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The Death Penalty: How America's Highest Court is Narrowing its Application

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Adam S. Goldstone¹

Introduction

The Supreme Court appears to be taking every opportunity to set “bright line” rules, which have the effect of significantly limiting the application of the death penalty in the United States. In *Roper v. Simmons*², the Court held that no one who was under the age of eighteen when he or she committed a crime could be executed. The Court clearly announced in *Atkins v. Virginia*³ that the death penalty does not apply to the mentally retarded. Most recently the Court handed down its decision in *Kennedy v. Louisiana*⁴ which in effect holds that a state may not impose a penalty of death on an individual for crime that did not result in the death of the victim.⁵

In deciding *Kennedy v. Louisiana*, is the Court simply stating that *Coker v. Georgia*⁶ controls in all death penalty cases and, as such, applying that decision in an ever broadening manner? Or was the Court responding to the “prevailing decency standard” noted in *Trop v. Dulles*?⁷ Perhaps the Supreme Court is trying to avoid deciding which non-homicide crimes are worthy of death. According to the recent decisions handed down, the Court created bright line rules restricting the application of the death penalty in the United States.

Our task is not to give effect to our individual views on capital punishment; rather, we must determine what the Constitution permits a state to do under its reserved powers.... The Court has overstepped the bounds of proper constitutional adjudication by substituting its policy judgment for that of the state legislature.— Chief Justice Warren Burger.⁸

History of the Death Penalty in American

Since before this country's inception, societies have used death as a form of punishment.⁹ The first documented execution in the United States occurred in 1608.¹⁰ When the Founding Fathers wrote the U.S. Constitution, the colonies utilized the death penalty as a

form of punishment. The lack of explicit prohibition on the use of the death penalty indicates the Framers accepted the death penalty as an appropriate means of punishment.¹¹ It appears the Framers of the Constitution never intended for the States to extinguish the application of the death penalty through the “cruel and unusual punishment” provision. The Fifth Amendment ensures that, no person can be deprived of “life, liberty, or property” without due process of law.¹² Therefore, the clear implication is not that the government is forbidden from taking a life, but rather that before the government may take a life, that individual must be afforded due process of law.

Through the early 1900's, each state possessed legislative control over the death penalty.¹³ At the United States' inception, the various colonies applied the death penalty as they deemed appropriate in accordance with the penal systems they developed.¹⁴ Generally, the States reserved the death penalty for the crimes of murder and rape; however some permitted capital punishment for crimes against religion and the government.¹⁵ Massachusetts was the first state to restrict the use of the death penalty, stating capital crimes were limited to “murder, sodomy, burglary, buggery, arson, rape, and treason.”¹⁶ In response to these restrictions, other states followed suit, including those that divided the crime of murder into degrees.¹⁷

In 1846, Michigan bowed to the demands of abolitionists and abolished the death penalty for all crimes with the exception of treason.¹⁸ During the next half century, Rhode Island, Wisconsin, Iowa, Maine and Colorado abolished the death penalty for all crimes.¹⁹ The trend toward abolishing the death penalty gained momentum after the turn of the century, when nine states did away with their death penalty laws.²⁰ However, around the beginning of World War I, six of the nine states reinstated their death penalty statutes.²¹

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The most dramatic developments in the United States death penalty doctrine occurred prior to 1970, taking place in various state legislatures. In 1972, in the *Furman v. Georgia* decision, the Supreme Court effectively removed the power of the States to legislate the application of the death penalty.²² Since *Furman*, the Court has taken the lead role in restricting and narrowing the application of the death penalty in this country, a role specifically granted to the legislatures of the individual states.²³

The Court subsequently defined the Eighth Amendment's "cruel and unusual" provision and noted the purpose behind the death penalty:

The Eighth Amendment bars not only those punishments that are 'barbaric' but also those that are 'excessive' in relation to the crime committed, and a punishment is 'excessive' and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime.²⁴

We have held there are two distinct social purposes served by the death penalty: "retribution and deterrence of capital crimes by prospective offenders."²⁵

Since the ruling in *Furman*, many states passed new legislation reinstating the death penalty; however, these new laws placed restrictions on the application of the death penalty and created guidelines to narrow the specific class of crimes punishable by death. Yet, the Supreme Court continues to restrict death penalty application.²⁶

Which States Have Enacted Death Penalty Legislation and Which Methods of Execution are Utilized

Currently, thirty-six states have death penalty statutes.²⁷ In total, there are five different methods of execution allowed: lethal injection,²⁸ electrocution,²⁹ lethal gas,³⁰ firing squad,³¹ and hanging.³² Although the vast majority of states primarily use lethal injection, twenty states have alternate methods available, generally contingent on the choice of the inmate.³³

State statutes permitting lethal injection typically provide: "The punishment of death must be inflicted by continuous, intravenous administration of a lethal quantity of an ultrashort-acting barbiturate in combination with a chemical paralytic agent until death is pronounced by a licensed physician according to accepted standards of medical practice." The typical protocol utilizes a three-drug combination consisting of sodium pentothal,³⁴ pancuronium bromide,³⁵ and potassium chloride.³⁶ Each drug is given in a lethal amount, respectively causing the prisoner to become unconscious, inducing the cessation of breathing, and producing cardiac arrest.³⁷

States that permit execution by electrocution generally provide: "The sentence shall be executed by causing to pass through the body of the convict a current of electricity of sufficient intensity to cause death, and the application and continuance of such current through the body of such convict shall continue until such convict is dead."³⁸ Some of the most common problems with execution include: burning of parts of the body, the necessity for repeated shocks, and the inmate's awareness of the procedure.³⁹

In the four states that still permit the use of lethal gas as an option for execution, the statutes generally read: "The punishment of death must be inflicted by the administration of a lethal gas."⁴⁰ Although on the surface this method of execution appears outdated and antiquated, the only negative effect noted is the relatively lengthy time it takes for death to occur.⁴¹

While three states authorize hanging as a method of execution, hangings are infrequent as the last hanging execution occurred in 1996 in Delaware.⁴² Although hanging is the oldest method of execution in this country, it fell out of favor during the last century due to many botched attempts and was eventually replaced by electrocution.⁴³

Of the three states authorizing execution by firing squad, Utah was the last to perform such an execution.⁴⁴ The Utah statute provided for a five-person firing squad; of these five shooters, one would unknowingly carry a blank cartridge in his weapon, allowing each member of the firing squad to believe he did not end the prisoner's life.⁴⁵

Which Crimes are Worthy of Death: Federal and State

In a line of cases following the Supreme Court's decision in *Furman v. Georgia*,⁴⁶ the Court narrowed the

application of the death penalty among the states still enacting death penalty statutes. The Court has held that the Eighth Amendment bars execution of certain classes of offenders. In deciding whether a specific death penalty statute is violative of the Eighth Amendment's "cruel and unusual punishment" prohibition, the Court will consider whether there is a "reliable indicia" of a "national consensus" against the execution of certain classes of offenders.⁴⁷ When evaluating the "national consensus" the Court applies a two-part test that considers state legislation and the actions of sentencing juries.⁴⁸ Yet it has become clear that the Court is now more willing than ever to disregard this standard in lieu of its "own judgment."⁴⁹

Looking facially at the legislation of the various states and the federal government, the Court narrowed the application of the death penalty well beyond the "national consensus." For instance, the federal government passed legislation declaring the following crimes to be death eligible: genocide,⁵⁰ hostage taking resulting in death,⁵¹ kidnapping resulting in death,⁵² murder,⁵³ terrorism,⁵⁴ torture resulting in death,⁵⁵ treason,⁵⁶ use of interstate commerce facilities in the commission of murder-for-hire,⁵⁷ war crimes,⁵⁸ and the assassination, or kidnapping resulting in the death of a Congress, cabinet, or Supreme Court member.⁵⁹ Evaluating the laws of the various states with death penalty enactments, the consensus among the states is equally as clear. Of the thirty-six states that permit capital punishment, all allow the death penalty in cases of first-degree murder. Some states also allow the imposition of death in cases of treason,⁶⁰ train wrecking,⁶¹ capital drug trafficking,⁶² capital sexual battery,⁶³ aircraft hijacking,⁶⁴ perjury resulting in death,⁶⁵ kidnapping with aggravating factors,⁶⁶ placing a bomb near a bus terminal,⁶⁷ espionage,⁶⁸ and child rape.⁶⁹

Between the various states and the federal government, over twenty separate categories of criminal activity, besides murder, can trigger the seating of a death eligible jury in the sentencing phase of a capital trial. This is the will of the people. These are the legislative enactments. These are the sentences the juries have handed down. Therefore, these statutes form the "national consensus" and trump the "personal judgment" of nine Justices sitting in Washington, D.C.

Who is on America's Death Row

In the thirty-six states with the death penalty, the government (state and federal) has carried out a total of

1,111 executions⁷⁰ since the 1976 decision in *Gregg v. Georgia*.⁷¹ The decision in *Gregg* marked the beginning of the Supreme Court's concerted efforts to narrow the application of the death penalty. *Gregg* and the subsequent cases created bright line rules,⁷² which have significantly restricted the scope of the death penalty, thereby expanding the number of prisoners growing old on death row.⁷³

The United States Department of Justice, Bureau of Justice Statistics compiled information detailing the characteristics of those prisoners on death row in the United States.⁷⁴ As of December 31, 2006, the following statistics accurately depict the make-up of America's death row: 55.8% of the United States' death row population is white, 41.9% is black and 2.3% is comprised of other races. Women make up only 1.7%,⁷⁵ while men represent a staggering 98.3%. The median education level of death row inmates is 11th grade.⁷⁶ 8.4% of inmates had a prior homicide conviction, while 65.5% had prior felony convictions. Half of all inmates sentenced to death were between 20 to 29 years old at the time of arrest; 11% were 19 or younger; and less than 1% were 55 or older. The average age of a death row inmate at the time of arrest is 28 years. Although 7,115 people were sentenced to death from 1977 through the end of 2006, only about 15% (1,057) have actually been executed.⁷⁷ From 1976 through the present,⁷⁸ 1,111 inmates have been executed. The following is their statistical information:⁷⁹ Race of the inmates: 631 white, 380 black, 76 Hispanic, and 24 of other varying races. Race of the victims: 79% of murder victims were white (even though whites comprise only half of all murder victims), 15% black, 5% Hispanic, and the remaining 2% were composed of other racial groups.

Currently 3,309 inmates sit on death row in the United States.⁸⁰ California, Florida, Texas, Pennsylvania, and Alabama have the most inmates on death row.⁸¹ The total number of prisoners on death row in these five states is more than the remaining thirty-one states and Federal Government combined.⁸² Texas, Virginia, Oklahoma, Missouri, and Florida executed the most inmates since 1976,⁸³ executing more than twice the combined total of the remaining thirty-one states and the federal government.⁸⁴ The rate of executions, however, has fallen since the beginning of 2008. There have been only twelve executions in the United States since then,⁸⁵ and this is likely due to the budget constraints faced by each state in light of the current economic crisis, inasmuch as states cannot afford to prosecute death penalty appeals to the United States Supreme Court.⁸⁶

The Court Narrows the Application of the Death Penalty by Creating Bright Line Rules

In 1972, the United States Supreme Court decided *Furman v. Georgia*, holding that the imposition of the death penalty constituted cruel and unusual punishment and violated the Constitution.⁸⁷ The Court's decision forced national and state legislatures to rethink their statutes regarding capital offenses to ensure sentencing courts did not administer the death penalty in a capricious or discriminatory manner.⁸⁸ This ruling effectively vitiated death penalty statutes in each state. Following the ruling, thirty-eight state legislatures and the federal government enacted new death penalty statutes in order to comply with the mandate set forth in *Furman*. The line of cases below followed *Furman*, however, they exceeded the Court's scope by creating bright line rules which narrowed the states' valid death penalty legislation.

Coker v. Georgia.

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.⁸⁹

The above statement by the majority in *Coker* reveals how the Court remains out of touch with the people. The dissent noted the existence of an "extreme variation" in the crime of rape. Some perpetrators so grievously physically and psychologically injure victims, that their lives are beyond repair, causing continual suffering. Murder victims' suffering, on the other hand, ends after the attack.⁹⁰

[Furman v. Georgia]
effectively vitiated death
penalty statutes
in each state

The Supreme Court heard *Coker* after its ruling in *Gregg v. Georgia* when it held that the imposition of death was not cruel and unusual punishment if appropriate guidelines were followed in the application of the statute.⁹¹ In *Coker*, the Court had to determine whether a state could impose the death sentence on a defendant convicted of raping an adult woman.⁹² The Defendant,

Coker, escaped from prison while serving sentences for murder, rape, kidnapping and aggravated assault.⁹³ During this escape Coker entered the home of Elnita Carver, tied up her husband, and raped her at knife point. The trial court found Coker guilty and sentenced him to death for the rape of an *adult* woman.⁹⁴

Justices White, Stewart, Blackmun and Stevens concluded that the death sentence for the crime of rape is grossly disproportionate and excessive punishment and, therefore, forbidden by the Eighth Amendment.⁹⁵ However, Justices Brennan and Marshall concluded that the death penalty in *all* circumstances is cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments.⁹⁶ Justice Powell also concluded that death is disproportionate punishment for the crime of raping an *adult* woman *when the perpetrator committed the crime without excessive brutality and the victim did not sustain any serious or lasting injury.*⁹⁷ The majority stated in their opinion:

[I]t is now settled that the death penalty is not invariably cruel and unusual punishment within the meaning of the Eighth Amendment; it is not inherently barbaric or an unacceptable mode of punishment for crime; neither is it always disproportionate to the crime for which it is imposed.⁹⁸

To that end, the Court noted that attention must be given to the public attitudes concerning a particular sentence, history and precedent, legislative attitudes, and the response of juries reflected in their sentencing decisions are to be consulted.⁹⁹

The Court went on to redefine the Eighth Amendment and noted:

[T]he Eighth Amendment bars not only those punishments that are 'barbaric' but also those that are 'excessive' in relation to the crime committed, and a punishment is excessive and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than a purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime.¹⁰⁰

The majority did not discount the seriousness of

rape as a crime. Short of homicide, they regarded it as the “ultimate violation of self,” as it inflicts mental and psychological damage to the victim and it undermines the community’s sense of security and therefore injures the public.¹⁰¹ However, the Court stated no less than eight times in its opinion that their decision pertained solely to the rape of an adult woman.¹⁰² The Court contended the rape of a child is likely deserving of a death sentence.¹⁰³

In dissent, Justice Powell emphasized how the Majority consistently misquoted his dissent in *Furman v. Georgia*.¹⁰⁴ Powell reiterated that his opinion in *Furman* emphasized the proportionality test regarding rape should be applied on a case-by-case basis. Specifically Powell noted that, in some cases, the death penalty functions as grossly excessive punishment while in others it would not.¹⁰⁵ Powell opposed creating bright line rules because they tend to undermine the purpose of the Court by drawing lines in the sand which should not apply in every case. Powell clarified by stating, “The deliberate viciousness of the rapist may be greater than that of the murderer. Rape is never an act committed accidentally. Rarely can it be said to be unpremeditated. There also is wide variation in the effect on the victim.”¹⁰⁶ In a separate dissent, Chief Justice Warren Burger stated that the narrow issue here presented is whether the state of Georgia may constitutionally execute *this* petitioner for the particular rape which he has committed, in light of all the facts and circumstances shown by *this* record.¹⁰⁷

Unlike the plurality, I would narrow the inquiry in this case to the question actually presented: Does the Eighth Amendment’s ban against cruel and unusual punishment prohibit the state of Georgia from executing a person who has, within the space of three years, raped three separate women, killing one and attempting to kill another, who is serving prison terms exceeding his probable lifetime and who has not hesitated to escape confinement at the first available opportunity?¹⁰⁸

The Chief Justice continued by stating that once the Court holds that the death penalty does not violate the Eighth Amendment,¹⁰⁹ “it seriously impinges upon the State’s legislative judgment to hold that it may not impose such sentence upon an individual who has shown total and repeated disregard for the welfare,

safety, personal integrity, and human worth of others, and who seemingly cannot be deterred from continuing such conduct.”¹¹⁰ Chief Justice Burger sent a clear message that each crime must be independently judged and that there can be no Constitutional cookbook approach to death penalty cases.

Although the Supreme Court has cited *Coker* numerous times as granting the Court power to narrow the death penalty,¹¹¹ this interpretation is overbroad. The majority in *Coker* was clear and unambiguous when it held “that death is . . . a disproportionate penalty for the . . . rap[e] of an *adult* woman;”¹¹² this is supported by objective evidence, as represented by the attitude of state legislatures’ enactments and sentencing juries’ verdicts. The Court confined its decision in such a manner because death as a punishment for the rape of an adult woman without the taking of human life was excessive “in its severity and revocability.”¹¹³ However, the Court did allude to the fact that the imposition of the death penalty in other non-homicide instances, such as child rape, would be an appropriate application of capital punishment.¹¹⁴ In either instance, the Court shall consider the enactments of the state legislatures and the verdicts of the juries hearing those cases. It is not the province of the United States Supreme Court to legislate; rather, its purpose is to interpret the law.

Atkins v. Virginia.

It has been over twenty-five years since the Court used its significant power to set a bright-line rule limiting the application of the death penalty.¹¹⁵ However, with its decision in *Atkins v. Virginia*, the United States Supreme Court has once again placed itself in the role of legislator by limiting a state’s ability to define its own boundaries under the Eighth Amendment.

Daryl Atkins was convicted of abduction, armed robbery and capital murder, and was sentenced to death.¹¹⁶ Atkins and another man abducted William Jones at gunpoint in order to gain access to his automated teller bank account.¹¹⁷ After getting the money they wanted, the duo took Jones to an isolated location where they shot Jones eight times.¹¹⁸ Both Atkins and his partner confirmed the story, except for a single discrepancy: each said the other was the shooter.¹¹⁹ The prosecution allowed Atkins’ accomplice to plead guilty to first-degree murder in exchange for testimony against Atkins, thus making the man ineligible for the death penalty.¹²⁰ Atkins was convicted of capital murder.¹²¹ During the penalty phase of his trial, Atkins called one

witness to testify on his behalf—a forensic psychologist who testified that Atkins had an IQ of fifty-nine and, as such, he was considered “mentally retarded.”¹²²

In response, the State presented an expert rebuttal witness, Dr. Samenow.¹²³ Dr. Samenow evaluated Atkins and found that he was a person “who chose to pay attention sometimes, not to pay attention others, and did poorly on the IQ test because he did not want to do what he was required to do.”¹²⁴ The Supreme Court of Virginia affirmed Atkins’ sentence and further noted that Atkins did not argue “that his sentence was disproportionate to penalties imposed for similar crimes in Virginia, but instead contended that he [was] mentally retarded and thus [could not] be sentenced to death.”¹²⁵ The United States Supreme Court heard the case and held that executions of mentally retarded criminals constituted cruel and unusual punishment as prohibited by Eighth Amendment.¹²⁶

The Court noted that since its decision in *Penry v. Lynaugh*,¹²⁷

[A] significant number of states have concluded that death is not a suitable punishment for a mentally retarded criminal, and similar bills have passed at least one house in other states. . . . [This] provides powerful evidence that society today views mentally retarded offenders as categorically less culpable than the average criminal.¹²⁸

The Court held that in this instance the punishment is excessive and thus prohibited by the Eighth Amendment, and that an excessiveness claim must be judged by “currently prevailing standards of decency.”¹²⁹ The Court clarified this standard by stating “[i]t is *not so much the number of these states that is significant, but the consistency of the direction of change.*”¹³⁰

In delivering the opinion for the Court, Justice Stevens stated that in the thirteen years since they decided *Penry v. Lynaugh*,

[T]he American public, legislators, scholars, and judges have deliberated over the question of whether the death penalty should ever be imposed on a mentally retarded criminal. The consensus reflected in those deliberations [gives the] answer to the question presented by this case: whether such exe-

cutions are “cruel and unusual punishments” prohibited by the Eighth Amendment to the Federal Constitution.¹³¹

In determining how the Court should evaluate the “evolving standards of decency,” the Justices noted such decisions should be informed by “objective factors to the maximum possible extent.”¹³² The *Atkins* Court went on to note that the “clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country’s legislatures and judgment reached by its citizenry.”¹³³ Thus the standard for evaluating the “evolving standards of decency,” in order to determine “excessiveness” in sentencing is to consider the states’ legislation and the jury verdicts in relation to those laws enacted. There is absolutely no mention that the members of the Court should bring their own judgment to bear when evaluating the actions of the various state legislatures and their citizens,¹³⁴ yet that is exactly what has occurred.

The Court appeared to be mitigating its bright-line rule by leaving the door open for the states to interpret what is meant by “mentally retarded.”¹³⁵ Justice Stevens wrote in his opinion:

Not all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus. . . . [W]e leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.¹³⁶

This begs the question, what degree of mental retardation is sufficient to satisfy an excessiveness claim under the Eighth Amendment? It would seem as if the Court left this door open for a reason. Is it likely that the dissent’s argument made too much sense to be ignored?¹³⁷ Or has the Court heeded the words of Chief Justice Burger in his *Coker* dissent where he urged the Court not to issue bright-line rules but to allow for an Eighth Amendment determination on a case-by-case basis?¹³⁸

Justice Antonin Scalia held in his dissent that “today’s decision is the pinnacle of our Eighth Amendment death-is-different jurisprudence.”¹³⁹ Scalia scornfully wrote that the decision by the majority finds no support in the text or the history of the Eighth Amend-

ment.¹⁴⁰ “It does not even have support in current social attitudes regarding the conditions that render an otherwise just death penalty inappropriate.”¹⁴¹ He continued by stating that “[s]eldom has an opinion of this Court rested so obviously upon nothing but the personal views of its Members.”¹⁴² It is possible that this had an effect on the Members of the Court as they decided to leave the door open to the states to put in place their own standard for evaluating and determining mental retardation.

The death penalty is truly different because it generally fosters finality: finality for the convicted and finality for the victim and her family. However this finality is not guaranteed in all circumstances, as there is an apparent national consensus that we, as a society, will not execute those who are mentally retarded because this type of punishment neither serves as a deterrent nor allows for retribution. Although the Court created what seems to be a bright-line rule, it also realized the need for each state to legislate itself.¹⁴³ In doing so, the Court created an escape valve that offers a degree of state sovereignty. The Court accomplished this by leaving to the states the task of developing appropriate ways to evaluate and determine the level of mental retardation that would allow a defendant to escape the application of that state’s death penalty.

Roper v. Simmons.

“We can get away with murder, because we are minors.”¹⁴⁴

The Supreme Court of the United States has seen fit to narrow the application of the death penalty for the second time in three years. In 2005, *Roper v. Simmons* abrogated the law set forth sixteen years prior in *Stanford v. Kentucky*,¹⁴⁵ where the Court sanctioned the imposition of the death penalty for offenders who were at least sixteen years of age at the time of the crime.¹⁴⁶ Did the public consensus change during the sixteen years between *Roper* and *Stanford*, or did the Court’s make-up change?¹⁴⁷ Justice Kennedy noted that the public consensus supported the *Roper* decision.¹⁴⁸ He claimed to have applied a standard first set in *Trop v. Dulles*, later clarified in *Coker v. Georgia* and *Atkins v. Virginia*, that state legislation and jury decisions should prevail; how-

ever, here there was clearly no such national consensus or trend.¹⁴⁹

Christopher Simmons was a seventeen-year-old high school junior when he formulated a plan to commit burglary and murder by breaking and entering, tying up a victim and throwing the victim off a bridge.¹⁵⁰ He enlisted the help of two friends, who were fifteen and sixteen, respectively.¹⁵¹ “Simmons assured his friends that they could ‘get away with it’ because they were minors.”¹⁵² He identified his victim from a previous car accident, and, at 2 a.m., Simmons and his accomplices entered Shirley Crook’s home.¹⁵³ They bound her with duct tape, covered her eyes and mouth, and drove her to a state park where they proceeded to throw her from a railroad bridge into the Meramec River, drowning her.¹⁵⁴ Following this horrific act, Simmons bragged to his friends about his cold, calculated murder, confessed to police, and performed a reenactment of the murder on videotape.¹⁵⁵ Subsequently, Simmons was found guilty of capital murder and, after finding three aggravating factors, the jury recommended the death penalty.¹⁵⁶ In his majority opinion, Justice Kennedy held that the Eighth and Fourteenth Amendments prohibited the execution of individuals who were under the age of eighteen at the time of their capital crimes.¹⁵⁷

The Court relied on its decision in *Trop v. Dulles*, as it explained in *Atkins v. Virginia*, that the Court must consider the evolving standards of decency, which reflect the gradual maturation of society, in order to determine which punishments are disproportionate and in violation of the Eighth Amendment. While Justice Kennedy points to the Court’s ruling in *Atkins* for support, it is simply not analogous. In *Atkins*, there were actual indicia of a national consensus rejecting the use of the death penalty against mentally retarded individuals.¹⁵⁸ The *Atkins* Court pointed out that since their decision in *Penry*, more than nineteen states and the Federal Government changed their death penalty statutes to eliminate those deemed mentally retarded from death penalty eligibility.¹⁵⁹ That, however, was not the case in *Roper*. When the Court decided *Stanford*, there were twenty-two states that allowed executions of those who were under eighteen years old. When the Court decided *Roper*, only two states had changed their views.¹⁶⁰ In what world does a change of less than 10%

form a majority or trend, let alone indicia of national consensus? It simply does not.

This urges the question: if no national consensus can be determined from legislative trends, then on what basis did the United States Supreme Court see fit to restrict the application of valid state legislation? Could it be affected by outside influences or are the Justices simply imparting their personal opinions in the decision?¹⁶¹ Why create such a bright-line rule? Even though the *Atkins* Court created such a rule, it did so with an actual national consensus and it also allowed for interpretation and alteration in the rule's application by granting states the ability to define mental retardation.¹⁶² The Court thus tempered the bright-line rule against the states' need for self-governance. If there was ever an instance where the Court should allow for such leeway, it is here.

Justice Kennedy clearly notes that such a bright-line rule is fraught with problems, yet he held that a line must be drawn.¹⁶³ He stated that:

Drawing the line at eighteen years of age is subject, of course, to the objections always raised against categorical rules. The qualities that distinguish juveniles from adults do not disappear when an individual turns eighteen. By the same token, some under eighteen have already attained a level of maturity some adults will never reach.¹⁶⁴

This is certainly an area that needs no bright-line rule, and, as Chief Justice Burger's dissent in *Coker* noted, these types of rulings should be made on a case-by-case basis and should be fact driven.¹⁶⁵

Justice O'Connor has not changed her stance on the execution of those under eighteen years of age.¹⁶⁶ She formed part of the majority in *Stanford v. Kentucky*, which ruled that the application of the death penalty to those who were sixteen and seventeen years old was not violative of the Eighth Amendment's prohibition on cruel and unusual punishment.¹⁶⁷ In her dissent, O'Connor stated:

The Court's decision today establishes a categorical rule forbidding the execution of any offender for any crime committed before his 18th birthday, no matter how deliberate, wanton, or cruel the offense. Neither the objective evidence of contemporary societal values, nor the

Court's moral proportionality analysis, nor the two in tandem suffice to justify this ruling.¹⁶⁸

Justice O'Connor specifically noted that the majority "refrains from asserting that its holding is compelled by a genuine national consensus."¹⁶⁹ Further, she stated:

The Court has adduced no evidence impeaching the seemingly reasonable conclusion reached by many state legislatures: that at least some 17-year-old murderers are sufficiently mature to deserve the death penalty in an appropriate case. Nor has it been shown that capital sentencing juries are incapable of accurately assessing a youthful defendant's maturity or of giving due weight to the mitigating characteristics associated with youth.¹⁷⁰

Justice O'Connor ended her dissent by noting that "the day may come when . . . a clear national consensus can be said to have developed" when there is an actual legislative rejection of applying capital punishment to sixteen- or seventeen-year-old murderers; however, she concludes that "that day has not yet arrived."¹⁷¹

"Words have no meaning if the views of less than 50% of death penalty states can constitute a national consensus."¹⁷² Responding to the majority's finding that a state's act of abandoning its death penalty would be considered part of a national consensus opposing the *juvenile* death penalty,¹⁷³ Justice Scalia stated: "In an attempt to keep afloat its *implausible assertion* of national consensus, the Court throws overboard a proposition well-established in our Eighth Amendment jurisprudence."¹⁷⁴ Scalia, who was joined by Justice Thomas and the Chief Justice, noted that a more consistent approach would be to determine how many states permit sixteen- and seventeen-year-old offenders to be treated as adults with respect to noncapital offenses.¹⁷⁵

The dissent answers the ultimate question of how the Court came to create such a bright-line rule with no reasonable indicia of a national consensus. Justice Scalia would have held that the driving force behind the majority's decision was not the action of a few state legislatures, but the Court's "own judgment" that a murderer who is under eighteen years old can never be as morally culpable as his older counterparts.¹⁷⁶ Justices Scalia, Thomas, and Rehnquist admonished the majority

for supplanting the consensus of the American people with the views of a few United States Supreme Court Justices.¹⁷⁷

The Court took this opportunity to create another bright-line rule, which serves to limit the application of the death penalty. This is not a rule based on solid ground, nor is it a rule based in Constitutional Law. It is a rule based on the morals and personal judgment of five human beings. The Court has seen fit, with the *Roper* ruling, to tell the legislators of our fifty states that their carefully drafted laws, which reflect the true consensus of the people of this country, do not matter. With this decision, the Court's majority used its considerable power to rewrite legislation in a large number of sovereign states without concern for a national consensus or actual public opinion. This is simply not within the power granted to the United States Supreme Court.

Kennedy v. Louisiana.

An eight-year-old girl cried out in agony, wearing only a t-shirt and wrapped in a bloody blanket.¹⁷⁸ An expert in pediatric forensic medicine declared that her injuries, which resulted from a sexual assault, were the most severe he had seen in all his years in practice.¹⁷⁹ The vicious attack caused such severe damage that it required the victim to endure emergency vaginal and rectal surgery.¹⁸⁰ Shockingly, the attack was not at the hands of a stranger, but by the child's caregiver and protector—her stepfather.¹⁸¹ Patrick Kennedy was convicted and sentenced to death under Louisiana's child rape law.¹⁸²

Justice Anthony Kennedy wrote the majority opinion and concluded that the Eighth Amendment prohibits the application of the death penalty for the rape of a child where the crime does not result in the victim's death.¹⁸³ The opinion notes that capital punishment must be reserved for those criminals "who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'"¹⁸⁴ Assuming that a brutal child rape cannot be as severe as murder, Justice Kennedy clarified the Court's opinion regarding the relative severity of child rape, noting that although child rape may be devastating, it cannot compare to the moral depravity and severity of murder.¹⁸⁵

In numerous areas of the opinion, Kennedy quotes from *Coker v. Georgia*, but ignores the reasoning that surrounds the precise wording of the Court's decision. The *Coker* Court stated—no fewer than eight

times—that the death penalty is violative of the Eighth Amendment's prohibition on cruel and unusual punishment when applied to the crime of rape of an *adult* woman.¹⁸⁶ The *Coker* Court left open the question of whether the death penalty could be imposed as punishment for child rape, and the Louisiana State Supreme Court reasoned that children are a class that requires a special level of protection because of the significant harm that is created when a child is raped and that, short of first degree murder, there is no crime more deserving of death.¹⁸⁷

The reasoning in *Kennedy* certainly cannot be related to a national consensus or trend.¹⁸⁸ Both *Roper* and *Atkins* clearly state that it is "the consistency of the direction of change" rather than the numerical count that is significant when deciding whether a change in public opinion would cause the application of the death penalty to be considered unconstitutional.¹⁸⁹

Since Louisiana enacted its statute¹⁹⁰ authorizing the use of the death penalty in child rape cases, four other states have followed suit with similar legislation, and at least eight others have authorized capital punishment for other non-homicide crimes.¹⁹¹ The *Kennedy* majority turned a blind-eye to this trend of making child rape a capital crime and held that because forty-four states had not made child rape a capital crime, the national consensus is that child rape should not be a capital crime.¹⁹² In this instance, the Court ignored its own doctrine by neglecting to analyze the national trend regarding child rape statutes.¹⁹³

The majority noted that instead of creating a bright-line rule, it could do what was done with murder offenses and narrow the class of aggravating circumstances eligible to be considered during sentencing in capital cases.¹⁹⁴ However, rather than instituting such a viable alternative, the majority held that it was too "difficult to identify standards that would guide the decision maker so that the penalty would not be imposed in an arbitrary manner but would be "reserved for the most severe cases of child rape."¹⁹⁵ The United States Supreme Court found it too difficult to investigate and set standards that would narrow the scope of the death penalty in child rape cases, while keeping the legislation alive. That the Court, by a slim majority, declined to take the opportunity to set forth standards carving out an exception for severe cases of child rape causes one to speculate that the Court impermissibly supplanted the will of the people for its own judgment.

Finally, the majority addressed the issue of deterrence, reasoning that because child sexual abuse is

underreported, and because a victim may want to protect her assailant from the potential of receiving the death penalty, allowing capital punishment would ultimately increase the risk of non-reporting and diminish the penalty's objectives.¹⁹⁶ However, it is that the feelings of shame and self-blame that victims of child sexual abuse feel is what most often leads victims to refrain from reporting their abuse.¹⁹⁷ The offender's punishment is rarely, if ever, taken into account, assuming the child even knows enough to consider it.¹⁹⁸ Given the uncertainty surrounding deterrence of child rape, it appears as if the majority is legislating from the bench instead of objectively evaluating the law.

The dissent addressed the majority's argument that it is "not feasible to channel the exercise of sentencing discretion in child-rape cases."¹⁹⁹ Justice Alito stated that this concern does not provide a basis for striking down every child rape law without considering the scope and application of those laws.²⁰⁰ In other words, the Court has no cause to issue bright-line rules that unnecessarily create sweeping changes. The states are perfectly capable of self-rule and determining the scope and applicability of their legislation.

Justice Alito was joined by Chief Justice Roberts, and Justices Scalia and Thomas in his dissent.²⁰¹ The Justices make it abundantly clear that the majority's reasoning is flawed and does not support a finding that Louisiana's child rape law is unconstitutional.²⁰² Justice Alito points out that although the majority indicates the presence of a national consensus that the death penalty is never acceptable for the crime of child rape, he contends that it is not supported by sound reasoning.²⁰³ Further, Alito cautions the majority when substituting its opinion for that of the people by allowing their "independent judgment" to strike down a law that the state of Louisiana found constitutional.²⁰⁴ The dissent holds that the "objective indicia" of our society's "evolving standards of decency" in this matter are summarized as follows: "Neither Congress nor juries have done anything that can plausibly be interpreted as evidencing the 'national consensus' that the Court perceives."²⁰⁵ While the dissent is not suggesting that six new state laws create a national consensus, they are stating the Court has held that it is not the number but the trend that determines a consensus and that it is apparent more states have en-

acted statutes making child rape a death eligible crime than those that have passed legislation forbidding the use of capital punishment in child rape cases since the *Coker*. The Court obscured a developing trend permitting the death penalty for child rape and implemented its "own judgment" regarding the death penalty rather than respecting the will of the state legislatures.

Finally, the dissent notes that the Louisiana legislature, and those states following suit, determined that the immaturity and vulnerability of a child add a devastating dimension to rape that is not present in the rape of an adult.²⁰⁶ It is this harm that justifies the imposition of the death penalty.²⁰⁷ Justice Scalia declared that the majority provided no legitimate explanation for why the state legislature should be overruled and that bold references to "decency," "moderation," and "moral judgment" are simply not enough to declare a state law unconstitutional.²⁰⁸

In addition, Justice Ruth Bader Ginsburg reminded the Court that *Coker* was decided by only a plurality and that Justice Powell's separate concurrence left open the prospect that death could be imposed for rape in extreme circumstances, even in cases where the victim did not die.²⁰⁹ During oral argument, Ginsburg noted that states might not be passing laws like Louisiana's because they were interpreting *Coker* to limit the death penalty to homicides: "*Coker* seems to cover the waterfront, and we cannot know if there is a consensus... until this Court clarifies what *Coker* stands for."²¹⁰

Justice Breyer, also during oral argument, brought up a legendary legal argument: the slippery slope.²¹¹ He suggested that if the Court were to uphold a death sentence where the victim was not killed, states would begin enacting legislation making any horrific act a capital crime.²¹² However, this is not the case, as states have had the ability to write those types of laws prior to this decision and they have been quite restrained in their capital crime legislation. It is a weak argument that, should Louisiana's law be deemed constitutional, other states would jump to enact legislature authorizing the death penalty in crimes that, in the view of the Court, do not warrant capital punishment.

Chief Justice Roberts brought the case back to the issue of "national consensus," making it quite clear

The Court obscured a developing trend permitting the death penalty for child rape and implemented its "own judgment" regarding the death penalty rather than respecting the will of the state legislatures.

that he did not see a consensus against Louisiana's child rape law and, in fact, he suggested the trend is in favor of such a law.²¹³ He stated that "more and more states are passing statutes imposing the death penalty in situations that do not result in death."²¹⁴

There can be little doubt that the slim majority has decided this case based on their "own judgment" and not on "objective indicia" of "national consensus." If the Court had truly relied on the standard set in *Trop v. Dulles* they would have reviewed the enactments of the various state legislatures and found that since Louisiana enacted this statute, there have been more states that have enacted similar legislation than those that have rejected such proposals. Further, the decision of the Louisiana Supreme Court indicates the painstaking lengths it went to in analyzing this case and determining that the jury made the correct decision. Since the two-part test for "evolving standards of decency" includes evaluating the legislative actions of the various states and reviewing the decisions of those juries, it is abundantly clear that the *Kennedy* Court substituted its moral judgment and opinion for that of the people in an ongoing crusade to narrow the application of the death penalty in the United States.

How the Justices Are Divided on the Death Penalty

Our task is not to give effect to our individual views on capital punishment; rather, we must determine what the Constitution permits a state to do under its reserved powers. Chief Justice Burger.²¹⁵

Chief Justice Burger wrote in *Coker v. Georgia* that the special circumstances and facts which bear directly on whether the death penalty should be imposed must be derived from each individual instance and not from an overbroad bright-line rule.²¹⁶ In other words, the Justices of the Supreme Court of the United States should strive to enforce the states' legislation by viewing each case as a separate and distinct entity and not a broad area of law that can be corralled by a single, totally encompassing rule.

Retribution and deterrence are consistently held to be the two distinct purposes served by the death penalty.²¹⁷ Society regularly produces individuals who commit horrific crimes that go beyond the bounds of normal imagination—the kinds of crimes that allow

most of us to accept the use of capital punishment in certain cases.²¹⁸ However, when capital punishment is viewed as a whole, we are struck with the stark truth of erroneous convictions, DNA evidence exonerations as well as the issues of bias and racism.²¹⁹ It is this truth that has led some people who would normally support the death penalty to condemn it completely,²²⁰ and, indeed, "[t]he power of this paradox is tearing apart the Supreme Court."²²¹ For this reason it is important to clarify the Supreme Court justices' views on capital punishment.²²²

Justice John Paul Stevens

John Paul Stevens was nominated to the Supreme Court by President Gerald Ford in 1975.²²³ Although Stevens was appointed by a Republican President and was an antitrust lawyer, he has seemingly strayed away from the conservative nature that led the party to place him on the Court.²²⁴ Stevens' individualistic personality places him on the outside of the Court's mainstream and many have pointed out that he is quirky and has an unconventional view of jurisprudence.²²⁵ This can be seen in his various opinions.

When writing about the death penalty in *Baze v. Rees*,²²⁶ Justice Stevens argued that in the absence of a causal relation, "deterrence cannot serve as a sufficient penological justification for this uniquely severe and irrevocable punishment."²²⁷ Professor Cass Sunstein²²⁸ provided a note of caution to Justice Stevens when he said, "the absence of evidence of deterrence should not be confused with evidence of absence."²²⁹

Justice Stevens directed the Court in *Atkins v. Virginia* that a "national consensus" is determined not so much by the number of states for or against the death penalty, but by the consistency of the direction of change that is occurring in the state legislatures.²³⁰ He wrote the majority opinion using the "national consensus" doctrine as called for by the Court in *Trop v. Dulles*²³¹ and applied in *Coker v. Georgia*.²³² However, he added the consistency of change theory to the *Trop* doctrine. In particular, Stevens stated that "consistency of direction of change" led the court to reverse its own longstanding support of capital punishment for those with significant mental retardation.²³³ Yet when a similar "consistency of direction" was noted in *Kennedy v. Louisiana*, he discounted such a change in direction and sided with the majority that prohibited the application of the death penalty for child rapists.²³⁴ Justice Stevens could be using his senior status on the Court to act as a

legislator, even though he wrote in *Gregg v. Georgia* that, “the requirements of the Eighth Amendment must be applied with an awareness of the limited role to be played by the courts, and that we may not act as judges as we might as legislators.”²³⁵ It is this type of inconsistency that has led commentators to label Justice Stevens “quirky.”

Justice Stevens has made his position abundantly clear. The eighty-eight year old jurist was one of the authors of *Gregg v. Georgia*, which supported the re-instatement of the death penalty in 1976.²³⁶ However, Stevens is now of the belief that the death penalty is unconstitutional in every instance due to procedural and fairness problems.²³⁷ He has clearly noted that his time on the Court has convinced him that legislators choose to retain the death penalty because of habit rather than putting forth a deliberate process that “balances costs and risks.”²³⁸

Justice Antonin Scalia

Supreme Court Justice Antonin Scalia, who has been called one of the most colorful jurists on the bench, “defies simple characterization.”²³⁹ Justice Scalia has been quoted as saying that he agonizes over the fact that his duty often forces him to do things that he just does not want to do.²⁴⁰ At the time of his appointment by President Ronald Reagan, Justice Scalia was the youngest justice on the Court, but that did not stop him from stating his philosophy of strict interpretation and judicial restraint.²⁴¹

Justice Scalia has been firm in his stance on the Court. He has held, and continues to hold, that the personal views of justices are not a valid consideration when making decisions that go against the will of the people as noted through the enactments of their duly elected representatives.²⁴² Scalia wrote in his dissent in *Atkins* that, “[s]eldom has an opinion of this Court rested so obviously upon nothing but the personal views of its members.”²⁴³ He concluded as such because “rarely if ever [will it] be the case that the Members of this Court will have a better sense of the evolution in views of the American people than do their elected representatives.”²⁴⁴ In other words, the justices should not apply their “own judgment” when deciding cases that involve valid determinations by state legislators; they must side with the will of the people.

In January, 2002, Justice Scalia spoke at the University of Chicago’s Pew Forum on Religion and Public Life. He was joined by Beth Wilkinson, the lead pros-

ecutor in the Timothy McVeigh²⁴⁵ trial, and was quoted as saying, “You want to have a fair death penalty? You kill; you die. That’s fair. You wouldn’t have any of these problems about, you know, you kill a white person, you kill a black person. You want to make it fair? You kill; you die.”²⁴⁶

In his dissent in *Atkins*, Justice Scalia concludes that the majority’s opinion adds another impediment to the legitimate application of the death penalty, and in doing so they simply pile on substantive and procedural requirements in order to invent a “death is different” jurisprudence.²⁴⁷ This is quite closely followed up by his dissent in *Roper v. Simmons*, where Scalia reaffirms his support for the death penalty:

We must disregard the new reality that, to the extent our Eighth Amendment decisions constitute something more than a show of hands on the current Justices’ current personal views about penology, they purport to be nothing more than a snapshot of American public opinion at a particular point in time . . . We must treat these decisions just as though they represented *real* law, *real* prescriptions democratically adopted by the American people, as conclusively . . . construed by this Court.²⁴⁸

Scalia concluded by noting that if the Court were to update the Eighth Amendment any time the Justices’ personal opinions changed, it would destroy stability and make case law an unreliable basis for states to design laws and to effectively represent the will of the citizenry.²⁴⁹ Justice Scalia fully supports the right of the states to enact their own legislation, and believes that, in creating bright-line rules, the Court interferes with state sovereignty. Being an originalist and textualist, Justice Scalia holds true to the text of the Constitution and, in doing so, firmly supports the states application of the death penalty.²⁵⁰

Justice Anthony Kennedy

Anthony Kennedy was not President Reagan’s planned nominee for the Court.²⁵¹ After two failed nominations, Reagan’s administration needed a nominee that would sail through the Congressional confirmation process and Edwin Meese recommended Kennedy, who was then sitting on the Ninth Circuit Court of Appeals.²⁵²

During the time he spent with the Ninth Circuit, Kennedy held steady to his “case-by-case” approach and refused to make bright-line rules.²⁵³ He has proven to be a pivotal member of the Supreme Court and, often times, close decisions turn on his vote.²⁵⁴ Yet, it has be-

Justice Thomas has closely aligned himself with the far right of the Court.²⁷² He has been referred to as “Scalia junior,” a nickname indicating his frequent unwavering concurrences with the outspoken Justice Antonin Scalia.²⁷³

come apparent that his time on the Court has eroded the standards he held firm when he was on the court of appeals.

There is no better example of Kennedy’s change in philosophy than the comparison of his decision in *Stanford v. Kentucky*²⁵⁵ with that of *Roper v. Sim-*

mons.²⁵⁶ Justice Kennedy had been on the Court only a year, when he sided with the majority in *Stanford* in 1989 and held that the death penalty was not violative of the Eighth Amendment’s prohibition against cruel and unusual punishment and those who commit murder at age sixteen and seventeen could be sentenced to death.²⁵⁷ He went on to agree with Justice Antonin Scalia, and together they declared, “we emphatically reject petitioner’s suggestion that the issues in this case permit us to apply our ‘own informed judgment,’ . . . regarding the desirability of permitting the death penalty for crimes by 16- and 17-year-olds.”²⁵⁸

Less than two decades later, however, Justice Kennedy reversed his position when writing the decision in *Roper*. In that decision, Kennedy found that the application of the death penalty to those less than eighteen years old was violative of the Eighth Amendment’s prohibition against cruel and unusual punishment.²⁵⁹ He argued, “[w]e then must determine, in the exercise of our *own independent judgment*, whether the death penalty is a disproportionate punishment for juveniles.”²⁶⁰ This is the exact proposition that Kennedy emphatically rejected in *Stanford*. It would appear from this example that Justice Kennedy has left behind his “case-by-case” approach and abandoned his opposition to creating bright-line rules, which has recently included limiting the states’ ability to enact comprehensive death penalty legislation.

Justice David Souter

Justice David Souter joined the Supreme Court in 1990, after being nominated by President George H.W. Bush.²⁶¹ He was relatively unknown due to the fact that he had only served five months on the U.S. Court of Appeals before being elevated to the Supreme Court.²⁶² Conservatives believed that Souter was a restrained jurist who would bolster the right wing of the Court, held then by Justices Scalia and Rehnquist.²⁶³ However, Souter did not fall in line with Scalia and Rehnquist, or the Court’s right bloc. He has formed a centrist bloc, and often stands in opposition of the conservative right.²⁶⁴

Justice Souter’s view of the death penalty can be made no clearer than his own words in *Kansas v. Marsh*.²⁶⁵ In that dissent, Souter called the Kansas death penalty law “morally absurd,”²⁶⁶ and that when considering the hazards of death penalty prosecution as well as the reality of DNA exonerations, it creates broad doubt as to the validity of the death penalty itself.²⁶⁷ Justice Souter has taken every opportunity presented to him to narrow the application of the death penalty among the states. He cast a vote creating bright-line rules against capital punishment in *Atkins v. Virginia*, *Roper v. Simmons*, and most recently in *Kennedy v. Louisiana*. From his voting history, Justice David Souter appears to be more centrist than conservative and is not a supporter of the death penalty.

Justice Clarence Thomas

Justice Clarence Thomas, who is best known for not asking any questions during oral arguments, was appointed to the Court by President George H.W. Bush in 1991.²⁶⁸ Thomas is currently the only black member of the United States Supreme Court and the second black member in United States history.²⁶⁹ There are those that posit he was chosen only because of his color in an effort to replace the retired Thurgood Marshall.²⁷⁰ However, President Bush has stated that Thomas was chosen because of his outstanding legal qualifications.²⁷¹ Justice Thomas has closely aligned himself with the far right of the Court.²⁷² He has been referred to as “Scalia junior,” a nickname indicating his frequent unwavering concurrences with the outspoken Justice Antonin Scalia.²⁷³

Although Clarence Thomas has not spoken often, he made his views clear on the death penalty. In *Kennedy v. Louisiana*, Justice Thomas, along with Justices Scalia and Roberts joined Justice Alito’s dissent,

which vehemently opposed to the majority's imposition of a "blanket rule" barring the death penalty, especially when the specific facts and circumstances of the case are not considered.²⁷⁴ Further, during his Senate confirmation hearings, Senator Strom Thurmond asked Justice Thomas about his views on the death penalty.²⁷⁵ Justice Thomas stated:

The death penalty is the harshest penalty that can be imposed, and it is certainly one that is unchangeable. And we should be most concerned about providing all the rights and all the due process that can be provided and should be provided to individuals who may face that kind of a consequence. I would be concerned, of course, that we would move too fast, that if we eliminate some of the protections that perhaps we may deprive that individual of his life without due process. I believe that there should be reasonable restrictions at some point.²⁷⁶

There is no ambiguity in Justice Thomas's words, he stands firm in favor of the death penalty, while still providing a defendant due process of law.

Justice Ruth Bader Ginsburg

President Bill Clinton's first appointment to the United States Supreme Court was Ruth Bader Ginsburg.²⁷⁷ Ginsburg was elevated to the Court from the D.C. Circuit to replace retiring Justice Byron White.²⁷⁸ Although known as a liberal, Ginsburg has not hesitated to vote with the Court's right.²⁷⁹ However, Justice Ginsburg is in favor of abolishing the death penalty.²⁸⁰ She has stated that "she supports a proposed state moratorium on the death penalty, adding that accused murderers with good lawyers 'do not get the death penalty.'" ²⁸¹ Ginsburg further noted that our justice system operates best when opposing positions are well represented, and that is typically not the case with death eligible crimes.²⁸² As with Justices Stevens, Breyer, and Souter, Justice Ginsburg is steadfast in her opposition of the death penalty.

Justice Stephen Breyer

Although a Democrat, Stephen Breyer was appointed to the First Circuit Court of Appeals by President Ronald Reagan and elevated to the Supreme Court

in 1994 by President Bill Clinton.²⁸³ Justice Breyer states that he takes a pragmatic approach to constitutional issues, as he is more interested in coherence and continuity in the law, rather than following textual strictures.²⁸⁵ This often places him directly in opposition of Justice Scalia and his textual philosophy.²⁸⁵ No place is this opposition more clear than on the issue of the death penalty.

Justice Breyer has taken every opportunity to develop bright-line rules for the restriction of the death penalty. He voted with the majority in deciding that the death penalty should not be applied in cases involving the mentally retarded,²⁸⁶ those who committed capital murder when under eighteen years old,²⁸⁷ and when the crime does not result in the death of the victim.²⁸⁸ Justice Breyer stated during oral arguments in *Kennedy v. Louisiana*, that if the Court were to uphold a law which permitted the imposition of death for a crime in which the victim was not killed, it would create a "slippery slope" inviting legislatures throughout the United States to make capital crimes out of anything they thought was horrible.²⁸⁹ While Justice Breyer does not go as far as to call for the abolition of the death penalty, as many on the Court's left do, he does favor its restriction to only allow for the imposition of death when the victim of a crime has died, no matter how horrific that crime may be.²⁹⁰ Therefore, it is quite likely that Justice Breyer will continue to vote in favor of restricting the application of the death penalty.

Chief Justice Roberts

John G. Roberts, Jr. was confirmed as the seventeenth Chief Justice of the United States Supreme Court on September 29, 2005.²⁹¹ Roberts became the second youngest Chief Justice since John Marshall.²⁹² According to Professor Cass Sunstein, Chief Justice Roberts is a "judicial minimalist," who emphasizes respect for judicial precedent.²⁹³ Roberts is entrenched, however, in the conservative bloc of the Court's right, and often votes with Justices Scalia, Thomas, and Alito.²⁹⁴

In joining the dissent of Justice Alito in *Kennedy v. Louisiana*, the Chief Justice made his position on the death penalty perfectly clear.²⁹⁵ The dissent argued that the death penalty is constitutional and does not violate the Eighth Amendment's prohibition against cruel and unusual punishment.²⁹⁶ Further, the dissent argued that the "independent judgment" of the Members of the

Court has no place in Constitutional decisions.²⁹⁷ The dissent was also quick to point out to the majority in *Kennedy* that there was no “national consensus” running against Louisiana’s child rape law and, in fact, an opposite trend in support of such laws could be found.²⁹⁸ When considering Chief Justice Roberts’ young age, it is quite conceivable that he will lead the Court for the next few decades. Additionally, he will probably remain on the right of the Court and stand firm in his support of the death penalty.

Justice Samuel Alito

President George W. Bush made his second nomination to the U.S. Supreme Court when he chose a judge from the Third Circuit Court of Appeals, Samuel A. Alito, Jr.²⁹⁹ Justice Alito aligns himself with the Court’s right and credits conservative writings criticizing the Warren Court’s decisions in areas of criminal procedure, the Establishment Clause, and reapportionment, as his motivation for attending law school.³⁰⁰

Although very few death penalty cases were heard during his tenure with the Third Circuit, Justice Alito made sure that he was personally involved in every aspect of those decisions.³⁰¹ Before his nomination, few people knew his views on the death penalty.³⁰² However, Senator Feingold said of Justice Alito, “I found a person who actually thought about it deeply, who was troubled by innocent people being sentenced to death, and who gave particular concern to how those [death penalty] cases were handled as a Court of Appeals judge.”³⁰³

Justice Alito supports the application of the death penalty by the states and is against the formulation of bright line rules that serve to restrict such state legislation. In his dissent in *Kennedy v. Louisiana*, Alito noted that the majority was usurping the work of state Legislators, as the Court could provide no cogent explanation as to why the Louisiana law should be overridden.³⁰⁴ He notes that “[c]onclusory references to ‘decency,’ ‘moderation,’ ‘restraint,’ ‘full progress’ and ‘moral judgment’ are not enough.”³⁰⁵ Furthermore, he directs the majority to defer to the judgment of Louisiana and a growing number of other states.³⁰⁶ In addition, he emphasizes that the harm caused to the victims of child rape and to society as a whole is grave.³⁰⁷ He concludes by declaring that these considerations represent the true “national consensus.”³⁰⁸

Justice Alito could not have been clearer in his

belief that the decision was purely a question for lawmakers, not Supreme Court Justices, stating that³⁰⁹ “[t]he Court is willing to block the potential emergence of a national consensus in favor of permitting the death penalty for child rape because, in the end, what matters is the Court’s ‘own judgment’ regarding ‘the acceptability of the death penalty.’”³¹⁰ In his clear and unambiguous statements, Justice Alito has reaffirmed his conservative posture and his position on the Court’s right. Given his young age and his vigor for the U.S. Constitution, it is likely that Justice Alito will remain on the Court for quite some time and will help to prevent the Court from further narrowing the application of the death penalty.

The United States Supreme Court is clearly divided on the issue of the death penalty. On the far left are Justices Stevens, Souter, and Ginsburg who firmly believe that the death penalty should be restricted or abolished.³¹¹ Towards the middle are Justices Breyer and Kennedy. Justice Breyer has stated that he believes that there should be no application of the death penalty unless the crime results in the death of the victim.³¹² Justice Kennedy has proclaimed himself to be the swing vote in matters concerning the death penalty; however, this is far from accurate.³¹³ Justice Kennedy has abandoned his “case-by-case” approach, and is now siding with the Court’s left in creating bright-line rules that serve to narrow the application of the death penalty. His votes in *Atkins v. Virginia*, *Roper v. Simmons*, and *Kennedy v. Louisiana* clearly paint Kennedy as someone who is not a supporter of the states’ right to enact comprehensive death penalty legislation. For all his posturing and statements, Justice Kennedy completes the majority the Court requires to continue restricting the application of capital punishment.

While on the Court’s far right is the ever present Justice Scalia, he is consistently joined by Justice Thomas in their support of state legislatures and their right to enact comprehensive death penalty legislation.³¹⁴ Justice Alito, being the newest member of the Court, has not had the opportunity to weigh in on the death penalty as Scalia and Thomas have, but his voice was clear in his dissent in *Kennedy v. Louisiana*. Alito is a firm supporter of the death penalty, as well as the states’ right to enact comprehensive capital punishment legislation.³¹⁵ Lastly, Chief Justice Roberts is clearly aligned with the Court’s right.³¹⁶ His views on the death penalty are expressed by the fact that he joined the dissent in *Kennedy*, which admonished the majority for

supplanting the will of the people, with its “own judgment” in matters concerning the application of state capital punishment legislation.³¹⁷

Although this represents the make-up of the Court today, it is very likely to change in the near future. Justice John Paul Stevens is 88 years old, followed by Justice Ginsburg at 76 years old.³¹⁸ The average age of the three remaining members of the Court’s left is 70.³¹⁹ Compare this with the Court’s right. Justice Scalia is 72 and is likely to follow the path taken by former Chief Justice Rehnquist, which means he will be on the bench for quite some time.³²⁰ However, the average age of the three remaining Justices on the Court’s right is only 58.³²¹ It is safe to assume that the Court’s right will stay in place for at least the next decade or two. Given these statistics, the Court’s continued narrowing of the application of the death penalty may be halted with a single new appointment to the Court.

On May 1, 2009 Justice David Souter sent a letter to President Barack Obama indicating his plans to retire from the Court in June, 2009 when the Court begins summer recess.³²² On May 26, 2009 President Obama nominated appeals court judge Sonia Sotomayor to replace David Souter as an Associate Justice on the United States Supreme Court.³²³

Judge Sotomayor has been involved with the federal judicial system for over 18 years.³²⁴ Sotomayor was originally appointed to the bench as a U.S. District Court for the Southern District of New York, and is currently an Appellate Court Judge on the Second Circuit Court of Appeals.³²⁵ Her rulings during her tenure as a judge have leaned toward the left and she is often referred to as a “liberal judge.”³²⁶ In a March, 1981 memo, while working with the Puerto Rican Legal Defense and Education Fund, Sotomayor wrote “Capital Punishment is associated with evident racism in our society. . . . The number of minorities and the poor executed or awaiting execution is out of proportion to their numbers in the population.”³²⁷ It appears that Sotomayor, if confirmed, would stand in as a direct replacement for David Souter when it comes to the narrowing of the state’s application of the death penalty.

Conclusion

When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they ‘deserve,’ then there are

sown the seeds of anarchy – of self-help, vigilante justice, and lynch law.

- Justice Potter Stewart³²⁸

The Fifth Amendment to the United States’ Constitution reads:

No person shall be held to answer for a *capital*, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; . . . *nor be deprived of life, liberty, or property, without due process of law. . . .*³²⁹

From this clear and unambiguous statement comes the basis for our death penalty legislation. Our founding fathers undoubtedly understood that certain crimes would require the application of capital punishment, otherwise they would not have so clearly addressed it. This amendment solidifies the fact that certain acts will fall into the category of *capital* crimes. In such instances, no person shall be deprived of their life at the hands of the government without due process of law. This Constitutional amendment purposely tempers the application of the death penalty with the mandate of due process and therefore serves as an inherent check on death penalty legislation of the states. Thus, there can be no cause to allow the Justices of the Supreme Court to interject their “own judgment” into such matters and in effect narrow the scope of valid state legislation.

If we were to allow the Justices to continue along such a path, then who would speak for the sexually abused eight year old girls of our Country? The “evolving standard of decency” doctrine put forth in *Trop v. Dulles* holds that claims of excessive punishment must be determined using the standards of decency that currently prevail.³³⁰ Contemporary society holds that children constitute a class of people who need special protection because they are incapable of defending themselves. Therefore, when an adult sees fit to violate the innocence of a small child for their own lascivious gratification, society deems this behavior to be among the worst of the worst.

Louisiana Sex Crimes Prosecutor, Kate Bartholomew, has accurately summed up the standards

of decency that prevail today when she said, “the rape of a child is more heinous and hideous than a homicide.”³³¹ She continued by stating that child rape “takes away [the child’s] innocence. It takes away their childhood. It mutilates their spirit. It kills their soul.”³³² The cases that have stemmed from the decision in *Coker v. Georgia* have considerably narrowed the states’ application of the death penalty. The Court has liberally construed the proposition set in *Coker* to hold that bright-line rules should be established in order to restrict the application of the death penalty only to acts that cause the victim’s death.³³³ This does not comport with the U.S. Constitution, nor does it comport with the national consensus surrounding the death penalty. In sum, the Members of the Court must be admonished to stop supplanting their “own judgment” for that of the people and to respect the legislation of the state[s] in their death penalty enactments. It must be firmly held that the creation of bright line rules restricting the application of the death penalty ends here and now.

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² See *Roper v. Simmons*, 543 U.S. 551, 578 (2005) (holding the Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when they committed their crimes, and abrogating *Stanford v. Kentucky*, 492 U.S. 361 (1989), which rejected the proposition that the Constitution bars capital punishment for juvenile offenders younger than 18).

³ *Atkins v. Virginia*, 536 U.S. 304, 305 (2002) (concluding that executions of mentally retarded criminals constitutes “cruel and unusual punishments” prohibited by the Eighth Amendment. Thus, overturning the rule the United States Supreme Court set in *Penry v. Lynaugh*, 492 U.S. 302 (1989)).

⁴ See *id.* (determining that the Eighth Amendment bars Louisiana from imposing the death penalty for the rape of a child when the crime did not result and was not intended to result, in the victim’s death. This ruling is in direct opposition of the holding of the Court in *Coker v. Georgia*, 433 U.S. 584 (1977), when the Court held that the death penalty for the rape of an *adult* woman is violative of the Eighth Amendment, but clearly noted that the rape of a child is a different offense of a greater magnitude and in some instances would warrant the application of the death penalty).

⁵ *Id.* The Court appears to be unaffected by the documentary evidence that while death stops the pain of the victim of homicide, children who have been raped, especially by an adult, are repeatedly revictimized by memories of the trauma.

⁶ See *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (defining the Eighth Amendment’s “cruel and unusual” prohibition as barring

“barbaric” and/or “excessive” punishments in relation to the crime committed punishment is “excessive” and unconstitutional if it: 1) makes no measurable contribution to acceptable goals of punishment, and hence is nothing more than the purposeless and needless imposition of pain and suffering; or 2) is grossly out of proportion to the severity of the crime). *Id.* In this case, that imposition of death was excessive and disproportionate to the crime of rape of an *adult* woman. *Id.* The Court specifically restricts this ruling to the rape of an adult woman, and makes mention that the rape of a child is crime of horrific proportions that could warrant the death penalty. *Id.*

⁷ See *Trop v. Dulles*, 356 U.S. 86 (1958) (declaring the Eighth Amendment must “draw its meaning from the evolving standards of decency that mark the progress of a maturing society”); see also Dwight Aarons, *The Abolitionist’s Dilemma: Establishing the Standards for the Evolving Standards of Decency*, 6 PIERCE L. REV. 441 (March, 2008) (stating that the Court in *Trop v. Dulles* did not provide further meaning to “evolving standards of decency.” It took until the 1970s (with *Coker*) for the Court to begin to subject the death penalty to constitutional regulation. Since then, the Court has repeatedly invoked the phrase “evolving standards of decency” when assessing the death penalty and has slowly given further content to the phrase). The Court has since clarified that the test for evaluating the “evolving standards of decency” comes from the actions of the various state[s] legislators and the jury verdicts following suit. *Id.*

⁸ *Coker v. Georgia*, 433 U.S. 584, 604 (1977).

⁹ RAYMOND PATERNOSTER, *CAPITAL PUNISHMENT IN AMERICA* 3 (Sarah Bacon ed., Oxford Univ. Press 2007).

¹⁰ *Id.*

¹¹ U.S. CONST. amend. VIII.

¹² U.S. CONST. amend V.

¹³ PATERNOSTER, *supra* note 9, at 3.

¹⁴ See STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* 6 (2002) (stating “England’s North American colonies exhibited significant regional variation in their criminal codes right from the beginning”).

¹⁵ PATERNOSTER, *supra* note 9, at 5.

¹⁶ *Id.*

¹⁷ *Id.* at 6.

¹⁸ *Id.* at 9.

¹⁹ *Id.* (Rhode Island did so in 1852, Wisconsin in 1853, Iowa in 1872, Maine in 1876, and Colorado in 1897).

²⁰ PATERNOSTER, *supra* note 8, at 3 (states include: Kansas, Minnesota, Washington, Oregon, North Dakota, South Dakota, Tennessee, Arizona, and Missouri).

²¹ *Id.*

²² See *Furman v. Georgia*, 408 U.S. 238, 240 (1972) (reversing the lower court’s ruling holding the death penalty violated the Eighth and Fourteenth Amendments because the application of the penalty was discretionary, haphazard, and discriminatory in that it was inflicted in a small number of possible cases and against minorities).

²³ See *id.* at 268 (imposing the Courts discretion on the death penalty as a constitutional issue emphasizing the need to narrow the historical interpretation of the Clause).

²⁴ *Coker*, 433 U.S. at 584.

²⁵ *Roper*, 543 U.S. at 571.

²⁶ See also *Coker v. Georgia* 433 U.S. 584 (1977) (restricting the imposition of the death penalty for the rape of a woman); *Atkins*

v. Virginia, 536 U.S. 304 (2002) (holding unconstitutional the execution of the mentally handicap) Roper v. Simmons 543 U.S. 551 (2005) (concluding capital punishment may not be imposed on minors under the age of eighteen); Kennedy v. Louisiana, 128 U.S. 2641 (determining the execution of a child rapist as unconstitutional).

²⁷ Clark County Prosecutor Homepage, <http://www.clarkprosecutor.org/html/death/methods.htm> (last visited July 11, 2009) [hereinafter Clark County]. Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Virginia, Washington, Washington, and the Federal Government all currently allow the death penalty as an appropriate punishment. *Id.*

²⁸ Clark County, *supra* note 27. Lethal Injection is available in every jurisdiction. *Id.*

²⁹ *Id.* Electrocutation is authorized in Alabama, Arkansas, Florida, Illinois, Kentucky, Nebraska, Oklahoma, South Carolina, Tennessee, and Virginia. *Id.*

³⁰ *Id.* Lethal Gas is an option available to inmates in Arizona, California, Missouri, and Wyoming. *Id.*

³¹ *Id.* Idaho, Oklahoma, and Utah permit an inmate to choose death by firing squad. *Id.*

³² *Id.* Hanging is permitted by law in Delaware, New Hampshire, and Washington. *Id.*

³³ See Clark County, *supra* note 27.

³⁴ Death Penalty Information Center Homepage, <http://deathpenaltyinfo.org/descriptions-execution-methods#injection> [hereinafter Death Penalty Info] (noting that a barbiturate is used to render the prisoner unconscious) (last visited July 11, 2009).

³⁵ *Id.* (a muscle relaxant which paralyzes the diaphragm and lungs).

³⁶ *Id.* (causes cardiac arrest).

³⁷ Sarah Tofte, *Three-drug Protocol Is Not the Answer*, RAPID CITY JOURNAL, Oct. 14, 2006.

³⁸ See Development of Lethal Injection, <http://www.hrw.org/reports/2006/us0406/3.htm> (last visited July 11, 2009).

³⁹ Clark County, *supra* note 27.

⁴⁰ See Death Penalty Info, *supra* note 34 (noting that the most common lethal gas utilized was cyanide gas).

⁴¹ Death Penalty Info, *supra* note 34. According to the Execution Procedures noted in North Carolina, death is estimated to occur within six to eighteen minutes of the lethal gas emissions.

⁴² Death Row Factsheet, www.doc.delaware.gov/information/deathrow_factsheet.shtml (last visited July 11, 2009). Billy Bailey was executed by hanging in following his murder conviction.

⁴³ Clark County, *supra* note 27.

⁴⁴ Hal Schindler, *Taylor's Death Was Quick . . . But Some Weren't So Lucky Executioner's Song—a Utah Reprise*, THE SALT LAKE TRIBUNE, Jan. 28, 1996 (Utah executed John Albert Taylor by firing squad on January 27, 1996).

⁴⁵ See WILLIAM SCHABAS, THE DEATH PENALTY AS CRUEL TREATMENT AND TORTURE 78 (1996).

⁴⁶ See 408 U.S. 238, 238 (1972) (issuing a per curiam decision after hearing the consolidated case of three defendants bring the question: “Does the imposition and carrying out of the death

penalty in [these cases] constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments?”). The Court answered in the affirmative. The Court also stipulated that assuming the establishment of clear guidelines, there can still be no assurance sentencing patterns will change in accordance with its decision, leaving states scrambling to enact new death penalty legislation that provided clear guidelines and standards for the application of death in sentencing. *Id.*

⁴⁷ *Atkins*, 536 U.S. at 304.

⁴⁸ *Id.*

⁴⁹ *Kennedy*, 128 S.Ct. at 2650.

⁵⁰ 18 U.S.C.A. § 1091 (West 2007).

⁵¹ 18 U.S.C.A. § 1203 (West 1996).

⁵² 18 U.S.C.A. § 1201 (West 2006).

⁵³ 18 U.S.C.A. § 1111 (West 2003).

⁵⁴ 18 U.S.C.A. § 2332 (West 1996).

⁵⁵ 18 U.S.C.A. § 2340A (West 2001).

⁵⁶ 18 U.S.C.A. § 2381 (West 1994).

⁵⁷ 18 U.S.C.A. § 1958 (West 2004).

⁵⁸ 18 U.S.C.A. § 2441 (West 2006).

⁵⁹ 18 U.S.C.A. § 351 (West 1996).

⁶⁰ Death Penalty Info, *supra* note 34. The following states permit the imposition of death for Treason: Arkansas, California, Colorado, Georgia, Illinois, Louisiana, Mississippi, Missouri, and Washington.

⁶¹ *Id.* The lone state authorizing death for train wrecking is California.

⁶² *Id.* Florida and Missouri are the only states that have a capital drug trafficking statute.

⁶³ *Id.* Montana makes a convict death eligible for the crime of capital sexual battery.

⁶⁴ *Id.* Georgia and Mississippi have declared that aircraft hijacking is a crime punishable by death.

⁶⁵ Death Penalty Info, *supra* note 33. A person who commits perjury that results in death is a capital offense in California and Idaho.

⁶⁶ *Id.* Colorado, Georgia, Kentucky, Idaho, Illinois, Missouri, and Montana allow the death penalty as a sentence for the crime of aggravated kidnapping.

⁶⁷ *Id.* Missouri is the lone state that makes a person convicted of placing a bomb by a bus terminal eligible for death.

⁶⁸ *Id.* New Mexico is alone in permitting a jury to consider the death penalty in cases of espionage.

⁶⁹ *Id.* Oklahoma, South Carolina, Georgia, Montana, Louisiana, Florida, and Texas permit the imposition of death for the crime of child rape.

⁷⁰ See Capital Punishment Statistics <http://www.ojp.usdoj.gov/bjs/cp.htm> (last visited July 11, 2009) (depicting the statistical analysis of the use of the death penalty).

⁷¹ See *Gregg v. Georgia*, 428 U.S. 153, 189 (1976) (setting forth two broad guidelines that a death penalty statute must adhere to in order to comport with the Eighth Amendment. First, the scheme must provide objective criteria to direct and limit the sentencing discretion). The objectiveness of these criteria must in turn be ensured by appellate review of all death sentences. Second, the scheme must allow the sentence, whether judge or jury, to take into account the character and record of an individual defendant. *Id.*

⁷² See *Coker v. Georgia*, 433 U.S. 584 (1977) (restricting the imposition of the death penalty for the rape of a woman); *Atkins v.*

Virginia, 536 U.S. 304 (2002) (holding unconstitutional the execution of the mentally handicap); *Roper v. Simmons*, 543 U.S. 551 (2005) (concluding capital punishment may not be imposed on minors under the age of eighteen); *Kennedy v. Louisiana*, 128 U.S. 2641 (determining that the execution of a child rapist is unconstitutional).

⁷³ This could be because states are weary that the Court may strike down death penalty legislation.

⁷⁴ Capital Punishment Statistics, *supra* note 70.

⁷⁵ *Id.* There were a total of 51 women on America's death rows, as of December 31, 2007. However, only 11 women have been executed since 1976.

⁷⁶ *Id.* 14% of death row inmates did not reach ninth grade, 37% of inmates had between a ninth and eleventh grade education.

40% of death row inmates had a high school diploma or G.E.D., but only 9% had any college education. *Id.*

⁷⁷ *Id.*

⁷⁸ July 16, 2008.

⁷⁹ Death Penalty Info, *supra* note 34.

⁸⁰ *Id.*

⁸¹ According to the Death Penalty Information Center, *supra* note 34, as of January 1, 2008, California has 667 inmates on their death row, Florida has 397, Texas has 373, Pennsylvania has 228, and Alabama has 203 prisoners on their death row.

⁸² *Id.* (noting that the top five states have 1840 inmates on their collective death rows, however, the remaining 31 states and the federal government's death row only contain 1469 inmates).

⁸³ *Id.* Texas has executed 407 inmates from 1976 through July 16, 2008. During that same period Virginia executed 101 inmates, Oklahoma put to death 87 inmates, Missouri executed 66, and Florida has executed 65. However, the number of Florida executions will climb to 66 with the execution of Richard Henyard on September 23, 2008.

⁸⁴ *Id.* The top five states together have executed 726 prisoners, while the remaining 31 states (and the federal government) have executed just under 300 prisoners.

⁸⁵ See Stephen Hudak, *Court Rejects Richard Henyard's Petition for Relief, Clearing Way for Execution*, ORLANDO SENTINEL, Sept. 10, 2008. Virginia has executed three inmates in 2008; Texas, Georgia, and South Carolina have each executed two inmates; and Oklahoma, Florida, and Mississippi has each executed only one inmate in 2008. *Id.* These numbers are accurate as of September 22, 2008. Richard Henyard's expected execution was in Florida on September 23, 2008. *Id.*

⁸⁶ This is likely in response to the Supreme Court's decision to hear *Baze v. Rees*, 128 S. Ct. 1520 (2008), and the moratorium on state executions it created until decided.

⁸⁷ *Furman v. Georgia*, 408 U.S. at 350.

⁸⁸ *Id.*

⁸⁹ *Coker*, 433 U.S. 584, 598 (1977). Rape is devastating and life is not only unhappy, but rape causes a state of significant depression that is often beyond repair.

⁹⁰ *Id.* at 604.

⁹¹ *Gregg v. Georgia*, 428 U.S. 153, 169 (1976).

⁹² *Coker*, 433 U.S. at 587.

⁹³ *Id.*

⁹⁴ *Id.* (emphasis added).

⁹⁵ *Id.* at 584.

⁹⁶ *Id.* at 585.

⁹⁷ *Coker*, 433 U.S. at 585 (emphasis added).

⁹⁸ *Id.* at 591. The majority did imply that the death penalty was disproportionate to the crime of rape of an adult woman, still it is not cruel and unusual punishment in violation of the Eighth Amendment. *Id.*

⁹⁹ See *id.* at 592 (mandating the application of the evolving standards of decency doctrine).

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 597.

¹⁰² *Id.*

¹⁰³ See *id.* at 594 (noting Florida, Mississippi, and Tennessee authorize the death penalty in some rape cases where child was victim and refusing to strike these statutes the Court left open the use of the death penalty for those whom commit the crime of child rape).

¹⁰⁴ See *Furman*, 408 U.S. at 350 (holding that the imposition and carrying out of the death penalty in [these cases] constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments). The majority noted that a state may not capriciously or discriminatorily apply their death penalty and they must formulate standards and guidelines for the application of capital punishment. *Id.* This decision effectively dismantled the death penalty statute in every state. *Id.*

¹⁰⁵ *Coker*, 433 U.S. at 602.

¹⁰⁶ *Id.* at 603.

¹⁰⁷ *Id.* at 606 (Burger, C.J., dissenting) (emphasis added).

¹⁰⁸ *Id.* at 607.

¹⁰⁹ *Id.* at 610 (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 (1976)).

¹¹⁰ *Coker*, 433 U.S. at 610.

¹¹¹ See, e.g., *Kennedy v. Louisiana*, 128 S. Ct. 2641 (2008) (applying *Coker v. Georgia*, 433 U.S. 584 (1977), the Court held that the Eighth Amendment prohibits the death penalty for the rape of a child when the child's death did not occur).

¹¹² *Id.* at 597 (emphasis added).

¹¹³ *Id.* at 585.

¹¹⁴ *Id.* at 596.

¹¹⁵ See *id.* (holding the death penalty to be an Eighth Amendment violation and a disproportionate penalty for the rape of an adult woman).

¹¹⁶ *Atkins v. Virginia*, 536 U.S. 304, 307 (2002).

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.* at 308.

¹²¹ *Atkins*, 536 U.S. at 309.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.* at 309 n.6.

¹²⁵ *Id.* at 310 (internal quotation marks omitted).

¹²⁶ *Id.* (abrogating its holding in *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989), that the mentally retarded could be executed).

¹²⁷ 492 U.S. 302 (1989).

¹²⁸ *Atkins*, 536 U.S. at 304.

¹²⁹ *Id.* (citing *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958)).

¹³⁰ *Id.* (emphasis added).

¹³¹ *Id.* at 307.

¹³² *Id.* at 312 (citing *Harmelin v. Michigan*, 501 U.S. 957, 1000 (1991) (quoting *Rummel v. Estelle*, 445 U.S. 263, 274-75 (1980))).

¹³³ *Atkins*, 536 U.S. at 312 (quoting *Penry v. Lynaugh*, 492 U.S.

302, 331 (1989)).

¹³⁴ *Id.* at 304 (citing *Coker v. Georgia*, 433 U.S. 584, 597 (1977) (“[T]hus in cases involving a consensus, our own judgment is brought to bear.”)).

¹³⁵ *See id.* at 317 (acknowledging the substantial disagreements involved in determining whether a defendant is in fact mentally retarded).

¹³⁶ *Id.* (quoting *Ford v. Wainwright*, 477 U.S. 399, 416-17 (1986)) (internal quotations omitted).

¹³⁷ *See id.* at 321 (Rehnquist, J., dissenting).

The question presented by this case is whether a national consensus deprives Virginia of the constitutional power to impose the death penalty on capital murder defendants like petitioner, i.e., those defendants who indisputably are competent to stand trial, aware of the punishment they are about to suffer and why, and whose mental retardation has been found an insufficiently compelling reason to lessen their individual responsibility for the crime. *Id.*

The majority claims a national consensus against executing the mentally retarded because eighteen states passed laws limiting death eligibility based on mental retardation alone. Twenty states—including Virginia—leave that consideration to the jury.

¹³⁸ *See Coker v. Georgia*, 433 U.S. 584, 606 (1977) (Burger, C.J., dissenting) (criticizing the unnecessary breadth of the majority’s holding).

¹³⁹ *Atkins*, 536 U.S. at 337 (Scalia, J., dissenting).

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 337-38.

¹⁴² *Id.*

¹⁴³ *See Id.* at 321 (asserting that the Court has no reason to disagree with “the legislatures that have recently addressed” the issue of the death penalty and mental retardation, yet holding that the execution of mentally retarded criminals is unconstitutional).

¹⁴⁴ Christopher Simmons likely said something similar to his accomplices. *Roper v. Simmons*, 543 U.S. 551, 556 (2005) (emphasis added) (“Simmons assured his friends they could “get away with it” because they were minors.”).

¹⁴⁵ 492 U.S. 361 (1989) *abrogated by Roper v. Simmons*, 543 U.S. 551 (2005) (holding that the imposition of capital punishment on an individual for a crime committed at sixteen or seventeen years of age did not violate evolving standards of decency and thus did not violate the Eighth Amendment).

¹⁴⁶ *Roper*, 543 U.S. at 551.

¹⁴⁷ The law set in *Stanford* allowing for the execution of those under age eighteen was decided by a majority consisting of Rehnquist, White, O’Connor, Scalia and Kennedy. Justices Brennan, Marshall, Blackmun, and Stevens dissented. When compared to the Court in *Roper*, only Justice Kennedy changed his stance. In less than two decades, Justice Kennedy has changed position and now says that the death penalty for offenders under eighteen years old is violative of the Eighth Amendment’s prohibition against cruel and unusual punishment. The votes in support of the decision in *Roper* were Stevens, Kennedy, Souter (new member), Ginsburg (new member), and Breyer (new member), while the votes against were Rehnquist, O’Connor, Scalia and Thomas (new member).

¹⁴⁸ *Roper*, 543 U.S. at 563.

¹⁴⁹ *See id.* at 553 (noting that in 1989, twenty-two states allowed the executions of those under eighteen and in 2005, twenty states still allowed for the execution of minors; therefore, any change in public attitude or legislation was so negligible that it could not be considered a trend). However, the Court found such a trend, appearing as though it used its “own judgment” and not that of the people.

¹⁵⁰ *Id.* at 556.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Roper*, 543 U.S. at 556.

¹⁵⁴ *Id.* at 556-57.

¹⁵⁵ *Id.* at 557.

¹⁵⁶ *Id.* at 558.

¹⁵⁷ *See id.* at 551 (contradicting Kennedy’s prior *Stanford* decision, where he joined the majority in holding the capital punishment of minors to be constitutional).

¹⁵⁸ *See Atkins v. Virginia*, 536 U.S. 304, 315 (2002) (acknowledging the significant number of states and the consistency of their legislative direction towards prohibiting the execution of mentally retarded persons as evidence of the national sentiment and consensus).

¹⁵⁹ *Id.* at 314-15.

¹⁶⁰ Terrance P. Jeffrey, *Justice Kennedy Should Stand for Reelection*, HUMANEVENTS.COM, Mar. 14, 2005, available at <http://www.humanevents.com/article.php?id=6798>.

¹⁶¹ As this decision clearly does not follow the “evolving standards of decency” measure, which is defined as the legislation of the states as it represents the clearest and most reliable objective evidence of contemporary values, it must be based on part in the justices bringing to bear their own judgment. *See Coker v. Georgia*, 433 U.S. 584, 597 (1977) (asserting that the attitude of state legislatures and juries in conjunction with the Constitution represent the evolving standards of decency).

¹⁶² *Atkins*, 536 U.S. at 316-17.

¹⁶³ *See Roper* 543 U.S. at 573-74 (identifying the difficulties the courts and psychologists have in determining minors’ objective maturity levels to aid in establishing a bright-line rule regarding age).

¹⁶⁴ *Id.* at 574.

¹⁶⁵ *See Coker*, 433 U.S. at 606 (Burger, J., dissenting) (lambasting the majority’s holding as unnecessarily broad).

¹⁶⁶ *See Roper*, 543 U.S. at 587 (O’Connor, J., dissenting) (criticizing the majority’s decision that the Eighth Amendment prohibits capital punishment for minors).

¹⁶⁷ *Stanford v. Kentucky*, 492 U.S. 361, 380 (1989) *abrogated by Roper v. Simmons*, 543 U.S. 551 (2005) (O’Connor, J., concurring).

¹⁶⁸ *Roper*, 543 U.S. at 587 (O’Connor, J., dissenting).

¹⁶⁹ *Id.* at 588.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 591 (quoting *Stanford*, 492 U.S. at 382 (O’Connor, J., concurring)).

¹⁷² *Id.* at 609 (Scalia, J., dissenting).

¹⁷³ *Id.* at 564 (majority opinion).

¹⁷⁴ *Roper*, 543 U.S. at 610 (emphasis added).

¹⁷⁵ *See id.* at 611 (Scalia, J., dissenting) (noting that every state allows sixteen or seventeen year olds to be treated as adults in relation to non-capital offenses, and some states even require that

juveniles as young as fourteen be tried as adults if they are charged with murder. The following state statutes that establish minors' eligibility to be tried as an adults: ALASKA STAT. § 47.12.030 (2008); HAW. REV. STAT. § 571-22 (2008); IOWA CODE ANN. § 232.45 (2009); ME. REV. STAT. ANN. tit. 15, § 3101(4) (2008); MASS. GEN. LAWS ANN. ch. 119, § 74 (West 2009); MICH. COMP. LAWS ANN. § 764.27 (West 2008); MINN. STAT. ANN. § 260B.125 (West 2009); N.D. CENT. CODE § 27-20-34 (2008); R.I. GEN. LAWS § 14-1-7 (2008); VT. STAT. ANN. tit. 33, § 5516 (2008); W. VA. CODE ANN. § 49-5-10 (West 2008); WIS. STAT. ANN. § 938.18 (West 2007).

¹⁷⁶ *Roper*, 543 U.S. at 615.

¹⁷⁷ *Id.*

¹⁷⁸ *Kennedy v. Louisiana*, 128 S.Ct. 2641, 2646 (2008).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 2647; *see also* LA. REV. STAT. ANN. § 14:42 (1997) (repealed 2008) (authorizing the death penalty for the rape of a child under the age of thirteen).

¹⁸² *Kennedy*, 128 S. Ct. at 2648. At trial, the goddaughter of Kennedy's former wife testified for the State that Kennedy sexually abused her three times when she was eight years old and that the last incident involved sexual intercourse. *Id.*

¹⁸³ *Id.* at 2642.

¹⁸⁴ *Id.* at 2642.

¹⁸⁵ *Id.* at 2644.

¹⁸⁶ *Id.* at 2641 (emphasis added).

¹⁸⁷ *Id.* at 2642 (citing *Coker v. Georgia*, 433 U.S. 584 (1977) and summarizing the reasoning the Louisiana State Supreme Court).

¹⁸⁸ Even though the majority attempts to claim there is a national consensus against allowing the death penalty in cases of child rape, there are no reliable indicia of national consensus—as required by *Atkins v. Virginia*—supporting such a conclusion. However, the results of a recent Quinnipiac University survey, conducted on July 17, 2008, indicated that 55% of those surveyed approve of the imposition of death for child rapists, while only 38% opposed the death penalty under the same circumstances. Quinnipiac University Polling Institute, July 17, 2008 Poll, <http://www.quinnipiac.edu/x1295.xml?ReleaseID=1194> (last visited Apr. 17, 2009). That same survey asked “Which punishment do you prefer for people convicted of murder: the death penalty or life in prison with no chance of parole?” *Id.* In that instance only 47% of people approved of the death penalty for murderers, just 3% more than those that oppose it. *Id.* It is blatantly clear that the national consensus is more in favor of the death penalty for child rapists than for murderers. *Id.*

¹⁸⁹ *See Roper v. Simmons*, 543 U.S. 551, 566 (2005) (affirming the direction of change, rather than the pace of the change, as the primary indication of national consensus); *Atkins v. Virginia*, 536 U.S. 304, 315 (2002) (“It is not so much the number of these States that is significant, but the consistency of the direction of change.”).

¹⁹⁰ LA. REV. STAT. ANN. § 14:42 (2008).

¹⁹¹ *Kennedy*, 128 S. Ct. at 2642.

¹⁹² *See id.* at 2652 (examining Georgia case law, which held that statutory rape is a non-capital crime).

¹⁹³ *See id.* at 2650 (emphasizing that the consensus is not dispositive and the constitutionality of the death penalty also relies on “the Court’s own understanding and interpretation”).

¹⁹⁴ *Id.* at 2660.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 2663.

¹⁹⁷ *See generally* Darkness to Light: Confronting Child Sexual Abuse With Courage, “Getting Help if a Child is Sexually Abused,” <http://www.darkness2light.org/GetHelp/child-sexual-abuse-resources.asp> (last visited Apr. 17, 2009) (finding that almost eighty percent of sexually abused children initially deny abuse and seventy-five percent of those who eventually disclose do so accidentally).

¹⁹⁸ *Id.*

¹⁹⁹ *Kennedy*, 128 S. Ct. at 2673 (Alito, J., dissenting).

²⁰⁰ *Id.*

²⁰¹ *Id.* at 2665.

²⁰² *Id.* at 2665.

²⁰³ *Id.*

²⁰⁴ *Kennedy*, 128 S.Ct. at 2672.

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 2677.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ Lyle Denniston, Supreme Court of the United States Blog, www.scotusblog.com/wp/?s=coker (last visited Mar. 2, 2009).

²¹⁰ *See id.*

²¹¹ *Id.*

²¹² *Id.*

²¹³ *See* Quinnipiac University Poll, *supra* note 187 (confirming Chief Justice Robert’s opinion).

²¹⁴ *Id.*

²¹⁵ *Coker*, 433 U.S. at 604 (Burger, J., dissenting).

²¹⁶ *Id.* at 606.

²¹⁷ *Roper*, 543 U.S. at 571.

²¹⁸ Edward Lazarus, *A Basic Death Penalty Paradox that is Tearing the Supreme Court Apart*, FINDLAW.COM, <http://writ.news.findlaw.com/lazarus/20021031.html> (last visited Mar. 2, 2009).

²¹⁹ Lazarus, *supra* note 217.

²²⁰ *Id.*

²²¹ Lazarus, *supra* note 217.

²²² The Justices are noted in their order of appointment to the Court.

²²³ *See* On the Issues: Every Political Leader on Every Issue, John Paul Stevens on Crime, http://www.ontheissues.org/Court/John_Paul_Stevens_Crime.htm (last visited Mar. 2, 2009).

²²⁴ Linda Greenhouse, *Justice Stevens Renounces Capital Punishment*, N.Y. TIMES, Apr. 18, 2001, available at <http://www.ny-times.com/2008/04/18/washington/18memo.html?ex=1366257600&en=4b5dce3ab9f0c476&ei=5124&partner=permalink&exp=permalink>.

²²⁵ *See* Oyez: U.S. Supreme Court Media, John Paul Stevens profile, http://www.oyez.org/justices/john_paul_stevens (last visited Mar. 2, 2009) [hereinafter Oyez, Stevens].

²²⁶ 128 S. Ct. 1520 (2008).

²²⁷ *Baze*, 128 S. Ct. at 1547 (Stevens, J., concurring) (renouncing his support for the death penalty); *see also* Greenhouse, *supra* note 223.

²²⁸ The University of Chicago, The Law School, Cass Sunstein Faculty Profile, available at <http://www.law.uchicago.edu/faculty/sunstein> (last visited Mar. 2, 2009).

²²⁹ Cass Sunstein & Justin Wolfers, *A Death Penalty Puzzle, the*

Murky Evidence for and Against Deterrence, WASH. POST, June 30, 2008, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/06/29/AR2008062901476.html> (last visited Mar. 2, 2009).

²³⁰ *Atkins*, 536 U.S. at 315.

²³¹ 356 U.S. 86, 86 (1958).

²³² See *Coker v. Georgia*, 433 U.S. 584, 593 (1977) (declaring, “[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. At no time in the last 50 years have a majority of the States authorized death as a punishment for rape. In 1925, 18 States, the District of Columbia, and the Federal Government authorized capital punishment for the rape of an adult female.”).

²³³ See *Atkins*, 536 U.S. at 315-16.

²³⁴ See *Kennedy*, 128 S. Ct. at 2651 (noting that the trend among state Legislatures was the enactment of child rape death penalty statutes).

²³⁵ See *Coker*, 433 U.S. at 613 (Burger, C.J., dissenting) (quoting Justice Stevens from his decision in *Gregg v. Georgia*, 428 U.S. 153 (1976)).

²³⁶ *Gregg v. Georgia*, 428 U.S. 153, 153 (1976).

²³⁷ See The Political Inquirer, “John Paul Stevens Opposes “Death Penalty” on Procedure and Fairness Issues”, available at <http://politicalinquirer.com/2008/04/18/john-paul-stevens-opposes-death-penalty/> (last visited Mar. 2, 2009).

²³⁸ *Id.*

²³⁹ Oyez: U.S. Supreme Court Media, Antonin Scalia profile, available at http://www.oyez.org/justices/antonin_scalia (last visited Mar. 2, 2009) [hereinafter Oyez, Scalia].

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² See *Atkins*, 536 U.S. 304, 304 (2002).

²⁴³ *Id.* at 338 (Scalia, J., dissenting).

²⁴⁴ *Id.* at 341 (Scalia, J., dissenting (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 865 (Scalia, J., dissenting))).

²⁴⁵ See CNN, Defense Says McVeigh Neither ‘a Monster or a Demon,’ available at <http://www.cnn.com/US/9706/06/mcveigh.wrap/index.html> (last visited Apr. 18, 2009).

²⁴⁶ Kate Randall, *US Supreme Court Justice Scalia on capital punishment: “Death is no big deal,”* Jul. 5, 2002, available at <http://www.wsws.org/articles/2002/jul2002/scal-j05.shtml> (last visited Apr. 18, 2009).

²⁴⁷ *Atkins*, 536 U.S. at 352-53 (Scalia, J., dissenting).

²⁴⁸ *Roper*, 543 at 629-30 (2005) (Scalia, J., dissenting).

²⁴⁹ *Id.*

²⁵⁰ See Nina Totenberg, *Justice Scalia, the Great Dissenter, Opens Up*, NPR, Apr. 28, 2008, available at <http://www.npr.org/templates/story/story.php?storyId=89986017> (quoting Justice Scalia, “I’m an originalist and a textualist, not a nut.”).

²⁵¹ Oyez: U.S. Supreme Court Media, Anthony Kennedy profile, available at http://www.oyez.org/justices/anthony_kennedy/ (last visited Mar. 2, 2009).

²⁵² *Id.* President Reagan’s first choice was the ultraconservative Robert Bork. It was Bork’s conservatism that stopped him from being confirmed. Reagan’s second choice was Douglas Ginsburg, a member of the D.C. Court of Appeal. Ginsburg removed his name from consideration after only nine days when rumors concerning his past marijuana use surfaced. Edwin Meese was

President Reagan’s counselor and a member of the National Security Council. Meese was friends with Kennedy since they met in California in the 1960’s when Kennedy was a lobbyist. *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Stanford*, 492 U.S. at 361.

²⁵⁶ *Roper*, 543 U.S. at 551.

²⁵⁷ See *Stanford*, 492 U.S. at 362.

²⁵⁸ *Id.* at 378.

²⁵⁹ *Roper* 543 U.S. at 578.

²⁶⁰ *Id.* at 578 (emphasis added).

²⁶¹ Oyez: U.S. Supreme Court Media, David Souter profile, available at http://www.oyez.org/justices/david_h_souter (last visited Mar. 2, 2009) [hereinafter Oyez, Souter].

²⁶² *Id.* At the time of Justice Souter’s appointment to the Supreme Court, little was known about him or his positions. *Id.*

²⁶³ *Id.*

²⁶⁴ Oyez, Souter, *supra* note 261.

²⁶⁵ *Kansas v. Marsh*, 548 U.S. 163, 163 (2006).

²⁶⁶ *Id.* at 207

²⁶⁷ See Charles Lane, *Justices Clash Over Death Penalty Case*, WASH. POST, June 27, 2006, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/06/26/AR2006062600410.html> (last visited Mar. 2, 2009) (discussing the Supreme Court’s ruling in *Kansas v. Marsh*, which upheld the death penalty in Kansas).

²⁶⁸ *Clarence Thomas: Two Years of Court Silence*, ASSOCIATED PRESS, Feb. 25, 2008, available at <http://www.msnbc.msn.com/id/23335249/> (last visited Apr. 18, 2009) [hereinafter *Clarence Thomas*].

²⁶⁹ See Oyez: U.S. Supreme Court Media, Clarence Thomas profile, available at http://www.oyez.org/justices/clarence_thomas/ (last visited Mar. 2, 2009) [hereinafter Oyez, Thomas].

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ See *Kennedy*, 128 S. Ct. at 267.

²⁷⁵ See *Nomination of Clarence Thomas to the Supreme Court, Senate Confirmation Hearings* (Sept. 10, 1991) (questioning by Sen. Strom Thurmond) [hereinafter *Thomas Confirmation Hearings*].

²⁷⁶ *Thomas Confirmation Hearings*, *supra* note 274.

²⁷⁷ Oyez: U.S. Supreme Court Media, Ruth Bader Ginsburg profile, available at http://www.oyez.org/justices/ruth_bader_ginsburg/ (last visited Mar. 2, 2009) [hereinafter Oyez, Ginsburg].

²⁷⁸ Oyez, Ginsburg, *supra* note 276.

²⁷⁹ *Id.*

²⁸⁰ *Ginsburg Backs Ending Death Penalty*, ASSOCIATED PRESS, Apr. 9, 2001, available at <http://www.truthinjustice.org/ginsburg.htm> (last visited Mar. 2, 2009) [hereinafter Ginsburg, Associated Press].

²⁸¹ *Id.*

²⁸² *Id.* (quoting Justice Ginsburg as saying, “I have yet to see a death case among the dozens coming to the Supreme Court on eve-of-execution stay applications in which the defendant was well represented at trial”).

²⁸³ Oyez: U.S. Supreme Court Media, Stephen G. Breyer profile, available at http://www.oyez.org/justices/stephen_g_breyer/ (last visited Mar. 2, 2009) [hereinafter Oyez, Breyer].

²⁸⁴ See Cass Sunstein, *Justice Breyer's Democratic Pragmatism*, 115 Yale L.J. 1719, 1726 (2006).

²⁸⁵ *Id.*

²⁸⁶ See *Atkins*, 536 U.S. 304, 304 (2002).

²⁸⁷ See *Roper*, 543 U.S. 551, 551 (2005).

²⁸⁸ See *Kennedy*, 128 S.Ct. 2641, 2641 (2008).

²⁸⁹ Denniston, *supra* note 209.

²⁹⁰ See Denniston, *supra* note 209 (showing Justice Breyer's opposition to capital punishment when the crime does not result in the death of a victim. However, Justice Breyer has not renounced, absolutely, the death penalty).

²⁹¹ See Oyez: U.S. Supreme Court Media, John Roberts profile, available at http://www.oyez.org/justices/john_g_roberts_Jr/ (last visited Mar. 2, 2009) [hereinafter Oyez, Roberts].

²⁹² Oyez, Roberts *supra* note 290.

²⁹³ See Cass Sunstein, *The Minimalist*, L.A. TIMES, May 25, 2006, at B11, available at <http://www.law.uchicago.edu/sunstein-minimalism-roberts.html> (last visited Mar. 2, 2009).

²⁹⁴ See generally, *Kennedy*, 128 S.Ct. 2641(2008); *District of Columbia v. Heller*, 554 U.S. 290 (2008); and *Gonzales v. Carhart*, 550 U.S. 124 (2007) (providing helpful background information showing Chief Justice Roberts' voting record with the Court's conservative Justices Scalia, Thomas and Alito on issues such as the death penalty, gun control and abortion).

²⁹⁵ See *Kennedy*, 128 S. Ct. at 2665 (Alito, J., dissenting) (joining in Justice Alito's dissent was Chief Justice Roberts).

²⁹⁶ *Id.*

²⁹⁷ See *Id.* at 2644 (Alito, J., dissenting) (criticizing the court: "[T]he Court concludes, in its independent judgment, that the death penalty is not a proportional punishment for the crime of child rape . . . [t]he Court's own judgment should be brought to bear on the death penalty's acceptability under the Eighth Amendment").

²⁹⁸ *Id.* at 2672.

²⁹⁹ See Oyez: U.S. Supreme Court Media, Samuel Alito profile, available at http://www.oyez.org/justices/samuel_a_alito_Jr/ (last visited Mar. 2, 2009) [hereinafter Oyez, Alito].

³⁰⁰ *Id.*

³⁰¹ See *Nomination of Samuel Alito to the Supreme Court, Senate Confirmation Hearings*, 109 Cong. 277 (2006) [hereinafter Alito Confirmation Hearings].

³⁰² Sentencing and Law Policy, *Alito and Feingold discuss the death penalty*, Nov. 10, 2005 available at http://sentencing.typepad.com/sentencing_law_and_policy/2005/11/alito_and_feing.html (last visited Apr. 19, 2009).

³⁰³ *Id.*

³⁰⁴ *Kennedy*, 128 S.Ct. at 2673 (Alito, J., dissenting).

³⁰⁵ *Id.* at 2677.

³⁰⁶ See *Kennedy*, 128 S.Ct. at 2672 (Alito, J., dissenting) (stating how Louisiana and other states are adopting harsher laws against child rape).

³⁰⁷ *Id.* at 2676-77.

³⁰⁸ *Id.* at 2673.

³⁰⁹ See 128 S. Ct. at 2677 (Alito, J., dissenting) (finding that "[i]t is the judgment of the Louisiana lawmakers and those in an increasing number of other States that these harms justify the death penalty. The Court provides no cogent explanation why this legislative judgment should be overridden.").

³¹⁰ *Id.* at 2673.

³¹¹ See Greenhouse, *supra* note 224; Lane, *supra* note 267; Gins-

burg, Associated Press, *supra* note 280.

³¹² See Denniston, *supra* note 209.

³¹³ See Bill Mears, *Justice Kennedy works on his swing*, CNN.com, Sept. 29, 2008 available at <http://www.cnn.com/2006/LAW/09/25/scotus.kennedy/index.html> (indicating that Justice Kennedy is seen as being the decisive vote in many Supreme Court decisions) (last visited Apr. 19, 2009).

³¹⁴ Cases in which Justices Scalia Thomas voted together in support of the death penalty include *Atkins*, 536 U.S. 304, 304 (2002), *Roper*, 543 U.S. 551, 551 (2005) and *Kennedy*, 128 S. Ct. 2641, 2641 (2008).

³¹⁵ See *Kennedy*, 128 S. Ct. 2641, 2665 (2008) (dissenting from the majority that struck down a Louisiana law permitting the death penalty for child rapists).

³¹⁶ See *Kennedy*, 128 S. Ct. 2641, 2641(2008), *District of Columbia v. Heller*, 554 U.S. 290, 290 (2008) and *Gonzales v. Carhart*, 550 U.S. 124, 124 (2007) (noting court opinions where Roberts has voted with the Court's conservative Justices Scalia, Thomas and Alito on issues such as the death penalty, gun control and abortion).

³¹⁷ *Kennedy*, 128 S. Ct. 2641, 2644 (2008).

³¹⁸ See Oyez, Ginsburg, *supra* note 277; Oyez, Stevens, *supra* note 225.

³¹⁹ See Oyez: U.S. Supreme Court Media, Anthony Kennedy profile, available at http://www.oyez.org/justices/anthony_kennedy/ (last visited Mar. 2, 2009) (Justice Kennedy is 72); Oyez, Souter, *supra* note 261 (Justice Souter is 69); Oyez, Breyer, *supra* note 283 (Justice Breyer is 70). The average of these three ages roughly amounts to 70.

³²⁰ Oyez, Scalia, *supra* note 239.

³²¹ See Oyez, Alito, *supra* note 298 (Justice Alito is 59); Oyez, Roberts *supra* note 299 (Justice Roberts is 54); Oyez, Thomas, *supra* note 269 (Justice Thomas is 60). The average of these three ages roughly amounts to 58.

³²² Letter from Justice David H. Souter to President Barack Obama (May 1, 2009), available at www.scribd.com/doc/14839021/Souters-Letter (last visited July 12, 2009).

³²³ Major Garrett et al., *Obama Nominates Judge Sonia Sotomayor for Supreme Court Justice*, FOXNews.com, May 26, 2009, www.foxnews.com/politics/2009/05/26/obama-announce-supreme-court-nominee-tuesday-morning/ (last visited July 12, 2009).

³²⁴ *Id.*

³²⁵ *Id.*

³²⁶ *Id.*

³²⁷ Michael Doyle & Marisa Taylor, *Sotomayor, Tough-Minded yet True to Her Roots, Defies Simple Labeling*, Miami Herald, July 12, 2009, available at www.miamiherald.com/news/politics/AP/story/1138243.html (last visited July 12, 2009).

³²⁸ *Furman*, 408 U.S. at 308.

³²⁹ U.S. CONST. amend. V. (emphasis added).

³³⁰ *Trop v. Dulles*, 356 U.S. 86, 99-101(1958).

³³¹ Landon Webber, *Victims Ignored and Justice Denied, Because of Supreme Court's 'Evolving Standards'*, Jun. 27, 2008 available at <http://www.writeidea.org/2008/06/victims-ignored-and-justice-denied.html> (last visited Apr. 19, 2009).

³³² *Id.*

³³³ See *Coker*, 433 U.S. at 584 (ruling that state legislatures cannot make child rape a capital crime).