

## ***Kennedy and the Tail of Minos***

*J. Richard Broughton* \*

### I. INTRODUCTION

In Dante's *Inferno*, Minos sat as the ultimate judge of human sin.<sup>1</sup> Dante explains in Canto V that when the damned appeared in Hell, they would confess their sins to Minos, who would then wrap his tail around his body.<sup>2</sup> The circle to which the soul was assigned was determined by the number of times that Minos wrapped his tail.<sup>3</sup> Dante's recognition of Minos in this role was no accident: Minos, son of Zeus and Europa and king of Crete, was known as a wise and just ruler and lawgiver,<sup>4</sup> and his role as a leading judge in the Underworld is described by Virgil<sup>5</sup> (who guides Dante's main character through Hell in the *Inferno*).

Dante's description of the punishment in Hell and the procedure for receiving it provides important lessons for us with respect to the definition and administration of the criminal law. Of course, it reminds us that punishment matters, that who and to what extent we punish tells us about our morality, humanity, and our commitment to safeguarding the political community. It reminds us, too, that punishment matters to our politics because political institutions must be capable of controlling the people;<sup>6</sup>

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\* Visiting Assistant Professor of Law, Wayne State University Law School. This Article also makes reference to some capital litigation in which I participated as a lawyer at the U.S. Department of Justice. The Article does not, however, contain or rely upon any nonpublic information. I am grateful to Wendy for her support, and thankful for Blair, who was born during the writing of this Article.

1. DANTE ALIGHIERI, *INFERNO* 41 (Allen Mandelbaum trans., 1980) (1308).

2. *Id.* ("There dreadful Minos stands, gnashing his teeth:/examining the sins of those who enter,/he judges and assigns as his tail twines./I mean that when the spirit born to evil/appears before him it confesses all;/and he, the connoisseur of sin, can tell/the depth in Hell appropriate to it").

3. *Id.* ("[A]s many times as Minos wraps his tail/around himself, that marks the sinner's level.").

4. See PIERRE GRIMAL, *THE DICTIONARY OF CLASSICAL MYTHOLOGY* 275–76 (Stephen Kershaw ed., 1991) (1951). It is interesting that Minos is introduced in Canto V at the entrance to the Circle that contains the lustful. Minos, in addition to his reputation as a lawgiver, was also known to have numerous mistresses which led Pasiphae, his wife, to curse him (the curse was then lifted by Procris, whom he tried to seduce). *Id.*

5. See VIRGIL, *THE AENEID* 139 (Harlan Hoge Ballard trans., 1930).

6. See *THE FEDERALIST* NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961). See also J. Richard Broughton, *The Second Death of Capital*

criminal and penal legislation are manifestations of that effort. Depriving human beings of their freedom and sometimes their lives is a tragic but necessary responsibility of the state. In this sense, Dante reminds us that it matters *who determines* criminal punishment and how it is determined. That question has special significance for American government and politics because its resolution sits squarely at the intersection of constitutionalism and criminal justice: in the effort to control both the governed *and* those who govern (as our system contemplates), to what extent should the punishment decisions of judicial actors and institutions take priority over the punishment decisions of political actors and institutions?

These concerns about whom, why, and how we punish and about the political considerations that attend the challenge of violent crime in America have particular force in the debate about both the death penalty and particular applications of it as well as the Supreme Court's role in regulating it. The Supreme Court's recent decision in *Kennedy v. Louisiana*<sup>7</sup> concerning the constitutionality of Louisiana's capital child rape statute demonstrates the force of these concerns about what punishment is appropriate and who should make the determination about its propriety. In light of the Court's aggressive posture in favoring claims of categorical exemption from capital punishment, it is still useful to ask: has our Constitution entrusted the Court to act as a kind of contemporary Minos? *Kennedy* (the opinion authored for the Court by—to make the matter somewhat more confusing to discuss—Justice Kennedy) struck down the statute, which had been consistently upheld by the Louisiana Supreme Court<sup>8</sup> as violating the Eighth Amendment's ban on cruel and unusual punishments. The statute provided the death penalty for aggravated rape of a child under the age of thirteen.<sup>9</sup> The United States

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*Punishment*, 58 FLA. L. REV. 639, 662 (2006) (discussing Madison's observation that government must first control the governed, then control itself).

7. 128 S. Ct. 2641 (2008).

8. *Kennedy v. Louisiana*, 957 So. 2d 757 (La. 2007), *rev'd*, 128 S. Ct. 2641 (2008). *See also* *State v. Wilson*, 685 So. 2d 1063 (La. 1996), *cert. denied* *Bethley v. Louisiana*, 520 U.S. 1259 (1997) (upholding constitutionality of capital child rape statute).

9. LA. REV. STAT. ANN. § 14:42 (2007). A substantial body of scholarship exists concerning the Louisiana capital child rape statute and on the subject more broadly. *See, e.g.*, J. Richard Broughton, "On Horror's Head Horrors Accumulate": *A Reflective Comment on Capital Child Rape Legislation*, 39 DUQ. L. REV. 1 (2000); Annaliese Flynn Fleming, *Louisiana's Newest Capital Crime: The Death Penalty for Child Rape*, 89 J. CRIM. L. & CRIMINOLOGY 717 (1999); James H.S. Levine, *Creole and Unusual Punishment—A Tenth*

military, Georgia, Montana, Oklahoma, South Carolina, and Texas all have similar statutes.<sup>10</sup>

In the Louisiana case, Patrick Kennedy was convicted under this statute in 2003 for brutally raping his eight-year-old stepdaughter.<sup>11</sup> Kennedy challenged the law under the Court's

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*Anniversary Examination of Louisiana's Capital Rape Statute*, 51 VILL. L. REV. 417 (2006); Melissa Meister, *Murdering Innocence: The Constitutionality of Capital Child Rape Statutes*, 45 ARIZ. L. REV. 197 (2003); Emily Marie Moeller, *Devolving Standards of Decency: Using the Death Penalty to Punish Child Rapists*, 102 DICK. L. REV. 621 (1998); Corey Rayburn, *Better Dead Than Raped?: The Patriarchal Rhetoric Driving Capital Child Rape Statutes*, 78 ST. JOHN'S L. REV. 1119 (2004); 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 (2006).

10. See National Defense Authorization Act for the Fiscal Year 2006, Pub. L. No. 109-163, 119 Stat. 3136, 3263 (2006); GA. CODE ANN. § 16-6-1(a)(1)–(2) (2003); MONT. CODE ANN. § 45-5-303 (2007); OKLA. STAT. ANN. tit. 10, § 7115(E) (West 2007); S.C. CODE ANN. § 16-3-655(C)(I) (Supp. 2007); TEX. PENAL CODE § 12.42(c)(3) (West Supp. 2008).

Some controversy in the *Kennedy* litigation concerned the omission—by the Court and the parties—of the UCMJ provision, known as section 552(b) of the National Defense Authorization Act of 2006, making child rape a capital offense. The State filed a petition for rehearing, and the United States joined in the request as amicus curiae. The omission resulted in requests from commentators that the Court correct its error. See, e.g., Editorial, *Supreme Slip-Up*, WASH. POST, July 5, 2008, at A14 (arguing that the Court grant rehearing); Laurence H. Tribe, *The Supreme Court is Wrong on the Death Penalty*, WALL ST. J., July 31, 2008, at A13 (arguing that the Court wrongly decided the case).

On October 1, 2008, the Court modified the opinion, adding a footnote concluding that the UCMJ provision did not alter the Court's original national consensus analysis. See *Kennedy v. Louisiana*, 128 S. Ct 2641, 2653 n. (2008). Justices Kennedy and Scalia issued separate statements regarding the Court's holding.

11. *Kennedy*, 128 S. Ct. at 2646–48. According to the evidence presented at trial, when police arrived at Kennedy's home, the stepdaughter, L.H., was found wrapped in a bloody blanket and was bleeding profusely from her vagina. Her cervix and vagina had been separated as a result of the rape, such that her rectum protruded into her vagina; her injuries required emergency surgery. A pediatric forensic expert testified that her injuries were "the most severe he had seen from a sexual assault in his four years of practice." *Id.* at 2646. L.H. initially did not implicate Kennedy in the crime, and Kennedy denied his own involvement. After L.H. returned home to her mother on June 22, 1998, following a period of removal from the mother's custody, L.H. told her mother that Kennedy had raped her. Kennedy was arrested and charged under the capital rape statute after L.H. gave a videotaped statement with the Child Advocacy Center. At trial L.H. recounted the rape, and said she overheard Kennedy on the telephone saying she had "become a 'young lady.'" *Id.* at 2648. She admitted that she had initially falsely accused two neighborhood boys of the crime. The evidence presented at trial also showed that Kennedy sexually abused another eight-year-old girl, S.L. (who is related to Kennedy's ex-wife), on three occasions.

1977 decision in *Coker v. Georgia*,<sup>12</sup> in which a plurality of the Court held that the death penalty was grossly disproportionate for the crime of raping an adult woman. Justice Powell's separate opinion questioned whether the death penalty could ever be proportionate for rape, including the rape of a child.<sup>13</sup> Answering that question, the Court in *Kennedy* held that the Louisiana statute failed to satisfy the two-pronged analysis that the Court has developed for Eighth Amendment cases in which the defendant seeks a categorical exemption from the imposition of capital punishment.<sup>14</sup> First, there is an existing national consensus against the practice of employing the death penalty in civilian cases of child rape.<sup>15</sup> And second, in the Court's own independent judgment, rape—even the rape of a child—does not compare with murder in terms of the individual harm that it produces.<sup>16</sup> Therefore, the death penalty is disproportionate for the rape of a child prosecuted in civilian court and for all civilian crimes against the person that do not result in the death of the victim.<sup>17</sup>

At its core, *Kennedy* is a case about relative resulting harms, in particular the comparative harm between murder and child rape. But it also raises questions about the authority of the Supreme Court to judge for itself the gravity of violent crimes against the person and to rethink the acceptability of severe criminal punishments for them.

Whether one supports or opposes the death penalty for the aggravated rape of a child, there can be little doubt that there remains great value in continuing our national dialogue about punishment by death. It matters. *Kennedy* offers a particularly rich opportunity for dialogue, especially for constitutional and criminal law scholarship. Consequently, rather than spend much time on the (admittedly important) substantive question of whether the death penalty should be permissible for the crime of aggravated child rape, this Article instead offers three distinct but related normative observations, leading to one overarching conclusion about the *Kennedy* decision and the Court's categorical exemption jurisprudence. First, *Kennedy* is essentially a case about comparative resulting harm among violent crimes. The *Kennedy* dissent should have offered a more robust attack on the Court's two-pronged capital Eighth Amendment methodology, which

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12. 433 U.S. 584 (1977).

13. *Id.* at 604 (Powell, J., concurring in part and dissenting in part).

14. *Kennedy*, 128 S.Ct. at 2650–51.

15. *Id.* at 2652–53.

16. *Id.* at 2659–60.

17. *Id.* at 2660.

undervalues legitimate penological justifications for capital punishment (particularly retributive ones based on considerations of harm, both social and individual) and ultimately constitutionalizes public policy preferences in the form of a kind of judge-made Death Penalty Code. Under that Code, the Court acts as the ultimate arbiter of offense seriousness, public morality, and the political acceptability of capital punishment. Second, the Court's attempt to limit its holding is illusory. This is so because *Kennedy's* loose rhetoric and underdeveloped harm theory could jeopardize the constitutionality of *any* statute that permits the imposition of the death penalty for a non-homicide crime, including crimes against the state and even unintentional murders that fail to satisfy the Court's own sensibilities about harm. Finally, *Kennedy* demonstrates that there remains both relevance and legitimacy in the debate over the scope and exercise of judicial power, particularly when the exercise of judicial power undermines the community's reasoned response to the problem of violent crime. Questions about the nature of judicial review are not and ought not to be mutually exclusive of the substantive debate about the meaning of the Eighth Amendment. Ultimately, the Court's approach to its categorical exemption jurisprudence reflects the Court's assumption of its role as a kind of modern day tail-wrapping Minos, not so much fixing punishment, but nonetheless determining for the Nation the gravity of harm inflicted by a particular crime and the acceptability of capital punishment for it.

## II. *KENNEDY*, HARM, AND THE FAILURES OF THE CONSENSUS— INDEPENDENT JUDGMENT METHODOLOGY

*Kennedy* is premised upon a two-pronged analytical framework for judging whether to exempt from the imposition of capital punishment a particular crime or category of offenders. But there is inherent tension in this approach. The Court has said that it looks first at objective indicia of public attitudes about the particular practice at issue (legislative enactments, jury decisions, prosecutorial practices) to determine whether a national consensus exists regarding that practice,<sup>18</sup> but 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.”<sup>19</sup>

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18. See *Roper v. Simmons*, 543 U.S. 551, 564–67 (2005); *Atkins v. Virginia*, 536 U.S. 304, 314–17 (2002).

19. *Roper*, 543 U.S. at 563 (citing *Atkins*, 536 U.S. at 312 (quoting *Coker v. Georgia*, 433 U.S. 584, 597 (1977))).

These two lines of analysis seem to be incompatible; at a minimum, one of the prongs is superfluous.<sup>20</sup>

With regard to the first prong of this methodology, the *Kennedy* opinion traces the historical development of capital rape statutes, noting that in 1925 eighteen states, the District of Columbia, and federal law authorized the death penalty for rape.<sup>21</sup> After *Furman v. Georgia*<sup>22</sup> invalidated most of these laws, six states re-enacted capital rape legislation; however, all of those statutes were subsequently invalidated either by the Court's 1976 capital cases or by state court decisions.<sup>23</sup> Louisiana re-enacted its capital child rape statute in 1995, and Georgia, Montana, Oklahoma, South Carolina, Texas, and the military (as part of the Uniform Code of Military Justice) followed.<sup>24</sup> Comparing this recent trend to the ones found in *Atkins v. Virginia*,<sup>25</sup> *Roper v. Simmons*,<sup>26</sup> and *Enmund v. Florida*,<sup>27</sup> the Court concluded that the trend was not significant enough to establish a national consensus favoring the practice. The Court also rejected the contention that many states specifically declined to enact such legislation not because the political community opposed it, but because the legislatures erroneously believed that *Coker* prohibited the death penalty for all rapes, including the rape of a child.<sup>28</sup> Although *Coker* contained some ambiguous language, the Court conceded, when viewed in the appropriate context, that *Coker* announced a

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20. See Broughton, *supra* note 6, at 651.

21. *Kennedy*, 128 S. Ct. at 2651.

22. 408 U.S. 238 (1972).

23. *Kennedy*, 128 S. Ct. at 2651.

24. *Id.* Again, the Court originally failed to cite the UCMJ provision, section 552(b) of the National Defense Authorization Act of 2006. See *id.* at 2653 n. Justice Kennedy's separate statement regarding the denial of rehearing, however, argued that the UCMJ provision was not relevant to the Court's national consensus analysis, which was limited to the civilian law context. *Id.* (statement of Kennedy, J.).

25. 536 U.S. 304 (2002). At the time of the *Atkins* decision, eighteen capital jurisdictions forbade the death penalty for the mentally retarded, and twenty permitted it.

26. 543 U.S. 551 (2005). At the time of the *Roper* decision, eighteen capital jurisdictions forbade the death penalty for juvenile offenders, and twenty permitted it.

27. 458 U.S. 782 (1982). At the time of the *Enmund* decision, eight jurisdictions permitted the death penalty for participation in a robbery that resulted in a murder committed by an accomplice. *Enmund's* rule was subsequently modified by *Tison v. Arizona*, 481 U.S. 137 (1987), which held that the culpability mandate of *Edmund* could be satisfied where the offender engages in major participation in a felony and demonstrates reckless indifference to human life.

28. *Kennedy*, 128 S. Ct. at 2653–56.

more limited holding, applying only to the rape of an adult woman.<sup>29</sup>

*Kennedy* completes its national consensus analysis by stating that positive legislation is not the only indicia of societal attitudes toward the execution of child rapists.<sup>30</sup> In addition, the Court explains, it matters that no one has been executed for the rape of an adult or a child since 1964, and no one has been executed for a non-homicide offense since 1963.<sup>31</sup> Kennedy and Richard Davis (who was also recently convicted in Louisiana for the aggravated rape of a child) were the only two people currently on death row in the Nation for non-homicide crimes.<sup>32</sup> Consequently, the Court concludes, when these figures are combined with the paucity of state or federal legislation making the rape of a child a capital crime, there is a national consensus against capital punishment for child rape.<sup>33</sup>

Then, in part IV of the Court's opinion, Justice Kennedy explains that the analysis of the objective indicia of societal attitudes related to the capital punishment of child rapists is but a starting point, and not a dispositive basis for decision. Rather, "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."<sup>34</sup> As applied in *Kennedy*, this is essentially a proportionality analysis that depends upon a comparison between the harms caused by murder and child rape.

Although the *Kennedy* Court (unlike the *Coker* Court) does not attempt to minimize the individual harms inflicted by the rape of a child—"the attack was not just on [the victim] but on her childhood,"<sup>35</sup> "[r]ape has a permanent psychological, emotional, and sometimes physical impact on the child,"<sup>36</sup> "[w]e cannot dismiss the years of long anguish that must be endured by the victim of child rape"<sup>37</sup>—*Kennedy* nevertheless concludes, as did

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29. *Id.* at 2654 ("Confined to [the *Coker* passage about rape generally] *Coker's* analysis of the Eighth Amendment is susceptible of a reading that would prohibit making child rape a capital offense. In context, however, *Coker's* holding was narrower than some of its language read in isolation.").

30. *Id.* at 2657.

31. *Id.*

32. *Id.*

33. *Id.* at 2657–58.

34. *Id.* at 2658 (quoting *Coker v. Georgia*, 433 U.S. 584, 597 (1977)).

35. *Id.*

36. *Id.*

37. *Id.* Others have discussed the harm done by rape, particularly child rape, and I have been critical of the *Coker* Court's minimization of those harms. See SUSAN ESTRICH, REAL RAPE (Harvard Univ. Press 1987); Broughton, *supra* note

*Coker*, that rape (like all non-homicide crimes against the person) does not compare with murder in terms of the individual harm it produces.<sup>38</sup> The relevant distinction concerns the taking of a human life, an act that the Court deems unique in terms of “severity and irrevocability.”<sup>39</sup> Here the Court does not hesitate to follow *Coker*’s reasoning, explaining that “[t]he murderer kills; the rapist, if no more than that, does not . . . .”<sup>40</sup> The Court defends its proportionality analysis by noting the significance of “the number of executions that would be allowed” if the Court followed Louisiana’s approach.<sup>41</sup> The Court explains that child rape occurs more than first-degree murder and thus could be punished with death more often.<sup>42</sup> Therefore, it would be inconsistent with the Nation’s evolving standards of decency and the Court’s avowed mission to limit the use of capital punishment to allow the death penalty for child rape.<sup>43</sup> The Court concludes its excessiveness discussion by explaining why its conclusion is consistent with the retributive and deterrent goals of punishment.<sup>44</sup>

In response, Justice Alito’s *Kennedy* dissent is persuasive on many fronts. It offers a compelling response to the majority’s national consensus analysis and demonstrates why capital child rape legislation can just as adequately narrow the class of death-eligible offenders as statutory sentencing procedures for capital murder.<sup>45</sup> Justice Alito demonstrates that a number of state courts and legislators actually read or could have read *Coker* to apply to all rapes, not merely to the rape of an adult woman.<sup>46</sup> Providing examples from a number of jurisdictions, he concludes, “the *Coker* dicta gave state legislatures a strong incentive not to push for the enactment of new capital child-rape laws even though these legislators and their constituents may have believed that the laws would be appropriate and desirable.”<sup>47</sup> He also notes that in the five additional jurisdictions that were considering capital child rape

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9, at 35–38; Owen D. Jones, *Sex, Culture, and the Biology of Rape: Toward Explanation and Prevention*, 87 CAL. L. REV. 827 (1999).

38. *Kennedy*, 128 S. Ct. at 2659–60.

39. *Id.* at 2659, 2660 (quoting *Coker*, 433 U.S. at 598).

40. *Id.* at 2654 (quoting *Coker*, 433 U.S. at 598). The *Coker* dissent rejected the plurality’s understanding of the harm caused by rape. *See Coker*, 433 U.S. at 611–12 (Burger, C.J., dissenting).

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

42. *Id.*

43. *Id.*

44. *Id.* at 2662–64.

45. *Id.* at 2665–71, 2673–74 (Alito, J., dissenting).

46. *Id.* at 2665–71.

47. *Id.* at 2668.

legislation recently but failed to enact it; such failure occurred only after the grant of certiorari in *Kennedy*, and nothing in the record indicates that the legislatures refused to pass the legislation because they viewed it as offensive to social standards of decency.<sup>48</sup> Although Justice Alito is reluctant to conclude that a national consensus unquestionably exists in favor of the practice of imposing the death penalty for child rape, he nonetheless acknowledges that society's moral standards could be evolving *toward* harsher punishment for child rapists, not away from it.<sup>49</sup> The Court, though, deprives the democratic process of its capacity for demonstrating whether our society desires a move in that direction.

The Alito dissent mirrors the *Coker* dissent insofar as it accepts both broader retributive and utilitarian justifications for capital child rape statutes. Both *Coker* and *Kennedy*, though, assert what appear to be primarily retributive bases for applying a categorical exemption for the respective rapes in those cases based on a finding of disproportionality, though the harm analysis adds a touch of utilitarianism.<sup>50</sup> However, the retributive theory of *Kennedy* and *Coker* (indeed, the Court's entire proportionality theory in these cases) is arguably too narrow.<sup>51</sup> Moreover, even if

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48. *Id.* at 2671.

49. *Id.* at 2672–73.

50. My own sense is that *Kennedy* and *Coker* remain primarily retributive. The harm assessment is prominent but does not really concern the prevention of future harm (classical deterrence)—rather, it is an evaluation of how the harm caused relates to the offender's deserved punishment. This has led to a description of the Court's capital proportionality jurisprudence as "limiting retributivism." See, e.g., Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: "Proportionality" Relative to What?*, 89 MINN. L. REV. 571, 591 (2005); Richard S. Frase, *The Warren Court's Missed Opportunities in Substantive Criminal Law*, 3 OHIO ST. J. CRIM. L. 75, 96 (2005). See also NORVAL MORRIS, *MADNESS AND THE CRIMINAL LAW* 182–87, 196–202 (Univ. of Chicago Press 1982) (explaining the principle of "limiting retributivism" as recognizing an outer limit on desert).

Alice Ristroph has argued for an interpretation of the Eighth Amendment that is based on principles of proportionality, but concedes that proportionality is not derived solely or necessarily from retribution. See Alice Ristroph, *Proportionality as a Principle of Limited Government*, 55 DUKE L.J. 263 (2005). Paul Robinson has also written about the efficacy of hybrid approaches to distributing punishment. See Paul H. Robinson, *Hybrid Principles for the Distribution of Criminal Sanctions*, 82 NW. U. L. REV. 19 (1987).

51. See Frase, *Excessive Prison Sentences*, *supra* note 50, at 588–97 (examining the Court's proportionality jurisprudence under the Eighth Amendment and offering distinct theories of proportionality, concluding that the Court's capital cases tend to employ a "limiting retributivism" understanding of proportionality); Mary Sigler, *Contradiction, Coherence, and Guided Discretion in the Supreme Court's Capital Sentencing Jurisprudence*, 40 AM. CRIM. L.

we assume that the Court's proportionality principle is exclusively or primarily retributive and put aside the utilitarian and consequentialist justifications for capital child rape legislation that the Court undervalues but that could well form a basis for the legislation, we err if we underestimate the retributive argument to be made here *in favor* of the Louisiana statute. Justice Alito implies (correctly, I think) that the moral culpability and blameworthiness of a child rapist like Patrick Kennedy are adequate to support not just criminal responsibility but severe punishment as well.<sup>52</sup> The objection from retributivist quarters—and the one that Justice Kennedy's opinion employs, like Justice White's *Coker* opinion—would be that the rape of a child where death does not result produces less harm than murder and therefore justifies lesser punishment because the offender's moral desert is lessened; that is, rape fails to approximate the harm produced by murder, a standard retributive objection based on calculations of proportionality.<sup>53</sup> But one plausible response is that child rape simply produces a different *kind* of harm than murder; its magnitude, combined with the moral blameworthiness of the child rapist, is still sufficient to employ capital punishment as a just desert. Just as not all harms resulting from violent crime are of the same magnitude, neither are they of the same genus. There is no textual, historical, structural, or precedential basis for concluding that the Eighth Amendment constitutionalizes only one kind of

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REV. 1151 (2003) (exploring the use of retributivism and other punishment theories in the Court's capital cases). Cf. Steven G. Gey, *Justice Scalia's Death Penalty*, 20 FLA. ST. U. L. REV. 67 (1992) (discussing retributivism in the context of the Court's guided discretion jurisprudence); Alice Ristroph, *Desert, Democracy, and Sentencing Reform*, 96 J. CRIM. L. & CRIMINOLOGY 1293, 1301–02 (2006) (discussing “limiting retributivism” as a method for reconciling retribution and utilitarianism and indicating the view of others that *Roper* and *Atkins* are examples of the Court's use of limiting retributivism); Paul H. Robinson, *The A.L.I.'s Proposed Distributive Principle of “Limiting Retributivism”*: Does It Mean in Practice Anything Other than Pure Desert, 7 BUFF. CRIM. L. REV. 3, 10–12 (2003) (expressing doubts about using desert as a limiting principle).

52. *Kennedy*, 128 S. Ct. at 2676 (Alito, J., dissenting). See also Douglas A. Berman & Stephanos Bibas, *Engaging Capital Emotions*, 102 NW. U. L. REV. COLLOQUY 355, 361 (2008) (considering the role of emotion in capital sentencing and stating that “a strict ranking of murder as eclipsing all rapes, even child rapes, is emotionally tone deaf,” giving reasons why child rape may present an emotionally stronger case for capital punishment).

53. See Markus Dirk Dubber, *Regulating the Tender Heart When the Axe is Ready to Strike*, 41 BUFF. L. REV. 85, 134 (1993) (arguing that for retributivists, “the taking of a human life, and only the taking of a human life, deserves the imposition of the death penalty”).

harm in determining whether a legally-authorized punishment is excessive—if it did, the Court would have to acknowledge the invalidity of capital sentences for treason and espionage that do not result in death. The *Kennedy* majority thus wrongly assumes that the taking of a life is the only kind of harm that the Eighth Amendment recognizes as justifying the legislative provision for the death penalty for a crime against the person.

Another response is that, even if we assume, as Justice Kennedy does and as the *Coker* Court did, that the magnitude of the harm from aggravated child rape is less than that of a murder, this does not answer the question of whether it nevertheless has reached the threshold for harm (and culpability) that justifies the possibility of imposing the death penalty. On this theory, the death penalty could still be proportionate for an aggravated child rape that reaches a certain threshold level of harm necessary for capital punishment, even if a murder ranks slightly higher on the sliding scale of harm. This of course would require the state to demonstrate why a specific incident of child rape or a particular child rapist is so aggravated and the offender so deserving that the case has crossed the threshold that should be required for capital punishment; but again, Justice Alito adequately explains why principles of aggravation and procedures for considering it could apply as easily in a child rape proceeding as in a murder proceeding.<sup>54</sup> Therefore, there remains a plausible harm-retributivist argument for preserving the option of capital punishment in particularly aggravated cases of child rape. The *Kennedy* majority thus devalues the force of retributivism (not to mention the remaining, largely ignored principles of deterrence and incapacitation) by assuming a one-size-fits-all approach to evaluating harm for purposes of Eighth Amendment proportionality analysis.

Despite its strengths, however, the dissent fails to adequately challenge the structural integrity of the two-pronged framework and, in particular, the political neutrality of the “independent judgment” rationale. If the objective indicia disfavor a particular practice, then why does the Court’s independent judgment matter? More importantly, if the Court’s independent judgment is the ultimate trump card, why even bother considering the objective indicia in the first place? Indeed, it is this latter question that appears most appropriate because it is the Court’s own judgment about the “acceptability” of the death penalty that seems to be

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54. See *Kennedy*, 128 S. Ct. at 2673–74 (Alito, J., dissenting).

governing in cases like *Atkins*,<sup>55</sup> *Roper*,<sup>56</sup> *Coker*,<sup>57</sup> and now *Kennedy*.<sup>58</sup>

If the Court was serious about looking to objective indicia of societal attitudes (and there is, as I have explained, some reason to question whether the Court is truly serious about that enterprise),<sup>59</sup> then the Court should have accounted for the many non-homicide capital statutes in force before *Kennedy* that would be constitutional when viewed at a moderate level of abstraction: about 40% of death penalty jurisdictions (fifteen out of thirty-seven) have enacted such legislation, and seven out of thirty-seven (just under 20%) enacted capital child rape statutes in recent years.<sup>60</sup> If the Court was serious about using persistent changes or trends in capital legislation as the standard for measuring a national consensus favoring or disfavoring a particular practice (a dubious measurement, but one now firmly established),<sup>61</sup> then it should have at least recognized the moral significance of the national trend in recent years *toward* the preservation or adoption of non-death-resulting capital legislation, not its abolition (and this is especially true of capital child rape legislation).<sup>62</sup> Instead, however, the Court found not that such a trend did not exist—indeed, Justice Alito’s dissent persuasively demonstrated the “potential emergence of a national consensus in favor of permitting the death penalty for child rape;” rather, the trend was simply not

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55. 536 U.S. 304 (2002) (creating a categorical exemption for the mentally retarded).

56. 543 U.S. 551 (2005) (creating a categorical exemption for offenders under age 18).

57. 433 U.S. 584 (1977) (creating a categorical exemption for persons who rape an adult woman).

58. See Broughton, *supra* note 6, at 651 (discussing the incompatibility of the two-prongs).

59. See *id.* at 647–51.

60. The Louisiana Supreme Court, unlike the United States Supreme Court, fully considered the other non-homicide capital crimes in conducting its own analysis. See *State v. Kennedy*, 957 So. 2d 757, 785–88 (La. 2007), *rev’d*, 128 S. Ct. 2641 (2008). Although the Louisiana Supreme Court identifies thirty-eight death penalty jurisdictions, since the time of the *Kennedy* state court decision (May 22, 2007), New Jersey has abolished its death penalty. See *New Jersey Abolishes Death Penalty*, CBSNews.com, Dec. 17, 2007, <http://www.cbsnews.com/stories/2007/12/17/national/main3624792.shtml>. New Jersey did not, however, punish any non-homicide offenses by death.

The United States Supreme Court, though, limited its national consensus analysis to civilian criminal law. See *Kennedy v. Louisiana*, No. 07-343, slip op. at 3–4 (U.S. Oct. 11, 2008) (statement of Kennedy, J.).

61. See *Atkins v. Virginia*, 536 U.S. 304, 315 (2002).

62. See J. Richard Broughton, *Off the Rails on a Crazy Train? The Structural Consequences of Atkins and Modern Death Penalty Jurisprudence*, 11 WIDENER L. REV. 1, 8 (2004).

as significant as that found in *Atkins* and *Roper*. Society's moral evolution is constitutionally treated as a one-way ratchet—that is, away from the use of capital punishment—though this is the very kind of ratchet that the Court has previously said did not exist in its Eighth Amendment review.<sup>63</sup>

But even if we assume the integrity of the Court's national consensus conclusion, it appears not to ultimately matter—either in *Kennedy* or in the Court's other categorical prohibition cases—because the “Constitution contemplates” (where?) that the Court's independent judgment about the acceptability of the death penalty must ultimately govern, a proposition that the Alito dissent should have more directly questioned.<sup>64</sup>

*Kennedy* suggests that whether the death penalty for child rape would be “acceptable” to the Court depends upon the relative harm caused by rape in comparison to murder. And yet (as Justice Alito points out, too) the Court's opinion forbids capital punishment no matter how brutal the rape and no matter how much harm to the child victim a particular rape might produce.<sup>65</sup> In this sense, the *Kennedy* majority undervalues both the potential individual harm that child rape causes and the legislature's recognition of this reality. But the opinion, focused as it is on *individual* harm, also ignores the *social* harms produced by child rape. The majority acknowledges the revulsion of jurors at the child rapist and his moral depravity but fails to adequately address the social harm to the political community that attends child rape (indeed, all violent crime).<sup>66</sup> In addition, the Court's concern about the number of executions that “would be allowed under [Louisiana's] approach” is a curious contradiction.<sup>67</sup> Earlier, in its national consensus analysis, the Court found it significant that despite the existence of capital rape legislation, no one had been executed for this crime since 1964, and no one has been executed for any non-homicide crime since 1963.<sup>68</sup> If these statistics mean anything, they

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63. See *Gregg v. Georgia*, 428 U.S. 153, 176 (1976) (joint opinion). See also *Harmelin v. Michigan*, 501 U.S. 957, 990 (1991) (stating that “[t]he Eighth Amendment is not a ratchet . . . disabling States from giving effect to altered beliefs and responding to changed social conditions”).

64. In his statement concerning the denial of rehearing, Justice Scalia argues that at the time of its adoption, the Eighth Amendment “would have been laughed to scorn if it had read ‘no criminal penalty shall be imposed which the Supreme Court deems unacceptable.’ But that is what the majority opinion said . . . .” *Kennedy v. Louisiana*, No. 07-343, slip op. at 3 (U.S. Oct. 1, 2008) (statement of Scalia, J.).

65. *Kennedy*, 128 S. Ct. at 2665 (Alito, J., dissenting).

66. See *infra* note 103 and accompanying text.

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

68. *Id.* at 2657.

presumably mean that the mere existence of capital rape legislation is no guarantee that death sentences or executions will follow. And yet, in defending its determination that the death penalty is excessive for aggravated child rape, the Court concludes that our evolving standards of decency would be offended by the high number of executions that would be permitted by the mere existence of capital child rape legislation.<sup>69</sup> This inconsistency is exacerbated by the Court's acknowledgement that the potentially high number of death sentences and executions for capital child rape would offend the Court's unembarrassed desire to limit the use of the death penalty.

But therein lay precisely the kind of internal contradiction that plagues the Court's Eighth Amendment capital jurisprudence: why is the death penalty for child rape—or for any crime—disproportionate merely because it may be imposed with some frequency? Indeed, as a matter of textual interpretation, does not the Court's national consensus analysis assume that the "unusual" language of the Eighth Amendment is better satisfied when a punishment is imposed *infrequently*? The contradiction here suggests perhaps that the Court means only that the death penalty cannot be imposed too often or too seldom, but this begs the question as to what precise level of frequency the Eighth Amendment demands or forbids. One would have thought that the purpose of the Court's narrowing jurisprudence was chiefly to address overuse, to constrain the government in its employment of the death penalty by limiting the class of death-eligible offenders, even those whose offense falls unquestionably into a category of offenses for which the death penalty is permissible, such as murderers. But the Court's categorical exemption cases demonstrate what appears to be its own distrust of the very narrowing procedures that it has otherwise mandated.<sup>70</sup> And, consistent with this distrust of the ability of jurors to meaningfully distinguish the most culpable and deserving defendants, the

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69. *Id.* at 2660.

70. For example, the jury must have an adequate vehicle for considering and giving effect to mental deficiency as a mitigating factor, but apparently cannot be trusted to give effect to the diminished culpability of the mentally retarded, so a categorical exemption must apply for this category of offenders to ensure that a disproportionate punishment is not imposed upon them. *Compare Penry v. Johnson (Penry II)*, 532 U.S. 782, 797 (2001) with *Atkins v. Virginia*, 536 U.S. 304, 321 (2002). Youth is a valid mitigating factor that must be within the jury's reach, but a categorical exemption must apply for those under age eighteen who kill because, apparently, juries cannot be trusted to distinguish the levels of culpability among sixteen- and seventeen-year-old murderers. *Compare Johnson v. Texas*, 509 U.S. 350, 367 (1993) with *Roper v. Simmons*, 543 U.S. 551, 578–79 (2005).

*Kennedy* Court of course rejects the application of narrowing factors in the context of a capital child rape proceeding, even apparently conceding the distrust I describe: according to the Court, narrowing factors are not useful in the child rape context because “[i]n this context, which involves a crime that in many cases will overwhelm a decent person’s judgment, we have no confidence that the imposition of the death penalty would not be so arbitrary as to be ‘freakis[h].’”<sup>71</sup> But the Court makes this determination only because—*only* because—the capital child rape victim did not die.<sup>72</sup> This distinction, as I have explained here, lacks coherence, and the Court fails to explain why this distinction is relevant to the State’s ability to employ a scheme of aggravation and mitigation to constrain its imposition of the death penalty.

More importantly, where and why does the Eighth Amendment insist that it is the Supreme Court’s responsibility to limit the use of a particular penal sanction by employing a particular punishment theory? Aside from mere reference to the “in-the-end-the-Constitution-says-that-it-is-for-us-to-decide” rhetoric culled from *Coker* and merely blindly repeated in case after case with no further explanation of its origin or its structural limits, the Court does not tell us. The Court does not explain—in *Kennedy* or elsewhere—why its moral intuition matters more than that of the political actors in those states that have adopted capital child rape legislation, who have debated and enacted this legislation based on their own considerations about the gravity of the offense and the experiences of their communities. Nor does the Court explain why “decency” requires greater and greater *restrictions* on the use of capital punishment; decency and moral progress could, it is at least arguable, require harsher punishments for crimes that are highly aggravated and that produce great individual and social harm, even if they do not result in death. The Court’s narrow subjective proportionality analysis is one plausible approach; however, it is only one, and the Court does not demonstrate why the Constitution favors the Court’s approach above all others. Indeed, this may be especially problematic with regard to retributive desert, which is informed by the moral sensibilities of the community that can better be given meaning and expression by their political representatives.<sup>73</sup> The Court largely ignores other legitimate

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71. *Kennedy*, 128 S. Ct. at 2660–61 (quoting *Furman v. Georgia*, 408 U.S. 238, 310 (1972) (Stewart, J., concurring)).

72. *Id.* at 2661 (rejecting application of aggravating and mitigating factors in child rape proceedings because individual harm cannot be quantified where death does not result).

73. See Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 734 (2005) (recognizing that agencies may not be better at assessing just deserts).

punishment theories that political actors could adopt in responding to the harms caused by child rape and the moral blameworthiness of the child rapist.<sup>74</sup>

In Dantean terms, the Court's "independent judgment" would have us believe that the child rapist belongs with the lustful in the Second Circle where the damned are forever ensnared in a violent storm.<sup>75</sup> But could Minos not also legitimately place the child rapists in the Seventh Circle with those who committed violence against their neighbors, whose souls boil in Phlegethon, a river of blood; or even lower in the Circle of Violence, with those who have committed violence against Nature; or perhaps even the first tier (Caina) of the lowest Circle of the Malebolge, with those who committed treachery against their kin, damned to have their heads bent downward and frozen in a lake of ice?<sup>76</sup> It is not clear that the Court's assessment of the harm here is the only or the correct one,

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than legislators "because legislators represent the moral views of a broader constituency."); Ristroph, *supra* note 51, at 1325–26 (despite the desirability of limits on majoritarian judgments about criminal punishment, "desert seems a poor avenue through which to limit the power to punish . . . . Desert is widely recognized as a subjective and moral notion, and thus within the province of the people rather than legal experts.").

74. See Frase, *Excessive Prison Sentences*, *supra* note 50, at 600–01 (briefly assessing whether there could exist a utilitarian alternative to the Court's retributive proportionality approach); Sigler, *supra* note 51, at 1154–61 (discussing the plausible alternatives to retribution as potential justifications for capital punishment). The Court does add a discussion of why it believes its conclusion is consistent with retributive and deterrence theories generally, but this discussion is of little comfort. See *Kennedy*, 128 S. Ct. at 2661–62. It comes only *after* the Court has deployed its limited harm theory to render the death sentence here excessive, and thus reveals itself to be more of an afterthought than a primary basis for the proportionality assessment.

75. See DANTE, *supra* note 1, at 42–47. The effort to place the child rapists in any particular Circle of Dante's Hell is bound to be imperfect. But it seems, to me, the child rapist would be especially ill-suited for the circle of the lustful, whose souls do not appear to have been guilty of any violence. It is not unreasonable to feel sympathy for some in this Circle. Indeed, the figure of Francesca Da Rimini in the Second Circle is one of the most compelling in the *Inferno*, causing Dante's Pilgrim to be so overcome by her story of passion for her lover that the Pilgrim faints. *Id.* at 47. For an excellent essay on Francesca, see Mark Musa, *Behold Francesca Who Speaks So Well*, in DANTE'S INFERNO: THE INDIANA CRITICAL EDITION 310–24 (Mark Musa trans. & ed., 1995).

76. DANTE, *supra* note 1, at 105–11, 133–39, 293–99. The Malebranche ("Evil Claws") are the demons who oversee this portion of Hell. See *id.* at 187–89. Again, the theoretical placement of child rapists in the *Inferno* is necessarily imperfect—the circles of violence and treachery contained the souls of those who murdered. But my point here is that it would not be implausible or unreasonable to conclude that the violence of child rape is deserving of punishment more like that of other violent actors.

nor is it clear why the Court's assessment is constitutionally entitled to greater weight than that of the political community acting through its representatives. At a minimum, the political community ought to have the opportunity to effectuate such a judgment through its criminal laws and to determine on its own whether a serious, violent crime has resulted in enough personal and community harm to justify the death penalty, unimpeded by judicial second-guessing except where the legislature acts with no plausible, rational basis for that punishment.<sup>77</sup> But such a sensible regime is not possible in a world governed by the omniscient moral judgment of five Supreme Court Justices.

The language could not be starker. As the Court said in *Atkins*, “[W]e shall first review the judgment of legislatures that have addressed the suitability of imposing the death penalty on the mentally retarded, and then consider reasons for agreeing or disagreeing with their judgment.”<sup>78</sup> What is couched as a straightforward proportionality analysis appears to be an exposition on the lack of wisdom in imposing the death penalty for aggravated child rape as a matter of public policy. To be sure, Justice Alito's *Kennedy* dissent confronts this reality: the Court defends its excessiveness rationale by saying, among other things, that the death penalty is not “in the best interests of the victims” of child rape, that the death penalty for child rape could create procedural difficulties in a particular case, and that the victim's testimony may be unreliable.<sup>79</sup> As Justice Alito explains, these may be acceptable political arguments for refusing to impose the death penalty for child rape, but it is difficult to see how these arguments are relevant to the Eighth Amendment's meaning or its application to capital child rape legislation. The Alito dissent, though, neglects to confront the structural inconsistency of the

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77. Michael Perry, who rejects capital punishment on human rights theory, has discussed whether this kind of Thayerian deference is nonetheless desirable in the capital punishment arena. See Michael J. Perry, *Is Capital Punishment Unconstitutional? And Even If We Think It Is, Should We Want the Supreme Court to So Rule?*, 41 GA. L. REV. 867, 898–902 (2007). See also James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893) (explaining why the Supreme Court should act deferentially when asked to articulate constitutional norms). Jim Liebman has written about the different levels of intrusiveness in the Court's death penalty cases. See James S. Liebman, *Slow Dancing With Death: The Supreme Court and Capital Punishment, 1963–2006*, 107 COLUM. L. REV. 1, 14–16 (2007).

78. *Atkins v. Virginia*, 536 U.S. 304, 313 (2002). See also *Roper v. Simmons*, 543 U.S. 551, 564 (2005) (repeating that the Court has returned to the practice of exercising its own independent judgment in determining the propriety of the death penalty).

79. *Kennedy*, 128 S. Ct. at 2673–74 (Alito, J., dissenting).

Court's methodology or the origins of its assertion of power to determine the "acceptability" of a particular death penalty practice.

The Court's statement that it reads the Constitution as empowering the Court to render its own independent judgment about the acceptability of the death penalty—the decision to agree or disagree with the policy choices of the legislature, a judgment that in practice has become unbounded—is a remarkable one, which clarifies the breadth of the judicial role that the Court has assumed in these cases. Yet it has largely escaped public attention.<sup>80</sup> If one were looking for the doctrinal key to the Court's asserted power to dictate and constitutionalize a Death Penalty Code for the Nation—to wrap its tail as a constitutional Minos, judging for itself the gravity of the sin and the acceptability of a given punishment—it is contained in these passages.

### III. *KENNEDY*, HARM, AND THE CONSEQUENCES FOR OTHER CRIMES AND CRIMINALS

*Kennedy* certainly fits into the categorical bar jurisprudence developed in *Atkins*, *Roper*, *Coker*, and even *Enmund*. The methodology of these cases is virtually identical (though *Coker* was decided before the "national consensus" nomenclature gained common usage). A careful study of these cases, though, reveals an important difference among them—while the first prong of the categorical bar approach is similar in each case, the second prong as applied in *Kennedy* and *Coker* is ultimately about judging harms. That harm analysis raises serious question about both the Court's methodology (addressed in Part II) and *Kennedy's* consequences.

Although each of the aforementioned cases is a categorical exemption case, *Atkins* and *Roper* assert a bar based on the physical characteristics of the offender at issue and focus the proportionality inquiry on the offender's reduced culpability; *Kennedy* and *Coker* assert a bar based on the kind of crime that the defendant committed and focus upon the gravity of the harm each

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80. But see Richard A. Posner, *The Supreme Court, 2004 Term, Foreword: A Political Court*, 119 HARV. L. REV. 31, 46–47 (2005) (explaining that, in *Roper*, the Court's judgment was akin to that of a legislative body); Benjamin Wittes, *What Is "Cruel and Unusual?"*, 134 POL'Y REV. 15, 16–20 (2005) (explaining that the Court's Eighth Amendment cases are marked by "rank subjectivity"). Cf. Dora W. Klein, *Categorical Exclusions from Capital Punishment: How Many Wrongs Make a Right?*, 72 BROOK. L. REV. 1211 (2007) (questioning whether the rationales of *Atkins* and *Roper* have made the death penalty more just).

offense causes.<sup>81</sup> Indeed, one arguably could include *Enmund* and *Tison*, at least partially, in this category of cases because although the *Enmund-Tison* rule was crafted for a particular kind of offense (felony murder), the rule also directs us to the state of mind of the individual defendant and, as a consequence, his moral culpability for his acts (which under this rule is lessened the more attenuated the defendant's participation).<sup>82</sup> *Enmund* and *Tison* are thus a kind of hybrid. In *Kennedy* and *Coker*, though, the offender remains highly (indeed, ultimately) culpable and blameworthy. Even if it is possible to feel some sympathy for defendants like Darryl Atkins and Christopher Simmons, no such sympathy attaches to defendants like Patrick Kennedy and Ehrlich Coker.<sup>83</sup> The death penalty thus is unacceptable under the Eighth Amendment, the Court tells us, not because the criminal actor is insufficiently morally blameworthy but because, despite his moral blameworthiness, his act, or more precisely, the individual harm resulting from it, is insufficiently serious to warrant capital punishment.<sup>84</sup> Why? Because no death has occurred, the Court concludes.<sup>85</sup> Comparative harm to the victim, as judged by the Court, then, is the linchpin of the *Kennedy* majority's proportionality analysis.

This leads to my next observation about *Kennedy*, which is that it creates an inevitable route for challenge to all manner of crimes that do not result in death. *Kennedy* exempts not just the crime of aggravated child rape (by civilians, at least) but all non-homicide crimes against the person<sup>86</sup>—not because a national consensus exists against imposing the death penalty for those crimes (the

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81. See *Kennedy*, 128 S. Ct. at 2659–60; *Coker*, 433 U.S. at 598; *Atkins*, 536 U.S. at 318; *Roper*, 543 U.S. at 571.

82. See *Tison v. Arizona*, 481 U.S. 137 (1987); *Enmund v. Florida*, 458 U.S. 782 (1982).

83. One wonders whether Simmons, despite his youth, was such a sympathetic figure. Simmons admitted that he wanted to kill someone and boasted after killing Shirley Crook by binding her hands and feet and throwing her off of a railroad trestle. *Roper*, 543 U.S. at 556–57. He had substantially planned the crime and executed it practically as he envisioned. *Id.* at 556.

84. *Kennedy*, 128 S. Ct. at 2660. Note that Justice O'Connor's dissent in *Enmund* criticized the Court for failing to explain why the Eighth Amendment rejects "standards of blameworthiness based on other levels of intent" or blameworthiness based on the harm that resulted from *Enmund's* acts in participating in the armed robbery. See *Enmund*, 458 U.S. at 824–25 (O'Connor, J., dissenting). For an excellent discussion of whether social harm or the culpable act should be the central organizing principle of the criminal law, see Larry Alexander, *Crime and Culpability*, 1994 J. CONTEMP. LEGAL ISSUES 1 (1994) (arguing for centrality of the culpable act).

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

86. *Id.* at 2659–60.

Court offers no evidence or analysis to support that proposition), but simply because they do not result in death and thus do not produce sufficient individual harm for capital punishment to be a permissible response from the political community. *Kennedy* says its rule is a straightforward one: no hidden agenda here. The majority states clearly that it is not addressing whether the death penalty is permissible for “crimes against the state” such as treason, espionage, and drug kingpin activity (which, strangely, the Court considers an offense against the state).<sup>87</sup> But the majority gives us no reason as to why these crimes would not also be subject to the categorical bar if the ultimate standard is whether they compare with murder in terms of moral depravity (which appears to be defined simply in terms of the resulting individual harm, the taking of a life). As explained earlier, if the harm that is relevant to the categorical exemption analysis is not limited to the specific *kind* of harm that the individual experiences when a murder occurs (severity beyond mere graveness, combined with irrevocability),<sup>88</sup> then there is ample reason to believe that other non-homicide offenses could produce harm of sufficient magnitude to justify capital punishment. But if this is true, then the *Kennedy* Court should have more carefully articulated its harm principle in exempting child rape and other non-homicide crimes. The impression that the analysis leaves is that the kind of individual harm resulting from murder is the only standard of harm that the Eighth Amendment contemplates for proportionality purposes when capital punishment is at issue. The only distinction that *Kennedy* makes between treason, espionage, and drug kingpin activity on the one hand and non-homicide crimes like child rape on the other hand is that the former are “crimes against the state.”<sup>89</sup> But this tells us precisely nothing about whether or why the former crimes produce harms sufficient to justify the death penalty, and the latter do not.<sup>90</sup>

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87. *Id.* at 2659. For the federal drug kingpin law, see 18 U.S.C. § 3591(b) (2006). Section 3591(b) does not require a culpable act that results in death. *Cf. id.* § 3591(a). The capital sentencing proceeding for a drug kingpin offense is governed by section 3592(d), the aggravating factors for which do not require a death to result from the act.

88. *Kennedy*, 128 S. Ct. at 2659–60.

89. *Id.* at 2659. Indeed, the literature already contains arguments against the constitutionality of the death penalty for crimes against the state like treason and espionage. See Ryan Norwood, *None Dare Call It Treason: The Constitutionality of the Death Penalty for Peacetime Espionage*, 87 CORNELL L. REV. 820 (2002); James G. Wilson, *Chaining the Leviathan: The Unconstitutionality of Executing Those Convicted of Treason*, 45 U. PITT. L. REV. 99 (1983).

90. The same can be said of the Court’s late effort to distinguish the death penalty for child rape under military law. Justice Kennedy’s statement

Of course, “crimes against the state” involve serious social harms created by the threat to the government and to national institutions responsible for the security of the political community. But it is wrong to assume that crimes against the person do not also produce social harm or to ignore such social harm because it is not expressed in precisely the same way as the social harm resulting from a crime against the state.<sup>91</sup> Had the Court acknowledged the realities of social harm resulting from serious, violent crimes against the person—for example, undermining the community’s sense of security, creating fear in the community—it would have been compelled to combine that harm with the substantial individual harm caused by aggravated child rape and with the moral culpability of the child rapist.<sup>92</sup> Moreover, the Court would be compelled to conclude that its effort to “independently judge” the gravity of an offense is more complicated than a simple quantification of personal injury. The distinction between crimes against the state and crimes against the person, while legitimate on its face, becomes more complicated when that distinction is used simply to justify differing treatments in Eighth Amendment capital proportionality analysis. The Court avoids this complication by avoiding an assessment of social harm altogether.

The Court’s effort to limit its holding also involves some sleight of hand. While the Court tells us that its holding is narrow in that it is not addressing the constitutionality of capital punishment for crimes against the state, it nonetheless invalidates

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concerning the denial of rehearing appears to limit the Court’s holding to civilian child rape defendants, but it is useful to ask, as Justice Scalia does in response, whether the distinction matters, at least with regard to child rape. *See* Kennedy v. Louisiana, No. 07-343, slip. op. at 3 (U.S. Oct. 1, 2008) (statement of Scalia, J.) (“It is difficult to imagine, however, how rape of a child could sometimes be deserving of death for a soldier but never for a civilian.”).

91. Joshua Dressler has persuasively discussed the social harm that is important to the finding of criminal responsibility. *See* Joshua Dressler, UNDERSTANDING CRIMINAL LAW 120–22 (4th ed. 2006). *See also* Albin Eser, *The Principle of “Harm” in the Concept of Crime: A Comparative Analysis of the Criminally Protected Legal Interests*, 4 DUQ. L. REV. 345 (1965) (discussing social harms and the criminal law).

92. In cases of aggravated child rape, the Court need not choose between a culpability principle and a harm principle in assessing the offender’s desert—both exist here. *Cf.* Michael S. Moore, *The Independent Moral Significance of Wrongdoing*, 1994 J. CONTEMP. LEGAL ISSUES 237, 237–38 (1994) (arguing that wrongdoing, which is a culpable act that causes harm, can enhance the offender’s desert as a retributive matter, though harm is not a necessary or sufficient condition for punishability, but culpability is). *See also* Alexander, *supra* note 84, at 17–23 (offering a critique of social harm theories).

statutes for all non-homicide capital crimes against the person.<sup>93</sup> Yet the Court's national consensus analysis does not account for the extensive number of these latter crimes, thus leading us to wonder why (if) the other non-homicide capital crimes against the person did not satisfy the national consensus analysis. As explained earlier, if the scope of the asserted governmental power is framed at a moderate level of abstraction—as the power to impose the death penalty for a serious crime of violence that does not result in the death of the victim—then one would imagine that the Court's national consensus analysis could look very different, as about 40% of death penalty jurisdictions have enacted legislation of this kind.<sup>94</sup> But the Court frames the issue at the narrowest level of generality—as the power to impose the death penalty for the rape of a child—and thus finds that no national consensus or trend of the kind that the Court found significant in *Atkins* and *Roper* existed to justify the Louisiana statute. Further, the Court excludes military law from its analysis. In this way, the Court frames the issue before it at a narrow level of generality for purposes of conducting its national consensus analysis yet broadens the level of generality when conducting its subjective proportionality analysis, holding that no non-homicide crimes against the person can be punished by death.

Consider also the loose language that Justice Kennedy employs in saying that the death penalty is disproportionate for someone who does not kill or intend to assist another in killing the rape victim.<sup>95</sup> This language appears as if it was designed to make the holding here consistent with the rule of *Enmund*, which concluded that the death penalty is proportionate for anyone who kills, attempts to kill, or intends to kill.<sup>96</sup> Perhaps Justice Kennedy leaves an opening to legislators to craft new capital child rape legislation that provides for capital punishment where there is evidence that the defendant intended that the victim be killed but the killing was unsuccessful. The problem, however, is obvious: if the ultimate measure of proportionality is the individual harm done by murder (i.e., that it results in the taking of a life)—which is, the Court tells us, uniquely different from crimes where death does not result—then one must wonder whether the harm that the Court deems sufficient for the imposition of capital punishment is produced

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93. *Kennedy*, 128 S. Ct. at 2659–60.

94. *See supra* note 60 and accompanying text. *See also* *State v. Kennedy*, 957 So. 2d 757, 779–91 (La. 2007), *rev'd*, 128 S. Ct. 2641 (2008) (reviewing non-homicide capital crimes throughout the country).

95. *Kennedy*, 128 S. Ct. at 2650–51.

96. *Enmund v. Florida*, 458 U.S. 782, 801 (1982).

even by the intended, but unsuccessful, killing of a child rape victim. Despite Justice Kennedy's "did not intend to assist another in killing" language, the Court uses other language to suggest that the harm from an intended but unsuccessful killing is *not* adequate for the imposition of capital punishment—for example, when the Court describes the "severity and irrevocability" of murder as helping to establish its unique harm.<sup>97</sup>

This ambiguity could prove appealing to prosecutors and legislators who may wish to seize upon this language to provide for capital punishment where the government can demonstrate the defendant's intent to kill a child rape victim even if the defendant is unsuccessful. The argument to be made here is that such a defendant bears a higher degree of moral culpability and blameworthiness than someone who rapes with no intent to kill, that such a crime creates even greater social harm, that *Enmund* clearly contemplates an available death penalty for one who intends to participate in a murder, and that *Tison* permits imposition of the death penalty where there is major participation and reckless indifference to human life. Still, as previously stated, *Kennedy* was not really about relative culpability—even a committed abolitionist could easily acknowledge Patrick Kennedy's high degree of moral culpability or blameworthiness; rather, *Kennedy* is chiefly about the comparative resulting individual harm between murder and rape and the Court's (erroneous) conclusion that, at least for crimes against the person, nothing else compares to the taking of a life. Thus, after *Kennedy*, the argument *for* capital punishment where there is evidence of an intent to kill would have to establish that an intended but unsuccessful killing results in individual harm (and, it should be included, social harm) comparable to a successful one. Perhaps this is an opening for the legislature, but an unfortunately narrow one.

Compare this language of intent, which seems to give some legitimacy to capital punishment where there *is* an intent to kill, with Justice Kennedy's use of the word "intentional" to describe the kind of murder for which the death penalty remains proportionate.<sup>98</sup> Justice Kennedy explains, "we conclude that, in determining whether the death penalty is excessive, there is a distinction between *intentional* first-degree murder on the one hand, and nonhomicide [sic] crimes against individual persons, even including child rape, on the other."<sup>99</sup> But between these two extremes lies a vast territory of serious homicides that, though

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

98. *See id.*

99. *Id.* (emphasis added).

unintentional, produce great harm, social and individual, and unquestionably involve a high degree of moral culpability. For example, consider the Federal Government's pending capital prosecution of Naeem Williams in Hawaii. After months of persistent degradation and abuse of his daughter, the Government alleges, Williams ultimately killed her with a severe blow to her body, then delayed in contacting medical personnel in order to allow him time to clean the murder scene and alter the evidence of her killing.<sup>100</sup> Although Williams is charged with child abuse murder under the federal murder statute<sup>101</sup> and apparently had no specific intent to kill his daughter, the fact that his act was committed as part of a long pattern of physical, psychological, and emotional abuse against a vulnerable victim that directly resulted in her death renders his crime especially morally reprehensible and adequately aggravated to warrant capital punishment. Of course, the capital defense bar could seize upon Justice Kennedy's language to insist that the death penalty is disproportionate for unintentional killings and that such offenses should now fall within the categorical prohibition for offenses. One would imagine that *Enmund* and *Tison* settled this—so long as a death actually occurs, the death penalty remains available even if the killing was unintentional (as all felony murders are, by definition). Then again, one would imagine that *Penry I* settled the question of the death penalty's application to the mentally retarded<sup>102</sup> and that *Stanford v. Kentucky* settled the question of the death penalty's application to those who kill while under the age of eighteen.<sup>103</sup> No legislative practice or legislative judgment about the gravity of a crime and the just deserts of the criminal is safe in a world in which the Court's independent judgment rules all.

Moreover, if we are still to take the *Enmund-Tison* rule seriously and assume that the death penalty remains permissible for a non-triggerman accomplice who commits an unintentional

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100. United States v. Williams, 2007 WL 2916123, at \*1–2 (D. Haw. Oct. 2, 2007).

101. See 18 U.S.C. § 1111(a) (2006) (provisions making it a federal first-degree murder when the murder is committed in the perpetration of child abuse or as part “of a pattern or practice of assault or torture against a child”).

102. *Penry v. Lynaugh*, 492 U.S. 302 (1989) (upholding imposition of death penalty for the mentally retarded), *abrogated by* *Atkins v. Virginia*, 536 U.S. 304 (2002) (the execution of a mentally retarded criminal is prohibited by the Eighth Amendment).

103. *Stanford v. Kentucky*, 492 U.S. 361 (1989) (upholding imposition of death penalty for offenders who committed murder at ages 16 and 17, respectively), *abrogated by* *Roper v. Simmons*, 543 U.S. 551 (2005) (the Eighth and Fourteenth Amendments prohibit imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed).

murder (where there is major participation in a felony and reckless indifference to human life), then the Court must be forced to take seriously the reality that some non-homicide crimes, such as the rape of a child, may be committed with such brutality and may be so highly aggravated that they arguably produce more individual and social harm than an unintentional murder. As Justice Alito observed, “is it really true that every person who is convicted of capital murder and sentenced to death is more morally depraved than every child rapist?”<sup>104</sup> The *Kennedy* Court’s answer is “yes” because its standard of moral depravity is determined by the taking of a life. But Justice Alito’s question (which, it turns out, is probably rhetorical) captures the difficulty with the majority’s absolutist comparative harm standard.

Finally, *Kennedy*’s influence might be felt in a *per se* challenge to prosecuting the mentally ill for a capital offense, seeking to extend a categorical exemption to this class of offenders. In light of *Atkins* and *Roper*, the American Bar Association has led a movement to create legislative exemptions for the mentally ill.<sup>105</sup> The Court’s decision in *Panetti v. Quarterman*<sup>106</sup>—although not a categorical exemption case, but rather a case involving a straightforward claim of competence to be executed under *Ford v. Wainwright*<sup>107</sup>—helped shine greater light on the problem of mental illness in the criminal justice system generally and in capital cases specifically.<sup>108</sup> It is likely that constitutional litigation

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104. *Kennedy*, 128 S. Ct. at 2676 (Alito, J., dissenting). See also Berman & Bibas, *supra* note 52, at 361–62 (presenting the argument for why some child rapists may be more deserving of capital punishment than murderers).

105. See Paul M. Igasaki et al., *Recommendation and Report on the Death Penalty and Persons with Mental Disabilities*, 30 MENTAL & PHYSICAL DISABILITY L. REP. 668 (2006); Ronald J. Tabak, *Mental Disability and Capital Punishment: A More Rational Approach to a Disturbing Subject*, 34 HUMAN RIGHTS 5 (Spring 2007); Helen Shin, Note, *Is the Death of the Death Penalty Near? The Impact of Atkins and Roper on the Future of Capital Punishment for Mentally Ill Defendants*, 76 FORDHAM L. REV. 465 (2007). But cf. Eileen P. Ryan & Sarah B. Berson, *Mental Illness and the Death Penalty*, 25 ST. LOUIS U. PUB. L. REV. 351, 365–71, 381 (2006) (stating that, if a categorical exemption for the mentally ill is to be established, it should apply only to those with “Axis I disorders in which there is psychosis” and criticizing the ABA Task Force recommendations).

106. *Panetti v. Quarterman*, 127 S. Ct. 2842 (2007).

107. *Ford v. Wainwright*, 477 U.S. 399 (1986).

108. See Richard J. Bonnie, *Panetti v. Quarterman: Mental Illness, the Death Penalty, and Human Dignity*, 5 OHIO ST. J. CRIM. L. 257 (2007). In addition, Carol Steiker’s thoughtful analysis of *Panetti* suggests that after *Panetti*, “the grounds for that [new substantive] standard will draw the Court (or lower courts in the first instance) into the same kind of substantive Eighth Amendment jurisprudence reflected in the *Atkins* and *Simmons* decisions.” Carol S. Steiker, *Panetti v.*

on this question will reach the Court. In that event, however, the Court will not be comparing the harms caused by the mentally ill offender's crime, as in *Kennedy* and *Coker*, but the offender's moral culpability, as in *Atkins* and *Roper*. But the claim will nonetheless force the Roberts Court to again grapple with the scope of the existing categorical exemption framework, which *Kennedy* reaffirms in its entirety.

#### IV. *KENNEDY* AND THE CONTINUING RELEVANCE OF FORMAL INSTITUTIONAL ARRANGEMENTS

*Kennedy* comes at a time when some legal scholars and commentators, particularly those who follow the Supreme Court closely, have indicated that we have now moved beyond debates about the proper role of the Court and about the wisdom of particular exercises of judicial review.<sup>109</sup> No more of the debate over judicial activism and judicial restraint; rather, they contend, we have now reached the point in the evolution of constitutionalism at which the real (and, in their view, appropriate) debate is exclusively a substantive one.<sup>110</sup> As Cliff Sloan put it recently in an online debate, “[I]et’s retire the label of ‘activist’ once and for all, and have at it on the issues.”<sup>111</sup> Andrew Siegel amplifies this point, explaining that “the gap between the reality of constitutional law (in which groups of judges committed to a broad judicial role battle over the substance of the rights to be jealously protected) and the rhetoric of constitutional politics (in which

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Quarterman: *Is There a “Rational Understanding” of the Supreme Court’s Eighth Amendment Jurisprudence?*, 5 OHIO ST. J. CRIM. L. 285, 299 (2007).

109. See posting of Andrew Siegel (amsiegel) to PrawfsBlawg, <http://www.prawfsblawg.blogspot.com/prawfsblawg/2008/week26/index.html> (June 26, 2008, 14:28 EST); posting of Cliff Sloan to Slate.com, <http://www.slate.com/id/2193813/entry/2194352/> (June 26, 2008, 15:49 EST); posting of Howard Wasserman to PrawfsBlawg, <http://www.prawfsblawg.blogspot.com/prawfsblawg/2008/week26/index.html> (June 26, 2008, 15:16 EST).

110. See Siegel, *supra* note 109; Wasserman, *supra* note 109.

111. Sloan, *supra* note 109. Cf. KERMIT ROOSEVELT III, *THE MYTH OF JUDICIAL ACTIVISM: MAKING SENSE OF SUPREME COURT DECISIONS* (2006) (rejecting the language of “judicial activism” and offering a new model for resolving the tension between conservative views of constitutional interpretation and those who defend the “living Constitution”); Caprice L. Roberts, *In Search of Judicial Activism: Dangers in Quantifying the Qualitative*, 74 TENN. L. REV. 567 (2007) (exploring the difficult meaning of “judicial activism” and cautioning against efforts to determine activism empirically).

liberal ‘activists’ battle conservatives committed to ‘judicial restraint’) has grown untenable.”<sup>112</sup>

Let me concur in part and dissent in part and explain why cases like *Kennedy* require us to be more cautious about ratifying absolute and aggressive judicial review, particularly in the death penalty area. I agree that the labels “judicial activism” and “judicial restraint” have become rather meaningless in our constitutional dialogue and if we all saw fit to abandon them altogether, there would be little reason to quarrel with that decision. Political figures and commentators on politics from both sides of the political aisle often use that terminology as a rhetorical device, though with varying degrees of success (which perhaps depends upon how many voters care much about, or pay much attention to, questions about the proper role of judges, a critically important question in our constitutional system but one wonders whether it carries the same weight with most voters as questions about jobs, taxes, and national security).<sup>113</sup> I also take Professor Siegel’s point that the Supreme Court has firmly embraced its core review function in constitutional cases and that the differences among the justices have more to do with differing substantive visions of constitutional law—as I have said elsewhere, the modern Supreme Court’s immodest understanding of its power has created the impression that it does not like to cede ground to the political branches or to other non-judicial decision-makers (or even to state courts).<sup>114</sup>

I would add a few caveats to Professor Siegel’s otherwise accurate comments about the current Court. For example, Justice Thomas has expressed his understanding of the Court’s limits in war powers cases;<sup>115</sup> Justice Scalia has consistently urged that the Court get out of the substantive due process business<sup>116</sup> and has exerted an effort to extend the political question doctrine to

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112. Siegel, *supra* note 109.

113. See Alan Dershowitz, *Reactionary Activism*, HUFFINGTON POST, July 23, 2007, [http://www.huffingtonpost.com/alan-dershowitz/reactionary-activism\\_b\\_57453.html](http://www.huffingtonpost.com/alan-dershowitz/reactionary-activism_b_57453.html); Klaus Marre, *McCain Lambastes Judicial Activism*, THE HILL, May 6, 2008, <http://thehill.com/campaign-2008/mccain-lambastes-judicial-activism-2008-05-06.html>.

114. See J. Richard Broughton, *Judicializing Federative Power*, 11 TEX. REV. L. & POL. 283, 309–10 (2007); Broughton, *supra* note 6, at 658.

115. See *Hamdan v. Rumsfeld*, 548 U.S. 557, 678–81 (2006) (Thomas, J., dissenting), *superseded by statute as stated in* *Boumediene v. Bush*, 128 S. Ct. 2229, 2234 (2008); *Hamdi v. Rumsfeld*, 542 U.S. 507, 582–83 (2004) (Thomas, J., dissenting).

116. See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 1002 (1992) (Scalia, J., concurring in part and dissenting in part); *Cruzan v. Mo. Dep’t of Health*, 497 U.S. 261, 300–01 (1990) (Scalia, J., concurring).

political gerrymandering cases;<sup>117</sup> the Chief Justice has asserted the need for greater deference in federal habeas cases involving state prisoners;<sup>118</sup> and the Court has (though rarely) employed language of deference such as the language that characterized *Gonzales v. Raich*'s recognition of broad federal criminal law powers under the Commerce Clause.<sup>119</sup> So it is hardly true that all of the Justices have wholly abandoned structural limits on judicial review. On the whole, though, it is true that the Court's *majorities* have not lately taken seriously the notion that the Court's powers are meaningfully constrained by structural limits. And that failure is particularly apparent in the Court's capital punishment jurisprudence and its approach to claims of categorical exemption from the death penalty, a subject area that often is conspicuously omitted from the debates about judicial activism, in favor of issues related to substantive due process, religion, and equal protection.<sup>120</sup>

If the idea expressed in this recent commentary, however, is to abandon from constitutional discourse all structural concerns about the role of courts and the consequences of judicial action for both the vertical and horizontal separation of governmental power and to exclusively favor arguments about the substantive reach of constitutional provisions, then a dissent is in order. Whether we use the unhelpful label of "judicial activism" or some other nomenclature is beside the point: structural concerns about institutions and the effects of judicial power are not mutually exclusive of substantive concerns about the merits of constitutional issues. And the "broad" conception of the judicial role that justifies the "jealous" protection of individual rights does not tell us much about how aggressive the Court should be when interpreting the

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117. See *Vieth v. Jubelirer*, 541 U.S. 267, 267–69 (2004) (plurality opinion of Scalia, J.).

118. See *Abdul-Kabir v. Quarterman*, 127 S. Ct. 1654, 1683–84 (2007) (Roberts, C.J., dissenting) (arguing the state courts were entitled to greater deference from federal courts under the Anti-Terrorism and Effective Death Penalty Act); *House v. Bell*, 547 U.S. 518, 560–61 (2006) (Roberts, C.J., dissenting) (arguing that the Court owed deference to lower court factual findings and asserting a narrow view of the role of federal habeas courts in allowing state prisoners to raise procedurally defaulted constitutional claims).

119. See *Gonzales v. Raich*, 545 U.S. 1, 22 (2005) (employing deferential review by finding that Congress had a rational basis for concluding that failure to regulate intrastate manufacture of marijuana would leave a gap in the federal Controlled Substances Act).

120. Of course, there are scholars who argue that despite the Court's exertion of judicial review in the capital sentencing area, that review has not proven useful. See, e.g., Scott W. Howe, *The Failed Case for Eighth Amendment Regulation of the Capital-Sentencing Trial*, 146 U. PA. L. REV. 795, 796–97 (1998); Liebman, *supra* note 77, at 122–30.

structural provisions of the original text of the Constitution when a case does not directly implicate the Constitution's individual rights provisions. And even when individual rights *are* at stake, the scope of judicial review of political action remains worthy of attention, especially when the power is exercised to undermine the political community's reasoned efforts to control the people by responding to the problems of violent crime.

I have emphasized the critical role of institutional arrangements in ordering and administering the criminal justice system, as those arrangements enable the government to control the governed and ultimately itself.<sup>121</sup> Courts have a special but carefully and purposely limited role in those arrangements. Constitutional controls and limits are not just for political actors; they exist for judges, too, no matter how omnipotent the modern Supreme Court fancies itself.<sup>122</sup> As Rick Garnett has thoughtfully explained, there is much virtue in judicial humility.<sup>123</sup> Granting courts a blank check to simply "have at it" on the merits of constitutional issues may ultimately result in ignoring important checks on their institutional power and greater likelihood that they will abandon any meaningful sense of humility. Moreover, as I have previously argued, courts compromise the Constitution's framework and vision for responsible citizenship and self-government when they narrow the distance between themselves and the political institutions that filter out and moderate popular passions and prejudices.<sup>124</sup> This design becomes critical when we consider how best to define and punish violent crime.<sup>125</sup> Of course, courts play a vital role in constraining political forces, and the Eighth Amendment plainly imposes a judicially enforceable outer limit on criminal punishment. But when the exercise of the judiciary's power simply mimics the kind of action that we should desire and expect of *political* actors, courts undermine their own credibility as responsible agents of limited government and constitutional constraint and simultaneously compromise the constitutional value of allowing the political branches of government to do their work

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121. See Broughton, *supra* note 6, at 662.

122. See *id.* at 662–63.

123. Kermit Roosevelt III & Richard W. Garnett, Debate, *Judicial Activism and its Critics*, 155 U. PA. L. REV. PENNUMBRA 112, 119 (2006) (referencing a lecture by Walter F. Murphy on "Constitutional Virtues"). See also Posner, *supra* note 80, at 56 (stating that "[j]udicial modesty is not the order of the day in the Supreme Court").

124. See ROGER M. BARRUS ET AL., *THE DECONSTITUTIONALIZATION OF AMERICA: THE FORGOTTEN FRAILTIES OF DEMOCRATIC RULE* 121–22 (2004); Broughton, *supra* note 6, at 659–60.

125. Broughton, *supra* note 6, at 660; Broughton, *supra* note 114, at 310.

effectively.<sup>126</sup> As Judge Richard Posner explained of the *Roper* decision, “[the Court] was doing what a legislature asked to allow the execution of seventeen-year-old murderers would be doing: making a political judgment.”<sup>127</sup> The same can be said of the Court’s work in *Kennedy*. Moreover, the Court knows how to articulate Eighth Amendment deference to the penal judgments of the community—its non-capital Eighth Amendment jurisprudence has recognized and enforced limits on the Court’s imposition of its own value judgments in the realm of criminal punishment.<sup>128</sup> But the Court has followed a divergent approach to capital and non-capital proportionality review, an approach that has led to the rather bizarre result of liberally permitting severe punishments for non-violent crimes but aggressively scrutinizing and invalidating severe punishments for violent crimes. It seems strange that the community’s moral and political judgment is entitled to less weight and is subject to more exacting judicial intervention when it is imposing harsh penal sanctions for the most brutal of crimes. Indeed, other scholars, like Rachel Barkow, have noted the untenable nature of the Court’s dual-track approach to Eighth Amendment proportionality review.<sup>129</sup> This approach further leads us to wonder whether, though the Court is capable of self-enforcing institutional restraints in reviewing criminal punishments, the lure of constitutionalizing the Justices’ moral sensibilities has become too appealing in death penalty cases.

Of course, the constitutional design requires more of political actors and institutions, which, to competently and safely control the people, must take seriously the social controls necessary and appropriate for preventing and punishing violent crime. With homicide rates rising in certain parts of the country, the spread of gang violence (particularly to areas beyond major cities), and the continuing threats to community safety posed by drug and firearms trafficking (and the attendant connections between trafficking and violent crime), it is especially important that political actors

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126. See BARRUS, *supra* note 124, at 112 (“[T]he conviction that judicial officials are also political actors can have undesirable effects on the behavior of citizens.”).

127. See Posner, *supra* note 80, at 47.

128. See, e.g., *Ewing v. California*, 538 U.S. 11, 24 (2003) (noting the “longstanding” deference afforded to legislatures in crafting criminal punishments).

129. See Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 MICH. L. REV. (forthcoming 2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1267266](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1267266) (follow “Download” hyperlink, and then choose a location from which to download).

exercise their responsibility to soberly and intelligently identify the best uses of the criminal law and criminal punishment.<sup>130</sup> Sometimes justice requires that political actors adopt robust penal sanctions in response to these conditions of violent crime; at other times, political actors must become more sensitive to the societal consequences of unnecessarily harsh punishments where offenders are not demonstrably dangerous to the community or whose crimes lack sufficient gravity to justify the kind of moral desert appropriate for serious acts of violence. Yet, notwithstanding the legislative trends toward more severe punishments for violence against children, our national political dialogue—consider, in particular, the 2008 presidential campaign—shows little more than cursory attention to the problem of violent domestic crime.<sup>131</sup> Congress retains ample, though properly circumscribed, powers to enact important federal criminal law reforms, and the President's law enforcement and criminal justice powers are perhaps the most robust of those in the arena of domestic policy.<sup>132</sup> This institutional

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130. See FED. BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES: PRELIMINARY SEMI-ANNUAL UNIFORM CRIME REPORT (2008), [http://www.fbi.gov/ucr/2008prelim/table\\_1.html](http://www.fbi.gov/ucr/2008prelim/table_1.html) (showing increases in murder in nonmetropolitan counties and in cities of 50,000 to 99,999 and a sharp increase in murder in cities of under 10,000). Of course, the news on crime rates is not all discouraging: as the most recent FBI data show, some of the rises are slow, and over a longer period the violent crime rate nationally has actually *decreased*. See *id.* at tbl. 3.

131. See Radley Balko, *Criminal Justice Unfairly Ignored on Trail*, POLITICO, July 17, 2008, <http://www.politico.com/news/stories/0708/11804.html>; Posting of Douglas A. Berman to Sentencing Law & Policy (May 5, 2008, 10:16 EST), [http://www.sentencing.typepad.com/sentencing\\_law\\_and\\_policy/2008/05/will-the-2008-p.html](http://www.sentencing.typepad.com/sentencing_law_and_policy/2008/05/will-the-2008-p.html). But see Senator John McCain, Remarks at National Sheriffs' Association in Indianapolis, Ind. (July 1, 2008), <http://www.JohnMcCain.com/informing/news/speeches> (follow "07.01.08" hyperlink) (discussing various criminal justice policies). Incidentally, both Senator McCain and Senator Barack Obama responded to the Supreme Court's decision in *Kennedy*, and both condemned the ruling. See Joan Biskupic, *McCain, Obama Both Slam Court Decision*, USATODAY, June 26, 2008, [http://www.usatoday.com/news/washington/2008-06-25-scotus-child-rape\\_N.htm](http://www.usatoday.com/news/washington/2008-06-25-scotus-child-rape_N.htm). Senator Obama's position was perhaps more surprising, though during the campaign he said so very little about his views on major issues of criminal justice that it would be difficult to discern whether his view of the Court's work in *Kennedy* was markedly different from his views on capital punishment issues more generally. Perhaps, then, the most surprising aspect of Senator Obama's position on *Kennedy* is that he even stated it in the first place.

132. The Rehnquist Court's judicial enforcement of federalism norms placed significant limits on Congress's criminal law-making authority pursuant to the Commerce Clause. See *United States v. Morrison*, 529 U.S. 598 (2000); *Lopez v. United States*, 514 U.S. 549 (1995). But the Court's decision in *Gonzales v. Raich* makes clear that Congress's powers in the field of criminal justice remain substantial, as a consequence of both the Commerce Clause and the Necessary and Proper Clause. 545 U.S. 1, 22 (2005). See also *Perez v. United States*, 402

scheme enables political forces to engage in sober reflection and intelligent action to address criminal violence. But they will be much less likely to do so if they know, on the one hand, that reviewing judges will do their jobs for them, or on the other hand that judges will simply ignore the reasoned political will of the community (refined by political institutions) and enforce their own will in its stead.<sup>133</sup>

In the final analysis, *Kennedy* reminds us to ask a question that the Court has not asked itself in its categorical exemption jurisprudence (or elsewhere, really): if courts are protecting us from the political branches and political majorities, who is protecting us from the courts?

That question is neither unreasonable nor anachronistic.

## V. CONCLUSION

The punishment of violent crime is among the most solemn of social and political responsibilities. But in modern political life, reviewing courts and the Supreme Court in particular too often supplant political institutions as the forum for debating the desirability of capital punishment and certain limits on its infliction.<sup>134</sup> There are compelling policy arguments—for example, that the aggravated rape of a child should not be punished by death and that lawmakers should not enact legislation permitting such a

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U.S. 146, 151–52 (1971) (reasoning that the Commerce Clause embraces purely local activities that are part of a larger class of economic activity that substantially affects interstate commerce). The Spending Clause also remains a meaningful source of congressional power to effect criminal justice policy. *See, e.g., United States v. Sabri*, 326 F.3d 937, 949 (8th Cir. 2003) (upholding portion of federal bribery statute as necessary and proper to carrying into execution the spending power).

As for the President, he can recommend legislation to Congress, give it information on the state of the Union relative to criminal justice, and veto criminal justice legislation that is unwise or unconstitutional. *See* U.S. CONST. art. II, § 3 & art. I, § 7. He can also appoint judges who will render decisions in criminal cases and who, in his view, may reach decisions on criminal justice issues that would be consistent with his vision of criminal law and procedure. The Criminal Justice Presidency, as I refer to it, is the subject of a separate scholarly project.

133. *See* THE FEDERALIST NO. 78, at 469 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“[I]f [the courts] should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body. The observation, if it proved anything, would prove that there ought to be no judges distinct from that body.”).

134. *See* Broughton, *supra* note 6, at 658–59.

punishment. Indeed, the *Kennedy* majority makes many of those arguments. My point, though, is that those arguments—however compelling—have virtually nothing to do with the meaning and scope of the Cruel and Unusual Punishment Clause, as Justice Alito correctly explains in his *Kennedy* dissent. And their inclusion in an opinion that attempts to interpret that Clause only serves to undermine both the Court's legitimacy and the functioning of the political processes in a constitutional democracy. Thus, I continue to urge, as I have in this Article, greater attention to structural and institutional concerns when evaluating capital punishment jurisprudence.

This is not to say that appellate courts should get out of the business of reviewing criminal punishments. But the question is not whether the Court can enforce constitutional limits on punishment; rather, the question is about the level of aggressiveness or deference that the Court will apply to the considered moral judgments and lived experiences of political communities. Indeed, there is a compelling argument to be made that where the crimes involved are non-violent and result in minimal harm, courts ought to be more robust in reviewing facially harsh sentences and in enforcing limits on political actors. Conversely, where the crime is violent, the defendant's moral culpability is adequately established, and the harms—both individual and social—are undeniably substantial, reviewing courts should be more reluctant to interfere with the political community's considered moral judgment and lived experiences, as refined through the processes of making law.

Precisely because we care about the formal institutional arrangements for controlling the people, we should be troubled by the Death Penalty Code that the Burger and Rehnquist Courts devised over the course of thirty years.<sup>135</sup> Through that Code the Court now mandates extensive regulatory procedures for the capital sentencing proceeding to ensure the narrowing of death-eligibility and yet simultaneously distrusts the effectiveness of those procedural requirements so much that the Court dictates—through its own assessments of culpability and harm and with no deference to the judgments and sensibilities of political communities—the categories of crimes and offenders that can be subject to capital punishment in the first instance. Perhaps the Roberts Court will eventually find a way to reject and dismantle that Code. But if *Kennedy* is any indication (and, as I have explained here, I think it *is*), let us not hold our collective breath.

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135. See J. Richard Broughton, *The Roberts Court and the Death Penalty Code*, 12 JONES L. REV. 145, 149–50 (2008).

Rather, in the death penalty arena at least, it is more likely that we can expect the Court, like Minos in Dante's Hell, to continue wrapping its tail around itself, employing its own judgment and penal theory to dictate by itself—and for the Nation—the seriousness of a crime, the appropriate state of public morality, and the acceptability of capital punishment.