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Creole and Unusual Punishment - A Tenth Anniversary Examination of Louisiana's Capital Rape Statute

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CREOLE AND UNUSUAL PUNISHMENT—A TENTH ANNIVERSARY
EXAMINATION OF LOUISIANA'S CAPITAL
RAPE STATUTE

I. INTRODUCTION

The history of imposing capital sentences on those convicted of designated crimes is as old as the history of society itself.¹ Over time, as cultures developed and advanced, many changes clearly materialized in the values and customs of each individual society.² In the United States, actions that were considered criminal and punishable by death during the Colonial and Revolutionary periods are today considered common activities and not criminal at all.³ Conversely, punishments once considered legally and socially acceptable now violate the Eighth Amendment's prohibition on cruel and unusual punishments.⁴ As times change and American society

1. See, e.g., JOHN LAURENCE, *A HISTORY OF CAPITAL PUNISHMENT* 1 (1960) (recounting that "[f]rom the earliest times death as a deterrent to others must have been common"). Evidence of capital punishment in ancient societies has been found as early as 1500 B.C.E. in accounts of criminal trials in Egypt. See *id.* at 2 (outlining historical evidence of capital punishment). Additionally, the Bible is replete with references to imposition of death for a multitude of crimes. See, e.g., *Exodus* 21:12 (authorizing capital punishment for murder); *Exodus* 21:16 (authorizing capital punishment for kidnapping); *Exodus* 22:19 (authorizing capital punishment for bestiality); *Exodus* 35:2 (authorizing capital punishment for working on Sabbath); *Leviticus* 20:10 (authorizing capital punishment for adultery); *Leviticus* 20:13 (authorizing capital punishment for homosexuality); *Leviticus* 24:16 (authorizing capital punishment for blasphemy); *Deuteronomy* 22:20-21 (authorizing capital punishment for loss of virginity).

2. See generally LAURENCE, *supra* note 1, at 1-27 (providing brief but comprehensive historical overview of changes in imposition of capital punishment in various societies over course of 3500 years from ancient Egypt to modern United States).

3. See BRADLEY CHAPIN, *CRIMINAL JUSTICE IN COLONIAL AMERICA, 1606-1660* 137 (1983) (reciting multitude of religious crimes in Colonial America, including failure to attend church services, violation of Sabbath, disturbing church services and reviling church doctrine and ministers); LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 34 (1993) (noting that, in early years of our country, "[a]n offense against God was an offense against society" and that acts of immoral character were found to be criminal). Additionally, in a study of seven counties in Massachusetts from 1760 to 1774, thirty-eight percent of all criminal cases were for fornication, with almost all of those charges being brought against mothers of illegitimate children. See *id.* at 54 (recounting statistics on capital punishment in early America).

4. See U.S. CONST. amend. VIII (prohibiting cruel and unusual punishments); see also FRIEDMAN, *supra* note 3, at 40 (including branding, letter-wearing, whipping, banishment and mutilation as common punishments throughout seventeenth and eighteenth centuries); Matthew W. Meskell, Note, *The History of Prisons in the United States from 1777 to 1877*, 51 STAN. L. REV. 839, 841-43 (1999) (outlining early American punishments designed to inflict pain in effort to deter crime—including whipping, branding and gagging—and punishments designed to humili-

evolves, shifting customs mandate adjustments to the manner in which criminals are punished.⁵ This requires constant vigilance and scrutiny by the courts over government attempts to impose overly harsh punishments.⁶

Since 1972, when the Supreme Court of the United States in *Furman v. Georgia*⁷ functionally invalidated all then-existing death penalty laws, over three-quarters of the states and the federal government have reenacted statutes allowing for capital sentencing for certain crimes.⁸ The

ate offenders—including use of stocks, pillories and scarlet letters); Barbara Clare Morton, Note, *Bringing Skeletons Out of the Closet and into the Light—“Scarlet Letter” Sentencing Can Meet the Goals of Probation in Modern America Because It Deprives Offenders of Privacy*, 35 SUFFOLK U. L. REV. 97, 101-04 (2001) (detailing shaming penalties and their prevalence in Colonial America).

5. See Michael J. O’Connor, Note, *What Would Darwin Say?: The Mis-Evolution of the Eighth Amendment*, 78 NOTRE DAME L. REV. 1389, 1398 (2003) (observing Court opinions that reflect necessity of changing punishments to adjust to changing societal conditions).

6. See generally Daniel Suleiman, Note, *The Capital Punishment Exception: A Case for Constitutionalizing the Substantive Criminal Law*, 104 COLUM. L. REV. 426, 439-51 (2004) (outlining nature of judicial sentencing review in death penalty cases and evaluating legitimacy of contention that “death is different” when appraising criminal sentences).

7. 408 U.S. 438 (1972).

8. See, e.g., Adam M. Gershowitz, *The Invisible Pillar of Gideon*, 80 IND. L.J. 571, 585 (2005) (citing *Atkins v. Virginia*, 536 U.S. 304, 342 (2002) (Scalia, J., dissenting)) (noting that thirty-eight states presently authorize capital punishment). The states that have specifically authorized capital punishment by statute are: Alabama (ALA. CODE § 13A-5-40 (2005)); Arizona (ARIZ. REV. STAT. ANN. § 13-703 (2005)); Arkansas (ARK. CODE ANN. § 5-4-601 (2005)); California (CAL. PENAL CODE § 190 (West 2005)); Colorado (COLO. REV. STAT. § 18-1.3-401 (2005)); Connecticut (CONN. GEN. STAT. § 53a-46a (2005)); Delaware (DEL. CODE ANN. tit. 11, § 4209 (2005)); Florida (FLA. STAT. § 775.082 (2005)); Georgia (GA. CODE ANN. § 16-5-1 (2005)); Idaho (IDAHO CODE ANN. § 18-4004 (2005)); Illinois (720 ILL. COMP. STAT. 5/9-1 (2005)); Indiana (IND. CODE § 35-50-2-9 (2005)); Kansas (KAN. STAT. ANN. § 21-3439 (2004)); Kentucky (KY. REV. STAT. ANN. § 507.020 (West 2005)); Louisiana (LA. REV. STAT. ANN. § 14:30 (2004)); Maryland (MD. CODE ANN., CRIM. LAW § 2-201 (West 2002)); Mississippi (MISS. CODE ANN. § 97-3-19 (2004)); Missouri (MO. REV. STAT. § 565.020 (2005)); Montana (MONT. CODE ANN. § 45-5-102 (2005)); Nebraska (NEB. REV. STAT. § 28-105 (2004)); Nevada (NEV. REV. STAT. § 200.030 (2003)); New Hampshire (N.H. REV. STAT. ANN. § 630:1 (2005)); New Jersey (N.J. STAT. ANN. § 2C:11-3 (West 2005)); New Mexico (N.M. STAT. § 30-2-1 (2003)); New York (N.Y. PENAL LAW § 125.27 (McKinney 2004)); North Carolina (N.C. GEN. STAT. § 14-17 (2004)); Ohio (OHIO REV. CODE ANN. § 2929-02 (West 2005)); Oklahoma (OKLA. STAT. tit. 21, § 21-701.9 (2005)); Oregon (OR. REV. STAT. § 163.105 (2003)); Pennsylvania (18 PA. CONS. STAT. ANN. § 1102 (West 2005)); South Carolina (S.C. CODE ANN. § 16-3-20 (2004)); South Dakota (S.D. CODIFIED LAWS § 22-6-1 (2005)); Tennessee (TENN. CODE ANN. § 39-13-204 (2005)); Texas (TEX. PENAL CODE ANN. § 19.03 (Vernon 2005)); Utah (UTAH CODE ANN. § 76-5-202 (2005)); Virginia (VA. CODE ANN. § 18.2-31 (2005)); Washington (WASH. REV. CODE § 10.95.030 (2005)); Wyoming (WYO. STAT. ANN. § 6-2-101 (2005)). The federal government has also reenacted capital sentencing statutes providing for the death penalty for several crimes, all of which a life must be taken to qualify a defendant for a capital sentence. See, e.g., 18 U.S.C. § 1111 (2005) (authorizing capital punishment for first-degree murder); *id.* § 1958 (authorizing

Court held that the standards juries employed in determining death sentences were inadequate, resulting in applications of capital punishment that were arbitrary and capricious.⁹ By and large, the statutes passed in response to *Furman* addressed the inadequacies identified by the Court.¹⁰ One requirement that has remained constant for a death sentence to be validly imposed, however, is that a death must occur as a result of the defendant's criminal acts.¹¹ Despite the Court's consistency and regularity in sustaining this requirement, states have tried, over the years, to evade this apparent prerequisite to execution.¹² Presently, one state—Louisiana—actively sanctions the imposition of a death sentence for a rape in which no life was taken.¹³ In the ten years since Louisiana passed its con-

capital punishment for murder for hire); *id.* § 2245 (authorizing capital punishment for murder related to rape or child molestation). For a discussion of the Supreme Court's abrogation of capital punishment in the United States via *Furman*, see *infra* notes 56-65 and accompanying text.

9. See *Furman*, 408 U.S. at 312-13 (White, J., concurring) (finding that manner in which capital punishment was administered led to arbitrariness and capriciousness in dispensation of death sentences).

10. See generally *Gregg v. Georgia*, 428 U.S. 153, 163-68 (1976) (Stewart, Powell and Stevens, JJ., joint opinion) (describing revisions instituted by Georgia in re-drafting its capital sentencing statute and reviewing in favorable manner in which revisions would address concerns elucidated by *Furman* Court).

11. See Irene Merker Rosenberg & Yale L. Rosenberg, *Of God's Mercy and the Four Biblical Methods of Capital Punishment: Stoning, Burning, Beheading, and Strangulation*, 78 TUL. L. REV. 1169, 1182 (2004) (observing that in contemporary America, capital punishment has been reserved for murderers). But see Eugene Volokh, *Crime Severity and Constitutional Line-Drawing*, 90 VA. L. REV. 1957, 1968 (2004) ("It is possible that the death penalty may still be available for child rape and for very serious national security crimes such as treason and espionage.").

12. For a discussion of states that have attempted to maintain legislation permitting capital punishment for crimes involving sexual assaults, see *infra* note 13 and accompanying text.

13. See LA. REV. STAT. ANN. § 14:42 (2004) (authorizing imposition of capital sentence for aggravated rape where victim is under twelve years old). Although Florida and Montana have also enacted aggravated rape laws, Florida's Supreme Court declared its statute unconstitutional, and Montana has yet to impose its death penalty on any offenders. See FLA. STAT. § 794.011(2)(a) (2005) (authorizing capital sentencing for adult offenders—those over eighteen years old—who commit "sexual battery" on victims under twelve years of age), *invalidated by* *Buford v. State*, 403 So. 2d 943 (Fla. 1981); MONT. CODE ANN. § 45-5-503(3)(c)(i) (2003) (permitting imposition of death sentence for repeat sexual offenders, regardless of victim's age). The Florida Supreme Court invalidated its capital child rape statute in 1981, holding that "a sentence of death is grossly disproportionate and excessive punishment for the crime of sexual assault and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment." *Buford*, 403 So. 2d at 951 (finding death sentence unconstitutional for crime where no life is taken). The statute remains on the books today, despite its invalidation by the Florida Supreme Court nearly twenty-five years ago. See § 794.011(2)(a) (providing for capital punishment for rape of child under twelve despite invalidation by Florida Supreme Court). Several additional states, including Alabama, California, Massachusetts, Mississippi and Pennsylvania, have debated or considered similar statutes in their legislatures but have yet to enact comparable legislation. See Corey Rayburn, *Better Dead Than R(ap)ed?: The Patriarchal Rhetoric Driving Capital Rape Statutes*, 78 ST. JOHN'S L. REV. 1119, 1137 (2004) (reciting statutory changes that have been de-

troubling statute, the landscape of American criminal justice has changed dramatically.¹⁴ Most importantly, the Supreme Court has clarified the circumstances under which a state may put one of its citizens to death, thus raising a serious question of the constitutionality of Louisiana's capital rape law.¹⁵

Accordingly, in recognition of the ten-year anniversary of Louisiana's capital rape statute, it is appropriate to reexamine the statute in light of recent developments in the Supreme Court's Eighth Amendment jurisprudence.¹⁶ Additionally, sufficient time has now passed to evaluate certain statements made by the Louisiana Supreme Court in support of the statute.¹⁷ The court stated that "[t]he fact that Louisiana is presently the sole state allowing the death penalty for the rape of a child is not conclusive. There is no constitutional infirmity in a state's statute simply because that jurisdiction chose to be first."¹⁸ The past ten years have shown conclusively that Louisiana was the first and remains the only state that actively sanctions executing convicted child rapists.¹⁹ Based on several developments in the interim decade impacting the constitutionality of capital rape statutes, Louisiana's statute presently violates the Cruel and Unusual Punishments Clause of the Eighth Amendment.²⁰

bated and considered for adoption in various state legislatures). For a discussion of Louisiana's capital child rape statute, see *infra* notes 117-40 and accompanying text.

14. See Anthony C. Thompson, *It Takes a Community to Prosecute*, 77 NOTRE DAME L. REV. 321, 338 (2002) (describing changing and emergent nature of criminal justice in America). See generally Adriaan Lanni, *The Future of Community Justice*, 40 HARV. C.R.-C.L. L. REV. 359 (2005) (outlining historical changes in criminal justice and calculating potential future implications of continued change).

15. See, e.g., *Roper v. Simmons*, 125 S. Ct. 1183, 1190 (2005) (declaring capital sentences unconstitutional when imposed on offenders who were under eighteen at time capital crime was committed); *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (holding that execution of mentally retarded criminals violates Eighth Amendment). For a discussion of *Roper*, see *infra* notes 149-58 and accompanying text. For a discussion of *Atkins*, see *infra* notes 141-48 and accompanying text.

16. For a discussion of the passage and implementation of Louisiana's capital rape statute, see *infra* notes 117-23 and accompanying text. For a discussion of recent Supreme Court cases having an impact on capital punishment, see *infra* notes 141-58 and accompanying text.

17. See *State v. Wilson*, 685 So. 2d 1063, 1069 (La. 1996) (suggesting that statute's legitimacy is not impeached by failure of other states to enact similar legislation and predicting that other states would follow Louisiana's lead once statute's constitutionality was settled judicially), *cert. denied*, 520 U.S. 1259 (1997).

18. *Id.*

19. See *id.* at 1068 (noting that Louisiana was only state permitting execution of convicted child rapists); see also Rayburn, *supra* note 13, at 1137-39 (reciting states that have debated legislation similar to Louisiana's and commenting that no other states have acted on these debates and enacted comparable legislation).

20. See J. Chandler Bailey, Note, *Death Is Different, Even on the Bayou: The Disproportionality of Crime and Punishment in Louisiana's Capital Child Rape Statute*, 55 WASH. & LEE L. REV. 1335, 1371 (1998) (arguing against capital rape statutes); Jennifer L. Cordle, Note, *State v. Wilson: Social Discontent, Retribution, and the Constitutionality of Capital Punishment for Raping a Child*, 27 CAP. U. L. REV. 135, 162 (1998) (opposing

The Constitution protects individuals' rights and freedoms against unreasonable government action.²¹ Specifically, the Eighth Amendment guards Americans from imposition of punishments that society regards as unacceptable.²² As the Supreme Court has developed its methodology in examining the constitutionality of punishments, it has invalidated penal sentences that are arbitrary and capricious, as well as those that are disproportionate or otherwise offend the Constitution by failing to achieve either of the primary aims of punishment—retribution and deterrence.²³

capital child rape statutes); Annaliese Flynn Fleming, Comment, *Louisiana's Newest Capital Crime: The Death Penalty for Child Rape*, 89 J. CRIM. L. & CRIMINOLOGY 717, 749 (1999) (deducing that contemporary society rejects death sentences for child rapists); Pamela J. Lormand, Comment, *Proportionate Sentencing for the Rape of a Minor: The Death Penalty Dilemma*, 73 TUL. L. REV. 981, 1015 (1999) ("The Louisiana rape of a minor statute at issue in *State v. Wilson* does not meet the tests employed by the United States Supreme Court in determining the constitutionality of the death penalty for a given offense."); Emily Marie Moeller, Comment, *Devolving Standards of Decency: Using the Death Penalty to Punish Child Rapists*, 102 DICK. L. REV. 621, 648 (1998) (concluding that death penalty should be reserved for offenders who take human life); David W. Schaaf, Note, *What if the Victim Is a Child? Examining the Constitutionality of Louisiana's Challenge to Coker v. Georgia*, 2000 U. ILL. L. REV. 347, 378 (advising against imposing death penalty for child rape); Lisa White Shirley, Note, *State v. Wilson: The Louisiana Supreme Court Sanctions the Death Penalty for Child Rape*, 72 TUL. L. REV. 1913, 1923-24 (1998) (concluding that Louisiana's capital child rape statute is unconstitutional). *But see* J. Richard Broughton, "On Horror's Head Horrors Accumulate": A Reflective Comment on Capital Child Rape Legislation, 39 DUQ. L. REV. 1, 42 (2000) (concluding that capital rape statutes do not violate Constitution); Yale Glazer, *Child Rapists Beware! The Death Penalty and Louisiana's Amended Aggravated Rape Statute*, 25 AM. J. CRIM. L. 79, 112-13 (1997) (arguing in support of capital child rape statutes if sufficient safeguards are implemented to limit class of death-eligible defendants); Elizabeth Gray, Comment, *Death Penalty and Child Rape: An Eighth Amendment Analysis*, 42 ST. LOUIS L.J. 1443, 1469 (1998) (supporting capital child rape statutes); Melissa Meister, Note, *Murdering Innocence: The Constitutionality of Capital Child Rape Statutes*, 45 ARIZ. L. REV. 197, 224 (2003) (asserting constitutionality of capital sentencing for child rapists); Bridgette M. Palmer, Note, *Death as a Proportionate Penalty for the Rape of a Child: Considering One State's Current Law*, 15 GA. ST. U. L. REV. 843, 877-78 (1999) (predicting that Supreme Court will uphold Louisiana's capital rape statute and that other states will also implement similar legislation); Matthew Silversten, Comment, *Sentencing Coker v. Georgia to Death: Capital Child Rape Statutes Provide the Supreme Court an Opportunity to Return Meaning to the Eighth Amendment*, 37 GONZ. L. REV. 121, 166 (2001-02) (arguing broadly that not only are capital rape statutes constitutional but that Supreme Court should overrule *Coker*). For a discussion of the ability of the arguments in *Wilson* to withstand a challenge before the Supreme Court, see *infra* notes 159-218 and accompanying text.

21. See LEE EPSTEIN & THOMAS G. WALKER, CONSTITUTIONAL LAW FOR A CHANGING AMERICA: INSTITUTIONAL POWERS AND CONSTRAINTS 7-10 (2001) (describing principles underlying Constitution and portraying importance of separation of powers and checks and balances to maintenance of individual rights).

22. See Mark Spatz, Comment, *Shame's Revival: An Unconstitutional Regression*, 4 U. PA. J. CONST. L. 827, 842 (2002) ("The Supreme Court has transformed the Eighth Amendment into secular gospel espousing humanity to all. . . . [T]he Eighth Amendment was put in place to protect human dignity.")

23. See, e.g., *Roper v. Simmons*, 125 S. Ct. 1183, 1200 (2005) (prohibiting capital punishment on juvenile offenders); *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (prohibiting capital punishment on mentally retarded offenders); *Enmund v. Flor-*

Accordingly, the Court should invalidate Louisiana's capital rape statute because it fails to comport with the Court's requirements for valid punishments.²⁴

This Note does not analyze or consider the morality underlying the application of the death penalty but rather confines itself to addressing the constitutionality of capital rape statutes under the Supreme Court's current jurisprudence.²⁵ First, Part II of this Note examines the historical progression of the death penalty in the United States.²⁶ Next, Part III catalogues the resurrection of statutes, appearing first in Louisiana in 1995, which permit capital sentences for sexual assaults committed with particular aggravation.²⁷ Part IV reports recent Supreme Court rulings with potential impacts on the validity of capital rape statutes.²⁸ Part V examines the effect these cases will have on the Court's analytical approach to potential challenges to capital sexual assault statutes.²⁹ Finally, Part VI concludes that Louisiana's capital rape statute is unconstitutional

ida, 458 U.S. 782, 801 (1982) (invalidating capital sentence for accomplice of fender who did not kill, intend to kill or attempt to kill); *Coker v. Georgia*, 433 U.S. 584, 600 (1977) (holding that Constitution does not permit death sentence for crime of rape); *Trop v. Dulles*, 356 U.S. 88, 103 (1958) (concluding that Eighth Amendment prohibits denationalization as punishment); *Weems v. United States*, 217 U.S. 349, 382 (1910) (finding fifteen years imprisonment at hard labor, shackled at wrist and ankle, disproportionate to crime of forgery and prohibited by Eighth Amendment).

24. For a discussion of the proper analysis with which to examine the constitutionality of capital rape statutes, see *infra* notes 174-218 and accompanying text.

25. See generally MARK COSTANZO, JUST REVENGE: COSTS AND CONSEQUENCES OF THE DEATH PENALTY 129-49 (1997) (examining moral justifications in favor of capital punishment); Anthony V. Alfieri, *Mitigation, Mercy, and Delay: The Moral Politics of Death Penalty Abolitionists*, 31 HARV. C.R.-C.L. L. REV. 325 (1996) (summarizing moral and ethical dilemmas inherent in application of capital punishment); Davison M. Douglas, *God and the Executioner: The Influence of Western Religion on the Death Penalty*, 9 WM. & MARY BILL RTS. J. 137 (2000) (providing historical overview of religious attitudes towards capital punishment and influences those attitudes have had on states' utilization of death penalty); Richard W. Garnett, *Christian Witness, Moral Anthropology, and the Death Penalty*, 17 NOTRE DAME J.L. ETHICS & PUB. POL'Y 541 (2003) (outlining moral and religious objections to capital punishment); Ori Lev, *Personal Morality and Judicial Decision-Making in the Death Penalty Context*, 11 J.L. & RELIGION 637 (1994-95) (critiquing moral considerations in capital jurisprudence in rulings and decisions of particular judges and justices); Thomas J. Walsh, *On the Abolition of Man: A Discussion of the Moral and Legal Issues Surrounding the Death Penalty*, 44 CLEV. ST. L. REV. 23 (1996) (discussing certain moral and legal objections to capital punishment).

26. For a discussion of the origins and subsequent history of capital punishment in the United States, see *infra* notes 31-110 and accompanying text.

27. For a discussion of the justifications and circumstances surrounding the rebirth of capital rape statutes, see *infra* notes 111-40 and accompanying text.

28. For a discussion of recent Supreme Court decisions with an impact on capital rape jurisprudence, see *infra* notes 141-58 and accompanying text.

29. For a discussion of the potential ramifications of recent Court decisions on capital rape jurisprudence, see *infra* notes 159-218 and accompanying text.

and violates the Eighth Amendment's prohibition on cruel and unusual punishments.³⁰

II. CAPITAL PUNISHMENT EVOLUTION IN THE UNITED STATES

A. *Development and Application of Capital Punishment in the United States Before Furman*

Capital punishment was utilized in the United States from the time the first settlers arrived on the continent.³¹ The pilgrims brought from Europe their religious and moral convictions, coupled with a stringent stance on law and order in the Colonies, where many crimes were punishable by death.³² Over time, support for capital punishment in America waxed and waned, and the number of annual executions in the United States declined at a steady rate beginning in 1935, when 199 executions occurred, until 1967, when the last execution was carried out in the United States before *Furman*.³³

American judicial history of capital punishment jurisprudence began in 1879 with *Wilkerson v. Utah*.³⁴ In *Wilkerson*, the Supreme Court held that execution by firing squad did not violate the Eighth Amendment's proscription on cruel and unusual punishments.³⁵ Previous cases heard by

30. For a summary discussion of the arguments presented in this Note and the conclusion that the Eighth Amendment prohibits the execution of child rapists, see *infra* notes 219-26 and accompanying text.

31. See Nicholas Levi, Note, *Veil of Secrecy: Public Executions, Limitations on Reporting Capital Punishment, and the Content-Based Nature of Private Execution Laws*, 55 FED. COMM. L.J. 131, 133-35 (2002) (noting prevalence of capital punishment beginning in Colonial era); Kristi Tumminello Prinzo, Note, *The United States—"Capital" of the World: An Analysis of Why the United States Practices Capital Punishment While the International Trend Is Towards Its Abolition*, 24 BROOK. J. INT'L L. 855, 868-69 (1999) (examining origins of capital punishment in America).

32. Accord Levi, *supra* note 31, at 133 ("The Colonial punishment scheme was modeled heavily after the system in England . . ."); see CHAPIN, *supra* note 3, at 55 (noting transference of Puritan ethic and use of death penalty from England to American colonies); THE DEATH PENALTY IN AMERICA: AN ANTHOLOGY 5 (Hugo Adam Bedau ed., 1964) (discussing variations of capital punishment between individual American colonies).

33. See STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY 208 (2002) (outlining steady decrease in number of executions in United States during first half of twentieth century). 1968 marked the first year since the establishment of the United States that no executions were transacted within its borders. See *id.*; see also M. WATT ESPY & JOHN ORTIZ SMYKLA, EXECUTIONS IN THE UNITED STATES, 1608-2002: THE ESPY FILE, <http://www.deathpenaltyinfo.org/ESPYdate.pdf> (last visited Oct. 12, 2005) (identifying every execution carried out in United States from 1608-2002, including demographic information about deceased, jurisdiction which authorized execution, crime(s) committed by deceased and method of execution).

34. 99 U.S. 130 (1879).

35. See *id.* at 134-35 (describing historical basis for capital punishment and death by firing squad and concluding that execution by firing squad was constitutionally permissible). *Wilkerson* had been convicted by a jury of murder and sentenced to death by firing squad. See *id.* at 130-31 (reciting facts). In appealing his

the Court had not raised objections under the Cruel and Unusual Punishments Clause.³⁶ Thus *Wilkinson* represented the Court's first foray into the viability of the Eighth Amendment as a means to challenge capital punishment statutes.³⁷

Eleven years after *Wilkinson*, the Court was again confronted with a challenge to a specific method of execution in *In re Kemmler*.³⁸ *Kemmler* challenged a New York statute, which provided for execution by electrocution for first-degree murder.³⁹ In a ruling markedly similar to that handed down in *Wilkinson*, the Court declined to hold electrocution to be a violation of the Eighth Amendment, noting that "the punishment of death is not cruel within the meaning of that word as used in the [C]onstitution."⁴⁰ Despite a bevy of recent public outcry against the continued use of the electric chair, *Kemmler* remains valid law today.⁴¹

sentence, he did not argue that the imposition of a capital sentence was cruel and unusual, per se, but that the method the State of Utah sought to use, the firing squad, violated the Eighth Amendment. *See id.* at 131 (same). In rendering its verdict, the Court analyzed multiple treatises on military law and reached the conclusion that "the punishment of shooting as a mode of executing the death penalty for the crime of murder in the first degree is not included [as a cruel and unusual punishment] within the meaning of the eighth amendment." *Id.* at 135.

36. *See id.* (summarizing previous challenges and finding no inconsistency in upholding death sentence).

37. *See generally* Christopher Q. Cutler, *Nothing Less Than the Dignity of Man: Evolving Standards, Botched Executions and Utah's Controversial Use of the Firing Squad*, 50 CLEV. ST. L. REV. 335, 368-69 (2002) (discussing early importance of *Wilkinson* and *In re Kemmler*, 136 U.S. 436 (1890), on Supreme Court's capital jurisprudence). For a discussion of *Kemmler*, see *infra* notes 38-41 and accompanying text.

38. 136 U.S. 436 (1890).

39. *See id.* at 441 (reciting facts). *Kemmler* was convicted of first-degree murder and sentenced to die in New York's electric chair. *See id.* at 439-41 (same). He appealed his sentence on the grounds that electrocution violated the Eighth Amendment's Cruel and Unusual Punishments Clause. *See id.* at 441 (same).

40. *Id.* at 447. The Court determined that although the Eighth Amendment did not apply to the states, *Kemmler's* challenge would still have failed because a sentence of death was not cruel and unusual within the meaning of the Eighth Amendment. *See id.* (reciting holding). The Court further opined that "if the punishment prescribed for an offence against the laws of the State were manifestly cruel and unusual as burning at the stake, crucifixion, breaking on the wheel, or the like, it would be the duty of the courts to adjudge such penalties to be within the constitutional prohibition." *Id.* at 446. In recent years, state supreme courts have divided as to whether or not modern jurisprudence prohibits the continued use of electrocution as a constitutional form of execution. *Compare Dawson v. State*, 554 S.E.2d 137, 145 (Ga. 2001) (determining that continued use of electrocution, in light of availability of more humane alternatives such as lethal injection, violates Georgia's constitutional prohibition on cruel and unusual punishments), *with Jones v. State*, 701 So. 2d 76, 80 (Fla. 1997) (upholding continued use of electrocution as permissible method of execution under Florida's constitution), *cert. denied*, 523 U.S. 1014 (1998).

41. *See Reid v. Johnson*, 333 F. Supp. 2d 543, 545 n.2 (E.D. Va. 2004) (noting that electrocution remains constitutionally acceptable method of execution). *See generally* Dawn Macready, *The "Shocking" Truth About the Electric Chair: An Analysis of the Unconstitutionality of Electrocution*, 26 OHIO N.U. L. REV. 781, 793-99 (2000) (cata-

During the first sixty years of the twentieth century, the Supreme Court decided two cases that, although not involving capital sentencing, are essential to later debates on the definition of "cruel and unusual punishments."⁴² In *Weems v. United States*,⁴³ the defendant was sentenced to fifteen years imprisonment at hard and painful labor for falsifying public records.⁴⁴ The Court struck down the punishment as cruel and unusual because the defendant's crime and sentence were disproportionate.⁴⁵ While the Court could not elucidate what specifically constituted disproportionality in sentencing, it commented that a central consideration to such review was an evaluation of the sentence's severity compared with sentences both for comparable and more severe crimes.⁴⁶ The Court concluded that severe sentences for relatively minor crimes were dispropor-

loguing recent mishaps during electrocutions and responses of courts to arguments that these botched executions constitute cruel and unusual punishment).

42. See *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (holding that Eighth Amendment prohibits punishment of denationalization); *Weems v. United States*, 217 U.S. 349, 382 (1910) (holding that excessive punishments are also cruel and unusual). For a discussion of *Weems*, see *infra* notes 43-48 and accompanying text. For a discussion of *Trop*, see *infra* notes 49-55 and accompanying text.

43. 217 U.S. 349 (1910).

44. See *id.* at 360 (reciting facts). *Weems* was a United States citizen living in the Philippines, then under American control. See *id.* (same). He was convicted of falsifying public and official documents upon evidence that he had forged pay records to indicate that some employees had received salary payments when they had not and that he subsequently kept the money for himself. See *id.* at 362-63 (same).

45. See *id.* at 357-58 (finding punishment disproportionate to crime and in violation of Eighth Amendment); *id.* at 381 (discussing proportionality in sentencing). The Court described the punishment, known as *cadena temporal*, graphically, in an effort to illustrate its severity:

Its minimum degree is confinement in a penal institution for twelve years and one day, a chain at the ankle and wrist of the offender, hard and painful labor, no assistance from friend or relative, no marital authority or parental rights or rights of property, no participation even in the family council. These parts of his penalty endure for the term of imprisonment. From other parts there is no intermission. His prison bars and chains are removed, it is true, after twelve years, but he goes from them to a perpetual limitation of his liberty. He is forever kept under the shadow of his crime, forever kept within voice and view of the criminal magistrate, not being able to change his domicile without giving notice to the "authority immediately in charge of his surveillance," and without permission in writing.

Id. at 366. Furthermore, the Court found that an individual convicted in the Philippines of falsification of bank notes, which could result in the loss of thousands of dollars, could be sentenced to no greater punishment than an individual who committed a crime similar to *Weems*'s. See *id.* at 380-81 (seeking proportionality in sentencing). Finding this punishment to be "repugnant to the bill of rights [sic]," the Court reversed judgment against *Weems* and declared the punishment a violation of the Eighth Amendment. See *id.* at 382 (reversing judgment of lower court).

46. See *id.* at 380 (identifying multitude of crimes, including certain degrees of homicide and crimes analogous to treason, that are not punished as severely as defendant had been).

tionate and constituted violations of the Eighth Amendment.⁴⁷ *Weems* marked the first time the Court rejected a penalty as cruel and unusual, and it also established the requirement of proportionality in the imposition of punishment.⁴⁸

In 1958, the Court was again confronted with an opportunity to further define cruel and unusual punishments in *Trop v. Dulles*.⁴⁹ The defendant was charged with and convicted of desertion from the army while stationed in Morocco during World War II.⁵⁰ He later discovered that he had lost his citizenship as a result of his wartime desertion.⁵¹ The Supreme Court, hearing the appeal from the dissolution of his citizenship, held that the “use of denationalization as a punishment [was] barred by the Eighth Amendment” because such punishment is disproportionate to the crime of desertion.⁵² Chief Justice Warren, writing for the plurality, stated that “the words of the [Eighth] Amendment are not precise, and their scope is not static. The Amendment must draw its meaning from the *evolving standards of decency* that mark the progress of a maturing society.”⁵³ This statement achieved prominence among courts in evaluating the constitutionality of punishments, and all questions of proportionality now hinge on how the punishment is seen in light of “evolving standards of

47. *See id.* (rejecting disproportionate sentences as unconstitutional).

48. *See* Erwin Chemerinsky, *The Constitution and Punishment*, 56 STAN. L. REV. 1049, 1052 (2004) (explaining principles of proportionality in sentencing and effect on American jurisprudence); *see also* MICHAEL A. FOLEY, *ARBITRARY AND CAPRICIOUS: THE SUPREME COURT, THE CONSTITUTION, AND THE DEATH PENALTY* 26 (2003) (critiquing approaches taken by Justices McKenna and White in their respective majority and dissenting opinions in *Weems* and describing framework in which complete examination of impact of *Weems* must occur); Cutler, *supra* note 37, at 373-75 (delineating importance of *Weems* decision on future constitutional interpretation and extrapolating that “the *Weems* Court allowed the judiciary to consider modern interpretations of cruelty and unusualness”).

49. 356 U.S. 86 (1958).

50. *See id.* at 87-88 (reciting facts). Trop had been a private in the army and escaped from a stockade in Casablanca, where he had been confined following an earlier disciplinary violation. *See id.* at 87 (same). He was located the following day and voluntarily returned to the control of the military, at which time he surrendered to the military police. *See id.* (same). The total duration of his absence was less than a day. *See id.* (same).

51. *See id.* at 88 (stating facts). Section 401(g) of the Nationality Act of 1940 provided that as a consequence of his conviction as a deserter, Trop had been stripped of his citizenship and his nationality as an American. *See id.* (noting consequences of desertion as applied through Act).

52. *See id.* at 101 (reciting holding and declaring punishment of citizenship forfeiture contrary to Constitution).

53. *Id.* at 100-01 (emphasis added). The Chief Justice continued:

There may be involved no physical mistreatment, no primitive torture. There is instead the total destruction of the individual's status in organized society. It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development. The punishment strips the citizen of his status in the national and international political community.

Id.

decency.”⁵⁴ *Trop* marked only the third instance in which the Court invalidated a criminal penalty under the Eighth Amendment’s prohibition on cruel and unusual punishments.⁵⁵

B. *Furman v. Georgia*—*The Supreme Court Invalidates America’s Capital Punishment Statutes*

In 1972, the Court effectively invalidated all then-existing statutes permitting capital sentencing in the landmark case *Furman v. Georgia*.⁵⁶ *Furman* represented a challenge to Georgia’s method of imposing capital sentences.⁵⁷ The defendants in *Furman* were sentenced to death in judicial proceedings that allowed judges and juries untrammelled discretion in imposing sentences—no guidelines existed to assist the judges or juries in determining appropriate sentences.⁵⁸ *Furman* has proven to be the cor-

54. See BANNER, *supra* note 33, at 249 (recounting that after Justice Goldberg was installed on Supreme Court, he circulated memorandum to other Justices questioning validity of capital punishment under Eighth Amendment, heavily emphasizing “evolving standards of decency”); FOLEY, *supra* note 48, at 42 (“Ultimately, the ‘evolving standards of decency’ concept may be the benchmark against which all punishments are compared and evaluated.”); Matthew Debbis, *The Cruel and Unusual Punishment Clause of the Eighth Amendment Prohibits the Execution of Mentally Retarded Defendants: Atkins v. Virginia*, 41 DUQ. L. REV. 811, 826 (2003) (“The Eighth Amendment implications that resulted from [*Trop*] served as the backbone for determining whether a punishment was in violation of the cruel and unusual [punishments] clause of the Eighth Amendment.”). Additionally, one commentator expounds that:

Warren’s phrase, “evolving standards of decency,” accurately describes both what examination of the framers’ intention reveals and how the Supreme Court consistently dealt with the Eighth Amendment. Intention and precedent thus point in the same direction: The Eighth Amendment authorizes the [J]ustices of the Supreme Court to use their best judgment to decide whether a particular punishment is so inconsistent with contemporary standards of justice and with widely accepted theories of punishment as to be “cruel and unusual.”

MARK TUSHNET, CONSTITUTIONAL ISSUES: THE DEATH PENALTY 16 (1994).

55. See RANDALL COYNE & LYN ENTZEROTH, CAPITAL PUNISHMENT AND THE JUDICIAL PROCESS 129 (2d ed. 2001) (noting Court at that time “had invalidated only three punishments under the Cruel and Unusual Punishment Clause”). The Court invalidated punishments in *Weems*, then *Trop* and finally in *Robinson v. California*, 370 U.S. 660 (1962). See COYNE & ENTZEROTH, *supra* (same).

56. 408 U.S. 238 (1972). *Furman* was decided concurrently with two companion cases, *Jackson v. Georgia* and *Branch v. Texas*. See *id.* at 239 (per curiam) (noting consolidation of cases).

57. See *id.* (recounting nature of appeal brought in *Furman*). *Furman* was charged with and convicted of murder for shooting a man whose house he was burglarizing. See *id.* at 315 (Marshall, J., concurring) (reciting facts).

58. See *id.* at 240 (Douglas, J., concurring) (describing wide discretion afforded judges and juries in capital sentencing procedures). Defendants challenged their convictions based on this overly wide latitude. See *id.* (articulating nature of defendants’ appeals); see also Michael A. Cokley, Comment, *Whatever Happened to That Old Saying “Thou Shalt Not Kill?”: A Plea for the Abolition of the Death Penalty*, 2 LOY. J. PUB. INT. L. 67, 89-90 (2001) (remarking that Court’s reasoning in *Furman* was that Georgia’s death penalty law was arbitrary in nature and gave too much discretion to juries in passing sentences).

nerstone decision in the Court's history of adjudicating imposition of the death penalty—a period now exceeding 135 years.⁵⁹

Invalidating the Georgia (and Texas) sentencing procedures as inconsistent with the Eighth Amendment, the *Furman* Court produced ten separate opinions spanning over 230 pages, a most extraordinary occurrence.⁶⁰ Specifically, the Court held that the death sentences in *Furman* were cruel and unusual in violation of the Eighth Amendment.⁶¹ Georgia's capital sentencing statute had allowed the sentencer (either judge or jury) to determine a sentence of life or death based on any information the sentencer considered relevant, and the Court found that this discretion led to arbitrary and capricious sentencing, resulting in a violation of the Eighth Amendment.⁶² The dissenters explained individually

59. See BANNER, *supra* note 33, at 261 (characterizing *Furman* as “one of the most significant decisions in the history of the Court”); FOLEY, *supra* note 48, at 62 (“[*Furman*] remains the most important Supreme Court decision on the death penalty . . . [and is] a decision we must understand if we are to understand anything about the constitutional issues that confront the Court yearly.”).

60. See *Furman*, 408 U.S. at 239-40 (per curiam) (reciting opinion of Court containing specific holding and identifying five Justices filing separate concurring opinions and four Justices filing separate dissenting opinions); see also BANNER, *supra* note 33, at 261 (describing all nine Justices writing individual opinions in *Furman* as “an unusual step” but necessary in light of significant nature of decision); FOLEY, *supra* note 48, at 62 (including length and depth of *Furman* opinion as reason for its continuing relevance and importance in examinations of capital punishment). For a discussion of the individual concurrences and dissents, see *infra* notes 62-63 and accompanying text.

61. See *Furman*, 408 U.S. at 239-40 (per curiam) (summarizing holding). The per curiam opinion stated that “the imposition and carrying out of the death penalty in these cases constitute[s] cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments” and ordered the judgments reversed as to the matter of sentence. *Id.*

62. See *id.* at 255-57 (Douglas, J., concurring) (“[T]he discretion of judges and juries in imposing the death penalty enables the penalty to be selectively applied Thus, these discretionary statutes are unconstitutional in their operation.”); *id.* at 309-10 (Stewart, J., concurring) (“These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual.”); *id.* at 313 (White, J., concurring) (“[T]he penalty is so infrequently imposed that the threat of execution is too attenuated to be of substantial service to criminal justice.”). Two Justices joined the plurality, writing that the imposition of death as a punishment always violated the Clause and was unconstitutional *per se*. See *id.* at 286 (Brennan, J., concurring) (“It is a denial of human dignity for the State arbitrarily to subject a person to an unusually severe punishment that society has indicated it does not regard as acceptable, and that cannot be shown to serve any penal purpose more effectively than a significantly less drastic punishment.”); *id.* at 360 (Marshall, J., concurring) (“[E]ven if capital punishment is not excessive, it nonetheless violates the Eighth Amendment because it is morally unacceptable to the people of the United States at this time in their history.”). Justice Marshall further stated that “the question with which we must deal is not whether a substantial proportion of American citizens would today, if polled, opine that capital punishment is barbarously cruel, but whether they would find it to be so in the light of all information presently available.” *Id.* at 362. This passage, in which Marshall states his belief that an enlightened society would oppose capital punishment, became known as the “Marshall Hypothesis,” a foundation of Marshall's capital jurispru-

that, regardless of their personal opinions on the death penalty, the appropriate forum for debates on such punishments was in state legislatures, not in federal courts.⁶³ The practical effect of *Furman* was to create a moratorium on executions and commute the sentences of all inmates then on death row.⁶⁴ *Furman* drove the capital statutes in the United States into disarray and sent state legislatures into a drafting frenzy, as they composed new legislation in attempts to rewrite their death penalty statutes in a manner acceptable to the Court.⁶⁵

C. Contemporary Era of Death Penalty Jurisprudence—Capital Punishment After *Furman*

1. Initial Post-*Furman* Cases

Almost immediately after *Furman*, individual states began revising and reenacting their capital statutes in efforts to bring their death penalty laws within the standards outlined in *Furman*.⁶⁶ The first case challenging

dence. See HUGO ADAM BEDAU, *KILLING AS PUNISHMENT* 99-101 (2004) (explaining “Marshall Hypothesis” and discussing later empirical attempts to verify proposition that informed populous would oppose capital punishment); see also Austin Sarat & Neil Vidmar, *Public Opinion, the Death Penalty, and the Eighth Amendment: Testing the Marshall Hypothesis*, 1976 WISC. L. REV. 171, 177-97 (discussing viability of “Marshall Hypothesis” and describing results of efforts to test theory). See generally Alan W. Clarke et al., *Executing the Innocent: The Next Step in the Marshall Hypotheses*, 26 N.Y.U. REV. L. & SOC. CHANGE 309 (2000-01) (examining critically Marshall’s hypotheses of public opinion and impacts on support for capital punishment and discussing recent public opinion polls on capital punishment).

63. See *Furman*, 408 U.S. at 385 (Burger, C.J., dissenting) (“There are no obvious indications that capital punishment offends the conscience of society to such a degree that our traditional deference to the legislative judgment must be abandoned.”); *id.* at 410 (Blackmun, J., dissenting) (expressing belief that proper forum for debates over utility and proportionality of capital punishment is in Congress and state legislatures, not in courts); *id.* at 418 (Powell, J., dissenting) (“[T]he decision [ruling the death penalty unconstitutional] encroaches upon an area squarely within the historic prerogative of the legislative branch—both state and federal—to protect the citizenry through the designation of penalties for prohibitible conduct.”); *id.* at 467 (Rehnquist, J., dissenting) (“The most expansive reading of the leading constitutional cases does not remotely suggest that this Court has been granted a roving commission . . . to strike down laws that are based upon notions of policy or morality suddenly found unacceptable by a majority of this Court.”).

64. See David R. Schieferstein, *The Death Penalty Cases: Shaping Substantive Criminal Law*, 58 IND. L.J. 187, 192 (1982-83) (arguing that while scope of *Furman* decision was not necessarily clear, its effect was to invalidate majority of capital sentencing schemes then in effect); Note, *Discretion and the Constitutionality of the New Death Penalty Statutes*, 87 HARV. L. REV. 1690, 1690 (1974) (noting that *Furman* “mandated the invalidation of statutes enacted by thirty-nine states and by the federal government, and the reversal of [over 600] death sentences”).

65. See BANNER, *supra* note 33, at 267-70 (describing steps taken by various state legislatures to bring their capital punishment statutes in accord with requirements described by *Furman* Court).

66. See *id.* at 268 (recognizing that following announcement of *Furman* decision, “legislators in five states professed their intention to introduce bills to resurrect capital punishment”). Within four years of *Furman*, thirty-five states and the

these new statutes was *Gregg v. Georgia*⁶⁷ in 1976. In *Gregg*, the defendant was charged with armed robbery and murder and was convicted at trial.⁶⁸ Following his conviction, in a separate sentencing stage, the jury sentenced the defendant to die for his crimes.⁶⁹ The Supreme Court ruled that the safeguards implemented by the Georgia Legislature into the trial process—including the bifurcated (two-stage) trial and the jury’s ability to consider mitigating and aggravating circumstances in advance of passing sentence—were sufficient to protect the rights of criminal defendants.⁷⁰

federal government had enacted new statutes permitting capital punishment for certain offenders. *See id.* (detailing post-*Furman* legislative enactments); *see also* HUGO ADAM BEDAU, *DEATH IS DIFFERENT* 164 (1987) (noting that thirty-six states had active capital punishment statutes in 1987). That number had increased to thirty-eight states by 2002. *See* Gershowitz, *supra* note 8, at 585 (citing *Atkins v. Virginia*, 536 U.S. 304, 342 (2002) (Scalia, J., dissenting)) (identifying states that sanction capital punishment).

67. 428 U.S. 153 (1976).

68. *See id.* at 158-60 (Stewart, Powell and Stevens, JJ., joint opinion) (stating facts).

69. *See id.* at 161 (same). The new statute enacted by Georgia in response to *Furman* provided for a two-stage, or bifurcated, trial: a guilt stage, in which the defendant’s guilt or innocence was determined, and a sentencing stage, in which the appropriate punishment was determined and imposed. *See id.* at 162-68. Additionally, during the sentencing stage, the jury was permitted to consider any facts presented in mitigation or aggravation, which might lead it toward or away from leniency in sentencing. *See id.* at 163-66. The Court found that the ability to consider mitigating and/or aggravating circumstances in sentencing was an adequate safeguard against much of the previously untrammelled discretion afforded to juries in capital sentencing. *See id.* at 197. The jury’s attention was directed away from characteristics of the defendant and focused, more appropriately, on the circumstances of the defendant’s crime. *See id.* (praising statute’s centering of attention on specifics of criminal act rather than on criminal defendant). This, the Court found, was an important measure to ensure that sentences imposed on defendants were more properly based on the crimes committed and less on personal, racial or economic attributes of an individual defendant. *See id.* (same). Specifically, the Court noted that “while some jury discretion still exists, the discretion to be exercised is controlled by clear and objective standards so as to produce non-discriminatory application” of the death penalty. *Id.* at 197-98 (citation and internal quotation marks omitted). In addition to the safeguards implemented in the trial process, the statutory sentencing scheme provided for an automatic appeal of all death sentences to the Georgia Supreme Court. *See id.* at 198 (discussing and approving automatic review of capital sentences by state supreme court). The Georgia Supreme Court was then required to “review each sentence of death and determine whether it was imposed under the influence of passion or prejudice, whether the evidence supports the jury’s finding of a statutory aggravating circumstance, and whether the sentence is disproportionate compared to those sentences imposed in similar cases.” *Id.* (citation omitted). This automatic appeal, the Court determined, was an “important . . . safeguard against arbitrariness and caprice.” *Id.*

70. *See id.* at 191-92 (“[A] bifurcated system is more likely to ensure elimination of the constitutional deficiencies identified in *Furman*.”). The Court also concluded that juries’ lack of experience and expertise in imposing sentences on defendants would be offset and alleviated by their ability to consider mitigating and aggravating circumstances. *See id.* at 192 (expressing favor for additional safeguard of aggravating and mitigating circumstances).

The Court concluded that the wholesale sweeping changes Georgia had implemented in its capital sentencing scheme were sufficient to overcome the arbitrariness and capriciousness inherent in the system, as identified in *Furman*.⁷¹ Accordingly, the Court declared the revised Georgia capital punishment scheme sufficient to prevent the imposition of a death sentence from violating the Eighth Amendment's Cruel and Unusual Punishments Clause.⁷²

The following year, the Court addressed the question of whether the death penalty was a disproportionate punishment for the crime of rape in *Coker v. Georgia*.⁷³ In *Coker*, the defendant was charged with and convicted of, *inter alia*, armed robbery, kidnapping and rape.⁷⁴ At trial, he was convicted and sentenced to death.⁷⁵ Examining the viability of capital sentencing for rape, the Court noted a specific trend among the states against imposing such sentences.⁷⁶ The Supreme Court ruled that "a sentence of

71. *See id.* at 191-95 (holding that procedures implemented by Georgia Legislature were sufficient to give sentencers enough guidance in decision-making that arbitrariness and capriciousness had been sufficiently eliminated from sentencing procedures).

72. *See id.* at 207 (sustaining constitutionality of Georgia's revised capital sentencing scheme). The Court opined that "[t]he new Georgia sentencing procedures . . . focus the jury's attention on the particularized nature of the crime and the particularized characteristics of the individual defendant," and that "[n]o longer can a jury wantonly and freakishly impose the death sentence." *Id.* at 206-07. The Court confined its holding in *Gregg*, however, to sustain capital sentencing for crimes in which a life was taken. *See id.* at 187 n.35 (explaining that facts of *Gregg* only warrant judicial determination of constitutionality of death sentence for crimes resulting in death). Specifically, the Court explained: "We do not address here the question whether the taking of the criminal's life is a proportionate sanction where no victim has been deprived of life—for example, when capital punishment is imposed for rape, kidnapping, or armed robbery that does not result in the death of any human being." *Id.* For a discussion of the constitutionality of death sentences for rape, see *infra* notes 73-78 and 111-40 and accompanying text.

73. 433 U.S. 584 (1977).

74. *See id.* at 587 (reciting facts). At the time of the commission of his offenses in this case, Coker had been incarcerated for multiple crimes, including rape and murder, but subsequently escaped from prison, accosted a couple in their Georgia home, robbed them and raped the woman. *See id.* (same).

75. *See id.* at 591 (explaining jury's decision to impose death sentence). The jury found the presence of aggravating factors and found that these were not outweighed by any mitigation. *See id.* (same).

76. *See id.* at 593-96 (examining history of capital punishment application for rape). The Court noted that in the preceding fifty years, there had never been a majority of states that authorized death as a punishment for rape. *See id.* at 593 (same). Additionally, following *Furman's* invalidation of all then-existent capital sentencing statutes, only six states passed revised statutes that permitted death sentences for rape, compared to sixteen states whose capital rape statutes were invalidated by *Furman*. *See id.* at 594-95 (finding paucity in number of states that reimplemented capital rape statutes after *Furman*). The Court identified Georgia, North Carolina and Louisiana as the only states that provided for capital sentences for the rape of an adult woman and noted that because both of the latter states made the death penalty mandatory upon conviction, those statutes were invalidated by other Court decisions the previous year. *See id.* at 594 (recounting specific states that reinstated such laws). Florida, Mississippi and Tennessee had

death is grossly disproportionate and excessive punishment for the crime of rape and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment."⁷⁷ At the time, *Coker's* holding was essential to the Court's uncertain capital sentencing jurisprudence—an apparent precedent prohibiting capital punishment for non-homicide crimes.⁷⁸ Eighteen years later, however, *Coker* gave rise to a new and hotly contested controversy regarding the constitutionality of capital rape statutes—those that sanction death sentences where the rape victim is a child.⁷⁹

2. *Capital Punishment and the Felony Murder Rule*

Since the acceptance of revised capital punishment statutes in *Gregg*, the Court has often been asked to clarify the circumstances under which a sentence of death is permissible.⁸⁰ In *Enmund v. Florida*,⁸¹ the Court addressed the constitutionality of a death sentence for a defendant who participated in a crime in which a life was taken but whose conduct did not

reenacted statutes allowing for death sentences in some cases of child rape, but the Tennessee Supreme Court had already invalidated its statute by the time *Coker* was decided. See *id.* at 595 (citing *Collins v. State*, 550 S.W.2d 643 (Tenn. 1977)) (noting Tennessee Supreme Court's invalidation of child rape statute). Thus, the Court recognized that Georgia was "the sole jurisdiction in the United States at the . . . time that authorize[d] a sentence of death when the rape victim [was] an adult woman." *Id.* at 595-96. But see Rayburn, *supra* note 13, at 1134 (opining that comparatively small number of states that had reenacted capital rape statutes was based more on legislatures' focus being primarily on constitutionality of new capital sentencing statutes, not on which crimes should be made death-eligible).

77. *Coker*, 433 U.S. at 592. The Court concluded that "the legislative rejection of capital punishment for rape strongly confirms our own judgment, which is that death is indeed a disproportionate penalty for the crime of raping an adult woman." *Id.* at 597 (noting lack of legislative support from states for capital rape sentencing). In addressing the fact that rape in Georgia was punishable by death while deliberate murder, absent aggravating circumstances, was not, the Court concluded that "[i]t is difficult to accept the notion, and we do not, that the rapist, with or without aggravating circumstances, should be punished more heavily than the deliberate killer as long as the rapist does not himself take the life of his victim." *Id.* at 600 (rejecting capital punishment for rapists as disproportionate to crime of rape); see also Rayburn, *supra* note 13, at 1133 (summarizing five main factors identified by Court in concluding that punishment of death for rape was contrary to social trend away from such severe punishments).

78. See Margaret Jane Radin, *The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishments Clause*, 126 U. PA. L. REV. 989, 990-92 (1978) (discussing significance of *Coker* decision and potential impact on future Eighth Amendment jurisprudence); Rayburn, *supra* note 13, at 1135 (noting that Court extended *Coker* rationale to other crimes, finding capital punishment unconstitutional for armed robbery and kidnapping); Rosenberg & Rosenberg, *supra* note 11, at 1206-07 (questioning whether death penalty would be upheld for crimes such as child rape, espionage or treason).

79. For a discussion of the return of capital rape statutes, see *infra* notes 111-40 and accompanying text.

80. For a discussion of specific cases decided by the Court in its efforts to clarify the law surrounding capital punishment, see *infra* notes 81-110 and accompanying text.

81. 458 U.S. 782 (1982).

directly lead to the victim's death.⁸² The defendant was the getaway driver in an armed robbery and was not present when the victims were fatally shot.⁸³ The Court rejected the imposition of a capital sentence on one "who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed," as disproportionate.⁸⁴

Five years later, the Court considered a variation of the circumstances of *Enmund* in *Tison v. Arizona*.⁸⁵ The petitioners in *Tison* were tried for and convicted of felony murder stemming from their involvement in a prison break that eventually led to the murder of four people.⁸⁶ Following their conviction under Arizona's felony murder rule, the petitioners were sentenced to death.⁸⁷ The Supreme Court ruled that although the petitioners did not actually commit the murders, their level of involvement was adequate to warrant imposition of the death penalty.⁸⁸ The

82. *See id.* at 787 (reciting specific issue before Court). Specifically, the petitioner asked "whether death is a valid penalty under the Eighth and Fourteenth Amendments for one who neither took life, attempted to take life, nor intended to take life." *Id.*

83. *See id.* at 784-85 (providing facts). It was not contested at trial that Enmund had not actually committed the murders, and the prosecutor stated in his closing argument that Enmund's codefendant had pulled the trigger. *See id.* at 784 (same). Additionally, the Florida Supreme Court, hearing Enmund's appeal, found no evidence that he was present when the planned robbery turned into a murder. *See id.* at 786 (same).

84. *Id.* at 797 (rejecting Florida's felony murder statute as unconstitutional). Drawing a parallel between *Enmund* and *Coker*, the Court held that "we have the abiding conviction that the death penalty, which is 'unique in its severity and irrevocability,' is an excessive penalty for the robber who, as such, does not take human life." *Id.* (quoting *Gregg v. Georgia*, 428 U.S. 153, 187 (1976) (Stewart, Powell and Stevens, JJ., joint opinion)) (noting disproportionality of capital sentence for one whose involvement in crime is not directly related to fatal consequences).

85. 481 U.S. 137 (1987).

86. *See id.* at 139-41 (stating facts). The petitioners, who were brothers, smuggled a number of guns into a prison to assist their father and his cellmate in their escape. *See id.* at 139 (same). They then participated in the hijacking of a vehicle passing on the highway with the intention of stealing the car. *See id.* at 140 (same). After the successful theft of the victims' vehicle, the petitioners' father and his cellmate murdered the driver and three passengers of the hijacked car, all members of the same family, including a two-year-old boy. *See id.* (same). According to the petitioners' statements, they were not present at the scene of the actual murders but had been ordered away by their father and the other triggerman. *See id.* at 141 (same).

87. *See id.* at 141-43 (reciting procedural history). In passing sentence, the trial judge did not consider the brothers' "participation [in the murders] was relatively minor," but instead found that the "participation of each petitioner in the crimes giving rise to the application of the felony murder rule . . . was very substantial." *Id.* at 142 (citation omitted) (noting significant nature of petitioners' contributions to underlying crimes). The judge also found that each petitioner could have reasonably foreseen "that his conduct would cause . . . or create a grave risk of . . . death." *Id.* (citation omitted) (noting foreseeability of danger apparent to petitioners).

88. *See id.* at 158 (discussing and differentiating substantial involvement of petitioners in actions necessary to facilitate homicides). The Court also noted that a number of state courts had interpreted *Enmund* to permit the imposition of capi-

Court determined that the petitioners demonstrated a reckless disregard for human life, evidenced by their facilitation of the prison break and their assistance in flagging down the victims' car.⁸⁹ The Court held that the circumstances in *Tison* and *Enmund* were sufficiently different that the holdings in the two cases were not inconsistent.⁹⁰ The rule resulting from *Enmund* and *Tison* is that while minor involvement in a crime in which a life is taken is insufficient to warrant a capital sentence, death may be imposed if a defendant's participation was substantial and his mental state reached the level of reckless indifference to human life.⁹¹

3. *Two New Breeds of Defendants: Executing Juveniles and the Mentally Retarded*

In the two years that followed *Tison*, the Supreme Court tackled two substantial issues in capital jurisprudence—the constitutionality of executing juveniles and that of executing the mentally retarded.⁹² Under the common law, it had long been recognized that juveniles, even those as young as seven years old, could be sentenced to death in certain circumstances.⁹³ Continuing its trend of reviewing the constitutionality of the death penalty, the Court, in the late 1980s, addressed whether juveniles

tal sentences on defendants whose “substantial participation in a violent felony under circumstances likely to result in the loss of innocent human life” made the deaths foreseeable. *Id.* at 154 (presenting cases with factual bases similar to *Tison*).

89. *See id.* at 157-58 (differentiating petitioners' involvement in underlying crimes). The Court later concluded:

[T]he reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state . . . that may be taken into account in making a capital sentencing judgment when that conduct causes its natural, though also not inevitable, lethal result.

Id. (finding petitioners' level of participation sufficiently high to warrant imposition of death sentences).

90. *See id.* at 144 (distinguishing *Tison* from *Enmund*). The Court held that “major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement.” *Id.* at 158.

91. *See* Andrew H. Friedman, Note, *Tison v. Arizona: The Death Penalty and the Non-Triggerman: The Scales of Justice are Broken*, 75 CORNELL L. REV. 123, 145-47 (1989) (discussing elimination of “intent to kill” requirement to qualify defendants for capital accomplice liability); *see also* Richard A. Rosen, *Felony Murder and the Eighth Amendment Jurisprudence of Death*, 31 B.C. L. REV. 1103, 1161-63 (1990) (illustrating potential problems associated with application of *Enmund-Tison* rule).

92. For a discussion of specific holdings on these issues, *see infra* notes 96-107 and accompanying text.

93. *See* WILLIAM BLACKSTONE, 4 COMMENTARIES *23-24 (identifying England's common law as permitting execution of juvenile offenders possibly as young as seven years old); MATTHEW HALE, 1 PLEAS OF THE CROWN *24-29 (establishing rebuttable presumption of incapacity to commit felony at age fourteen).

remained eligible for capital sentencing in *Thompson v. Oklahoma*⁹⁴ and *Stanford v. Kentucky*.⁹⁵

In *Thompson*, the Court invalidated an Oklahoma law that permitted the execution of fifteen-year-old offenders as a violation of the Eighth Amendment.⁹⁶ Specifically, the Court noted that no state other than Oklahoma had statutorily allowed for the execution of those younger than sixteen when their crimes were committed.⁹⁷ Furthermore, the Court determined that defendants under age sixteen have a reduced appreciation for the consequences of their actions.⁹⁸ Accordingly, the Court concluded that, based on the national consensus in opposition to such practices and the decreased culpability of young juveniles, capital sentences were unconstitutional for offenders fifteen years old and younger as contrary to evolving standards of decency.⁹⁹

In *Stanford*, the Court, finding “neither a historical nor a modern societal consensus forbidding the imposition of capital punishment on any person who murders at 16 or 17 years of age,” upheld the permissibility of

94. 487 U.S. 815 (1988).

95. 492 U.S. 361 (1989). *Stanford* was decided concurrently with a companion case, *Wilkins v. Missouri*. See *id.* at 368 (noting consolidation of cases).

96. See *Thompson*, 487 U.S. at 838 (concluding that Eighth and Fourteenth Amendments are offended by executing offenders who were less than sixteen at time their offenses were committed).

97. See *id.* at 829. The Court found that persons under age sixteen may not vote or serve on a jury in any state, purchase pornographic materials in any state, drive a vehicle without parental consent in forty-nine states or marry without parental consent in forty-six states. See *id.* at 824 (examining ages of majority in other states). Additionally, the Court found that all states had enacted legislation “designating the maximum age for juvenile court jurisdiction at no less than 16.” *Id.* Accordingly, the Court established that these legislative decisions “[are] consistent with the experience of mankind, as well as the long history of our law, that the normal 15-year-old is not prepared to assume the full responsibilities of an adult.” *Id.* at 824-25 (summarizing rationale for rejecting execution of fifteen-year-old offenders); see also Michael Mello, *Executing Rapists: A Reluctant Essay on the Ethics of Legal Scholarship*, 4 WM. & MARY J. WOMEN & L. 129, 138-39 (1997) (detailing ages of majority in multiple states and outlining rights and restrictions placed on minors by various states).

98. See *Thompson*, 487 U.S. at 835 (“Inexperience, less education, and less intelligence makes the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult.”). The Court continued, stating: “The reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult.” *Id.* (discussing maturity level of defendants under age sixteen).

99. See *id.* at 836-37 (restating holding and rationale). “Given the lesser culpability of the juvenile offender, the teenager’s capacity for growth, and society’s fiduciary obligations to its children,” the Court found that neither deterrence nor retribution were acceptable justifications for executing juveniles who were fifteen years old at the time of their offenses, rendering such sentences cruel and unusual within the meaning of the Eighth Amendment. See *id.* (rejecting arguments in support of executing fifteen-year-old offenders).

capital sentences for juveniles in that age range.¹⁰⁰ The Court found that the lack of a consensus against executing juveniles aged sixteen or seventeen demonstrated that the evolving standards of decency in American society did not prohibit executing such defendants.¹⁰¹ Thus, the constitutionally permissible minimum age for imposition of a death sentence in the United States was set at sixteen.¹⁰²

The same day the Court decided *Stanford*, it also decided *Penry v. Lynaugh*,¹⁰³ a case that challenged Texas's practice of executing mentally retarded offenders.¹⁰⁴ The defendant was convicted of murder and sentenced to death by a Texas court despite substantial evidence of mild to moderate mental retardation.¹⁰⁵ The Supreme Court found no constitutional infirmity in affirming the defendant's capital sentence, holding that a defendant's mental retardation, standing alone, was insufficient to preclude a sentence of death.¹⁰⁶ The Court also found no evidence of a na-

100. See *Stanford*, 492 U.S. at 380 (recounting holding and rationale). At the time the case was decided, the Court noted that twenty-two of the thirty-seven states that permitted capital punishment made no express exemption for those who were sixteen at the time their crimes were committed, and only twelve of the thirty-seven prohibited such sentences on seventeen-year-olds. See *id.* at 370 (finding no consensus against executing sixteen or seventeen-year-old offenders).

101. See *id.* at 369-71 (noting that petitioner's only valid claim was based on evolving standards of decency because execution of sixteen and seventeen-year-olds was commonplace at time of Framers). The Court rejected the argument that, because no clear consensus existed in support of or in opposition to executing such offenders, the process was unconstitutional. See *id.* at 373 (placing burden of demonstration of national consensus on petitioners).

102. See, e.g., John R. Frank, Note, *Stanford v. Kentucky: Did the Court Bite the Constitutional Bullet?*, 23 AKRON L. REV. 547, 559-60 (1990) (discussing implications of *Stanford* decision); Shelia L. Sanders, Comment, *The Imposition of Capital Punishment on Juvenile Offenders: Drawing the Line*, 19 S.U. L. REV. 141, 148-52 (1992) (outlining and restating conclusions reached in *Thompson* and *Stanford* and predicting effects of those holdings on future capital jurisprudence).

103. 492 U.S. 302 (1989), *abrogated by* *Atkins v. Virginia*, 536 U.S. 304 (2002).

104. See *id.* at 307 (summarizing issue).

105. See *id.* at 307-11 (reciting facts). At a pre-trial competency hearing, it was determined that Penry's IQ was between fifty and sixty-three, indicative of mild to moderate mental retardation. See *id.* at 307-08 (noting extent of petitioner's mental defect). There was additional testimony that Penry's social maturity was equivalent to that of a nine or ten-year-old. See *id.* at 308 (discussing Penry's socialization skills).

106. See *id.* at 340 (summarizing holding and rationale). The Court concluded that while "mental retardation is a factor that may well lessen a defendant's culpability for a capital offense . . . we cannot conclude . . . that the Eighth Amendment precludes the execution of any mentally retarded person of Penry's ability convicted of a capital offense simply by virtue of his or her mental retardation alone." *Id.* (rejecting argument that mental retardation should disqualify defendants from death eligibility). Additionally, the Court found that "[s]o long as sentencers can consider and give effect to mitigating evidence of mental retardation in imposing sentence, an individualized determination whether death is the appropriate punishment can be made in each particular case." *Id.* (internal quotation marks omitted) (supporting case-by-case determination of level of mental retardation and its effects on particular defendant's behavior).

tional consensus against executing the mentally retarded and accordingly rejected petitioner's argument that such a practice was at odds with the evolving standards of decency described in *Trop*.¹⁰⁷

In *Stanford* and *Penry*, the Court emphasized the lack of a national consensus prohibiting executions of juveniles aged sixteen and seventeen as well as mentally retarded defendants.¹⁰⁸ The Court stated that if imposing capital sentences on these classes of defendants violated evolving standards of decency, it should be reflected in the actions of state legislatures in prohibiting such sentences.¹⁰⁹ Although the Court noted that a legislative survey indicated no clear consensus among the states against executing juveniles and mentally retarded defendants, the Court would see a rapid shift in states' positions within the following decade and a half.¹¹⁰

III. THE REBIRTH OF CAPITAL PUNISHMENT FOR RAPE: THE COKER LOOPHOLE

A. *The Supreme Court Left the Door Open a Crack . . .*

When the Supreme Court decided *Coker v. Georgia*, it addressed the specific issue presented to it—namely, the constitutionality of the death

107. *See id.* The Court implied, however, that should a consensus someday emerge against executing mentally retarded individuals, such a practice may come to violate such evident "evolving standards." *See id.*; *see also* Lyn Entzeroth, *Putting the Mentally Retarded Criminal Defendant to Death: Charting the Development of a National Consensus to Exempt the Mentally Retarded from the Death Penalty*, 52 ALA. L. REV. 911, 932-41 (2001) (charting emergence of national consensus against execution of mentally retarded defendants and discussing what additional requirements were necessary to overturn *Penry*); Joanna Hall, Comment, *Atkins v. Virginia: National Consensus or Six-Person Opinion?*, 12 AM. U. J. GENDER SOC. POL'Y & L. 361, 370 (2004) (analyzing what Court considers "national consensus"); Lyndsey Sloan, Comment, *Evolving Standards of Decency: The Evolution of a National Consensus Granting the Mentally Retarded Sanctuary*, 31 CAP. U. L. REV. 351, 374-79 (2003) (discussing emergence of national consensus against executing mentally retarded offenders). For a discussion of *Atkins v. Virginia* and the Court's recognition of such a consensus in 2002, *see infra* notes 141-48 and accompanying text.

108. *See Penry*, 492 U.S. at 330-31 (noting that prohibitions of Eighth Amendment are not limited to punishments that were cruel and unusual at time of Constitution's ratification but can also hinge on evidence of national consensus as representation of evolving standards of decency); *Stanford v. Kentucky*, 492 U.S. 361, 369-70 (1988) (stating that without historical basis for argument against capital punishment, petitioner must establish national consensus against application of punishment in given circumstances).

109. *See Penry*, 492 U.S. at 331 ("In discerning those 'evolving standards,' we have looked to objective evidence of how our society views a particular punishment today. The clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures.") (citations omitted); *Stanford*, 492 U.S. at 369 (considering state and federal legislative decisions indicative of punishments that society considers cruel and unusual).

110. *See Penry*, 492 U.S. at 335; *Stanford*, 492 U.S. at 371-72. For a discussion of the Court's re-examination of the holdings in *Penry* and *Stanford*, *see infra* notes 141-58 and accompanying text.

penalty for the crime of rape.¹¹¹ In *Coker*, the challenged statute made no reference to the age of the victim, stating that the commission of *any* rape was sufficient to warrant imposition of a sentence of death.¹¹² In an apparent effort to qualify the circumstances of his particular case, however, Coker's appellate argument sought to differentiate his crime from those for which other states sanctioned the death penalty, arguing that execution was an excessive and disproportionate punishment for the "rape of an adult woman."¹¹³ The Court seized upon this phraseology, and its opinion made numerous references to the "adult woman" language.¹¹⁴ Despite the fact that these words were not a part of the statute at issue in *Coker*, they made their way into the holding.¹¹⁵ Some critics and lawmakers identified the Court's language as indicative of its permission to execute rapists whose victims were not adults but children.¹¹⁶

111. See *Coker v. Georgia*, 433 U.S. 584, 586 (1977) ("Coker was granted a writ of certiorari . . . limited to the single claim, rejected by the Georgia court, that the punishment of death for rape violates the Eighth Amendment . . .").

112. See GA. CODE ANN. § 26-2001 (1972) ("[A] person convicted of rape shall be punished by death or by imprisonment."), *invalidated by Coker v. Georgia*, 433 U.S. 584 (1977), *superseded by* GA. CODE ANN. § 16-6-1 (2005). Rape was defined, under this section, as "carnal knowledge of a female, forcibly and against her will. Carnal knowledge in rape occurs when there is any penetration of the female sex organ by the male sex organ." *Id.* (defining rape). There was no requirement that the victim be over a certain age to qualify the assailant for death, merely that the rape occur as statutorily defined and the victim be female. See *id.*

113. See Brief of Petitioner, *Coker*, 433 U.S. 584 (No. 75-5444), *available at* 1976 WL 181481, at *21 (noting that "[w]hile the rape of an adult woman is a serious crime, it almost nowhere except in Georgia [is] viewed today as warranting the punishment of death"); see also Bailey, *supra* note 20, at 1364 ("The Supreme Court used the phrase 'adult woman' in *Coker* because the facts in *Coker* presented only the rape of an adult woman.").

114. See, e.g., *Coker*, 433 U.S. at 593 ("[W]e seek guidance in history and from the objective evidence of the country's present judgment concerning the acceptability of death as a penalty for rape of an adult woman."); see also *State v. Wilson*, 685 So. 2d 1063, 1066 & n.2 (La. 1996) (cataloguing fourteen instances in *Coker* where Court made specific reference to "adult woman" language), *cert. denied*, 520 U.S. 1259 (1997).

115. See *Coker*, 433 U.S. at 592 (reciting specific question and holding). The Court "concluded that a sentence of death is grossly disproportionate and excessive punishment for the crime of rape and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment." *Id.* Although the "adult woman" language appears nowhere in the Court's concise holding, it has become inherent in nearly every subsequent recitation of the *Coker* decision. For examples of the overstatement of the *Coker* holding, see *infra* note 116.

116. See, e.g., Broughton, *supra* note 20, at 3-4 (presenting holding of *Coker* as prohibiting death penalty for "rape of an adult woman"); Glazer, *supra* note 20, at 83 (noting "adult woman" language in *Coker* holding); Rayburn, *supra* note 13, at 1132 (including "adult woman" in description of *Coker* holding); Rosenberg & Rosenberg, *supra* note 11, at 1203 (same); Volokh, *supra* note 11, at 1967-68 (remarking about "adult woman" language in *Coker*); Meister, *supra* note 20, at 199 (differentiating *Coker* based on "adult woman" language).

B. . . . and Louisiana Caught Its Foot

1. *Introduction and Passage of the Statute*

In March 1995, the Louisiana House of Representatives reviewed a bill, House Resolution 55, which proposed amending the state's rape statute to permit the execution of offenders convicted of rape where the victim was less than twelve years old.¹¹⁷ The bill was referred to the House Administration of Justice Committee where considerable debate occurred and testimony was taken about whether death was a disproportionate penalty for a rape in which no life was taken.¹¹⁸ Eventually, the committee approved the bill by a divided vote of 4-3 with one member abstaining.¹¹⁹ The full house then passed the bill by a vote of 79-22.¹²⁰

Following approval by the house, the bill was transferred to the senate for its review and approval.¹²¹ The Senate Judiciary Committee voted unanimously to approve the bill, and it subsequently passed the full senate, without debate, by a vote of 34-1.¹²² Governor Edwin Edwards signed the bill on June 17, and it became effective in August 1995.¹²³

2. *A Judicial Challenge Upheld by Louisiana's Supreme Court*

In 1996, barely a year after the enactment of the aggravated rape statute, the Louisiana Supreme Court addressed the statute's constitutionality

117. See H.B. 55, 1995 Reg. Sess. (La. 1995) (proposing to amend La. R.S. 14:42(C) to permit capital sentencing for child rapists).

118. See Minutes of Meeting, Louisiana House Committee on Administration of Criminal Justice (Apr. 19, 1995) (reporting debate among Committee members and testimony of expert witnesses) (on file with author).

119. See *id.* (reporting Committee vote). Upon consideration of the bill before the entire House of Representatives, an amendment was proposed that would have permitted castration of child rapists in lieu of the death penalty. See 1995 La. Acts 937 (recounting proposed amendment of Representative McCain to sanction castration of rapists instead of capital punishment). The bill's sponsor, Representative Schneider, objected, and a full vote of the House membership rejected the proposed amendment. See *id.* at 937-38 (reporting objection to and rejection of amendment proposal by vote of 27-79). A second amendment was then proposed that would have added castration as a required punishment, in addition to the death penalty, for offenders convicted of aggravated rape. See *id.* at 938 (reporting introduction and objection to second amendment). The second amendment failed as well by a margin of 23-73. See *id.* at 938-39 (noting failure to pass amendment).

120. 1995 La. Acts at 939 (summarizing vote to pass bill and listing individual representatives' votes).

121. See Minutes of Meeting, Louisiana Senate Judiciary Committee (May 30, 1995) (summarizing introduction of bill to Committee and presenting abstract of debate and testimony) (on file with author).

122. See *id.* (reporting Committee vote); 1995 La. Acts 1891 (reporting vote of full Senate).

123. See Rayburn, *supra* note 13, at 1136 (describing circumstances of enactment of capital rape statute).

in *State v. Wilson*.¹²⁴ Appellees in *Wilson* were separately charged with aggravated rape under the statute, and each filed a motion to quash their indictments on the grounds that the statute was unconstitutional.¹²⁵ In each case, the trial court granted the motion to quash, and the State appealed.¹²⁶

Appellees argued that the imposition of a death sentence for aggravated rape violated the United States and Louisiana Constitutions because it was cruel and unusual.¹²⁷ First, appellees contended that the punishment was excessive and disproportionate to the crime being punished and that a sentence of death cannot be imposed for a crime that does not result in death.¹²⁸ Second, Appellees argued that the statute's language

124. 685 So. 2d 1063 (La. 1996), *cert. denied*, 520 U.S. 1259 (1997). *Wilson* was decided concurrently with a companion case, *State v. Bethley*. See *id.* at 1065 (listing details of charges and court's decision to consolidate appeals).

125. See *id.* at 1064-65 (repeating issue and question in case). Petitioner *Wilson* was charged with the aggravated rape of a five-year-old girl. See *id.* at 1064 (providing factual background in both cases). Petitioner *Bethley* was charged with raping three girls, ages five, seven and nine, one of whom was his daughter. See *id.* at 1065 (same). It was also alleged that *Bethley* was aware that he was HIV positive at the time of his crimes. See *id.* (same).

126. See *id.* (outlining procedural posture). Both petitioners raised the same Eighth Amendment objections to the statute, but the trial courts split in their rationales for finding the statute invalid. See *id.* (same). The trial court in *Wilson* found the statute unconstitutional on its face, and the court in *Bethley* found the statute itself constitutional but the class of death-eligible defendants unconstitutionally broad. See *id.* (same).

127. See *id.* at 1065 (arguing that punishment was unconstitutional). Appellees' brief asserts that "the statute violates the Eighth and Fourteenth Amendments to the United States Constitution, and Article 1, Sections 3 and 20 of the Louisiana Constitution." Brief of Appellee Patrick Dewayne Bethley at 2, *Wilson*, 685 So. 2d 1063 (No. 96-KA-2076) (on file with author), *cert. denied*, 520 U.S. 1259 (1997).

128. See Brief of Appellee, *supra* note 127, at 8 (outlining arguments against capital punishment on bases of lack of proportionality and excessive nature of capital punishment). Relying on the actions of legislatures and sentencing juries, appellees alleged existence of an "overwhelming national consensus that capital punishment is a disproportionate penalty for the rape of a child" and urged the Louisiana Supreme Court to invalidate the statute on that basis. See *id.* Appellees asserted that a death sentence is always disproportionate to a crime that does not result in the victim's death. See *id.* at 22. Citing *Coker*, *Enmund* and *Tison*, appellees expressed that a death sentence can only be permitted when a finding is made that a defendant's actions demonstrated a reckless indifference to human life. See *id.* & nn.26-27. Appellees averred:

Since *Furman*, the United States Supreme Court has never affirmed a death sentence in a case in which a death did not occur. In that time, the Court has twice considered the proportionality of capital punishment for a felony murderer who did not kill. In *Enmund* . . . the Court held that capital punishment is disproportionate for the felony murderer who does not kill, attempt to kill, or intend that a killing take place. In *Tison* . . . the Court expanded this holding somewhat, ruling that "major participation in [a] felony . . . , combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement" for the felony murderer.

Id. Appellees continued: "R.S. 14:42 requires a finding that the defendant participated in a felony, aggravated rape. However, it does not require a finding that a

permits its application in an arbitrary and capricious manner.¹²⁹ Last, appellees asserted that the imposition of such a penalty did not achieve the goals of punishment.¹³⁰

Rejecting appellees' objections, the Louisiana Supreme Court overturned the trial court decisions, finding the capital rape law consistent with the Louisiana and United States Constitutions.¹³¹ The court dismissed the argument that *Coker* prohibited the imposition of capital punishment for a defendant convicted of raping a child.¹³² With regard to the statute, the court explained that it was not within its proper authority to overrule the will of the people, ostensibly expressing its unwillingness to overturn legislative actions it considered to have been legitimately enacted.¹³³ The justices further rejected the argument that the statute was unconstitutional because no other states had similar provisions in their laws.¹³⁴ The state supreme court opined that Louisiana's status as the only state to permit such a punishment did not indicate that the statute was

death took place and that the defendant manifested a reckless indifference to human life. Accordingly, it is unconstitutional under the holdings of *Enmund*, *Coker* and *Tison*." *Id.*

129. *See id.* at 30 (contending that lack of guidance for jury in passing sentence will lead to arbitrary and capricious determinations). Appellees asserted that the capital rape statute, standing alone, failed to narrow the class of death-eligible child rapists because it lacked statutory aggravating circumstances. *See id.* (citing lack of objective guidance to assist juries in determining sentences). Appellees claimed that the section of Louisiana's sentencing statute that prescribes aggravating factors was only intended to be applied to first-degree murder cases, as evidenced by one sentence of the statute which contained a reference to "the impact that the death of the victim has had on the family members." *See id.* (maintaining that statutory factors then in existence were insufficient to apply in capital rape sentencing). Because no specific list of statutory aggravating factors existed, as required for capital sentencing under the United States and Louisiana Constitutions, appellees contended that the statute must be declared unconstitutional. *See id.* at 32-33 (same).

130. *See id.* at 22-27 (explaining that neither retribution nor deterrence is sufficiently accomplished by imposing death on child rapists).

131. *See Wilson*, 685 So. 2d at 1064 (summarizing holding).

132. *See id.* at 1067 (finding that decision of state legislature to amend statute to permit death sentences for child rape was legitimate exercise of legislative prerogative). Specifically, the court found that "[a] 'maturing society,' through its legislature has recognized the degradation and devastation of child rape, and the permeation of harm resulting to victims of rape [under age twelve] The damage a child suffers as a result of rape is devastating to the child as well as to the community." *Id.*

133. *See id.* ("The courts must exercise caution in asserting their views over those of the people as announced through their elected representatives.").

134. *See id.* at 1068 (concluding that because other states previously punished child rape with death, trend was discernable and credence was lent to Louisiana Legislature's passage of capital rape statute). The court cited several statutes from the *Coker* era, which were earlier invalidated by the Supreme Court, as examples of a continuous trend in the area of capital sentencing condoning death sentences for child rapists. *See id.* (identifying states that previously punished child rape with death and concluding such evidence indicated ongoing inclination toward permitting execution for such offenders).

cruel and unusual but did prove that a trend in favor of such penalties had yet to reach other states.¹³⁵ The court ultimately held that “given the appalling nature of the crime, the severity of the harm inflicted upon the victim, and the harm imposed on society, the death penalty is not an excessive penalty for the crime of rape when the victim is a child under the age of twelve years old.”¹³⁶

The case was appealed, unsuccessfully, to the United States Supreme Court as *Bethley v. Louisiana*.¹³⁷ Despite the Court’s decision not to hear the appeal, three Justices took an unusual measure and published a statement regarding the Court’s denial of certiorari.¹³⁸ Justice Stevens, joined by Justices Ginsburg and Breyer, stated that although the Court would not hear the case because it lacked finality of judgment, “[i]t is well settled that . . . [the Court’s] decision to deny a petition for writ of certiorari does not in any sense constitute a ruling on the merits of the case in which the writ is sought.”¹³⁹ The inference from this statement is weighty and influential; it suggests that the three Justices believed that although *Bethley* was not ripe for resolution, the issues it presented were important and worthy of adjudication when the procedural posture is correct at some point in the future.¹⁴⁰

IV. RECENT SUPREME COURT RULINGS WITH CONSEQUENCES ON THE CAPITAL RAPE DEBATE

A. *Moratorium on Executing the Mentally Retarded: Atkins v. Virginia*¹⁴¹

In 2002, thirteen years after the Court upheld executions of mentally retarded defendants in *Penry v. Lynaugh*, the Court reversed its holding in

135. *See id.* at 1069 (“The fact that Louisiana is presently the sole state allowing the death penalty for the rape of a child is not conclusive. There is no constitutional infirmity in a state’s statute simply because that jurisdiction chose to be first.”). Further addressing this issue, the court expounded that “[i]t is quite possible that other states are awaiting the outcome of the challenges to the constitutionality of the . . . [Louisiana] statute before enacting their own [capital rape statutes].” *Id.* (rejecting argument that sufficient time had elapsed and no other states had amended their laws in manner similar to Louisiana).

136. *Id.* at 1070.

137. 520 U.S. 1259, 1259 (1997) (denying writ of certiorari).

138. *See id.* (publishing statement of Justice Stevens, joined by Justices Ginsburg and Breyer, respecting denial of certiorari); *see also* Moeller, *supra* note 20, at 623 (discussing nature of Justices’ decision to include statement accompanying certiorari denial and noting such statements indicate that Court’s decisions not to review particular cases are not necessarily approvals of challenged laws).

139. *Bethley*, 520 U.S. at 1259.

140. *Accord* Palmer, *supra* note 20, at 856 (opining that *Bethley* statement was invitation to potential future petitioners to challenge similar laws); *see* State v. Gardner, 947 P.2d 630, 650 n.11 (Utah 1997) (“These Justices suggest that certiorari may have been denied only because the Louisiana decision does not represent a final judgment in the case . . .”).

141. 536 U.S. 304 (2002).

that case in *Atkins v. Virginia*.¹⁴² Atkins was sentenced to death despite expert testimony indicating that he was mildly mentally retarded.¹⁴³ The Supreme Court reversed his sentence, holding that “a national consensus ha[d] developed against [executing mentally retarded offenders].”¹⁴⁴ The Court examined legislative developments in the thirteen years since *Penry*, finding that a substantial number of states enacted legislation specifically prohibiting the execution of the mentally retarded.¹⁴⁵ This led the Court to conclude that “[t]he practice . . . has become truly unusual, and it is fair to say that a national consensus has developed against it.”¹⁴⁶ The Court then identified two additional reasons in its death penalty jurisprudence consistent with the legislative consensus: that executing mentally retarded offenders satisfied neither aim of capital punishment—retribution and deterrence—and that mentally retarded offenders’ reduced intellectual and cognitive capacities cannot support their punishment by death.¹⁴⁷ Despite rigorous dissents by Chief Justice Rehnquist and Justice

142. *See id.* at 321 (rejecting continued imposition of capital sentences on mentally retarded defendants and overruling *Penry*).

143. *See id.* at 308-09 (summarizing expert testimony presented in Atkins’s defense). A forensic psychologist testified on Atkins’s behalf that the defendant was mildly mentally retarded with an IQ of fifty-nine. *See id.* (explaining procedures and reliability of IQ test). This IQ was approximately the same as the defendant’s in *Penry*, who was determined to have an IQ between fifty and sixty-three. *See Penry v. Lynaugh*, 492 U.S. 302, 307 (1989) (noting *Penry*’s multiple IQ tests and scores), *abrogated by Atkins v. Virginia*, 536 U.S. 304 (2002).

144. *Atkins*, 536 U.S. at 316. The Court later held that “[c]onstruing and applying the Eighth Amendment in the light of our evolving standards of decency, we therefore conclude that such punishment is excessive and that the Constitution places a substantive restriction on the State’s power to take the life of a mentally retarded offender.” *Id.* at 321 (internal quotation marks omitted).

145. *See id.* at 313-15 (discussing state legislatures’ reactions to *Penry*). Outlining the period between the *Penry* and *Atkins* decisions, the Court found that eighteen states had statutorily rejected permitting the execution of mentally retarded offenders and that a nineteenth had prohibited such practices the year before *Penry*. *See id.* (recounting measures enacted and discussed in particular states). Additionally, the Court stated:

It is not so much the number of these States that is significant, but the consistency of the direction of change. Given the well-known fact that anticrime legislation is far more popular than legislation providing protections for persons guilty of violent crime, the large number of States prohibiting the execution of mentally retarded persons (and the complete absence of States passing legislation reinstating the power to conduct such executions) provides powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal.

Id. at 315-16 (footnote omitted).

146. *Id.* at 316.

147. *See id.* at 318-21 (outlining and rejecting additional justifications for executing mentally retarded defendants). The Court concluded that with respect to retribution, “the severity of the appropriate punishment necessarily depends on the culpability of the offender,” and that “the lesser culpability of the mentally retarded offender surely does not merit” a death sentence. *Id.* at 319. Addressing deterrence, the Court concluded that those offenders who are mentally retarded and have a reduced capability to understand and process information will be un-

Scalia, the majority in *Atkins* successfully overturned the *Penry* decision made just thirteen years earlier.¹⁴⁸

B. *Overturing Stanford—Juvenile Defendants No Longer Eligible for Execution: Roper v. Simmons*¹⁴⁹

Three years after the Court decided *Atkins*, another controversial death penalty statute reached the Justices in *Roper v. Simmons*, urging reconsideration of the constitutionality of executing juveniles.¹⁵⁰ *Roper* was a challenge to *Stanford v. Kentucky*, presenting the question of whether the execution of defendants who were sixteen or seventeen years old at the time of their crimes was constitutional.¹⁵¹ Given another opportunity to clarify its Eighth Amendment jurisprudence, the Court overruled *Stanford* and found such sentences unconstitutional.¹⁵²

The Supreme Court held that the Cruel and Unusual Punishments Clause precludes a sentence of death for juvenile offenders.¹⁵³ The Court

deterred by the prospect of execution as punishment for their actions because the possibility and nature of punishment often does not influence their conduct. *See id.* at 319-20 (rejecting deterrence as legitimate objective of executing mentally retarded defendants). Additionally, the Court found that the “lesser ability of mentally retarded defendants to make a persuasive showing of mitigation” makes them more susceptible to being convicted on the basis of uncontested aggravating circumstances, and that “[m]entally retarded defendants may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes.” *Id.* at 320-21.

148. *See id.* at 321 (reciting holding of Court). Chief Justice Rehnquist asserted that the majority’s argument about a national consensus was mere lip service to obfuscate the real motivation behind the majority’s opinion—that the individual Justices subjectively preferred to prohibit execution of the mentally retarded—and not demonstrative of any consensus at all. *See id.* at 322 (Rehnquist, C.J., dissenting) (rejecting majority’s determination of national consensus). Writing separately, Justice Scalia also dissented, contending that the Court’s decision “find[s] no support in the text or history of the Eighth Amendment,” and that “[the ruling] does not even have support in current social attitudes regarding the conditions that render an otherwise just death penalty inappropriate.” *Id.* at 337-38 (Scalia, J., dissenting) (criticizing Court’s general Eighth Amendment jurisprudence). Justice Scalia opined that an insufficient number of states opposed the execution of the mentally retarded to constitute a national consensus. *See id.* at 343 (noting that considerably higher degrees of agreement were required in *Coker* and *Enmund* before the proscription of death penalty was warranted in those cases). Justice Scalia also argued that an insufficient amount of time had elapsed since *Penry* to determine the existence of a true consensus. *See id.* at 344 (“It is myopic to base sweeping constitutional principles upon the narrow experience of a few years.” (quoting *Coker v. Georgia*, 433 U.S. 584, 614 (1977) (Burger, C.J., dissenting))) (internal quotation marks omitted).

149. 125 S. Ct. 1183 (2005).

150. *See id.* at 1187 (noting Court’s willingness to reconsider question of executing juveniles within fifteen years of precedential adjudication).

151. *See id.* (reciting issue and context of *Roper*).

152. *See id.* at 1190 (summarizing acceptance of case and affirmation of verdict).

153. *See id.* at 1198 (explaining rejection of *Stanford* and restating holding).

also drew a number of correlations with the *Atkins* decision of three years earlier.¹⁵⁴ The Court found evidence of a national consensus against imposing capital sentences on juveniles.¹⁵⁵ It further expounded that “the death penalty is reserved for a narrow category of crimes and offenders” and that characteristics implicit in the nature of juvenile offenders support the conclusion that they “cannot with reliability be classified among the worst offenders.”¹⁵⁶ As in *Atkins*, *Roper* included vociferous dissents, provided by Justices O’Connor and Scalia.¹⁵⁷ The bell, however, could not be

154. *See id.* at 1192 (finding national consensus, similar to that identified in *Atkins*, in opposition to execution of juvenile offenders). The Court drew an analogy between the manner in which legislatures have addressed juveniles sentenced to death with the manner in which they had previously addressed similar penalties on mentally retarded defendants, as addressed in *Atkins*. *See id.* at 1193 (“The . . . [eighteen] States that have abandoned capital punishment for juvenile offenders since *Stanford* is smaller than the number of States that abandoned capital punishment for the mentally retarded after *Penry*; yet we think the same consistency of direction of change has been demonstrated.”). The Court further expounded:

As in *Atkins*, the objective indicia of consensus in this case—the rejection of the juvenile death penalty in the majority of States; the infrequency of its use even where it remains on the books; and the consistency in the trend toward abolition of the practice—provide sufficient evidence that today our society views juveniles, in the words *Atkins* used respecting the mentally retarded, as “categorically less culpable than the average criminal.”

Id. at 1194 (quoting *Atkins v. Virginia*, 536 U.S. 304, 316 (2002)).

155. *See id.* at 1192 (identifying existence of national consensus against imposing capital sentencing on juvenile defendants).

156. *Id.* at 1195. Speaking in general terms, the Court outlined three differences between adults and juveniles under eighteen, which it felt precluded such juvenile offenders from suffering a sentence of death. *See id.* (introducing reasons for disqualification of juveniles for capital punishment). First, the Court noted that “a lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults,” and that “[t]hese qualities often result in impetuous and ill-considered actions and decisions.” *Id.* (quoting *Johnson v. Texas*, 509 U.S. 350, 367 (1993)). Second, the Court found that “juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure.” *Id.* The third difference identified by the Court “is that the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed.” *Id.* Justice Stevens concurred in the judgment, reiterating his belief that the manner in which the Court approaches Eighth Amendment cases must stress the importance of evaluating each case in light of evolving standards of decency. *See id.* at 1205 (Stevens, J., concurring) (accentuating importance of interpreting Constitution in evolutionary manner as society continues to develop).

157. *See id.* at 1213 (O’Connor, J., dissenting) (expressing preference for proportionality issues addressed by Court to be resolved through individualized sentencing procedures—where juries have ability to consider defendant’s age and immaturity as mitigating circumstances—rather than through categorical age-based rules adopted by Court). Justice O’Connor also disagreed with the Court’s finding of a clear national consensus. *See id.* at 1216 (“[T]he objective evidence is inconclusive; standing alone, it does not demonstrate that our society has repudiated capital punishment of 17-year-old offenders in all cases.”). She concluded that “[w]ithout a clearer showing that a genuine national consensus forbids the execution of such offenders, this Court should not substitute its own ‘inevitably subjective judgment’ on how best to resolve this difficult moral question for the

“unrung”; the Court overruled *Stanford* and injected additional uncertainty into an area of law already replete with unpredictability.¹⁵⁸

V. ATKINS-ROPER ANALYSIS OF LOUISIANA’S CAPITAL RAPE STATUTE

Although Supreme Court decisions are fact-specific to the cases presented, the Court’s holdings can have a broad, sweeping impact on legal disputes arising under similar circumstances.¹⁵⁹ Thus, each of the Court’s decisions informs potential litigants of the Court’s positions on related matters and questions of law.¹⁶⁰ Accordingly, the Court’s holdings

judgments of the Nation’s democratically elected legislatures.” *Id.* at 1217 (citing *Thompson v. Oklahoma*, 487 U.S. 815, 854 (1988) (O’Connor, J., concurring)). Also dissenting was Justice Scalia who diverged from the plurality’s determination of a national consensus against executing juvenile offenders and echoed Justice O’Connor’s concerns about the broad nature of the rule presented by the plurality. *See id.* at 1218 (Scalia, J., dissenting) (“Words have no meaning if the views of less than 50% of death penalty States can constitute a national consensus. Our previous cases have required overwhelming opposition to a challenged practice, generally over a long period of time.”) (citation omitted). Justice Scalia criticized the plurality for its characterization of forty-seven percent of the states, which permit capital punishment—eighteen of thirty-eight—as a national consensus, noting that in previous cases, such as *Coker v. Georgia* and *Enmund v. Florida*, more conclusive percentages were required for the determination of a national consensus. *See id.* (outlining parameters of “halfhearted” claims of national consensus by plurality). Finally, Justice Scalia wrote of his dismay at the plurality’s decision to consider the standards and opinions of foreign countries and interest groups in making its determination on the constitutionality of executing juveniles. *See id.* at 1226 (“[T]he basic premise of the Court’s argument—that American law should conform to the laws of the rest of the world—ought to be rejected out of hand.”).

158. *See* Roger P. Alford, *Roper v. Simmons and Our Constitution in International Equipose*, 53 UCLA L. REV. 1, 9-21 (2005) (describing multiple interpretive theories utilized by Court in adjudicating death penalty cases, several of which were employed in *Roper*); Thomas Healy, *The Rise of Unnecessary Constitutional Rulings*, 83 N.C. L. REV. 847, 861 n.59 (2005) (including *Roper* as one of Court’s complicated constitutional interpretation cases); Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677, 721-25 (2005) (illustrating complicated and often confusing nature of Court’s capital jurisprudence and explaining *Roper*’s role in evaluation process). *See generally* Brian W. Varland, *Marking the Progress of a Maturing Society: Reconsidering the Constitutionality of Death Penalty Application in Light of Evolving Standards of Decency*, 28 HAMLINE L. REV. 311 (2005) (discussing Court’s recent trend of reevaluating issues decided comparatively recently and potential future impact on constitutionality of capital sentencing).

159. *See, e.g.*, Margaret Meriwether Cordray & Richard Cordray, *The Philosophy of Certiorari: Jurisprudential Considerations in Supreme Court Case Selection*, 82 WASH. U. L.Q. 389, 450-52 (2004) (describing how Court’s decisions to grant or deny certiorari in particular cases can be bellwethers, indicative of future Court decisions); *The Supreme Court, 1993 Term: Leading Cases*, 108 HARV. L. REV. 139, 159 (1994) (extrapolating that past Court decisions can be indicative of future jurisprudence).

160. *See* Frank Leonard Madia, *Death Penalty Jurisprudence: The Difference Between Life and Death*, 14 J. SUFFOLK ACAD. L. 73, 100 (2000) (“Historical analysis of death penalty jurisprudence can effectively predict future events.”); Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 359 (1995) (critiquing apparent convoluted nature of Court’s various approaches to evaluating constitutionality of capital punishment while explicating that understanding of

in *Atkins* and *Roper* provide intimations about the Court's potential decision and rationale should it elect to decide a challenge to capital rape laws.¹⁶¹

Present-day objections to capital punishment for child rapists are not dissimilar to those raised nearly thirty years ago in *Coker*.¹⁶² Many critics of Louisiana's capital rape statute continue to rely primarily on the principle of proportionality and contend that capital punishment is unjustly imposed on the criminal who does not take a human life.¹⁶³ They also make arguments, similar to those made in *Atkins* and *Roper*, that based on the characteristics of the particular offender and the peculiar nature of the crime, the death penalty is an unjust and excessive punishment.¹⁶⁴ Based on the analyses performed by the Court in invalidating the respective Virginia and Missouri laws in *Atkins* and *Roper*, the Louisiana child rape statute is cruel and unusual, and its continued application violates the Eighth Amendment of the United States Constitution.¹⁶⁵

Federalist supporters of the Louisiana statute would seek to exclude the bases of the Court's holdings in *Atkins* and *Roper* because those cases should have no precedential value in Louisiana.¹⁶⁶ On the contrary, the cases can provide a wealth of information regarding the Court's possible attitude toward its future capital jurisprudence.¹⁶⁷ Most prominent is the

Court's precedents is essential to determination of future direction of death penalty jurisprudence).

161. For a discussion of the potential impact of *Atkins* and *Roper* on the Court's future capital jurisprudence as applied to capital rape statutes, see *infra* notes 162-218 and accompanying text.

162. See generally Broughton, *supra* note 20 (identifying proportionality and racial discrimination as most prevalent objections to capital rape sentencing, similar to *Coker*-era objections).

163. See, e.g., Bailey, *supra* note 20, at 1371-72 (opining capital rape statutes are excessive and disproportionate to crime); Lormand, *supra* note 20, at 1014 (contending that *Wilson* decision was inconsistent with Supreme Court's proportionality jurisprudence as applied in *Coker*); Schaaf, *supra* note 20, at 347 (concluding that Louisiana's capital rape statute is disproportionate as well as arbitrary and capricious in its application).

164. See *Roper v. Simmons*, 125 S. Ct. 1183, 1200 (2005) (holding capital punishment cruel and unusual when imposed on juvenile offenders); *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (finding capital punishment cruel and unusual when imposed on mentally retarded offenders).

165. For a discussion of the guidelines utilized in *Atkins* and *Roper* and their application to child rape laws, see *supra* notes 159-64 and *infra* notes 166-218 and accompanying text.

166. See, e.g., Glazer, *supra* note 20, at 94-95 (arguing that so long as Louisiana maintains sufficient safeguards to protect rights of accused, courts lack authority to overrule voters' will as expressed through their legislative representatives). Glazer also argues that courts are not permitted to substitute their own beliefs for the legislative autonomy exerted by Louisiana's Legislature. See *id.* at 94 ("[C]ourts must avoid deciding the extent of criminal sanctions of the various states.").

167. See Meister, *supra* note 20, at 207-08 (criticizing Court's approach in *Atkins* while contemporaneously applying it to find capital child rape laws constitutional); see also Sarah P. Newell, Note, *State v. Gales: The First Test of Nebraska's New System of Capital Punishment—The Battle Is Over, But What About the War?*, 83 NEB. L.

manner in which the Court reached its determinations that the challenged laws violated the Eighth Amendment.¹⁶⁸

In *Atkins* and *Roper*, the Court used a uniform approach to guide its decision-making process.¹⁶⁹ First, the Court determined whether the death penalty was cruel and unusual in the given case, based on its level of excessiveness to the crime in light of societal evolving standards of decency.¹⁷⁰ Next, the Court conducted an analysis of state legislative decisions to determine whether a national consensus existed in support of or against the issue being contested.¹⁷¹ Last, it conducted an independent evaluation, based on the Justices' own legal interpretations as to whether the statute in question passed constitutional muster.¹⁷² If the Court ever examines the Louisiana statute or similar legislation from another state, it should use this "*Atkins-Roper*" analysis and should ultimately conclude that the statute is invalid.¹⁷³

A. Step 1: Ensuring Proportionality Between Crime and Punishment

In the first step, which involves a proportionality analysis, the Court should find that a capital sentence is a grossly excessive punishment to the crime of raping a child under twelve years old.¹⁷⁴ Modern capital jurisprudence mandates that a life be taken to justify imposition of the death penalty.¹⁷⁵ The *Enmund* and *Tison* rulings require either that defendants

REV. 932, 934-35 (2005) (remarking on importance of proper interpretation of Supreme Court precedent when analyzing legal principles, even where issues presented are not identical).

168. See Meister, *supra* note 20, at 207 (objecting to nature of Court's analysis in *Atkins*).

169. For a discussion of the analysis used by the Court in *Atkins* and *Roper*, see *infra* notes 170-72 and accompanying text.

170. See *Roper v. Simmons*, 125 S. Ct. 1183, 1190 (2005) (examining proportionality of punishment to crime in light of evolving standards of decency); *Atkins v. Virginia*, 536 U.S. 304, 311-12 (2002) (same).

171. See *Roper*, 125 S. Ct. at 1192-94 (performing legislative accounting of states which abandoned juvenile executions); *Atkins*, 536 U.S. at 313-16 (listing jurisdictions within United States which condoned execution of mentally retarded defendants).

172. See *Roper*, 125 S. Ct. at 1198-200 (examining external factors that might concur or conflict with Court's determination against constitutionality of juvenile executions); *Atkins*, 536 U.S. at 318-21 (performing subjective examination of any considerations which support Court's holding against executing mentally retarded defendants).

173. For a discussion of what the Court would likely conclude in performing such an analysis, see *infra* notes 174-218 and accompanying text.

174. See, e.g., Volokh, *supra* note 11, at 1968 ("[T]he Court must . . . [understand] *Coker* as practically limiting the death penalty almost exclusively to murder prosecutions And this limitation reflects a fairly clear and coherent (though not uncontroversial) rule that the infliction of death should be reserved largely for those who themselves inflict death.") (footnote omitted); Bailey, *supra* note 20, at 1371-72 (concluding death is unconstitutional punishment for child rape).

175. See *Coker v. Georgia*, 433 U.S. 584, 598 (1977) ("[T]he death penalty . . . is an excessive penalty for the rapist who, as such, does not take human life."); see

kill, attempt to kill or intend to kill their victim, or that they display a reckless indifference for human life in which they should foresee that death could reasonably be expected to occur.¹⁷⁶ In the case of child rapists, though their crimes may be unspeakably vile, that standard is simply not met.¹⁷⁷

Many proponents of imposing the death penalty on child rapists rely on the physical and psychological effects of the sexual assault on the child victim to express the licentious nature of an offender's conduct.¹⁷⁸ Although the effects on victims are certainly severe and excruciatingly painful, they typically do not rise to a life-threatening level.¹⁷⁹ Such arguments fail to constitute intent to kill or a reckless disregard for human life as required under the standard of *Enmund* and *Tison*.¹⁸⁰ Consequently, an

also *Enmund v. Florida*, 458 U.S. 782, 793 (1982) (rejecting imposition of capital sentence on defendant who "did not take life, attempt to take it, or intend to take [it]").

176. *See Tison v. Arizona*, 481 U.S. 137, 158 (1987) (finding that major participation in commission of felony combined with reckless indifference to human life is sufficient to warrant death sentence); *Enmund*, 458 U.S. at 793 (requiring evidence that defendant killed, intended to kill or attempted to kill to justify capital sentence). The *Wilson* court relied on *Tison* to justify the imposition of a capital sentence on a defendant who did not take his victim's life yet failed to take into account that the *Tison* Court implied that death was required. *See* Glazer, *supra* note 20, at 98 (noting flaw in Louisiana Supreme Court's interpretation of *Tison*); *see also* Mello, *supra* note 97, at 157 ("Rape, as a class of crime, is no doubt generally viewed as less serious than murder." (quoting Brief of Respondent, *Coker v. Georgia*, 433 U.S. 584 (1977) (No. 75-5444), available at 1977 WL 189754, at *18)). *But see* Volokh, *supra* note 11, at 1970 ("Murder may be more heinous than adult rape or child rape, but is it so qualitatively different that the Eighth Amendment should preclude the death penalty for the latter two crimes?").

177. *See Coker*, 433 U.S. at 598 ("[R]ape by definition does not include the death of or even the serious injury to another person."). Additionally, "in terms of moral depravity and of the injury to the person and to the public, [rape] does not compare with murder, which does involve the unjustified taking of human life." *Id.* The *Coker* Court made no distinction in describing the crime of rape based on the age of the victim, whether an adult or a minor. *See id.* (depicting rape without regard for age of victim).

178. *Accord* Meister, *supra* note 20, at 208-09 (describing physical, psychological and social effects of child rape); Palmer, *supra* note 20, at 863-66 (recounting traumatic effects of rape on children's bodies, minds and emotions); *see* State v. Wilson, 685 So. 2d 1063, 1070 (La. 1996) (relying on severity of injury to child rape victims to conclude that execution of child rapists is not disproportionate or excessive), *cert. denied*, 520 U.S. 1259 (1997).

179. *See, e.g.*, LINDA BROOKOVER BOURQUE, DEFINING RAPE 51 (1989) (comparing post-sexual assault reactions of rape victims to post-traumatic stress disorder—severe in intensity and consequence on victims, but temporary in nature); PAT GILMARTIN, RAPE, INCEST, AND CHILD SEXUAL ABUSE 128-30 (1994) (depicting sadness, moodiness, anxiety, interpersonal communication problems, headaches, depression and cognitive/learning problems to be among most common effects of child sexual abuse/rape).

180. *Accord* Moeller, *supra* note 20, at 635 ("There is a basic difference in the harm produced by rape and murder—the rape victim's life continues, [while] the murder victim's does not."); *see Coker*, 433 U.S. at 597-98 (noting that, despite phys-

evaluation of the proportionality of a death sentence for the aggravated rape of a child would fail the first step of an *Atkins-Roper* analysis.¹⁸¹

B. Step 2: The Quest for a National Consensus

The second step in the *Atkins-Roper* analysis requires a determination of the existence or deficiency of a national consensus regarding the punishment under examination.¹⁸² When the Court decided *Coker* in 1977, it found that Georgia was the only state that permitted the execution of a rapist whose victim was an adult.¹⁸³ Today, the Louisiana statute stands alone, much as Georgia's capital rape statute did nearly three decades ago, in authorizing execution of child rapists.¹⁸⁴ The *Atkins-Roper* analysis requires a clear consensus that the states agree that a punishment is impermissible for a given crime; consideration is also afforded to the speed and consistency of the societal shift in one direction or another.¹⁸⁵ In the case of executions of child rapists, the consensus is clear—no other state actively sanctions the execution of “the rapist who, as such, does not take human life.”¹⁸⁶ Additionally, in the interim years since the *Coker* decision, only a few states have passed legislation permitting capital punishment for rape crimes, and Louisiana is the only state whose supreme court has upheld the punishment as constitutional.¹⁸⁷ Ample time has passed for a

ical and psychological injuries inflicted by rapists, rape still does not rise to equivalent level of murder and lacks requisite severity to warrant penalty of death).

181. See Fleming, *supra* note 20, at 749 (concluding death sentence for child rape fails proportionality under *Coker* reasoning); Schaaf, *supra* note 20, at 359 (finding capital rape laws fail proportionality analysis as identified in *Enmund-Coker* line of cases).

182. See *Roper v. Simmons*, 125 S. Ct. 1183, 1192-94 (2005) (examining decisions of state legislatures and sentencing juries to determine existence of national consensus against executing juveniles); *Atkins v. Virginia*, 536 U.S. 304, 311-17 (2002) (examining legislative enactments and jury decisions in identifying consensus against executing mentally retarded offenders).

183. See *Coker*, 433 U.S. at 595-96 (“The upshot is that Georgia is the sole jurisdiction in the United States . . . that authorizes a sentence of death when the rape victim is an adult woman . . .”).

184. For a discussion of the plight of similar statutes in other jurisdictions, see *supra* note 13 and accompanying text.

185. See *Roper*, 125 S. Ct. at 1194 (concluding majority of states' rejection of executing juveniles constituted national consensus); *Atkins*, 536 U.S. at 315-16 (finding that eighteen states having amended their statutes to prohibit execution of mentally retarded defendants was strong evidence of consensus); cf. Mello, *supra* note 97, at 160 (“Two out of thirty-eight jurisdictions is not impressive objective indicia that our ‘evolving standards of decency’ condone executing rapists.”) (footnote omitted).

186. *Coker*, 433 U.S. at 598. Montana also allows for capital rape sentencing but only for repeat offenders. See MONT. CODE ANN. § 45-5-503(3)(c)(i) (2003). At the time of this Note, no one had been sentenced under the Montana statute. See Mont. Dep't of Corr., Death Row: Who Are They?, <http://www.cor.state.mt.us/facts/deathrow.asp> (last visited Oct. 18, 2005) (identifying all offenders on Montana's death row as convicted murderers).

187. See Rayburn, *supra* note 13, at 1137-39 (noting various states' discussions of passing similar legislation, but also noting their failure to do so); Adam Liptak,

trend to develop among states moving toward capital rape standards, but no such trend has emerged.¹⁸⁸ As such, the only possible conclusion is that the national consensus is in favor of sparing the life of the child rapist, and thus any statute that holds otherwise fails to comply with constitutional standards.¹⁸⁹

C. *Step 3: Identifying Any Compelling Reasons Against Consensus*

The third step of the *Atkins-Roper* analysis would be the most difficult to predict because an independent analysis must be performed to determine the existence or absence of a compelling reason for the Court to disagree with the legislative consensus.¹⁹⁰ In *Atkins*, the Court discussed whether the two principal aims of punishment, retribution and deterrence, were satisfied by permitting the execution of mentally retarded defendants.¹⁹¹ In *Roper*, the Court focused on the characteristics of juvenile offenders and whether they were fully culpable for their actions given their reduced age and maturity.¹⁹² The Court then proceeded to review international statistics that indicated a world consensus, similar to that among the states, had formed in opposition to the death penalty for juve-

Louisiana Sentence Renews Debate on the Death Penalty, N.Y. TIMES, Aug. 31, 2003, at 20, available at 2003 WLNR 5646485 (discussing states' lack of legislative support for argument in favor of constitutionality of Louisiana law). For a discussion of other states' efforts to enact capital rape laws, see *supra* note 13 and accompanying text.

188. *Compare* State v. Wilson, 685 So. 2d 1063, 1069 (La. 1996) (suggesting that given ample time, additional states will enact statutes similar to Louisiana's capital rape statute), *cert. denied*, 520 U.S. 1259 (1997), *with Coker*, 433 U.S. at 595 (finding period of five years sufficient to determine evidence of national trend in passage of capital rape laws).

189. *Accord* Moeller, *supra* note 20, at 643 (insisting any evaluation of constitutionality of Louisiana's capital rape statute must also evaluate decisions of other states to not implement similar legislation); Shirley, *supra* note 20, at 1922 (criticizing Louisiana Supreme Court's decision upholding capital rape statute in spite of Supreme Court indications that single jurisdiction's support is insufficient to combat finding of national consensus); *see Coker*, 433 U.S. at 595-96 (determining that punishment sanctioned in only one state is strongly indicative of unconstitutionality of such punishment).

190. *See Roper*, 125 S. Ct. at 1194-200 (considering moral culpability of juvenile offenders and international perspectives on propriety of executing juveniles); *Atkins*, 536 U.S. at 317-22 (evaluating characteristics of mentally retarded offenders and finding no demonstrable reason to recede from conclusion that consensus among state legislatures is correct in abolishing capital punishment of mentally retarded defendants). *But see* Silversten, *supra* note 20, at 147 (reiterating that "the Court can only strike down [a capital rape] statute if it offends the Constitution, not because it offends the Justices").

191. *See Atkins*, 536 U.S. at 317-22 (discounting effectiveness of retribution and deterrence as capital goals when applied to mentally retarded offenders).

192. *See Roper*, 125 S. Ct. at 1194-98 (concluding that executing juvenile offenders, whose moral culpability is not as fully developed as adult offenders, is aberrant and violates Eighth Amendment's Cruel and Unusual Punishments Clause).

nile offenders.¹⁹³ In both *Atkins* and *Roper*, the Court found no compelling reason to warrant deviation from the finding of national consensus.¹⁹⁴ An analysis of the constitutionality of executing child rapists would properly include all of the above-listed considerations.¹⁹⁵

Retribution and deterrence are the compelling aims that society seeks to achieve through its criminal justice system.¹⁹⁶ Retribution is satisfied if the punishment fits the crime.¹⁹⁷ Rape, a criminal act in which no life is taken, however, is disproportionate to a sentence of death even if the victim is a child.¹⁹⁸ Contemporary jurisprudence calls for penalties that are

193. See *id.* at 1198-200 (finding international community near-universally rejects execution of juvenile offenders); see also Anthony N. Bishop, *The Death Penalty in the United States: An International Human Rights Perspective*, 43 S. TEX. L. REV. 1115, 1134-38 (2002) (noting denunciation by world community of capital sentencing for juvenile offenders).

194. See *Roper*, 125 S. Ct. at 1200 (concluding that extrinsic evidence does not preclude conclusion that consensus against executing juvenile offenders indicates that such punishment has become cruel and unusual within meaning of Eighth Amendment); *Atkins*, 536 U.S. at 321 (finding no reason to disagree with decisions of legislatures in prohibiting execution of mentally retarded offenders).

195. See *Callins v. Collins*, 510 U.S. 1141, 1148-49 (1994) (Blackmun, J., dissenting from denial of certiorari) (noting importance and severity of process of deciding upon whom death should be imposed and discussing Court's numerous failures at appropriately regulating such processes by failing to consider all factors surrounding death penalty debate). But see *Atkins*, 536 U.S. at 352-53 (Scalia, J., dissenting) (protesting that *Atkins* decision wrongfully expands list of factors considered in determining constitutionality of capital sentences); Silversten, *supra* note 20, at 152-53 (opining that Framers of Constitution did not want Court to consider any factors other than Constitution's text in declaring validity of statutes).

196. *Accord Roper*, 125 S. Ct. at 1196 (quoting *Atkins*'s enumeration of two distinct social purposes served by punishment); see *Atkins*, 536 U.S. at 319 (citing *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (Stewart, Powell and Stevens, JJ., joint opinion)) (finding retribution and deterrence to be social purposes behind capital punishment).

197. See *Atkins*, 536 U.S. at 319 ("With respect to retribution—the interest in seeing that the offender gets his 'just deserts'—the severity of the appropriate punishment necessarily depends on the culpability of the offender.").

198. See *Fleming*, *supra* note 20, at 737 ("Raping a child, if unaccompanied by any other crime, does not result in death. It is a heinous and serious crime deserving of severe punishment; however, because it does not result in loss of life, it does not deserve the death penalty."). The punishment of death does not have any retributive effect. See, e.g., *Rayburn*, *supra* note 13, at 1164 (finding retributive goals of child rape statutes will not be met); *Fleming*, *supra* note 20, at 749 (opining lack of proportionality of sentence in executing child rapists renders statutes ineffective at achieving retributive goals); *Lormand*, *supra* note 20, at 1012 (discussing potential negative effects of capital rape statutes, such as decreased reporting of intra-family child rapes and negative effects on goals of retribution); *Moeller*, *supra* note 20, at 642 (arguing that because retribution is directly tied to offender's individual culpability, execution of offenders who do not kill is disproportionate and fails to contribute to retributive aims of punishment); *Schaaf*, *supra* note 20, at 356-57 (noting that strict liability statutes, which permit offenders to be sentenced to death without possessing intent to commit crime, defeat any deterrent or retributive effects statute may have). But see, e.g., *Gray*, *supra* note 20, at 1468 (finding goals of retribution satisfied by execution of child rapists); *Meister*,

proportionate to the crime for which they are imposed.¹⁹⁹ An overly harsh punishment would not fit a less severe crime.²⁰⁰ While the rape of a child is certainly no minor crime, it does not rise to the level of severity mandated to warrant the taking of the offender's life.²⁰¹

A punishment possesses a deterrent effect if it discourages others from committing the criminal acts being punished.²⁰² Additionally, it is well established that any punishment that is more severe than another, yet fails to provide a greater deterrent effect, is considered disproportionate and therefore unconstitutional.²⁰³ There is no evidence to suggest that instances of aggravated rape have decreased in Louisiana since the passage of the capital rape law in 1995, as would have been expected had the law enjoyed a deterrent effect.²⁰⁴ Accordingly, because insufficient support

supra note 20, at 224 (concluding that executing child rapists is not offensive to Eighth Amendment and therefore sufficient to meet goals of punishment).

199. See *Tison v. Arizona*, 481 U.S. 137, 168 (1987) (requiring that punishment must be proportionate to crime punished); *Enmund v. Florida*, 458 U.S. 782, 788 (1982) (finding death disproportionate for non-triggerman in capital murder who did not kill, attempt to kill or intend to kill); *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (finding death disproportionate for rape of adult woman); *Gregg v. Georgia*, 428 U.S. 153, 174 (1976) (requiring punishment be proportionate to crime and finding death proportionate sentence for first-degree murder).

200. See, e.g., *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (rejecting denationalization of army soldier convicted of wartime desertion); *Weems v. United States*, 217 U.S. 349, 382 (1910) (rejecting fifteen years hard labor as disproportionate sentence for falsifying documents).

201. *Accord Bailey*, *supra* note 20, at 1372 (opining that capital sentence is disproportionate and unconstitutional for rape even when victim is child); see *State v. Wilson*, 685 So. 2d 1063, 1074 (La. 1996) (Calogero, C.J., dissenting) (finding death penalty unconstitutional for crime of rape of child under age twelve), *cert. denied*, 520 U.S. 1259 (1997).

202. See *Atkins*, 536 U.S. at 319 (defining deterrence as "the interest in preventing capital crimes by prospective offenders").

203. See *Furman v. Georgia*, 408 U.S. 238, 359 & n.141 (1972) (Marshall, J., concurring) ("[P]unishment may not be more severe than is necessary to serve the legitimate interests of the State.").

204. See FBI, U.S. DEP'T OF JUSTICE, CRIME IN THE UNITED STATES 2004 89 (2004) (reporting 35.8 forcible rapes per 100,000 residents in Louisiana in 2004); FBI, U.S. DEP'T OF JUSTICE, CRIME IN THE UNITED STATES 2003 85 (2003) (reporting 41.1 forcible rapes per 100,000 residents in Louisiana in 2003); FBI, U.S. DEP'T OF JUSTICE, CRIME IN THE UNITED STATES 2002 81 (2002) (reporting 34.1 forcible rapes per 100,000 residents in Louisiana in 2002); FBI, U.S. DEP'T OF JUSTICE, CRIME IN THE UNITED STATES 2001 79 (2001) (reporting 31.4 forcible rapes per 100,000 residents in Louisiana in 2001); FBI, U.S. DEP'T OF JUSTICE, CRIME IN THE UNITED STATES 2000 78 (2000) (reporting 33.5 forcible rapes per 100,000 residents in Louisiana in 2000); FBI, U.S. DEP'T OF JUSTICE, CRIME IN THE UNITED STATES 1999 77 (1999) (reporting 33.1 forcible rapes per 100,000 residents in Louisiana in 1999); FBI, U.S. DEP'T OF JUSTICE, CRIME IN THE UNITED STATES 1998 76 (1998) (reporting 36.8 forcible rapes per 100,000 residents in Louisiana in 1998); FBI, U.S. DEP'T OF JUSTICE, CRIME IN THE UNITED STATES 1997 79 (1997) (reporting 41.3 forcible rapes per 100,000 residents in Louisiana in 1997); FBI, U.S. DEP'T OF JUSTICE, CRIME IN THE UNITED STATES 1996 75 (1996) (reporting 41.5 forcible rapes per 100,000 residents in Louisiana in 1996); FBI, U.S. DEP'T OF JUSTICE, CRIME IN THE UNITED STATES 1995 71 (1995) (reporting 42.7 forcible rapes per 100,000 residents in Lou-

exists for the contention that execution is a greater deterrent than imprisonment for rape, the penalty is cruel and unusual within the meaning of the Eighth Amendment.²⁰⁵

While child rapists may possess no absolute characteristic that serves to reduce their culpability, the inherent nature of their crimes mitigates against the imposition of capital punishment.²⁰⁶ Rapists, by definition, do not take the lives of their victims.²⁰⁷ If they did, they would be murderers, and the constitutionality of a sentence of death would not be in question under the Court's current jurisprudence.²⁰⁸ Although rapists commit acts that are considered savage and horrifying, they do not murder within the meaning of the law.²⁰⁹ By subjecting child rapists to the possibility of a death sentence upon conviction, they have no reason to allow the rape victim to live.²¹⁰ By murdering their victims, rapists eliminate the best potential witness against their case and face no greater punishment at trial

isiana in 1995). Although the Uniform Crime Reports, from which this data is amassed, do not specifically identify victim information for those twelve years and younger, it is estimated that approximately one in six forcible rape victims are twelve years old or younger. PATRICK A. LANGAN & CAROLINE WOLF HARLOW, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CRIME DATA BRIEF: CHILD RAPE VICTIMS, 1992 1-2 (1994) (providing methodology for calculating percentage of rape victims who are children).

205. See *Furman*, 408 U.S. at 280 (Brennan, J., concurring) ("Although the determination that a severe punishment is excessive may be grounded in a judgment that it is disproportionate to the crime, the more significant basis is that the punishment serves no penal purpose more effectively than a less severe punishment.") (footnote omitted).

206. See Owen W. Jones, *Sex, Culture, and the Biology of Rape: Toward Explanation and Prevention*, 87 CAL. L. REV. 827, 829-31 (1999) (portraying differences in researchers' beliefs about why rapes occur). Because leading scientists are unable to determine what general motivation is responsible for sexual offenders' criminal behavior, they have been unable to conclude that there is one specific characteristic or trait that compels rapists to rape. See generally *id.* (discussing research into traits that may be common among sex offenders); Christina E. Wells & Erin Elliott Motley, *Reinforcing the Myth of the Crazy Rapist: A Feminist Critique of Recent Rape Legislation*, 81 B.U. L. REV. 127, 153-61 (2001) (describing genre of rapists known as "crazed" rapists).

207. See Volokh, *supra* note 11, at 1968 (describing difficult nature of line-drawing in criminal culpability but identifying clear line between crimes in which life was taken and all other crimes).

208. See *Gregg v. Georgia*, 428 U.S. 153, 187 (1976) (finding death penalty proportionate to crime of deliberate murder).

209. See *Coker v. Georgia*, 433 U.S. 584, 598 (1977) ("[R]ape by definition does not include the death of or even the serious injury to another person. The murderer kills; the rapist, if no more than that, does not."). But see Meister, *supra* note 20, at 224 ("One who takes another's life is a murderer; one who rapes a child under the age of twelve murders innocence.").

210. See Glazer, *supra* note 20, at 85 ("Opponents [of the statute] argue . . . that a rapist, knowing he is subject to the death penalty both for merely raping the victim, or for raping and subsequently killing the victim, will have no incentive to not kill [sic] the victim.").

than if they had allowed the victims to survive.²¹¹ Thus, by condoning capital sentencing for child rapists, Louisiana runs the risk of encountering more child rape/murder victims.²¹²

Additionally, an international analysis would show that the world community has rejected execution as a punishment for rape even when the victim is a child.²¹³ Beginning with *Trop v. Dulles*, the Court has consistently looked to international sources for purposes of consensus-building, even when determining matters strictly pertaining to American constitutional interpretation.²¹⁴ When the Supreme Court decided *Coker*, it cited a 1965 survey stating that only three of sixty major countries sanctioned the death penalty for the crime of rape.²¹⁵ In the forty years since that

211. See Rayburn, *supra* note 13, at 1159 (“When death is the penalty for rape and murder, . . . the rapist has every incentive to kill the child victim because the child is likely to be the only witness. . . . If murder does not incur additional punishment, then the motivation to kill the primary witness to the crime is strong.”) (footnotes omitted); Lormand, *supra* note 20, at 1013 (finding that rapists may have increased motivation to kill their victims to dramatically reduce likelihood of being identified and punished).

212. See Rayburn, *supra* note 13, at 1159 (noting rapists have increased incentive to murder victim if no supplementary punishment will be inflicted). One commentator noted the impossibility of making an accurate prediction as to how many murders of child rape victims could occur if death remains an available punishment for child rape. See Glazer, *supra* note 20, at 106 (explaining indeterminable nature of statistics of crimes which do not occur).

213. See WILLIAM A. SCHABAS, *THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW* 1-3 (2d ed., Cambridge Univ. Press 1997) (1993) (discussing steady decline of international acceptance of capital punishment); Rayburn, *supra* note 13, at 1140-43 (noting international trend away from capital sentencing and noting that several countries that elect to execute rapists do so under religious laws, not civil statutes).

214. See, e.g., *Roper v. Simmons*, 125 S. Ct. 1183, 1198 (2005) (“[T]he United States is the only country in the world that continues to give official sanction to the juvenile death penalty.”); *Atkins v. Virginia*, 536 U.S. 304, 317 n.21 (2002) (“[W]ithin the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved.”); *Thompson v. Oklahoma*, 487 U.S. 815, 830-31 & n.31 (1988) (examining permissibility of executing juveniles in foreign countries); *Enmund v. Florida*, 458 U.S. 782, 796-97 n.22 (observing that “the doctrine of felony murder has been abolished in England and India, severely restricted in Canada and a number of other Commonwealth countries, and is unknown in continental Europe”); *Coker*, 433 U.S. at 596 n.10 (finding value in examining international acceptance of capital punishment); *Trop v. Dulles*, 356 U.S. 86, 102 (1958) (“The civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime.”). *But see Roper*, 125 S. Ct. at 1226 (Scalia, J., dissenting) (“[T]he basic premise . . . that American law should conform to the laws of the rest of the world . . . ought to be rejected out of hand.”); *Atkins*, 536 U.S. at 325 (Rehnquist, C.J., dissenting) (“[I]f it is evidence of a national consensus for which we are looking, then the viewpoints of other countries simply are not relevant.”).

215. *Accord* SCHABAS, *supra* note 213, at 196-200 (observing that opposition to capital punishment by international community, even for rape and murder, was widely apparent as early as 1949 Geneva Conventions); see *Coker*, 433 U.S. at 596 n.10 (noting that only three of sixty nations surveyed retained capital punishment for rape in which victim’s life was not taken).

survey was compiled, dozens of additional countries have abolished capital punishment for all crimes, and countless others have substantially narrowed the class of death-eligible defendants.²¹⁶ At the present time, there is no evidence that the death penalty enjoys any greater international acceptance for the crime of rape, whether of an adult woman or a child, than it did at the time *Coker* was decided.²¹⁷ Therefore, the *Atkins-Roper* analysis would fail to identify the existence of any international influence that could lead to a conclusion contrary to the national consensus against capital punishment for child rapists.²¹⁸

VI. CONCLUSION

Since the *Coker* decision in 1977, the Supreme Court's capital jurisprudence has grown dramatically and unpredictably.²¹⁹ One factor that has remained constant, however, is the states' near-unanimity in their legislative opposition to capital sentencing for rape.²²⁰ Pursuant to the method of analysis for the constitutionality of capital sentences the Court adopted in *Atkins* and *Roper*, the Louisiana capital rape statute fails to survive Supreme Court scrutiny.²²¹

Until 2003, the debate over the statute's legitimacy was merely academic in nature; despite the Louisiana Supreme Court's affirmative deci-

216. See, e.g., Bishop, *supra* note 193, at 1120 (counting 111 countries that have abolished capital punishment, while eighty-four countries retain it). The United States lags behind the rest of the world community in identifying evolving standards of decency, which would necessitate the abolition of the death penalty, particularly for specific crimes and against certain offenders to whom few, if any, other democracies in the world continue to apply capital sentencing. See generally *id.* (noting sluggish nature of United States to adhere to larger, globally accepted beliefs on continued use of death penalty).

217. See SCHABAS, *supra* note 213, at 2 (indicating steady trend in world community away from capital punishment since 1945). But see Rayburn, *supra* note 13, at 1140-43 (finding international opinion mixed about executing child rapists). It is difficult to identify which nations execute offenders for child rape because statistics such as ages of rape victims are not always kept accurately. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CROSS NATIONAL STUDIES IN CRIME AND JUSTICE vii (2004) (describing difficulties in compiling accurate rape statistics in international community because different victim information is gathered in different countries).

218. See generally SCHABAS, *supra* note 213 (outlining history of death penalty and describing consistent trend in international community away from capital sentencing).

219. See Suleiman, *supra* note 6, at 427 (describing development and variable nature of Court's capital jurisprudence).

220. See Rayburn, *supra* note 13, at 1137-39 (noting that despite several states' discussions of passing statutes similar to Louisiana's, no jurisdiction has yet done so).

221. For a discussion of *Atkins-Roper* analysis and its application to capital rape statutes, see *supra* notes 159-218 and accompanying text.

sion in *Wilson*, no defendants had been sentenced under the law.²²² That changed in August 2003 when a Jefferson Parish jury sentenced Patrick Kennedy to death for raping his eight-year-old stepdaughter.²²³ Kennedy's conviction has breathed new life into the death debate, spurring speculation as to how the Supreme Court may rule should it decide his appeal.²²⁴ A Supreme Court analysis of Kennedy's sentence would likely follow the guidelines set forward by the Court in *Atkins* and *Roper*, the two most recent substantive cases on the constitutionality of capital punishment.²²⁵ Under the methods of analysis and review utilized in those cases, Louisiana's statute fails to pass muster and must be declared unconstitutional in violation of the Eighth Amendment.²²⁶

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222. See Joe Darby, *Man Gets Death in Rape of Girl, 8; Judge Rejects Request to Grant New Trial*, NEW ORLEANS TIMES-PICAYUNE, Oct. 3, 2003, at M1, available at 2003 WLNR 2095533 (noting first sentencing under R.S. 14:42 in August 2003).

223. See *id.* (recounting details of Kennedy's crimes); Liptak, *supra* note 187 (discussing unusual nature of capital sentence for rape); see also *State v. Kennedy*, 854 So. 2d 296, 296 (La. 2003) (affirming death sentence for convicted child rapist).

224. See Kris Axtman, *Judicial Rarity: Death Penalty in a Rape Case*, CHRISTIAN SCI. MONITOR, Sept. 8, 2003, at 2, available at 2003 WLNR 2243468 (speculating whether death sentence will be upheld if Kennedy's appeal reaches United States Supreme Court).

225. See Jennifer Eswari Borra, *Roper v. Simmons*, 13 AM. U. J. GENDER SOC. POL'Y & L. 707, 715 (2005) (implying that because *Roper* will likely have consequences on future death penalty cases, methods of analysis implemented therein will also be similarly utilized).

226. For a discussion of *Atkins-Roper* analysis and its application to capital rape statutes cases, see *supra* notes 159-218 and accompanying text.

