

KENNEDY V. LOUISIANA REAFFIRMS THE NECESSITY OF REVISING THE EIGHTH AMENDMENT'S EVOLVING STANDARDS OF DECENCY ANALYSIS

*“For if the interaction of this Justice and the constitutional text over the years confirms any single proposition, it is that the demands of human dignity will never cease to evolve.”*¹

INTRODUCTION

*Kennedy v. Louisiana*² is the latest “cruel and unusual punishment” case exposing the problematic nature of the Supreme Court’s approach to Eighth Amendment jurisprudence. In a 5–4 split, the Supreme Court held that the death penalty is an unconstitutional punishment for the rape of a child,³ and arguably for any crime that does not result in the victim’s death.⁴ In reaching this conclusion, the majority combined the “evolving standards of decency” test with its own understanding of the dictates of the Eighth Amendment to determine whether the challenged punishment was disproportionate to the crime.⁵

Noting that only six states had laws extending the death penalty to cases of child rape, and that the appellant was one of “only two individuals now on death row in the United States for a nonhomicide offense,”⁶ the majority concluded that there was a national consensus against capital punishment in that context.⁷ The dissent, however, examined the same data through a different lens and reached the opposite conclusion. The dissent looked at the number of states that had legalized capital punishment for child rape in light of the Court’s decision in *Coker v. Georgia*.⁸ The fact that six states had passed laws making child rape a capital crime *after* and hence *despite* that decision

¹ Justice William J. Brennan, Jr., U.S. Supreme Court, Speech to the Text and Teaching Symposium at Georgetown University (Oct. 12, 1985), in ORIGINALISM: A QUARTER-CENTURY OF DEBATE 55, 67 (Steven G. Calabresi ed., 2007).

² 128 S. Ct. 2641 (2008).

³ *Id.* at 2664.

⁴ *See id.* at 2665.

⁵ *Id.* at 2649–50.

⁶ *Id.* at 2657.

⁷ *Id.* at 2657–58.

⁸ *See id.* at 2665–70 (Alito, J., dissenting) (discussing the implications of *Coker v. Georgia*, 433 U.S. 584 (1977)). In *Coker*, the Court held that capital punishment was a disproportionate penalty for the rape of an adult woman. *Coker*, 433 U.S. at 597. The Court’s reasoning, however, could be taken to suggest that its holding was much broader, encompassing nonhomicide crimes generally. *See id.* at 598 (stating that “[r]ape is without doubt deserving of serious punishment; but in terms of moral depravity and of the injury to the person and to the public, it does not compare with murder”).

indicated society's growing concern with sex crimes against children and approval of harsher penalties.⁹ The dissent also argued that the Court's decision in *Coker* kept many state legislatures from expressing their convictions of what society's standards of decency actually are on this issue.¹⁰

Kennedy confirms that the Court's evolving standards of decency test is unworkable. The data used to interpret society's standards can be construed multiple ways, in effect becoming a cover for the majority to impose its own subjective views. By cutting off public policy debate in the state legislatures, the Court substitutes its own voice for the voice of the people speaking through their elected representatives. Furthermore, because the Court's decisions are final, societal views cannot change over time—except within the confines the Court has established. Policymaking is not a judicial function, and the Court should not be at liberty to impose its moral judgments on the rest of the country. Proper deference should be given to those best able to decipher and reflect society's standards of decency—the people's representatives.

The evolving standards of decency analysis that characterizes the Court's Eighth Amendment jurisprudence must be revised if it is to achieve its purpose of accurately reflecting societal values. Instead of seeking to determine national consensus—an inherently subjective task—the Court should limit its inquiry to the particular facts of the case before it. Specifically, the Court should first assess whether the legislature could have reasonably concluded that some criminals could act with sufficient moral culpability to merit the challenged penalty. If the Court concludes that the legislative enactment was indeed reasonable, the Court should then ask whether the jury could have reasonably concluded that the sentenced punishment was justified under the particular facts and circumstances of the case.

This Note is divided into five parts. Part I provides a brief summary of the Eighth Amendment's historical background leading up to its current interpretation by the Supreme Court. Part II analyzes the difficulty of determining national consensus from state legislation, jury sentencing data, and other sources the Court has characterized as "objective indicia." It also discusses the Court's propensity to selectively employ the results of the evolving standards of decency analysis to support its independent judgments. Part III describes the inherent problems of the evolving standards of decency analysis that render it an unworkable judicial construct even if the Supreme Court *could* correctly interpret national consensus. Part IV compares the Court's independent proportionality review of Eighth Amendment cases with its evolving

⁹ *Kennedy*, 128 S. Ct. at 2669, 2671 (Alito, J., dissenting).

¹⁰ *Id.* at 2671–72.

standards of decency analysis, discussing the increasingly transparent overlap between the two. Part V discusses what test could effectively remedy the weaknesses that plague the evolving standards of decency analysis.

I. HISTORICAL BACKGROUND OF EIGHTH AMENDMENT JURISPRUDENCE

A. *The Early Meaning and Application of the Cruel and Unusual Punishment Clause*

The language of the Eighth Amendment—“[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted”¹¹—was adopted nearly verbatim from the English Declaration of Rights of 1688.¹² There is little evidence in the historical records of the Framers’ intent as to the constitutional phrase’s meaning and application.¹³ The absence of such a protection in the Constitution was noted only twice during the state ratifying conventions, and the inclusion of the Clause in the Bill of Rights received little discussion and debate in Congress before being adopted.¹⁴ The few times this Clause was mentioned, it was referenced within the context of proscribing torturous punishments such as the rack and gibbet.¹⁵ Although the death penalty was the *exclusive* and *mandatory* sentence for offenses such as “murder, treason, piracy, arson, and rape” in the early days of the republic,¹⁶ the “courts rarely adjudicated Eighth Amendment claims.”¹⁷ In fact, the Supreme Court relied on the Cruel and Unusual Punishment Clause to decide a mere six cases during the first 175 years of its existence.¹⁸ Hence, it appears from early history that the Eighth

¹¹ U.S. CONST. amend. VIII.

¹² *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (citing English Declaration of Rights, 1688, 1 W. & M., 2d Sess., c. 2).

¹³ *Furman v. Georgia*, 408 U.S. 238, 258 (1972) (Brennan, J., concurring).

¹⁴ *Id.*; *Weems v. United States*, 217 U.S. 349, 368 (1910).

¹⁵ See *Furman*, 408 U.S. at 258–59 (Brennan, J., concurring) (citing DEBATES IN THE CONVENTION OF THE COMMONWEALTH OF MASSACHUSETTS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION (1788), reprinted in 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 111 (Jonathan Elliot comp. & rev., N.Y., Burt Franklin 1974) (1888)).

¹⁶ Bridgette M. Palmer, Note, *Death as a Proportionate Penalty for the Rape of a Child: Considering One State’s Current Law*, 15 GA. ST. U. L. REV. 843, 847–48 (1999) (citing *Woodson v. North Carolina*, 428 U.S. 280, 289 (1976) (plurality opinion)).

¹⁷ *Id.* at 848 (citing Margaret Jane Radin, *The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishments Clause*, 126 U. PA. L. REV. 989, 997 (1978)).

¹⁸ Corinna Barrett Lain, *Deciding Death*, 57 DUKE L.J. 1, 10 (2007) (citing THE SUPREME COURT IN CONFERENCE, 1940–1985: THE PRIVATE DISCUSSIONS BEHIND NEARLY 300 SUPREME COURT DECISIONS 618 (Del Dickson ed., 2001)).

Amendment's initial primary purpose was to "prevent[] the prescription of torturous or barbaric methods of punishment."¹⁹

B. A Succinct Overview of the Birth and Development of the Court's Eighth Amendment Evolving Standards of Decency Analysis

In contrast to its limited historical interpretation, recent Supreme Court jurisprudence has left the meaning of the Eighth Amendment's Cruel and Unusual Punishment Clause purposely vague.²⁰ Thus, instead of being confined to merely what was considered cruel and unusual punishment at the time of its adoption, the Court has determined that the Clause must adapt to current sentiment.²¹

This reversal of course began with *Weems v. United States*, where the Court held that a Philippine court's sentence of fifteen years imprisonment for falsifying government documents was unconstitutionally severe under the Eighth Amendment.²² The Court concluded that the proscription of cruel and unusual punishments "is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice."²³ The Court expanded upon this concept of looking to what society would tolerate rather than past interpretation of the Cruel and Unusual Punishment Clause in *Trop v. Dulles*.²⁴ In *Trop*, the Court coined the phrase that would come to characterize the new realm of Eighth Amendment jurisprudence: "The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."²⁵ While the Court split on the issue of whether the death penalty was being imposed arbitrarily and was thus unconstitutional in *Furman v. Georgia*, all the Justices agreed that the Eighth Amendment was not static: "A punishment is inordinately cruel . . . chiefly as perceived by the society so characterizing it. The standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard

¹⁹ Palmer, *supra* note 16, at 848 (citing *State v. Wilson*, 96-1392, 96-2076, pp. 2-3 (La. 12/13/96); 685 So. 2d 1063, 1065).

²⁰ See Wayne Myers, Roper v. Simmons: *The Collision of National Consensus and Proportionality Review*, 96 J. CRIM. L. & CRIMINOLOGY 947, 960 (2006); Jeffrey C. Matura, Note, *When Will it Stop? The Use of the Death Penalty for Non-Homicide Crimes*, 24 J. LEGIS. 249, 263 (1998).

²¹ *Id.*

²² 217 U.S. 349, 380-82 (1910).

²³ *Id.* at 378.

²⁴ 356 U.S. 86, 101 (1958) (plurality opinion) (holding that "denationalization as a punishment is barred by the Eighth Amendment").

²⁵ *Id.*

itself remains the same, but its applicability must change as the basic mores of society change.”²⁶

Thus, the Supreme Court decided that the Cruel and Unusual Punishment Clause of the Eighth Amendment should be interpreted to reflect society’s evolving standards of decency. This left the Court with the challenging task of deciding how exactly to judge “evolving standards,” a question the Justices cannot seem to agree on how to answer.²⁷ Nevertheless, while their views differ as to what factors should be considered when determining national consensus, all the Justices concur that any test must necessarily include an examination of the most reliable “objective indicia” of society’s values—state legislation and jury sentencing data.²⁸

II. THE DIFFICULTY OF DETERMINING NATIONAL CONSENSUS AND THE COURT’S PROPENSITY TO SELECTIVELY USE THE EVOLVING STANDARDS OF DECENCY ANALYSIS TO SUPPORT ITS INDEPENDENT FINDINGS

The Supreme Court has not been able to articulate a clear and consistent standard for determining national consensus. In *Coker v. Georgia*, the Court said its “judgment should be informed by objective factors to the maximum possible extent.”²⁹ Yet even when looking at “objective indicia” of societal standards—legislative enactments and jury sentencing data—the Supreme Court cannot agree on what actually constitutes a “consensus” for or against a given punishment.³⁰ The proper interpretation of the available legislative, jury, and other data is open to dispute, allowing it to be easily manipulated into supporting

²⁶ 408 U.S. 238, 382 (1972) (Burger, C.J., dissenting).

²⁷ Myers, *supra* note 20, at 960 (citing *Roper v. Simmons*, 543 U.S. 551, 561–64 (2005)); Matura, *supra* note 20, at 255. The Justices have held diverging views on how society’s standards of decency should be determined. For example, Justice Stevens has espoused turning to foreign laws for insight. *E.g.*, *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002). Chief Justice Rehnquist, in contrast, argued that legislative enactments and jury sentences should “be the sole indicators by which courts ascertain the contemporary American conceptions of decency for purposes of the Eighth Amendment.” *Id.* at 324. According to Justice Scalia in *Stanford v. Kentucky*, the majority position of the states on a penalty was the determining indicator of society’s standards. 492 U.S. 361, 370–71 (1989). Yet, Justice Kennedy in *Roper* stated that a minority position could represent society’s standards if it appeared that the position was gaining increasing support. *Roper*, 543 U.S. at 566.

²⁸ Myers, *supra* note 20, at 960 (quoting *Roper*, 543 U.S. at 563), 980; Matura, *supra* note 20, at 255.

²⁹ 433 U.S. 584, 592 (1977).

³⁰ 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, 1090–91 (2006).

evidence for whatever the desired outcome of the Court majority happens to be.³¹

A. Legislative Enactments

The Court has relied on legislative enactments in its evolving standards of decency analysis as the best indicator of the will of the people.³² As the Court expressed in *Gregg v. Georgia*, “[i]n a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people.”³³ While the Justices have acknowledged the central importance of state legislation to an analysis of society’s standards of decency, however, they have consistently disagreed on how to interpret legislation to determine national consensus.³⁴

Writing for the plurality in *Stanford v. Kentucky*, Justice Scalia declared that a state’s practice had to be significantly at odds with the rest of the country before the Court would find that there was a national consensus against it.³⁵ In an attempt to decipher society’s view of the death penalty for sixteen and seventeen-year-olds, the plurality in *Stanford* compared the number of states that had an exemption for juveniles in their death penalty statutes to the number of death penalty states that did not exempt juveniles.³⁶ Because more states allowed the death penalty for juveniles than did not allow it, the Court concluded that national consensus affirmed the appropriateness of that punishment.³⁷ But the scales would have tipped in the other direction if the state count were construed as the dissent wanted—to include states that banned the death penalty completely.³⁸

³¹ See Myers, *supra* note 20, at 984.

³² See *id.* at 980 (stating that state laws are “[t]he first indicator relied upon by the Court,” but are “not an unfettered reflection of society’s views” (citing Norman J. Finkel, *Prestidigitation, Statistical Magic, and Supreme Court Numerology in Juvenile Death Penalty Cases*, 1 PSYCHOL. PUB. POL’Y & L. 612, 622–23 (1995))).

³³ 428 U.S. 153, 175–76 (1976) (plurality opinion) (quoting *Furman v. Georgia*, 408 U.S. 238, 383 (1972) (Burger, C.J., dissenting)).

³⁴ Jacobi, *supra* note 30, at 1096.

³⁵ See 492 U.S. 361, 370–71, 380 (plurality opinion) (holding that the Eighth Amendment did not prohibit the execution of sixteen and seventeen-year-olds), *abrogated* by *Roper v. Simmons*, 543 U.S. 551 (2005).

³⁶ *Id.* at 370–72 (citations omitted).

³⁷ *Id.* at 372. In support of its conclusion, the Court stated that “[o]f the 37 States whose laws permit capital punishment, 15 decline to impose it upon 16-year-old offenders and 12 decline to impose it on 17-year-old offenders. This does not establish the degree of national consensus this Court has previously thought sufficient to label a particular punishment cruel and unusual.” *Id.* at 370–71.

³⁸ See Lain, *supra* note 18, at 30–31; see also *Stanford*, 492 U.S. at 384 (Brennan, J., dissenting). The dissent would have added the District of Columbia and the fourteen states that did not authorize capital punishment to the states that specifically exempted

The Court reversed course in *Roper v. Simmons*.³⁹ Although not much had changed in the sixteen years between the Supreme Court's decision in *Stanford* and its decision in *Roper*, the Court found a national consensus against the juvenile death penalty in *Roper* using the same methodology employed by the dissent in *Stanford*.⁴⁰ Adding the number of states that had eliminated the death penalty entirely (twelve) to those that had merely exempted juveniles (eighteen) resulted in a total of thirty states against the practice.⁴¹ If the Court had not included in its calculation the twelve non-death penalty states, however, the ratio would be twenty to eighteen, making the states against the juvenile death penalty the minority.⁴² Thus, if the Court had chosen to employ the same standards in *Roper* as it did in *Stanford*, there would still be no consensus against a juvenile death penalty; and by the Court's standards in *Roper*, "it could have invalidated the juvenile death penalty in 1989."⁴³ Hence, it appears that the result—a finding of a given penalty's constitutional validity under the Eighth Amendment—can depend on little more than which equation the Court chooses to employ to determine national consensus.⁴⁴

In *Roper*, the Court tried to get around the inconsistency of its methodology by explaining that it was "consistency of the direction of change" that was important in determining national consensus, rather than a sheer number count of states for and against the challenged penalty.⁴⁵ In his dissent, Justice Scalia charged the Court with

juveniles from the death penalty, tipping the count in their favor—twenty-seven opposed to the death penalty for sixteen-year-old offenders and thirty opposed to it for seventeen-year-old offenders, versus twenty-five and twenty-two in favor. *Stanford*, 492 U.S. at 384 (Brennan, J., dissenting).

³⁹ 543 U.S. 551 (2005).

⁴⁰ See Lain, *supra* note 18, at 30 (citing *Roper*, 543 U.S. at 564).

⁴¹ *Roper*, 543 U.S. at 564 (citing *Atkins v. Virginia*, 536 U.S. 304, 313–15 (2002)).

⁴² See Myers, *supra* note 20, at 975. In his dissent, Justice Scalia argued that the non-death penalty states should be left out of the equation because they have no laws specifically addressing the juvenile death penalty, and thus the majority could only presume those states believed juveniles were less culpable than adults. See *Roper*, 543 U.S. at 610–11 (Scalia, J., dissenting). In *Stanford*, Scalia criticized the dissent by likening the practice of including non-death penalty states in the state count to "discerning a national consensus that wagering on cockfights is inhumane by counting within that consensus those States that bar all wagering." *Stanford*, 492 U.S. at 370 n.2.

⁴³ Lain, *supra* note 18, at 31.

⁴⁴ See *id.* (citing *Atkins*, 536 U.S. at 342–44 (Scalia, J., dissenting)).

⁴⁵ *Roper*, 543 U.S. at 566 (quoting *Atkins*, 536 U.S. at 315). Five states had abandoned the juvenile death penalty since the Court's decision in *Stanford*. *Id.* at 565. The Court concluded: "The number of States that have abandoned capital punishment for juvenile offenders since *Stanford* is smaller than the number of States that abandoned capital punishment for the mentally retarded after *Penry v. Lynaugh*, 492 U.S. 302 (1989)]; yet we think the same consistency of direction of change has been demonstrated." *Id.* at 566.

substituting its own subjective judgment for national consensus and noted that in previous cases, overwhelming opposition to a challenged practice over a significant span of time was required to overrule a state practice.⁴⁶ The Court's new emphasis on "direction of change" led some scholars to draw the logical conclusion that "as long as some measurement of a change in the direction of state laws is consistent, the Court will view it as an indication of a national consensus, even if as few as two or three states are responsible for the change."⁴⁷

The Court chose to ignore its recent "direction of change" line of reasoning in its most recent Eighth Amendment case, *Kennedy*. In that case, the Court glossed over the dissent's argument that the recent enactment of death penalty statutes for child rape in six states could signify a new trend.⁴⁸ Instead, it went back to the strict state count methodology of *Stanford*, focusing on the fact that out of the thirty-seven jurisdictions imposing capital punishment, only six States had authorized it for child rape.⁴⁹ This latest Eighth Amendment decision demonstrates that the Court has not set a consistent standard for how states should be counted to comprise a consensus for purposes of the evolving standards of decency analysis.⁵⁰ In the end, state legislation is not an objective or reliable indicator of national consensus because it may too easily be construed to match the desired outcome of both the Court majority and the dissent.

B. Jury Sentencing Data

The other "objective index of contemporary values" used by the Court is jury sentencing data, but this also can be—and has been—interpreted to support either side of the argument in a given case, making the analysis just as subjective as when the Court examines legislative enactments.⁵¹ In *Stanford*, the rarity of juvenile death sentences was used by the plurality to show that juries were properly considering mitigating circumstances and applying the death penalty only in the most severe cases,⁵² while the dissent hailed it as evidence of

⁴⁶ *Id.* at 609, 615 (Scalia, J., dissenting).

⁴⁷ Myers, *supra* note 20, at 979; *see also* Jacobi, *supra* note 30, at 1140 (stating that "[*Atkins* and *Roper*] suggest that the consistency of direction outweighs the importance of the number of states to have passed a provision").

⁴⁸ *Kennedy*, 128 S. Ct. at 2657, 2672–73 (Alito, J., dissenting).

⁴⁹ *See id.* at 2657.

⁵⁰ Jacobi, *supra* note 30, at 1155.

⁵¹ *See* Palmer, *supra* note 16, at 873–74 (citing Valerie P. Hans, *How Juries Decide Death: The Contributions of the Capital Jury Project*, 70 IND. L.J. 1233, 1233 (1995) (noting the volatility of jury sentencing statistics)).

⁵² *See* *Stanford v. Kentucky*, 492 U.S. 361, 374 (1989) (plurality opinion).

societal condemnation of the penalty.⁵³ Conversely, in *Coker v. Georgia*, the plurality cited the fact that only one in ten jurors sentenced convicted rapists to death as conclusive evidence of society's disapproval of the death penalty for rape.⁵⁴ Those who would hold that limited death penalty sentences by juries may be nothing more than a reflection of the facts of the crime were in the dissent.

Drawing conclusions about societal consensus based on jury sentencing data is dangerous because it is unclear how such data should be interpreted. Jury reluctance to impose the death penalty does not necessarily mean society disfavors that form of punishment. It is certainly reasonable to believe that, given the weight of responsibility for executing someone, jurors are likely to seriously consider mitigating circumstances and be hesitant to impose the death penalty except in the most severe cases.⁵⁵ Also, the results are skewed because it only takes a single juror to prevent a jury from returning a sentence of death.⁵⁶

In his dissent in *Thompson v. Oklahoma*, Justice Scalia used an example to illustrate why jury sentencing data is a fallible basis for a finding of societal consensus.⁵⁷ He noted that while thirty women were executed between 1930 and 1955 in the United States, only three were executed between 1955 and 1986, and not one was executed between 1962 and 1984.⁵⁸ Under the plurality's reasoning which considers the rarity of jury death penalty sentences, it would be unconstitutional to impose capital punishment on a woman.⁵⁹ In addition, one scholar has noted that using evidence of rare jury sentencing to establish national consensus shows a fundamental misunderstanding of the function of deterrence:

If the criminal justice system works on deterrence, it should be preventing people from committing the sort of crimes for which the death penalty is applicable. The rare use of the death penalty is not evidence that it is not effective; indeed the death penalty could conceivably *never* be exercised and nevertheless be effective, as long as it remained a credible threat.⁶⁰

Furthermore, jury sentiment against imposing the death penalty for a given crime may not be representative of societal opinion as a whole.⁶¹

⁵³ See *id.* at 386–87 (Brennan, J., dissenting).

⁵⁴ 433 U.S. 584, 596–97 (1977) (plurality opinion).

⁵⁵ Palmer, *supra* note 16, at 874.

⁵⁶ *Woodson v. North Carolina*, 428 U.S. 280, 312 (1976) (Rehnquist, J., dissenting).

⁵⁷ 487 U.S. 815, 871 (1988) (Scalia, J., dissenting).

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ Jacobi, *supra* note 30, at 1144.

⁶¹ *Woodson*, 428 U.S. at 312 (Rehnquist, J., dissenting).

The majority of society has presumably already spoken through its legislatures, accepting the appropriateness of the punishment.⁶²

The fundamental disagreement between the members of the Court over how to interpret jury sentencing data continued in *Kennedy*. The majority claimed that execution statistics “confirm our determination . . . that there is a social consensus against the death penalty for the crime of child rape.”⁶³ “[N]o individual ha[d] been executed for the rape of an adult or child since 1964 . . . [or] for any other nonhomicide offense . . . since 1963.”⁶⁴ The dissent countered that this fact provided no support for the Court’s position because there were no executions *for any crime* between 1968 and 1977.⁶⁵ Additionally, there was the potentially chilling effect of *Coker* in 1977, making it doubtful that the Court would uphold a death sentence for a nonhomicide crime.⁶⁶ Furthermore, even if jury sentencing data could provide sound evidence of societal consensus, the pertinent “evidence” was not on the majority’s side. After Louisiana made child rape a capital offense in 1995, juries returned death penalty verdicts for offenders of that law in two out of four cases.⁶⁷ As Justice Alito noted, “This 50% record is hardly evidence that juries share the Court’s view that the death penalty for the rape of a young child is unacceptable under even the most aggravated circumstances.”⁶⁸

As *Kennedy* confirms, the proper interpretation of jury sentencing data is disputable, making it an unsuitable basis for Eighth Amendment jurisprudence. The numerous ways that jury sentencing data can be interpreted means that any attempt to discern national consensus from such “objective indicia” will necessarily require great judicial subjectivity.⁶⁹

C. Other Indicia of National Consensus: Public Opinion Polls, Sociological Data, and International Opinion

The Court has considered controversial indicia such as public opinion polls, scientific and sociological data, and international opinion

⁶² *Id.*

⁶³ *Kennedy*, 128 S. Ct. at 2657.

⁶⁴ *Id.*

⁶⁵ *Id.* at 2672 (Alito, J., dissenting) (citing DEATH PENALTY INFO. CTR., EXECUTIONS IN THE U.S. 1608–2002: THE ESPY FILE EXECUTIONS BY DATE 382 (M. Watt Espy & John Ortiz Smykla comp., n.d.), <http://www.deathpenaltyinfo.org/ESPYyear.pdf>; Bureau of Justice Statistics, U.S. Dep’t of Justice, Key Facts at a Glance: Executions, <http://www.ojp.gov/bjs/glance/tables/exetab.htm>).

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Jacobi, supra* note 30, at 1147.

in its attempt to discern national consensus. The Court especially tends to emphasize these additional factors in its analysis when the “primary” indicators of national consensus provide only questionable support for the majority’s position.⁷⁰

Foreign laws and sociological data are improper bases for a determination of the nation’s evolving standards of decency.⁷¹ International opinion is irrelevant on its face to a determination of our nation’s public sentiment, and public polls and statistics promulgated by third party organizations are subject to methodological and other errors which bring their validity into question.⁷² Polls can be skewed based on a host of factors, such as the composition of the target population, the sampling design used, and the questions asked.⁷³ Thus, they can often produce inconsistent and hence unreliable results.⁷⁴ Courts are not in a good position to choose between conflicting scientific data, which is why these policy decisions are better left to legislatures.⁷⁵ The legislative arena is the proper forum for debating the merits of evidentiary data supporting and condemning a given policy. Legislators directly represent the communities they have been elected to serve, and thus can evaluate scientific data with an eye toward local circumstances and needs.

The broad spectrum of data to choose from on any given issue encourages the Court to overstate favorable findings and overlook unfavorable ones.⁷⁶ For example, in *Roper*, the majority cited studies which purported to show that juveniles lack the moral maturity to be fully culpable for premeditated murder, but failed to cite studies that

⁷⁰ *E.g.*, *Roper v. Simmons*, 543 U.S. 551, 575–78 (2005) (relying heavily on international opinion to support its holding even though the state count was even more open to debate than in *Atkins* (citing *Trop v. Dulles*, 356 U.S. 86, 102–03 (1958) (plurality opinion)); *Atkins v. Virginia*, 536 U.S. 304, 322 (2002) (Rehnquist, J., dissenting) (lamenting the Court’s use of foreign laws, professional and religious organizational views, and public opinion poll data to support its decision); Lain, *supra* note 18, at 33 (“*Roper* was unique in its heavy reliance on international opinion to support the ruling in the case.” (citing *Roper*, 543 U.S. at 575–78)). In *Atkins*, the Court compensated for its inability to show that a clear majority of states favored exempting mentally retarded offenders from the death penalty by emphasizing factors not previously considered, such as foreign laws, the views of professional organizations, and opinion polls. *Atkins*, 536 U.S. at 316 n.21 (citations omitted).

⁷¹ *See Atkins*, 536 U.S. at 322–28 (Rehnquist, J., dissenting).

⁷² *Id.* at 325–26.

⁷³ *Id.* at 326.

⁷⁴ *See id.*

⁷⁵ *Roper*, 543 U.S. at 618 (Scalia, J., dissenting) (citing *McCleskey v. Kemp*, 481 U.S. 279, 319 (1987)).

⁷⁶ *See Myers*, *supra* note 20, at 988 (citations omitted) (discussing the Court’s ability to choose scientific studies and briefs that may be biased towards a certain policy).

concluded that juveniles may be just as culpable as adults.⁷⁷ The majority even went so far as to cite one part of a study that supported its position that a juvenile can never be sufficiently culpable to merit the death penalty, and ignored the part that went against its conclusion.⁷⁸

In *Kennedy*, the majority attempted to bolster its position by discussing sociological questions such as the “problems” that capital punishment for child rape presented.⁷⁹ These included the special risks of unreliable testimony by children and the fact that the crime often occurs within families.⁸⁰ According to Justice Kennedy, families might be inclined to “shield the perpetrator from discovery” when the penalty is death, resulting in more rapes going unreported.⁸¹

In his dissenting opinion, Justice Alito responded that these concerns and speculations were “policy arguments” that were “simply not pertinent to the question [of] whether the death penalty is ‘cruel and unusual’ punishment.”⁸² The Eighth Amendment, he argued, “does not authorize this Court to strike down federal or state criminal laws on the ground that they are not in the best interests of crime victims or the broader society.”⁸³

The dubious reliability of sociological data makes it shaky ground on which to rest a finding of society’s standards of decency. Moreover, it improperly draws the Court into the legislative domain of public policymaking by requiring it to choose between conflicting scientific studies. Therefore, such considerations should have no part in the Court’s Eighth Amendment analysis.

III. EVEN IF THE SUPREME COURT *COULD* CORRECTLY INTERPRET NATIONAL CONSENSUS, THERE ARE STILL INHERENT PROBLEMS WITH THE EVOLVING STANDARDS OF DECENCY ANALYSIS

Even if the evolving standards of decency analysis could be objectively and consistently applied, it is inherently flawed and therefore

⁷⁷ See *id.* at 987 (noting the Court’s failure to include any studies showing juvenile culpability (citing *Roper*, 543 U.S. at 617 (Scalia, J., dissenting))).

⁷⁸ The study cited by the majority in *Roper* stated, “[a]dolescents are overrepresented statistically in virtually every category of reckless behavior.” *Roper*, 543 U.S. at 569 (quoting Jeffrey Arnett, *Reckless Behavior in Adolescents: A Developmental Perspective*, 12 DEV. REV. 339, 339 (1992)). The majority, however, only cited the first part of the finding—that adolescents are overrepresented in every category of reckless behavior—leaving out the rest which would not support its reasoning that all adolescents are too reckless to be held accountable for capital murder. Myers, *supra* note 20, at 988–89 (citing *Roper*, 543 U.S. at 569).

⁷⁹ See *Kennedy*, 128 S. Ct. at 2663.

⁸⁰ *Id.* at 2663–64 (citations omitted).

⁸¹ *Id.* at 2664.

⁸² *Id.* at 2673 (Alito, J., dissenting).

⁸³ *Id.*

would still be unworkable. The test's most glaring deficiency lies in the fact that it is self-defeating. Society is precluded from reconsidering its standards once the Court draws a bright line rule based on its interpretation of what those standards prescribe at that particular moment in time. In other words, if the evolving standards test is the product of the realization that societal norms are not static but subject to change, then using it to support broad, irreversible prohibitions undermines its essential purpose by freezing the status quo into constitutional law.

Justice O'Connor pointed out in her concurring opinion in *Thompson v. Oklahoma* that the history of public attitudes toward the death penalty has demonstrated the danger of "inferring a settled societal consensus."⁸⁴ Beginning around World War I and continuing into the 1950s and 1960s, many states abolished or limited their death penalty statutes, and executions steadily declined "in absolute terms and in relation to the number of homicides occurring in the country," actually ceasing altogether for several years beginning in 1968.⁸⁵ Justice O'Connor concluded:

In 1972, when this Court heard arguments on the constitutionality of the death penalty, such statistics might have suggested that the practice had become a relic, implicitly rejected by a new societal consensus We now know that any inference of a societal consensus rejecting the death penalty would have been mistaken. But had this Court then declared the existence of such a consensus, and outlawed capital punishment, legislatures would very likely not have been able to revive it. The mistaken premise of the decision would have been frozen into constitutional law, making it difficult to refute and even more difficult to reject.⁸⁶

Public support for the death penalty rebounded after the Court's decision in *Furman v. Georgia*, which had required the current death penalty statutes to be reformed.⁸⁷ While the death penalty was only supported by fifty percent of the public when *Furman* was decided in 1972, that figure climbed to sixty-six percent only four years later, the highest level of support for capital punishment in twenty-five years.⁸⁸ Thus, the Court would indeed have been mistaken in *Furman* to entrench the status quo by outlawing the death penalty.

⁸⁴ 487 U.S. 815, 854 (1988) (O'Connor, J., concurring).

⁸⁵ *Id.* at 854–55 (citing WILLIAM J. BOWERS, *LEGAL HOMICIDE: DEATH AS PUNISHMENT IN AMERICA, 1864–1982*, at 26–28 (2d ed. 1984); HUGO ADAM BEDAU, *THE DEATH PENALTY IN AMERICA* 23, 25 (3d ed. 1982)).

⁸⁶ *Id.* at 855.

⁸⁷ See Lain, *supra* note 18, at 22.

⁸⁸ *Id.* (citing David W. Moore, *Americans Firmly Support Death Penalty*, *GALLUP POLL MONTHLY*, June 1995, at 23, 24–25).

The increasing breadth of the Court's Eighth Amendment decisions continues to expand the areas in which society's standards of decency may no longer evolve. In *Coker v. Georgia*, the Court made a categorical ruling that rape of an adult woman, "regardless of the degree of brutality of the rape or the effect upon the victim," can never be deserving of the death penalty.⁸⁹ In *Kennedy*, this ruling was expanded to encompass all nonhomicide crimes, except those against the state.⁹⁰

In making broad and categorical determinations on the constitutionality of a given punishment, the Court is usurping the role of states and juries. Whether the death penalty is an appropriate punishment for the crime of rape, for instance, is an open-ended question.⁹¹ The penalty may or may not be an effective deterrent: it may encourage rape victims to come forward knowing societal disapproval of the crime is strong, or it may discourage prosecution if the victim is trying to protect the rapist; it may cause citizens to feel more secure, or it may weigh on their consciences as an excessive punishment.⁹² The Court can only guess as to the answer, while the legislatures can evaluate the value of capital punishment as a deterrent given their own local conditions and make informed policy decisions.⁹³ This is why such questions are best left in the province of legislatures. In support of this position, Justice Burger wrote:

The Court has repeatedly pointed to the reserve strength of our federal system which allows state legislatures, within broad limits, to experiment with laws, both criminal and civil, in the effort to achieve socially desirable results.

. . . .

Statutory provisions in criminal justice applied in one part of the country can be carefully watched by other state legislatures, so that the experience of one State becomes available to all. Although human lives are in the balance, it must be remembered that failure to allow flexibility may also jeopardize human lives—those of the victims of undeterred criminal conduct.

. . . .

. . . It is difficult to believe that Georgia would long remain alone in punishing rape by death if the next decade demonstrated a drastic

⁸⁹ 433 U.S. 584, 603 (1977) (Powell, J., dissenting in part). The plurality's actual holding stated, "death is indeed a disproportionate penalty for the crime of raping an adult woman." *Id.* at 597 (plurality opinion).

⁹⁰ *Kennedy*, 128 S. Ct. at 2659.

⁹¹ *Coker*, 433 U.S. at 617 (Burger, C.J., dissenting).

⁹² *Id.*

⁹³ *Id.* at 617 n.11 (citing *Gregg v. Georgia*, 428 U.S. 153, 186 (1976) (plurality opinion)).

reduction in its incidence of rape, an increased cooperation by rape victims in the apprehension and prosecution of rapists, and a greater confidence in the rule of law on the part of the populace.⁹⁴

Thus, it ultimately should not matter whether states that choose to make rape a capital offense in certain circumstances are a minority going against the national consensus or are the beginning of a trend.⁹⁵

At the foundation of the Court's Eighth Amendment jurisprudence is the idea that "cruel and unusual punishment" should be defined to reflect society's evolving standards of decency. If the purpose of the evolving standards of decency analysis is to be achieved, the states must be allowed to experiment with their penal laws. To conclude otherwise is to concede "that the evolutionary process has come suddenly to an end; that the ultimate wisdom as to the appropriateness of capital punishment under all circumstances, and for all future generations, has somehow been revealed."⁹⁶ For the Court to make rulings with such presumptuous implications demonstrates an "assumption of power," the arrogance of which "takes one's breath away."⁹⁷

An inherent weakness in the evolving standards of decency analysis is that its focus on national consensus robs the states of their policymaking power to experiment and diversify.⁹⁸ As previously mentioned, this contradicts the spirit and purpose of the Eighth Amendment test. The Louisiana Supreme Court expounded on the necessity of allowing states to experiment with penal laws in *State v. Wilson*, pointing out that precluding a punishment simply because only a few states have as of yet implemented it would prevent any new laws from being passed.⁹⁹ Thus, state legislation that is the first of its kind should not be considered per se unconstitutional.¹⁰⁰ If the needs and standards of our society continually change, and that is the overriding consideration in applying the Eighth Amendment's Cruel and Unusual Punishment Clause, then it is absurd to prevent the legislatures from responding to shifts in societal values. As one scholar wrote, "To the extent that a given limitation rests on a national consensus established by state legislation, the prohibition should not logically be permanent because there is no evidence that the consensus on which it rests is

⁹⁴ *Id.* at 615–16, 618.

⁹⁵ *See id.* at 616.

⁹⁶ *Id.* at 619 n.15 (quoting *Furman v. Georgia*, 408 U.S. 238, 430–31 (1972) (Powell, J., dissenting)).

⁹⁷ *Atkins v. Virginia*, 536 U.S. 304, 348 (2002) (Scalia, J., dissenting).

⁹⁸ *Jacobi*, *supra* note 30, at 1091–92.

⁹⁹ 96-1392, 96-2076, p. 10 (La. 12/13/96); 685 So. 2d 1063, 1069.

¹⁰⁰ *See Palmer*, *supra* note 16, at 870 (citing *Wilson*, 96-1392, 96-2076 at p. 10; 685 So. 2d. at 1069).

permanent.”¹⁰¹ States should be free to reverse or amend their policies without fear that the Court will take away their policymaking power.¹⁰² As Justice Scalia commented in *Harmelin v. Michigan*, “The 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.”¹⁰³

Even where it is clear that the states with legislation prescribing a challenged penalty are a minority, the implications of that fact are ambiguous. The Court should not automatically assume that when only a few state legislatures support stricter punishments, those states have not yet been “enlightened.”¹⁰⁴ As *Furman* demonstrated, it may well be the case that those states are simply the first to express the public’s changing attitude.¹⁰⁵ As another example, the Court in *Coker* emphasized that only three states had reinstated their statutes allowing for execution in cases of rape after *Furman* had struck down all state death penalty statutes as arbitrary in 1972.¹⁰⁶ But the Court had only reinstated the death penalty as a valid punishment the year before *Coker* was decided in *Gregg v. Georgia*.¹⁰⁷ Hence, the majority could just as easily have found it noteworthy that three states had already re-implemented their death penalty statutes.¹⁰⁸

In *Kennedy*, Justice Alito argued that the tally of legislative enactments for and against making child rape a capital offense should not be considered in a vacuum.¹⁰⁹ Rather, influential factors such as the Court’s prior decisions should be taken into account.¹¹⁰ The majority emphasized the fact that only six states had laws allowing the death penalty for child rape as strong evidence of a national consensus against it.¹¹¹ Alito pointed out an alternative argument. He noted that the six states that had enacted such laws “might represent the beginning of a

¹⁰¹ Jacobi, *supra* note 30, at 1119; *see also* *Roper v. Simmons*, 543 U.S. 551, 616 (2005) (Scalia, J., dissenting) (“[I]f the Eighth Amendment is an ever-changing reflection of ‘the evolving standards of decency’ of our society, it makes no sense for the Justices then to *prescribe* those standards rather than discern them from the practices of our people.”).

¹⁰² Jacobi, *supra* note 30, at 1108–09.

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

¹⁰⁴ *See* Jacobi, *supra* note 30, at 1122.

¹⁰⁵ *See generally supra* notes 87–88 and accompanying text.

¹⁰⁶ *Coker v. Georgia*, 433 U.S. 584, 594 (1977) (plurality opinion).

¹⁰⁷ 428 U.S. 153, 186–87 (1976) (plurality opinion).

¹⁰⁸ Jacobi, *supra* note 30, at 1130.

¹⁰⁹ *See Kennedy*, 128 S. Ct. at 2665–69 (Alito, J., dissenting) (noting how case law interpretation has resulted in a “very high hurdle for state legislatures considering the passage of new [penal] laws”).

¹¹⁰ *See id.*

¹¹¹ *Id.* at 2657–58 (majority opinion).

new evolutionary line” that “would not be out of step with changes in our society’s thinking since *Coker* was decided.”¹¹² There were abundant indications that society had become more aware of and concerned about sex crimes against children, including the fact that five states had legislation pending that would authorize capital punishment for child rape.¹¹³ The majority dismissed the contention that this was meaningful, stating that it is unsound to base a determination of contemporary norms on state legislation not yet enacted.¹¹⁴ But, in taking this position, the Court ignored the fact that the state legislatures were “operat[ing] under the ominous shadow” of the Court’s dicta in *Coker*.¹¹⁵

The argument that the recent legislative enactments making child rape a capital offense could signify a burgeoning trend is compelling given the Court’s decision in *Roper v. Simmons*. The Court had found in *Roper* that a mere five states passing laws against the juvenile death penalty was enough to indicate a new consensus regarding society’s standards of decency.¹¹⁶ The trend in *Kennedy* is more persuasive than that in *Roper*.¹¹⁷ In *Roper*, the Court noted that the five states that had permitted the death penalty for juveniles when it was ruled constitutional in *Stanford v. Kentucky*¹¹⁸ had since discarded the death penalty in such cases.¹¹⁹ By enacting penalties less severe than what was constitutionally allowed, those states had no reason to fear invalidation by the Court. In contrast, the Court in *Kennedy* noted that six states had enacted the death penalty for child rape since the Court in *Coker* held that the death penalty for rape of an adult was unconstitutional.¹²⁰ Thus, these states were boldly challenging the Court’s previous decision by operating outside of the boundaries it had arguably set. States enacting laws in spite of the likelihood that they will be invalidated by the Court is stronger evidence of a new trend in social sentiment than when invalidation is not a risk. Hence, if the Court was willing to conclude that societal consensus had shifted in *Roper*, it should not have hesitated to reach the same conclusion in *Kennedy*.

¹¹² *Id.* at 2669 (Alito, J., dissenting).

¹¹³ *Id.* at 2669–71.

¹¹⁴ *Id.* at 2656 (majority opinion).

¹¹⁵ *Id.* at 2672 (Alito, J., dissenting).

¹¹⁶ *Roper v. Simmons*, 543 U.S. 551, 565 (2005).

¹¹⁷ Kenneth C. Haas, *The Emerging Death Penalty Jurisprudence of the Roberts Court*, 6 PIERCE L. REV. 387, 434 (2008) (citing *State v. Kennedy*, 05-1981, p. 43 (La. 5/22/07), 957 So. 2d 757, 788).

¹¹⁸ 492 U.S. 361, 380 (1989).

¹¹⁹ *Roper*, 543 U.S. at 565 (citing VICTOR L. STREIB, ISSUE NO. 76, THE JUVENILE DEATH PENALTY TODAY: DEATH SENTENCES AND EXECUTIONS FOR JUVENILE CRIMES, JANUARY 1, 1973–DECEMBER 31, 2004, at 5, 7 (2005)).

¹²⁰ *Kennedy*, 128 S. Ct. at 2657.

Legislatures are influenced by what they think the Court will do, making some states hesitant to pass laws they believe will be invalidated.¹²¹ Hence, societal standards of decency are left to evolve in an artificial environment created by the Court, making untainted public sentiment impossible to measure. For example, Justice White's discussion in *Coker* that the current mixed judgment of state legislatures "weighs very heavily on the side of rejecting capital punishment as a suitable penalty for raping an adult"¹²² was not the only conclusion that could be drawn from the fact that many states chose not to reenact their death penalty statutes for rape after the temporary ban on the death penalty was lifted. Rather, it could just as well represent "hasty legislative compromise occasioned by time pressures following *Furman*, a desire to wait on the experience of those States [that] did enact such statutes, or simply an accurate forecast of [the Court's] holding."¹²³

When a legislative enactment's constitutional validity is on the line, other states that may be contemplating similar statutes may wait to see if the Court will uphold the controversial law before enacting their own.¹²⁴ There is evidence that this is exactly what followed from the Court's ambiguous decision in *Coker*. In that case, it was unclear whether the Court's holding was limited to precluding the death penalty for rape of an adult woman, or whether it would extend to cover all nonhomicide crimes.¹²⁵ In *Kennedy*, Justice Alito contended that the Court's suggestion in *Coker* that laws allowing the death penalty for nonhomicide crimes would be struck down led many legislatures to decline to pass such statutes.¹²⁶ Thus, Justice Alito concluded, state legislatures "have not been free to express their own understanding of our society's standards of decency."¹²⁷

The Supreme Court of Florida actually invalidated Florida's capital child rape statute as unconstitutional based on its interpretation of

¹²¹ Jacobi, *supra* note 30, at 1150.

¹²² *Coker v. Georgia*, 433 U.S. 584, 596 (plurality opinion).

¹²³ *Id.* at 614 (Burger, C.J., dissenting).

¹²⁴ *State v. Wilson*, 96-1392, 96-2076, p. 10 (La. 12/13/96); 685 So. 2d 1063, 1069 (citing *Coker*, 433 U.S. at 616 (Burger, C.J., dissenting)).

¹²⁵ *Coker*, 433 U.S. at 598 (plurality opinion) ("[I]n terms of moral depravity and of the injury to the person and to the public, [rape] does not compare with murder, which does involve the unjustified taking of human life."); see also Matura, *supra* note 20, at 249 ("[*Coker*] set a precedent that the Court would closely examine, and possibly invalidate, any sentence of death for a crime not involving a homicide.").

¹²⁶ *Kennedy*, 128 S. Ct. at 2665-66 (Alito, J., dissenting). In support of the contention that legislatures were hesitant to pass statutes authorizing the death penalty for nonhomicide crimes following the *Coker* decision, see 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, 134-35 (2006).

¹²⁷ *Kennedy*, 128 S. Ct. at 2672 (Alito, J., dissenting).

Coker in *Buford v. State*.¹²⁸ While acknowledging that the *Coker* holding was facially limited to addressing the constitutionality of the death penalty for rape of an adult woman, the Florida court nevertheless found that “[t]he reasoning of the justices in *Coker v. Georgia* compels us to hold that a sentence of death is grossly disproportionate and excessive punishment for the crime of sexual assault and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment.”¹²⁹ Interpretations such as that of the Florida Supreme Court in *Buford* are indicative of the high hurdle state legislatures faced when considering the passage of laws permitting capital punishment for child rape.¹³⁰

The majority in *Kennedy* claimed that there was a lack of reliable data showing that the Court’s decision in *Coker* was deterring states from enacting death penalty statutes for child rape.¹³¹ In so concluding, the majority brushed over the dissent’s specific mention of excerpts from the legislative record in Texas, where opponents of a capital child rape law had tellingly argued that “the law would . . . fail to pass the proportionality test established by the U. S. Supreme Court.”¹³² These legislators further stated: “Texas should not enact a law of questionable constitutionality simply because it is politically popular, especially given clues by the U. S. Supreme Court that death penalty laws that would be rarely imposed or that are not supported by a broad national consensus would be ruled unconstitutional.”¹³³ Thus, it is true that some state legislators bowed to the pressure of anticipated Court opinion, even though they believed their constituents supported laws permitting capital punishment for the rape of a child.¹³⁴

The Court’s evolving standards of decency test is self-defeating. The test cannot succeed in accurately measuring societal consensus because the power of the Court to cement the status quo prevents state legislatures from reflecting societal views that conflict with prior or anticipated Court decisions.¹³⁵ Thus, the named purpose of the evolving standards analysis is undercut.

¹²⁸ 403 So. 2d 943, 951 (Fla. 1981).

¹²⁹ *Id.* at 950–51.

¹³⁰ See *Kennedy*, 128 S. Ct. at 2667 (Alito, J., dissenting).

¹³¹ *Id.* at 2655 (majority opinion).

¹³² *Id.* at 2668 (Alito, J., dissenting) (quoting TEX. H. RESEARCH ORG., BILL ANALYSIS: DEATH PENALTY, INCREASED PUNISHMENT FOR SEX CRIMES AGAINST CHILDREN, H.B. 8, 80th Sess., at 10 (Mar. 5, 2007)).

¹³³ *Id.* at 2668–69 (quoting TEX. H. RESEARCH ORG., *supra* note 132).

¹³⁴ See *Kennedy*, 128 S. Ct. at 2668 (Alito, J., dissenting).

¹³⁵ See *Jacobi*, *supra* note 30, at 1122. As Justice Alito explained:

When state lawmakers believe that their decision will prevail on the question whether to permit the death penalty for a particular crime or class of offender, the legislators’ resolution of the issue can be interpreted as an expression of their own judgment, informed by whatever weight they attach to

IV. FURTHER MUDDYING THE WATERS OF EIGHTH AMENDMENT ANALYSIS: THE COURT'S INDEPENDENT PROPORTIONALITY REVIEW

An increasingly important component of the Supreme Court's Eighth Amendment analysis is the exercise of its own independent judgment. Aside from a determination of society's standards, the Court independently reviews the imposed sentence to determine whether it amounts to the unnecessary and wanton infliction of pain or is grossly disproportionate to the severity of the offense.¹³⁶ Although the Court's evolving standards of decency analysis and independent review are considered to be two distinct inquiries, the two often overlap. The difficulty of discerning national consensus under the evolving standards analysis raises the question of whether the Court's interpretation of society's values is truly accurate, or is simply an echo of the views held by the members of the Court.¹³⁷ It is noteworthy that the Court has never found that national consensus conflicted with its independent review.¹³⁸ One could argue that a lack of distinction between the two tests is irrelevant; the definition of cruel and unusual punishment should ultimately be left to the Court's subjective judgment. Yet even the Court itself does not take that position; rather, it recognizes the importance of objectivity to an Eighth Amendment analysis.

The suggestion that the Court's opinion alone should be the deciding factor for Eighth Amendment disputes has been met with resounding disapproval by the Court on numerous occasions. Justice Scalia, writing for the plurality in *Stanford v. Kentucky*, discounted the Court's exercise of independent judgment as having no bearing on the acceptability of a particular punishment under the Eighth Amendment,¹³⁹ and the Court in *Coker v. Georgia* stated that judgment should be informed by "objective factors to the maximum possible extent."¹⁴⁰ Thus, the Court

the values of their constituents. But when state legislators think that the enactment of a new death penalty law is likely to be futile, inaction cannot reasonably be interpreted as an expression of their understanding of prevailing societal values. In that atmosphere, legislative inaction is more likely to evidence acquiescence.

Kennedy, 128 S. Ct. at 2669 (Alito, J., dissenting).

¹³⁶ *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion).

¹³⁷ See Myers, *supra* note 20, at 984 ("[T]he Court's independent judgment will also likely overwhelm any signs of a national consensus [I]t appears that in *Roper*, the majority selectively utilized the national consensus analysis only so long as it was useful to support its independent findings of proportionality.")

¹³⁸ See *Stanford v. Kentucky*, 492 U.S. 361, 379 (1989) (plurality opinion), *abrogated* by *Roper v. Simmons*, 543 U.S. 551 (2005).

¹³⁹ See *Stanford*, 492 U.S. at 379 (plurality opinion).

¹⁴⁰ *Coker*, 433 U.S. at 592 (plurality opinion); see also *Kennedy*, 128 S. Ct. at 2649 ("[T]he Eighth Amendment's protection against excessive or cruel and unusual punishments . . . is determined . . . by the norms that 'currently prevail.'" (quoting Atkins

has recognized, at least superficially, that the Eighth Amendment is not subject to the ad hoc views of the prevailing majority on the bench.

The Court, however, has been giving its independent judgment increasing weight in more recent Eighth Amendment decisions. In *Atkins v. Virginia*, the Court backed away from the strong stand taken against the exercise of its independent judgment in *Stanford*.¹⁴¹ In *Roper v. Simmons*, the Court openly rejected the previous position in *Stanford* and affirmed the importance of its independent findings in Eighth Amendment cases.¹⁴² The danger of the independent review approach lies in the result—societal standards are swallowed up by the Court’s subjective judgment.¹⁴³ This is exactly what happened in *Coker*, where the Court held that the death penalty was unconstitutionally disproportionate to the crime of adult rape.¹⁴⁴ After discussing the weak evidence of national consensus in its favor, the Court hung its hat on its own moral judgment that rape was not worthy of capital punishment because it did not involve the taking of human life.¹⁴⁵

The Court also placed substantial weight on its own value judgments in *Kennedy*. The Court affirmed its reasoning in *Coker* that the death penalty for a crime that did not result in the loss of human life was morally unjustifiable.¹⁴⁶ Thus, the Court concluded that capital punishment was prohibited for all nonhomicide crimes except, interestingly, those against the state.¹⁴⁷ The Court claimed that it overturned Louisiana’s law based on national consensus as well as its own independent judgment.¹⁴⁸ But when it came to light that the Court had been mistaken about the federal government’s position on the death penalty for child rape,¹⁴⁹ the Court declined to rehear the case.¹⁵⁰

v. Virginia, 536 U.S. 304, 311 (2002))). Perhaps the Court is reluctant to take off the evolving standards of decency mask that lends facial legitimacy and a false sense of objectivity to its independent judgments.

¹⁴¹ See *Atkins*, 536 U.S. at 312–13 (citing *Coker*, 433 U.S. at 597 (plurality opinion)).

¹⁴² See 543 U.S. 551, 563 (2005) (citing *Atkins*, 536 U.S. at 312). The Court in *Roper* stated that it rejected the view in *Stanford* that the Court’s independent judgment is immaterial in determining the constitutional validity of a challenged punishment because such a stance is inconsistent with prior Eighth Amendment case law. *Roper*, 543 U.S. at 574–75 (citing *Thompson v. Oklahoma*, 487 U.S. 815, 833–38 (1988) (plurality opinion); *Coker*, 433 U.S. at 597 (plurality opinion)).

¹⁴³ See *Roper*, 543 U.S. at 615–16 (Scalia, J., dissenting).

¹⁴⁴ *Coker*, 433 U.S. at 592 (plurality opinion).

¹⁴⁵ *Id.* at 598.

¹⁴⁶ *Kennedy*, 128 S. Ct. at 2659 (citing *Coker*, 433 U.S. at 598 (plurality opinion)).

¹⁴⁷ *Id.* Delving further into the inconsistency of this reasoning is beyond the scope of this Note.

¹⁴⁸ *Id.* at 2650–51.

¹⁴⁹ Neither the parties to the suit nor the Court had realized that Congress had authorized the death penalty for child rape under military law. See National Defense Authorization Act of 2006, Pub. L. No. 109-163, div. A, tit. V, sec. 552(b), 119 Stat. 3136,

Louisiana claimed that a rehearing was necessary because the Court's finding on national consensus had been invalidated by the recently changed military law.¹⁵¹ In his statement respecting denial of rehearing, Justice Scalia contended that there was no reason to rehear the case based on evidence of a lack of national consensus because the majority opinion had been based solely on the independent judgment of the Court.¹⁵² Scalia's conclusion is bolstered by the Court's silence in response to Louisiana's inquiry as to whether the Court's independent judgment alone was enough to support an Eighth Amendment holding.¹⁵³ Hence, it appears from the Court's most recent Eighth Amendment case that the importance of keeping its decisions consistent with *society's* evolving standards of decency may be diminishing.

The Court's independent proportionality review should not take center stage in the Eighth Amendment analysis. The Court has built up its Eighth Amendment jurisprudence around the idea that "cruel and unusual punishment" must be defined in accordance with society's evolving standards of decency. Therefore, it follows that the Justices' personal opinions should give way to society's expressed views.¹⁵⁴

3263 (codified as amended at 10 U.S.C. § 920 (2006)); see also Bidish Sarma, *Still in Search of a Unifying Principle: What Kennedy v. Louisiana and the Supreme Court's Denial of the State's Petition for Rehearing Signal for the Future*, 118 YALE L.J. POCKET PART 55, 55 (2008), <http://thepocketpart.org/2008/10/14/sarma.html>.

¹⁵⁰ See *Kennedy*, 128 S. Ct. 2641, rehearing denied 129 S. Ct. 1 (2008). The Court had stated in its majority opinion that "Congress in the Federal Death Penalty Act of 1994 expanded the number of federal crimes for which the death penalty is a permissible sentence . . . but it did not do the same for child rape or abuse." *Kennedy*, 128 S. Ct. at 2652. Three days after the *Kennedy* opinion was issued, the Court's error was made public by Colonel Dwight Sullivan in his commentary on the CAAFlog blog. Posting of Dwight Sullivan to CAAFlog, <http://www.caaflog.com/2008/06/28/the-supremes-dis-the-military-justice-system/#comments> (June 28, 2008).

¹⁵¹ Petition for Rehearing at 4, *Kennedy*, 128 S. Ct. 2641 (No. 07-343).

¹⁵² *Kennedy*, 128 S. Ct. 2641, rehearing denied 129 S. Ct. at 3 (statement of Scalia, J.) ("[T]here is no reason to believe that absence of a national consensus would provoke second thoughts."). Justice Scalia also said, "I am voting against the petition for rehearing because the views of the American people on the death penalty for child rape were, to tell the truth, irrelevant to the majority's decision in this case." *Id.*

¹⁵³ Sarma, *supra* note 149, at 58–59.

¹⁵⁴ See *Stanford v. Kentucky*, 492 U.S. 361, 379 (1989) (plurality opinion), *abrogated by Roper v. Simmons*, 543 U.S. 551 (2005). Justice Scalia described why it was unacceptable for the Eighth Amendment to be driven by the Justices' subjective views in *Roper*:

If the Eighth Amendment set forth an ordinary rule of law, it would indeed be the role of this Court to say what the law is. But the Court having pronounced that the Eighth Amendment is an ever-changing reflection of the evolving standards of decency of our society, it makes no sense for the Justices then to *prescribe* those standards rather than discern them from the practices of our people.

Roper, 543 U.S. at 616 (Scalia, J., dissenting) (internal quotation marks omitted).

Perhaps the Court's independent judgment should be relegated to a second tier inquiry as in *Stanford*, where the Court stated that the Justices' subjective opinions should only be sought when objective indicia *invalidates* a statutory punishment.¹⁵⁵ Thus, the Judges' independent analysis would be confined to function as an additional protection of state sovereignty by reaffirming the presumed validity of legislative enactments under the Eighth Amendment. The power of the Court's independent proportionality review must be minimized to prevent the Court from morphing into a "committee of philosopher kings."¹⁵⁶

The evolving standards of decency analysis may be nothing more than a smokescreen for the Court's independent proportionality review. Even so, this does not mean that all attempts to discern societal standards should simply be abandoned. A new test is needed that will minimize judicial subjectivity and protect the ability of state legislatures to enact penal laws that reflect the moral values of the people.

V. REVISING THE COURT'S EVOLVING STANDARDS OF DECENCY ANALYSIS

If the Court's current approach to determining what constitutes cruel and unusual punishment is inherently flawed and unworkable, then a different test is needed to guide Eighth Amendment jurisprudence. In *Weems v. United States*, the first case to suggest that the definition of cruel and unusual punishment must conform to society's values, Justice White wrote a dissenting opinion advocating a hands-off approach.¹⁵⁷ His approach would essentially limit the Court's task to determining only whether the punishment imposed would have been considered barbaric at the time the Eighth Amendment was ratified.¹⁵⁸ Justice White argued:

It would be an interference with matters left by the Constitution to the legislative department of the government for us to undertake to weigh the propriety of this or that penalty fixed by the legislature for specific offenses. So long as they do not provide cruel and unusual punishments, such as disgraced the civilization of former ages, and made one shudder with horror to read of them, as drawing, quartering, burning, etc., the Constitution does not put any limit upon legislative discretion.¹⁵⁹

While Justice White's approach would effectively rid the Court's analysis of all subjective elements, it is hardly an improvement on the current test because it fails to take into account changes in society's

¹⁵⁵ *Stanford*, 492 U.S. at 379 (plurality opinion).

¹⁵⁶ *Id.*

¹⁵⁷ See 217 U.S. 349, 404 (1910) (White, J., dissenting) (citing *Whitten v. Georgia*, 47 Ga. 297 (1872)).

¹⁵⁸ See *id.* (citing *Whitten*, 47 Ga. 297).

¹⁵⁹ *Id.* (quoting *Whitten*, 47 Ga. 297).

standards of decency. Under such an approach, eighteenth century punishments such as execution for “cutting down a tree, stripping a child, robbery, and forgery”¹⁶⁰ would be constitutionally acceptable as long as they were not considered barbaric at the time the Eighth Amendment was ratified. Both the Court and most Americans today would undoubtedly find such a conclusion preposterous. The Court has rightly rejected a test that only looks backwards and does not take into account society’s evolving views on humane punishments. Hence, Justice White’s idea of cutting the Court completely out of the equation and leaving the legislatures with nearly unbridled discretion is not the answer. We must look elsewhere for a solution to the problems of the current Eight Amendment test.

A major problem with the Court’s evolving standards test is its tendency to usurp the roles of legislatures and juries. One of the strengths of our federal system is that any state, acting under the authority granted by its citizens, can “serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”¹⁶¹ This freedom is substantially eviscerated by the Court’s current ability to invalidate legislative enactments that do not conform to the status quo. Furthermore, there is no evidence to suggest that sentencing juries cannot accurately assess mitigating characteristics in a particular case; thus, there is no justification for the Court to prevent juries from “treat[ing] exceptional cases with exceptional punishment[s].”¹⁶² Of course, this does not mean legislatures and juries should have unchecked power to do whatever they want; both must operate within the confines of the constitutional mandate against cruel and unusual punishment. But because the Court’s function is neither to make policy decisions nor to remove all sentencing discretion from juries, legislatures and juries should have broad latitude to decide whether a given penalty fits the crime. The Court acknowledged this in *Gregg v. Georgia*, stating:

¹⁶⁰ Matura, *supra* note 20, at 250 (citing William J. Brennan, Lecture, *Constitutional Adjudication and the Death Penalty: A View from the Court*, 100 HARV. L. REV. 313, 328 (1986)).

¹⁶¹ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (defending a state’s right to confer a monopoly on existing businesses as properly a legislative determination); *see also* *Harmelin v. Michigan*, 501 U.S. 957, 990 (1991) (plurality opinion) (“Diversity not only in policy, but in the means of implementing policy, is the very *raison d’être* of our federal system.”).

¹⁶² Myers, *supra* note 20, at 972 (citing *Roper v. Simmons*, 543 U.S. 551, 619 (2005) (Scalia, J., dissenting)); *see also* *Roper*, 543 U.S. at 603–04 (O’Connor, J., dissenting) (arguing that the Court fails to support its claim “that sentencing juries cannot accurately evaluate a youthful offender’s maturity or give appropriate weight to mitigating characteristics”).

[I]n assessing a punishment selected by a democratically elected legislature against the constitutional measure, we presume its validity. We may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved. And a heavy burden rests on those who would attack the judgment of the representatives of the people.¹⁶³

Hence, the proper Eighth Amendment test ought to be flexible, respecting the policymaking discretion of the people speaking through their representatives. This will allow society's laws to reflect society's evolving standards of decency.

The best test for purposes of accurately gauging current societal values combines the views expressed by Justice Brennan¹⁶⁴ in *Furman v. Georgia* with those of Justice O'Connor in *Roper v. Simmons* and Justice Burger in *Coker v. Georgia*. Stated concisely, the test the Court should apply has two parts. 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.

The proposed test will now be explained in greater detail, beginning with each Justice's contribution. Justice Brennan defined the proper Eighth Amendment test as being a cumulative one:

If a punishment is *unusually severe*, if there is a *strong probability* that it is inflicted *arbitrarily*, . . . and if there is *no reason to believe* that it serves *any* penal purpose more effectively than some less severe punishment, then the continued infliction of that punishment violates

¹⁶³ 428 U.S. 153, 175 (1976) (plurality opinion).

¹⁶⁴ Justice Brennan was firmly against the death penalty, considering it unconstitutional under any circumstances and consistently taking the side of those in favor of more judicial oversight. See Dwight Aarons, *The Abolitionist's Dilemma: Establishing the Standards for the Evolving Standards of Decency*, 6 PIERCE L. REV. 441, 466–67 (2008). “Justice Brennan, who . . . never voted to affirm a capital sentence, was widely regarded for his behind-the-scenes efforts and willingness to form coalitions with other Justices to issue opinions generally in line with his own jurisprudential philosophy.” *Id.* Thus, he would undoubtedly find it ironic that his test is being used in this Note in support of allowing state legislatures more discretion in enacting penal laws under the Eighth Amendment.

the command of the Clause that the State may not inflict inhuman and uncivilized punishments upon those convicted of crimes.¹⁶⁵

Justice O'Connor and Chief Justice Burger elaborated on the "unnecessary breadth" of the Court's Eighth Amendment rulings banning the death penalty for entire classes of people.¹⁶⁶ In her dissent in *Roper*, Justice O'Connor argued that the majority erred in striking down the death penalty for those under eighteen: "a legislature may reasonably conclude that at least *some* [seventeen]-year-olds can act with sufficient moral culpability, and can be sufficiently deterred by the threat of execution, [and thus] capital punishment may be warranted."¹⁶⁷ The same can be said of rapists or other perpetrators of nonhomicide crimes that involve atrocious behavior. Chief Justice Burger reached a similar conclusion in *Coker*, noting in his dissent that society could disapprove of the death penalty as a punishment for rape generally, yet approve of it for a repeat felon where no other punishment would be effective.¹⁶⁸ This was exactly the case presented in *Coker*; a recidivist rapist serving a life sentence escaped from prison, broke into the house of a young couple, and raped and kidnapped the wife.¹⁶⁹ Brandishing a knife, the felon told the woman's husband, whom he had bound and gagged, that if he was followed by the police he would kill the woman because "*he didn't have nothing to lose—that he was in prison for the rest of his life, anyway.*"¹⁷⁰ By 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.¹⁷¹

The Court's holding in *Coker* cannot possibly be the result of a proper application of the Eighth Amendment. The Eighth Amendment was written and adopted to prevent the implementation of cruel and unusual punishments, not to obstruct justice. Chief Justice Burger argued that the Court should have narrowed the scope of its decision in *Roper* to address only whether the death penalty was appropriate given the specific facts of the crime.¹⁷² Such a limitation would eliminate the

¹⁶⁵ *Furman v. Georgia*, 408 U.S. 238, 282 (1972) (Brennan, J., concurring) (emphasis added).

¹⁶⁶ *Coker v. Georgia*, 433 U.S. 584, 606 (1977) (Burger, C.J., dissenting); *Roper*, 543 U.S. at 600 (O'Connor, J., dissenting).

¹⁶⁷ *Roper*, 543 U.S. at 600.

¹⁶⁸ *See Coker*, 433 U.S. at 606–07 (Burger, C.J., dissenting).

¹⁶⁹ *See id.* at 609 n.4.

¹⁷⁰ *Id.* (quoting Appendix at 121, *Coker*, 433 U.S. 584 (No. 75-5444)).

¹⁷¹ *See id.* at 606–07.

¹⁷² According to Chief Justice Burger, the Court should have narrowed the question in *Coker* to whether

problem of sweeping decisions that rob the people, acting through their representatives and juries, of their policymaking powers and sentencing discretion. Because every case presents a unique set of facts and circumstances, the Court should make a determination on the constitutional validity of a challenged penalty by evaluating the case on its own merits. This way the Eighth Amendment cannot be used to undermine justice.

The Eighth Amendment analysis used by the Louisiana Supreme Court in its 1996 decision *State v. Wilson* follows the precepts outlined above fairly closely. In holding that the death penalty for child rape was constitutional, the court deferred to the state legislature's conclusion that the death penalty for the crime of child rape served the penological goals of both retribution and deterrence, making the punishment appropriate for the crime.¹⁷³ According to the court, the death penalty is not an excessive punishment for the crime of child rape because of "the appalling nature of the crime, the severity of the harm inflicted upon the victim, and the harm imposed on society" as a result.¹⁷⁴ Thus, the punishment meets the first and third prongs of validity under Justice Brennan's Eighth Amendment test. Capital punishment is not an "unusually severe" punishment for child rape because it serves the penological goals of retribution and deterrence.¹⁷⁵ In addition, it is not inconceivable that the death penalty serves these goals "more effectively than some less severe punishment,"¹⁷⁶ making it an effective expression of society's moral outrage as mandated by *Gregg*.¹⁷⁷

The Louisiana Supreme Court next assessed whether the death penalty statute for the aggravated rape of a child was applied arbitrarily or capriciously.¹⁷⁸ The court found that the legislature had met the standard of narrowly defining capital offenses.¹⁷⁹ Furthermore, the

the Eighth Amendment's ban against cruel and unusual punishment prohibit[s] the State of Georgia from executing a person who has, within the space of three years, raped three separate women, kill[ed] one and attempt[ed] to kill another, who is serving prison terms exceeding his probable lifetime[,] and who has not hesitated to escape confinement at the first available opportunity?

Id. at 607.

¹⁷³ See *State v. Wilson*, 96-1392, 96-2076, p. 18 (La. 12/13/96); 685 So. 2d 1063, 1073 (citing *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (plurality opinion)). The Supreme Court in *Gregg* stated that the death penalty serves the two social purposes of retribution and deterrence, and "is an expression of society's moral outrage at particularly offensive conduct." *Gregg*, 428 U.S. at 183 (plurality opinion).

¹⁷⁴ *Wilson*, 96-1392, 96-2076 at p. 13; 685 So. 2d at 1070.

¹⁷⁵ See *Furman v. Georgia*, 408 U.S. 238, 282 (1972) (Brennan, J., concurring).

¹⁷⁶ *Id.*

¹⁷⁷ *Gregg*, 428 U.S. at 183 (plurality opinion).

¹⁷⁸ *Wilson*, 96-1392, 96-2076 at p. 13; 685 So. 2d at 1070.

¹⁷⁹ *Id.* at p. 16; 685 So. 2d at 1072.

defendants¹⁸⁰ were given a bifurcated trial and jury uniform guidelines under the Louisiana Code of Criminal Procedure that prescribed consideration of aggravating and mitigating circumstances.¹⁸¹ Hence, the second prong of Justice Brennan's test was also met because there was not a "strong probability" that the punishment was being "inflicted arbitrarily."¹⁸² The aggravating and mitigating circumstances of the particular case were examined and determined to have been properly taken into account.¹⁸³

Wilson is a good illustration of what should be the extent of the Supreme Court's Eighth Amendment review. The Court ought to first assess whether the legislature could have reasonably concluded that some criminals could act with sufficient moral culpability to merit the challenged penalty (Justice O'Connor's test). In making this assessment, the Court would determine if the challenged penalty is unusually severe so as to serve no legitimate penological goals; whether there is a strong probability that the punishment is inflicted arbitrarily; and whether there is no reason to believe it would be more effective in deterring or recompensing the targeted crime than a lesser penalty (Justice Brennan's test). If the challenged punishment fails the Court's first assessment, then it is unconstitutional under the Eighth Amendment and the inquiry ends there. But if the Court concludes that the legislative enactment was reasonable, it must then shift its inquiry to the specific facts of the case. Under this second part of the test, the Court would ask whether the jury could have reasonably concluded that the sentenced punishment was justified under the particular facts and circumstances of the case (Chief Justice Burger's test). Thus, under the redefined evolving standards test the Court would first decide if the legislature could have reasonably envisioned a scenario where the crime would be proportionate to the punishment, and if so, whether the jury could have reasonably concluded that the particular case presented such a scenario. If the answer to both questions is yes, then the punishment is valid under the Eighth Amendment.

The new Eighth Amendment test proposed by this Note would rectify the problems that render the old test unworkable. As Justice Scalia recognized, "the risk of assessing evolving standards is that it is all too easy to believe that evolution has culminated in one's own

¹⁸⁰ One of the defendants was an HIV-positive male accused of raping a five-year-old girl, a seven-year-old girl, and a nine-year-old girl, one of which was his own daughter. *Id.* at p. 2; 685 So. 2d at 1065. The other defendant allegedly raped a five-year-old girl. *Id.* at p. 1; 685 So. 2d at 1064.

¹⁸¹ *Id.* at pp. 13–14; 685 So. 2d at 1071.

¹⁸² *Furman v. Georgia*, 408 U.S. 238, 282 (1972) (Brennan, J., concurring).

¹⁸³ *See Wilson*, 96-1392, 96-2076 at pp. 14–17; 685 So. 2d at 1071–72.

views.”¹⁸⁴ The new test would remove the temptation for judicial subjectivity by eliminating the need to predict national consensus. Under the current test, the Court attempts to accomplish the impossible task of determining national consensus, allowing it to have its way with the flexible results of social science methodology. Instead of focusing on the arbitrary question of which states are for and against a challenged punishment, the Court should ask whether the legislature that enacted the punishment could have reasonably concluded that it was justifiable. If the legislature had “no reason to believe that it serves any penal purpose more effectively than some less severe punishment,”¹⁸⁵ then it is an excessive penalty. Evaluating the punishment in light of the facts and circumstances surrounding its enactment, thereby doing away with the need to divine national consensus, frees legislatures to experiment with social policies their constituents find appropriate and desirable. The Court would no longer have the power to make broad rulings that entrench the status quo or interfere in any other way with the evolution of society’s standards of decency.

The Court has been steadfast in its commitment to the idea that “capital punishment must be limited to those offenders who commit a narrow category of the most serious crimes and whose extreme culpability makes them the most deserving of execution,” a commitment it reaffirmed in *Kennedy*.¹⁸⁶ The approach proposed by this Note would not undermine that principle. On the contrary, it offers the defendant even more protection. Even if it is determined that the legislature acted reasonably in enacting the challenged penalty, the Court will still examine the jury’s sentencing decision to ensure that the crime could reasonably be found deserving of the punishment given the particular facts of the case. Thus, the purpose of the Court’s inquiry would still be to ensure that the punishment meets the standard of being proportionate to the crime. It simply shifts a greater share of the burden of defining “cruel and unusual punishment”—which necessarily involves a moral judgment¹⁸⁷—to the people’s representatives rather than to the “majority of the small and unrepresentative segment of our society that sits on [the Supreme] Court.”¹⁸⁸

¹⁸⁴ *Thompson v. Oklahoma*, 487 U.S. 815, 865 (1988) (Scalia, J., dissenting).

¹⁸⁵ *Furman*, 408 U.S. at 282 (Brennan, J., concurring).

¹⁸⁶ *Kennedy*, 128 S. Ct. at 2650 (quoting *Roper v. Simmons*, 543 U.S. 551, 568 (2005)) (internal quotation marks omitted).

¹⁸⁷ *Id.* at 2649 (citing *Furman*, 408 U.S. at 382 (Burger, C.J., dissenting)).

¹⁸⁸ *Thompson*, 487 U.S. at 873 (Scalia, J., dissenting).

CONCLUSION

The Supreme Court's decision in *Kennedy* merely reaffirms what the Court's prior Eighth Amendment case law has already shown—that the evolving standards of decency analysis fails in its essential purpose. It does not promote society's sentiment on the appropriateness of a given punishment because it cannot accurately and objectively gauge that sentiment. As illustrated in *Kennedy*, state legislatures often refrain from enacting laws they believe the Court will invalidate. Hence, the Court's attempt to decipher society's true values based on an assessment of state legislation turns into mere speculation. Additionally, there is no hard and fast rule for how the "objective indicia" of national consensus—legislative enactments and jury sentencing data—are to be interpreted. Interpretation of these factors easily turns into a purely subjective judgment call by the Court majority, which can cherry-pick from other favorable "indicators" such as international law or public opinion polls to bolster its decisions. Moreover, even if the Court could properly assess society's current sentiment on the justness of a given penalty, freezing the status quo into constitutional law prevents society from reevaluating its standards or reacting to changed conditions with new penal laws.

The facts and circumstances surrounding the *Kennedy* decision suggest that society's concern for protecting the dignity and welfare of its most innocent and vulnerable citizens may have grown, culminating in the demand that child rapists face the possibility of a harsher penalty. The Court apparently cannot conceive of societal standards evolving toward the imposition of harsher punishments rather than away from them. Perhaps the Court is forgetting that harsher penalties, if they serve their proper purpose as effective deterrents, reflect a desire on the part of society to promote the value of human life rather than show a callous indifference to it. Assessing the justice and effectiveness of a given punishment necessarily involves policy determinations that those closest to the situation—the people's representatives—are best equipped to make. The Court must ultimately have the final say on what constitutes cruel and unusual punishment under the Eighth Amendment, but it can do so without making broad, categorical rules that usurp the discretion of state legislatures and juries. As Judge Warriner from the U.S. District Court of the Eastern District of Virginia aptly remarked:

I have never understood why the phrase "evolving standards of decency" has been an appropriate concept within the framework of our law and society. If our government were an authoritarian one, or if it were a monarchy, evolving concepts could only be recognized either by judicial declaration or by edict. Within a republic, however, evolving notions are to be manifest in the law as the people through their elected representatives decide. For a judge to deem himself able to

determine for the people what their concepts of decency are is reminiscent of, if not the functional equivalent of, a monarchy.¹⁸⁹

The Court must significantly revise its Eighth Amendment evolving standards of decency analysis if it is to truly be a measure of *society's* evolving standards of decency, which is its stated purpose. By eliminating the need to make a subjective pronouncement of national consensus and focusing instead on the specific legislative enactment and jury sentence challenged, the Court will no longer be at liberty to replace society's sense of justice and fairness with its own.

Bethany Siena

¹⁸⁹ Riddick v. Bass, 586 F. Supp. 881, 882 n.1 (E.D. Va. 1984).