was improper, his conviction and sentence were upheld (*Thompson v. Oklahoma* 1988, 820).

The Supreme Court then granted certiorari in order to investigate two issues: first, if the introduction of inflammatory photographs was a violation of Thompson's rights in that they may have biased the jury against him, and second, whether a sentence of death imposed on a 15-year-old individual was constitutionally viable in relation to the prohibition on cruel and unusual punishment proscribed by the Eighth Amendment (*Thompson v. Oklahoma* 1988, 820-821).

Penry v. Lynaugh, 1989

Johnny Paul Penry was tried by a Texas State Court after committing a capital murder in 1979. In pursuance of an insanity defense at trial, a psychologist testified that Penry was mildly retarded and that his condition left him unable to control his impulses and without the ability to

learn from experience. In light of conflicting psychological evidence submitted by the State, the jury rejected the insanity claim and found him guilty. During sentencing, the jurors were given a list of special issues to consider and instructed to consider all the evidence that had been submitted during trial when answering them. By answering all the special issues in the affirmative, the jury sentenced Penry to death (*Penry v. Lynaugh* 1989, 307-312).

Counsel elevated the issue of Penry's death sentence to the Texas Court of Criminal Appeals claiming two points of contention; first, that the structure of the special issues presented to the jury had not afforded the panel any substantial way to consider Penry's retardation as a mitigating circumstance, and second, that the execution of a mentally retarded man would violate the cruel and unusual punishment clause of the Eighth Amendment. The Texas Court of Criminal Appeals rejected these notions and upheld Penry's execution. Although Penry was denied certiorari on a request for direct review, habeas corpus proceedings ultimately placed the questions initially posed to the Texas Court of Criminal Appeals before the justices of the Supreme Court (*Penry v. Lynaugh* 1989, 312-313).

Stanford v. Kentucky, 1989

In 1989, the Supreme Court considered the cases of Kevin Stanford and Heath Wilkins in the consolidated case, *Stanford v. Kentucky*. Stanford had been charged with first-degree murder in Kentucky 1981 and Wilkins had been charged with first-degree murder for a separate act that took place in Missouri in 1985. Having been under the age of 18 at the time of their crimes, both Stanford and Wilkins had to be transferred from the juvenile justice system to be tried as adults. In each case, the state opted to take that step and ultimately both Stanford and Wilkins were found guilty of capital murder and sentenced to death (*Stanford v. Kentucky* 1989, 365-367).

In the appeals process, counsel for each offender took the position that the Eighth Amendment prohibition on cruel and unusual punishment should apply to any individual under the age of 18. After the Supreme Court of each involved state rejected the idea that the execution of an offender under the age of 18 would be a violation of the constitution, the Supreme Court granted certiorari to decide the issue (*Stanford v. Kentucky* 1989, 368).

Case Commonalities

Much of this work's assumption that attorneys at oral arguments should focus on the least resolute member of the bench stems from the idea initially advanced by Pritchett that the justices themselves have policy preferences that they tend to adhere to when possible (1941, 890). If such is true, it would stand to reason that an individual approaching the bench with the intent of arguing a point that bears great similarity to an issue already decided by the Court would fare poorly in efforts to sway justices that had already ruled against the position he or she intended to champion. As is made clear by the facts of the cases related above and the questions they presented to the Court, a common thread between the four proceedings exists in that they each requested a categorical exemption from the death penalty for a specific class of the citizenry.

The Justices and the Voting Blocs

As is often the case with issues of high salience, voting blocs developed among the justices in the above related cases. By way of the various opinions in the first two cases, *Ford* and *Thompson*, a fairly clear divide among the majority of the justices can be detected along ideological lines and the potential for a swing vote is made evident.

In *Ford*, the Court's liberal bloc of justices composed of William J. Brennan, Thurgood Marshall, Harry Blackmun, and John P. Stevens was joined by the less predictable Justice Lewis F. Powell to form the majority (*Ford v. Wainwright* 1986, 401). Founding its argument in

English common law, the bloc ruled that the execution of individuals suffering from insanity was categorically unconstitutional and that Florida had not adequately investigated Ford's claim (*Ford v. Wainwright* 1986, 417-418). Justice William Rehnquist wrote a dissent in which he was joined by Chief Justice Warren E. Burger (*Ford v. Wainwright* 1986, 431). In it, the conservative justices held that no categorical exemption from the sentence of death for the mentally insane could be established and that the common law that the liberal bloc had relied upon to reach their decision actually lent credence to the procedure that Florida had used in hearing Ford's claim (*Ford v. Wainwright* 1986, 435). Through a separate opinion in which she was joined by Justice Byron White, Justice Sandra Day O'Connor concurred in part with each bloc, stating that Florida's procedure for evaluating Ford's claim was indeed insufficient while contending that the execution of insane persons could not be established as categorically unconstitutional (*Ford v. Wainwright* 1986, 428-431).

Though *Ford* did not demonstrate entirely binary voting blocs among the nine justices, it did offer some insight on how the most conservative and liberal leaning justices of the Supreme Court might act when confronted with similar requests for constitutionally mandated categorical exemptions from capital punishment. The liberal bloc of justices was unequivocally more open to the idea than were their conservative colleagues.

Shortly after *Ford*, some changes in the Court's roster took place. Chief Justice Burger retired in 1986 and Justice Rehnquist became the new Chief Justice. In turn, Justice Antonin Scalia was appointed to the Court to fill the ensuing vacancy (Banks and Blakeman 2012, 5). In 1987, Justice Powell retired from the Court as well. His seat was filled by Justice Anthony Kennedy in the early months of 1988 (Banks and Blakeman 2012, 77).

In June of 1988, the voting tendencies of the justices in these types of cases were further expounded in *Thompson*. Outside of Justice Kennedy, who opted to take no part in the *Thompson* proceedings due to the fact that he had been appointed to the Court after the case had been argued (*Thompson v. Oklahoma* 1988, 838), the justices separated in a fashion reminiscent to *Ford*.

In *Thompson*, the remaining members of the majority from *Ford* predictably aligned behind the petitioner to form the plurality (*Thompson v. Oklahoma* 1988, 818). Authored by Justice Stevens, the plurality's opinion contended that the "evolving standards of decency that mark the progress of a maturing society" had come to recognize that the execution of an individual that had committed his crime while under the age of 16 would constitute "cruel and unusual punishment" (*Thompson v. Oklahoma* 1988, 818).

The recently appointed Justice Scalia authored a dissent in *Thompson* in which he was joined by Chief Justice Rehnquist and Justice White (*Thompson v. Oklahoma* 1988, 859). Rejecting the plurality's logic, the dissent's opinion stressed that a static chronological line was insufficient in determining an individual's level of maturity and opined that the already-in-place individuating mechanisms that a person went through prior to being sentenced to death were better suited to the task (*Thompson v. Oklahoma* 1988, 859-863).

As she had in *Ford*, Justice O'Connor again authored an opinion that separated her from each of the blocs (*Thompson v. Oklahoma* 1988, 848). In it, she joined the plurality in determining that Thompson could not be executed but maintained that the evidence for a national consensus against the practice was insufficient for establishing a categorical exemption as a matter of constitutionality (*Thompson v. Oklahoma* 1988, 849).

Through a consideration in relation to *Thompson*, the next two cases that presented similar requests for categorical exemptions to the Court are where the hypothesis of this work will be tested. Under the attitudinalist assertion that justices vote their preferences, the decisions in *Ford* and *Thompson* should have made the future voting behavior of the majority of the justices fairly predictable in cases where they were confronted with similar questions. Given that ideological blocs among the justices had begun to emerge in *Ford* and that even clearer ideological lines in cases dealing with requests for categorical exemptions from the death penalty as a matter of constitutionality had been drawn in *Thompson*, an individual accepting of the concepts advanced by attitudinal theorists might well arrive at the conclusion that future decisions on related subject matter would be most likely to hinge on the decision of Justice O'Connor. The proceedings in *Penry* and *Stanford* therefore provide an ideal opportunity to consider whether or not legal professionals involved in oral proceedings are responsive to the predictability in judicial decision making assumed by the attitudinal model.

In the analysis section of this work, the oral arguments in *Penry* and *Stanford* will be contextualized in relation to the writings of Justice O'Connor and the ideological blocs in the opinions from *Thompson* in an effort to determine if any excessive attention is paid to Justice O'Connor's stated positions on the subject of categorical constitutional exemptions from capital punishment in relation to the opinions of her colleagues.

METHODOLOGY

Largely, the analysis that has been conducted for this work is a comparative consideration of written documents and audio recordings based on a word count. To elaborate, the content of the oral arguments from *Penry* and *Stanford* were analyzed, core arguments were detected, and the words spent advancing them were counted. The pertinent arguments were then considered against the writings of the justices who authored opinions in *Thompson* in order to produce workable data from which inferences about deference on the part of attorneys could be drawn. In conducting this examination a number of questions inherent to the processes related above became apparent. The answers that were settled on in resolving these difficulties will be detailed at some length in the succeeding paragraphs of this section.

Overcoming Transcription Issues

The first issue that was encountered in attempting to create workable data sets from the oral arguments came by way of transcript availability. In relation to oral arguments, the electronic archives of the Supreme Court only go back as far as 2000. Fortunately, this issue was easily overcome. The original audio recordings for the oral arguments from both *Penry* and *Stanford* are readily available online through Oyez (2016). In each instance, Oyez also provided a typed transcript version of the arguments presented in the recording. For this work, these typed documents were compared to the original recordings and altered accordingly if necessary to produce a written document that mirrored the original audio. After this process had been exhaustively implemented, attention was turned to the task of identifying core arguments and refining them in an effort to create useful data.

Identifying Core Arguments

In detecting core arguments, the most routine issue encountered was one of context. Determining how words should be evaluated regularly proved difficult and the difficulty was greatly exacerbated by short sentences or usages of a single word.

In reviewing the oral arguments, determinations about the nature of ideas advanced by any individual were discerned from the smallest possible collection of words that afforded context to the point being made. In many cases, this tactic resulted in what this study found to be the preferable outcome; the context of single sentences could be discerned independent from the conversation taking place. However, on occasions in which an attorney saw fit to make a statement of brevity, the scope of consideration had to be expanded in order to assign context. In these instances, context was drawn from the most recent preceding point that afforded it. For the purpose of this work, the outer limits used for establishing context in cases of short sentences were set at individual conversations, to imply uninterrupted discourses between two parties.

To provide an example, in one of the oral arguments for the consolidated *Stanford* case, while arguing on behalf of Stanford, Frank W. Heft made the statement “that’s correct” (No. 87-5765 1989). Absent context, the statement has no meaning. As a result, for the purpose of this analysis, this comment was considered alongside the greater conversation taking place. In the case of this example, the conversation took place between Heft and Justice Blackmun with the latter attempting to get the former’s opinion on the issue of arbitrariness in relation to a categorical line in the sand related to age. Ultimately, Heft worked the conversation to an earlier ruling of the Court that had identified the necessity of line-drawing and related that he believed it to be justifiable in this case because he felt a clear societal consensus supported it (No. 87-5765 1989).

Heft's initial statement in this example, "that's correct," was given context by way of Justice Blackmun's line of questioning (No. 87-5765 1989). As a result, Heft's initial comment was scored as an advancement of the idea that line drawing was arbitrary. In contrast, the subsequent more substantive statements made by Heft in an effort to arrive at the point that a societal consensus existed contained context unto themselves and as such were classified as part of an effort by the petitioner to advance the argument that a clear societal consensus supported Stanford's claim that the Eighth Amendment prohibition against cruel and unusual punishment applied to 17-year-old offenders.

Avoiding Unintended Inference

In compiling the data, another primary concern was that information contained in the *Penry* and *Stanford* arguments thought to be related to the *Thompson* opinions could feasibly be the result of inferences drawn by the author of this work that were not intended by the individual responsible for the argument. Thankfully, in many cases this issue was easily resolved by way of the involved attorneys' propensity to explicitly cite the casework from which they drew their precedence. This tendency proved greatly advantageous to this work in that it afforded the ability to unambiguously categorize words stemming from arguments that attorneys had directly tied to *Thompson* or arguments directly tied to casework referenced by the *Thompson* majority, dissent, or concurrence that had been framed in a near identical fashion. The above related conversation between Justice Blackmun and Heft serves to illustrate how these standards were applied. Though the conversation directly related in the example never explicitly referenced *Thompson*, Heft had opened his argument on categorical line drawing by explaining that "One point of agreement for all members of the Court in *Thompson v. Oklahoma* [had been] that there is some age below which a juvenile's crime [could] never be punished by death" (No. 87-5765

1989). By doing so, Heft demonstrated his intent to tie the issue of line drawing as an acceptable practice to the Court's opinion from *Thompson*.

Unfortunately, the tendency for attorneys to relate precisely where their arguments were derived from did not prove to be universally encompassing throughout the arguments under consideration. A thorough analysis of the oral arguments from *Penry* and *Stanford* revealed a great number of arguments that demonstrated a clear connection to one or more of the *Thompson* opinions in which no casework was directly cited. Though arguments of this nature open the door to potential issues of improper categorization based on unintended inferences that this work seeks to avoid, these arguments were still categorized as it was determined that strict avoidance of such arguments only served to create issues with the collected data through improper omission. In all cases, the rationale for categorizing arguments against specific opinions from the *Thompson* case is clearly related in the applicable sections of the analysis itself.

Refining the Available Information

Once relevant core arguments had been identified, consideration was turned to the substantive content of those arguments. It may seem obvious to simply count the words as spoken but this approach proved unsatisfactory for a variety of reasons. As such, statements made during oral arguments by all parties were universally edited to eliminate missteps, formalities, and elicited repetitions. The factors that were used to identify instances of each are briefly outlined below.

Missteps

Purportedly, speaking before the justices of the Supreme Court is a rather nerve-racking experience (Shullman 2004, 271). Perhaps as a result of this, attorneys begin sentences with one preparatory clause only to abandon it for another with remarkable regularity. Beyond that, it is

not uncommon for an attorney to stammer and repeat words. An example of this point is afforded by way of the *Penry* arguments when in presenting the idea that the special factors presented by the Court were an ineffective conduit for juries to express hesitations evoked in them by mitigating circumstances Curtis C. Mason said, “And there... they are... there's lots of mitigating evidence that doesn't readily fit into negating one of those but may make a juror consider a sentence of death... death inappropriate” (No. 87-6177 1989).

Mason's statement contains 30 words but the first four are nothing more than abandoned efforts at starting a sentence. In addition, near the end of the sentence the word “death” is repeated. Therefore, for the purpose of converting this statement into data the sentence was revised to read “there's lots of mitigating evidence that doesn't readily fit into negating one of those but may make a juror consider a sentence of death inappropriate” and only 25 words are counted.

Formalities

In oral arguments some statements are made as a result of enduring tradition in virtually all cases. Perhaps the most well-known example of this is the acknowledgement issued by counsel after being called forward by the Chief Justice: “Thank you Mr. Chief Justice, and may it please the Court.” No effort was lent to assigning value to these customs and words spent on them were not categorized for the purpose of this study.

Dependent on the individual before the Court, it is also common to hear counsel open or close statements with the term “Your Honor.” In an effort to provide increased uniformity in the collected data, these formalities were also removed from the final count of words spent advancing any given idea.

Finally, the method by which prior casework is referenced is not static among participants at oral arguments. Some individuals tend to make reference to cases through use of the formal name while others prefer the common short-hand. Using the earliest case recounted in the literature review section of this work as an example, one could site the case as “*Ford v. Wainwright*” or simply as “*Ford*.” Given the level of expertise of all individuals involved in the examined proceedings, this work contends that there is no substantial difference in the information conveyed by the two different formats. As a result, regardless of the format actually used, each such reference has been counted as a use of only one word.

Elicited Repetitions

In rare circumstances, an individual missed all or part of what had been said and was forced to ask the speaker to repeat the information. Such elicited repetitions were discarded for the purpose of evaluation.

The Reduction of Available Information

Applying the standards related above to the arguments under examination resulted in a considerable reduction of the information available for consideration. In *Penry*, where the issue of reduction proved to be most pronounced, the process of identifying only applicable arguments and then subsequently refining those arguments resulted in 78% of the arguments presented by counsel being excluded from consideration. While this may seem like a jarring figure when considered alone, factually such a reduction was to be expected. In *Penry*, 15 cases were drawn on by the attorneys in developing their arguments and two substantial questions, one of which had nothing at all to do with the issues raised in *Thompson*, were considered (No. 87-6177 1989). As such, it stands to reason that the majority of the arguments presented did not directly relate to

the *Thompson* case. Though substantially less distinct, a similar reduction of the information available for analysis resulted during the exploration of the *Stanford* arguments as well.

Converting the Arguments into Data

Once the above related steps had been completed, the statements of the attorneys contained in the refined documents were considered against the opinions authored by the justices in *Thompson*. Each statement was then categorized in relation to the opinion or opinions, if any, that it supported. To provide an example, in the argument for *Penry*, Frederic J. Cowan stated “I would only say to you that if there is a deterrent value, I see no reason why it would not apply to juveniles as well as to adults” (No. 87-6177 1989). In comparing this statement to the opinions authored in *Thompson* it was discovered that the dissenting bloc of justices had advanced the idea that there was no evidence to suggest that the deterrence effect rationale for the death penalty was ineffective in relation to juvenile offenders (*Thompson v. Oklahoma* 1988, 872-873). In her separate opinion, Justice O’Connor related that she believed the same (*Thompson v. Oklahoma* 1988, 853). As such, the statement was classified as 29 words developed from ideas presented in the opinion of the concurrence and the dissent.

ANALYSIS

This analysis considers the content of oral arguments against the opinions authored in the *Thompson* case. As such, it is necessary to open this section with a brief account of the positions taken by plurality, the concurrence, and the dissent in *Thompson*. Afterward, attention will be turned to the three arguments presented in the two cases subsequent to *Thompson* from the set under consideration. The first of these oral arguments was made in relation to *Penry*, the remaining two were made in relation to the *Stanford* consolidated case. In an effort to alleviate confusion, this analysis makes use of the names of the individual offenders involved in the *Stanford* proceedings as designators for the arguments; the first is herein further referred to as the Wilkins argument and the second is identified as the Stanford argument. Moving from one argument to the next, this analysis considers the statements made by the petitioners and respondents in an effort to identify instances in which arguments were built from the *Thompson* opinions of the plurality, concurrence, dissent, or some combination thereof. Once detected, such arguments are converted to data and any apparent deference on the part of each attorney is considered.

The Thompson Opinions

As was related in the literature review section of this work, *Thompson* presented two questions to the Court. Of those, only the second issue under consideration in that case, the viability of executing a person that was legally considered a child at the time of his crime, is of importance to this analysis. Here, a general understanding of the decisions reached in the three opinions that were authored by the justices in relation to the *Thompson* proceedings will be provided. Throughout the greater analysis herein undertaken, more in depth explorations of specific portions of these opinions will be conducted as required.

The plurality in *Thompson* ultimately reached the conclusion that Thompson's death sentence, and by extension a sentence of death for any offender "under 16 years of age at the time of his or her offense," was unconstitutional under the Eighth Amendment as incorporated to the states (*Thompson v. Oklahoma* 1988, 838). The plurality rested its decision on a principal first recognized by the Court in 1958; that "evolving standards of decency... mark the progress of a maturing society" (*Trop v. Dulles* 1958, 101).

In her concurrence, Justice O'Connor agreed with the plurality's decision to vacate Thompson's sentence but stopped short of accepting the categorical exemption from the death penalty that the plurality sought to impose as an issue of constitutionality (*Thompson v. Oklahoma* 1988, 848-849). Justice O'Connor's rationale for vacating Thompson's sentence was based on the fact that Oklahoma had not expressed a specific minimum age that would allow for the execution of a child that had been transferred to the adult criminal justice system (*Thompson v. Oklahoma* 1988, 850-851). Her reason for rejecting the idea of a constitutional prohibition against the execution of all similarly situated individuals was based on the idea that no national consensus against the act could be conclusively demonstrated (*Thompson v. Oklahoma* 1988, 855).

In contrast to the opinions of both the plurality and the concurrence, because proper individualized consideration had been given to Thompson, the dissent saw no issue with his sentence of death (*Thompson v. Oklahoma* 1988, 859). Founding their decision on historical records, the dissent identified that the common law would have allowed for Thompson's execution at the time of the Eighth Amendment's ratification (*Thompson v. Oklahoma* 1988, 864). In discussing the idea that a societal consensus had developed over time to reject the

practice of executing 15-year-old offenders, the dissent held that legislative trends throughout the country suggested the opposite (*Thompson v. Oklahoma* 1988, 867-869).

The Penry Argument

In the *Penry* argument, Curtis C. Mason acted as the petitioner while Charles A. Palmer argued for the respondent. In the following sub-sections, their arguments will be contextualized against the *Thompson* opinions in an effort to determine from which opinion or opinions arguments made in relation to that case were developed.

The Arguments of the Petitioner

In his opening remarks, Mason related how he saw the issues that brought Penry's case before the Court. First, the petitioner posited that there were relevant mitigating factors that should have been considered in Penry's sentencing that were left to the wayside as a result of the constrictive nature of the special issues that the jurists were required to base their answers on. Though alone this point has no inherent relation to the issues that were presented in *Thompson*, in recounting the nature of the mitigating factors he believed had been overlooked, Mason included the issue of Penry's mental age, stating that "psychological testing support[ed]" the idea that Penry "ha[d] the mind of a six to seven-year old child" (No. 87-6177 1989). In doing so, Mason laid the ground work to present the issue of mental incapacity in a context that could be related to the *Thompson* decision. This groundwork was crucial to the proper construction of Mason's second point; that Penry's sentence of death should be thought of as cruel and unusual on its face in that his culpability was necessarily limited by virtue of his mental age (No. 87-6177 1989).

After considerable time had been spent discussing matters related to what relevant mitigating evidence was and whether or not the jury had sufficient opportunity to consider it in

Penry's case, Mason was prompted to present his argument for an Eighth Amendment exemption from capital punishment for the mentally handicapped. In addressing the point, Mason tied his argument for an exemption that would be applicable to Penry to the Court's *Thompson* opinions by stating that he believed "Justice O'Connor's concurring opinion as well as... Justice Scalia's dissenting opinion" lent to the idea that Penry could not constitutionally be given a sentence of death (No. 87-6177 1989).

Explicitly citing Justice O'Connor's *Thompson* concurrence as the basis for the argument, Mason recounted that a consensus existed in *Thompson* in that all members of the Court had agreed "that there is some age below which a juvenile's crimes can never be constitutionally punished" (No. 87-6177 1989). Though the idea contained in Mason's statement about a consensus in the *Thompson* opinions could be easily thought of as neutrally applicable, Mason's pronouncement of the *Thompson* concurrence as the source from which it was constructed led this work to categorize it as an argument constructed from the writings of Justice O'Connor.

In an attempt to make the above related point of consensus that existed in the *Thompson* opinions relevant to the case at hand, Mason turned to *Part II* of the opinion of the *Thompson* dissent. There, it was related that "Blackstone's Commentaries on the Laws of England" had placed the age at "which there was a rebuttable presumption of incapacity" at 14 (*Thompson v. Oklahoma* 1988, 864). Applying the authority that the dissent had found in Blackstone to the case at hand, Mason opined that it stood to reason that Penry's mental age should operate as a parallel to the chronological line for rebuttable presumption (No. 87-6177 1989).

In furthering his argument on the subject of mental age as a potential prohibiting factor in relation to the death sentence, Mason continued in his deference to the writings of the *Thompson* dissent. When questioned about the reliability of mental age as an objective method for

answering questions related to the protections afforded by the cruel and unusual punishment clause, Mason again drew from the dissent's consideration of Blackstone to suggest that some general deviation in approximating mental age should be thought of as acceptable because, regardless of his exact mental age, Penry's condition left him within the range of rebuttable presumption established in the common law (No. 87-6177 1989).

A subsequent question aimed at clarifying how exactly Mason believed the issue of mental age should factor into the Court's consideration sought to determine if the petitioner understood there to be differences between mental and chronological age that could "be taken into account for purposes of the cruel and unusual punishment clause" (No. 87-6177 1989). In response, Mason accepted that a difference in chronological and mental age must exist, but insisted that a connection was apparent between the two in that both had an impact on an individual's level of personal culpability. In answering the question, Mason explained that Penry's "punishment should bear some relationship to [his] moral culpability" (No. 87-6177 1989). Continuing the argument, Mason declared that Penry's mental disability reduced his culpability as a matter of necessity (No. 87-6177 1989). In *Thompson*, both the plurality and the concurrence related that an individual's blameworthiness should be considered in sentencing determinations (*Thompson v. Oklahoma* 1988, 834, 853). However, the idea that proportional culpability could be tied to age as an issue of necessity was rejected by the concurrence (*Thompson v. Oklahoma* 1988, 853). As such, while the petitioner's initial response was categorized as an argument based on the opinions of the *Thompson* plurality and concurrence collectively for the purpose of this evaluation, the subsequent point was considered to have been developed from the opinion of the plurality alone.

In the final exchange of his half-hour block of time before the Court, Mason made another argument that was constructed using points supported exclusively by the plurality. During that discussion, Mason was asked if he believed that an individual that lacked moral culpability as a result of mental defect should also be understood to lack the ability to be “quite as morally virtuous as more intelligent people” (No. 87-6177 1989). In responding to the idea, Mason blamed Penry’s issues on outside factors, relating that he could have been virtuous if he had “been raised properly” (No. 87-6177 1989). Here, Mason’s argument clearly mirrored a point made by the plurality; that youths alone are not to bear responsibility for their actions (*Thompson v. Oklahoma* 1988, 834).

The Petitioner’s Arguments as Data

After Mason’s argument was refined using the standards explained in the methodology section of this work, a total of 3,140 words were attributed to him. Of these, this analysis found that 421 directly related to the decision in *Thompson*. It is by way of these 421 words that this study considers the concept that Mason might have constructed his arguments with the goal of swaying specific justices in mind.

In Mason’s argument, 98 words were spent making points related to the *Thompson* case that were generally neutral in nature. The remaining 323 were attributed to five separate categories: arguments constructed from the plurality (79), arguments constructed from the concurrence (33), arguments constructed from the dissent (160), arguments constructed from the plurality and the concurrence (22), and arguments constructed from the concurrence and the dissent (29).

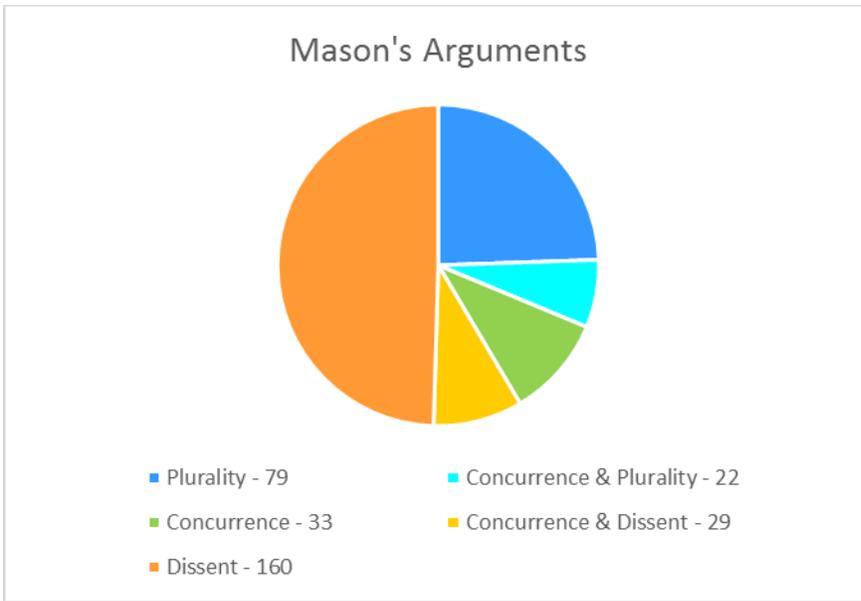


Figure 1

While the data gathered from Mason's time before the Court does not show clear deference to the *Thompson* concurrence as was expected, it does suggest that Mason may have viewed some of the members of the Court as fairly safe votes. Framed by Mason as the product of the *Thompson* opinions of the dissenting bloc and the concurrence, the argument suggesting that Thompson should not have been given a sentence of death absent a consideration of rebuttable presumption on the basis of his mental age is particularly significant. Certainly, Mason's argument is entirely valid in relation to the opinions he cited as its foundation but Justice O'Connor and the dissenting bloc alike ultimately reached conclusions that were far less sympathetic to age as a mitigating factor than did the plurality.

As is made clear through even the most cursory examination of the *Thompson* writings, the members of the plurality would be most likely to accept the argument that Penry could not be executed as a result of his mental age. Nevertheless, Mason decided to entirely omit the writings of the bloc most likely to prove sympathetic to the idea he was presenting and engaged the justices that had separated themselves from that plurality through arguments specifically crafted

to appeal to their written decisions. This point seems all the more significant in that arguments built under this pretext account for nearly 70% of the total words that Mason spent in direct relation to specific *Thompson* opinions.

While the collected data infers that the petitioner may have been aware that the justices of the *Thompson* plurality were predisposed to voting in a manner amenable to his position, Mason's time before the Court clearly fails to demonstrate the type of deference that was anticipated by this work. Instead of using his time in an effort to sway the individual that this paper contends should have been seen as the obvious swing vote, Mason used the majority of his time focusing on points made by the dissent when addressing matters related to *Thompson*.

The Arguments of the Respondent

As the respondent in *Penry*, Palmer related issues in the case at hand to *Thompson* directly through three distinct strains of argument. The first dealt with the difference between mental and chronological age, the second dealt with the concept of deliberate action, and the third addressed Penry's culpability in relation to the mitigating evidence of his mental handicap.

In relation to the issue of Penry's mental age, Palmer discussed *Thompson* in an effort to separate the concept of mental age from that of chronological age. It was Palmer's contention that while the indicator provided by chronology allowed the Court an opportunity to create a constitutional rule built on an objective fact, Penry's mental age was insufficient to that end in that it was subject to the acceptance of professional opinions that must, by their nature, be subjective (No. 87-6177 1989). Through this point, the respondent directly tied his argument on the subject of mental age to the *Thompson* case.

While Palmer did not take the stance that Penry's mental age should not have been considered in relation to the special issues presented for the sentencing jury's consideration, he

did maintain that any connection between what the plurality in *Thompson* had deemed “the special mitigating force of youth” (*Thompson v. Oklahoma* 1988, 834) and the mental age assigned to Penry through expert testimony was a conjecture without basis (No. 87-6177 1989). Though it was very clearly Palmer’s intent to tie the subject of mental age to the Court’s writings in *Thompson*, the respondent never made any unambiguous effort to connect the point to a single specific opinion. To the contrary, arguments presented by the respondent in relation to Penry’s mental age were most commonly crafted to suggest a general detachment between the holding in *Thompson* and the circumstances in *Penry*. For this reason, the majority of the words spent by Palmer on considering the point of mental age as a point related to *Thompson* cannot be said to imply any deference to a specific *Thompson* opinion on the part of the respondent.

Arguments presented on the subject of Penry as a deliberate actor were less ambiguously developed. Such arguments were constructed in relation to the opinions of the *Thompson* concurrence and dissent, each of which had clearly rejected the idea that some categorical brightly drawn line might demonstrate the division between people that could act deliberately and those that could not (*Thompson v. Oklahoma* 1988, 853, 873). In short, Palmer contested that despite the nature of Penry’s condition, his “mental status [was] such that he knew what he was doing” (No. 87-6177 1989).

The final issue that Palmer explicitly tied to *Thompson* during his argument addressed the subject of Penry’s culpability. In exploring the issue of moral culpability, Justice O’Connor asked Palmer if “the Texas instructions” could feasibly have resulted in a juror answering no to any of the special issues based on the issue of Penry’s retardation absent other mitigating influences. In response, Palmer explicitly used the writings of Justice O’Connor from her concurrence in *California v. Brown* (1987, 545) in a context that closely mirrored a point she had

made during the *Thompson* decision to relate why he believed that the jury could not have, and should not have, the option to consider “moral culpability apart from the special issues” (No. 87-6177 1989). Drawing on the aforementioned casework, Palmer explained that considerations of moral culpability were to “take into account some nexus between the evidence and the defendant's actions in committing the crimes” (No. 87-6177 1989). He then explained that while Mason, Penry, amici filed on behalf of the petitioner, and even a justice from a lower court had all at some point alleged that Penry’s condition presented “relevance outside the issues,” none of those people or entities had explained how those issues might appropriately be shown as having directly contributed to the crimes for which Penry was tried (No. 87-6177 1989).

In Palmer’s opinion, allowing the jury to consider Penry’s retardation absent the context provided by the special issues would have been nothing more than “a discretionary grant of mercy,” which would clearly result in a failure to consider any link between the actions an individual had undertaken and how the evidence proposed as mitigating drove those actions (No. 87-6177 1989).

The Respondent’s Arguments as Data

Under the standards of refinement detailed in the methodology section of this work, Palmer used 3,214 words in the Penry argument. Of those, this analysis determined that 1005 had a direct relation to *Thompson*. The respondent’s statements can be classified in four categories: arguments constructed from the plurality (52), arguments constructed from the concurrence (420), arguments constructed from the concurrence and the dissent (72), and words used in a neutral sense (461).

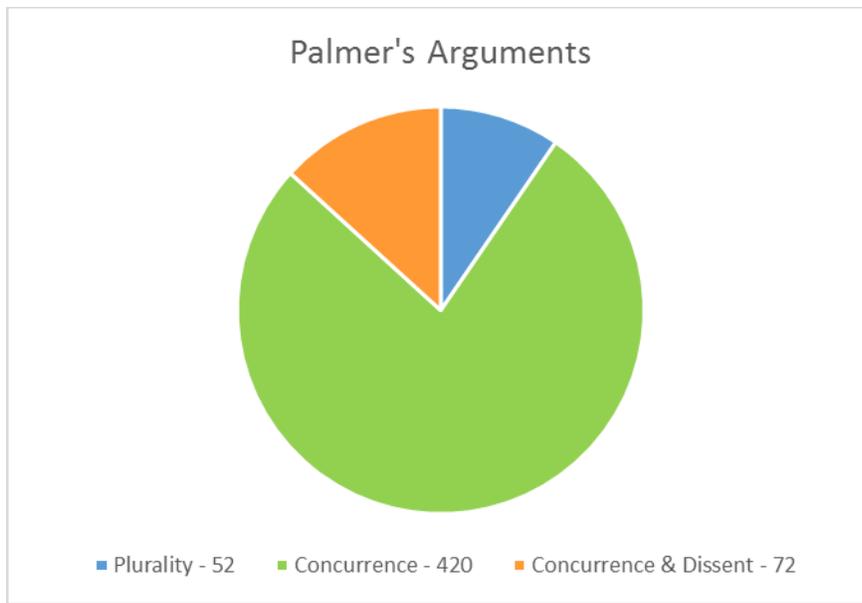


Figure 2

Palmer's argument serves as a clear illustration of the expectations of this work made manifest. Throughout his argument, the respondent spent very little time arguing points that directly addressed positions taken by either the plurality or the dissent. Instead, Palmer opted to focus on arguments that could be related to *Thompson* in a way that would likely be well received by Justice O'Connor, the individual this work contends should have been perceived as the swing vote.

In arguing the *Penry* case, when Palmer discussed ideas that had been expressed as important to either the plurality or dissent in *Thompson*, some brevity was apparent. From an attitudinalist perspective, Palmer's decision to be concise on points that were specific to either the *Thompson* plurality or dissent alone is entirely reasonable. If one accepts that the justices are servants of their personal policy preferences, than it follows that members of the *Thompson* plurality and dissent alike would be very unlikely to change sides in the greater ideological argument that is common to each of the cases examined here. In contrast, when presented with an opportunity to discuss an issue that had proven important to the *Thompson* concurrence, the

respondent invested time in exploring the issue thoroughly. The fact that Palmer gave substantially more attention to the line of argument that was likely to prove relevant in Justice O'Connor's eventual vote than he did to arguments that were likely to be pertinent to either the *Thompson* plurality or dissent implies that the respondent may have perceived the members of the *Thompson* blocs as unlikely to abandon their previously expressed positions on the issue at hand.

The Wilkins Argument

In the Wilkins argument, Nancy A. McKerrow acted as the petitioner while John M. Morris argued for the respondent. As above, the following subsections will explore the arguments of the petitioner and the respondent in an effort to detect deference.

The Arguments of the Petitioner

In making her argument on behalf of Wilkins, McKerrow leaned heavily on points made by the plurality in *Thompson*. Citing the “well-recognized and fundamental differences between children and adults,” McKerrow stated that “even the most mature 16-year-old [was] still a child in every state in the United States” and therefore could not have the degree of moral culpability that is required to justify a sentence of death (No. 87-6026 1989). In elaborating on the idea she had presented, the petitioner went into depth on two specific factors that she deemed relevant to establishing the point that a national consensus against the execution of 16-year-old offenders was apparent, each of which closely reflected points made by the *Thompson* plurality in relation to 15-year-old offenders.

First, the petitioner addressed statutes that, while chronologically based, had no direct relation to capital sentencing. The petitioner cited several specific examples of Missouri statutes that drew lines based on age and related that more than 80 such laws were in place (No. 87-6026

1989). In doing so, she closely paralleled the *Thompson* plurality, who had stated that class statutes unrelated to the actual issue of the death sentence could be thought of as relevant indicators that juveniles were “not prepared to assume the full responsibilities of an adult” (*Thompson v. Oklahoma* 1988, 825).

Second, McKerrow turned her attention to the indications that could be inferred from professional leaders. Citing a resolution from “the National Council of Juvenile and Family Court Judges” rejecting the death sentence as an appropriate option for offenders under the age of 18, the petitioner suggested that such a rejection stemming from the very individuals most often tasked to deal with that category of offenders lent “strong support” to the idea that a national consensus against the practice did in fact exist (No. 87-6026 1989). In the *Thompson* decision, only the plurality directly addressed the value of the opinions of professional organizations. In closing *Part III* of their argument, the plurality identified that both “the American Bar Association and the American Law Institute [had] formally expressed their opposition to the death penalty for juveniles” and conveyed the importance of reaching a decision that was consistent with the views of “respected professional organizations” (*Thompson v. Oklahoma* 1988, 830).

Collectively, these two points were the most central to McKerrow’s argument. Not only did she speak on them at great length in her initial argument; she also returned to them when using the time she had reserved for rebuttal. In relation to her first point, what the petitioner offered during rebuttal was largely a summary of the points she had made earlier. In dealing with the concept of professional organizations, McKerrow used the opportunity afforded by the rebuttal to more explicitly tie her second point to the opinion of the *Thompson* plurality by

returning to her example and then specifically evoking the two professional organizations that had been referenced in the plurality's writings (No. 87-6026 1989).

As she had done with points made by the *Thompson* plurality, McKerrow established two separate arguments using points made in Justice O'Connor's *Thompson* concurrence as a basis. The first and more substantive related to transfer statutes while the second addressed an issue of federal law.

Relatively early in her argument, McKerrow raised the point that Missouri's capital sentencing statute did not specifically address a minimum age at which an individual could be constitutionally executed. Specifically referencing the concurrence of Justice O'Connor, McKerrow then posited that the State's decision to conditionally transfer juvenile offenders to the adult criminal justice system did not necessarily imply an acceptance of the death penalty as a potential sentence for juveniles. Instead, the petitioner maintained that Missouri's transfer statute existed simply to afford relief to the juvenile justice system in instances where they found they did not have the "resources and facilities" necessary "to effectively deal with violent children or to protect society against those children" (No. 87-6026 1989).

Another instance in which the petitioner directly tied her argument to Justice O'Connor's concurrence can be found in a brief reference to an amendment adopted in federal drug code. The policy in question had been referenced by Justice O'Connor as a potential indicator of federal legislative will in her *Thompson* opinion (*Thompson v. Oklahoma* 1988, 851-852) and it was referenced without further elaboration to the same end by McKerrow (No. 87-6026 1989).

Beyond the two arguments just related, the petitioner invoked the concurrence of Justice O'Connor on two other occasions; once in discussing the need for "strong counter-evidence" to a national consensus, and once in attempting to explain why legislative action on the part of the

state pursuing a minimum age for executions had not been successful (No. 87-6026 1989). Each of these points were exceptionally brief and the latter was largely tangential. Nevertheless, as the concurrence was explicitly related as the basis for the construction of these arguments, they were categorized accordingly.

The final category of arguments presented by McKerrow that was detected by this analysis demonstrated an overlap by drawing from points that could be attributed to the *Thompson* plurality and concurrence alike. A single thread of argument by the petitioner was determined to be part of this category. In discussing the prospect of considering state statutes that failed to express a minimum age as evidence against a national consensus, the petitioner referred to the combined weight of the opinions of the plurality and the concurrence in stating that the “majority of the Court [had] already rejected that reasoning” (No. 87-6026 1989). This point, initially made in McKerrow’s opening argument, was later expanded on during her rebuttal where she used a specific state statute as an example and claimed that statutes with no minimum age did not tell the Court “anything about how young is too young to be executed” (No. 87-6026 1989).

The Petitioner’s Arguments as Data

After refinement, McKerrow’s argument contained 3,763 words. Of those, 1,854 were found to bear relation to the various *Thompson* opinions. Once categorized, those words were found to be dispersed among three separate categories as follows: arguments constructed from the plurality (1,162), arguments constructed from the concurrence (576), and arguments constructed from the plurality and the concurrence (116).

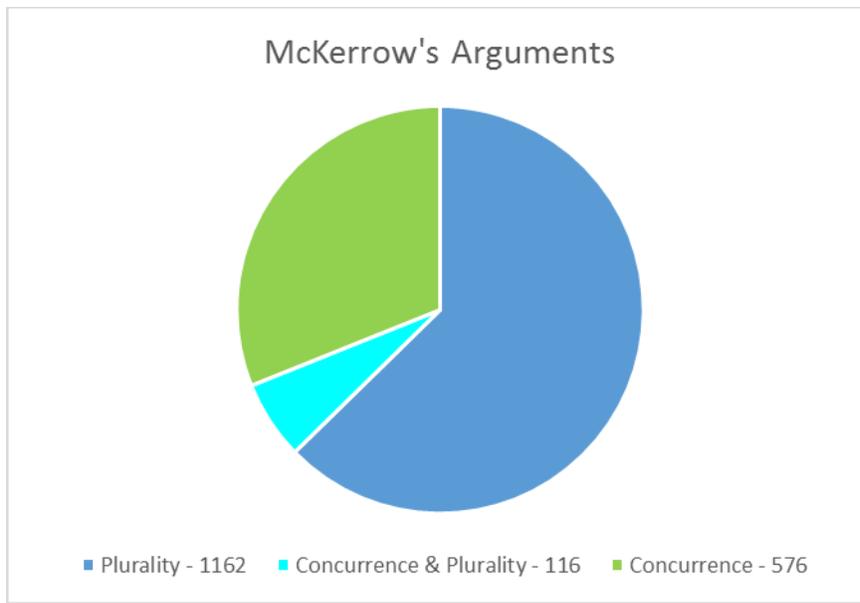


Figure 3

As is made clear in Figure 3, the majority of the arguments made by McKerrow found their foundation in the writings of the *Thompson* plurality. Given that Wilkins' situation was remarkably similar to that of Thompson, it might seem imminently reasonable that the petitioner would attempt to garner the favor of the same group of justices that had declared Thompson's sentence unconstitutional. However, from the attitudinalist perspective, such an approach is largely counterintuitive. To elaborate through an example, neither the concurrence nor the dissent in *Thompson* gave any indication that they thought of statutes unrelated to capital sentencing or the opinions of professional organizations as relevant factors for consideration. As such, the arguments constructed by McKerrow on those subjects would only likely prove compelling to members of the *Thompson* plurality. As was related in the literature review section of this work, the four justices of the *Thompson* plurality had clearly established themselves as amenable to the idea of categorical exemptions from the sentence of death in both *Ford* and *Thompson*. If one accepts the idea that justices are likely to hold to their own personal preferences on policy issues when approached with similar questions, this means that the

majority of the words used by McKerrow in relation to *Thompson* were essentially examples of the petitioner preaching to the choir.

The above point notwithstanding, when one considers only the arguments made by McKerrow that had a relationship to a specific *Thompson* opinion, 37% of them were used addressing concepts that had been referenced as important to the concurrence. In contrast, no effort on the petitioner's part was made to sway the three members of the *Thompson* dissent through arguments specifically built on points they had deemed salient. This truth may support an idea presented in the introduction of this work; McKerrow may have perceived Justice O'Connor as more flexible than the members of the *Thompson* dissent and crafted her argument accordingly.

The Arguments of the Respondent

In reviewing the case for Missouri presented by Morris, it was discovered that the majority of the arguments he advanced used points made by the *Thompson* dissent, the concurrence, or some combination of the two as their foundation. With the exception of a single argument built from points advanced by the plurality, statements made by the respondent outside of the aforementioned categories that had a clear relation to the *Thompson* decision either referred to points on which there had been no contention among the justices or were used to explain the respondent's decision to take no stance on an issue that opposing counsel had put forward as pertinent. These arguments and the categorization decisions related to them will be elaborated on below.

The first argument developed by Morris that found its basis in the *Thompson* opinions opened with statements that reflected information that had been advanced by the dissent, then evolved to include information that dealt with points made by both the dissent and concurrence

before returning to a presentation of information that was once again drawn from the opinion of the dissent alone. The issue of considering the 18 states that had opted not to set a specific minimum age for execution that stood as separate from the age at which the states' transference statute allowed for an individual to be tried in the adult criminal justice system was the subject of the argument.

As had the dissent in *Thompson* (1988, 868), Morris insisted that statutes that had not expressed a minimum age were relevant to the Court's analysis of the evolving standards of decency (No. 87-6026 1989). Expounding on the contention, Morris incorporated issues raised in the *Thompson* concurrence while arguing the dissent's stance that the laws of the 18 states in question could not simply be discounted if an "accurate analysis" was to be conducted (*Thompson v. Oklahoma* 1988, 868).

In her *Thompson* concurrence, Justice O'Connor had expressed concern that the legislatures of the states that had not set a minimum age may not have "considered the fact that the interaction between their capital punishment statutes and their juvenile offender statutes could in theory lead to executions for crimes committed before the age of 16" (*Thompson v. Oklahoma* 1988, 851). Making direct reference to this point, Morris recounted and subsequently attempted to address Justice O'Connor's concerns by identifying that "five of the 18" statutes in question either made explicit reference to the potential for "capital punishment or to that state's version of capital murder" (No. 87-6026 1989). Furthering the point that the suggested lack of consideration on the part of the individual state legislatures was unlikely, Morris pointed to what he related as "less direct" evidence in that 14 of the statutes in question had explicitly referenced "age as a mitigating factor" in capital punishment cases (No. 87-6026 1989).

Continuing his argument concerning the 18 states that lacked a minimum age specifically related to capital sentencing procedures, Morris identified that if indeed interaction between transference and sentencing statutes were nothing more than oversights of the legislatures that had crafted them, one would expect that such mistakes would have been rectified. The respondent emphasized this point by explaining that the question at hand was not “academic” in nature, as no fewer than eight individuals that had committed capital offenses while 16 or under had in fact received death sentences in states that had not expressed a minimum age (No. 87-6026 1989). In closing the line of argument, Morris explained that he believed that even absent the considerations he had listed, assuming that “legislatures just didn't think about” capital sentencing as a possibility when constructing the statutes in question presented as counterintuitive (No. 87-6026 1989). Each of these final two arguments are near mirrors of statements made in *Part III* of the *Thompson* dissent (*Thompson v. Oklahoma* 1988, 864, 876).

In another line of argument, Morris addressed the idea that the sentencing habits of juries could be used as an indicator of public will. In the respondent's view, sentencing statistics demonstrating that very few offenders of Wilkins' age received the death sentence were of very little evidentiary value absent accompanying statistics on how many people of that same age had been “convicted of a capital crime” (No. 87-6026 1989). Here, Morris adopted a position that was closely related to that of the *Thompson* concurrence and dissent. In *Thompson*, Justice O'Connor had related that the jury statistics the plurality had used in arriving at their decision were lacking because they failed to “indicate how many juries [had] been asked to impose the death penalty for crimes committed below the age of 16” (*Thompson v. Oklahoma* 1988, 853). Likewise, the dissent argued that such decontextualized statistics failed to demonstrate anything

other than the fact that executions involving young people were rare (*Thompson v. Oklahoma* 1988, 870).

On the subject of culpability, Morris explained that in spite of the mitigating force of youth, Wilkins was entirely to blame for his actions. Turning attention to the facts in Wilkins' case, the respondent pointed out that the convicted had been found to "have acted with deliberation," to have had "knowledge of the consequences" of his actions, and to have made the decision to kill his victim because he believed that it would better "his chances of not being apprehended" (No. 87-6026 1989). By way of this last point, Morris then tied the concept of culpability to the potential deterrent that the death penalty is intended to provide. The respondent believed that such a "vicious risk-benefit analysis" on Wilkins part clearly belied the idea that youth would necessarily render an individual unable to consider the potential price of his actions (No. 87-6026 1989). Here again, Morris pulled from the *Thompson* concurrence and dissent. In *Thompson*, Justice O'Connor rejected the idea that 15-year-old offenders were less culpable as an issue of necessity and maintained that no evidence had been produced to support the idea that young offenders were less likely to be responsive to the deterrence effect of the death penalty (*Thompson v. Oklahoma* 1988, 853). Speaking on the same matters, in that no evidence to clearly support either proposition existed, the dissent suggested that arriving at such conclusions required that an individual consider their own opinion on the matter as dispositive (*Thompson v. Oklahoma* 1988, 873).

Referring to an argument advanced by opposing counsel, Morris related the idea of considering age-based legislation that did not directly relate to capital sentencing as inappropriate in the case at hand (No. 87-6026 1989). In *Thompson*, the plurality made reference to several class statutes that were applicable only to individuals of a specific age as contributing

to their decision. Referencing laws that prevented anyone under the age of 16 from voting, driving, gambling and participating in a variety of other activities, the plurality held that lawmakers had unanimously decided that the young were “not prepared to assume the full responsibilities of an adult” (*Thompson v. Oklahoma* 1988, 824-825). In explaining why he believed such statutes should not be thought of as dispositive factors, Morris made reference to several of the same class statutes that had been covered by the plurality in *Thompson* (No. 87-6026 1989). As such, Morris’ argument, though contrarian in nature, is considered by this work to have been developed from the opinion of the *Thompson* plurality.

During his argument, Morris spent time on two points that were related to *Thompson* that did not demonstrate any deference to a particular opinion from that case. The first came by way of his opening statements and addressed a point of unity among the *Thompson* opinions; the decision to consider state statutes that had addressed a minimum age for execution as relevant indicators of public will (No. 87-6026 1989). Indeed, each written opinion in *Thompson* did at some point reference the states in question while contemplating the number of states that would or would not allow Thompson’s execution (*Thompson v. Oklahoma* 1988, 826-829, 849, 867).

The second point made by Morris in relation to *Thompson* that this work considers to lack clear deference dealt with the “Anti-Drug Abuse Act of 1988” (No. 87-6026 1989). After a justice prompted Morris to comment on the legislation in question, the respondent stated that while the Act had been “discussed and argued in *Thompson*” he had opted to “set aside the federal jurisdiction” because he could neither “disprove or prove” its value as an indicator of public will (No. 87-6026 1989). Given his tendency to argue from points on which the concurrence and dissent in *Thompson* had agreed, Morris’ decision to take a neutral position when confronted with a point that had generated conflict between them is intriguing unto itself.

However, Morris' decision to avoid taking any stance on the issue offers no clear deference to any position and as such has been classified as a neutral statement for the purposes of this study.

The Respondent's Arguments as Data

The refinement process reduced the total number of words spoken by Morris to 4,328, of which 3,142 were identified as having a relationship to the *Thompson* decision. Upon evaluation, those 3,142 words were separated into five categories as follows: arguments constructed from the plurality (282), arguments constructed from the dissent (772), arguments constructed from the concurrence (34), arguments constructed from the dissent and concurrence (1776), and words used in a neutral sense (278).

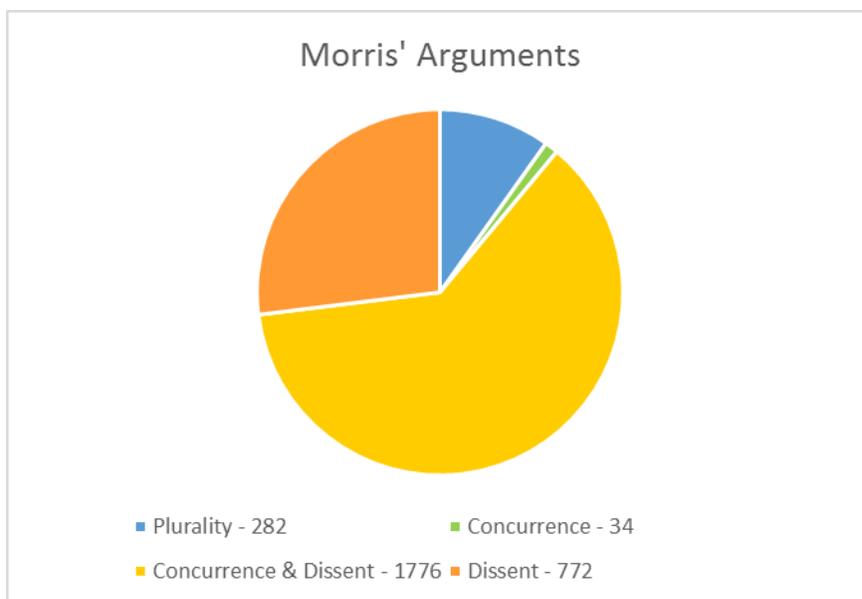


Figure 4

Though Morris' arguments offered the greatest amount of attention to the *Thompson* dissent, they show that the respondent placed heavy value on ideas advanced by the concurrence as well. Excluding the neutral points, the respondent's arguments that included elements of the

concurrency's opinion represent some 63% of the total number of words that Morris used in relation to *Thompson*.

Though not as decisively as the data collected from Palmer's arguments, the data collected by way of Morris' statements support the initial hypothesis of this work to some extent. Figure 4 demonstrates that Morris spent more time presenting points that would be well received by the category of dissent and concurrence than he did on any other. However, the data related to Morris cannot be said to support the hypothesis of this work in that the respondent spent surprisingly little time focusing on points that were unique to the *Thompson* concurrence when considered against the attention he gave to the arguments that were unique to the dissent.

The Stanford Argument

In the Stanford argument, Frank W. Heft acted as the petitioner while Frederic J. Cowen argued for the respondent. As above, this area of the analysis will consider the arguments made by each attorney in an effort to categorize the statements made.

The Arguments of the Petitioner

Of the arguments herein examined, Heft's were the most beholden to a single *Thompson* opinion; the petitioner constructed four substantial points, each of which advanced ideas that were unique to the plurality throughout the *Thompson* decision. Beyond these extensive arguments, Heft made three statements related to *Thompson* that were exceedingly brief. In contrast to the greater arguments presented by Heft, the statements from this latter category were not built solely from the opinion of the *Thompson* plurality. Instead, one presented a concept universally accepted by the justices during *Thompson* while the other two blurred the lines between the opinions of the plurality and the concurrence.

The bulk of Heft's time before the bench was spent developing the idea that 18 could be demonstrated as the defining line between children and adults. Among the factors identified by the petitioner as indications that such a line existed were legislative enactments that did not deal with capital sentencing and the unique characteristics of youth that served to mitigate culpability in young offenders (No. 87-5765 1989). In these arguments, one can clearly see deference to the opinion of the *Thompson* plurality. While elaborating on societal expressions that demarked adults, Heft frequently discussed legislative enactments that dealt with age in terms of "voting rights or the ability to sit on a jury" (No. 87-5765 1989). As explained during the section of this analysis pertaining to the Wilkins argument, in *Thompson* the argument suggesting that such statutes were of any relevance in relation to capital sentencing decisions was unique to the plurality (*Thompson v. Oklahoma* 1988, 824-825). Heft explained that he believed society's rationale for developing a "dividing line between childhood and adulthood" was based on the issue of responsibility. He posited that maturity was accompanied by "emotional and intellectual development" and that such growth was necessary for an individual to bear "moral culpability" for their actions (No. 87-5765 1989). In assigning less culpability to Thompson through their decision, the plurality explained that young people were "less intelligent" and "much more apt to be motivated by pure emotion" (*Thompson v. Oklahoma* 1988, 835). Finally, Heft regularly related that the inherent immaturity of youth was an issue of "widespread agreement" (No. 87-5765 1989). While this same insistence was given voice by the plurality in *Thompson*, it was dismissed as irrelevant by way of the concurrence and rejected outright by the dissent (*Thompson v. Oklahoma* 1988, 834, 853, 873).

On the issue of the death sentence as a form of deterrence against crimes committed by persons under the age of 18, the petitioner argued that the relatively small percentage of juvenile

offenders on death row deprived the idea of its validity. Using the same context-free statistics related to the overall number of adolescents that had been sentenced to death that had been embraced by the *Thompson* plurality, Heft arrived at the conclusion that the “remote possibility” of receiving a sentence of death was insufficient to the task of deterring criminal activity among young offenders (No. 87-5765 1989). Beyond the connection that existed by way of the numbers employed, the conclusion the petitioner reached echoed the words of the *Thompson* plurality, who had related that the chances of a “teenage offender” receiving a death sentence was “so remote as to be virtually nonexistent” (*Thompson v. Oklahoma* 1988, 837).

Through questions from the bench, the petitioner’s argument against the death penalty as an effective form of deterrence for those 17 and under evolved into an argument advancing the idea that sentencing statistics could be interpreted as revealing “society's reluctance to inflict the death penalty on juveniles” (No. 87-5765 1989). Heft maintained that the exceptionally small percentage of death row inmates that had committed their crime prior to turning 18 stood as evidence that juries were more reluctant to give a sentence of death under those circumstances (No. 87-5765, 1989). In *Thompson*, this same logic had been put forward by the plurality and subsequently rejected by both the concurrence and the dissent on the basis that it neglected to consider several other factors that could explain the apparent age-based disproportion evidenced by the numbers (*Thompson v. Oklahoma* 1988, 832, 852-853, 869-870).

In pursuance of his goal of establishing youth as a mitigating factor that would provide absolute exemption from the prospect of a sentence of death, Heft referenced a case in which the Court had ruled that “the chronological age of a minor [was] itself a relevant mitigating factor of great weight” (*Eddings v. Oklahoma* 1982, 116). Identifying what he thought of as “a fundamental flaw” in the criminal justice system, Heft posited that the mitigating factor of youth

was given no greater consideration than any other “mitigating circumstance that the states might proscribe” (No. 87-5765 1989). In *Thompson*, in an effort to relate the “special mitigating force of youth,” the plurality referenced the same case to the same effect (*Thompson v. Oklahoma* 1988, 834).

The final substantial argument constructed by Heft to which this analysis gives consideration was on the subject of international opinion. Using literature provided by Amnesty International, Heft related that “143 out of 180 nations rejected capital punishment for people under 18” (No. 87-5765 1989). The will of “other nations” was referenced in *Part III* of the *Thompson* plurality’s opinion as a factor to which they had given consideration. Citing several examples of nations that had rejected the practice of executing juveniles, the plurality related that “civilized standards of decency” had been expressed globally and implied that the standards of the United States should be consistent with them (*Thompson v. Oklahoma* 1988, 830). Though the concept of international opinion was never thoroughly explored by the concurrence or the dissent, the latter did offer a curt refutation of the concept that such should be considered in stating that “the legislation of (American) society... is assuredly all that is relevant” (*Thompson v. Oklahoma* 1988, 868).

With the subject of Heft’s greater arguments explored, attention will now be turned to the three short statements referenced in the opening paragraph of this subsection. In his opening remarks, Heft related that a consensus existed in the various *Thompson* opinions in the conclusion that “some age below which a juvenile’s crime can never be punished by death” must exist (No. 87-5765 1989). Such is unambiguously the case; the above quoted passage by Heft is taken nearly verbatim from the concurrence (*Thompson v. Oklahoma* 1988, 848), the plurality came to the conclusion that Thompson himself was too young to be executed (*Thompson v.*

Oklahoma 1988, 838), and the dissent offered that there had always been an age-based line of “absolute incapacity” in felony prosecution (*Thompson v. Oklahoma* 1988, 864). Because Heft did not explicitly cite a single *Thompson* opinion as the basis for his statement on the existing consensus, for the purpose of this study the comment has been categorized as one of neutrality.

The other two *Thompson*-related statements were made in connection to one another on the subject of counting state capital sentencing statutes as objective indicators of a national consensus. The first related that “only six states...set the minimum age for capital punishment below 18” (No. 87-5765 1989). The second identified that 26 states would not allow for the execution of a juvenile offender at all (No. 87-5765 1989). Here, the former has been categorized as drawing on both the *Thompson* plurality and concurrence while the latter has been determined to be related to the opinion of the concurrence alone. This categorization decision was reached after a thorough consideration of the methods of state counting that each of the aforementioned *Thompson* opinions adopted. The plurality specifically addressed states that had no capital punishment statutes and states that had not “expressly stated” a minimum age as not being focused “on the question of where the chronological age line should be drawn” (*Thompson v. Oklahoma* 1988, 828-829). As such, the plurality determined that the best course of action was to examine only statutes that had “expressly established a minimum age” (*Thompson v. Oklahoma* 1988, 829). The concurrence offered a similar consideration of states that had established a minimum age but held that non-death penalty states should be counted alongside them (*Thompson v. Oklahoma* 1988, 849).

The Petitioner’s Arguments as Data

Refinement left this analysis with 3,198 words from Heft to consider. Of those, 1,765 were determined to bear a relationship to the *Thompson* opinion. The overwhelming majority

(1,676) were attributed as having been constructed from the opinion of the plurality. The remaining 89 words were categorized as follows: arguments constructed from the concurrence (12), arguments constructed from the plurality and concurrence (17), and words used in a neutral sense (60).

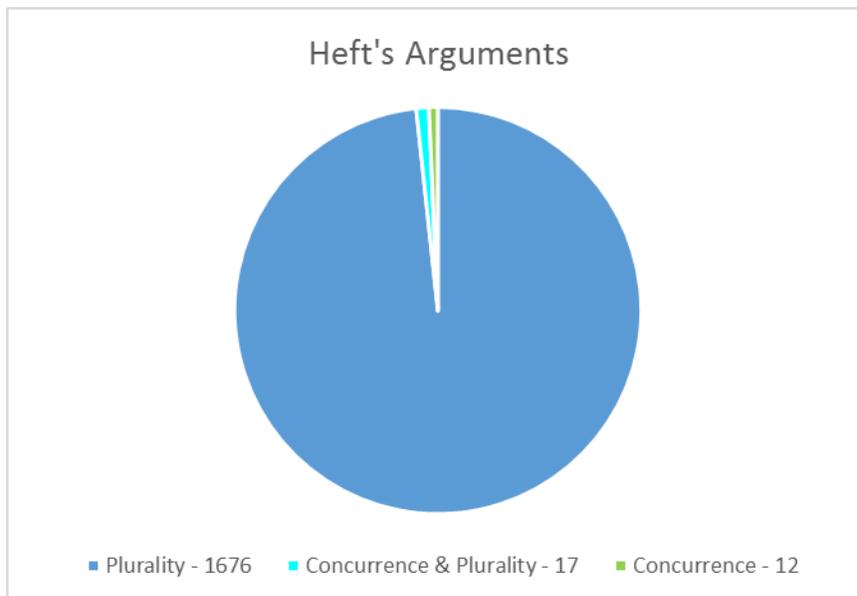


Figure 5

In conversations related to *Thompson*, Figure 5 demonstrates that Heft held a clear and near constant adherence to points made by the plurality. Contrary to the expectation set forth in the thesis of this work, Heft afforded virtually no attention to the arguments presented by Justice O'Connor in *Thompson*.

As earlier related during the consideration of the data harvested from McKerrow's time before the Court, for an attorney to construct arguments that only speak to points made by members of the Court that had already assumed a position on the issue that was favorable to the petitioner would defy logic under an attitudinalist understanding of judicial behavior. Unlike

McKerrow, Heft has no substantial secondary category of argument to consider. As such, Heft's arguments seem entirely at odds with the tenets of attitudinal theory.

While the attitudinal model does not provide an adequate explanation for Heft's behavior, one method of legal interpretation in cases of plurality outcomes does. The exact precedential value of plurality opinions is the subject of some debate. Here, a brief consideration of one specific method of interpretation is required in light of the data collected from Heft's arguments (Kimura 1992, 1600). Often, in Supreme Court cases where no simple majority of justices ascribe to a single opinion, precedential value is thought to derive from "the largest coalition of justices" (Kimura 1992, 1600-1601). Under this model of interpretation of the precedential value of plurality opinions, the lack of attention given to points made by either the *Thompson* concurrence or dissent in Heft's argument could be the result of the petitioner having adopted a strictly objective approach.

The Arguments of the Respondent

In stark contrast to the nearly exclusively plurality-based arguments presented by Heft, Cowen presented ideas that were constructed using the full range of *Thompson* opinions. In his half-hour before the bench, Cowen developed robust arguments on the value of individualized sentencing considerations, the nature of the national consensus in relation to the age at which a capital offender could appropriately be executed, and the will of the people of Kentucky. In each of these arguments, Cowen interwove information pulled from multiple opinions to address a single point. Herein, an analysis of these major arguments will be offered followed by a brief examination of short statements made by the respondent that, while not part of the aforementioned arguments, did bear a relationship to the *Thompson* opinions.

Cowen opened his argument with a statement on the value of “individualized consideration... focusing on the nature of the crime and the personal culpability of the individual” (No. 87-5765 1989). In the course of developing the point, the respondent borrowed language from the *Thompson* dissent, leaned on concepts that that had been embraced by both the dissent and concurrence as factual, and interjected an idea that was specific to the concurrence.

In the *Thompson* decision, in an effort to illustrate the value of individuating mechanisms, the dissent opened with a recounting of the facts that had led to Thompson’s sentence of death (*Thompson v. Oklahoma* 1988, 859-863). Cowen utilized a similar tactic in his argument by explaining that, despite his youth, Stanford had been found in multiple judiciary proceedings to have acted with purposefulness in the commission of his crime. The culmination of the respondent’s point came in the form of a statement describing Stanford as a “street-wise” offender (No. 87-5765 1989). In the *Thompson* dissent, the idea that a juvenile might be a “street-wise” offender and therefore “indistinguishable, except for their age, from their adult criminal counterparts” was addressed on two separate occasions (*Thompson v. Oklahoma* 1988, 865, 874).

As had been suggested by the *Thompson* dissent, the respondent maintained that a “street-wise” juvenile would bear the same level of individual culpability as a similarly situated adult offender (No. 87-5765 1989). Cowen insisted that if this logic were to be accepted, one would also be forced to accept the idea that some people under the age of 18 were entirely culpable for their actions and therefore chronological age could only serve as “an imperfect proxy” for the actual maturity of an individual (No. 87-5765 1989). As has already been thoroughly related in earlier sections of this analysis, the idea that adolescent offenders could

exhibit the level of blameworthiness that is requisite to a sentence of death was accepted in both the dissent and concurrence in *Thompson*.

While in the midst of developing the above related argument against a firm chronologically based prohibition against the sentence of death, Cowen endeavored to establish that a rule based on age alone, while thought of as acceptable by the plurality in *Thompson*, would stand as a departure from the Court's more well established insistence that a person's level of culpability should be thought of as relative to "the individual's participation in [a] crime" (No. 87-5765 1989). This brief interjection in the larger point being made drew from the opinion of Justice O'Connor directly; having accepted that some young people were entirely culpable for their own actions, the concurrence spoke on the importance of considering the "nexus between the punishment imposed and the defendant's blameworthiness" (*Thompson v. Oklahoma* 1988, 853).

Seeking to establish that the logic that had prevented Thompson's execution was not sufficient to the task of declaring Stanford's execution unconstitutional, Cowen turned his attention to the subject of state legislatures' capital sentencing statutes and the idea that a national consensus could be evidenced through them. While explicitly stating that he believed the *Thompson* plurality to have erred, Cowen offered that even under their analysis, a consensus against the execution of individuals 17 years or older could not be evidenced (No. 87-5765 1989). Building on this concept, the respondent constructed an argument that employed aspects of all three *Thompson* opinions.

Cowen opened his consensus-based line of argument with a warning; likening public opinion to a swinging pendulum, the respondent cautioned against freezing unsettled notions into constitutional law (No. 87-5765 1989). In this point, a very intentional invocation of the

Thompson dissent and concurrence is apparent. In addressing jury statistics used as a dispositive factor by the *Thompson* plurality, the dissent dismissed any trend they might evidence as a “pendulum swing in social attitudes” (*Thompson v. Oklahoma* 1988, 869). For her part, Justice O’Connor had related that similar statistics had once nearly led the Court to adopt a misconception that would have “frozen (a mistake) into constitutional law” (*Thompson v. Oklahoma* 1988, 855).

Moving on, Cowen turned to the legislative enactments of the various states and the manners in which each of the *Thompson* opinions had seen fit to consider them. In line with the opinion of the *Thompson* dissent, Cowen’s contention was that states that had opted not to set an explicit minimum age for execution should be thought of as evidence supporting the idea that no national consensus against the execution of juvenile offenders existed (No. 87-5765 1989). In relation to the opinion of the *Thompson* plurality, Cowen identified that the fact that all states had set the chronological line for juvenile jurisdiction at an age higher than Thompson’s was determined to be “most relevant” to their analysis (*Thompson v. Oklahoma* 1988, 824-825). He then used this argument to point out that the same could not be said for Stanford because many states had legislation that automatically waived 17-year-old offenders to the adult criminal justice system in murder cases (No. 87-5765 1989). Giving consideration to the states that had set an explicit minimum age, Cowen related that while none would have allowed for Thompson’s execution, six had expressly authorized the execution of 17-year-old offenders (No. 87-5765 1989). This point was clearly made in relation to the opinions of the plurality and the concurrence, both of whom had found great weight in the fact that no state had unambiguously provided for the execution of a 15-year-old (*Thompson v. Oklahoma* 1988, 824-825, 849).

Cowen's argument on the subject of states that had established a specific minimum age included a segment that was specific to the state for which he stood as representation. In response to a question from the bench, Cowen offered a thorough explanation of Kentucky's "juvenile transfer statute" (No. 87-5765 1989). The respondent related that Kentucky had not set a minimum age for execution at the time of Stanford's crime but maintained that the transfer statute contained language that evidenced that the legislature had given consideration to the idea that the decision to transfer a juvenile might ultimately lead to execution (No. 87-5765 1989). In *Thompson*, the concurrence expressed concern over the idea that transference statutes that failed to address a minimum age could represent an oversight on the legislature's part as opposed to an actual legislative will to consider execution an appropriate punishment for some adolescent offenders (*Thompson v. Oklahoma* 1988, 851-852). The *Thompson* dissent addressed the concurrence's claim that juvenile death sentences might be the result of a legislative "fluke" as preposterous (*Thompson v. Oklahoma* 1988, 876). Cowen's argument walked the line between the concurrence and the dissent, never expressing the concerns of the former as unrealistic while working to establish as fact the idea that Stanford's sentence was by no means a fluke (No. 87-5765 1989).

In building his arguments on the national consensus, Cowen frequently made general statements related to *Thompson* that were designed to demonstrate how the various opinions might be seen to align under his method of analysis (No. 87-5765 1989). Because these statements referenced *Thompson* but were not particular to a specific opinion, they were categorized as neutral for the purpose of this work.

In addition to the arguments examined above, Cowen spoke briefly on deterrence, the relative value of statistics, mercy as a legislative prerogative, and chronology-based laws enacted

at the state level (No. 87-5765 1989). Each of these points had clear connections to ideas expressed in at least one of the *Thompson* opinions. As such, they will be briefly explained below.

In addressing the issue of a deterrent effect of the death penalty, Cowen offered that no evidence indicated that it would be any less applicable to children than adults (No. 87-5765 1989). As was already explained during the examination of Morris' argument in the section of this work dealing with the Wilkins' argument, both the concurrence and the dissent held that no evidence indicated that the deterrence effect was invalid in relation to adolescent offenders.

Relating the issue of youth as comparable to other mitigating factors, Cowen inferred that the logic used to arrive at a "constitutional prohibition" on the basis of age might very easily be adapted to other factors (No. 87-5765 1989). In *Thompson*, the dissent had expressed a concern on the same grounds. Using statistics related to female executions as an example, the dissent suggested that one could arrive at the same conclusion of unconstitutionality if rarity was the only consideration (*Thompson v. Oklahoma* 1988, 871).

Cowen put forward that an age-based exemption from the death penalty would be an action taken on the basis of mercy. The respondent posited that while compassion in sentencing could be appropriate if it resulted from legislative enactment, it had already been established as outside the realm of Eighth Amendment jurisprudence as a constitutional matter (No. 87-5765 1989). In *Thompson*, the dissent suggested that the plurality's opinion demonstrated the hallmarks of legislative action designed to bring their own perceptions of "mercy" into force (*Thompson v. Oklahoma* 1988, 873).

Through an argument that was similar to the one presented by Morris during the Wilkins' argument, Cowen identified the chronology-based statutes related to voting and jury service as

matters of “administrative convenience” (No. 87-5765 1989). As with Morris’ argument on the subject, Cowen’s has been categorized as relating to the *Thompson* plurality.

The Respondent’s Arguments as Data

The refinement of Cowen’s argument left a total 3,503 words to be considered. Of these, 1,271 were found to have no clear relation to the *Thompson* opinions. Disbursed between six different groupings, the 2,232 words that were related to *Thompson* were categorized as follows: arguments constructed from the plurality (321), arguments constructed from the dissent (711), arguments constructed from the concurrence (71), arguments constructed from the dissent and concurrence (874), arguments constructed from the plurality and concurrence (94) and words used in a neutral sense (161).

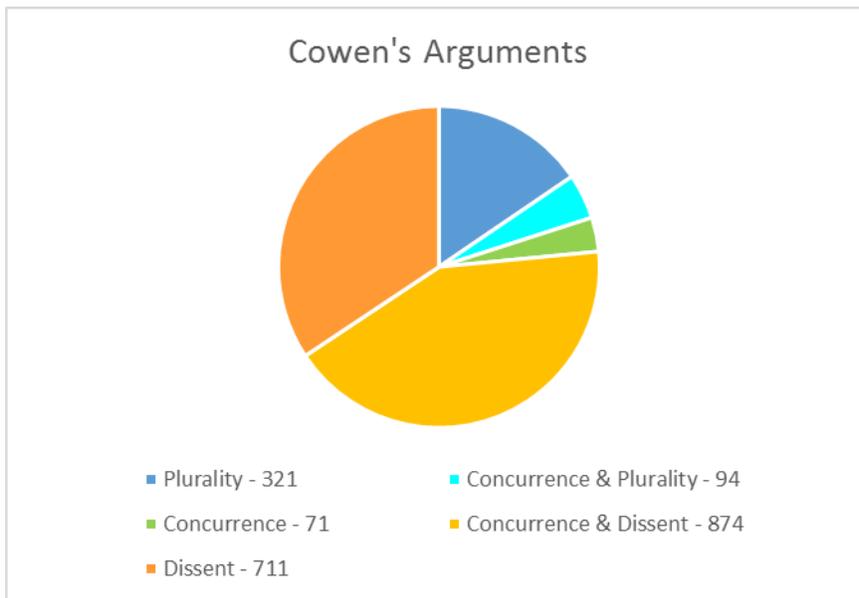


Figure 6

In matters related to *Thompson*, Morris afforded the dissent the majority of his attention. However, as was the case with Morris and McKerrow, a deference to the writings of the *Thompson* concurrence represented the second most prominent expenditure of Morris’ time.

When neutral ideas are excluded from the tally and overlapping arguments are factored in, a total of half of the words used by Cowen in relation to the *Thompson* decision incorporated points that Justice O'Connor had given weight to in her opinion.

As has proven the case with the majority of the analyzed arguments, Morris' cannot be said to support the hypothesis of this work. Though it appears that the respondent may have been aware of Justice O'Connor as a potential swing vote and to some extent tailored his argument accordingly, he still spent the majority of the words he used in relation to *Thompson* appealing to the dissent. As has been stated in relation to several of the arguments earlier considered, arguments constructed through points that were unique to the members of the Court that have already established themselves as sympathetic should be thought of as a wasted words from an attitudinalist perspective.

A Consideration of the Collected Data

This work's assumption that clear deference to the writings of Justice O'Connor would be apparent in the arguments considered did not prove accurate in the majority of cases. Rather, only Palmer behaved in a fashion that was entirely consistent with the hypothesis of this work. Still, when the datasets created for this work are considered against one another, some trends that are worthy of further contemplation can be detected.

A majority of four data sets can be used to establish that most attorneys used the majority of the words they spent on issues that could be directly related to *Thompson* arguing from the perspective of the bloc that had previously proven sympathetic to their position. Having already related why this truth should present as odd in relation to an attitudinal understanding of the justices during several of the individual considerations throughout the analysis, here a robust reconstruction of the point seems unnecessary. Suffice it to say that if indeed attorneys can

detect potential swing votes as this work assumes, they must also know which justices are ideologically predisposed to supporting their cause. In light of this, arguments constructed around points that are only likely to appease sympathetic justices seem largely unreasonable.

A second trend in the data sets affords a potential rationale for the above related point. In some cases, the tendency for attorneys to give primary deference to *Thompson* opinions other than the concurrence may be a simple matter of the obvious overlap between ideas being put forward in the case at hand and the existing opinions of the blocs. Undeniably, the opinions of the *Thompson* plurality and dissent are easily adaptable to the positions taken by petitioners and respondents respectively. If attorneys are assumed to accept the principles of attitudinalism and primary deference to sympathetic bloc opinions is subsequently assumed to be the result of the aforementioned natural overlap, one would expect the points made by the *Thompson* concurrence to represent, at a minimum, the second highest percentage of arguments presented in relation to *Thompson*. This idea is not universally supported by the collected data but the arguments of Palmer, McKerrow, Morris, and Cowen can be accurately described as conducive to this adaptation of the hypothesis initially presented in this work.

A final observation of a truth that was shared by the majority of the data sets collected is that it was uncommon for attorneys to develop arguments that might reasonably be described as targeting the *Thompson* bloc that was unsympathetic to the position they were arguing. Outside of the argument presented by Mason, it was entirely normal for petitioners to avoid points that were unique to the *Thompson* dissent; in the arguments of respondents, very little attention was given to ideas that were held as dispositive by the *Thompson* plurality alone. In relation to an attitudinal understanding of the Court, this point is unsurprising; it would be unreasonable for an attorney to spend considerable time attempting to sway a justice that had already exhibited an

ideological position that stood in contrast to the one he or she was tasked to champion. Unlike the seemingly irrational tendency for attorneys to afford serious attention to the justices that were already likely to support their cause, no natural overlap with prior opinions would be likely to result in the incidental construction of arguments that drew on points that had been dispositive to the decisions of justices that had previously espoused opposing ideological views.

Despite the fact that the above related points generally lend to the idea that attorneys' arguments are regularly constructed in a way that suggests that the legal professionals responsible for them perceive the justices as being responsive to their own previously divulged opinions, one of the cases herein analyzed provided a significant reason to believe that legal objectivism is the decisive factor in the construction of arguments presented to the Court for some attorneys. Throughout the argument presented by Heft, the opinions of the *Thompson* concurrence and dissent alike were all but entirely ignored. In contrast to the arguments of every other attorney that served as the basis for this examination, Heft focused almost exclusively on points that had been made by the plurality and cannot be said to have engaged in any activity that demonstrated an effort to directly appeal to either the *Thompson* concurrence or dissent. As was related earlier in this analysis, such an approach on Heft's part gives no indication that the petitioner saw either Justice O'Connor or the members of the *Thompson* dissent as more likely to be responsive to arguments tailored to their individual policy preferences than they would be to arguments of any other kind.

CONCLUSIONS

In the limitations section of this paper it was identified that due to the narrow scope of this work there would be some difficulty in establishing any indications revealed through the analysis of the arguments herein considered as necessary truths of the behavior of legal professionals. Through the analysis conducted and a careful contemplation of the collected data it was made apparent that the process of drawing conclusions is further complicated in that the data sets constructed for this work yielded widely divergent results. In light of the fact that no truth related to how attorneys interact with the justices could be perceived as universal through the collected data, this work turns first to the observable differences for a fundamental conclusion, and second, to implications derived from the majority.

In relation to the thesis of this work, one of the examined arguments clearly supported it while another directly refuted it. Given that these data sets stand out as unique from the others developed for this work, such obvious indications of how attorneys perceive the justices should be thought of as exceptions as opposed to rules. Still, they stand as the foundation for the most evident conclusion that can be derived from this work; that legal professionals do not collectively share an opinion of the manner in which the Court functions.

Given the contradiction that is inherent in how Heft and Palmer approached the justices, it is reasonable to conclude that legal professionals cannot be thought of as categorically accepting either the attitudinal model of judicial behavior or legal objectivism. It is possible that some circularity exists in this observation. If one accepts the idea that, as elevated attorneys, the justices themselves are prone to be susceptible to the same motivations as any other legal professional, then the bench may well be home to individuals akin to Heft and Palmer alike. In

turn, individual impressions of members of the Court may form the opinions of the bench that attorneys hold.

Of course, in studying the actions of people the discovery of a categorical truth would be exceptional indeed. As such, observations that held true to the majority of the arguments examined should be thought of as useful indications of how the legal professionals see the Court. When the trends detected through the analysis of this work are considered alongside one another it seems that most attorneys try to argue primarily from a position that will be accepted by a previously identified ideologically sympathetic bloc, secondarily to a perceivable swing vote, and very rarely in a fashion that would represent an effort to pull votes from a bloc of justices that have expressed contradictory ideological leanings. While this pattern could be seen as support for the attitudinal model of judicial behavior, it is not compelling.

If one accepts plurality opinions as having some limited precedential worth, by virtue of the task assigned to the petitioners herein examined the above related pattern could just as easily be thought of as an example of legal objectivism at work. With that considered, the number of occasions in which the pattern served as a good illustration of arguments constructed under attitudinalist presumptions is reduced to two. As a result, in order to establish more consequential truths related to the trends identified in this work, further study would be required.

RECOMMENDATIONS

To date, the majority of studies concerned with “judicial motivations” have been conducted using the voting habits of the justices as the quantifiable variable (Smithey 2011, 741). In order to foster a more complete understanding of judicial behavior, attention should be turned toward developing useful information from other aspects of the Court’s business. In relation to the Supreme Court, a robust pool of official information to draw from exists in the transcripts of the arguments presented to the Court and the official decisions authored after cases are considered.

Considerations of judicial behavior that are detached from the most commonly employed methods of exploration have the capability to provide new insights that cannot be produced through the exploration of binary voting decisions. Through the research conducted in this paper there is a clear illustration of this point; the contextualization of the documents herein considered resulted in the detection of trends that offer insights into the types of arguments that legal professionals perceive as likely to influence the justices of the Supreme Court. Information of this kind could not have been produced through an inspection of votes alone.

The extensive collection of written documentation that has been produced by casework brought before the Court represent a wealth of quantifiable information, much of which has yet to be thoroughly explored in relation to investigations of judicial behavior. It is the recommendation of this work that researchers expand the scope of quantifiable evidence that is typically drawn on in studies of judicial behavior. In direct relation to the analysis conducted in this work and the methods used throughout, more specific recommendations for further research are presented in the next and final section.

Opportunities for Further Research

As a result of this work having approached a well explored area of study by way of a new path, opportunities for further research presented themselves in abundance. Here, three that would likely yield interesting results will be presented for consideration.

First, the methods used in this study to examine oral arguments could be applied to more case sets of a similar nature. As related in the closing paragraph of the conclusions section of this work, an examination of this type could be conducted on the same basis as this work in an effort to either prove or disprove the implication that the majority of legal professionals are adherent to an attitudinal understanding of Supreme Court justices. However, such a close relationship to this study need not necessarily be the nature of the pursuit in order to adapt the methods employed in it. Presumably, the type of data constructed by way of this analysis could be used to a wide variety of ends.

Second, this exact set of cases could be considered with the scope of the information under examination expanded. As explained in the methodology section, considering these cases in relation to the *Thompson* decision specifically drastically reduced the amount of information that could be converted to data. In this work, the decision to compare the arguments from *Penry* and *Stanford* to the opinions from *Thompson* was made because no changeover in the justices occurred throughout. In order to expand the consideration to include points made in the arguments that were unrelated to *Thompson*, a study would have to be based on the ideological leanings of the justices involved in every referenced opinion.

Finally, it is possible that individuals considered in this exploration do not behave in a fashion that is consistent with the findings of this work on every occasion in which they are tasked to argue before the Supreme Court. As a result, a similar study in which all of the

arguments presented by individual attorneys herein examined would yield valuable information.

Heft and Palmer have both stood before the Court as representation on several occasions.

Having proved the most divisive examples of how attorneys perceive judicial behavior at the

Supreme Court level in this work, this pair would be ideally suited to an exploration focused on

determining if there is consistency in how individuals develop arguments for the Court.

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