NOTE

KENNEDY V. LOUISIANA AND THE ABOLITION OF THE DEATH PENALTY FOR CHILD RAPE: EUTHANIZING "EVOLVING STANDARDS OF DECENCY"

> [I]s it really true that every person who is convicted of capital murder and sentenced to death is more morally depraved than every child rapist? . . . Indeed, I have little doubt that, in the eyes of ordinary Americans, the very worst child rapist—predators who seek out and inflict serious physical and emotional injury on defenseless young children—are the epitome of moral depravity.[1]

INTRODUCTION

Justice Alito accurately summed up the overwhelming moral and emotional arguments against the U.S. Supreme Court's recent holding in *Kennedy v. Louisiana*. Few crimes, if any, so shock the conscience as the rape of a child. Few offenders seem less deserving of mercy than those who rape a child, while arguably no other victim has been so wronged or violated as the young victim. Truly, any argument for sparing child rapists that is based on an appeal to mercy or human compassion is destined to fail in modern society.[2] That is why it was essential for Justice Kennedy's majority opinion to accurately reflect and build upon the Court's existing death-penalty jurisprudence when it invalidated Louisiana's child-rape statute.

Unfortunately for those who disagree with the very principle of capital punishment, Justice Kennedy singularly failed at this task. That he was unable to craft a persuasive argument to counter the visceral antipathy that crimes against defenseless children generate is understandable. However, his tortured interpretation manipulating Supreme Court death-penalty precedent set his

1. Kennedy v. Louisiana, 128 S. Ct. 2641, 2676 (2008) (Alito, J., dissenting).

2. For example, opposition to the Court's ruling spanned the partisan divide in the 2008 Presidential election, as both Barack Obama and John McCain expressed disagreement with *Kennedy*. *See* Robert Barnes, *High Court Rejects Death for Child Rape*, WASH. POST, June 26, 2008, at A1.

decision—and, potentially, subsequent attempts to limit the application of capital punishment—on shaky ground.

Admittedly, the Supreme Court's death-penalty jurisprudence has been modified and altered over the years since the Court's first aborted attempt to abolish the practice in *Furman v. Georgia*.[3] But throughout the intervening years, an ever-shifting Court has returned again and again to our "evolving standards of decency." This concept, though elusive of strict definition, has provided an overarching principle by which all Eighth Amendment questions have been resolved. Justices opposed to capital punishment have used the "evolving standards" argument to deem death an unconstitutional penalty for certain crimes and offenders, while those seeking to retain the practice have shown how capital punishment as an institution still comports with "evolving standards."

In his majority opinion, Justice Kennedy fundamentally redefined "evolving standards of decency" so as to render the concept nearly meaningless. In so doing, he has relegated to the dustbin the strongest argument for abolishing the death penalty for child rapists within the Court's accepted precedent. In its place, Justice Kennedy has relied more strongly on the theory, first pronounced in *Coker v. Georgia*, that the Eighth Amendment requires the Court to bring its "own judgment" to bear on the permissibility of capital punishment in particular situations.[4] This formulation is an inadequate and inherently less justifiable substitute for the "evolving standards" concept and only renders Justice Kennedy's arguments more tenuous.[5]

This Note analyzes Justice Kennedy's reasoning in *Kennedy v. Louisiana* and argues that, despite leading to the correct outcome, it is fundamentally flawed. Part I provides a brief overview of the heinous crime that was the basis of the case as well as a short examination of the case's procedural history. Part II discusses the long and often complex evolution of Supreme Court death-penalty jurisprudence that Justice Kennedy drew from—and modified—in his majority opinion. Part III analyzes the reasons why *Kennedy* is both a poorly crafted opinion and one that damages the integrity of existing constitutional limitations on the death penalty. Finally, this Note offers a rationale that reaches the same result as *Kennedy* but is more properly in keeping with precedent.

3. 408 U.S. 238, 238–40 (1972) (per curiam).

4. 433 U.S. 584, 597 (1977).

5. It should be clarified that, as originally formulated by Justice White in *Coker*, the Court's "own judgment" test was not viewed as an alternative to, but rather as a complement of, the "evolving standards of decency" concept. *See id.* However, it is one of the contentions of this Note that Justice Kennedy fundamentally dismantled the conventional understanding of "evolving standards of decency" and relied on the Court's "own judgment" more as a substitute.

I. THE CASE

Justice Kennedy accurately characterized the facts of the case when he commented that they could not be "recounted . . . sufficient[ly] to capture in full the hurt and horror inflicted on [the] victim."[6] On March 2, 1998, Patrick Kennedy's eight-year-old stepdaughter L.H. was viciously raped at her home in Louisiana.[7] L.H. suffered severe internal injuries as a result of the rape and had to undergo invasive surgery to repair the damage; one expert in pediatric forensic medicine considered the girl's injuries the most serious he had ever seen.[8] After an investigation, Kennedy was indicted by a grand jury on May 7, 1998, for the rape and was convicted on August 25, 2003, after a ten-day trial.[9] The next day, a unanimous jury recommended that Kennedy be sentenced to death under Louisiana's aggravated-rape statute,[10] which permitted capital punishment for the rape of a child less than twelve years of age.[11]

Kennedy appealed his conviction and sentence to the district court, arguing in part that section 14:42 of the Louisiana Revised

6. *Kennedy*, 128 S. Ct. at 2646.

7. State v. Kennedy, 05-1981, pp. 1–2 (La. 5/22/07); 957 So. 2d 757, 760–61.

8. *Id.* at p. 2; 957 So. 2d at 761.

9. *Id.* at pp. 1–2; 957 So. 2d at 760. The long period between the indictment and the jury trial resulted from, in the words of the Louisiana Supreme Court, Kennedy's "vigorous pre-trial defense," which included approximately fifty motions. *Id.* at p. 1; 957 So. 2d at 760.

10. *Id.* at pp. 1–2; 957 So. 2d at 760.

11. LA. REV. STAT. ANN. § 14:42 (1997). In his majority opinion, Justice Kennedy detailed the essential elements of the statute in effect at the time of Kennedy's trial:

> A. Aggravated rape is a rape committed . . . where the anal or vaginal sexual intercourse is deemed to be without lawful consent of the victim because it is committed under any one or more of the following circumstances:
>
> . . . .
>
> (4) When the victim is under the age of twelve years. Lack of knowledge of the victim's age shall not be a defense.
>
> . . . .
>
> D. Whoever commits the crime of aggravated rape shall be punished by life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence.
>
> (1) However, if the victim was under the age of twelve years, as provided by Paragraph A(4) of this Section:
>
> (a) And if the district attorney seeks a capital verdict, the offender shall be punished by death or life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence, in accordance with the determination of the jury.

Kennedy, 128 S. Ct. at 2647–48 (quoting § 14:42). Section 14:42 of the Louisiana Revised Statutes was amended in 1995 to permit a jury to sentence a defendant to death who is convicted of raping a victim under the age of twelve, even if the victim did not die. *Kennedy*, 05-1981 at p. 30; 957 So. 2d at 779.

Statutes was unconstitutional.[12] The district court denied his motions and approved the death sentence.[13] Kennedy subsequently appealed to the Louisiana Supreme Court, which had previously upheld the constitutionality of the amended section 14:42. In *State v. Wilson*, Louisiana's high court emphasized that children, above all others, were a class in need of special protection.[14] As such, the court went on to conclude that "given the appalling nature of the crime, the severity of the harm inflicted upon the victim, and the harm imposed on society, the death penalty is not an excessive penalty for the crime of rape when the victim is a child under the age of twelve years old."[15]

In *State v. Kennedy*, the Louisiana Supreme Court echoed many of the same sentiments from *Wilson* in upholding the constitutionality of Kennedy's sentence. However, it did so in light of the analytical process adopted in the U.S. Supreme Court's decisions in *Atkins v. Virginia*[16] and *Roper v. Simmons*.[17] The Louisiana court first reasoned that child rape is the "most heinous of all non-homicide crimes"[18] and proceeded to catalogue all of the other non-homicide crimes in death-penalty jurisdictions that are capital offenses.[19] The court then focused on the fact that four states had followed Louisiana's lead in enacting statutes authorizing death for child rapists, evidencing the type of directional trend *Atkins* and *Roper* had found particularly significant.[20]

Given this objective evidence, the Louisiana Supreme Court, not surprisingly, reiterated its subjective judgment that child rape is "like no other crime."[21] Emphasizing the vulnerability of children and the duty of society to vigorously protect them, the court concluded that death was not a disproportionate sentence for child

12. *Kennedy*, 05-1981 at p. 20; 957 So. 2d at 772.

13. State v. Kennedy, No. 98-1425, 2003 WL 25278316 (La. Dist. Ct. Oct. 2, 2003) (order denying motion for a new trial and imposing sentence).

14. State v. Wilson, 96-1392, p. 6 (La. 12/13/96); 685 So. 2d 1063, 1067.

15. *Id.* at p. 13; 685 So. 2d at 1070.

16. 536 U.S. 304 (2002) (holding that the execution of mentally retarded criminals violates the Eighth Amendment).

17. 543 U.S. 551 (2005) (holding that the death penalty is unconstitutional when imposed on individuals who were under the age of eighteen when their crimes were committed).

18. State v. Kennedy, 05-1981, p. 38 (La. 5/22/07); 957 So. 2d 757, 785.

19. *Id.* at pp. 40–42; 957 So. 2d at 786–88. The court concluded that thirty-eight percent of capital jurisdictions permit the death penalty for some non-homicide crimes. *Id.* at p. 42; 957 So. 2d at 788.

20. *Id.* at pp. 42–43; 957 So. 2d at 788. The other four states with child-rape capital-punishment statutes were Oklahoma, South Carolina, Montana, and Georgia. Montana adopted its provision in 1997, Georgia amended its statute to specifically provide for capital punishment of child rapists in 1999, and Oklahoma and South Carolina had just enacted their statutes in 2006. *Id.* at pp. 37–38; 957 So. 2d at 784–85.

21. *Id.* at p. 44; 957 So. 2d at 789 (quoting State v. Wilson, 96-1392, p. 6 (La. 12/13/96); 685 So. 2d 1063, 1067).

rape.[22] Kennedy subsequently petitioned for certiorari to the U.S. Supreme Court, which granted his application in order to assess the constitutionality of capital punishment for child rape.[23]

II. BACKGROUND

Given the often strong and emotional views Americans hold toward the death penalty, it is perhaps strange how few cases have reached the Supreme Court challenging the practice. In fact, it was less than forty years ago, in *Furman v. Georgia*, when the Court first applied an Eighth Amendment analysis to capital punishment and found the practice, as it was then being administered, unconstitutional.[24] The groundwork for the *Furman* decision, however, was laid out much earlier in two noncapital cases, *Weems v. United States*[25] and *Trop v. Dulles*.[26] Furthermore, since *Furman*, capital punishment for murder has again been found constitutional,[27] yet it has been limited both in procedural aspects[28] and in who may be sentenced to death.[29] The result has been a complex jurisprudence where minor differences in emphasis and, sadly, Justices' personal opinions often dictate life or death.

This Part discusses four rough eras of death-penalty jurisprudence to provide the necessary elements underlying the decision in *Kennedy v. Louisiana*. First, the major pre-*Furman* cases that created and elaborated upon the concept of "evolving standards of decency" are explained. Second, the elimination of capital punishment in *Furman* and the subsequent repudiation of

22. *Id.* at pp. 44–45, 957 So. 2d at 789 (citing *Wilson*, 96-1392 at p. 6; 685 So. 2d at 1067).

23. Kennedy v. Louisiana, 128 S. Ct. 2641, 2649 (2008).

24. Furman v. Georgia, 408 U.S. 238, 239–40 (1972) (per curiam).

25. 217 U.S. 349 (1910).

26. 356 U.S. 86 (1958).

27. Gregg v. Georgia, 428 U.S. 153, 169 (1976) (plurality opinion).

28. *See, e.g.*, Eddings v. Oklahoma, 455 U.S. 104, 114 (1982) (requiring the sentencer to consider relevant mitigating evidence as a matter of law); Godfrey v. Georgia, 446 U.S. 420, 428 (1980) (holding that a finding that the crime "was 'outrageously or wantonly vile, horrible and inhuman'" was insufficient to constitute a restraint on "arbitrary and capricious infliction of the death sentence," as required by *Gregg*); Lockett v. Ohio, 438 U.S. 586, 605 (1978) (holding that the death-penalty sentence cannot be "precluded [by statute] from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death").

29. *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 568 (2005) (finding capital punishment of juvenile offenders under eighteen unconstitutional); Atkins v. Virginia, 536 U.S. 304, 321 (2002) (holding that the execution of mentally retarded offenders violates the Eighth Amendment); Enmund v. Florida, 458 U.S. 782, 797 (1982) (holding that the Eighth Amendment does not permit a sentence of death for one "who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed").

that holding in *Gregg v. Georgia* are addressed. Importantly, these cases demonstrate a fundamental shift in the meaning of "evolving standards" that proved central to the analysis in *Kennedy v. Louisiana*. Third, *Coker v. Georgia*, which forbade the use of capital punishment in cases of the rape of an adult woman where the victim did not die,[30] is examined. In applying a proportionality analysis to statutes permitting the death penalty for adult rape, *Coker* provided one half of the rationale for the decision in *Kennedy v. Louisiana*. Finally, the modern cases of *Atkins* and *Roper*, each of which limited the application of the death penalty based on offender characteristics, are discussed. These two cases set out the other half of the framework relied upon by Justice Kennedy in *Kennedy v. Louisiana*.

A. Weems v. United States *and* Trop v. Dulles*: The Genesis of "Evolving Standards"*

The central principle underlying all modern capital-punishment jurisprudence was first developed a century ago in *Weems v. United States*. Prior to that decision, the few cases dealing with the death penalty to reach the high Court were concerned with whether particular methods of capital punishment, like firing squads[31] and electrocution,[32] were cruel and unusual. *Weems* was groundbreaking as it was the first case to find that a particular punishment for a specific crime violated the Eighth Amendment's Cruel and Unusual Punishments Clause.[33]

The defendant in *Weems* was an officer of the United States government in the Philippines who was convicted of falsifying documents and sentenced to fifteen years of hard labor, a loss of personal and property rights, and surveillance for the remainder of his life.[34] In holding that such a punishment violated the Eighth Amendment, Justice McKenna spelled out three tests for assessing the constitutionality of state-imposed punishments. These tests, in various formulations, have defined the reaches of Eighth Amendment jurisprudence ever since.

Justice McKenna's first test held punishments cruel and unusual if the severity of the punishment was disproportionately higher than the harm meant to be prevented.[35] This proportionality

30. 433 U.S. 584, 592 (1977).

31. Wilkerson v. Utah, 99 U.S. 130, 134–35 (1878) (holding that death by firing squad was not cruel and unusual punishment).

32. *In re* Kemmler, 136 U.S. 436, 447–49 (1890) (holding that electrocution, though unusual in light of prior methods, was nonetheless not cruel punishment and was therefore constitutional).

33. Weems v. United States, 217 U.S. 349, 380–81 (1910); *see also* Arthur J. Goldberg, *The Death Penalty for Rape*, 5 HASTINGS CONST. L.Q. 1, 2 (1978).

34. *Weems*, 217 U.S. at 358–67; *see also* Goldberg, *supra* note 33, at 2–3.

35. *Weems*, 217 U.S. at 366–67 ("[I]t is a precept of justice that punishment for crime should be graduated and proportioned to offense.").

analysis compares the punishment to the crime and decides if the two are commensurate. The second test was more ambitious: it focused on the traditional justifications for punishment and held that punishments were cruel and unusual if less severe alternatives existed that could achieve the same goals.[36] This test has wide-ranging implications, as it suggests that an upper limit for the punishment of any particular crime exists. Justice McKenna's third test served as something of a catchall provision, but also a modifier for the previous two tests. In essence, punishments were cruel and unusual if they offended contemporary moral values, as "enlightened by a humane justice."[37]

In the mind of Justice Goldberg, discussing *Weems* many years later, this final test "acts as a lens through which the Court must view the other tests for excessive punishment and disproportionate harm."[38] Nevertheless, it took some years for the Court to accept the framework imposed on the Eighth Amendment by *Weems*. For example, shortly after World War II, the Court ignored *Weems* and returned to its earlier Eighth Amendment jurisprudence when it held that it was not cruel and unusual to reelectrocute a condemned man whose first attempted execution failed.[39] However, Justice McKenna's tests in *Weems* were not forgotten, as Chief Justice Warren demonstrated in the seminal case of *Trop v. Dulles*.

Trop succeeded in breathing life into the bare-bones structure of *Weems*'s Eighth Amendment tests. *Trop* challenged the constitutionality of punishing a wartime deserter from the American army by stripping the man of his citizenship.[40] Chief Justice Warren readily understood that *Weems*'s proportionality test was inapplicable to the case, since, as wartime desertion could be punished by death, a loss of citizenship was surely a less severe result.[41] Instead, Chief Justice Warren framed the question around *Weems*'s contemporary-moral-values test: "The question is whether this penalty subjects the individual to a fate forbidden by the principle of civilized treatment guaranteed by the Eighth Amendment."[42]

In reviving the contemporary-moral-values test, Chief Justice Warren emphasized the fluid and aspirational nature required in the analysis. The meaning and scope of the Eighth Amendment implicitly change over time in response to society's development

36. *Id.* at 381.
37. *Id.* at 378.
38. Goldberg, *supra* note 33, at 3.
39. Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 464 (1947) ("The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely.").
40. Trop v. Dulles, 356 U.S. 86, 87–88 (1958).
41. *Id.* at 99.
42. *Id.*

along the way. In Chief Justice Warren's timeless formulation, "[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[43] Thus, *Trop* made clear that the Eighth Amendment not only evolved with society, but that it evolved in a decided direction. Applied in the context of capital punishment, Chief Justice Warren's statement seemingly points toward American society's eventual desire for the complete abolition of the death penalty.

Furthermore, this unidirectional advance was reflective of the most cherished values of our society, as "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man."[44] *Trop* thereby reinvigorated the tests from *Weems* and solidified their place in Eighth Amendment jurisprudence. It also emphasized that the "evolving standards of decency" concept, which had served to focus the other *Weems* tests, now acted as the ultimate arbiter of the constitutionality of punishments. Most importantly, *Trop* emphasized that any such analysis was not merely a mechanical test, or even one that was simply meant to reflect contemporary society. Rather, by tying "evolving standards of decency" to "the dignity of man," *Trop* showed that the test should be conducted almost above the law, testing and challenging American society to strive for more just and moral results. Such a test defied strict definition, and its proper application was soon challenged when the Court again addressed the death penalty in the 1970s.

B. Furman v. Georgia *and* Gregg v. Georgia*: "Evolving Standards" Applied to Capital Punishment*

As previously mentioned, the only Eighth Amendment challenges to the death penalty prior to the 1970s concerned particular methods of execution, not the constitutionality of capital punishment itself. Perhaps, as Chief Justice Warren stated in *Trop*, though there were "forceful" arguments against the death penalty, "in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty."[45] These assumptions began to shift in the 1960s for two important reasons. First, several new members of the Supreme Court began to question the constitutionality of the death penalty; Justice Goldberg went so far as to send a memo to his colleagues urging them to accept a challenge to the practice on Eighth Amendment "cruel and unusual" grounds.[46] Second, while the number of capital crimes increased

43. *Id.* at 101.
44. *Id.* at 100.
45. *Id.* at 99.
46. *See* Goldberg, *supra* note 33, at 4–7. Justice Goldberg took particular note of international opinion against the death penalty and of polls indicating weakening American support for the institution. *Id.* at 4. He also advocated an

during the 1950s and 1960s, the number of persons executed for these crimes steadily declined, a strong indication of the declining support for capital punishment among Americans during this time period.[47]

With these developments fresh in the Court's mind, it accepted a challenge for the first time to the constitutionality of the death penalty itself in light of the Eighth Amendment's prohibitions.[48] In *Furman*, the Court declared that "the imposition and carrying out of the death penalty" constituted cruel and unusual punishment and thus the Constitution barred capital punishment.[49] Despite the sweeping nature of this pronouncement, however, the Court could not speak with a united voice; in fact, each Justice filed a separate opinion.[50] Nevertheless, there was strong support behind Chief Justice Warren's view of "evolving standards of decency."[51] This concept, itself a refinement of Justice McKenna's tests in *Weems*,

activist role for the Court, emphasizing how the Court had often "led rather than followed public opinion in the process of articulating and establishing progressively civilized standards of decency." *Id.* at 5. The irony of Justice Goldberg's advocacy, of course, is that he did not remain on the Court long enough to accept a case where he could test his theories, choosing instead to become the United States' Ambassador to the United Nations. However, prior to his departure, Justice Goldberg did dissent from a denial of certiorari in a capital-rape case in which he referenced a United Nations survey on the limited international imposition of the death penalty for rape and the fact that thirty-three states had banned capital punishment for such a crime. *See* Rudolph v. Alabama, 375 U.S. 889, 889 (1963), *denying cert. to* 152 So. 2d 662 (Ala. 1963). Justice Goldberg also specifically invoked the "evolving standards of decency" language of *Trop* in his dissent. *Id.* at 890.

47. Furman v. Georgia, 408 U.S. 238, 291–93 (1972) (Brennan, J., concurring).

48. A moratorium on executions was imposed in 1967 as the Court was faced with several challenges to capital punishment. *See id.* at 293. The most important challenge besides *Furman* was *McGautha v. California*, 402 U.S. 183 (1971). This case, subsequently overruled by *Furman*, considered a due process challenge to allowing unfettered jury discretion in imposing the death sentence on a convicted capital defendant. The Court, in an opinion by Justice Harlan, affirmed the constitutionality of this practice, noting that juries could wisely distinguish between offenders, sending only the worst to death row. *Id*. at 220–22. In a concurring opinion, Justice Black stated that he believed that the Framers had not intended to abolish capital punishment with the Eighth Amendment and that their view should stand, for judges should not "amend the Constitution by interpretation to keep it abreast of modern ideas." *Id.* at 226 (Black, J., concurring). Despite this stated conviction, Justice Black had joined Chief Justice Warren's majority opinion thirteen years earlier in *Trop v. Dulles*, which defined the concept of "evolving standards of decency." *See Trop*, 356 U.S. at 87.

49. *Furman*, 408 U.S. at 239–40 (per curiam).

50. *Id.* at 240.

51. Chief Justice Warren's "evolving standards of decency" framework was echoed in several of the opinions declaring capital punishment, as applied, to be unconstitutional. *Id.* at 242 (Douglas, J., concurring); *id.* at 269–70 (Brennan, J., concurring); *id.* at 327 (Marshall, J., concurring).

was enhanced further in *Furman*, particularly in the opinions of Justices Brennan and Marshall.

Justice Brennan identified four factors for the Court to consider when evaluating whether a particular punishment is cruel and unusual, each of which echoes *Weems*. First, the punishment must not be so severe as to degrade human dignity.[52] Second, the government may not inflict severe punishments arbitrarily.[53] Third, severe punishments "must not be unacceptable to contemporary society."[54] Fourth, such punishments cannot be excessive.[55] Throughout each test, Justice Brennan, reminiscent of Chief Justice Warren, infused an overarching vision that the tests should be applied *above* the law. Justice Brennan repeatedly underscored the uniqueness of the death penalty as a criminal sanction—popularly known as the "death is different" theory—and how this unusual severity was best evidenced by its "finality and enormity."[56]

These grandiose statements were not merely the work of a master wordsmith; rather, they showed Justice Brennan's application of the "evolving standards of decency" principle in the manner intended for it in *Trop*. In other words, the "evolving standards of decency" concept was meant to be a form of meta-analysis, something not purely definable, but through which the Court was tasked with evaluating the constitutionality of particular punishments. Such a principle is distinct, however, from simply applying the personal whims of individual Justices to a case. Instead, it was a principle that permeated the words and phrases of the Constitution and gave the Articles and Amendments a greater meaning that the Justices were supposed to apply. As Justice Brennan so succinctly put it, "[w]hen examined by the principles applicable under the Cruel and Unusual Punishments Clause, death stands condemned as fatally offensive to human dignity."[57]

52. *Id.* at 271 (Brennan, J., concurring).

53. *Id.* at 274. Ultimately, the holding of the case was narrowed to risk-of-arbitrariness grounds when evaluating the sentencing scheme. *See* Steven D. Arkin, Note, *Discrimination and Arbitrariness in Capital Punishment: An Analysis of Post-*Furman *Murder Cases in Dade County, Florida, 1973–1976*, 33 STAN. L. REV. 75, 75 (1980). For example, Justice Stewart concurred in the result because current death-penalty procedures meant that individuals were sentenced "capriciously," and that the penalty ended up being "wantonly and . . . freakishly imposed." *Furman*, 408 U.S. at 309–10 (Stewart, J., concurring). Justice White viewed the arbitrariness from a deterrence standpoint, noting that due to the rarity with which the death penalty was actually imposed, it was little more than "the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes." *Id.* at 312 (White, J., concurring).

54. *Furman*, 408 U.S. at 277 (Brennan, J., concurring).

55. *Id.* at 279. As Justice Brennan mentions, this "excessiveness" principle was first raised by Justice Field in his dissent to *O'Neil v. Vermont*, 144 U.S. 323, 338–39 (1892) (Field, J., dissenting).

56. *Furman*, 408 U.S. at 287–90 (Brennan, J., concurring).

57. *Id.* at 305.

Justice Marshall similarly applied the original concept of "evolving standards of decency" in his concurrence in *Furman*. He emphasized that the decision turned not only on the language of the Eighth Amendment, but also on the fact that the Cruel and Unusual Punishments Clause must be interpreted in a manner consistent with the nation's "self-respect."[58] After a painstaking journey through the history of American punishment schemes and an exhaustive dissection of every possible justification for the death penalty, Justice Marshall opined that an American public truly informed of the discriminatory application of the death penalty would never accept its use.[59] This utopian view of how individual citizens would respond is indicative of the overarching application of the "evolving standards of decency" concept. In striking down the death penalty, Justice Marshall believed the Court was paying homage to the American system of government: "Only in a free society could right triumph in difficult times, and could civilization record its magnificent advancement."[60] These words truly emphasized the purposive and aspirational nature intended for the "evolving standards of decency" principle.

Thus, Justices Brennan and Marshall further refined Chief Justice Warren's "evolving standards" concept, affirming that it inherently incorporated a clear direction and served as an all-encompassing approach to punishment analysis.[61] Nevertheless, in spite of the idealistic approach in *Furman*, the Court fundamentally altered the meaning of "evolving standards of decency" in *Gregg v. Georgia*. Decided only four years after *Furman*, *Gregg* upheld the constitutionality of Georgia's revised capital-sentencing scheme.[62]

58. *Id.* at 315 (Marshall, J., concurring).

59. *See id.* at 333–69.

60. *Id.* at 371.

61. For an enlightening and forceful argument that influenced both Justices Brennan and Marshall in *Furman*, see Arthur J. Goldberg & Alan M. Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773 (1970).

62. Gregg v. Georgia, 428 U.S. 153, 207 (1976). *Gregg* focused, as had Justice Stewart in his concurrence in *Furman*, on the risk of arbitrariness inherent in pre-*Furman* sentencing schemes. Such an angle is not surprising, of course, as Justice Stewart authored the judgment of the Court and a joint opinion in *Gregg*. *Gregg* spelled out four steps in the "guided sentencing" scheme enacted by Georgia in the aftermath of *Furman*. First, the list of capital crimes was shortened. Second, aggravating factors based on the circumstances of each case further limited the number of criminals for whom death was a possibility. Third, juries were to take into account individual mitigating factors about particular criminals, so as to limit the application of capital punishment. Fourth, direct appellate review to the state supreme court was ordered so as to ensure against arbitrariness. *See id.* at 196–207 (plurality opinion). In sum, these procedures narrowed the specific criminals, convicted of certain classes of crimes, whom a jury could sentence to death. Once sufficiently narrowed, the jury discretion permitted in *McGautha v. California* was deemed acceptable. *See* Zant v. Stephens, 462 U.S. 862, 873–80 (1983)

In so doing, *Gregg* took the aspirational character of "evolving standards of decency" and refashioned that concept into a functional, inherently objective analytical framework.[63]

While still recognizing that "evolving standards of decency" was the proper standard for judging the constitutionality of a punishment, the Court in *Gregg* construed *Furman* as not calling for Justices' "subjective judgment" of Americans' current views.[64] The Eighth Amendment, Justice Stewart declared, actually requires that the Court "look to objective indicia that reflect the public attitude toward a given sanction."[65] The Court expressly endorsed two specific objective indices: legislative enactments and jury verdicts.[66] Given that in the wake of *Furman* at least thirty-five states reenacted modified capital-punishment schemes and 460 individuals were sentenced to death, the *Gregg* majority determined that the "evolving standards of decency" in America had not caused citizens to reject capital punishment.[67]

In holding that the death penalty was not a disproportionate punishment in all cases for murder, *Gregg* rejected the overarching and directional form of the "evolving standards of decency" concept developed through *Trop* and *Furman*.[68] Any meta-analytical structure inherent to "evolving standards" was suppressed; instead, the meaning of the Eighth Amendment's Cruel and Unusual Punishments Clause was to be found in the will of the current majority in the country. Consequently, the values of human dignity and societal progress that were encapsulated in the "evolving standards of decency" principle in *Trop* and *Furman* were erased from the analysis. Hereafter, the Court's construction of the Eighth Amendment could only serve as a mirror to reflect current practices rather than as a measure of truly evolving human decency.

(explaining the *Gregg* narrowing formulation).

63. It is one of the primary contentions of this Note that Supreme Court Eighth Amendment jurisprudence has transformed "evolving standards of decency" from its initial form in *Trop* and *Furman* of an aspirational concept, to a more practical analytical framework in *Gregg* and *Coker*, and finally into an objectively defined rule of death-penalty constitutional decisions in *Kennedy*. In the process, the original intent of "evolving standards of decency" as a lofty guiding principle meant to inform the Justices' interpretation of the Cruel and Unusual Punishments Clause has largely been distorted and, potentially, lost altogether.

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

65. *Id.*

66. *Id.* at 179–82.

67. *Id.*

68. For a cogent and fascinating article finding that the Supreme Court's "death is different" jurisprudence (emphasizing the uniqueness of capital punishment due to the severity and irrevocability of death), as applied in modern "evolving standards of decency" analysis, missed the proper purposive view of the Eighth Amendment, see William W. Berry III, *Following the Yellow Brick Road of Evolving Standards of Decency: The Ironic Consequences of "Death-Is-Different" Jurisprudence*, 28 PACE L. REV. 15 (2007).

C. Coker v. Georgia*: The Supreme Court Reconsiders Its Approach*

In the wake of *Gregg*, the nation's legislatures faced a confusing situation. While *Furman* had deemed capital punishment unconstitutional, as administered, for *all* crimes, *Gregg* specifically held Georgia's sentencing scheme constitutional as applied to convictions for first-degree murder. Thus, the punishment for a plethora of crimes once deemed capital in certain jurisdictions, like rape and kidnapping, remained in limbo, subject only to *Furman*'s seemingly rejected holding.

The Court attempted to resolve this quandary in *Coker v. Georgia*.[69] Coker was already serving long sentences for murder, rape, and kidnapping when he escaped from a Georgia prison and raped a woman at knifepoint.[70] Following the sentencing procedures that had been revised by the state legislature after *Furman*, the jury found sufficient aggravating factors, that were not outweighed by mitigating circumstances, and sentenced Coker to death.[71] The Supreme Court granted certiorari and reversed the sentence.[72] In his plurality opinion, Justice White held that, "with respect to rape of an adult woman . . . a sentence of death is grossly disproportionate and excessive punishment . . . and is therefore forbidden by the Eighth Amendment."[73]

Coker was the first case to lay out an explicit proportionality test for the constitutionality of capital punishment for specific crimes. Justice White stated that the Court was "firmly embrac[ing] the holdings and dicta" of *Furman* and *Weems* (just as, he claimed, it had done in *Gregg*) when it deemed the death penalty an excessive punishment in relation to the rape of an adult woman.[74] A punishment could be excessive in two ways, either by not furthering the justifications for punishment (and thus being "nothing more than the purposeless and needless imposition of pain and suffering") or by being "grossly out of proportion to the severity of the crime."[75] For Justice White, the key aspect was proportionality.[76]

The emphasis on proportionality was not an accident; after all, *Gregg* specifically left for future cases the determination of whether the death penalty was a proportionate sanction for crimes where the victim did not die.[77] Instead, it was the manner in which Justice

69. 433 U.S. 584 (1977).
70. *Id.* at 587 (White, J., plurality opinion).
71. *Id.* at 587–91.
72. *Id.* at 586, 600.
73. *Id.* at 592.
74. *Id.*
75. *Id.*
76. *See* David J. Karp, Note, Coker v. Georgia*: Disproportionate Punishment and the Death Penalty for Rape*, 78 COLUM. L. REV. 1714, 1716 (1978).
77. Welsh S. White, *Disproportionality and the Death Penalty: Death as a Punishment for Rape*, 38 U. PITT. L. REV. 145, 146–47 (1976).

White addressed the issue of proportionality that set new precedents and laid the groundwork for *Kennedy*. The Court began by conforming to the model of *Gregg*, examining the history of the death penalty for rape as well as the contemporary judgment of the practice, as evidenced by jury verdicts and state statutes.[78] The Court made a strong argument against capital-rape statutes using these objective indices. For example, the Court noted that of the sixteen jurisdictions that had authorized the death penalty for the rape of an adult woman prior to *Furman*, only three chose to reenact similar laws in their guided sentencing schemes.[79] Moreover, as two of the other statutes were invalidated under the reasoning of *Woodson v. North Carolina*,[80] Georgia was the only state in the nation that had a statute making the rape of an adult woman a capital offense at the time of *Coker*.[81]

Similarly, Justice White looked to the other major form of objective information suggested by *Gregg*—jury verdicts—and found it wanting. While precise numbers of jury determinations were not available, Justice White pointed to the sixty-three rape cases which had been presented to the Georgia Supreme Court since the state had adopted its guided sentencing scheme following *Furman*.[82] Of the sixty-three cases reviewed, only six convicted rapists had been sentenced to death by juries.[83] While Justice White acknowledged that such a number was not trivial, he was nevertheless convinced that "in the vast majority of cases, at least 9 out of 10, juries have not imposed the death sentence."[84] Thus, the two key indicators of

78. Charles E. Lawrence, Jr., *Criminal Law—Death as a Punishment for Rape—Disproportional, Cruel and Unusual Punishment:* Coker v. Georgia, 21 HOW. L.J. 955, 964 (1978).

79. *Coker*, 433 U.S. at 594.

80. 428 U.S. 280, 304–05 (1976). *Woodson* was a companion case to *Gregg*, and it invalidated mandatory death-penalty schemes. *Id.* at 305; *see also* Roberts v. Louisiana, 428 U.S. 325, 331–34 (1976) (invalidating Louisiana's mandatory death sentence for substantially the same reasons as in *Woodson*). Some states, in the wake of *Furman*'s pronouncements against arbitrariness in capital-punishment schemes, enacted statutes whereby conviction of certain crimes automatically led to a sentence of death. *Woodson* reinforced the constitutional imperative that capital sentencing structures had to permit an individualized sentencing determination. *Woodson*, 428 U.S. at 304.

81. *Coker*, 433 U.S. at 595–96 (White, J., plurality opinion). Interestingly, the Court made note of the fact that two states made the rape of a child by an adult a capital offense—the same topic at issue in *Kennedy v. Louisiana*. *Id.* at 595–96.

82. *Id.* at 596.

83. *Id.* at 597.

84. *Id.* Justice White dismissed Georgia's argument that juries, instead of implicitly rejecting the application of the death penalty to rapists, were demonstrating that the guided sentencing schemes created in the wake of *Furman* were having their intended effect—juries were condemning only the worst offenders to death. *See id.* It is unclear from the opinion, other than the ultimate decision rendered by the Court, why Justice White gave this view little credence.

American contemporary values strongly argued against retaining the death penalty for the rape of an adult woman.

However, Justice White did not conclude his analysis with the rather persuasive statistics condemning capital punishment for rape; in fact, he stated that "the attitude of state legislatures and sentencing juries do not wholly determine this controversy."[85] Instead, Justice White added a significant new element to the Court's death-penalty jurisprudence: "[T]he Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment."[86]

When the Justices expressed their "own judgments" on the issue, it revealed a panel torn between their disgust with rape as a crime and their desire to limit the reach of capital punishment. Justice White first emphasized that the Court "[did] not discount the seriousness of rape as a crime. . . . Short of homicide, it is the 'ultimate violation of self.'"[87] Rape shows an "almost total contempt for the personal integrity and autonomy of the female victim" and even causes public injury, as it "undermines the community's sense of security."[88]

However, even the truly heinous nature of the crime of rape was insufficient to warrant the punishment of death, according to the majority. Ultimately, "in terms of moral depravity and of the injury to the person and to the public, [rape] does not compare with murder."[89] The Court was engaged in difficult line drawing, and consciously so: "The murderer kills; the rapist, if no more than that, does not. Life is over for the victim of the murderer; for the rape victim, life may not be nearly so happy as it was, but it is not over and normally is not beyond repair."[90] The Court was quick to remind Americans that such line drawing was essential when dealing with the death penalty, "which 'is unique in its severity and irrevocability.'"[91] In considering the weight of this "death is different" mantra, the conflicted Court deemed narrowing the scope of capital punishment to be a more important goal than sanctioning

85. *Id.*

86. *Id.* The wording of Justice White's pronouncement was wholly new to death-penalty jurisprudence. However, it is possible that the formulation was intended to invoke the essence of the abolitionist views in the *Furman* decision, specifically those of Justices Brennan and Marshall. If that was indeed the intention, it was a misunderstanding of the abolitionist viewpoint, which was firmly grounded in Supreme Court interpretation of the Eighth Amendment. While Justices Brennan and Marshall assuredly had their own viewpoints on the material, their actual opinions eschewed expressing their personal feelings. *See supra* notes 52–61 and accompanying text.

87. *Coker*, 433 U.S. at 597.

88. *Id.* at 597–98.

89. *Id.* at 598.

90. *Id.*

91. *Id.* (quoting Gregg v. Georgia, 428 U.S. 153, 187 (1976)).

death for rapists.[92]

D. Atkins v. Virginia *and* Roper v. Simmons*: A New Era of Limits on Capital Punishment*

A quarter century after *Coker*, the Court saw fit to revisit Justice White's formulation when faced with challenges to the constitutionality of the death penalty as applied to the mentally retarded and to minors. While each category naturally lends itself to the proportionality analysis of *Coker*, there is a significant difference in application. While *Coker* examined the proportionality of capital punishment in relation to a particular *offense* (specifically, the rape of an adult woman), the Court was asked in *Atkins v. Virginia* and *Roper v. Simmons* to judge the proportionality of the death penalty in relation to murders committed by particular classes of *offenders* (the mentally retarded and those under eighteen, respectively).[93] Nevertheless, the Court proceeded to follow much of the same basic analysis it had developed in *Coker*, but with two significant alterations.

Atkins was the first of the two cases to reach the Court. Daryl Atkins was challenging the constitutionality of the Court's prior holding in *Penry v. Lynaugh*,[94] which found no Eighth Amendment violation in the execution of a mentally retarded inmate.[95] In overturning *Penry*, Justice Stevens was quick to point out the legislative, scholarly, and public attention given to the question of executing the mentally retarded in the wake of that decision.[96] In sum, the consensus had shifted against the Court's prior holding.

Justice Stevens relied on the same objective indices of contemporary judgment as had Justice White in *Coker*; however, the numbers were not nearly as striking in regard to legislative enactments concerning the execution of the mentally retarded in 2002 as they had been for rapists in 1977. Whereas Georgia alone retained the death penalty for the rape of an adult woman in 1977, only thirty states had prohibited death for the mentally retarded by 2002, which left twenty states that still permitted the practice.[97]

92. For an historical argument that *Coker* impermissibly equated a punishment falling out of popular favor with a violation of the Eighth Amendment, see Barbara Clare Morton, *Freezing Society's Punishment Pendulum:* Coker v. Georgia *Improperly Foreclosed the Possibility of Capital Punishment for Rape*, 43 WILLAMETTE L. REV. 1 (2007).

93. Joanna H. D'Avella, Note, *Death Row for Child Rape? Cruel and Unusual Punishment Under the* Roper-Atkins *"Evolving Standards of Decency" Framework*, 92 CORNELL L. REV. 129, 144–46 (2006).

94. 492 U.S. 302 (1989).

95. *Id.* at 340.

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

97. Roper v. Simmons, 543 U.S. 551, 564 (2005); *see also Atkins*, 536 U.S. at 313–16. Justice Scalia's dissent in *Atkins* highlighted this weaker counting correlation. In his opinion, it was disingenuous for the majority to include the twelve states which had abolished capital punishment altogether in the count in

Justice Stevens, however, argued that the relatively unconvincing counting statistics were more than outweighed by another factor: "It is not so much the number of these States that is significant, but the consistency of the direction of change."[98] Justice Stevens pointed to the steady stream of state legislatures that had banned the execution of the mentally retarded in the years since the *Penry* decision, with no states turning the other way.[99] Moreover, among the several states that had left the practice on the books, only five had executed an offender known to have an IQ below seventy since *Penry*.[100] Although still focusing on objective statistics, Justice Stevens's invocation of a "direction" to change about the death penalty echoes the abolitionist viewpoint in *Furman* and represents a significant modification to the *Coker* analytical model.[101]

The other alteration to Justice White's *Coker* reasoning arose when Justice Stevens proceeded to the second step of the *Coker* analysis, the Court's "own judgment." Justice Stevens cautioned that utilizing the Court's "own judgment" was not an opportunity to overturn majoritarian decisions, but rather was limited to "asking whether there is reason to disagree with the judgment reached by the citizenry and its legislators."[102] This narrow justification for independent Court judgment comports with the shift in how the Court has seen its own role since the time of *Coker*. Regardless of the underlying rationale, the Court found several reasons to support the trend of state legislatures toward abolishing the death penalty for the mentally retarded. First, the acknowledged justifications for capital punishment (retribution and deterrence) were less likely to apply to the mentally retarded, who were seen as less deserving of

order to argue that a consensus of states had rejected the death penalty as applied to the mentally retarded. *See id.* at 341–49 (Scalia, J., dissenting).

98. *Atkins*, 536 U.S. at 315 (majority opinion).

99. *Id.* at 313–16. Justice Stevens noted that public outcry over the execution of a mentally retarded offender in, of all places, Georgia led to the first local ban on the practice in 1986. Several states followed Georgia's lead; moreover, when New York reinstituted the death penalty in 1995, it expressly barred the execution of the mentally retarded. Even in Virginia, whose law was at issue in *Atkins*, one house of the legislature had passed such a ban. *See id.* at 313–15.

100. *Id.* at 316.

101. Of course, Justice Stevens, who was in the plurality in *Gregg v. Georgia*, has changed his stance toward the death penalty and now finds it unconstitutional on Eighth Amendment grounds. *See* Baze v. Rees, 553 U.S. 35, 128 S. Ct. 1520, 1542–52 (2008) (Stevens, J., concurring). Justice Stevens is not the first Justice to have a change of heart. Justices Blackmun and Powell, both of whom concurred in the judgment in *Gregg*, later came to view the death penalty as unconstitutional. *See* Callins v. Collins, 510 U.S. 1141, 1157 (1994) (Blackmun, J., dissenting), *denying cert. to* 998 F.2d 269 (5th Cir. 1993); JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 451 (1994) ("I have come to think that capital punishment should be abolished." (quoting Justice Powell)).

102. *Atkins*, 536 U.S. at 313.

punishment and less able to control their actions.[103] Furthermore, the defendants' mental retardation would enhance the likelihood of false confessions, prevent defendants from persuasively arguing for mitigation to counter the prosecution's aggravating factors, and keep them from properly assisting their attorneys in their defense.[104] The Court thus concurred in the ongoing judgment of state legislatures that it was unconstitutional to execute a mentally retarded defendant convicted of murder.[105]

The Court tackled a similar issue in *Roper*, which challenged the constitutionality of executing individuals below age eighteen. Like *Atkins*, *Roper* overturned precedent, in this instance *Stanford v. Kentucky*,[106] which had held that the execution of an individual older than fifteen but younger than eighteen was not barred by the Eighth Amendment.[107] *Roper* also utilized the same analytical structure as *Atkins*; however, the objective numerical support was even weaker in that case than it had been in *Atkins*. Writing for the majority, Justice Kennedy acknowledged this issue, noting that "the rate of change in reducing the incidence of the juvenile death penalty, or in taking specific steps to abolish it, has been slower."[108] Nevertheless, Justice Kennedy borrowed Justice Stevens's formulation in *Atkins* and concluded that the direction of change, and the consistency of that direction, was sufficient for the required showing of an objective consensus against the death penalty.[109]

Given his weaker objective argument, Justice Kennedy leaned more heavily on the second prong of the *Coker* analysis than Justice Stevens had in *Atkins*.[110] Without implicitly limiting the reach of the Court's "own judgment" analysis as Justice Stevens had in *Atkins*, Justice Kennedy reasoned that minors are often more

103. *Id.* at 318–20.

104. *Id.* at 320–21.

105. *Id.* at 321. Despite the sweeping nature of the Court's pronouncement, it left to the states the task of defining "mentally retarded." The Court did give a clue to its own suggested measure, however, by highlighting an IQ of seventy as a cutoff point. *Id.* at 308 n.3.

106. 492 U.S. 361 (1989).

107. *Id.* at 380; *see also* Roper v. Simmons, 543 U.S. 551, 562, 574–75 (2005). *Stanford* referred to such a narrow window because the Court had previously banned the execution of individuals less than sixteen years of age at the time of their crimes. *See* Thompson v. Oklahoma, 487 U.S. 815, 838 (1988).

108. *Roper*, 543 U.S. at 565. Specifically, only five states had abolished the juvenile death penalty in the fifteen years since *Stanford*. *Id.*

109. *Id.* at 565–67.

110. It is also instructive to note that Justice Kennedy, unlike Justice Stevens in *Atkins*, made no mention of limiting the scope of the Court's "own judgment" to merely analyzing the validity of the states' legislative enactments. In fact, Justice Kennedy characterized *Atkins* as returning to a rule established before *Stanford* (which had rejected the "own judgment" analysis), namely the more freewheeling "own judgment" analysis in *Coker*. *Id.* at 563. This willingness to use the Court's "own judgment" as a sword, rather than as a shield, proved essential to the reasoning in *Kennedy v. Louisiana*.

impetuous, are more vulnerable to peer pressure, and have a "less fixed" character than adults.[111] Nor could an individualized sentencing determination by a jury properly cull out the worst offenders; in the end, the differences between adults and minors "are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability."[112] Justice Kennedy concluded his discussion of the Court's "own judgment" by highlighting the fact that the United States was the only country in the world that still officially permitted the death penalty for minors,[113] sparking a caustic dissent from Justice Scalia.[114]

Atkins and *Roper* fit naturally in the tension developed by *Gregg* and *Coker*: while unwilling to declare the death penalty unconstitutional per se, the Court has found several occasions to limit its application. Importantly, each of these cases is innately reactive; the Court can justifiably argue that it is simply interpreting the Constitution in a manner consistent with the winds of change in legislative and public opinion across the country. On the other hand, they are both indicative of a Court that, in the end, simply does not trust juries to make the correct decision every time. All of these oft-conflicting issues found their way into *Kennedy v. Louisiana* where, if anything, the Court only muddled them further.

III. ANALYSIS

In crafting his majority opinion in *Kennedy v. Louisiana*, Justice Kennedy employed a subtle shift in phrasing that had substantial consequences for "evolving standards of decency" and proportionality analysis in death-penalty cases. Ever since *Gregg*, the innately aspirational "evolving standards of decency" principle of Eighth Amendment analysis had been more grounded; the Court was thereafter required to measure the evolution by objective indices like legislative enactments and jury verdicts.[115] And since *Atkins*, these objective indices had been collected, analyzed, and reported as a national consensus.[116] However, in neither of these cases was the fundamental nature of "evolving standards of decency" completely objectified; "consensus" served as but a measure of the prevailing interpretation of decency, not as a substitute for it.

Moreover, proportionality review has been a distinct test of Eighth Amendment validity ever since *Weems*. Justice McKenna

111. *Id.* at 569–70.
112. *Id.* at 572–73.
113. *Id.* at 575.
114. *Id.* at 622 (Scalia, J., dissenting) ("Though the views of our own citizens are essentially irrelevant to the Court's decision today, the views of other countries and the so-called international community take center stage.").
115. Gregg v. Georgia, 428 U.S. 153, 173–76 (1976) (plurality opinion).
116. Atkins v. Virginia, 536 U.S. 304, 307 (2002).

suggested that contemporary values (later clarified and given direction as "evolving standards of decency" by Chief Justice Warren in *Trop*) serve as a lens through which other Eighth Amendment tests, like disproportionate harm, should be viewed.[117] Likewise, as *Atkins* makes clear, "[p]roportionality review under those evolving standards should be *informed by* 'objective factors to the maximum possible extent.'"[118] In other words, not only is proportionality review a practical test that is distinct from and guided by "evolving standards of decency," but so are any objective elements used in the measurement.

Thus, despite the admittedly complex nature of the Supreme Court's Eighth Amendment jurisprudence, subsequent cases (even those like *Gregg* that significantly undermined the value of the concept) understood "evolving standards of decency" as an overarching analytical framework. While after *Gregg* it was to be informed and measured objectively, it was still a separate principle.

Justice Kennedy changed this jurisprudential relationship in *Kennedy v. Louisiana*. For the first time, our "evolving standards of decency" were not only *measured* by national consensus and a framework for evaluating proportionality; instead, the "evolving standards of decency" were actually *defined* by national consensus and proportionality.[119] Although he paid lip service to the framework as being a legal reflection of human dignity, Justice Kennedy proceeded to use national consensus and proportionality as substitutes for, rather than indicators of, "evolving standards of decency." This choice, subtle in its verbal distinction, has incredible legal consequences, particularly in Justice Kennedy's opinion. In fact, by redefining "evolving standards of decency" as an objectively-measured rule, Justice Kennedy has torn the only legitimate legal argument out of his opinion. His remaining framework—national consensus, proportionality review, and, ultimately, the Court's "own judgment"—is a weak scaffold that leaves his majority opinion faltering.

The remainder of this Note covers three topics. First, it examines each of *Kennedy*'s purported justifications for declaring the death penalty for child rape unconstitutional and demonstrates why they are unconvincing. Second, it briefly studies certain aspects of Justice Alito's dissent and explains why they are not an adequate substitute for Justice Kennedy's flawed opinion. Finally, it concludes with a suggestion for how the abolition of the death penalty for child rape—the result in *Kennedy* that this author happens to agree with—could be achieved through the application of

117. Weems v. United States, 217 U.S. 349, 378 (1910); Goldberg, *supra* note 33, at 3.

118. *Atkins*, 536 U.S. at 312 (emphasis added) (quoting Harmelin v. Michigan, 501 U.S. 957, 1000 (1991)).

119. Kennedy v. Louisiana, 128 S. Ct. 2641, 2649–51 (2008).

existing Court precedent.[120]

A. The Inadequacy of Justice Kennedy's Analysis as Applied to Child Rape

1. The Absence of Real Consensus

Even supposing, as Justice Kennedy incorrectly did, that a national consensus truly defined "evolving standards of decency," his argument failed to prove that any such consensus against the death penalty for child rapists even existed. Setting aside the American public's view of the matter, the majority opinion in *Kennedy* did not offer valid statistical evidence to establish the existence of a national consensus.

For instance, Justice Kennedy offered evidence of jury verdicts in Louisiana to support his reasoning. As he noted, only the petitioner, Patrick Kennedy, and one other man had been sentenced to death under Louisiana's capital child-rape statute.[121] However, as Justice Alito countered in his critical dissent, these two criminals represented half of all convicted child rapists in Louisiana for whom prosecutors actually sought the death penalty.[122] A fifty-percent rate of condemning child rapists to death is hardly a glowing endorsement of an abolitionist spirit among Louisiana juries, even discounting the fact that a sample of four jury verdicts is hardly statistically sound.

Justice Kennedy's next attempt at demonstrating a national consensus was equally specious. He emphasized that only five other states[123] have enacted capital statutes for child rape, or only about one-tenth of available jurisdictions.[124] While this is certainly a small

120. For an interesting analysis that not only concluded that imposing the death penalty for child rape is unconstitutional, but also surprisingly presaged many of the arguments put forth both by Justice Kennedy in the majority and Justice Alito in dissent, see David W. Schaaf, Note, *What if the Victim Is a Child? Examining the Constitutionality of Louisiana's Challenge to* Coker v. Georgia, 2000 U. ILL. L. REV. 347.

121. *Kennedy*, 128 S. Ct. at 2657.

122. *Id.* at 2672 (Alito, J., dissenting).

123. It should be noted, however, that the State of Louisiana argued that this number should actually be six. Florida had a statute on the books at the time of this case that authorized the death penalty for the rape of a child under twelve. However, the Florida Supreme Court, applying the reasoning of *Coker*, had invalidated the law in 1981. Nevertheless, the Florida legislature never amended the statute. *See id.* at 2651 (majority opinion).

124. Shortly after the Supreme Court handed down its decision in *Kennedy*, the State of Louisiana petitioned for a rehearing. The State contended, accurately, that the Court had neglected to consider the fact that the Uniform Code of Military Justice authorized the death penalty for child rape committed by U.S. soldiers. In a perfunctory memorandum issued October 1, 2008, Justice Kennedy held that the "authorization of the death penalty in the military sphere does not indicate that the penalty is constitutional in the civilian context." Kennedy v. Louisiana, 129 S. Ct. 1, 1–2 (2008) (mem.).

minority, the analysis itself creates significant problems. Most pressing is the notion that the Supreme Court would base its interpretation of the Constitution on a bare majority. In other words, if twenty-six of the jurisdictions in America—the fifty states plus the federal government—sanctioned capital punishment for child rape, would the punishment no longer violate the Eighth Amendment? And with such a small number of jurisdictions to consider—with the attendant problems of differing populations in each state making the counting statistics even less representative of the public's view—why would the Court resort to such a strategy in the first place?

The Court clearly recognized the deficiencies of this "head count" mode of analysis in *Atkins* and *Roper* and there opted instead to draw national consensus from evidence of a consistent direction of change. Unfortunately for Justice Kennedy, this more valid means of objectively determining a national consensus singularly fails with regard to capital child-rape statutes. As Justice Kennedy conceded, "[I]t is true that in the last 13 years there has been change towards making child rape a capital offense."[125] To counter this evidence of a trend in favor of capital child-rape statutes, Justice Kennedy weakly suggested that any showing of a trend was "not as significant as the data in *Atkins*."[126] While his point was numerically accurate, the pace at which states signed up to follow Louisiana's lead, and the number that had proposed similar legislation (pending at the time of the decision), diminished Justice Kennedy's claim.[127]

In sum, any claim laid to a "national consensus" against capital punishment for child rape is problematic at best. Unfortunately for Justice Kennedy, he had redefined "evolving standards of decency" as a combination of a national consensus and proportionality review. He was therefore required to rest ever more heavily on *Coker*'s proportionality analysis.

2. Disproportionate Weight on Faulty Proportionality Analysis

Coker was the first case to reject the death penalty for a particular offense. In so doing, the Court revived one of the tests for cruel and unusual punishment first announced in *Weems*, where the majority held that "it is a precept of justice that punishment for crime should be graduated and proportioned to offense."[128] Any such proportionality review can be conducted in several ways. Proportionality can be measured, as Justice Kennedy attempted, by laws and by the opinions of jurors. As previously shown, these

125. *Kennedy*, 128 S. Ct. at 2656.

126. *Id.*

127. *Id.*; *see supra* note 20. Louisiana had identified five states with pending legislation concerning capital punishment for child rape. *Kennedy*, 128 S. Ct. at 2656.

128. Weems v. United States, 217 U.S. 349, 367 (1910).

objective indices of how Americans view the adequacy of capital punishment for child rape are inconclusive.

Once objective indices are considered, the Court's proportionality review relies upon comparing the crime to the prospective punishment and to other related crimes and their respective punishments. Justice Kennedy first quickly dismissed the other non-homicide crimes that can lead to the death penalty in certain jurisdictions—like treason and terrorism—as crimes against the government, rather than against individuals.[129] While this distinction is technically accurate, it still fails to explain why child rape should not be a capital crime, even though treason is.[130] After all, proportionality analysis must necessarily compare apples and oranges; no two crimes are precisely the same. The question instead is under what rationale can a more severe punishment be warranted for a particular crime? By perfunctorily rejecting these other non-homicide crimes as inadequate comparisons, the majority opinion raised doubts about the remainder of its proportionality analysis.

The only other comparative crime left is first-degree murder, the same crime used by Justice White in his *Coker* plurality opinion. In fact, Justice Kennedy echoed the very rhetoric invoked by Justice White over thirty years before, saying, "'The murderer kills; the rapist, if no more than that, does not.'"[131] By using the same phrase that Justice White did in *Coker*, Justice Kennedy ratified some of the same outdated views with which *Coker* distinguished rape from murder. While acknowledging the heinous nature of the offense, *Coker* fundamentally conceived of rape as a sexual crime. Rape victims are violated because the rapist has implicitly destroyed "the [victim's] privilege of choosing those with whom intimate relationships are to be established."[132] Moreover, any emotional damage suffered by the victim was considered reparable: "[F]or the rape victim, life may not be nearly so happy as it was, but it is not over and normally is not beyond repair."[133]

The understanding of rape presented in *Coker* is thoroughly outdated. Feminist theories that defined rape as a crime of power, domination, and violence have long been accepted and prove a better explanation for the horrific act.[134] While Justice Kennedy did not

129. *Kennedy*, 128 S. Ct. at 2659.

130. Justice Alito made a similar argument in his dissent. *See id.* at 2676–77 (Alito, J., dissenting).

131. *Id*. at 2654 (majority opinion) (quoting Coker v. Georgia, 433 U.S. 584, 598 (1977) (White, J., plurality opinion)).

132. *Coker*, 433 U.S. at 597.

133. *Id.* at 598. Justice White's conception of rape was so skewed that in recounting the facts of the case, he explained how the victim was raped at knifepoint, but then succinctly noted that "[the victim] was unharmed." *Id.* at 587.

134. *See, e.g.*, LINDA BROOKOVER BOURQUE, DEFINING RAPE 14 (1989); ANN J. CAHILL, RETHINKING RAPE 15 (2001).

explicitly endorse the outmoded rationale of *Coker*, he adopted much of the same language Justice White used to distinguish adult rape from murder at a time when the understanding of rape was fundamentally different. Justice Kennedy did appreciate the "permanent psychological, emotional, and sometimes physical impact" of rape on the child, and cautioned that, for those reasons, the Court "should be most reluctant to rely upon the language of the plurality in *Coker*."[135] But in spite of this recognition, Justice Kennedy still co-opted many of the same blanket pronouncements as the *Coker* plurality. Nor did he adequately distinguish child rape from murder or provide any additional evidence of how the motives of child rapists might differ from adult rapists.

But why should he? After all, constitutional interpretation becomes far less persuasive when particular distinctions are read into the words of the Articles and Amendments. It is true that *Coker*, *Atkins*, and *Roper* found the death penalty to violate the constitutional prohibition against cruel and unusual punishment for specific offenses and offenders. However, in each case, the Court was simply reacting to the decisions of state legislatures and juries. The same cannot be said for *Kennedy*. As shown above, even the relatively unclear indices of public opinion and legislative enactments show a trend in favor of capital child-rape statutes.

Thus, *Kennedy* is a far more proactive opinion than the other essentially reactive proportionality decisions. Without a sufficient proportionality comparison, such a role flies in the face of judicial restraint. While *Furman* demonstrated that the Eighth Amendment can be used to prohibit certain punishments, *Kennedy* attempts to actively eliminate a category of crimes from receiving the ultimate punishment. Such an analysis necessitates the kind of decision—is every murder more evil than the worst child rape?—that is best left to legislatures. Of course, by endorsing the Court's "own judgment" analysis from *Coker* as well, the majority in *Kennedy* showed little concern with respecting the legislative process.

3. Flaws in the Court's "Own Judgment"

Even as it established a framework for evaluating the guided-sentencing structures set up in response to *Furman*, *Gregg* created another stumbling block to the clarity of future death-penalty jurisprudence. The Court's insistence on objective indices for measuring the "evolving standards of decency" in society rendered that analytical framework a paper tiger.[136] So when the Court was presented with *Coker*'s challenge to the constitutionality of Georgia's capital adult-rape law, it had only a toothless precedent to work

135. *Kennedy*, 128 S. Ct. at 2658.
136. Gregg v. Georgia, 428 U.S. 153, 173 (1976) (plurality opinion).

from. It was largely to recapture some of the Court's control over the fate of the death penalty in America that the plurality opinion in *Coker* fashioned the "own judgment" analysis.

While Justice Kennedy wholeheartedly endorsed this analysis, he made use of an inherently flawed rule. First of all, *Coker* was decided in a different era of the Supreme Court, and its "own judgment" analysis is a decided relic of that period. The Supreme Court was a far more aggressive body in that era and far more confident in its abilities as the ultimate arbiter of law.[137] Such a judicial philosophy is arguably less accepted by and less appropriate in a modern society more respecting of the diversity of people's opinions that make up the American public.

Secondly, as *Atkins* took pains to make clear, the Court's "own judgment" is to be employed only "in cases involving a consensus."[138] Needless to say, Justice Kennedy failed to establish a consensus by any acceptable method. Released from its properly limited role as a check on majoritarian excess, the "own judgment" analysis becomes precisely what the name implies—the opinions of individual Justices on what constitutes cruel and unusual punishment. While it is decidedly the role of Justices to interpret the Constitution, it sets a dangerous precedent to suggest that the opinions of individual Justices should rule the day.

Moreover, Justice Kennedy's attempts at using the Court's "own judgment" to distinguish child rape from murder largely came up short. Justice Alito's dissent quite effectively challenged many of the majority's judgments about capital child-rape statutes. For instance, Justice Kennedy argued that child rape could not be a capital crime because it would be "difficult to identify standards that would guide the decisionmaker so the penalty [would be] reserved for the most severe cases of child rape and yet not imposed in an arbitrary way," as required by *Gregg*.[139] In response, Justice Alito readily pointed to prior convictions, whether the rapist had multiple victims, or whether the victim was also severely injured physically as possible aggravating circumstances.[140] Likewise, when Justice Kennedy offered the potential unreliability of a child victim's testimony,[141] Justice Alito accurately noted that questions of testimonial accuracy occur in all cases.[142]

In short, the majority opinion's attempts to bring its "own judgment" to bear on legal issues were feeble and quite properly dismissed by the dissent. With the legal veneer wiped from these

137. A classic example of this judicial confidence can be found in Justice Stewart's famous description of obscenity: "I know it when I see it." Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

138. Atkins v. Virginia, 536 U.S. 304, 313 (2002).

139. *Kennedy*, 128 S. Ct. at 2660.

140. *Id.* at 2674 (Alito, J., dissenting).

141. *Id.* at 2663 (majority opinion).

142. *Id.* at 2674–75 (Alito, J., dissenting).

arguments, the purely personal opinions of the Justices that underlie them are quite clear. While this author agrees with Justice Kennedy's ultimate conclusion and even his personal feelings against capital child-rape laws, such individual views are not the proper basis for constitutional interpretation.

Therefore, none of Justice Kennedy's analytical models for invalidating Louisiana's statute—national consensus, proportionality, or the Court's "own judgment"—adequately justified the majority's result. On the other hand, while Justice Alito did a powerful job of countering the majority's analysis on many points, his reasoning was ultimately flawed as well.

B. Concerns with Justice Alito's Dissent

Justice Alito's dissent exposed many of the gaps in and inadequacies of Justice Kennedy's majority reasoning in *Kennedy*. However, on two critical points, the dissent's own reasoning significantly failed to persuade.

First, Justice Alito argued that the majority opinion should not have used *Coker* as a judicial model because, even though the holding was limited to cases of adult rape, the holding stifled legislative action on child-rape laws.[143] In other words, legislatures feared that a prohibition on capital punishment for adult rape would necessarily implicate child-rape laws, so they simply did not enact them. While there is some validity to this argument, it was poor judicial reasoning to predict that, in the absence of *Coker*, states would have lined up to enact capital child-rape statutes. This line of reasoning also ignores important differences in how the public believes those offenders who rape children should be punished as compared to those offenders who rape adults.

Furthermore, *Coker* was very clear about its limited holding, and states cannot plausibly suggest that they understood the opinion to be much broader. Justice Kennedy correctly noted in his majority opinion that *Coker* used the phrase "an adult woman" or "an adult female" eight times in a rather brief opinion.[144] In a sample of contemporary law-review articles analyzing *Coker*—two of which were written by students—all clearly understood the limited nature of the holding.[145] Although the confusion created by the

143. *Id.* at 2665–68.

144. *Id.* at 2654 (majority opinion).

145. *See, e.g.*, Goldberg, *supra* note 33, at 11 ("With respect to the rape of an adult woman, the Court concluded that the death penalty is a cruel and unusual punishment because it is excessive and disproportionate to the crime of rape."); Lawrence, *supra* note 78, at 966 ("Since the Supreme Court did not rule out the death penalty for rape of a child, state courts may continue to impose the death penalty in this instance until it too is held unconstitutional."); Karp, *supra* note 76, at 1729–30 ("After *Coker*, . . . [i]t is unclear, however, whether a like uniform prohibition on capital punishment is implied for kidnapping or sexual offenses against children . . . .").

quick succession of *Furman*, *Gregg*, and *Coker* certainly may have affected the decisions of state legislatures, there was still ample room for experimentation—yet no state enacted a capital child-rape statute until Louisiana in 1995.[146]

The second flaw in Justice Alito's opinion stems from his misconceived understanding of "evolving standards of decency." While Justice Kennedy certainly redefined the concept, he at least retained the underlying directional nature of the rule: "Confirmed by repeated, consistent rulings of this Court, this principle requires that use of the death penalty be restrained."[147] Despite this clear precedent, Justice Alito brazenly suggested that "evolving standards of decency" need not be unidirectional. He understood the recent enactment of capital child-rape laws as evolution of a different sort. "If, as the Court seems to think, our society is '[e]volving' toward even higher 'standards of decency,' these enactments might represent the beginning of a new evolutionary line."[148] Dismissing the decades of "evolving standards" precedent as merely a "metaphor of moral evolution,"[149] Justice Alito saw no reason why society should not simply execute more, rather than fewer, individuals. Such a belief not only repudiates existing jurisprudence, but carries potentially dangerous consequences for a society already corrupted by a culture of violence. As the Supreme Court has held for years, the Constitution should not perpetuate this violent cycle; to hold otherwise would be to repudiate *Trop*'s fundamental principle: "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man."[150]

C. Supreme Court Precedent Does Justify Holding Capital Child-Rape Statutes Unconstitutional

It is critical to keep the core principle of *Trop* in mind because it offers a constitutionally justifiable way of reaching the same result as *Kennedy*, but without the tortured reasoning. The critical mistake made by Justice Kennedy in his opinion was redefining "evolving standards of decency." Had he left the principle alone, as a lens through which to interpret the Eighth Amendment, capital punishment for child rape could be logically—if not without controversy—held unconstitutional.[151]

Rather than making weak attempts to explain away the conflicting evidence of a national consensus or the troublesome efforts to place child rape beneath murder in a hierarchy of moral culpability, the Court could simply have declared that the Eighth

146. Schaaf, *supra* note 120, at 347–48.
147. *Kennedy*, 128 S. Ct. at 2664–65.
148. *Id.* at 2669 (Alito, J., dissenting) (internal cross-reference omitted).
149. *Id.* at 2672.
150. Trop v. Dulles, 356 U.S. 86, 100 (1958).
151. Goldberg, *supra* note 33, at 3.

Amendment deems the death penalty for all forms of rape to be cruel and unusual punishment. In the end, the problem with the *Kennedy* opinion was not its holding, but its logic. This problem arose because "evolving standards of decency" were seen as the required showing—almost a maxim—rather than as an aspirational principle through which the Justices could interpret the Eighth Amendment.

Critics might argue that this proposal is merely a semantic shift; why condemn Justice Kennedy's resort to using the Court's "own judgment" while simultaneously asking the Court to use its judgment in interpreting the Eighth Amendment? But the difference is in where the subsequent foundation for the Supreme Court's decision would be laid. If objective evidence of "evolving standards of decency" fails to produce a clear answer and the Court is forced to rely heavily on its "own judgment," the ultimate authority is simply the views of Justices. On the other hand, if the Court declares the death penalty a cruel and unusual punishment for the crime of child rape as an interpretation of the Eighth Amendment, the ultimate authority is the Constitution itself.

No one doubts for a second that Justices Marshall and Brennan were personally and morally opposed to capital punishment; any reading of their concurring opinions in *Furman* makes their positions clear.[152] Nevertheless, these staunch abolitionists grounded their opinions declaring capital punishment unconstitutional in a reading of the Eighth Amendment, not in their own personal views.[153] The Supreme Court is tasked with interpreting the Constitution of the United States, not with using its "own judgment" as a proxy for imposing individual Justices' views on the text. While any interpretation necessarily involves some subjectivity, it is improper to announce subjective opinions as the basis for a Supreme Court decision.

The Court's "death is different" jurisprudence—based on capital punishment's unique severity and finality[154]—makes any death-penalty case complex and often troublesome. Until capital punishment as an institution is abolished, death-penalty cases will

152. Furman v. Georgia, 408 U.S. 238, 296 (1972) (Brennan, J., concurring) ("The country has debated whether a society for which the dignity of the individual is the supreme value can, without a fundamental inconsistency, follow the practice of deliberately putting some of its members to death."); *id.* at 371 (Marshall, J., concurring) ("In recognizing the humanity of our fellow beings, we pay ourselves the highest tribute.").

153. *Id.* at 305 (Brennan, J., concurring) (holding that since the death penalty is inconsistent with any of the principles derived from the Eighth Amendment in Supreme Court precedent, it fails to comport with human dignity); *id.* at 370–71 (Marshall, J., concurring) (declaring that the Court had not deviated from any of the principles embodied in the Eighth Amendment).

154. *Id.* at 287 (Brennan, J., concurring) ("The only explanation for the uniqueness of death is its extreme severity. Death is today an unusually severe punishment, unusual in its pain, in its finality, and in its enormity.").

inevitably involve line drawing, and any such line drawing must be done by Supreme Court Justices. The key is for these Justices to adhere to the Eighth Amendment when making these decisions. The "evolving standards of decency" in American society are infused in the Eighth Amendment and permit the Justices to determine the proper scope of cruel and unusual punishment. If the Supreme Court correctly limits itself to interpreting the Eighth Amendment, it can rightly abolish capital child-rape laws.

CONCLUSION

If anything, *Kennedy v. Louisiana* is the inevitable result of the slow dismantling of the visionary approach Justices Marshall and Brennan took toward the abolition of capital punishment under the Eighth Amendment. *Gregg v. Georgia* began the process of undercutting the lofty concept of "evolving standards of decency" by requiring that any standard be measured by objective evidence. In *Coker v. Georgia*, the Court was faced with the inevitable difficulty of reconciling its holding in *Gregg* with an obvious desire to limit the reach of capital punishment. However, instead of elevating "evolving standards of decency" to its aspirational role again, the Court created the less-justifiable tool of utilizing the Justices' "own judgment" of what is cruel and unusual punishment.

By truly detaching "evolving standards of decency" from its jurisprudential moorings, *Kennedy* completes this unfortunate process. "Evolving standards" are no longer an aspirational and directional beacon; instead, they are little more than the objective indices the Court chooses to examine. Sadly, upsetting this relationship simultaneously eliminated the only acceptable justification for the decision the Court reached in *Kennedy*.

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