

NOTE

DEATH ROW FOR CHILD RAPE? CRUEL AND UNUSUAL PUNISHMENT UNDER THE *ROPER-ATKINS* “EVOLVING STANDARDS OF DECENCY” FRAMEWORK

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INTRODUCTION

The United States has not executed any person for committing a crime that did not cause death since the Supreme Court reinstated the death penalty in 1976.¹ That may soon change, however, now that Patrick Kennedy sits on death row in Louisiana for raping an eight-year-old girl.² Kennedy is the first person sentenced to death for a non-homicide crime³ since *Coker v. Georgia*, in which the Supreme Court held that the death penalty is a disproportionate, and therefore unconstitutional, punishment for the crime of rape of an adult woman.⁴ While it is clear that *Coker* bars the use of the death penalty for that particular offense, it otherwise leaves open the question of which, if any, non-homicide crimes can constitutionally be punished by death.

Today, most states that allow capital punishment⁵ permit it only for crimes that result in death.⁶ Yet several capital states, including Louisiana, have statutes that authorize the death penalty for certain

¹ See Jeffrey Matura, Note, *When Will it Stop? The Use of the Death Penalty for Non-homicide Crimes*, 24 J. LEGIS. 249, 250 (1998); Adam Liptak, *Child's Rape Brings Death Sentence*, N.Y. TIMES, Aug. 31, 2003, at A6.

² See Transcript of Record at 6068–69, *State v. Kennedy*, 854 So. 2d 296 (La. 2003) (No. 98-1425) [hereinafter Transcript of Record].

³ See *id.*

⁴ See 433 U.S. 584 (1977).

⁵ The thirty-eight capital states are Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, and Wyoming. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CAPITAL PUNISHMENT 2004, at 2 (2005), <http://www.ojp.usdoj.gov/bjs/pub/pdf/cp04.pdf> [hereinafter CAPITAL PUNISHMENT 2004].

⁶ The twenty-five states that permit capital punishment only for homicide crimes are Alabama, Arizona, Connecticut, Delaware, Illinois, Indiana, Kansas, Maryland, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oregon, Pennsylvania, Tennessee, Texas, Utah, Virginia, Washington, and Wyoming. *Id.*

non-homicide offenses such as child rape.⁷ In 1995, the Louisiana state legislature enacted the statute under which Patrick Kennedy was sentenced, making it a capital offense to rape a child under the age of twelve.⁸ The Louisiana Supreme Court subsequently upheld the constitutionality of this law, and, in so holding, recognized that its decision may influence other states to pass similar death penalty statutes for non-homicide crimes.⁹

Kennedy's case is pending on direct appeal to the Louisiana Supreme Court.¹⁰ If that court upholds Kennedy's sentence, the U.S. Supreme Court will likely review the case and pass on the statute's constitutionality.¹¹ This possibility is particularly compelling in light of two recent Supreme Court decisions that have significantly altered the contours of U.S. capital law. First, in 2002, the Court held in *Atkins v. Virginia* that executing mentally retarded defendants violates the Constitution.¹² Then, in 2005, the Court held in *Roper v. Simmons* that imposing the death penalty on defendants who were juveniles when they committed their crimes is unconstitutional.¹³ The Court's methodology in deciding these cases had a different focus than its prior jurisprudence regarding the constitutionality of capital statutes. In both *Roper* and *Atkins*, the Court examined objective indicia of national consensus as evidenced by state laws¹⁴ and by jury practices,¹⁵ analyzed whether the punishments were proportional to the classes of crimes,¹⁶ and looked to other nations' treatment of the issues.¹⁷ Thus, the possibility that, in deciding Kennedy's case, the Court may now apply this new framework to determine the constitutionality of

⁷ See *id.* Of the thirteen states that authorize the death penalty for non-homicide crimes, five states—Arkansas, California, Colorado, Georgia, and Mississippi—authorize it only for what are known as extraordinary crimes, such as treason or espionage. *Id.* The remaining eight states—Florida, Idaho, Kentucky, Louisiana, Montana, Oklahoma, South Carolina, and South Dakota—authorize it for non-extraordinary, non-homicide crimes, such as child rape and aggravated kidnapping. 2006 Okla. Sess. Law Serv. 326 (West); 2006 S.C. Acts 346; CAPITAL PUNISHMENT 2004, *supra* note 5, at 2.

⁸ LA. REV. STAT. ANN. § 14:42 (1997).

⁹ See *State v. Wilson*, 685 So. 2d 1063, 1069 (La. 1996).

¹⁰ See Transcript of Record, *supra* note 2.

¹¹ When the Court last commented on Louisiana's capital child-rape statute in the context of a pretrial facial challenge to its constitutionality, Justice John Paul Stevens took the opportunity in his concurrence to the Court's denial of the writ of certiorari to emphasize that the Court had denied review not because the constitutional challenge was without merit, but instead because of a jurisdictional issue. See *Bethley v. Louisiana*, 520 U.S. 1259, 1259 (1997).

¹² See 536 U.S. 304 (2002).

¹³ See 543 U.S. 551 (2005).

¹⁴ See 543 U.S. at 609–11; 536 U.S. at 343–48.

¹⁵ See 543 U.S. at 569, 583; 536 U.S. at 323–24.

¹⁶ See 543 U.S. at 560–64; 536 U.S. at 311–13.

¹⁷ See 543 U.S. at 575–78; 536 U.S. at 318 n.21.

capital child-rape statutes raises several new and compelling issues for death penalty jurisprudence.

Moreover, the dramatic impact a determination of this issue would create also makes the possibility of Supreme Court review in Kennedy's case critical. Such a decision would have far-reaching implications not only for capital child-rape statutes, but also for all other capital non-homicide statutes, given the Supreme Court's characterization of rape as a crime second only to homicide in the harm that it causes.¹⁸ As such, a Supreme Court determination that capital child-rape statutes are unconstitutional would likely invalidate all capital non-homicide statutes because finding another capital non-homicide statute constitutional would require convincing the Court that the crime in question is worse than rape.¹⁹ In light of Supreme Court case law and commentary on the severity of rape, such a showing would be an extremely difficult, if not insurmountable, task.²⁰ On the other hand, a decision finding the Louisiana statute constitutional may encourage other states to pass capital statutes for child rape as well as other non-homicide crimes. It could even lead to a challenge of *Coker*.²¹

This Note analyzes the framework the Court used in *Atkins* and *Roper* and examines how it may use this framework to resolve whether capital child-rape statutes are constitutional. In particular, the Note examines how international opinion may inform the analysis in light of the increasing weight the Court afforded it in *Atkins* and *Roper* and asserts that the Court's use of international opinion reflects a more normative approach to deciding constitutionality in death penalty cases. Part I describes the historical development and current state of capital non-homicide statutes, including child-rape statutes, in the United States and discusses how Patrick Kennedy's case is a landmark one. Part II analyzes the Supreme Court's use of the "evolving standards of decency" principle both in the past and recently in *Atkins* and *Roper* as a vehicle for bringing international opinion into its analysis. Part III applies the *Roper-Atkins* framework to capital child-rape statutes and concludes that under the Court's new method of analysis, capital child-rape statutes are clearly unconstitutional, and that if the

¹⁸ See *Coker v. Georgia*, 433 U.S. 584, 597 (1977) (plurality opinion) ("Short of homicide, [rape] is the 'ultimate violation of self.'" (quoting U.S. DEP'T OF JUST., LAW ENFORCEMENT ASSISTANCE ADMINISTRATION REPORT, RAPE AND ITS VICTIMS: A REPORT FOR CITIZENS HEALTH FACILITIES AND CRIMINAL JUSTICE AGENCIES 1 (1975))); see also 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, 376 (noting that convincing the Court that a non-homicide crime is worse than rape would be quite difficult "[g]iven the severity *Coker* has assigned to rape as compared to other crimes").

¹⁹ See Schaaf, *supra* note 18, at 376.

²⁰ See *id.*

²¹ See *id.*

Court continues to consider international opinion in its death penalty jurisprudence (as seems likely), it will continue to limit the punishment's application.

I

PUNISHING CHILD RAPE BY DEATH: THE CURRENT STATE OF CAPITAL CHILD-RAPE STATUTES IN THE UNITED STATES

A. Factual Backdrop: Capital Punishment for Child Rape in the United States

Throughout U.S. history, the death penalty has been available only for what are considered the most serious crimes.²² The Supreme Court's 1910 decision in *Weems v. United States*, holding that the Eighth Amendment's Cruel and Unusual Clause requires that punishment for a crime be proportional to its severity, compels this limited application.²³ Though the Court in *Weems* changed the constitutionality analysis by introducing this proportionality consideration, it offered little additional guidance as to which crimes are actually proportional to the punishment of death. While the *Weems* standard could be read to bar capital punishment for any offense that does not result in death, states continued to apply the death penalty to both homicide and non-homicide crimes in the decades following the decision, although the vast majority of executions were still for homicide crimes.²⁴

Then, in 1977, the Court provided more guidance regarding the proportionality analysis when it held in *Coker v. Georgia* that the death penalty is a disproportionate, and therefore unconstitutional, punishment for the crime of "rape of an adult woman."²⁵ This decision revolutionized death penalty jurisprudence: Although the Court in *Coker* did not explicitly hold the death penalty unconstitutional for all crimes not involving killings,²⁶ many observers have read the decision to mean just that, since the Court based its holding largely on the

²² See, e.g., FRANKLIN ZIMRING, THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT 18 (2003).

²³ See 217 U.S. 349 (1910); see also *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (plurality opinion) (finding that a punishment that is "grossly out of proportion to the severity of the crime" is unconstitutionally excessive).

²⁴ See Matura, *supra* note 1, at 251 ("[B]etween 1930 and 1982, 3340 people were executed for murder, 455 were executed for rape, and 70 were executed for crimes such as armed robbery, espionage, kidnapping and burglary.").

²⁵ 433 U.S. 584 (1977) (plurality opinion).

²⁶ See *Coker*, 433 U.S. at 600 (plurality opinion) ("[I]n Georgia a person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being. He also commits that crime when in the commission of a felony he causes the death of another human being, irrespective of malice. But even where the killing is deliberate, it is not punishable by death absent proof of aggravating circumstances. It is difficult to accept the notion, and we do not, that the rapist, with or

distinction between crimes that cause death and crimes that do not.²⁷ The Court reasoned that because the crime of rape does not result in death, punishing rape by death would be unconstitutionally excessive.²⁸

The Court then reinforced this same type of proportionality analysis in *Enmund v. Florida* by applying its reasoning from *Coker* to hold that the death penalty is a disproportionate punishment for the crime of felony robbery because felony robbery, like rape, “‘does not compare with murder, which does involve the unjustified taking of human life.’”²⁹ The Court went on to state that “[a]s was said of the crime of rape in *Coker*, 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.”³⁰ Thus, the Court seemed to say that in order for a crime to be proportional to the punishment of death, it must cause death.³¹

The Georgia statute that the Court invalidated in *Coker* was the only statute in the United States at the time that authorized the death penalty for rape of an adult woman.³² After *Coker*, other state legisla-

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.”)

²⁷ See, e.g., Annaliese Flynn Fleming, Comment, *Louisiana's Newest Capital Crime: The Death Penalty for Child Rape*, 89 J. CRIM. L. & CRIMINOLOGY 717, 727 (1999).

²⁸ See *Coker*, 433 U.S. at 598 (plurality opinion) (“Rape is without doubt deserving of serious punishment; but in terms of moral depravity and of the injury to the person and to the public, it does not compare with murder, which does involve the unjustified taking of human life. Although it may be accompanied by another crime, rape 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. Life is over for the victim of the murderer; for the rape victim, life may not be nearly so happy as it was, but it is not over and normally is not beyond repair. We have the abiding conviction that the death penalty, which ‘is unique in its severity and irrevocability,’ is an excessive penalty for the rapist who, as such, does not take human life.” (quoting *Gregg*, 428 U.S. at 187 (plurality opinion) (citation omitted)); see also Fleming, *supra* note 27, at 727 (discussing the line drawn by the *Coker* Court between “crimes which result in loss of life, and crimes which do not”).

²⁹ 458 U.S. 782, 797 (1982) (quoting *Coker*, 433 U.S. at 598).

³⁰ *Id.* at 797 (quoting *Gregg*, 428 U.S. at 187) (citation omitted).

³¹ But see 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, 846 n.32 (1999) (pointing out that although the Court did not specifically mention it in its decision, race was also a major factor in *Coker* since the death penalty for rape was applied almost exclusively to black men who had raped white women).

³² *Coker*, 433 U.S. at 595–96 (plurality opinion). At the time of *Coker*, two other states had statutes authorizing the death penalty for rape of a child, but each of these statutes was later invalidated. See *id.* at 595 (plurality opinion). The Florida Supreme Court deemed its state's statute unconstitutional under *Coker*. See *Buford v. State*, 403 So. 2d 943, 951 (Fla. 1981), cited in Yale Glazer, *Child Rapists Beware! The Death Penalty and Louisiana's Amended Aggravated Rape Statute*, 25 AM. J. CRIM. L. 79, 81 n.2 (1997). In invalidating the Mississippi statute, the Mississippi Supreme Court stated that it did not need to reach the question of whether the statute was constitutional, because imposing the death penalty for child rape violates Mississippi state law. See *Leatherwood v. State*, 548 So. 2d 389, 403 (Miss. 1989), cited in Glazer, *supra*, at 81 n.2. While Tennessee also had a statute authorizing capital

tures were reticent to pass statutes authorizing the death penalty for any non-homicide crime, as these legislatures believed such statutes would be invalid under *Coker* since, under one reading of the case, the death penalty is unconstitutional not only for rape but for all other non-homicide crimes as well.³³ Indeed, after *Coker*, not a single state passed a statute allowing capital punishment for any form of rape until 1995 when Louisiana passed its child-rape statute³⁴—the one under which Patrick Kennedy was eventually sentenced to death.

Of the thirty-eight states that currently allow capital punishment,³⁵ only thirteen allow capital punishment for crimes other than homicide,³⁶ and only five of those thirteen—Florida, Louisiana, Montana, Oklahoma, and South Carolina—authorize the death penalty for child rape.³⁷ Yet no state has executed a person under a capital non-homicide statute since before *Coker*. In fact, the last execution for a crime not resulting in death was in 1964³⁸—before the Supreme Court suspended the use of the death penalty in 1972.³⁹ Thus, the question of whether all such non-homicide statutes, including the capital child-rape statutes, are constitutional remains unanswered and particularly compelling in light of the fact that they are all arguably unconstitutional under *Coker*.⁴⁰

B. Louisiana's Capital Child-Rape Statute and Patrick Kennedy: The First Person Sentenced to Death for a Non-homicide Crime Since Before *Coker v. Georgia*

All that may soon change, however, since a jury sentenced Patrick Kennedy to death for child rape in October 2003.⁴¹ Although Louisiana prosecutors in the past had sought the death penalty against other defendants under the child-rape statute, they had not succeeded in

punishment for child rape, its supreme court had already held the statute unconstitutional by the time of *Coker* because it made the death penalty mandatory for the crime. See *Collins v. State*, 550 S.W.2d 643 (Tenn. 1977), cited in *Coker*, 433 U.S. at 595 (plurality opinion).

³³ See Fleming, *supra* note 27, at 727; Matura, *supra* note 1, at 255.

³⁴ See Schaaf, *supra* note 18, at 350.

³⁵ CAPITAL PUNISHMENT 2004, *supra* note 5, at 2. Five of those thirty-eight states, however, could be considered de facto abolitionist, as they have not imposed the death penalty since the Supreme Court reinstated it in 1976. See DEATH PENALTY INFORMATION CENTER, FACTS ABOUT THE DEATH PENALTY 1 (2006), <http://www.deathpenaltyinfo.org/FactSheet.pdf>.

³⁶ CAPITAL PUNISHMENT 2004, *supra* note 5, at 2; Melissa Meister, Note, *Murdering Innocence: The Constitutionality of Capital Child Rape Statutes*, 45 ARIZ. L. REV. 197, 210–12 (2003).

³⁷ FLA. STAT. ANN. § 794.011 (West 2000); LA. REV. STAT. ANN. § 14:42 (1997); MONT. CODE ANN. § 45-5-503 (2005); 2006 Okla. Sess. Law Serv. 326 (West); 2006 S.C. Acts 346.

³⁸ See Matura, *supra* note 1, at 250; Liptak, *supra* note 1.

³⁹ See Michael P. Seng, *Reflections on When "We, the People" Kill*, 34 J. MARSHALL L. REV. 713, 715 (2001).

⁴⁰ See *State v. Wilson*, 685 So. 2d 1063, 1074 (La. 1996) (Calogero, C.J., dissenting).

⁴¹ See Transcript of Record, *supra* note 2, at 6068–69.

getting a jury to return a death sentence until Kennedy.⁴² Thus, for the first time since *Coker*, Kennedy's sentencing has brought to the fore an important question for death penalty jurisprudence, namely whether it is constitutional to punish non-homicide crimes, like child rape, by death.

Kennedy's case is pending on direct appeal in the Louisiana Supreme Court.⁴³ That court has already held the state's capital child-rape statute constitutional when the defendants in the consolidated cases of *State v. Wilson* raised a pretrial facial challenge to the statute's constitutionality.⁴⁴ In *Wilson*, the state charged and indicted the defendants under the statute for raping girls under the age of twelve.⁴⁵ Each defendant then brought a motion to quash the capital indictment.⁴⁶ In the lower Louisiana courts, each defendant won the motion to quash—one defendant on excessive punishment grounds and the other on “arbitrary and capricious” grounds.⁴⁷ Yet when the case reached the Louisiana Supreme Court on appeal, that court reversed the lower courts' rulings and held that the capital child-rape statute was constitutional.⁴⁸ One of the defendants applied for a writ of certiorari, but the Supreme Court denied it on jurisdictional grounds, as no final judgment had yet been reached.⁴⁹ Ultimately, *State v. Wilson* ended in plea bargains for life sentences, and any possibility of Supreme Court review of the statute's constitutionality stopped there.⁵⁰

Because the Louisiana Supreme Court recently found the statute constitutional in *Wilson*,⁵¹ it may simply follow its own precedent in Kennedy's case. On the other hand, it may overturn Kennedy's sentence due to a trial error or, alternatively, a change in position—namely that because the Louisiana Supreme Court decided *Wilson* before *Atkins* and *Roper* came down from the U.S. Supreme Court, it may now find differently on the issue of the statute's constitutionality.

If the court upholds the statute, the U.S. Supreme Court may take advantage of the opportunity to review the Louisiana Supreme Court's decision, since Kennedy, being the first person sentenced to

⁴² See Liptak, *supra* note 1.

⁴³ See Transcript of Record, *supra* note 2.

⁴⁴ See 685 So. 2d, at 1073.

⁴⁵ *Id.* at 1064–65.

⁴⁶ *Id.*

⁴⁷ See Schaaf, *supra* note 18, at 351.

⁴⁸ See *Wilson*, 685 So. 2d at 1073.

⁴⁹ See *Bethley v. Louisiana*, 520 U.S. 1259, 1259 (1997). Although it was unnecessary for them to do so, Justices John Paul Stevens, Ruth Bader Ginsburg, and Stephen Breyer issued a statement in which they emphasized that the Court denied certiorari solely on the basis of the finality doctrine. See *id.* Perhaps this unnecessary explanation of the jurisdictional bar indicated that they believed that the constitutional attack did in fact have merit.

⁵⁰ See Liptak, *supra* note 1.

⁵¹ See *Wilson*, 685 So. 2d at 1073.

death for committing a non-homicide crime since *Coker*, raises an issue that legislatures,⁵² courts,⁵³ and commentators⁵⁴ alike have debated for nearly thirty years—whether it is constitutional to execute a person for committing a crime that does not cause death, such as child rape. A determination by the U.S. Supreme Court of the Louisiana statute’s constitutionality has the potential to open or close the door not only to capital child-rape statutes, but to all other non-homicide capital statutes as well.

Even if the Supreme Court does not review Kennedy’s case, the issue of whether imposing the death penalty for non-homicide crimes is unconstitutionally excessive remains. The Court will inevitably review this issue at some point to resolve the heated debate surrounding these laws.

II

ATKINS AND *ROPER*—THE NEW FRAMEWORK: NATIONAL CONSENSUS, PROPORTIONALITY, AND (AGAIN) INTERNATIONAL OPINION

Although in the past the Supreme Court had looked to international opinion in death penalty cases,⁵⁵ its death penalty jurisprudence immediately prior to *Atkins v. Virginia*⁵⁶ and *Roper v. Simmons*⁵⁷ had stopped considering international opinion altogether,⁵⁸ making it appear that the Court had grown to agree with Justice Scalia and those

⁵² See, e.g., ARK. CODE ANN. § 5-14-103 (West 2006); COLO. REV. STAT. ANN. § 18-1.3-1201 (West 2006).

⁵³ See, e.g., *Roper v. Simmons*, 543 U.S. 551, 568–75 (2005); *Atkins v. Virginia*, 536 U.S. 304, 312–13 (2002).

⁵⁴ See Lisa White Shirley, *State v. Wilson: The Louisiana Supreme Court Sanctions the Death Penalty for Child Rape*, 72 TUL. L. REV. 1913 (1998); Meryl P. Diamond, Note, *Assessing the Constitutionality of Capital Child Rape Statutes*, 73 ST. JOHN’S L. REV. 1159 (1999); Fleming, *supra* note 27; Meister, *supra* note 36; Palmer, *supra* note 31; Pallie Zambrano, Comment, *The Death Penalty Is Cruel and Unusual Punishment for the Crime of Rape—Even the Rape of a Child*, 39 SANTA CLARA L. REV. 1267 (1999).

⁵⁵ See, e.g., *Thompson v. Oklahoma*, 487 U.S. 815, 830–31 (1988) (plurality opinion) (“We have previously recognized the relevance of the views of the international community in determining whether a punishment is cruel and unusual.”); *Enmund v. Florida*, 458 U.S. 782, 796–97 (1982) (“[T]he 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 v. Georgia*, 433 U.S. 584, 596 (1977) (plurality opinion) (“It is . . . not irrelevant here that out of 60 major nations in the world surveyed in 1965, only 3 retained the death penalty for rape where death did not ensue.”); *Trop v. Dulles*, 356 U.S. 86, 102–03 (1958) (plurality opinion) (finding that the punishment in question was disproportionate to the crime in part because “[t]he civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime”).

⁵⁶ 536 U.S. 304 (2002).

⁵⁷ 543 U.S. 551 (2005).

⁵⁸ See *Stanford v. Kentucky*, 492 U.S. 361, 370 n.1 (1989); *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989).

commentators who believe it entirely inappropriate to consider international law when interpreting the U.S. Constitution.⁵⁹ As Justice Antonin Scalia asserted, “[T]he views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution.”⁶⁰

It is clear from *Atkins* and *Roper*, however, that the Court is now considering international opinion more than ever before.⁶¹ In *Atkins*, the Court asserted the relevance of international opinion to its application of the Eighth Amendment⁶² and then expanded greatly upon that idea in *Roper*.⁶³ In fact, *Roper* was the first Eighth Amendment case to devote an entire section of the opinion to international treatment of the topic under review.⁶⁴ Thus, though it may be only one factor in the Court’s analysis, international opinion could have dramatic implications for the future of death penalty jurisprudence.

A. Evolving Standards of Decency Determine What Is Cruel and Unusual Punishment

The Eighth Amendment, which is applicable both to the states through the Fourteenth Amendment and to the federal government, bars the use of “excessive sanctions” in the criminal justice system.⁶⁵ It states that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”⁶⁶ Underlying this provision is the fundamental “precept of justice that punishment for [a] crime should be graduated and proportioned to [the] offense.”⁶⁷ The Court uses this proportionality standard to determine which punishments are unconstitutionally excessive.

The Court rejects the idea that only those punishments that would have been deemed cruel and unusual at the time the Eighth Amendment was adopted are prohibited; rather, the Court holds that the appropriate inquiry considers contemporary norms.⁶⁸ In *Weems*, the Court explained that the cruel and unusual punishment clause is

⁵⁹ See *Thompson v. Oklahoma*, 487 U.S. 815, 859–78 (1988) (Scalia, J., dissenting); Roger P. Alford, *Misusing International Sources to Interpret the Constitution*, 98 AM. J. INT’L L. 57 (2004); Lawrence Connell, *The Supreme Court, Foreign Law, and Constitutional Governance*, 11 WIDENER L. REV. 59, 73 (2004).

⁶⁰ *Thompson*, 487 U.S. at 868 n.4.

⁶¹ See Roger P. Alford, *Roper v. Simmons and Our Constitution in International Equipose*, 53 UCLA L. REV. 1, 8 (2005).

⁶² See 536 U.S. 304, 316 n.21 (2002).

⁶³ See 543 U.S. 551, 575–79 (2005).

⁶⁴ See Alford, *supra* note 61, at 8.

⁶⁵ *Atkins v. Virginia*, 536 U.S. 304, 311 (2002).

⁶⁶ U.S. CONST. amend. VIII.

⁶⁷ *Weems v. United States*, 217 U.S. 349, 367 (1910), *quoted in Roper v. Simmons*, 543 U.S. 551, 560 (2005).

⁶⁸ See *id.* at 378.

“progressive, and is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice.”⁶⁹ As such, in determining what is constitutional under the Eighth Amendment, the Court looks to “evolving standards of decency that mark the progress of a maturing society.”⁷⁰

The “evolving standards of decency” principle is a flexible and dynamic rule of construction⁷¹ intended to evolve with societal norms as they develop so that the Court may reflect these norms in its constitutionality review.⁷² This principle is now the primary framework within which the Court reviews constitutional claims challenging the application of the death penalty,⁷³ and the Court’s commitment to it has grown even stronger in recent cases.⁷⁴

The main indicator of evolving standards of decency is objective indicia of a national consensus on what constitutes a proportional punishment for a particular offense. The Court has found that the best evidence of such norms is the legislation of the federal and state legislatures.⁷⁵ In addition to objective indicia of national consensus, the Court has also used jury practice as an important point of reference⁷⁶ and has even on occasion considered public opinion surveys and the views of professional organizations.⁷⁷ The Court has also looked to international opinion to determine evolving standards of

⁶⁹ *Id.*

⁷⁰ *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958) (plurality opinion).

⁷¹ See 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 *HAMLIN L. REV.* 311, 334 (2005).

⁷² See Shirley, *supra* note 54, at 1915 (“The view that the Cruel and Unusual Punishment Clause adapts to a changing society is now a central component of the Court’s proportionality review.”).

⁷³ See Varland, *supra* note 71, at 317 (“The *Trop* plurality’s novel ‘evolving standards of decency’ principle would eventually become an accepted framework employed in several major death penalty decisions of the late twentieth and early twenty-first centuries.”).

⁷⁴ See *id.* at 332 (“In recent decades, the Court’s Eighth Amendment decisions have shown a continued commitment to an ‘evolving standards of decency’ jurisprudence This commitment expanded in *Atkins v. Virginia* and *Roper v. Simmons*, where the Court signaled that it would reconsider past decisions to determine whether their holdings still squared with the Eighth Amendment’s dynamic meaning.”).

⁷⁵ See *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989) (“The clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country’s legislatures.”).

⁷⁶ See *id.* (stating that the Court has “looked to data concerning the actions of sentencing juries”); *Enmund v. Florida*, 458 U.S. 782, 794 (1982) (“Society’s rejection of the death penalty for accomplice liability in felony murders is also indicated by the sentencing decisions that juries have made. As we have previously observed, ‘The jury . . . is a significant and reliable objective index of contemporary values because it is so directly involved.’” (quoting *Coker v. Georgia*, 433 U.S. 584, 596 (1977) (plurality opinion))).

⁷⁷ See *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988) (plurality opinion) (“[T]he American Bar Association and the American Law Institute have formally expressed their opposition to the death penalty for juveniles.”).

decency when interpreting the Eighth Amendment,⁷⁸ and *Roper* and *Atkins* reflect the increased importance of this consideration to the Court's analysis.⁷⁹ As one commentator observed, "[I]n *Roper v. Simmons*, the Court unequivocally affirms the use of comparative constitutionalism to interpret the Eighth Amendment."⁸⁰

B. Consideration of International Opinion Under the *Roper-Atkins* "Evolving Standards of Decency" Framework

Considering international opinion in the Court's analysis has important implications. Though it is just one factor, it is an important one given that its continued expansion in *Roper* and *Atkins* signals a new trend in the Court's methodology for determining the constitutionality of imposing the death penalty for a particular offense.⁸¹ For the first time in an Eighth Amendment case, the Court in *Roper* devoted an entire section of the decision to a discussion of international opinion and even went so far as to give an explanation regarding how it is a relevant consideration.⁸²

This consideration of international opinion reflects the global view underlying the Court's death penalty jurisprudence, and since the United States uses the death penalty much more extensively than the majority of nations,⁸³ this view could lead to a limitation of the punishment in the United States. Moreover, the Court's bold statements regarding how international opinion is relevant to Eighth Amendment interpretation in *Roper* suggest that the Court may consider the international perspective in other facets of its constitutional jurisprudence.⁸⁴

⁷⁸ See *Enmund*, 458 U.S. at 788–89; Brief for Former U.S. Diplomats Morton Abramowitz et al. as Amici Curiae Supporting Respondents at 26–28, *Roper v. Simmons*, 543 U.S. 551 (2005) (No. 03-633) [hereinafter Abramowitz Brief]. The Framers intended that the Court should consider international norms, along with national considerations, in interpreting the Eighth Amendment. As Justice Harry Blackmun noted, "The drafters of the [Eighth] Amendment were concerned, at root, with the 'dignity of man,' and understood that 'evolving standards of decency' should be measured, in part, against international norms." Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 104 YALE L.J. 39, 45–46 (1994) (quoting *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (plurality opinion)).

⁷⁹ See Alford, *supra* note 59; Connell, *supra* note 59, at 59.

⁸⁰ Alford, *supra* note 61, at 1.

⁸¹ See Alford, *supra* note 59; Connell, *supra* note 59.

⁸² See *Roper*, 543 U.S. at 575–79; Alford, *supra* note 61, at 8. For a discussion of why the Court found international opinion relevant, see *infra* Part II.C.3.

⁸³ Ninety-eight countries and territories retain the death penalty. AMNESTY INTERNATIONAL, FACTS AND FIGURES ON THE DEATH PENALTY (2005), <http://web.amnesty.org/web/web.nsf/print/0F97867C9B88D6C88025704c003AFF41>. Thirty of these countries are abolitionist in practice, however, in that they have not used the death penalty in over ten years. See *id.* Only a small number of the remaining sixty-eight retentionist countries use the punishment each year. See *id.* In 2005, 94% of all recorded executions took place in one of four countries: China, Iran, Saudi Arabia, and the United States. See *id.*

⁸⁴ See Alford, *supra* note 61, at 22.

According to many commentators, the intent of the founders of the Constitution warrants the focus on international opinion.⁸⁵ As Human Rights Watch and Human Rights Advocates stated as amici curiae in *Roper v. Simmons*, “To view the evolving standard of decency in an isolated and insular domestic environment would be contrary to all that the drafters of the Constitution knew as essential to joining the ranks of nations.”⁸⁶ Justice Blackmun himself asserted that the founders intended the Eighth Amendment to uphold the “‘dignity of the man,’” and that as a result, evolving standards of decency must necessarily consider international norms.⁸⁷

Many commentators argue that prior Eighth Amendment cases also warrant consideration of international opinion.⁸⁸ One commentator, Harold Koh, argues that U.S. courts have historically considered international opinion when interpreting U.S. law and should thus continue to do so today.⁸⁹ He further asserts that the Court routinely looks to international opinion in three situations.⁹⁰ One such situation arises when the language of a constitutional provision “implicitly refers to a community standard.”⁹¹ For example, Koh asserts that the words “cruel and unusual” implicitly invoke a consideration of inter-

⁸⁵ See Abramowitz Brief, *supra* note 78, at 27; Brief for Human Rights Committee of the Bar of England and Wales, Human Rights Advocates, Human Rights Watch, and the World Organization for Human Rights USA as Amici Curiae Supporting Respondent at 3–8, *Roper v. Simmons*, 543 U.S. 551 (2005) (No. 03-633) [hereinafter Human Rights Brief]; Brief of President James Earl Carter Jr. et al. as Amici Curiae Supporting Respondent, *Roper*, 543 U.S. 551 (No. 03-633) [hereinafter Carter Brief]; Alford, *supra* note 61; Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT’L L. 43 (2004); Gerald L. Neuman, *The Uses of International Law in Constitutional Interpretation*, 98 AM. J. INT’L L. 82 (2004); Carly Baetz-Stangel, Note, *The Role of International Law in the Abolition of the Juvenile Death Penalty in the United States*, 16 FLA. J. INT’L L. 955 (2004). *But see* Connell, *supra* note 59, at 61 (“[T]he majority’s reliance on European law in [*Atkins and Lawrence v. Texas*], to justify its interpretation of the United States Constitution, improperly interferes in matters that historically have been left to state legislatures, thereby undermining both principles of federalism and American sovereignty.”).

⁸⁶ Human Rights Brief, *supra* note 85, at 7.

⁸⁷ See Blackmun, *supra* note 78, at 45–46 (quoting *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (plurality opinion)).

⁸⁸ See, e.g., Steven G. Calabresi & Stephanie Dotson Zimdahl, *The Supreme Court and Foreign Sources of Law*, 47 WM. & MARY L. REV. 743 (2005); Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT’L L. 1 (2006); Josh Hsu, *Looking Beyond the Boundaries: Incorporating International Norms into the Supreme Court’s Constitutional Jurisprudence*, 36 N.M. L. REV. 75 (2006).

⁸⁹ See Koh, *supra* note 85, at 44.

⁹⁰ See *id.* at 45 (“History suggests that over the years, the Court has regularly looked to foreign and international precedents as an aid to constitutional interpretation in at least three situations, which for simplicity’s sake I will call ‘parallel rules,’ ‘empirical light,’ and ‘community standard.’”).

⁹¹ *Id.* at 46 (“[T]he Court has looked outside the United States when a U.S. constitutional concept, by its own terms, implicitly refers to a *community standard*—e.g., ‘cruel and unusual,’ ‘*due process of law*,’ ‘*unreasonable searches and seizures*.’ In such cases, the Court has long since recognized that the relevant communities to be consulted include those outside our shores.”).

national norms, and, as such, the Court has—and should—consider international opinion when interpreting the Eighth Amendment.⁹² Koh also argues that the Court in *Trop v. Dulles* adopted the “evolving standards of decency” framework intending that the inquiry should reach international as well as domestic norms as is demonstrated by the fact that it has applied the standard as such.⁹³

Beginning in 1958 with *Trop*, the Court began explicitly considering international opinion in its Eighth Amendment cases.⁹⁴ In *Trop*, the Court noted that “[t]he civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime,” thus clearly incorporating international norms into its “evolving standards of decency” analysis.⁹⁵ In 1972, the *Coker* Court stated that “[i]t is . . . not irrelevant here that out of 60 major nations in the world surveyed in 1965, only 3 retained the death penalty for rape where death did not ensue.”⁹⁶ In 1982, the Court continued the trend through *Enmund v. Florida* by finding it telling 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.”⁹⁷ Finally, in 1988, the Court in *Thompson v. Oklahoma*, in looking back on its prior use of international opinion when considering the constitutionality of the juvenile death penalty, stated, “We have previously recognized the relevance of the views of the international community in determining whether a punishment is cruel and unusual.”⁹⁸ The court also cited the opposition to the practice “by other nations that share our Anglo-American heritage, and by the leading members of the Western European community” as relevant.⁹⁹

Two years after *Thompson*, however, in a drastic and largely unexplained departure from its precedent of considering international opinion, the Court in the five-to-four decision of *Stanford v. Kentucky* explicitly rejected the idea that international opinion was informa-

⁹² See *id.* at 46 (“For example, in deciding whether a particular punishment has become both ‘cruel and unusual,’ the Court has long taken notice of foreign and international practice to evaluate how ‘unusual’ the practice has become.”).

⁹³ See *id.* at 46–47 (“In *Trop v. Dulles*, the Court specifically held that the Eighth Amendment to the United States Constitution contains ‘evolving standards of decency that mark the progress of a maturing society.’ In *Trop* and subsequent cases, the Court made clear that this ‘evolving standard’ should be measured by reference not just to maturing American experience, but to foreign and international experience as well.” (quoting *Trop*, 356 U.S. at 101 (plurality opinion))).

⁹⁴ See 356 U.S. at 86.

⁹⁵ *Id.* at 102.

⁹⁶ 433 U.S. 584, 596 n.10 (1977) (plurality opinion).

⁹⁷ 458 U.S. 782, 796 n.22 (1982).

⁹⁸ 487 U.S. 815, 830 n.31 (1988) (plurality opinion).

⁹⁹ *Id.* at 830 (plurality opinion).

tive.¹⁰⁰ The majority stated that while international norms might be relevant to determine “‘whether a practice uniform among our people is not merely a historical accident’ . . . they cannot serve to establish the first Eighth Amendment prerequisite, that the practice is accepted among our people.”¹⁰¹ A strong dissent took issue with the majority’s decision to eschew international norms, stating that international opinion had been and should continue to be an important consideration.¹⁰² In *Penry v. Lynaugh*, handed down the same day as *Stanford*, the Court altogether ignored the idea that international opinion could be or had ever been relevant, and instead mentioned only the United States in its examination of evolving standards of decency.¹⁰³ In the wake of *Stanford* and *Penry*, the question of whether international opinion would prevail as a consideration loomed. But then in *Roper* and *Atkins*, the Court gave international opinion renewed force, quelling any doubts over the factor’s importance to the “evolving standards of decency” analysis.¹⁰⁴

Commentators also argue that given the general trend toward considering international opinion in the Court’s constitutional construction, the Court should likewise do so when interpreting the Eighth Amendment.¹⁰⁵ For example, in *Lawrence v. Texas*, the Supreme Court assessed whether certain practices are considered “an integral part of human freedom in many other countries.”¹⁰⁶ Additionally, the Court in *Washington v. Glucksberg* looked to the opinions of Western Europe to inform its determination of whether physician-assisted suicide violates the Due Process Clause of the Constitution.¹⁰⁷ The Court has performed similar analyses in cases regarding other constitutional doctrines.¹⁰⁸

¹⁰⁰ See 492 U.S. 361 (1989).

¹⁰¹ *Id.* at 370 n.1 (quoting *Thompson*, 487 U.S. at 868 n.4 (Scalia, J., dissenting)).

¹⁰² See *id.* at 388–90 (Brennan, J., dissenting) (“Our cases recognize that objective indicators of contemporary standards of decency in the form of legislation in other countries is also of relevance to Eighth Amendment analysis Within the world community, the imposition of the death penalty for juvenile crimes appears to be overwhelmingly disapproved.”).

¹⁰³ See 492 U.S. 302, 331 (1989).

¹⁰⁴ See *Roper v. Simmons*, 543 U.S. 551, 575–78 (2005); *Atkins v. Virginia*, 536 U.S. 304, 318 n.21 (2002).

¹⁰⁵ See, e.g., Abramowitz Brief, *supra* note 78, at 28 (“International opinion has informed this Court’s recent understandings of other constitutional doctrines as well.”); Human Rights Brief, *supra* note 85, at 22 (“Consistent with the approach of the Founders, on a number of occasions and with increasing frequency, this Court has recognized the permissibility of practices in this country.”); Neuman, *supra* note 85, at 84.

¹⁰⁶ 539 U.S. 558, 576–77 (2003).

¹⁰⁷ See 521 U.S. 702, 710 (1997) (noting that “almost every western democracy” opposes physician-assisted suicide).

¹⁰⁸ See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 342 (2003) (Ginsburg, J., concurring); *Raines v. Burd*, 521 U.S. 811, 828 (1997); Neuman, *supra* note 85, at 84.

C. The *Roper-Atkins* “Evolving Standards of Decency” Framework: A Closer Look

In *Atkins* and *Roper*, the Court used a three-part analysis to determine whether, under evolving standards of decency, imposing the death penalty would have been so disproportionate as to be “cruel and unusual” under the Eighth Amendment. In both cases, the Court first looked for a national consensus as evidenced by the acts of state legislatures. The Court then assessed the proportionality of the punishment to the relevant crimes, considering whether the death penalty was being limited, as required, to the most serious classes of crimes and offenders, and whether its application would serve the goals of retribution and deterrence. Lastly, the Court looked to international opinion to inform its analysis.

1. *National Indicia of Consensus*

The Court in *Atkins* departed from the strict “counting” methodology that it had used in prior death penalty cases. Under the old counting approach, a sheer majority of states determined whether there was a national consensus on an issue.¹⁰⁹ In *Atkins*, however, even though fewer than half of the states were against imposing the death penalty on the mentally retarded,¹¹⁰ the Court found that a national consensus disfavored the practice.¹¹¹ As Justice Scalia noted in his dissent, a minority of states is insufficient to constitute a consensus not only by definition,¹¹² but also under the Court’s prior case law.¹¹³ The majority justified its departure from the old counting standard by stating that “[i]t is not so much the number of these States that is significant, but the consistency of the direction of change.”¹¹⁴ Particularly in light of its justification, this departure reflects that the Court—even if it does not admit it—now weighs other factors more heavily than ever before in its death penalty jurisprudence, and, significantly, more heavily than counting.¹¹⁵

In *Roper*, the Court followed the modified counting methodology of *Atkins* and examined legislation and jury practice to find a national

¹⁰⁹ See, e.g., *Stanford v. Kentucky*, 492 U.S. 361, 370–72 (1989).

¹¹⁰ See 536 U.S. 304, 342 (2002) (Scalia, J., dissenting).

¹¹¹ See *id.* at 321 (majority opinion).

¹¹² See *id.* at 342–43 (Scalia, J., dissenting).

¹¹³ See *id.* at 343. Although in *Atkins*, the Court found 47% of capital states sufficient to establish a national consensus against executing the mentally retarded, *id.* at 321 (majority opinion), thirteen years earlier, in *Stanford v. Kentucky*, the Court found 42% of states insufficient to establish a consensus, 492 U.S. 361 (1989); accord S. Starling Marshall, Comment, “Predictive Justice”? *Simmons v. Roper and the Possible End of the Juvenile Death Penalty*, 72 *FORDHAM L. REV.* 2889, 2920 (2004).

¹¹⁴ *Atkins*, 536 U.S. at 315.

¹¹⁵ See Marshall, *supra* note 113, at 2921.

consensus against imposing the death penalty on juveniles.¹¹⁶ Here, again, the traditional counting method would not have yielded a consensus result, as the sheer numbers were identical to those in *Atkins*.¹¹⁷ To justify finding consensus, the Court relied on the *Atkins* “direction of change” reasoning, even though the “direction of change” evidence was weaker than in *Atkins* due to a slower rate of abolition.¹¹⁸ The Court explained its “direction of change” reasoning through two points: First, no state that had previously prohibited the juvenile death penalty reinstated it after the Court affirmed its constitutionality in *Stanford* (overturned by *Roper*), and second, the trend toward abolishing the juvenile death penalty compensated for its slow rate.¹¹⁹ Furthermore, the Court noted that in states that authorized the juvenile death penalty, juries rarely used it.¹²⁰ The Court further explained that the slower abolition rate simply illustrated that the consensus against the juvenile death penalty was larger to begin with than that against the death penalty for the mentally retarded.¹²¹

2. *Proportionality Analysis*

In both *Atkins* and *Roper*, the Court then considered the culpability of the defendants relative to the severity of the death penalty.¹²² Quoting the *Atkins* opinion, the *Roper* Court stated, “Capital punishment must be limited to those offenders who commit ‘a narrow category of the most serious crimes’ and whose extreme culpability makes them ‘the most deserving of execution.’”¹²³ Based on this precept, the *Roper* Court, for example, concluded that juveniles cannot be

¹¹⁶ See 543 U.S. 551, 563–68 (2005).

¹¹⁷ See *id.* The court stated:

When *Atkins* was decided, 30 States prohibited the death penalty for the mentally retarded. This number comprised 12 that had abandoned the death penalty altogether, and 18 that maintained it but excluded the mentally retarded from its reach. By a similar calculation in this case, 30 States prohibit the juvenile death penalty, comprising 12 that have rejected the death penalty altogether and 18 that maintain it but, by express provision or judicial interpretation, exclude juveniles from its reach.

Id. at 564 (citation omitted).

¹¹⁸ See *id.* at 563–68.

¹¹⁹ See *id.* at 565–67.

¹²⁰ See *id.* at 563–65 (“[E]ven in the 20 states without a formal prohibition on executing juveniles, the practice is infrequent. Since *Stanford*, six States have executed prisoners for crimes committed as juveniles. In the past 10 years, only three have done so . . .”).

¹²¹ See *id.* at 565–67.

¹²² See *Roper*, 543 U.S. at 567–72; *Atkins v. Virginia*, 536 U.S. 304, 317–19 (2002). Although the Court examined relative culpability in both *Atkins* and *Roper*, it did so in a slightly different fashion in each case. The *Atkins* Court considered whether executing the mentally retarded limits the death penalty to only the worst offenders in the context of its discussion of retribution. See 536 U.S. at 317–19. In *Roper*, however, the Court isolated relative culpability and discussed it separately—although still as part of its proportionality analysis—before examining retribution and deterrence. See 543 U.S. at 568–71.

¹²³ 543 U.S. at 568 (quoting *Atkins*, 536 U.S. at 319).

“among the worst offenders” because certain characteristics they typically possess—such as lack of maturity, vulnerability to external pressures, and underdeveloped character—make them incapable of belonging to that narrow class.¹²⁴

As part of the proportionality analysis, the Court in both *Atkins* and *Roper* also inquired into whether imposing the death penalty on the defendants would serve the goals of retribution and deterrence.¹²⁵ In conducting this inquiry, the *Roper* Court concluded that executing juveniles would not serve the retribution goal because imposing the most severe penalty on defendants with the diminished relative culpability would be disproportionate.¹²⁶ The *Roper* Court also found that the death penalty would not have achieved the deterrence goal since no evidence showed that the punishment had any deterrent effect on juveniles.¹²⁷

3. *International Opinion*

a. *International Opinion in the Roper-Atkins “Evolving Standards of Decency” Framework*

Lastly, in both *Atkins* and *Roper*, the Court used international opinion to bolster its conclusions regarding the constitutionality of the death penalty. First, in *Atkins*, the Court made a great leap by reintroducing international opinion into its analysis after having explicitly rejected the idea that it was a relevant consideration in *Stanford* and *Penry*.¹²⁸ The Court did so in a single, powerful footnote following its statement that there is a national consensus against the practice of executing the mentally retarded.¹²⁹ The footnote cites a brief filed by the European Union for the proposition that “[a]dditional evidence makes it clear that this legislative judgment reflects a much broader social and professional consensus [W]ithin the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved.”¹³⁰

The *Roper* Court then vastly expanded this type of analysis by, for the first time in any Eighth Amendment case, devoting an entire section of its opinion to a discussion of how international opinion bears

¹²⁴ *Id.* at 569.

¹²⁵ *See Roper*, 543 U.S. at 571–72; *Atkins*, 536 U.S. at 317–21.

¹²⁶ *See* 543 U.S. at 571.

¹²⁷ *See id.* at 571–72.

¹²⁸ 492 U.S. 361, 369 n.1 (1989) (“We emphasize that it is *American* conceptions of decency that are dispositive, rejecting the contention of petitioners and their various *amici* . . . that the sentencing practices of other countries are relevant.”); 492 U.S. 302, 331 (1989) (mentioning only the United States in its examination of “evolving standards of decency”).

¹²⁹ *See Atkins*, 536 U.S. at 316 n.21.

¹³⁰ *Id.*

on the issue.¹³¹ This treatment forcefully affirmed the pertinence of international opinion to Eighth Amendment interpretation.¹³² The Court began the discussion with the sweeping statement that its invalidation of the juvenile death penalty was supported by the “stark reality that the United States [wa]s the only country in the world that continue[d] to give [it] official sanction.”¹³³ The Court went on to say that it had in past cases referred (albeit not dispositively) “to the laws of other countries and to international authorities as instructive” when interpreting the “cruel and unusual punishment” clause.¹³⁴ After detailing its past Eighth Amendment decisions that considered international opinion,¹³⁵ the Court then cited an overwhelming uniformity of state practice, international covenants, and the United Kingdom’s recent death penalty jurisprudence as instructive.¹³⁶

The *Roper* Court went on to state that international opinion provides “respected and significant confirmation for [the Court’s] own conclusions.”¹³⁷ The opinion ended with a strong statement that both justified the Court’s use of international opinion and provided insight into its underlying rationale for using it: “It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.”¹³⁸

The implications here are dramatic. The *Roper* Court went beyond what any prior Eighth Amendment case that had examined international opinion had done. Though the Court characterized its use of international opinion as providing “confirmation” for its own conclusions,¹³⁹ its use clearly went further than prior cases’ conception of “confirmation.” One commentator summed up the difference well:

In the past, the Court has suggested that foreign practice might be useful as an additional indicator of what ordered societies require, but rarely has it given any real credence to foreign practices. *Roper* is significant in that it elevates foreign practice to a confirmatory role of what human decency requires.¹⁴⁰

¹³¹ See Alford, *supra* note 61, at 8.

¹³² See *id.* at 1.

¹³³ 543 U.S. 551, 575 (2005).

¹³⁴ *Id.*

¹³⁵ See *id.* at 575–78 (citing *Atkins v. Virginia*, 536 U.S. 304 (2002); *Thompson v. Oklahoma*, 487 U.S. 815 (1988); *Enmund v. Florida*, 458 U.S. 782 (1982); *Coker v. Georgia*, 433 U.S. 584 (1972); *Trop v. Dulles*, 356 U.S. 86 (1958)).

¹³⁶ See *id.*

¹³⁷ *Id.* at 578.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ Alford, *supra* note 61, at 18.

Perhaps most interesting about this discussion is that the *Roper* Court went much further than necessary by providing a general justification of the consideration of international opinion, discussing both why it is relevant to constitutional interpretation and why considering it does not offend U.S. sovereignty.¹⁴¹ The Court's grand finale, which asserted that acknowledging international opinion on fundamental rights should only strengthen the importance of those rights in our "heritage of freedom,"¹⁴² made clear that the Court's use of international opinion is normative rather than empirical. Thus, through this statement, the Court seemed to be returning the Eighth Amendment to its constitutional roots of using international opinion to gauge what appropriate deference to worldviews requires.¹⁴³

b. *International Opinion: A Normative Inquiry*

The Court's statements and methodology in both *Atkins* and *Roper* make clear that its use of international opinion when interpreting the Eighth Amendment is normative, meaning that the Court uses evidence of international norms to indicate what U.S. norms and values should be, and thus to provide insight when interpreting the U.S. Constitution. Such normative use of international opinion is consistent with the Court's constitutional interpretation on other fronts.¹⁴⁴ For example, the Court relied in part on international norms in *Lawrence v. Texas* to hold that the right to privacy should extend to same-sex relationships.¹⁴⁵ In so holding, the Court stated, "The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries. There has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent."¹⁴⁶

Additionally, the Court's references to fundamental rights and freedoms when discussing how international opinion informs constitutional interpretation suggest that this inquiry is a normative one. In *Roper*, for example, the Court stated that "the express affirmation of certain fundamental rights by other nations and peoples simply un-

¹⁴¹ See *Roper*, 543 U.S. at 575–79.

¹⁴² 543 U.S. at 578.

¹⁴³ See Alford, *supra* note 61, at 18; Harold Hongju Koh, *Paying "Decent Respect" to World Opinion on the Death Penalty*, 35 U.C. DAVIS L. REV. 1085 (2002).

¹⁴⁴ See Neuman, *supra* note 85, at 89.

¹⁴⁵ See 539 U.S. 558, 578–79 (2003).

¹⁴⁶ *Id.* at 577. Some critics argue that the Court's use of foreign law as indicative of international opinion in *Atkins* and *Lawrence* was flawed in that the Court cited only to laws that supported its own conclusions. See, e.g., Connell, *supra* note 59, at 74. A more plausible interpretation, however, is that the Court used international opinion in those cases in a normative rather than empirical manner, and as such, it was only necessary for the Court to look to the laws of nations that share values similar to those of the United States for normative insights.

derscores the centrality of those same rights within our own heritage of freedom,"¹⁴⁷ thus indicating that it uses international opinion to determine what fundamental rights the founders of the U.S. Constitution intended to afford. This normative use of international opinion evokes the notion Justice Blackmun espoused: Since "a decent respect for the global opinions of mankind" must inform the Eighth Amendment, the Court's "evolving standards of decency" analysis must embody international norms.¹⁴⁸

III

APPLYING THE *ROPER-ATKINS* "EVOLVING STANDARDS OF DECENCY" FRAMEWORK TO CAPITAL CHILD-RAPE STATUTES: BRINGING INTERNATIONAL OPINION BACK INTO THE ANALYSIS

Once one applies the *Roper-Atkins* framework to child rape, the issue becomes whether under evolving standards of decency the death penalty is so disproportionate for the crime of child rape as to be "cruel and unusual," and thus unconstitutional. To make this determination, the Supreme Court would consider national indicia of consensus as evidenced by the acts of state legislatures in enacting capital child-rape statutes as well as jury practice in utilizing those statutes. The Court would then consider the proportionality of the death penalty to child rape by analyzing whether child rape falls within the most serious class of crimes and whether applying the death penalty for child rape would serve the goals of retribution and deterrence. Lastly, the Court would consider international opinion on whether the death penalty is a proportionate penalty for child rape.

A. National Indicia of Consensus on Imposing the Death Penalty for Child Rape

Strong evidence indicates a national consensus against using the death penalty for child rape. Indeed, evidence indicates that there is

¹⁴⁷ 543 U.S. at 578.

¹⁴⁸ Harry A. Blackmun, *The Supreme Court and the Law of Nations: Owning a Decent Respect to the Opinions of Mankind*, 88 AM. SOC'Y INT'L L. PROC. 383, 387 (1994). As Justice Blackmun observed:

Refusing to consider international practice in construing the Eighth Amendment is convenient for a Court that wishes to avoid conflict between the death penalty and the Constitution. But it is not consistent with this Court's established construction of the Eighth Amendment. If the substance of the Eighth Amendment is to turn on the "evolving standards of decency" of the civilized world, there can be no justification for limiting judicial inquiry to the opinions of the United States. Interpretation of the Eighth Amendment, no less than treaties and statutes, should be informed by a decent respect for the global opinions of mankind.

Id.

a national consensus against using the death penalty for non-homicide crimes in general. Of the thirty-eight capital states, twenty-five permit the death penalty only for crimes that result in death; only thirteen states permit the death penalty for non-homicide crimes.¹⁴⁹ Although there seems to be no bright line demarcating what the Court would consider a national consensus,¹⁵⁰ the evidence of it here is stronger than in either *Roper* or *Atkins*, as a majority of capital states opposes the death penalty for non-homicide crimes. Moreover, that five of the thirteen capital non-homicide states authorize the death penalty only for what are known as extraordinary crimes, such as treason or espionage,¹⁵¹ further strengthens the evidence of consensus. Thus, without even looking specifically at child rape, the Court would likely find evidence of national consensus for prohibiting the death penalty for non-homicide crimes altogether.

The evidence of consensus against authorizing the death penalty for child rape in particular is even stronger than that against authorizing it for non-homicide crimes generally. Only five states—Florida, Louisiana, Montana, Oklahoma, and South Carolina—authorize the death penalty for child rape,¹⁵² and three of those five place conditions on its use: Florida's statute requires injury,¹⁵³ and Oklahoma's and South Carolina's statutes—both passed in June of 2006—require repeat offenses before a court may authorize the punishment.¹⁵⁴ Thus, the evidence of a national consensus against imposing the death penalty for child rape—the overwhelming majority of states in opposition to the practice, along with the limitations that some of the other states impose—is far stronger than that in either *Atkins* or *Roper*. Because there is evidence of a national consensus against imposing the death penalty for child rape using the *traditional* counting method, the Court would not need to resort to the *modified* counting methodology adopted in *Roper* and *Atkins*, two cases in which the Court could not have found consensus under the traditional counting method.¹⁵⁵

¹⁴⁹ CAPITAL PUNISHMENT 2004, *supra* note 5, at 2.

¹⁵⁰ It is clear, however, that the Court considers rape of an adult woman outside the bounds of constitutionality. See *Coker v. Georgia*, 433 U.S. 584 (1977).

¹⁵¹ See CAPITAL PUNISHMENT 2004, *supra* note 5, at 2.

¹⁵² See FLA. STAT. ANN. § 794.011 (West 2000); LA. REV. STAT. ANN. § 14:42 (1997); MONT. CODE ANN. § 45-5-503 (2005); 2006 Okla. Sess. Law Serv. 326 (West); 2006 S.C. Acts 346.

¹⁵³ See FLA. STAT. ANN. § 794.011(2)(a) (West 2000) (“A person 18 years of age or older who commits sexual battery upon, or in an attempt to commit sexual battery injures the sexual organs of, a person less than 12 years of age commits a capital felony . . .”).

¹⁵⁴ See 2006 Okla. Sess. Law Serv. 326 (West); 2006 S.C. Acts 346.

¹⁵⁵ See *Roper v. Simmons*, 543 U.S. 551, 563–68 (2005); *Atkins v. Virginia*, 536 U.S. 304, 342 (2002) (Scalia, J., dissenting).

Furthermore, although two of the five states with capital child-rape statutes passed their statutes just months ago,¹⁵⁶ these recent enactments are insufficient to make a “direction of change” argument under *Roper* or *Atkins* for a national consensus in favor of the death penalty for child rape.¹⁵⁷ Since only a few states had capital child-rape statutes in the first place,¹⁵⁸ the two recent enactments do not significantly alter the national consensus against the practice. In fact, they may only further demonstrate the existence of a consensus on the issue by highlighting the fact that the rest of the states recognized early on that executing a defendant for rape in any form is unconstitutional. As *Roper* explained, “It would be the ultimate in irony if the very fact that the inappropriateness of the death penalty [for child rape] was broadly recognized . . . were to become a reason to continue the execution of [child-rape offenders].”¹⁵⁹

On the other hand, one could argue that the low number of states authorizing the death penalty for child rape is not evidence of consensus but rather of attempted compliance with *Coker*. In other words, states without capital child-rape statutes may have failed to enact them not because they considered them excessive, but because they thought doing so would have violated *Coker*. Upon closer examination, however, this argument fails because even before *Coker*, there was a strong consensus against using the death penalty for child rape. As the *Coker* Court pointed out, only two jurisdictions authorized capital punishment for child rape at the time of the decision.¹⁶⁰

Moreover, four states—Mississippi, Massachusetts, Pennsylvania, and California—tried to pass capital child-rape statutes and failed,¹⁶¹ demonstrating that the idea of imposing the death penalty for child rape was considered and rejected through the democratic process rather than to comply with *Coker*. Had a state merely been complying with *Coker*, it would not have attempted to pass the legislation in the first place. Though one could argue that such attempts also showed

¹⁵⁶ 2006 Okla. Sess. Law Serv. 326 (West); 2006 S.C. Acts 346.

¹⁵⁷ *But see* Meister, *supra* note 36, at 210–12.

¹⁵⁸ FLA. STAT. ANN. § 794.011 (West 2000); LA. REV. STAT. ANN. § 14:42 (1997); MONT. CODE ANN. § 45-5-503 (2005).

¹⁵⁹ 543 U.S. at 567.

¹⁶⁰ 433 U.S. 584, 595–96 (1977) (“It should be noted that Florida, Mississippi, and Tennessee also authorized the death penalty in some rape cases, but only where the victim was a child and the rapist an adult. The Tennessee statute has since been invalidated because the death sentence was mandatory. The upshot is that Georgia is the sole jurisdiction in the United States at the present time that authorizes a sentence of death when the rape victim is an adult woman, and only two other jurisdictions provide capital punishment when the victim is a child.” (citation omitted)).

¹⁶¹ *See* Meister, *supra* note 36, at 217. Montana is also included in Meister’s discussion of states that have failed to pass capital child-rape statutes, *see id.*, but since the publication of the note, the state has since enacted such a law, § 45-5-503.

an increased interest in capital child-rape statutes,¹⁶² the ultimate invalidation of such proposals is more probative as evidence of consensus against such laws.

In addition to state statutes, jury practice further indicates a national consensus against imposing the death penalty for child rape. For example, Louisiana prosecutors had sought the death penalty against several different defendants under the state's capital child-rape statute for ten years, but until *Kennedy*, juries had consistently failed to return a death sentence.¹⁶³

B. Proportionality of the Death Penalty as a Punishment for Child Rape

The death penalty is an unconstitutional punishment for child rape because it is not among the "narrow category of the most serious crimes"; thus, imposing the death penalty does not proportionately serve the goal of retribution.¹⁶⁴ Commentators argue that both *Coker* and *Enmund* require that a crime cause death in order for the death penalty to be a proportionate punishment.¹⁶⁵ As such, child rape falls outside the class of "worst crimes" because it does not result in death,¹⁶⁶ and in light of this disproportionality, the retribution goal would be overserved by the punishment of death for child rape.

Arguments to the contrary are not wholly without merit, however. For example, some argue that since rape of a child is a more heinous crime than rape of an adult, the impacts both on the victim and on society warrant a more severe penalty.¹⁶⁷ Others argue that since there is increasing acknowledgement of rape, and particularly child rape, as a societal problem, harsher sanctions for it are also likely to be accepted.¹⁶⁸ One could argue that recently enacted laws—such as Megan's Laws,¹⁶⁹ new Federal Rules of Evidence that make a special exception to admit propensity evidence against convicted children molesters,¹⁷⁰ and an arguable increase in capital non-homicide statutes—reflect both the recognition of child rape as a problem as well

¹⁶² See Meister, *supra* note 36, at 217.

¹⁶³ See Liptak, *supra* note 1.

¹⁶⁴ *Roper v. Simmons*, 543 U.S. 551, 568 (2005) (quoting *Atkins v. Virginia*, 536 U.S. 304, 319 (2002)).

¹⁶⁵ See Matura, *supra* note 1, at 262; Schaaf, *supra* note 18, at 353–60.

¹⁶⁶ See Diamond, *supra* note 54, at 1177–81.

¹⁶⁷ See, e.g., Glazer, *supra* note 32, at 79, 85–90, 99–105; Palmer, *supra* note 31, at 834.

¹⁶⁸ See, e.g., Meister, *supra* note 36, at 210–16.

¹⁶⁹ Megan's Laws, named for the New Jersey statute passed following the rape and murder of seven-year-old Megan Kankar by a convicted sex offender, N.J. STAT ANN. § 2C:7-1 (West 2005), require convicted sex offenders to register with their states and local communities when they move.

¹⁷⁰ FED. R. EVID. 414.

as the receptivity toward more severe sanctions for it.¹⁷¹ While these arguments are not without force, they do not justify applying the death penalty to child rape offenders, as legislatures have significant leeway to impose harsher sanctions for child rape without having to resort to capital punishment.

In addition to its disproportionality and its failure to proportionately serve the retribution goal, authorizing the death penalty for child rape does not serve the deterrence function of the U.S. penal system. In fact, several factors suggest that the practice would actually inhibit the deterrence function. Imposing the death penalty for child rape, a punishment as severe as that for murder, actually removes a major incentive for rapists not to kill their victims.¹⁷² Not only would rapists have “nothing to lose” by killing their victims in the sense that they would face no greater punishment for doing so, but they may also actually have something to gain from killing their victims—eliminating the only witnesses to their crimes.¹⁷³ Furthermore, since acquaintances and relatives are often the perpetrators of child rape, making child rape a capital crime may inhibit the reporting of offenses, thus further hampering the deterrence function, as victims and their parents may be less likely to come forward when the punishment for the offender may be death.¹⁷⁴ Therefore, although children are a protected class,¹⁷⁵ and the policy interests in protecting them from rape and the physical, mental, and social trauma that comes with it may be more compelling than for adults,¹⁷⁶ imposing the death penalty for child rape could actually place children in more danger than ever before. As such, the death penalty for child rape is not the best way to satisfy these policy interests.¹⁷⁷

C. International Opinion on Imposing the Death Penalty for Child Rape

The rapidly growing trend toward abolishing the death penalty worldwide¹⁷⁸ should also encourage the Supreme Court to find the capital child-rape statutes unconstitutional and to limit the class of capital crimes in the United States to those crimes that cause death. One hundred twenty-nine countries have abolished the death penalty

¹⁷¹ See *id.*

¹⁷² See Glazer, *supra* note 32, at 105–07.

¹⁷³ See *id.*

¹⁷⁴ See Glazer, *supra* note 32, at 111; Diamond, *supra* note 54, at 1185–89.

¹⁷⁵ See Meister, *supra* note 36, at 209–10.

¹⁷⁶ See *id.* at 208–10.

¹⁷⁷ See Diamond, *supra* note 54, at 1185–89 (arguing that since capital child-rape statutes put children in more danger than they would be in otherwise, a state would be violating its duty to protect children if it were to enact such a law).

¹⁷⁸ See AMNESTY INTERNATIONAL, *supra* note 83; William A. Schabas, *International Law and Abolition of the Death Penalty: Recent Developments*, 4 ILSA J. INT'L & COMP. L. 535 (1998).

in law or practice.¹⁷⁹ Sixty-eight others retain it, but the number of nations that use the death penalty regularly is much smaller.¹⁸⁰ In 2005, four countries, including the United States, were responsible for 94 percent of all known executions around the world.¹⁸¹ The rate of abolition of the death penalty is also very high. In the past sixteen years alone, over forty countries have abolished the death penalty for all crimes.¹⁸² There are also several international agreements to abolish the death penalty, including four international treaties whereby nations have committed themselves against the practice.¹⁸³

International norms regarding the death penalty specifically for child rape must also inform the Court's analysis, however. Countries that authorize the death penalty specifically for child rape include China, Iran, Jordan, Mongolia, the Philippines, Uganda, and Uzbekistan.¹⁸⁴ But some of those countries also authorize the death penalty for adult rape,¹⁸⁵ a punishment that the Supreme Court held unconstitutional in *Coker*.¹⁸⁶

Furthermore, more than half of the countries that retain the death penalty do not have capital child-rape laws. As such, given that the Court's use of international opinion is normative rather than empirical, it should, and likely will, consider international opinion as a limiting factor on the use of the death penalty for child rape. Though this does not mean that the United States will abolish the death penalty entirely, it certainly means that considering international opinion may encourage the United States to limit its use of the death penalty to a narrow definition of the most severe crimes.¹⁸⁷ If international opinion factors into the Court's analysis at all, it would be difficult to justify any expansion of the class of capital crimes in the United States or any weakening of the definition of "serious" when much of the rest of the world is abolishing the death penalty altogether.

Not only will the Court likely use international opinion to limit the class of capital crimes, but it will also likely use it to speak to what evolving standards of decency require.¹⁸⁸ "The real question is whether the United States death penalty system is consistent with twentieth century international moral standards, consistent with en-

179 See AMNESTY INTERNATIONAL, *supra* note 83.

180 See *id.*

181 See *id.* The other three countries are all illiberal, authoritarian states: China, Iran, and Saudi Arabia. See *id.*

182 See *id.*

183 See *id.*

184 See ROGER HOOD, *THE DEATH PENALTY* 84–85 (3d ed. 2002).

185 See *id.* at 83–84, 86.

186 See 433 U.S. 584 (1977).

187 Cf. Schabas, *supra* note 178, at 535 ("International lawmakers urged the limitation of the death penalty . . . by restricting it to an ever-shrinking list of serious crimes.").

188 See Alford, *supra* note 61, at 18.

lightened world public opinion, and consistent with recent international legal pronouncements and decisions.”¹⁸⁹ The Court’s analysis in *Roper* and *Atkins*, which spoke of the U.S. “heritage of freedom” based on rights we share with other nations and peoples,¹⁹⁰ indicates that the Court may agree with such a statement. This broader view should compel the Court to strike down laws expanding the number of capital crimes and limit the class only to those that cause death.

CONCLUSION

Even without looking to international opinion, capital child-rape statutes are clearly unconstitutional. First, there is a strong national consensus against imposing the death penalty for child rape. In addition, the death penalty is a disproportionate punishment for the crime of rape, regardless of the age of the victim, because it does not cause death. Moreover, imposing the death penalty for child rape would fail to serve, and would likely inhibit, the retribution and deterrence functions of the U.S. penal system.

Looking at international opinion, however, gives the Court even more reason to invalidate capital child-rape statutes, as the worldwide movement to abolish the death penalty makes narrowing the class of capital crimes even more urgent. The United States stands alone in its death penalty jurisprudence in that, unlike many of its peer countries, it has not yet abolished the practice, and even as compared with other retentionist countries, it uses the death penalty with much greater frequency. If the United States is to continue as a leader among its peers, evolving standards of decency must incorporate the norms of foreign nations—not just those of the United States. As Justice Blackmun asserted, “Interpretation of the Eighth Amendment, no less than treaties and statutes, should be informed by a decent respect for the global opinions of mankind.”¹⁹¹

¹⁸⁹ Warren Allmand et al., *Human Rights and Human Wrongs: Is the United States Death Penalty System Inconsistent with International Human Rights Law?*, 67 *FORDHAM L. REV.* 2793, 2817 (1999).

¹⁹⁰ *Roper*, 543 U.S. at 578.

¹⁹¹ Blackmun, *supra* note 148, at 387.

