KENNEDY AND THE TAIL OF MINOS

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ABSTRACT

In Dante’s *Inferno*, the damned appeared before Minos, who judged the gravity of their sins and assigned their souls to their respective circles of Hell by wrapping his tail around his body. In this paper, I examine whether, in light of its decision in *Kennedy v. Louisiana* and its methodology for reviewing categorical exemptions from the death penalty, the Supreme Court has problematically assumed for itself the role of a kind of contemporary constitutional Minos, at least in the realm of capital punishment. First, I argue, *Kennedy* is a case about comparative resulting harms among violent crimes. The *Kennedy* dissent should have more robustly attacked the Court’s categorical exemption methodology, which undervalues legitimate penological justifications for capital punishment and ultimately constitutionalizes the Court’s subjective assessments of culpability and harm, allowing the Court to dictate offense seriousness, public morality, and political acceptability of the death penalty. Second, the Court’s attempt to limit its holding is illusory because *Kennedy’s* loose rhetoric and underdeveloped harm theory could jeopardize the constitutionality of any statute that permits the death penalty for a non-homicide offense, including crimes against the state, and even unintentional murders that may not satisfy the Court’s own sensibilities about resulting harm. Finally, *Kennedy’s* Minos-like approach to assessing the gravity of offenses and to imposing its own moral judgment demonstrates that there remains both relevance and legitimacy in the structural debate over the scope and exercise of judicial power, especially where that power undermines the community’s reasoned efforts to cope with violent crime.
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I. INTRODUCTION

In one scene of The Lion in Winter, a tale of the deception and treachery that accompanies King Henry II’s effort to name the successor to his empire, princes (and brothers) Richard and Geoffrey wait in the dungeon for their father, Henry II, to arrive and kill them. Richard says to Geoffrey, “He’s here. He’ll get no satisfaction out of me. He isn’t going to see me beg.”¹ Incredulous and annoyed by Richard’s priorities at the moment of their demise, Geoffrey says, “You chivalric fool. As if the way one fell down mattered.”²

Richard responds, “When the fall is all there is, it matters.”³

Punishment constitutes the fall in our criminal law – when the government has used its coercive powers to bring the moral condemnation of the community upon an individual – and it matters. How we punish, whom we punish, and why we punish says a great deal about our political community: our dedication to justice, our political morality, and our sense of responsibility and accountability that is a critical element of our humanity.⁴ This is true of the death penalty in particular. We see it, too, in the stories

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¹ THE LION IN WINTER (MGM Pictures 1968).
² Id.
³ Id.
that emerge from a criminal justice system that inflicts this kind of punishment. Defense lawyers and abolitionists speak eloquently of the personal stories that accompany the death penalty, stories of courageous, often misunderstood, souls caught inside and battling against an (as they depict it) unfair legal machinery that is woefully insensitive to claims of mercy and humanity and ignorant of its own shortcomings.\(^5\) Too often overlooked, too often marginalized, however, are the stories on the other side, the narrative that accompanies the lived experiences of real people victimized, and communities subjugated, by violent crime. Theirs are stories of loss and suffering, of lives spent dwelling in the shadows of gunmen and brutalization, and of hope for justice. They remind us of the responsibility of political society and of political authority to carefully but surely bring its moral condemnation upon the wicked. The capital prosecutor, as the political authority’s advocate, tells these stories, and in doing so does more than simply wield a majoritarian sword against wickedness; he also gives voice to those now speechless, united in a silent accord.\(^6\)

Punishment matters also to our politics, because political institutions must be capable of controlling the people;\(^7\) criminal and penal legislation are manifestations of that effort. We neglect – or in fact choose not – to talk about this anymore, this controlling the people; at least we do not talk about it in precisely that way. It is easy to understand why. Deriving substantially as they do from the strands of early modern

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\(^7\) See *The Federalist* No. 51, at 322 (James Madison) (Clinton Rossiter, ed. 1961).
political thought that posited that we entered civil society not so that Government could save our souls, but to protect our rights – our lives, our liberties, and our property – it is easy to understand why we are cautious about rhetoric that implies government’s dominion over our conduct. We often forget, however, that an important corollary for such security is the preservation of a tolerable civil social order in which certain kinds of socially harmful conduct must be met by the reasoned (and, I would add, spirited) condemnation of the political community. Our constitutional framework may have been conceived amidst the claims of the modern science of politics, but it did not abandon the understanding of the ancients, that tragedy is an omnipresent element of political life. Humans are weak, and flawed, and, often, dangerous to their fellow citizens and to the state. Depriving them of their freedom, and sometimes their life, is a tragic, but necessary, responsibility of the state.

These concerns about whom, why, and how we punish, and about the political considerations that attend the fight against violent crime in America, have particular force in the debate about both the death penalty and particular applications of it, and the Supreme Court’s role in regulating it. This is because it also matters who determines the fall, and how it is determined. In Dante’s Inferno, Minos sat as the ultimate judge of human sin. Dante explains in Canto V that when the damned appeared in Hell, they

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8 See JACK N. RAKOVE, ORIGINAL MEANINGS 7 (1996) (describing the influence of Locke and other Enlightenment philosophers on the development of the American Constitution); FORREST MCDONALD, NOVUS ORDO SECLORUM 7, 59-66 (1985) (same). Much attention is often focused upon the influences of Locke and other English thinkers, but often underestimated is the influence of the Scottish Enlightenment and, particularly, of Hume. See id. at 162.

9 I have in mind the ancient Greek idea of thumos, or public spiritedness. I explore the role of thumos in the criminal law in a separate, forthcoming article.

would confess their sins to Minos, who would then wrap his tail around his body.\textsuperscript{11} The circle to which the soul was assigned was determined by the number of times that Minos wrapped his tail.\textsuperscript{12}

The Court’s recent decision in \textit{Kennedy v. Louisiana},\textsuperscript{13} 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? \textit{Kennedy} (the opinion in which was 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,\textsuperscript{14} 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 12.\textsuperscript{15} Oklahoma, Montana, South

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\item \textsuperscript{11} \textit{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”).
\item \textsuperscript{12} \textit{Id.} (“as many times as Minos wraps his tail/around himself, that marks the sinner’s level.”).
\item \textsuperscript{13} 128 S. Ct. 2641 (2008).
Carolina, Georgia, Texas and the United States military all have similar statutes. In the Louisiana case, Patrick Kennedy was convicted under this statute in 2003, for brutally raping his eight-year-old stepdaughter. Kennedy challenged the law under the Court’s 1978 decision in *Coker v. Georgia*, in which a plurality of the Court held that the death penalty was disproportionate for the crime of raping an adult woman. Justice Powell’s separate opinion left open the question of whether the death penalty could ever be proportionate for a rape, including the rape of a child. Answering that question, the Court in *Kennedy* held that the Louisiana statute failed to satisfy the two-pronged

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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); see also Laurence H. Tribe, *The Supreme Court is Wrong on the Death Penalty*, WALL ST. JOURNAL, 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*, No. 07-343, slip. op., at 1 (U.S. Oct. 1, 2008). Justices Kennedy and Scalia issued separate statements regarding the Court’s holding.

17 *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.


19 *Id.* at 604 (Powell, J., concurring in the judgment in part and dissenting in part).
analysis that the Court has developed for Eighth Amendment cases in which the defendant seeks a categorical exemption from the imposition of capital punishment. First, there is an existing national consensus against the practice of employing the death penalty in civilian cases of child rape. 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. 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.

At its core, then, *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 the fall that is condemnation through the criminal law and punishment by death. It matters. And *Kennedy* offers a particularly rich opportunity for scholarly dialogue, and 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 paper instead offers three distinct but related normative observations, leading to one

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*Kennedy*, 128 S. Ct. at 2652-54.

*Id.* at 2659-60.

*Id.* at 2660.
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 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 in which 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 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. And 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,23 but that “in the end, our own judgment will be brought to bear on the acceptability of the death penalty.”24 These two lines of analysis seem to be incompatible; at a minimum, one of the prongs is superfluous.25

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 the United States authorized the death penalty for rape.26 After Furman v. Georgia27 invalidated most of these laws, six states re-enacted capital rape legislation, but all of those statutes were subsequently invalidated either by the Court’s 1976 capital cases or by state court decisions.28 Louisiana re-enacted its capital child

24 Roper, 543 U.S. at 563; see also Atkins, 536 U.S. at 312-13 (holding same); Coker v. Georgia, 433 U.S. 584, 597 (1977) (holding same).
25 See Broughton, Second Death, supra note 4, at 651.
26 Kennedy, 128 S. Ct. at 2651.
27 408 U.S. 238 (1972).
28 Kennedy, 128 S. Ct. at 2651.
rape statute in 1995, and Georgia, Montana, Oklahoma, South Carolina, Texas, and the United States (as part of the Uniform Code of Military Justice) followed. Comparing this recent trend to the ones found in Atkins v. Virginia (where eighteen capital jurisdictions forbade the death penalty for the mentally retarded, and twenty permitted it), Roper v. Simmons (where eighteen capital jurisdictions forbade the death penalty for juvenile offenders, and twenty permitted it), and Enmund v. Florida (where eight jurisdictions permitted the death penalty for participation in a robbery that resulted in a murder committed by an accomplice), 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. Although Coker contained some ambiguous language, the Court conceded, viewed in the appropriate context it is apparent that Coker announced a more limited holding, applying only to the rape of an adult woman.

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29 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 ___, 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. See Kennedy v. Louisiana, No. 07-343, slip. op. at 3-4 (statement of Kennedy, J.).


32 458 U.S. 782 (1982). Enmund’s rule was subsequently modified by Tison v. Arizona, 481 U.S. 137 (1987), which held that Enmund’s culpability mandate could be satisfied where the offender engages in major participation in a felony and demonstrates reckless indifference to human life.

33 Kennedy, 128 S. Ct. at 2654-56.

34 Id. at 2654 (“Confined to [Coker’s 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.”).
Kennedy completed its national consensus analysis by stating that positive legislation was not the only indicia of societal attitudes toward the execution of child rapists. In addition, the Court explained, 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. Kennedy and Richard Davis (who was also recently convicted in Louisiana for the aggravated rape of a child) are the only two people on death row in the Nation for non-homicide crimes. Consequently, the Court concluded, 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.

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.’” As applied in Kennedy, this is essentially a proportionality analysis that depends upon a comparison between the harms caused by murder and child rape.

35 Id. at 2657.
36 Id.
37 Id.
38 Id. at 2657-58.
39 Id. at 2658 (quoting Coker, 433 U.S. at 597).
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,”\(^40\) “[r]ape has a permanent psychological, emotional, and sometimes physical impact on the child,”\(^41\) “[w]e cannot dismiss the years of long anguish that must be endured by the victim of child rape”\(^42\) – *Kennedy* nevertheless concludes, as did *Coker*, that rape (like all non-homicide crimes against the person) does not compare with murder in terms of the individual harm it produces.\(^43\) The relevant distinction concerns the taking of a human life, an act that the Court deems unique in terms of “severity and irrevocability.”\(^44\) 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. . . .”\(^45\) 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.\(^46\) The Court explained that child rape occurs more than first-degree murder, and thus could be punished with death more often.\(^47\) Therefore, it would be inconsistent with the Nation’s evolving standards of decency, and the Court’s avowed

\(^{40}\) *Id.*

\(^{41}\) *Id.*

\(^{42}\) *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* Owen D. Jones, *Sex, Culture, and the Biology of Rape*, 87 CALIF. L. REV. 827 (1999); SUSAN ESTRICH, *REAL RAPE* (1987); Broughton, *Capital Child Rape Legislation, supra* note 15, at 35-38.

\(^{43}\) *Kennedy*, 128 S. Ct. at 2659-60.

\(^{44}\) *Id.* at 2659 (quoting *Coker*, 433 U.S. at 598); *id.* at 2660 (quoting *Coker*, 433 U.S. at 598).

\(^{45}\) *Id.* at 2659 (quoting *Coker*, 433 U.S. at 597). 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).

\(^{46}\) *Kennedy*, 128 S. Ct. at 2660.

\(^{47}\) *Id.*
mission to limit the use of capital punishment, to allow the death penalty for child rape.\textsuperscript{48} The Court then concludes its excessiveness discussion by explaining why its conclusion is consistent with the retributive and deterrent goals of punishment.\textsuperscript{49}

In response, Justice Alito’s \textit{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.\textsuperscript{50} Justice Alito demonstrates that a number of state courts and legislators actually read, or could have read, \textit{Coker} to apply to all rapes, not merely to the rape of an adult woman.\textsuperscript{51} Providing examples from a number of jurisdictions, he concludes, “the \textit{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.”\textsuperscript{52} He also notes that in the five additional jurisdictions that were considering capital child rape legislation recently but failed to enact it, such failure occurred only after the grant of certiorari in \textit{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.\textsuperscript{53} Although Justice Alito is reluctant to conclude that a national consensus unquestionably exists in favor of the

\textsuperscript{48} \textit{Id.}

\textsuperscript{49} \textit{Id. at} 2662-65.

\textsuperscript{50} \textit{Id. at} 2665-71, 2673-74 (Alito, J., dissenting).

\textsuperscript{51} \textit{Id. at} 2665-71 (Alito, J., dissenting).

\textsuperscript{52} \textit{Id. at} 2668 (Alito, J., dissenting).

\textsuperscript{53} \textit{Id. at} 2671 (Alito, J., dissenting).
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.\textsuperscript{54} The Court, though, now deprives the democratic process of its capacity for demonstrating whether our society desires a move in that direction.

The Alito dissent mirrors the \textit{Coker} dissent insofar as it accepts both broader retributive and utilitarian justifications for capital child rape statutes. Both \textit{Coker} and \textit{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.\textsuperscript{55} But the retributive theory of \textit{Kennedy} and \textit{Coker} (indeed, the Court’s entire proportionality theory in these cases) is arguably too narrow.\textsuperscript{56} Moreover, even if we assume that the Court’s

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\textsuperscript{54} \textit{Id.} at 2672-73 (Alito, J., dissenting).
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\textsuperscript{55} My own sense is that \textit{Kennedy} and \textit{Coker} remain primarily retributive – the harm assessment is prominent but does not really concern the prevention of future harm (classical deterrence) but rather 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.” \textit{See}, e.g., Richard Frase, \textit{Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: “Proportionality” Relative to What?}, 89 MINN. L. REV. 571, 591 (2005); Richard Frase, \textit{The Warren Court’s Missed Opportunities in Substantive Criminal Law}, 3 OHIO ST. J. CRIM. L. 75, 96 (2005); \textit{see also NORVAL MORRIS, MADNESS AND THE CRIMINAL LAW} 182-87, 196-202 (1982) (explaining the principle of “limiting retributivism” as recognizing an outer limit on desert). Alice Ristrop 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. \textit{See} Alice Ristrop, \textit{Proportionality as a Principle of Limited Government}, 55 DUKE L.J. 263 (2005). And Paul Robison has written about the efficacy of hybrid approaches to distributing punishment. \textit{See} Paul H. Robinson, \textit{Hybrid Principles for the Distribution of Criminal Sanctions}, 82 NW. U. L. REV. 19 (1988).
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\textsuperscript{56} \textit{See} Mary Sigler, \textit{Contradiction, Coherence, and Guided Discretion in the Supreme Court’s Capital Sentencing Jurisprudence}, 40 AM. CRIM. L. REV. 1151 (2003) (exploring the use of retributivism and other punishment theories in the Court’s capital cases); Frase, \textit{Excessive Prison Sentences}, supra note 55, 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); \textit{cf.} Alice Ristrop, \textit{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 \textit{Roper} and \textit{Atkins} are examples of the Court’s use of limiting retributivism); Paul H. Robinson, \textit{The A.L.I.’s Proposed Distributive Principle of “Limiting Retributivism”: Does it Mean Anything in Practice
proportionality principle is exclusively or primarily retributive, and putting 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 the child rapist like Patrick Kennedy is adequate to support not just criminal responsibility but severe punishment, as well.57 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.58 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, and there is no textual, historical, structural, or precedential basis for concluding that the Eighth Amendment constitutionalizes only one kind of harm in determining whether a legally-

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57 Id. at 2676 (Alito, J., dissenting). See also Douglas A. Berman & Stephanos Bibas, Engaging Capital Emotions, 102 NW. U. L. REV. COLLOQUIY 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).

58 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.”).
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.\(^\text{59}\) 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.

\(^{59}\) *See Kennedy*, 128 S. Ct. at 2673-74 (Alito, J., dissenting).
Despite its strengths, however, the dissent fails to adequately challenge the structural integrity of the two-prong framework, and, in particular, the political neutrality of the “independent judgment” rationale. If the objective indicia disfavor a particular practice, why then does it matter what the Court’s independent judgment is? 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 governing in cases like Atkins\(^{60}\) (which created a categorical exemption for the mentally retarded), Roper\(^{61}\) (which created a categorical exemption for offenders under age 18), Coker\(^{62}\) (which created a categorical exemption for persons who rape an adult woman), and now Kennedy.\(^{63}\)

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),\(^{64}\) 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 forty percent of death penalty jurisdictions (fifteen out of thirty-seven) have enacted such legislation, and seven out of thirty-seven (just under twenty percent) enacted capital child rape statutes in recent


\(^{63}\) See Broughton, Second Death, supra note 4, at 651 (discussing the incompatibility of the two-prongs).

\(^{64}\) See id. at 647-51.
years. 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), 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). 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, that the trend was simply not 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.

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


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. 12, 008) (statement of Kennedy, J.).


68 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.”).
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.\textsuperscript{69}

\textit{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.\textsuperscript{70} In this sense, the \textit{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).\textsuperscript{71} In addition, the Court’s concern about the number of executions that “would be allowed under [Louisiana’s] approach” is a curious contradiction.\textsuperscript{72} 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

\textsuperscript{69} 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 2 (U.S. Oct. 1, 2008) (statement of Scalia, J).

\textsuperscript{70} \textit{Kennedy}, 128 S. Ct. at 2665 (Alito, J., dissenting).

\textsuperscript{71} See infra note 96 and accompanying text.

\textsuperscript{72} \textit{Kennedy}, 128 S. Ct. at 2660.
executed for any non-homicide crime since 1963.\textsuperscript{73} If these statistics mean anything, they 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.\textsuperscript{74} 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 \textit{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 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

\begin{flushleft}
\textsuperscript{73} \textit{Id.} at 2657.

\textsuperscript{74} \textit{Id.} at 2660.
\end{flushleft}
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.\textsuperscript{75} And, consistent with this distrust of the ability of jurors to meaningfully distinguish the most culpable and deserving defendants, the \textit{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: narrowing factors are not useful in the child rape context because “[i]n this context, which involves a crime that 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].’”\textsuperscript{76} But the Court makes this determination only because – \textit{only} because – the capital child rape victim did not die.\textsuperscript{77} This distinction seems to lack 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, why (where?) 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-

\textsuperscript{75} For example, the jury must have an adequate vehicle for considering and giving effect to mental deficiency as a mitigating factor, see \textit{Penry v. Johnson (Penry II)}, 532 U.S. 782, 797 (2001), 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. \textit{See Atkins}, 536 U.S. at 321. Youth is a valid mitigating factor that must be within the jury’s reach, see \textit{Johnson v. Texas}, 509 U.S. 350 (1993), 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. \textit{See Roper v. Simmons}, 543 U.S. 551, 578-79 (2005).

\textsuperscript{76} \textit{Kennedy}, 128 S. Ct. at 2660-61 (quoting \textit{Furman v. Georgia}, 408 U.S. 238, 310 (Stewart, J., concurring)).

\textsuperscript{77} \textit{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).
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 lived 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, but 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.\footnote{See Rachel Barkow, Administering Crime, 52 UCLA L. REV. 715, 734 (2005) (recognizing that agencies may not be better at assessing just deserts than legislators, “because legislators represent the moral views of a broader constituency.”); Ristroph, Desert, supra note 56, 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.”).}

The Court largely ignores other legitimate punishment theories that political actors could adopt in responding to the harms caused by child rape and the moral blameworthiness of the child rapist.\footnote{See Sigler, supra note 56, at 1154-61 (discussing the plausible alternatives to retribution as potential justifications for capital punishment); Frase, Excessive Prison Sentences, supra note 55, at 600-01 (briefly assessing whether there could exist a utilitarian alternative to the Court’s retributive proportionality approach).}
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. 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, their heads bent downward and frozen in a lake of ice? It is
not clear that the Court’s assessment of the harm here is the only or the correct one, 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

The Court does add a discussion of why it believes its conclusion is consistent with retributive and
deterrence theories generally, see Kennedy, 128 S. Ct. at 2661-62, but this discussion is of little comfort. 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.

See DANTE, supra note 10, 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 310-24 (Mark Musa, trans. &
ed. 1995).

DANTE, supra note 10, 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.

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that the violence of child rape is deserving of punishment more like that of other violent actors.
second-guessing except where the legislature acts with no plausible, rational basis for that punishment. 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, “we 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.” 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, that the victim’s testimony may be unreliable. 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.

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82 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, Would We Want the Supreme Court to So Rule?, 41 GA. L. REV. 867, 898-902 (2007); see also James Bradley 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 penal 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).

83 Atkins, 536 U.S. at 313; 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).

84 Kennedy, 128 S. Ct. at 2673-74 (Alito, J., dissenting).
The dissent, though, neglects to confront the structural inconsistency of the 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.\(^85\) 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. \textit{Kennedy, Harm, and the Consequences for Other Crimes and Criminals}

\textit{Kennedy} certainly fits into the categorical bar jurisprudence developed in \textit{Atkins}, \textit{Roper}, and \textit{Coker}, and even \textit{Enmund}. The methodology of these cases is virtually identical (though \textit{Coker} was decided before the “national consensus” nomenclature gained common use). A careful study of these cases, though, reveals an important difference among them – while the first prong of the categorical bar approach is similar

\(^{85}\) But see Richard A. Posner, \textit{The Supreme Court, 2004 Term, Foreword: A Political Court}, 119 HARV. L. REV. 31, 47 (2005) (explaining that in \textit{Roper}, the Court’s judgment was akin to that of a legislative body); Benjamin Wittes, \textit{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, \textit{Categorical Exclusions from Capital Punishment: How Many Wrongs Make a Right?}, 72 BROOK. L. REV. 1211 (2007) (questioning whether the rationales of \textit{Atkins} and \textit{Roper} have made the death penalty more just).
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 offense causes.\(^{86}\) 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 that the defendant’s participation is).\(^{87}\) *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.\(^{88}\) 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,

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\(^{86}\) See *Atkins*, 536 U.S. at 318; *Roper*, 543 U.S. at 571.


\(^{88}\) 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.
the individual harm resulting from it, is insufficiently serious to warrant capital punishment.\textsuperscript{89} Why? Because no death has occurred, the Court concludes.\textsuperscript{90} Comparative harm to the victim, as judged by the Court, then, is the linchpin of the \textit{Kennedy} majority’s proportionality analysis.

This leads to my next observation about \textit{Kennedy}, which is that it creates an inevitable route for challenge to all manner of crimes that do not result in death. \textit{Kennedy} exempts not just the crime of aggravated child rape (by civilians, at least) but all non-homicide crimes against the person\textsuperscript{91} – not because a national consensus exists against imposing the death penalty for those crimes (the 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. \textit{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).\textsuperscript{92} But the majority gives us no reason as to why these crimes would not also be subject to the

\textsuperscript{89} \textit{Kennedy}, 128 S. Ct. at 2660. Note that Justice O’Connor’s dissent in \textit{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. \textit{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, \textit{Crime and Culpability}, 1994 J. CONTEMP. LEGAL ISSUES 1 (1994) (arguing for centrality of the culpable act).

\textsuperscript{90} \textit{Kennedy}, 128 S. Ct. at 2660.

\textsuperscript{91} \textit{Id.} at 2659-60.

\textsuperscript{92} \textit{Id.} at 2659. For the federal drug kingpin law, see 18 U.S.C. § 3591(b). Section 3591(b) does not require a culpable act that results in death. \textit{Compare id.} § 3591(a). The capital sentencing proceeding for a drug kingpin offense is governed by 18 U.S.C. § 3592(d), the aggravating factors for which do not require a death-resulting act.
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 I 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),\textsuperscript{93} then there is ample reason to believe that other non-homicide offenses could produce the kind of harm, or harm of sufficient magnitude, to justify capital punishment. But if this is true, then the \textit{Kennedy} Court should have more carefully articulated its harm principle in exempting child rape and other non-homicide crimes, because 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 \textit{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.”\textsuperscript{94} 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.\textsuperscript{95}

\textsuperscript{93} \textit{Kennedy}, 128 S. Ct. at 2659-60.


\textsuperscript{95} 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 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. \textit{See Kennedy v. Louisiana}, No. 07-343, slip. op. at 3 (U.S. Oct. 1, 2008) (statement of Scalia, J.) (“It is difficulty to imagine, however, how rape of a child could sometimes be deserving of death for a soldier but never for a civilian.”).
“Crimes against the state,” of course, 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. 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. 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. But 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, that it is not addressing the constitutionality

96 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 Eiser, The Principle of “Harm” in the Concept of Crime: A Comparative Analysis of the Criminally Protected Legal Interests, 4 DUQUESNE L. REV. 345 (1965) (discussing social harms and the criminal law).

97 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 Significance of Wrongdoing, 1994 J. CONTEMP. LEGAL ISSUES 237-38 (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 89, at 17-23 (offering a critique of social harm theories).
of capital punishment for crimes against the state, it nonetheless invalidates statutes for all non-homicide capital crimes against the person. Yet its 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 forty percent of death penalty jurisdictions have enacted legislation of this kind. 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. And the Court excludes military law from its analysis. So 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. This language looks as if it was designed to make

98 Kennedy, 128 S. Ct. at 2659-60.

99 See supra text and accompanying notes 65-67; see also State v. Kennedy, 957 So.2d 757 (La. 2007), rev’d, 128 S. Ct. 2641 (2008) (reviewing the non-homicide capital crimes throughout the country).

100 Id. at 2650-51.
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.\(^{101}\) So 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. But the problem 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 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.\(^{102}\)

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,


\(^{102}\) *Kennedy*, 128 S. Ct. at 2660.
and that *Tison* permits imposition of the death penalty where there is major participation and reckless indifference to human life. Still, as I have stated already here, *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. So 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. So 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.103 Justice Kennedy explains that “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 non-homicide crimes against individual persons, even including child rape, on the other.”104 But between these two extremes lies a vast territory of serious homicides that, though 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

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103 See id. at 2660.
104 Id. (emphasis added).
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 to allow him time to clean the murder scene and alter the evidence of her killing.\textsuperscript{105} Although Williams is charged with child abuse murder under the federal murder statute,\textsuperscript{106} 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 \textit{Enmund} and \textit{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). But, then again, one would imagine that \textit{Penry I} settled the question of the death penalty's application to the mentally retarded,\textsuperscript{107} and that \textit{Stanford v. Kentucky} settled the question of the death penalty's application to those who kill while under the age of eighteen.\textsuperscript{108} No legislative practice,

\begin{itemize}
\item \textsuperscript{105} United States v. Williams, 2007 WL 2916123 at *1-2 (D. Hawaii Oct. 2, 2007).
\item \textsuperscript{106} See \textit{18 U.S.C. § 1111} (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).
\item \textsuperscript{107} See \textit{Penry v. Lynaugh}, 492 U.S. 302 (1989) (upholding imposition of death penalty for the mentally retarded).
\end{itemize}
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 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?” 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. After *Atkins* and *Roper*, a movement has been afoot of late to create legislative exemptions for the mentally ill, a movement led by the American Bar Association. The Court’s decision in *Panetti v. Quarterman* – although not a

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109 *Kennedy*, 128 S. Ct. at 2676 (Alito, J., dissenting); see also Berman & Bibas, *supra* note 57, at 361-62 (presenting the argument for why some capital child rapes may be more deserving of capital punishment than murder).

categorical exemption case, but rather a case involving a straightforward claim of competence to be executed under *Ford v. Wainwright*\(^{112}\) – helped to shine greater light on the problem of mental illness in the criminal justice system generally, and in capital cases specifically.\(^{113}\) It is likely that constitutional litigation 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

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\(^{111}\) 127 S. Ct. 2842 (2007).

\(^{112}\) 477 U.S. 399 (1986).

\(^{113}\) 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. Quarterman: Is There a "Rational Understanding" of the Supreme Court’s Eighth Amendment Jurisprudence?, 5 Ohio St. J. Crim. L. 285, 299 (2007).
particular exercises of judicial review.\textsuperscript{114} 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.\textsuperscript{115} As Clifford Sloan put it recently in an online debate, “[l]et’s retire the label of ‘activist’ once and for all, and have at it on the issues.”\textsuperscript{116} 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 liberal ‘activists’ battle conservatives committed to ‘judicial restraint’) has grown untenable.”\textsuperscript{117}

Let me concur in part and dissent in part, and explain why cases like \textit{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 commenters on politics, on both sides of the political aisle, often use that terminology as a rhetorical device, though with varying degrees of success.


\textsuperscript{115} \textit{See} Seigel, \textit{supra} note 114; Wasserman, \textit{supra} note 114.


\textsuperscript{117} Seigel, \textit{supra} note 114.
(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). 118 I also take Professor
Seigel’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). 119 But I would add a few caveats to Professor Seigel’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; 120 Justice Scalia
has consistently urged that the Court get out of the substantive due process business 121
and has exerted an effort to extend the political question doctrine to political
gerrymandering cases; 122 the Chief Justice has asserted the need for greater deference in

118 See Klaus Marre, McCain lambastes judicial activism, TheHill.com, May 6, 2008,
http://thehill.com/campaign-2008/mccain-lambastes-judicial-activism-2008-05-06.html; Alan Dershowitz,
dershowitz/reactionary-activism_b_57453.html.

(2007); Broughton, Second Death, supra note 4, at 658.

Rumsfeld, 542 U.S. 507, 582 (Thomas, J., dissenting).

(Scalia, J., concurring in part and dissenting in part); Cruzan v. Director, Missouri Dept. of Health, 497

federal habeas cases involving state prisoners;\textsuperscript{123} and the Court has (though rarely) employed language of deference such as the language that characterized \textit{Gonzales v. Raich}'s recognition of broad federal criminal law powers under the Commerce Clause.\textsuperscript{124} So it is hardly true that all of the Justices have wholly abandoned structural limits on the Court. On the whole, though, it is true that the Court’s \textit{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.\textsuperscript{125}

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

\textsuperscript{123} \textit{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 Anti-Terrorism and Effective Death Penalty Act amendments governing federal habeas relief on the merits); 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).

\textsuperscript{124} \textit{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).

\textsuperscript{125} 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. \textit{See}, e.g., Liebman, \textit{supra} note 82, at 122-30; Scott W. Howe, \textit{The Failed Case for Eighth Amendment Regulation of the Capital Sentencing Trial}, 146 U. PA. L. REV. 795, 796-97 (1998).
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 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.

As I have argued previously, institutional arrangements have special significance for ordering and administering the criminal justice system, where it is those arrangements that enable the government to control the governed and preserve ordered liberty. Courts have a role to play in those arrangements, but that role is necessarily circumscribed, even in the effort to protect our rights. 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. As Rick Garnett has thoughtfully explained, there is much virtue in judicial humility. 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

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126 See Broughton, Second Death, supra note 4, at 662.

127 Id.

128 Kermit Roosevelt III & Richard W. Garnett, Debate, Judicial Activism and its Critics, 155 U. PA. L. REV. PENNUMBRA 112, 119 (2006); see also Posner, supra note 85, at 47 (stating that “judicial modesty is not the order of the day in the Supreme Court.”).
meaningful sense of humility. Moreover, as I have previously argued, the Constitution’s framework, and vision, for responsible citizenship and self-government is compromised when courts narrow the distance between themselves and the political institutions of our Republic.\footnote{Broughton, \textit{Second Death}, supra note 4, at 659-60; ROGER M. BARRUS, ET AL., \textit{THE DECONSTITUTIONALIZATION OF AMERICA} 121-22 (2004).} It is \textit{those} institutions that are designed to filter out and moderate public passions and prejudices, a design that is particularly important when we consider how best to define and punish violent crime.\footnote{Broughton, \textit{Second Death}, supra note 4, at 660; Broughton, \textit{Federative Power}, supra note 119, at 310.} 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 \textit{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 effectively.\footnote{See BARRUS, ET AL., supra note 129, at 112 (“the conviction that judicial officials are also political actors can have undesirable effects on the behavior of citizens”)} As Judge Richard Posner explained of the \textit{Roper} decision, “the Court was doing what a legislature asked to allow the execution of seventeen-year-old murders would be doing: making a political judgment.”\footnote{See Posner, \textit{supra} note 85, at 47.} The same can be said of the Court’s work in \textit{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.\textsuperscript{133} 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 subject to more exacting judicial intervention, when it is imposing harsh penal sanctions for the most brutal of crimes. Indeed, others scholars, like Rachel Barkow, have noted the untenable nature of the Court’s dual-track approach to Eighth Amendment proportionality review.\textsuperscript{134} 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 moralizing has become too appealing in death penalty cases.

Of course, the Constitution’s institutional design also creates responsibilities for our political institutions, which have a duty to deliberate about and act upon the social controls necessary and appropriate for preventing and punishing violent crime. This duty is particularly salient in a time when (at least short term) violent crime rates are rising in many areas of the country,\textsuperscript{135} and when the random and callous brutality ofgang


violence and of violence that is often traced to trafficking in drugs and firearms represent credible and serious threats to domestic security. 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 to serious acts of violence. Yet, notwithstanding the legislative trends toward more severe punishments for violence against children, a careful examination of the national political dialogue of the day – consider, in particular, the 2008 presidential campaign – shows little more than cursory attention to the problem of violent crime\(^\text{136}\) (except, perhaps, to the extent that such criminal activity is connected to concerns about illegal immigration or terrorism – worthy subjects for discussion, to be sure, but distinct problems). This, despite the constitutional authority vested in both the President and the Congress to effect legal reforms relative to criminal justice.\(^\text{137}\) Of

and over a longer period, the rate has actually decreased. Still, even short term increases in violent crime justify a more robust political dialogue about criminal justice policy.

\(^{136}\) See Radley Balko, \textit{Criminal justice unfairly ignored on trial}, Politico.com, July 16, 2008, \url{http://www.politico.com}; Douglas Berman, \textit{Will the 2008 Prez candidates ever seriously discuss modern incarceration realities?}, Sentencing Law & Policy, May 5, 2008, \url{http://www.sentencing.typepad.com/sentencing_law_and_policy/2008/05/will-the-2008-p.html}. But see Remarks by Senator John McCain at National Sheriffs Association, Indianapolis, IN, July 1, 2008, available at \url{http://www.JohnMcCain.com/informing/news/speeches} (discussing various criminal justice policies). Incidentally, both Senator McCain and Senator Barack Obama responded to the Supreme Court’s decision in \textit{Kennedy}, and both condemned the ruling. See Joan Biskupic, \textit{Justices reject death penalty for child rapists – McCain, Obama Both Slam Court Decision}, USAToday.com, June 26, 2008, \url{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 \textit{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 \textit{Kennedy} is that he even stated it in the first place.

\(^{137}\) Although the Rehnquist Court’s judicial enforcement of federalism norms placed significant limits on the Congress’s criminal law-making authority pursuant to the Commerce Clause, see \textit{Lopez v. United
course, governing is always preferred to rhetoric (which is \textit{not} the same thing as governing, though political leaders often confuse it as such), but even the absence of any meaningful dialogue among leading national political actors concerning violent crime, and the appropriate political responses to it, suggests the lack of any serious priorities for criminal justice governance. This state of affairs is not an invitation for courts to fill the void; it is, rather, an invitation for political actors to act. And they will be much less likely to do so if they know, on the one hand, that judges will do their jobs for them, or on the other hand, that judges will simply ignore the reasoned political will of the community and enforce their own will in its stead.\footnote{In the final analysis, then, \textit{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.

\footnote{See \textit{The Federalist No. 78}, at 437 (Alexander Hamilton) ("if [the courts] should be disposed to exercise \textsc{Will} instead of \textsc{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.").}
V. CONCLUSION

The punishment of violent crime is among the most solemn of social and political responsibilities. But it is an unfortunate consequence of modern political life that 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.139 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 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 Punishments 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. So I continue to urge, as I have in this paper, 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 (not one that I am making for purposes of this project, but one capable of being made) that where the crimes involved are non-violent and result in minimal harm,

139 See Broughton, Second Death, supra note 4, at 658-59.
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.

In a 1990 abortion case, *Hodgson v. Minnesota*, Justice Scalia’s separate opinion traced the complex and intricate rules that the Court had developed for abortion cases, noting the fine distinctions the Court had drawn and also noting what Justice Scalia viewed as the absence of any constitutional anchor for those distinctions. He referred to the “random and unpredictable results of our consequently unchanneled individual views,” and concluded, “I continue to dissent from this enterprise of devising an Abortion Code, and from the illusion that we have the authority to do so.”

The same can be said of the Death Penalty Code that the Burger and Rehnquist Courts devised over the course of thirty years, in which 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 reject both the perpetuation of that Code, and the illusion that it has the authority to do so. But if *Kennedy* is any indication (and, as I have explained here, I think it is), let us not hold our

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141 *Id.* at 480 (Scalia, J., concurring in the judgment in part and dissenting in part).
collective breath. 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 tale 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.