EVOLVING STANDARDS UNDER PRESSURE: KENNEDY V. LOUISIANA *AND THE RETURN OF CHILD RAPE DEATH PENALTY STATUTES*

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ABSTRACT

Eighth Amendment jurisprudence presupposes a confidence in moral progress that may be unwarranted. In applying the "evolving standards of decency test," the Supreme Court routinely assumes that society inexorably progresses toward greater moral enlightenment. Recent state legislation authorizing the death penalty for child rape challenges this assumption and the constitutional limits established in *Kennedy v. Louisiana*.

Doctrinal inconsistencies in the Court's categorical exemption cases preceding *Kennedy* produced a decision that intruded upon legislative authority while exposing the test's core weaknesses. The *Kennedy* decision, coupled with the newly enacted state legislation, has reignited debate over the Court's long held assumption and the proper degree of deference it should afford state legislatures. While the evolving standards of decency test remains an important mechanism for assessing Eighth Amendment claims, its inconsistent application and encroachment on legislative authority signal a need for reform.

This Note analyzes how recent legislative efforts to reinstate the death penalty for child rape have placed pressure on the Court to reexamine the evolving standards of decency test. Additionally, it advocates a narrow reconsideration of *Kennedy* and proposes a refinement of the test to promote doctrinal coherence, enhance predictability, and ensure appropriate deference to state legislatures.

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1. INTRODUCTION

"Rape has a permanent psychological, emotional, and sometimes physical impact on the child."[1] "[T]he victim's fright, the sense of betrayal, and the nature of her injuries [cause] more prolonged physical and mental suffering than, say, a sudden killing by an unseen assassin."[2] The rape of a young child robs them of the very innocence that defines childhood. It exploits the child's vulnerability and naivety for the gratification of the perpetrator. The social and psychological effects of child rape are particularly damaging when the perpetrator is a family member.[3] Yet, in *Kennedy v. Louisiana*, the Supreme Court paradoxically and erroneously determined that the brutal rape of an eight-year-old child by her stepfather did not justify the ultimate punishment.[4]

Kennedy illustrates the shortcomings of the "evolving standards of decency test" in determining what constitutes "cruel and unusual" punishment under the Eighth Amendment.[5] First articulated in *Trop v. Dulles*[6] and further defined in *Gregg v. Georgia*, the evolving standards of decency test involves two prongs: (1) the examination of "objective indicia that reflect the public attitude toward a given sanction," and (2) the Court's independent judgment of whether the punishment is disproportionate in light of the penological goals of retribution and deterrence.[7] Since *Gregg*, the Court has employed this framework to establish several categorical exemptions to the death penalty, often with inconsistent methodological justification.[8] These

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1 Kennedy v. Louisiana, 554 U.S. 407, 435 (2008).

2 *Id.*

3 SARA SCOTT, CTR. OF EXPERTISE ON CHILD SEXUAL ABUSE, KEY MESSAGES FROM RESEARCH ON INTRA-FAMILIAL CHILD SEXUAL ABUSE 6 (2023), https://perma.cc/Z6X4-Z25X.

4 *See* 554 U.S. at 413.

5 U.S. CONST. amend. VIII.

6 356 U.S. 86, 100–01 (1958).

7 428 U.S. 153, 173, 183 (1976) (plurality opinion).

8 *See* Coker v. Georgia, 433 U.S. 584, 599 (1977) (plurality opinion) (holding that the death penalty is a disproportionate punishment for the rape of an adult woman). *Compare* Enmund v. Florida, 458 U.S. 782, 788 (1982) (holding that the Eighth Amendment bars the death penalty for a felony-murder accomplice who neither killed, attempted to kill, nor intended that a killing occur), *with* Tison v. Arizona, 481 U.S. 137, 138 (1987) (holding that the death penalty may be imposed on a felony-murder participant who was a major participant in the felony and acted with reckless indifference

inconsistencies culminated in *Kennedy*, where the majority selectively emphasized certain considerations while introducing others without clear doctrinal grounding.[9] After contorting numbers to manufacture a national consensus against the death penalty for child rape, the Court grounded its independent judgment analysis in novel considerations untethered from prior categorical exemption precedent.[10] The result was a usurpation of legislative authority and a replacement of the democratically expressed moral judgments of six states with those of five unelected Justices. The *Kennedy* decision demonstrates how the test can enable judicial subjectivity, disregard democratic processes, and foster unpredictability.

Amid the extensive criticism, a central debate has emerged over whether the Court's assumption that societal morals move only toward greater enlightenment is unfounded.[11] Notably, contrary to this assumption, harsher punishments have accompanied[12] the rise of child sex offenses.[13] Several states have created mandatory minimum sentences for child sex offenses, and others even permit chemical or surgical castration.[14] Most recently, several states have challenged the constitutional limits established in *Kennedy* by enacting laws authorizing the death penalty for certain child rape offenses.[15] This development has reignited a broader debate over the degree

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to human life, irrespective of whether the participant intended to kill); *compare* Penry v. Lynaugh, 492 U.S. 302, 307 (1989) (holding that the Eighth Amendment did not categorically bar executing individuals with intellectual disabilities), *with* Atkins v. Virginia, 536 U.S. 304, 321 (2002) (holding that the Eighth Amendment prohibits executing individuals with intellectual disabilities); *compare* Stanford v. Kentucky, 492 U.S. 361, 380 (1989) (holding that the Eighth Amendment did not categorically bar executing offenders who were 16 or 17 at the time of their crimes), *with* Roper v. Simmons, 543 U.S. 551, 578 (2005) (holding that the Eighth Amendment prohibits executing offenders who were under 18 at the time of their crimes).

9 *See* 554 U.S. at 431–33, 442–45.

10 *Id.*

11 Kathryn E. Miller, *No Sense of Decency*, 98 WASH. L. REV. 115, 136 (2023).

12 Luke Fraser, Note, *Supreme Court Finds an Inexact Consensus to Spare Child Rapist: A Critical Examination of* Kennedy v. Louisiana, 47 HOU. L. REV. 215, 218 (2010).

13 SCOTT, *supra* note 3, at 7.

14 Fraser, *supra* note 12, at 218.

15 Alexandra L. Klein, Kennedy v. Louisiana *and the Future of the Eighth Amendment*, 52 PEPP. L. REV. 293, 332 (2025).

of deference the Court should afford state legislatures in an area traditionally reserved to the states.[16]

While the evolving standards of decency test remains an important mechanism for assessing Eighth Amendment claims, its inconsistent application and encroachment on legislative authority signal a need for reform. Moreover, the newly enacted state statutes, combined with the Court's recent shift toward originalism, suggest that reconsideration of *Kennedy* and a refinement or replacement of the test may be imminent.[17] This Note advocates applying the *Atkins* approach under the first prong of the evolving standards test, focusing on the consistent direction of legislative change, while conducting a fact-specific analysis under the second prong.

Part 2 discusses the origins and historical development of the evolving standards of decency test. Part 3 critiques the Court's flawed application of the test in *Kennedy v. Louisiana*, examines recent legislative efforts to reinstate the death penalty for child rape, and addresses the tension between affording state legislatures appropriate deference and ensuring that constitutional limits are upheld. Part 4 argues for a reconsideration of *Kennedy* on narrow grounds along with a refinement of the test to provide doctrinal coherence, enhance predictability, and ensure appropriate deference to state legislatures.

2. THE EVOLVING STANDARDS OF DECENCY TEST

2.1. Origins of the Evolving Standards of Decency Test

The Supreme Court's early interpretations of the Eighth Amendment's Cruel and Unusual Punishment Clause were marked by inconsistency, largely due to the clause's vague language and limited historical context.[18] The Eighth Amendment provides, "Excessive bail shall not be required, nor

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16 Letter from James Uthmeier, Att'y Gen. of Fla., to Pamela Bondi, Att'y Gen. of U.S., Laws Authorizing Capital Punishment for Child Rape 3 (Sep. 2, 2025) [hereinafter Uthmeier Letter], https://perma.cc/VXS3-GK3K (joined by the Attorneys General of 14 other states).

17 Meghan J. Ryan, *The Death of the Evolving Standards of Decency*, 51 FLA. ST. U. L. REV. 255, 286 (2024).

18 *Id.* at 263.

excessive fines imposed, nor cruel and unusual punishments inflicted."[19] The Amendment has been incorporated against the states through the Fourteenth Amendment.[20] Despite early disagreements over whether the Eighth Amendment extended beyond barbaric methods of punishment to prohibit excessive punishment, the Court consistently held torturous punishments to be unconstitutional.[21]

It was not until a 1910 case, *Weems v. United States*, that the Court confirmed the Eighth Amendment's ban of excessive, disproportionate punishment and declared that the Amendment "may acquire meaning as public opinion becomes enlightened by a humane justice."[22] This was the Court's first recognition that the Eighth Amendment's meaning could evolve over time, laying the foundation for the approach formalized in *Trop v. Dulles* nearly fifty years later.[23] In *Trop*, the Court emphasized that "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man," concluding that "[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[24] This represented the official birth of the "evolving standards of decency test," which would become a central framework in Eighth Amendment jurisprudence.

Although *Weems* and *Trop* were not capital punishment cases, the test was officially applied to the death penalty context in *Furman v. Georgia*, where a majority of the Justices concluded that the death penalty was carried out in an arbitrary manner.[25] Despite the fractured nature of the Court's opinion, the Justices endorsed the principle that the Eighth Amendment's meaning must evolve as society progresses.[26] *Furman* invalidated all existing

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19 U.S. CONST. amend. VIII.

20 Robinson v. California, 370 U.S. 660, 666 (1962) (holding that imposing punishment for an individual's narcotics addiction is unconstitutional).

21 *See* Ryan, *supra* note 17, at 264; Gregg v. Georgia, 428 U.S. 153, 170–71 (1976) (plurality opinion).

22 217 U.S. 349, 367, 378 (1910); *see also Robinson*, 370 U.S. at 666–67 (interpreting cruel and unusual punishment "in light of contemporary human knowledge").

23 Ryan, *supra* note 17, at 265–66.

24 Trop v. Dulles, 356 U.S. 86, 100–01.

25 408 U.S. 238, 239–40 (1972) (per curiam).

26 *Id.* at 242 (Douglas, J., concurring); *id.* at 269–70 (Brennan, J., concurring); *id.* at 329 (Marshall, J., concurring); *id.* at 383 (Burger, C.J., dissenting); *id.* at 409 (Blackmun, J., dissenting); *id.* at 429–30 (Powell, J., dissenting).

death penalty statutes[27] and sparked a major reform in death penalty legislation, with 36 states and the federal government enacting new death penalty statutes.[28]

Four years later, in *Gregg v. Georgia*, the Court upheld Georgia's newly enacted death penalty statute[29] and expanded upon the evolving standards of decency framework by adopting a two-step approach.[30] The first step involves examining the "objective indicia that reflect the public attitude toward a given sanction" to determine whether a national consensus exists against a particular punishment.[31] Here, the Court primarily examines legislative enactments and the actions of sentencing juries.[32] Legislative enactments are natural indicators of society's acceptance of the particular punishment.[33] The actions of sentencing juries can demonstrate that a punishment, while still authorized by law, may have fallen out of favor due to its infrequent imposition.[34] Yet the *Gregg* Court made clear that national consensus alone is not conclusive; rather, the Court must also exercise its own judgment in determining the constitutionality of a punishment.[35] Thus, the second step involves the Court exercising its independent judgment to determine whether the punishment comports with existing standards of decency.[36] In particular, the Court looks to "the Eighth Amendment's text, history, meaning, and purpose"[37] to assess whether the punishment is excessive or disproportionate in light of the penological goals of retribution and deterrence.[38] Nevertheless, the *Gregg* Court emphasized its distinct role from that of state legislatures, noting that "in assessing a punishment selected by a democratically elected legislature against the constitutional measure, [the Court] presumes its

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27 BRANDON L. GARRETT & LEE B. KOVARSKY, THE DEATH PENALTY 13 (Robert C. Clark et al. eds., 2018).

28 *Id.* at 22.

29 428 U.S. 153, 207 (1976) (plurality opinion).

30 *Id.* at 173–76.

31 *Id.* at 173.

32 Ian P. Farrell, *Strict Scrutiny Under the Eighth Amendment*, 40 FLA. ST. U. L. REV. 853, 861–62 (2013).

33 *Id.*

34 *Id.*

35 *Gregg*, 428 U.S. at 173 (plurality opinion).

36 Farrell, *supra* note 32, at 870.

37 Kennedy v. Louisiana, 554 U.S. 407, 421 (2008).

38 *Gregg*, 428 U.S. at 173, 183 (plurality opinion); Farrell, *supra* note 32, at 872.

validity."[39] This two-step approach to evaluating the constitutionality of death penalty statutes has persisted over the past four decades.[40]

2.2. Development of the Evolving Standards of Decency Test: Exemption Cases

Following the Court's initial formulation of the evolving standards of decency test, a series of decisions carving out categorical exemptions to the death penalty emerged. The Court has primarily identified three types of categorical exemptions: (1) those based on the defendant's characteristics, (2) those based on the nature of the offense, and (3) those involving statutes that impose mandatory death sentences.[41] Together, these exemption cases reveal the Court's inconsistent application of the evolving standards test by demonstrating its pattern of selectively applying certain objective criteria while disregarding other criteria to support its preferred outcome.[42] Under the subjective prong, the Court further justifies an exemption by reasoning that diminished moral culpability, based on either the defendant's characteristics or the nature of the offense, reduces the defendant's blameworthiness and renders the death penalty disproportionate.[43]

2.2.1. Rape: *Coker v. Georgia*

Coker v. Georgia was the first categorical offense exemption case that the Court decided upon after *Furman* and *Gregg*. The Court held that the rape of an *adult* woman was categorically exempt from the death penalty, concluding that a national consensus existed against such a punishment and that imposing it in this context would be grossly disproportionate to the offense.[44] Petitioner Coker had previously been convicted of "murder, rape,

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39 *Gregg*, 428 U.S. at 175 (plurality opinion).

40 Ryan, *supra* note 17, at 286 (noting that the last time the Court mentioned the evolving standards of decency test was in its 2017 case *Moore v. Texas*, 581 U.S. 1, 12 (2017)).

41 GARRETT & KOVARSKY, *supra* note 27, at 65.

42 *See id.* at 69–70.

43 *Id.* at 66–67.

44 433 U.S. 584, 599 (1977) (plurality opinion).

kidnapping, and aggravated assault."[45] While serving time for those offenses, Coker escaped prison, broke into the Carver home, tied up Mr. Carver, raped Mrs. Carver, and drove off in the Carvers' car after forcing Mrs. Carver into the car with him.[46] He was later "charged with escape, armed robbery, motor vehicle theft, kidnapping, and rape."[47]

Under Georgia law, capital punishment for rape was permitted if the jury found at least one of the three statutory aggravating factors to exist:

> (1) that the rape was committed by a person with a prior record of conviction for a capital felony; (2) that the rape was committed while the offender was engaged in the commission of another capital felony, or aggravated battery; or (3) the rape "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or aggravated battery to the victim."[48]

The jury found the first two aggravating factors existed and sentenced Coker to death.[49] The Georgia Supreme Court affirmed.[50] Coker appealed, arguing that the death penalty for the crime of rape was cruel and unusual under the Eighth Amendment.[51]

The Court asserted that its decision "should be informed by objective factors to the maximum possible extent" and that it must exercise its independent judgment to determine whether the punishment is grossly disproportionate to the offense.[52] The Court first looked to legislative enactments and concluded that there was a national consensus against imposing the death penalty for the rape of an adult woman.[53] The Court found it particularly significant that Georgia was the only state that permitted the death penalty for the rape of an adult woman.[54] Before *Furman*, 16 states and the federal government authorized the death penalty for the rape of an adult

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45 *Id.* at 587.
46 *Id.*
47 *Id.*
48 *Id.* at 598–99.
49 *Id.* at 591.
50 *Id.* at 586.
51 *Id.*
52 *Id.* at 592.
53 *Id.* at 596.
54 *Id.* at 595–96.

woman.[55] After *Furman*, no state that had not previously authorized the death penalty for rape chose to do so, and only three states that had previously authorized it chose to reinstate it.[56] However, because the Court decided in *Woodson v. North Carolina*[57] and *Roberts v. Louisiana*[58] that mandatory death sentences were unconstitutional, two of those three statutes were invalid.[59] Additionally, the Court noted that of the 63 rape cases reviewed by the Supreme Court of Georgia after *Furman*, only 6 had resulted in a death sentence.[60]

The all-male Court proceeded to assert its primacy by stating that the objective indicators strongly *confirmed its independent judgment*.[61] The Court concluded, "It is difficult to accept the notion, and we do not, that the rapist, with or without aggravating circumstances, should be punished more heavily than the deliberate killer as long as the rapist does not himself take the life of his victim."[62] Therefore, the Court held that regardless of the crime being serious, highly reprehensible, the "ultimate violation of self," a public injury, and physically and psychologically damaging, the death penalty was a disproportionate punishment for the rape of an adult woman.[63] Despite the Court's comment concerning aggravating factors, it noted that Georgia's definition of rape "does not include the death of or even serious injury to another person," raising the question of whether the Court would have reached a different conclusion had the definition included serious physical harm.[64] Two of the six Justices in the majority concurred merely because of their staunch belief that the death penalty is unconstitutional *per se*.[65]

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55 *Id.* at 593.
56 *Id.* at 594.
57 428 U.S. 280, 301–05 (1976) (plurality opinion).
58 428 U.S. 325, 335–36 (1976) (plurality opinion).
59 *Coker*, 433 U.S. at 594.
60 *Id.* at 596.
61 *Id.* at 597.
62 *Id.* at 600.
63 *Id.* at 597–98.
64 *Id.* at 598.
65 *Id.* at 600 (Brennan, J., concurring in judgment) ("Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, I concur in the judgment of the Court setting aside the death sentence imposed under the Georgia rape statute." (citation omitted)); *id.* at 600 (Marshall, J., concurring in judgment) ("The death penalty, I concluded, is a cruel

The dissent criticized the Court for substituting its own policy judgment for that of the Georgia legislature, refusing to adopt a guided discretion framework like the one applied in murder cases, and failing to give proper weight to the severity of the offense.[66] The dissent also correctly recognized the sweeping implication of the Court's decision: that the death penalty may only be imposed for crimes that result in the victim's death.[67] This decision laid the groundwork for what would later become the Court's deeply flawed ruling in *Kennedy v. Louisiana*.

2.2.2. Felony Murder

After *Coker*, the Court proceeded to establish a categorical offense exemption for felony murder.[68] In *Enmund v. Florida*, the petitioner acted as the getaway driver for two individuals who committed an armed robbery during which two others were murdered.[69] The Court held that it was unconstitutional under the Eighth and Fourteenth Amendments to impose the death penalty on an accomplice who did not kill, attempt to kill, or intend to kill.[70] Under the objective prong, the Court noted that only 8 of the 36 states that permitted the death penalty allowed for its imposition under such circumstances,[71] and that only one-third of all states would allow a defendant who participated in a robbery in which a murder occurred to be sentenced to death.[72] The Court also observed that of the 362 executions for murder between 1954 and 1982, only 6 involved defendants who did not personally kill the victim or hire someone to kill the victim.[73] Additionally, of the 796 inmates sentenced to death for homicide nationwide, only 3 were

and unusual punishment prohibited by the Eighth and Fourteenth Amendments." (quoting Gregg v. Georgia, 428 U.S. 153, 231 (1976) (Marshall, J., dissenting)) (internal quotation marks omitted)).

66 *Id.* at 604, 608–10 (Burger, C.J., dissenting).
67 *Id.* at 621.
68 GARRETT & KOVARSKY, *supra* note 27, at 75.
69 458 U.S. 782, 784–85 (1982).
70 *Id.* at 801.
71 *Id.* at 789.
72 *Id.* at 792.
73 *Id.* at 794.

sentenced without a finding that they either hired someone to kill the victim or participated in a plan to kill the victim.[74]

Under the subjective prong, the Court emphasized that attention should be given to the individual's culpability because the Constitution requires an individualized consideration of the offender's character and record before imposing the death penalty.[75] The Court reasoned that imposing the death penalty on the petitioner would have little deterrent effect because he neither killed nor intended to kill and had no reason to anticipate the murders.[76] Additionally, the Court explained that the petitioner's culpability must be limited to his participation in the robbery and assessed based on his personal responsibility and moral guilt.[77] Because the criminal justice system imposes harsher punishments on those who act with the intent to kill, the Court reasoned that his culpability was significantly less than that of his accomplices who committed the murder.[78]

The Court revisited the issue in *Tison v. Arizona*.[79] In refining the rule established in *Enmund*, the Court held that regardless of whether the offender intended the murder, if their participation in the crime was major and they acted with a reckless indifference to the value of human life, they may be sentenced to death.[80] Under the objective prong, the Court looked to legislative enactments and lower court interpretations of *Enmund* without considering jury action.[81] Of the 37 states that authorized capital punishment,[82] the Court found that 21 permitted the death penalty where "the defendant was a major actor in a felony in which he knew death was highly likely to occur."[83] Additionally, the Court observed that only 11 of the 37 states prohibited the death penalty for offenders who were major participants in a

74 *Id.* at 795.
75 *Id.* at 798.
76 *Id.* at 798–800.
77 *Id.* at 801.
78 *Id.* at 800–01.
79 481 U.S. 137, 138 (1987).
80 *Id.* at 158.
81 *See id.* at 153–55.
82 LAWRENCE A. GREENFELD, BUREAU OF JUST. STAT., CAPITAL PUNISHMENT 1987, at 4 (1988), https://perma.cc/CV8E-KH34.
83 *Tison*, 481 U.S. at 153–54. *But see id.* at 175 (Brennan, J., dissenting) (asserting that such a comparison should include abolitionist states).

felony murder and acted with extreme reckless disregard for human life.[84] The Court concluded that there was no clear national consensus against imposing the death penalty in cases where the defendant was a major participant in a felony murder but did not intend to kill.[85]

Under the subjective prong, the Court focused exclusively on the penological goal of retribution and emphasized that the defendant's mental state is critical in determining their culpability.[86] The Court asserted that intent alone is not definitive, as the person who intends to kill but acts in self-defense is not as culpable as the person who tortures another without regard for whether they live or die.[87] Therefore, when a defendant substantially partakes in criminal conduct that creates a grave risk of death, he acts with reckless disregard for human life and may be deemed to have a highly culpable mental state.[88] The Court concluded that sentencing an offender to death under such circumstances aligns with the penological goal of retribution and is consistent with Eighth Amendment requirements.[89] Thus, the felony murder rule allows individuals to be sentenced to death without a showing that they intended to kill or even intended to inflict serious bodily injury to the victim.

2.2.3. Intellectual Disability

While the Court was carving out a categorical exemption for specific felony murder offenses, it was simultaneously considering whether an exemption ought to apply to intellectually disabled offenders.[90] In its 1989 case *Penry v. Lynaugh*, the Court held that although intellectual disability may reduce the offender's culpability, it does not exempt their execution.[91] Under the objective prong, the Court observed that only one federal statute prohibited the execution of intellectually disabled individuals, one state had enacted a similar ban, and one other state had passed similar legislation that

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84 *Id.* at 154 (majority opinion) (requiring that the perpetrator act with intent to kill).
85 *See id.* at 138.
86 *Id.* at 156.
87 *Id.* at 157.
88 *Id.* at 157–58.
89 *Id.* at 158.
90 Penry v. Lynaugh, 492 U.S. 302, 307 (1989).
91 *Id.* at 340.

had not yet taken effect.[92] The Court held that even when these indicators were considered in conjunction with states that had abolished capital punishment entirely, there was still insufficient evidence of a national consensus against executing intellectually disabled individuals.[93] Additionally, the Court rejected public opinion polls and the American Association on Mental Retardation Resolution presented by the petitioner as insufficient evidence of national consensus, characterizing such evidence as better suited for legislative consideration.[94] The Court also did not consider any evidence of jury sentencing behavior.[95]

Under the subjective prong, Justice O'Connor acknowledged that intellectually disabled individuals vary in their capabilities but concluded that a diagnosis of intellectual disability does not automatically preclude the level of culpability necessary to warrant the death penalty.[96] Thus, there may be instances in which an intellectually disabled person acts with a highly culpable mental state, such that the death penalty serves the penological goal of retribution.[97] Therefore, the Court determined that intellectually disabled individuals were not categorically exempt from death penalty eligibility.[98]

Yet in its 2002 decision *Atkins v. Virginia*, the Court held that intellectually disabled individuals are categorically exempt from receiving the death penalty.[99] In reviewing objective criteria, the Court asserted that "[i]t is not so much the number of these States that is significant, but the consistency of the direction of change."[100] The Court gave weight to recent legislative developments by asserting that 16 new states had prohibited imposing the death penalty on intellectually disabled individuals since *Penry*.[101] It observed that one state legislature had unanimously adopted a similar bill,

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92 *Id.* at 334.
93 *Id.*
94 *Id.* at 335.
95 *Id.* at 334.
96 *Id.* at 338 (opinion of O'Connor, J.).
97 *See id.* at 337–39.
98 *Id.* at 340.
99 536 U.S. 304, 321 (2002).
100 *Id.* at 315.
101 *Id.* at 315–16 (noting that in total, 18 states prohibited the death penalty for the intellectually disabled).

while two others had passed similar legislation in at least one chamber.[102] Additionally, the Court noted that only five states had executed intellectually disabled individuals since *Penry*.[103] The Court highlighted additional evidence, such as foreign laws, opinion polls, and the views of religious and professional organizations—all of which supported the legislative developments.[104] Thus, the Court concluded that a national consensus existed against imposing the death penalty for intellectually disabled individuals.[105]

Under the subjective prong, the Court asserted that "the severity of the appropriate punishment necessarily depends on the culpability of the offender."[106] The Court explained that intellectually disabled individuals have diminished personal culpability because "they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others."[107] In light of their diminished culpability, the Court determined that imposing the death penalty on intellectually disabled individuals does not further the penological goal of retribution.[108] As for deterrence, the Court reasoned that an intellectually disabled person's tendency to act on impulse limits any deterrent effect the death penalty may have on other *intellectually disabled offenders*.[109] Thus, the Court held that intellectually disabled individuals are categorically exempt from death penalty eligibility.[110]

2.2.4. Juveniles

In the same year *Penry* was decided, the Court held in *Stanford v. Kentucky* that the Eighth Amendment does not prohibit imposing the death penalty on individuals who were sixteen or seventeen years old at the time

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102 *Id.*

103 *Id.* at 316.

104 *Id.* n.21.

105 *Id.*

106 *Id.* at 319.

107 *Id.* at 318.

108 *Id.* at 319.

109 *Id.* at 319–20. Emphasis is added to reflect the Court's focus on deterrence as it applies to individuals with intellectual disabilities, not the general population.

110 *Id.* at 321.

of the offense.[111] First, unlike the majority in the cases discussed above, Justice Scalia, writing for the majority in *Stanford*, noted that neither common law nor the nation's historical practices supported exempting such individuals from the death penalty.[112] Additionally, Justice Scalia contended that the Eighth Amendment requires the Court to look to the modern American conception of decency, not to the personal views of the Justices or those of foreign nations.[113] Further, unlike the *Atkins* Court, the Court in *Stanford* refused to consider other laws concerning persons under the age of 18, "public opinion polls, the views of interest groups, [or] the positions of professional associations."[114]

Under the objective prong, the Court held that there was no national consensus against imposing the death penalty for such individuals.[115] Only 15 of the 37 states that authorized the death penalty prohibited its imposition upon 16 year olds, and only 12 of the 37 prohibited its imposition upon 17 year olds.[116] In assessing jury sentencing behavior and actual executions, the Court reasoned that because individuals under 18 commit a much smaller percentage of capital crimes, the resulting discrepancy in treatment is not as significant as it might initially appear.[117] Of the 2,106 death sentences imposed between 1982 and 1988, only 15 involved individuals under 16, and only 30 involved individuals under 17.[118] Additionally, only 2% of all executions between 1642 and 1986 involved individuals under 18.[119] However, the Court concluded that the rarity of sentences and executions involving individuals under 18 "carr[ies] little significance."[120]

The Court refused to engage in the subjective prong analysis, characterizing it as tantamount to "replac[ing] judges of the law with a committee of philosopher-kings."[121] Moreover, the Court declined to consider social,

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111 492 U.S. 361, 380 (1989).
112 *Id.* at 368.
113 *Id.* at 369 n.1. This approach differs drastically from the one in *Atkins*.
114 *Id.* at 375–77.
115 *Id.* at 377.
116 *Id.* at 370.
117 *Id.* at 374.
118 *Id.* at 373.
119 *Id.* at 373–74.
120 *Id.* at 374.
121 *Id.* at 379.

ethical, or scientific evidence showing that minors possess reduced moral culpability—asserting that such arguments are best directed to the legislature.[122] The Court concluded that no national consensus existed against imposing the death penalty for 16 and 17 year olds.[123]

Just as the Court later revisited the categorical exemption for intellectually disabled individuals, it also reconsidered the categorical exemption for juvenile offenders in *Roper v. Simmons*. The *Roper* Court held that the Eighth Amendment prohibits imposing the death penalty for those under 18 at the time of the offense.[124] Unlike in *Stanford*, the Court included states that had completely abolished the death penalty as part of its count for determining national consensus.[125] It observed that 30 states prohibited the death penalty for juvenile offenders, with 12 having completely abolished it and 18 maintaining the death penalty but explicitly rejecting its application to juveniles.[126] Although the Court acknowledged that the pace of change in prohibiting the death penalty for juveniles was slower than in *Atkins*, with only five states that previously permitted the practice having abandoned it since *Stanford*, it still considered the consistent directionality of change to be significant.[127] The Court further found it meaningful that, since *Stanford*, no state that had previously prohibited the death penalty for juveniles had chosen to reinstate it.[128] Additionally, rather than focusing on the number of juveniles executed or sentenced to death, the Court turned its attention toward the small number of states that had carried out executions for crimes committed by juveniles.[129]

Under the subjective prong, the Court relied on scientific and sociological studies to conclude that juveniles' lack of maturity, underdeveloped sense of responsibility, susceptibility to external influences, and evolving character render them less morally culpable than adults.[130] Consequently, this diminished culpability makes them less blameworthy and undermines

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122 *Id.* at 378.
123 *Id.* at 380.
124 Roper v. Simmons, 543 U.S. 551, 578 (2005).
125 *Id.* at 564.
126 *Id.*
127 *Id.* at 565–66 (between 1989 and 2005).
128 *Id.* at 566.
129 *Id.* at 564–65.
130 *Id.* at 569–70.

the retributive justification for imposing the death penalty.[131] In focusing on *juveniles'* capacity to be deterred, the Court declared that the differences identified between adults and juveniles render them less likely to be deterred by the death penalty.[132] Unlike in *Stanford*, the Court considered various domestic laws concerning individuals under 18, foreign laws, the United Nations Convention on the Rights of the Child, and other international opinions.[133] Moreover, the Court asserted that the nature of the offense may unduly influence jurors and cause them to give insufficient weight to a juvenile's age as a mitigating factor.[134] Therefore, the Court concluded that juvenile offenders are categorically exempt from the death penalty.[135]

2.3. *Kennedy v. Louisiana*

2.3.1. Facts and Procedural History

On March 2, 1998, Patrick Kennedy called his place of work before 6:15 a.m. and informed his employer that he would not be able to come in.[136] Between 6:30 a.m. and 7:30 a.m., he called back and asked his coworker if he knew how to remove blood stains from white carpet "because his daughter had 'just become a young lady.'"[137] Shortly thereafter, he called a carpet cleaning company and "requested urgent assistance in removing bloodstains from a carpet."[138] It was not until 9:18 a.m. that Kennedy called 911 to report that his eight-year-old stepdaughter had been raped.[139]

Kennedy told emergency personnel on the phone that he had found his stepdaughter, referred to as L.H., in the side yard after hearing a loud scream.[140] He claimed that two neighborhood boys had raped L.H. and that

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131 *Id.* at 571.

132 *Id.* Emphasis is added to reflect the Court's focus on deterrence as it applies to juveniles, not the general population.

133 *Id.* at 575–78.

134 *Id.* at 573.

135 *Id.* at 578–79.

136 Kennedy v. Louisiana, 554 U.S. 407, 415 (2008).

137 *Id.*

138 *Id.*

139 *Id.* at 413.

140 *Id.*

he had seen one of them riding away on a bicycle.[141] Upon arriving, emergency personnel found L.H. wrapped in a bloody blanket on her bed and bleeding profusely.[142] Kennedy stated that he had bathed her and continued using a cloth and water to wipe blood from her.[143] The prosecution's expert testified that L.H.'s injuries were the worst he had seen.[144] L.H. had suffered a laceration to her vagina, causing her cervix to separate from the back of her vagina and her rectum to protrude into the vaginal canal.[145] Her perineum was completely torn from her anus to her vaginal opening.[146] These severe injuries required L.H. to undergo emergency surgery.[147] At trial, L.H. testified that she remembered Kennedy giving her orange juice with pills inside after the incident.[148] The bike Kennedy referred to was later found by investigators with flat tires, missing gears, and covered in spider webs.[149] L.H.'s cousin testified at trial that she had been sexually assaulted by Kennedy on three separate occasions when she was eight years old.[150]

In 1995, Louisiana reinstated capital punishment for the rape of a child, defining the offense as aggravated when "[t]he victim was under the age of twelve."[151] Kennedy was charged and convicted of aggravated rape and sentenced to death by a jury of his peers.[152] The Louisiana Supreme Court affirmed the decision and rejected Kennedy's argument that *Coker* governed his case.[153] Kennedy sought review, arguing that imposing the death penalty for the rape of a child constituted cruel and unusual punishment under the Eighth Amendment.[154]

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141 *Id.*
142 *Id.*
143 *Id.*
144 *Id.* at 414.
145 *Id.*
146 *Id.*
147 *Id.*
148 *Id.* at 417.
149 *Id.* at 415.
150 *Id.* at 417.
151 *Id.* at 417, 423.
152 *Id.* at 412.
153 *Id.* at 417.
154 *Id.* at 412.

2.3.2. Majority Opinion

The Court held that imposing the death penalty for the rape of a child, where the child is not killed, constitutes cruel and unusual punishment in violation of the Eighth Amendment.[155] Under the objective prong, the Court rejected the respondent's argument that the six states permitting capital punishment for child rape[156]—along with five others having similar pending legislation—demonstrated a consistent legislative change in favor of imposing the death penalty for such an offense.[157] The Court emphasized that, although there had been an apparent increase in statutes authorizing the death penalty for child rape since Louisiana enacted its statute, the increase was not as substantial as the one observed in *Atkins*.[158] The Court further noted that, unlike in *Roper*, where the slower pace of change could be explained by the large number of states that already exempted juveniles from receiving the death penalty, no such baseline existed for child rape because few states permitted the death penalty for the offense in 1995.[159] The Court found it particularly significant that the petitioner could not be executed for any form of child rape in 45 other jurisdictions, including 44 states and the federal government.[160]

Additionally, the Court undertook considerable efforts to refute the respondent's claim that the misinterpretation of *Coker* as applying to both child and adult rape prevented several state legislatures from enacting death penalty statutes for child rape.[161] The respondent argued that the misinterpretation of *Coker* rendered any review of state legislation under the objective prong misleading.[162] The Court acknowledged that although the *Coker*

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155 *Id.* at 421.

156 Although Florida had a statute authorizing the death penalty for child rape, the Court excluded Florida from its count because the Florida Supreme Court had previously held such a punishment unconstitutional. *See* Buford v. State, 403 So. 2d 943, 951 (Fla. 1981) (concluding that *Coker* compelled the conclusion that "a sentence of death is grossly disproportionate and excessive punishment for the crime of sexual assault and is therefore forbidden by the Eighth Amendment").

157 *Kennedy*, 554 U.S. at 431.

158 *Id.* at 432.

159 *Id.* at 432–33.

160 *Id.* at 426.

161 *Id.* at 426–28.

162 *Id.* at 426–27.

Court referred generally to the offense of rape several times, it distinguished between the rape of a child and that of an adult woman throughout its opinion.[163] The Court also noted that state legislators often look to state courts for guidance, several of which had held that *Coker* did not address the issue of child rape.[164] However, the Court simultaneously acknowledged that some confusion surrounding the *Coker* opinion existed in the lower courts.[165]

In concluding its objective prong inquiry, the Court examined execution rates, the number of states that had imposed the death penalty for child rape, and the number of offenders on death row for that crime. It noted that (i) no individual had been executed for the rape of a child or adult since 1964, (ii) Louisiana was the only state during that period to have imposed the death penalty for child rape,[166] and (iii) that only two people nationwide were on death row for non-homicide offenses at the time.[167] Therefore, the Court concluded that a national consensus existed against imposing the death penalty for child rape.[168]

Under the subjective prong, the Court concluded that retribution does not suffice to warrant the death penalty for child rape, as the offense must be distinguished from the most heinous murders for which the death penalty is reserved.[169] It asserted that permitting the death penalty for child rape does not necessarily right the child's wrong or reduce their hurt.[170] Specifically, the Court explained that permitting the death penalty may harm the child by forcing them to repeatedly recount their trauma throughout the legal process while making the moral decision of whether to participate in securing the death penalty for their rapist—often a family member.[171] Drawing on research studies, the Court further concluded that the risk of "unreliable, induced, or even imagined child testimony" diminishes the extent to

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163 *Id.* at 427–28.
164 *Id.* at 429.
165 *Id.* at 429–30.
166 *Id.* at 433–34 (pre-*Furman*).
167 *Id.* at 434.
168 *Id.*
169 *Id.* at 442.
170 *Id.*
171 *Id.* at 442–43.

which the death penalty meaningfully contributes to legitimate penological goals.[172]

As for deterrence, the Court stated that allowing the death penalty for child rape may increase underreporting while decreasing any deterrent effect.[173] Further relying on research studies, the Court asserted that children most often refrain from reporting being raped because they fear negative consequences for the offender.[174] This fear is particularly heightened when the offender is a family member, making it more likely that the victim and their family will conceal the offense.[175] Additionally, the Court noted that allowing the death penalty for child rape could reduce the rapist's incentive to spare the child's life.[176]

The Court also limited its holding to crimes against an individual while intentionally excluding those committed against the state that warrant the death penalty, such as espionage, treason, terrorism, and drug kingpin activity.[177] It held that when a crime against an individual does not result in the victim's death, the death penalty is inappropriate because such an offense is not comparable in severity or irrevocability to intentional first-degree murder.[178] The Court also asserted that permitting the death penalty for child rape would substantially expand the class of individuals eligible for capital punishment and result in a significant increase in executions as compared to first-degree murder.[179] The Court stated that such an expansion would not comport "with [its] evolving standards of decency and the necessity to constrain the use of the death penalty."[180] Moreover, the Court reasoned that, unlike in murder cases, courts could not develop workable standards for determining which child-rape offenders should be death-eligible.[181] Specifically, it explained that juries are at risk of becoming too overwhelmed

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172 *Id.* at 443.
173 *Id.*
174 *Id.*
175 *Id.*
176 *Id.*
177 *Id.* at 437.
178 *Id.* at 438.
179 *Id.*
180 *Id.* at 439.
181 *Id.*

to impose the death penalty in a reasonable and non-arbitrary manner because of the highly emotional nature of child rape cases.[182]

The Court concluded that although no single factor renders the death penalty for child rape unconstitutional, collectively they reveal significant concerns and demonstrate that such a punishment is disproportionate to the offense.[183]

3. Legislating Against the Court: *Kennedy*, Constitutional Confrontation, and Criticism

3.1. The Court's Flawed Application in *Kennedy v. Louisiana*

The Court's Frankenstein-like application of inconsistent precedent to reach its desired outcome in *Kennedy v. Louisiana* only reinforced the unpredictability and incoherence of its Eighth Amendment jurisprudence. Its selective use of precedent, coupled with its willingness to go far beyond existing case law, minimized the states' existing and developing death penalty statutes for child rape in favor of the Court's own moral judgment.[184] The analysis that follows traces and endorses Justice Alito's *Kennedy* dissent, while identifying several inconsistencies that emerge when *Kennedy* is measured against precedent.

3.1.1. Objective Prong

Rather than grounding its decision in objective factors "to the maximum possible extent," as it claimed to do in *Coker*,[185] the Court in *Kennedy* stated that it was merely "guided by 'objective indicia.'"[186] Additionally, the Court's determination that a national consensus existed against imposing the death penalty for child rape was premature, as many states likely avoided

182 *Id.*

183 *Id.* at 446.

184 *See* Mary Graw, Kennedy v. Louisiana: *A Chapter of Subtle Changes in the Supreme Court's Book in the Death Penalty*, 21 FED. SENT'G REP. 98, 100 (2008).

185 Coker v. Georgia, 433 U.S. 584, 592 (1977) (plurality opinion).

186 Graw, *supra* note 184, at 99–100 (emphasis omitted) (quoting *Kennedy*, 554 U.S. at 421).

enacting such statutes in light of the *Coker* decision.[187] The Court in *Coker* repeatedly described the offense of rape in general terms, for example, stating that "the death sentence imposed on Coker is a disproportionate punishment for rape."[188] Although the *Coker* Court mentioned "adult woman" several times throughout its opinion, uncertainty existed from the outset as to whether its holding extended to all forms of rape or was limited to those involving adult women. Justice Powell, in his partial concurrence and dissent in *Coker*, even remarked that "the plurality draws a bright line between murder and all rapes—regardless of the degree of brutality of the rape or the effect upon the victim."[189]

This uncertainty was evident in the various state interpretations of *Coker*. Although several state courts interpreted *Coker* as confined to the rape of an adult woman, many others interpreted it as extending to all rape or reasoned that its logic would render a death penalty statute for child rape unconstitutional.[190] For example, in *Buford v. State*, the Florida Supreme Court concluded that the reasoning in *Coker* effectively operated as a blanket prohibition on imposing the death penalty for any rape offense.[191] Justice Alito, in his *Kennedy* dissent, listed at least eight other state courts that had similarly interpreted *Coker*.[192] Additionally, the *Kennedy* Court noted that state legislators frequently rely on state courts for guidance; however, it is equally evident that they rely on Supreme Court precedent and dicta to evaluate the constitutionality of proposed legislation.[193] In light of *Coker*, states such as Oklahoma, South Carolina, and Texas considered but ultimately refrained from adopting death penalty statutes for child rape after opponents

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187 *Id.* at 100.

188 *Coker*, 433 U.S. at 599.

189 *Id.* at 603 (Powell, J., concurring); *see also Kennedy*, 554 U.S. at 449 (Alito, J., dissenting) (noting Powell's *Coker* concurrence and that it was reasonable for state legislatures to read *Kennedy* in the same way); Graw, *supra* note 184, at 100 (arguing that the *Kennedy* majority's "brevity of analysis of objective factors is apparent" in its "dismissal of the effect of *Coker* on legislators" in view of Powell's *Coker* concurrence).

190 *Kennedy*, 554 U.S. at 449 (Alito, J., dissenting).

191 *See id.* at 449–50 (Alito, J., dissenting); Buford v. State, 403 So. 2d 943, 951 (Fla. 1981).

192 *Kennedy*, 554 U.S. at 450–51 (Alito, J., dissenting).

193 *Id.* at 449.

argued that *Coker*'s reasoning either already barred or would surely bar such laws—demonstrating the decision's chilling effect on legislative action.[194]

In relying on *Atkins* and *Roper* to reject the respondent's directionality of legislative change argument, the Court failed to consider that the death penalty statutes concerning both intellectually disabled and juvenile offenders were enacted without fear of being struck down.[195] In contrast to the capital rape precedent, decisions prior to *Atkins* and *Roper* had upheld statutes imposing the death penalty for intellectually disabled individuals and certain juvenile offenders.[196] Moreover, having afforded leeway in *Roper* for a slower pace of change compared to that observed in *Atkins*, the Court should have afforded similar leeway in *Kennedy*, where the smaller number of state enactments compared to those in *Atkins* reflected the uncertainty created by *Coker*.[197]

While legislative inaction may represent disapproval, that inference is misplaced when legislatures abstain from acting out of fear that its laws will be invalidated.[198] Justice Alito underscored this point in his dissent, noting that five states halted their legislative efforts only after the Court granted certiorari in *Kennedy* and that many others withdrew their bills in anticipation of costly litigation.[199] Additionally, the Court's complete dismissal of pending legislation in five states is inconsistent with its acknowledgment in *Atkins* of even limited legislative action.[200] Similarly, the Court's decision to count abolitionist states as part of the total number of jurisdictions opposing the death penalty for child rape[201]—despite the Court excluding such states in *Stanford* and *Tison*[202]—further illustrates its selective use of precedent.

The Court further employed this selective approach when evaluating other indicators of national consensus. Rather than considering the total number of individuals sentenced to death for the offense, as the Court had

194 *Id.* at 452–53.
195 *Id.* at 454.
196 *Id.*
197 *See* Fraser, *supra* note 12, at 237–38.
198 *Kennedy*, 554 U.S. at 454 (Alito, J., dissenting); Farrell, *supra* note 32, at 888.
199 *Kennedy*, 554 U.S. at 458–59 (Alito, J., dissenting).
200 *Id.* at 431 (majority opinion); Atkins v. Virginia, 536 U.S. 304, 315–16 (2002).
201 *Kennedy*, 554 U.S. at 426.
202 Stanford v. Kentucky, 492 U.S. 361, 370 (1989); Tison v. Arizona, 481 U.S. 137, 152–54 (1987).

done in *Coker*, *Enmund*, and *Stanford*,[203] the *Kennedy* Court focused on the number of individuals executed for child rape and the fact that Louisiana was the only state that had imposed the death penalty for the offense since 1964.[204] This difference is meaningful because the number of individuals executed will likely differ from the number of individuals sentenced to death, as some may be exonerated, die before execution, or receive clemency. Moreover, the Court failed to acknowledge that not only were there low levels of executions for the crime of rape from 1964 until the time *Coker* was decided, but there were low levels of executions for all crimes because late 1960s litigation halted executions.[205] Additionally, Justice Alito noted in his dissent that prosecutors had sought the death penalty in four cases and juries had imposed it in two since Louisiana amended its child rape statute in 1995.[206] He correctly asserted that this record "hardly" demonstrates a consistent pattern of jury reluctance to impose the death penalty.[207]

Despite these tensions and inconsistencies, the *Kennedy* Court's selective reliance on precedent effectively subordinated the objective indicia to its own moral judgment. This shift reflected an increased reliance on the subjective prong and a corresponding retreat from the presumption of legislative validity articulated in *Gregg*.[208] Similarly, the *Kennedy* decision marked a departure from the judicial restraint advocated for in Justice Powell's *Furman* dissent. There, he argued that respecting the democratic process and limiting judicial overreach requires broad deference to legislatures in deciding which crimes warrant the death penalty.[209] *Kennedy v. Louisiana* exemplifies the very judicial overreach Justice Powell cautioned against.

3.1.2. Subjective Prong

The Court's selective application and departure from precedent is even more pronounced under its subjective prong analysis. In assuming the

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203 Coker v. Georgia, 433 U.S. 584, 596–97 (1977) (plurality opinion); Enmund v. Florida, 458 U.S. 782, 794–95 (1982); *Stanford*, 492 U.S. at 373.

204 *Kennedy*, 554 U.S. at 434.

205 *Id.* at 459–60 (Alito, J., dissenting).

206 *Id.* at 460.

207 *Id.*

208 Graw, *supra* note 184, at 100–03; *see* Fraser, *supra* note 12, at 240.

209 Furman v. Georgia, 408 U.S. 238, 457–58 (1972) (Powell, J., dissenting).

role of final moral arbiter, the Court concluded that the penological goal of retribution does not justify imposing the death penalty for child rape.[210] Specifically, the Court asserted that the Eighth Amendment requires a restrained application of the death penalty.[211] This approach conflates decency with leniency and assumes that meaningful progress can only be achieved by further restricting the death penalty's imposition.[212] Additionally, the Court's retribution analysis diverged from its approach in *Enmund* and *Atkins*, where it emphasized the proportionality between the severity of the punishment and the *defendant's* culpability.[213] Instead, the Court in *Kennedy* shifted its focus to whether the death penalty serves to right the child's wrong.[214]

In attempting to further diminish the retributive rationale by distinguishing intentional first-degree murder from rape, the Court failed to acknowledge that not every capital murderer exhibits greater moral depravity than every child rapist.[215] The Court's distinction is further weakened by its decision in *Tison*.[216] The *Tison* Court explained that moral culpability turns on the defendant's mental state and held that a participant in a crime creating a grave risk of death may be eligible for the death penalty regardless of an intent to kill.[217] Accordingly, it is logical to contend that a child rapist's moral culpability may exceed a murderer's when the circumstances, such as the victim's age and the brutality of the assault, create a substantial risk of death to the child.[218] Moreover, Justice Alito correctly noted in his *Kennedy* dissent that, "it is certainly true that the loss of human life represents a

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210 Graw, *supra* note 184, at 102–03; *Kennedy*, 554 U.S. at 442.

211 *Kennedy*, 554 U.S. at 439 ("It might be said that narrowing aggravators could be used in this context, as with murder offenses, to ensure the death penalty's restrained application. We find it difficult to identify standards that would guide the decisionmaker so the penalty is reserved for the most severe cases of child rape and yet not imposed in an arbitrary way.").

212 *See* Tonja Jacobi, *The Subtle Unraveling of Federalism: The Illogic of Using State Legislation as Evidence of an Evolving National Consensus*, 84 N.C. L. REV. 1089, 1119 (2006).

213 Enmund v. Florida, 458 U.S. 782, 798 (1982); Atkins v. Virginia, 536 U.S. 304, 319 (2002).

214 Graw, *supra* note 184, at 102; *Kennedy*, 554 U.S. at 442.

215 *Kennedy*, 554 U.S. at 466 (Alito, J., dissenting).

216 *Id.*

217 Tison v. Arizona, 481 U.S. 137, 157–58 (1987).

218 *See Kennedy*, 554 U.S. at 466–67 (Alito, J., dissenting).

unique harm, but that does not explain why other grievous harms are insufficient to permit a death sentence."[219] This point is reinforced by the Court's decision to leave open the possibility of imposing the death penalty for other non-homicide offenses, including "treason, espionage, terrorism, and drug kingpin activity."[220]

The Court's decision to limit its holding to non-homicide crimes against individuals, while excluding those against the state, offers no explanation for why it treated the latter as a more serious harm.[221] Although the majority acknowledged the severe psychological and emotional harm resulting from child rape, it failed to give adequate breadth to the profound effects such an offense has on society at large.[222] Children who experience sexual assault are at an increased risk of developing a range of psychological disorders, including anxiety, depression, eating disorders, sleep disturbances, dissociation, low self-esteem, post-traumatic stress disorder, borderline personality disorder, and suicidal ideation.[223] Many also engage in self-harming or maladaptive sexual behaviors and experience impaired psychosocial development.[224] Particularly violent assaults can result in long-term physical health consequences, such as reproductive complications and irritable bowel syndrome.[225] Beyond the individual, these harms impose high costs on society by increasing the demand on public resources such as social services, the criminal justice system, and the healthcare system.[226]

In an unprecedented fashion, the Court also incorporated several new considerations under its subjective prong analysis. The Court's consideration of what it deemed to be "in the best interests of crime victims" introduced a new factor that diverged from the Eighth Amendment's core purpose of protecting the rights of the accused.[227] This approach is wholly inconsistent with

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219 *Id.* at 467.
220 *Id.* at 437 (majority opinion).
221 *See id.* at 467 (Alito, J., dissenting).
222 Graw, *supra* note 184, at 104.
223 FIONA VERA-GRAY, CTR. OF EXPERTISE ON CHILD SEXUAL ABUSE, KEY MESSAGES FROM RESEARCH ON THE IMPACTS OF CHILD SEXUAL ABUSE 5 (2023), https://perma.cc/BFF2-C7E3.
224 *Id.* at 5–6.
225 *Id.* at 6.
226 *Id.* at 7.
227 Kennedy v. Louisiana, 554 U.S. 407, 462 (2008) (Alito, J., dissenting); *accord* Graw, *supra* note 184, at 102.

the categorical exemption cases discussed in Part 2. In those cases, the Court did not consider the potential effects that imposing the death penalty on the offender might have on the victim, the victim's family, or witnesses who testified against the offender. As Justice Alito persuasively argues, these policy considerations are matters best left to state legislatures.[228]

The Court further broadened the subjective prong's scope by introducing yet another new consideration: the "systemic concerns in prosecuting the crime of child rape."[229] In doing so, the Court relied on empirical research to support its reasoning—consistent with its approach in *Roper* but departing from its approach in *Stanford* and *Penry*. Its focus on the unreliability of child testimony is similarly inconsistent with the categorical exemption cases discussed in Part 2. In those cases, the Court did not consider witness credibility when determining whether the death penalty should be available for a particular offense, recognizing that such assessments are properly reserved for juries. Justice Alito aptly acknowledged that concerns regarding the reliability of child testimony are not confined to capital cases and are largely mitigated when DNA evidence corroborates the victim's account.[230] He further suggested that to address such concerns, the death penalty could be limited to cases in which independent evidence sufficiently establishes the defendant's guilt.[231]

The Court introduced a third new factor under the subjective prong: the large increase in executions as a result of upholding the capital rape statute.[232] However, this reasoning conflates death eligibility with actual execution rates and ignores that an increase in the former does not necessarily lead to a dramatic rise in the latter. In his *Furman* dissent, Chief Justice Burger acknowledged that even in states that authorize the death penalty for rape, the punishment was imposed far more sparingly than it was for

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228 *Kennedy*, 554 U.S. at 462 (Alito, J., dissenting).
229 *Id.* at 443; *accord* Graw, *supra* note 184, at 102–03.
230 *Kennedy*, 554 U.S. at 464 (Alito, J., dissenting).
231 *Id.* at 464–65.
232 *Id.* at 438–39 (majority opinion); Graw, *supra* note 184, at 102–03.

first-degree murder.[233] Notably, between 1930 and 1964, 455 people were executed for rape, while 3,325 were executed for murder.[234]

Additionally, the Court erroneously reasoned that because jurors may be overwhelmed by the facts involved in child rape cases, it would be too difficult to develop clear guidelines to narrow the death eligibility for child rapist.[235] This rationale is unconvincing because jurors often confront equally disturbing facts in homicide cases.[236] In his dissent, Justice Alito highlighted that several states, including Texas, Oklahoma, Montana, and South Carolina, had already adopted concrete criteria to limit death penalty eligibility in child rape cases.[237] Additionally, he proposed other criteria that could be used to narrow eligibility, including the child's age, the number of rapes committed, the number of victims, the offender's prior criminal record,[238] whether the victim was kidnapped, and whether severe physical injury resulted.[239]

The Court's subjective prong analysis reflects a marked departure from its Eighth Amendment precedent. By introducing new and extraneous considerations, the Court expanded its role beyond constitutional interpretation. Its selective use of precedent and disregard for state legislative authority further undermined the evolving standards framework and disrupted the balance between judicial restraint and state sovereignty.

3.2. New Legislation Challenging the Constitutional Limits of *Kennedy*

The *Kennedy* decision generated substantial backlash, drawing criticism from both supporters and opponents of the evolving standards of

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233 Furman v. Georgia, 408 U.S. 238, 391 (1972) (Burger, C.J., dissenting).

234 NICHOLAS DEB. KATZENBACH & MYRL E. ALEXANDER, U.S. DEP'T OF JUST., NATIONAL PRISONER STATISTICS-EXECUTIONS, 1930–1964, at 1, 12 (1964), https://perma.cc/76VK-5NGQ.

235 *Kennedy*, 554 U.S. at 462–63 (Alito, J., dissenting); Graw, *supra* note 184, at 103.

236 Graw, *supra* note 184, at 103.

237 *Kennedy*, 554 U.S. at 463 (Alito, J., dissenting).

238 *Id.* at 447.

239 *Id.* at 463–64.

decency test.[240] A central doctrinal critique is that the test rests on the problematic assumption that societal norms inevitably progress toward greater enlightenment and away from brutality.[241] The Court illustrated this assumption in *Kennedy*, concluding that "full progress and mature judgment means that resort to the penalty must be reserved for the worst of crimes and limited in its instances of application."[242] However, this assumption produces a "one-way ratchet" effect, whereby states are increasingly constrained as the Court relies on it to develop new categorical exemptions.[243] Once the Court declares the death penalty unconstitutional for a particular offense or class of offenders, state legislatures are effectively barred from authorizing it for that offense or class of offenders because any attempt would likely trigger constitutional challenges.[244] While appropriate in other constitutional contexts, this constraining effect under the evolving standards framework allows the Court to treat a snapshot of legislative consensus as sufficient to categorically invalidate the death penalty—transforming a potentially temporary political judgment into a permanent constitutional prohibition.[245]

Moreover, recent developments suggest a societal shift toward harsher punishments for sex offenses.[246] Notably, several states have recently attempted to undo the one-way ratchet effect by passing legislation authorizing the death penalty for child rape and directly challenging the constitutional limits established in *Kennedy*.[247] In taking the lead, the Florida

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240 Bethany Siena, Note, Kennedy v. Louisiana *Reaffirms the Necessity of Revising the Eighth Amendment's Evolving Standards of Decency Analysis*, 22 REGENT UNIV. L. REV. 259, 260 (2009); Fraser, *supra* note 12, at 243; Aaron M. Bachmann, Note, Kennedy v. Louisiana *and the Abolition of the Death Penalty for Child Rape: Euthanizing "Evolving Standards of Decency"*, 45 WAKE FOREST L. REV. 231, 232 (2010).

241 Miller, *supra* note 11, at 136.

242 *Kennedy*, 554 U.S. at 446–47; Graw, *supra* note 184, at 101–02.

243 Miller, *supra* note 11, at 129, 136–37; *see also* Klein, *supra* note 15, at 360; Jacobi, *supra* note 212, at 1119. Note that this Note does not advocate for the general elimination of categorical exemptions.

244 Miller, *supra* note 11, at 136–37.

245 Jacobi, *supra* note 212, at 1119; *see also* Siena, *supra* note 240, at 282.

246 *See* Klein, *supra* note 15, at 363; Rosemary Ardman, *Child Rape and the Death Penalty*, 61 IDAHO L. REV. 159, 163 (2025) (noting that "child sex offenders are subject to unique registration requirements, residency restrictions, and in seven states chemical castration as a potential condition of parole").

247 Klein, *supra* note 15, at 332.

legislature asserts in its statute that *Buford* and *Kennedy* were "wrongly decided and an egregious infringement of the states' power to punish the most heinous of crimes."[248] After Florida enacted its statute with strong bipartisan support in May 2023,[249] four other states—Tennessee, Idaho, Arkansas, and Oklahoma—enacted similar statutes.[250] Alabama, Arizona, Missouri, South Carolina, and South Dakota have all considered similar legislation since 2024.[251]

Additionally, President Trump issued an Executive Order on January 20, 2025, instructing the Attorney General to "take all appropriate action to seek the overruling of Supreme Court precedents that limit the authority of State and Federal governments to impose capital punishment."[252] On September 2, 2025, Florida Attorney General James Uthmeier submitted a letter to the Department of Justice, joined by fourteen other states, declaring their intent to pursue capital punishment for child rape and urging the Department to support their efforts in having *Kennedy v. Louisiana* overruled.[253] The discussion below briefly outlines each newly enacted statute. Collectively, these statutes challenge the Court's assertion in *Kennedy* that it is too "difficult to identify standards that would guide the decisionmaker," as each statute includes aggravating criteria that narrow jury discretion.[254] Many of the aggravating factors listed in these statutes include most, if not all, of the factors Justice Alito proposed in his *Kennedy* dissent.[255]

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248 FLA. STAT. § 921.1425(1)(a) (2025).

249 Ardman, *supra* note 246, at 160.

250 Uthmeier Letter, *supra* note 16, at 3; OKLA. STAT. tit. 21, § 843.5 (2025) (amended by S.B. 599, 60th Leg., 1st. Reg. Sess. (Okla. 2025)). Oklahoma already permitted the death penalty for certain child rape offenses after a prior conviction under § 843.5, but Senate Bill 599, effective November 1, 2025, expanded capital eligibility to first-time offenders. Senate Bill 599 also amended OKLA. STAT. tit. 21, § 1123 (2025), though its implications are not discussed here.

251 Ardman, *supra* note 246, at 162.

252 Exec. Order No. 14164, 90 Fed. Reg. 8463, 8464 (Jan. 20, 2025); Ardman, *supra* note 246, at 162 n.21.

253 Uthmeier Letter, *supra* note 16, at 3.

254 Kennedy v. Louisiana, 554 U.S. 407, 439 (2008).

255 *Id.* at 447, 463–64 (Alito, J., dissenting).

3.2.1. Florida's Statute

Florida's child rape statute classifies the sexual battery of any child under the age of twelve as a capital felony: "(2)(a) A person 18 years of age or older who commits sexual battery upon, or in an attempt to commit sexual battery injures the sexual organs of, a person less than 12 years of age commits a capital felony, punishable as provided in ss. 775.082 and 921.1425."[256]

Sexual battery is defined as oral, anal, or vaginal penetration.[257] Florida conducts bifurcated trials and permits the introduction of both aggravating and mitigating evidence during sentencing.[258] The prosecutor may choose to introduce victim impact evidence only after providing sufficient evidence to support at least two aggravating factors.[259] Before making a recommendation of death, the jury must unanimously find that the State has proven the existence of at least *two* aggravating factors beyond a reasonable doubt and that such factors outweigh any mitigating circumstances.[260] This requirement differs from Florida's capital murder statute, which requires that the jury find only one aggravating factor.[261] Moreover, the requirement is also distinguishable from the Louisiana capital rape statute that was at issue in *Kennedy*, which only required that the victim be of a certain age.[262] Although the recommendation of death requires the agreement of only eight jurors, the court may choose to impose a life sentence without the possibility of parole despite the jury's recommendation.[263] Any defendant sentenced to death may automatically appeal to the Florida Supreme Court.[264]

Many of the aggravating factors listed in Florida's capital murder statute are replicated in its capital sexual battery statute.[265] Florida's statutory

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256 FLA. STAT. § 794.011(2)(a) (2025).

257 *See id.* § 794.011(1)(j).

258 FLA. STAT. § 921.1425(2) (2025).

259 *See id.* § 921.1425(9).

260 *See id.* § 921.1425(3)(a)–(b).

261 FLA. STAT. § 921.141(2)(a) (2025).

262 Ardman, *supra* note 246, at 175.

263 § 921.1425(3)(c), (4)(a)(2).

264 *See id.* § 921.1425(6).

265 *Compare* § 921.141(6)(b) (prior capital or violent felony conviction), (f) (pecuniary gain), (h) (especially heinous, atrocious, or cruel), (m) (particularly vulnerable victim), (o) (defendant designated as a sexual predator), and (p) (victim previously

aggravating factors for capital sexual battery include: prior violent or capital convictions, status as a sexual predator or registered sex offender, reckless disregard for human life, use of a firearm, pecuniary motivation, especially heinous conduct, targeting a particularly vulnerable victim, prior protection orders, and infliction of serious bodily injury.[266]

3.2.2. Tennessee's Statute

In May 2024, Tennessee passed a law authorizing the death penalty for child rape.[267] The law provides separate statutory definitions for "rape of a child" and "aggravated rape of a child," with the distinction hinging on the victim's age:

> (a) Rape of a child is the unlawful sexual penetration of a victim by the defendant or the defendant by a victim, if the victim is more than eight (8) years of age but less than thirteen (13) years of age.[268]
>
> (a) Aggravated rape of a child is the unlawful sexual penetration of a victim by the defendant or the defendant by a victim, if the victim is eight (8) years of age or less.[269]

Despite this distinction, both offenses are death-eligible when committed by a defendant 18 years or older at the time of the offense.[270] Tennessee conducts bifurcated trials[271] and permits the jury, during the sentencing phase,

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attained a protection order against defendant), *with* § 921.1425(7)(b)–(c), (g)–(j) (enumerating the same aggravating factors for capital sexual battery).

266 § 921.1425(7).

267 Kimberlee Kruesi, *Tennessee Governor OKs Bill Allowing Death Penalty for Child Rape Convictions*, ASSOCIATED PRESS (May 14, 2024, at 14:34 CT), https://perma.cc/3FKX-MAG7; Ardman, *supra* note 246, at 161–62.

268 TENN. CODE ANN. § 39-13-522(a) (2025).

269 TENN. CODE ANN. § 39-13-531(a) (2025).

270 § 39-13-522(b)(2); § 39-13-531(b)(2).

271 TENN. CODE ANN. § 39-13-204(a) (2025). The compiler's notes explain:

> that §§ 4–11 of the act take effect on the thirtieth day following the occurrence of either the following circumstances: (1) The issuance of the judgment in a decision of the United States Supreme Court overruling, in whole or in relevant part, Kennedy v. Louisiana . . . ; or (2) The ratification of an amendment to the Constitution of the United States approving the use of the death penalty as a punishment for the

to weigh and consider any aggravating and mitigating circumstances raised by the evidence during either phase of the trial.[272] Additionally, the statute allows the victim's family to testify concerning the impact of the offense.[273] A death sentence shall be imposed only if the jury unanimously determines that the State has proven at least *one* statutory aggravating circumstance beyond a reasonable doubt and that the aggravating circumstances outweigh any mitigating evidence.[274] The Tennessee Supreme Court must automatically review all convictions and death sentences.[275]

Unlike Florida's statute, which separately lists aggravating factors for capital sexual battery, Tennessee's statute intermingles aggravating factors for capital murder and capital rape.[276] The aggravating factors most applicable to capital rape cases include: prior felony convictions; conduct creating a great risk of death; especially heinous, atrocious, or cruel conduct; commission of the offense during an escape from lawful confinement; mutilation of the victim's body; and targeting of a particularly vulnerable victim.[277]

3.2.3. Idaho's Statute

In March 2025, Idaho enacted legislation prescribing that "every person eighteen (18) years of age or older guilty of aggravated lewd conduct with a minor child twelve (12) years of age or under shall be punished by death or by imprisonment for life."[278] Idaho's statute is broader than those of Tennessee and Florida, as it authorizes the death penalty for sexual contact alone without requiring penetration:

> Any person eighteen (18) years of age or older who commits any lewd or lascivious act or acts on or with the body or any

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> conviction of an offense involving the infliction of severe physical and mental pain and suffering upon the victim with the intent to perpetrate first degree murder that does not result in the death of the victim.

272 § 39-13-204(e)(1).
273 § 39-13-204(c).
274 § 39-13-204(g)(1)(A).
275 TENN. CODE ANN. § 39-13-206(a)(1) (2025).
276 *Compare* FLA. STAT. § 921.1425(7), *with* TENN. CODE ANN. § 39-13-204(i).
277 § 39-13-204(i).
278 IDAHO CODE § 18-1508D (2025); Ardman, *supra* note 246, at 162.

> part or member thereof of a minor child twelve (12) years of age or under, including but not limited to genital-genital contact, oral-genital contact, anal-genital contact, oral-anal contact, manual-anal contact, or manual-genital contact . . . shall be guilty of felony aggravated lewd conduct with a minor child twelve (12) years of age or under.[279]

However, the statute requires the State to prove beyond a reasonable doubt the existence of at least two aggravating circumstances to secure a conviction[280] and at least *three* to obtain a death sentence.[281] Like Florida, Idaho conducts bifurcated trials and allows the introduction of relevant mitigating and aggravating evidence, along with victim impact evidence, during the sentencing phase.[282] The death penalty shall be imposed only if the jury unanimously finds the existence of at least three aggravating circumstances and further determines that no mitigating circumstances render its imposition unjust.[283]

Whereas Florida and Tennessee enumerate statutory aggravating factors in separate sentencing provisions, Idaho's statutory scheme employs definitional narrowing by embedding aggravating circumstances within the definition of the offense itself.[284] The statute identifies numerous aggravating circumstances, including repeated sexual abuse of the victim, sexual penetration, kidnapping or human trafficking, the defendant's status as a registered sex offender, abuse of a position of trust or power, torture or use of force or coercion, involvement of a weapon, infliction of great bodily injury or mutilation, offenses involving multiple victims or perpetrators, resulting pregnancy or transmission of a sexually transmitted disease, attempted strangulation, administration of intoxicating substances, and knowledge that the victim had a developmental disability.[285]

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279 § 18-1508C.

280 *Id.*

281 § 18-1508D; *see also* IDAHO CODE § 19-2515(10) (2025) (listing aggravating circumstances "at least three (3) of which must be found . . . beyond a reasonable doubt" before a death sentence for actions under § 18-1508C can be obtained).

282 § 19-2515(5)(a).

283 § 19-2515(7).

284 *Compare* TENN. CODE ANN. § 39-13-204(i) (2025), *and* FLA. STAT. § 921.1425(7) (2025), *with* § 18-1508C.

285 § 18-1508C.

3.2.4. Arkansas's Statute

Arkansas's capital child rape statute took effect in August 2025[286] and authorizes the death penalty for offenders 18 or older at the time of the offense.[287] Arkansas similarly conducts bifurcated trials and allows the introduction of relevant mitigating and aggravating evidence, along with victim impact evidence, during the sentencing phase.[288] Like Idaho's statute, Arkansas' statute incorporates aggravating circumstances within its statutory definition of capital rape.[289] The statute identifies four circumstances that constitute capital rape, each including a distinct aggravating circumstance.[290] Specifically, the statute provides that a defendant commits capital rape if "[h]e or she engages in sexual intercourse or deviate sexual activity with another person who is thirteen (13) years of age or younger," and either (1) causes or threatens to cause serious physical injury to that person,[291] (2) engages in such conduct during the commission of one of the listed offenses,[292] (3) uses or threatens to use a deadly weapon,[293] or (4) has a prior rape or capital rape conviction.[294]

Although certain aggravating circumstances are included in the statutory definition of capital rape, the jury must unanimously find at least *one* additional aggravating circumstance beyond a reasonable doubt to impose the death penalty.[295] These additional circumstances are enumerated in a separate sentencing statute that applies to capital murder, capital treason,

286 Gabriella Phelan, *Imposition of Death Penalty for Child Rapists Law goes into Effect in August*, KARK.COM (July 24, 2025, at 08:05 CT), https://perma.cc/35NE-S9Q2.

287 ARK. CODE ANN. § 5-14-114(b)(1)(A) (2025).

288 ARK. CODE ANN. § 5-4-602(1)–(4) (2025).

289 § 5-14-114.

290 *Id.*

291 § 5-14-114(1).

292 § 5-14-114(2) (including terrorism, kidnapping, vehicular piracy, robbery, aggravated robbery, residential burglary, commercial burglary, aggravated residential burglary, a felony violation of the Uniform Controlled Substances Act, first degree escape, trafficking of persons, engaging children in sexually explicit conduct for use in visual or print medium, or transportation of minors for prohibited sexual conduct).

293 § 5-14-114(3).

294 § 5-14-114(4).

295 ARK. CODE ANN. § 5-4-603(a)(1) (2025).

and capital rape.[296] The aggravating circumstances most applicable to capital rape cases include: committing the offense while unlawfully at liberty after a prior felony, having a prior violent felony conviction, knowingly causing or creating a risk of death to another person besides the victim, targeting a particularly vulnerable victim who suffers from a mental or physical disability or who is under the age of twelve, and committing the offense in an especially cruel or depraved manner.[297] After finding at least one additional aggravating circumstance, the jury must unanimously determine that the aggravating circumstances outweigh any mitigating circumstances.[298] Arkansas' statute also includes a severability clause specifying that if the death penalty provision is held unconstitutional, offenders convicted of capital rape shall instead be sentenced to life imprisonment without parole.[299]

3.2.5. Oklahoma's Statute

In contrast to the four statutes previously examined, Oklahoma recently amended an existing statute that had already authorized the death penalty for repeat offenders convicted of child rape.[300] The amendment expanded the death penalty to first-time offenders: "In addition to any other punishment prescribed by law, any person convicted of forcible anal or oral sodomy, rape, or rape by instrumentation, of a child under fourteen (14) years of age shall be eligible for punishment by death or by imprisonment for life without parole."[301]

However, Oklahoma did not establish separate sentencing procedures for the amended child rape statute and historically has not imposed the death penalty for child rape as a standalone offense under the pre-amendment statute.[302] Accordingly, if a death sentence were imposed under the

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296 ARK. CODE ANN. § 5-4-104(b) (2025); ARK. CODE ANN. § 5-4-604 (2025).

297 § 5-4-604.

298 § 5-4-603(a).

299 § 5-14-114(b)(3).

300 *See supra* note 250.

301 OKLA. STAT. tit. 21, § 843.5 (2025).

302 *Death Penalty for Offenses Other than Murder*, DEATH PENALTY INFO. CTR., https://perma.cc/V45B-NGW2.

newly amended child rape statute, the State would likely rely on its existing capital sentencing procedures applicable to first-degree murder.[303]

Such capital sentencing procedures require a bifurcated trial and permit the introduction of mitigating and aggravating evidence, as well as victim impact evidence, during the sentencing phase.[304] To impose the death penalty, the jury must unanimously find beyond a reasonable doubt the existence of at least *one* statutory aggravating circumstance and further determine that the mitigating circumstances do not outweigh the aggravating circumstances.[305] The aggravating circumstances most likely to be relied upon when seeking the death penalty for capital rape include: having a prior violent felony conviction; creating a great risk of death to multiple persons; committing the offense in an especially heinous, atrocious, or cruel manner;[306] committing the offense while serving a felony sentence of imprisonment; and continuing to engage in violent criminal conduct that poses a threat to society.[307]

Of the five statutes examined, Oklahoma's statute appears the most vulnerable to constitutional attack. Because it neither establishes separate sentencing procedures nor explicitly specifies how many aggravating circumstances must be proven to warrant the death penalty for child rape, uncertainty remains regarding its application. Taken together, these five statutes directly challenge the constitutional limits set forth in *Kennedy* and signal a shift in legislative direction that could prompt the Court to reconsider and potentially overrule its decision in *Kennedy*.

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303 OKLA. STAT. tit. 21, §§ 701.10–.12 (2025).

304 § 701.10.

305 § 701.11.

306 This aggravating factor was held unconstitutional as applied in *Maynard v. Cartwright*, 486 U.S. 356, 359–60, 364 (1988) (holding that "[t]o say that something is 'especially heinous' merely suggests that the individual jurors should determine that the murder is more than just 'heinous,' whatever that means, and an ordinary person could honestly believe that every unjustified, intentional taking of human life is 'especially heinous'" (citation omitted)).

307 § 701.12.

3.3. The Court's Insufficient Deference to State Legislatures

Disagreement over the appropriate level of deference the Court should afford state legislatures has persisted since the establishment of categorical exemptions in death penalty jurisprudence.[308] This disagreement has become particularly salient in light of the recently enacted state legislation.[309] Even before *Coker*, Justice Powell emphasized in his *Furman* dissent that "[w]hile the evidence and arguments advanced by petitioners might have proved profoundly persuasive if addressed to a legislative body, they do not approach the showing traditionally required before a court declares that the legislature has acted irrationally," highlighting the tension between judicial deference to state penal judgments and the Court's duty to enforce constitutional limits.[310] Additionally, the Court's presumption of legislative validity, as articulated in *Gregg*, stands in sharp contrast to its heightened reliance on its independent judgment observed in *Kennedy*.[311] Scholars have warned that without clearer limits, the evolving standards of decency test will continue to allow judges to substitute their own moral judgments for those of society.[312]

This concern is amplified by the Court's inconsistent application of the test. The Court's categorical exemption cases—even those addressing the same class of offenders or offenses—appear to rest on markedly different analytical frameworks, inviting doubt as to whether their divergent outcomes reflect genuine societal consensus or merely shifting doctrinal application. Although the test is intended to preserve deference to state legislatures,[313] that goal has been undermined by the Court's inconsistent application of various counting methods used to determine national consensus.[314]

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308 Coker v. Georgia, 433 U.S. 584, 604, 608–10 (1977) (Burger, C.J., dissenting) (criticizing the majority for exceeding its judicial authority by substituting its own policy judgment for that of the Georgia legislature).

309 *See* Uthmeier Letter, *supra* note 16, at 1, 3.

310 Furman v. Georgia, 408 U.S. 238, 456 (1972) (Powell, J., dissenting).

311 *See supra* note 208 and accompanying text.

312 Farrell, *supra* note 32, at 861–62; Siena, *supra* note 240, at 281.

313 Klein, *supra* note 15, at 365 n.441.

314 *See id.* at 361.

Ultimately, this has resulted in an encroachment on state legislative authority.[315]

Additionally, the Court has often equated a lack of consensus supporting the death penalty with an affirmative consensus against it.[316] This occurs because the Court's focus shifts, sometimes to states that have expressly prohibited the death penalty for an offense or class of offenders,[317] and other times to those that have not expressly authorized it.[318] The Court's application is similarly inconsistent in its treatment of abolitionist states, including them in some counts[319] while excluding them in others.[320] Cases such as *Enmund* and *Tison* illustrate the distortions that arise from selectively grouping dissimilar state statutes.[321] These inconsistencies, combined with the recent legislative developments, underscore the need to reconsider *Kennedy* and refine the evolving standards of decency test.

4. Reconsidering *Kennedy* and Refining the Standard

There are growing indications that the Court may be prepared to reconsider or even supplant the evolving standards of decency test. Lower courts have increasingly urged the Court to reevaluate the test, and three Justices have already signaled a willingness to abandon it.[322] Additionally, the Court has not referenced the test since its 2017 decision in *Moore v. Texas*.[323] In its 2019 decision, *Bucklew v. Precythe*, Justice Gorsuch anchored the majority opinion in a historical examination of execution practices at the

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315 *See* Siena, *supra* note 240, at 282; Graw, *supra* note 184, at 101–02.

316 Farrell, *supra* note 32, at 881.

317 Stanford v. Kentucky, 492 U.S. 361, 370–72 (1989).

318 Coker v. Georgia, 433 U.S. 584, 594 (1977).

319 Roper v. Simmons, 543 U.S. 551, 564 (2005).

320 *Stanford*, 492 U.S. at 370–72; Klein, *supra* note 15, at 361.

321 Jacobi, *supra* note 212, at 1136–37 (explaining that the majority in *Enmund* grouped 11 of the 36 states that allowed the death penalty as not supporting the death penalty for felony murder because they required an additional "mental state," while the majority in *Tison* grouped all the states that allowed for the death penalty for felony murder as supporting the death penalty even if the statute required an additional mental state).

322 Miller, *supra* note 11, at 119–22 (noting that Justices Thomas, Alito, and Roberts favor reconsidering or replacing the test).

323 *See* Ryan, *supra* note 17, at 286; Moore v. Texas, 581 U.S. 1, 12 (2017).

time of the Framing, entirely omitting any discussion of the evolving standards of decency test.[324] More recently, in *City of Grants Pass v. Johnson*, Justice Gorsuch employed the same historical approach by focusing on the meaning of "cruel" and "unusual" at the time of the Eighth Amendment's adoption.[325] The Court's recent decisions suggest both a retreat from the evolving standards of decency test and a shift toward incorporating originalism into its Eighth Amendment analysis.[326]

Regardless of the particular method the Court may ultimately adopt, its vacillating approach to determining national consensus and exercising its independent judgment highlights the need for reform. Scholars have proposed various reforms, ranging from complete abandonment of the test to modest adjustments aimed at enhancing its clarity.[327] This paper advocates reconsidering *Kennedy* on narrow grounds and refining the test by limiting the objective prong to two factors: (1) the consistency of the direction of legislative change, as articulated in *Atkins*, and (2) the consideration of jury sentencing practices.[328] Further, to constrain the Court's unfettered exercise of independent judgment, this Note proposes a fact-specific analysis under the subjective prong to assess whether a punishment is excessive or disproportionate in light of the penological goals of retribution and deterrence.[329]

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324 Miller, *supra* note 11, at 120 (noting that neither Justice Kavanaugh nor Justice Thomas made any mention of the test in their concurring opinions in *Bucklew v. Precythe*, 587 U.S. 119 (2019)); Klein, *supra* note 15, at 359.

325 603 U.S. 520, 543 (2024) ("None of the city's sanctions qualifies as cruel because none is designed to superadd terror, pain, or disgrace. Nor are the city's sanctions unusual, because similar punishments have been and remain among the usual modes for punishing offenses throughout the country." (cleaned up)); Klein, *supra* note 15, at 359.

326 Ryan, *supra* note 17, at 286.

327 *E.g.*, Miller, *supra* note 11, at 138, 144–45, 157; Farrell, *supra* note 32, at 897; Siena, *supra* note 240, at 283.

328 *Cf.* Edward M. Fox II, Note, *A Whisper to State Legislatures? The Potential Irony of the Supreme Court's Decision in* Kennedy v. Louisiana*, 128 S. Ct. 2641 (2008)*, 88 NEB. L. REV. 832, 847 (2010) (explaining Justice Alito's dissent in *Kennedy* as proposing a new framing of the evolving standards of decency test based on *Atkins*).

329 *See* Siena, *supra* note 240, at 283 (arguing that a fact-specific analysis should supplant, rather than supplement, the evolving standards of decency framework).

4.1. Refining the Objective Prong

As evidenced by the new child rape statutes, it cannot be presumed that the "standards of decency that mark the progress of a maturing society"[330] move only toward greater enlightenment.[331] In *Harmelin v. Michigan*, the Court cautioned that "[t]he Eighth Amendment is not a ratchet, whereby a temporary consensus on leniency for a particular crime fixes a permanent constitutional maximum, disabling the States from giving effect to altered beliefs and responding to changed social conditions."[332] Adopting the approach articulated in *Atkins* provides a principled method for correcting the one-way ratchet effect while simultaneously respecting the doctrine of stare decisis.[333] Specifically, it ensures appropriate deference to state legislatures, improves predictability, and contributes to greater doctrinal consistency.

The approach adopted in *Atkins* directs the Court to assess the consistency and directionality of legislative change to determine whether a national consensus exists.[334] This framework allows the Court to identify a national consensus for the death penalty after previously identifying a national consensus against it, thereby correcting the one-way ratchet effect.[335] Because each legislative enactment can meaningfully influence the Court's determination of national consensus under this approach, states have a heightened incentive to clarify their positions by enacting new legislation as emerging consensuses develop.[336] Greater legislative activity diminishes the likelihood that the Court will need to infer meaning from legislative silence—an inherently unreliable indicator of legislative intent.[337]

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

331 *See* Jacobi, *supra* note 212, at 1119.

332 501 U.S. 957, 990 (1991) (plurality opinion).

333 Fox II, *supra* note 328, at 850–51.

334 Jacobi, *supra* note 212, at 1106.

335 *See* Fox II, *supra* note 328, at 849 (summarizing the dissent's approach to the evolving standards of decency in *Kennedy*).

336 *See* Jacobi, *supra* note 212, at 1141–42 (noting that, after *Atkins* but before *Roper*, "states could have anticipated that evolving standards analysis would be applied, and states that opposed that trend would have had an incentive to legislate to express their support for juvenile execution").

337 Fraser, *supra* note 12, at 233–34 (stating that "[s]uch factors include budgetary concerns and the lack of state mechanisms to enforce and apply such punishment").

Moreover, focusing on whether society is moving toward or away from a particular punishment aligns with the underlying purpose of the evolving standards test, which is to track societal progress rather than freeze snapshots of legislation at a single point in time.[338] This approach would also enhance predictability by enabling individuals and states to anticipate judicial outcomes where legislative change has proceeded in a consistent direction.[339] Relatedly, it prevents outlier statutes from distorting the determination of a national consensus by requiring evidence of consistent legislative action across multiple states.[340] Although the exact number of states necessary to demonstrate a consistent direction of change is not wholly determined, *Atkins* and *Roper* provide guidance.[341]

Additionally, the Court should focus solely on jury sentencing behavior rather than the number of executions or the number of states that have imposed executions for a particular offense or category of offender.[342] As noted in Part 2, sentencing behavior provides a more accurate reflection of contemporary moral judgment and may differ from execution statistics due to exonerations, deaths before execution, or the granting of clemency.[343] Focusing on jury sentencing behavior also helps guard against statutes enacted solely for political posturing.[344] Thus, maintaining the consideration of jury sentencing behavior ensures that any national consensuses found to exist accurately reflects society's acceptance of the law as demonstrated by its practical application.[345]

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338 *See supra* notes 241–245 and accompanying text.

339 *See supra* notes 336–337 and accompanying text.

340 *See* Fox II, *supra* note 328, at 851 (explaining that if the dissent in *Kennedy* became the Court's test, state legislatures would have incentives to broaden or reenact capital statutes in response to political and local pressures).

341 Fraser, *supra* note 12, at 234–37 (analyzing how the Court applied the consistency of the direction of change approach in *Atkins* and *Roper*).

342 Stanford v. Kentucky, 492 U.S. 361, 373–74 (1989) (listing the percentage of juveniles executed); Roper v. Simmons, 543 U.S. 551, 564–65 (2005) (listing the number of states that had executed juveniles since *Stanford*).

343 *See supra* Part 2.

344 *See* Klein, *supra* note 15, at 302.

345 *See* Farrell, *supra* note 32, at 861–62 (noting that the infrequent imposition of a legally authorized punishment by sentencing juries may indicate it has fallen out of favor in practice).

4.2. Reconsidering *Kennedy* on Narrow Grounds

Having articulated a logical refinement of the objective prong, it is worth discussing how the Court could reapply the *Atkins* framework to reconsider *Kennedy* on narrow grounds. In *Kennedy*, the Court claimed to be applying the *Atkins* framework but failed to focus on the consistent direction of legislative change evidenced by the enactment of six death penalty statutes for child rape during the thirteen years preceding its decision.[346] Rather, the Court reverted to a numerical tally, concluding that the legislative "data" were insufficiently comparable to those relied upon in *Atkins*.[347] Additionally, the Court in *Atkins* even treated legislation that had passed in at least one chamber as meaningful.[348] A faithful application of *Atkins* would have recognized the legislative initiatives undertaken by five additional states prior to the Court granting certiorari in *Kennedy*.[349] Without addressing the normative question of whether such pending legislation should be considered, *Roper* suggests that the six statutes already enacted were alone sufficient to establish a consistent direction of legislative change.

The *Kennedy* Court's comparison to *Roper* was similarly misguided, as the *Roper* Court focused on the *number* of states prohibiting juvenile executions and the *rate of change* since *Stanford*.[350] Yet even under this flawed application, *Kennedy* still should have been decided differently. In *Roper*, five states enacted legislation prohibiting the execution of juveniles over 16, whereas in *Kennedy*, six states authorized the death penalty for child rape within a shorter 13-year period.[351] However, the Court in *Kennedy* justified the slower pace of change in *Roper* as a function of the large number of states that had already prohibited the death penalty for juveniles.[352] Accordingly, it

346 Fraser, *supra* note 12, at 234–35.

347 *Id.*; Kennedy v. Louisiana, 554 U.S. 407, 432 (2008).

348 Atkins v. Virginia, 536 U.S. 304, 315 (2002).

349 *Kennedy*, 554 U.S. at 458 (Alito, J., dissenting) (explaining how the Court's decision to grant certiorari in *Kennedy* "gave state legislators reason to delay the enactment of new legislation until the constitutionality of such laws was clarified"); Fox II, *supra* note 328, at 848.

350 Fraser, *supra* note 12, at 235.

351 *Id.* at 235, 237.

352 *See id.* at 237.

should have afforded similar leeway in *Kennedy*, where the slower pace of change was likely attributable to the uncertainty created by *Coker*.[353]

The Court's comparison of *Atkins* and *Roper* was flawed and fell short of the standard articulated in *Atkins*.[354] Rather than focusing on the consistent direction of legislative change, it incorrectly focused on the raw numbers when comparing *Atkins* and the rate of change when comparing *Roper*.[355] When *Atkins* and *Roper* are properly applied, the legislative record in *Kennedy* demonstrates a clear and consistent movement toward authorizing the death penalty for child rape. Thus, under the *Atkins* approach, it cannot be said that there existed a national consensus against imposing the death penalty for child rape.

With respect to jury sentencing behavior, Justice Alito correctly noted that a 50% death penalty sentencing rate in Louisiana "is hardly evidence that juries share the Court's view that the death penalty for the rape of a young child is unacceptable."[356] Additionally, he aptly observed that evaluating jury sentencing behavior under five other recently enacted statutes would likely be fruitless because they were "too recent for any individual to have been sentenced to death under them."[357] Thus, while jury sentencing behavior may not have borne much weight on the national consensus analysis, it cannot reasonably be said that the observable sentencing behavior weighed in favor of finding a national consensus against the death penalty for child rape.

4.3. Refining the Subjective Prong

Even when legislative consensus supports the death penalty, the Court must independently assess whether it is excessive or disproportionate in light of the goals of retribution and deterrence.[358] This Note proposes a two-prong, fact-specific framework to guide the Court's inquiry:

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353 *Kennedy*, 554 U.S. at 454–55 (Alito, J., dissenting); Fox II, *supra* note 328, at 848.
354 Fraser, *supra* note 12, at 236–37 (citation omitted).
355 *Id.* at 234–37.
356 *Kennedy*, 554 U.S. at 460 (Alito, J., dissenting).
357 *See id.* at 460 n.8.
358 Gregg v. Georgia, 428 U.S. 153, 173, 183 (1976) (plurality opinion).

> First, the Court must determine whether the legislature reasonably concluded that the crime could be committed with a level of culpability proportionate to the prescribed punishment. If so, the Court must then determine whether a reasonable jury could conclude that the criminal act in the instant case meets the required level of culpability. If both questions are answered in the affirmative, the punishment is constitutionally valid under the Eighth Amendment. If the first question but not the second is answered affirmatively, the criminal statute stands but the jury sentence is overruled. If the first question is answered negatively, the legislative enactment is void and the Court need not address the second question.[359]

This proposed framework brings coherence to the subjective prong by limiting the Court's recourse to extraneous considerations that have inconsistently been relied upon, such as foreign law and international policy.[360]

Additionally, this framework allows the Court to take a more nuanced approach. Although there may be general disapproval of the death penalty for a specific offense or class of offenders, support may nonetheless exist where no lesser punishment would adequately deter the defendant or further the penological goal of retribution.[361] This distinction is reflected in the common legislative practice of authorizing the death penalty only upon a finding of specified aggravating circumstances.[362] The recently enacted death penalty statutes for child rape exemplify the various aggravating circumstances that may elevate an offender's moral culpability to a level that warrants capital punishment.[363] Nonetheless, the Court retains ultimate

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359 Siena, *supra* note 240, at 283 (proposing that this test entirely supplant, rather than supplement, the evolving standards of decency).

360 *See id.* at 287; Roper v. Simmons, 543 U.S. 551, 575–78 (2005).

361 Siena, *supra* note 240, at 284 (noting that the defendant in *Coker* had nothing else to lose and that "[b]y declaring that the death penalty for rape was unconstitutional under all circumstances, the Court took away the only means of deterring Coker and other felons like him from committing further crimes upon escape or in prison, and also took away the possibility of retribution for subsequent crimes committed").

362 *See* FLA. STAT. § 921.1425(7) (2025); TENN. CODE ANN. § 39-13-204(a) (2025); IDAHO CODE § 18-1508C (2025); ARK. CODE ANN. § 5-4-604; OKLA. STAT. tit. 21, § 701.12 (2025).

363 *See, e.g.*, FLA. STAT. § 921.1425(7) (listing ten aggravating factors).

authority under the first prong's reasonability standard to assess whether a penalty is constitutionally disproportionate in relation to the specific crime committed.[364]

The second prong of the proposed framework ensures that the death penalty is justified under the specific facts of the case.[365] This approach strikes a balance between judicial oversight and legislative deference, enabling the Court to invalidate an excessive sentence as applied while still preserving the statute.[366] Moreover, it guarantees that only the most serious offenses committed by the most culpable defendants are subject to the death penalty, thereby advancing the Eighth Amendment's fundamental principle of proportionality.[367] While the Court is the final arbiter of what the Eighth Amendment forbids as cruel and unusual punishment, this framework allows it to exercise that authority without unduly intruding upon the discretion historically vested in state legislatures and juries.[368] Implementing a more regimented and clear process to guide the Court's independent judgment will further improve predictability, democratic legitimacy, and coherence across Eighth Amendment jurisprudence.

Kennedy v. Louisiana demonstrated the Court's most expansive exercise of its independent judgment in death penalty jurisprudence, triggering both political and academic upheaval. However, the deficiencies that mark *Kennedy* are deeply rooted in the Court's inconsistent application of the evolving standards of decency test. Adopting the framework articulated in *Atkins* and providing a fact-specific framework to guide the Court's independent judgment will work to remedy many of these deficiencies and promote a more consistent, principled application of the Eighth Amendment—one that respects legislative judgments.

5. CONCLUSION

Over the past five decades, the Court has tinkered with the evolving standards of decency test in an attempt to define what constitutes cruel and

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364 Siena, *supra* note 240, at 286.
365 *See id.* at 260.
366 *Id.* at 284–85.
367 *Id.* at 287.
368 *Id.* at 288.

unusual punishment.[369] In doing so, the Court's inconsistent application of the test has left it unclear and unpredictable, with its decision in *Kennedy* exposing the test's core weaknesses.[370] The *Kennedy* decision not only reflected the moral judgments of five unelected Justices but also wrongly portrayed them as representative of the entire nation's.[371] Consequently, the decision raised a deeper question: whether societal morality genuinely progresses in a linear, increasingly enlightened direction, or whether such progression is an illusory judicial fiction.[372]

Subsequent enactments of state statutes authorizing the death penalty for child rape suggest that such moral progress may be more contingent and contested than the Court's narrative assumes. How exactly these statutes will influence death penalty jurisprudence remains uncertain. Nevertheless, it appears increasingly likely that the Court will soon reassess its Eighth Amendment analysis.[373] The *Kennedy* decision, along with the Court's inconsistent application of the evolving standards test, illustrates the judicial overreach that has persisted across its categorical exemption cases.[374] A recalibration of institutional balance between the Court and state legislatures is essential to ensure that the Court's Eighth Amendment jurisprudence truly reflects society's evolving standards of decency.

Embracing the approach outlined in *Atkins* would allow the Court to reverse the one-way ratchet effect without necessitating wholesale abandonment of the evolving standards test.[375] This approach would also encourage legislative action while both limiting the Court's interpretation of legislative silence and mitigating the unpredictability of categorical exemption cases.[376] Considering jury sentencing behavior, as the Court intended in *Gregg*, would help to subdue any apparent national consensus arising solely from

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369 *See supra* note 8 and accompanying text.

370 *See supra* notes 8–9 and accompanying text.

371 *See supra* Sections 3.1.1–.2.

372 *See supra* note 241 and accompanying text (discussing the problematic assumption that societal norms inevitably progress toward greater enlightenment).

373 *See supra* notes 322–326 and accompanying text (discussing the Court's shift towards originalism).

374 *See supra* Section 3.3.

375 *See supra* notes 334–335 and accompanying text.

376 *See supra* notes 336–341 and accompanying text.

politically expedient statutes.[377] Additionally, adopting a fact-specific framework to guide the Court's independent judgment would limit its reliance on extraneous considerations and promote a more nuanced approach that respects legislative authority.[378] Together, these refinements would promote doctrinal coherence, improve predictability, and restore proper institutional balance.

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377 *See supra* notes 342–345 and accompanying text.
378 *See supra* notes 359–360 and accompanying text.