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From Weems to Graham: The Curious Evolution of Evolving Standards of Decency

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Since the 1958 case of Trop v. Dulles, the Supreme Court has held that grossly disproportionate punishments are cruel and unusual if they violate “the evolving standards of decency of a maturing society.” Traditionally, this was interpreted as prohibiting capital sentences for certain types of crimes and classes of offenders. More recently, in Graham v. Florida, the Court applied evolving standards to incarceration, banning the sentencing of juveniles who committed non-homicide crimes to life without parole.

This article breaks the Court’s understanding of evolving standards of decency into distinct periods. In each period the justices encountered a host of novel problems that they attempted, and often failed, to resolve. I discuss some additional complications in the wake of Graham, and conclude that this case’s inconsistent holding demands a more objective measure for what constitutes evolving standards of decency.

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by Zachary Baron Shemtob*

I. INTRODUCTION

Few constitutional provisions have split the Supreme Court as consistently as the cruel and unusual punishments clause of the Eighth Amendment. Up until the twentieth-century, the Court exclusively interpreted this provision to ban “inherently barbaric punishments,” or those that involved “torture or a lingering death.”¹ This changed in *Weems v. United States*, where the Court struck a sentence as disproportionate to the crime committed.² Over time, constitutional concerns over disproportionality led to capital punishment’s restriction for certain types of crimes and classes of offenders.³ Most recently, in *Graham v. Florida*, the Court applied evolving standards to incarceration, banning the sentencing of juveniles who committed non-homicide offenses to life without parole.⁴

This article breaks the Court’s understanding of evolving standards of decency into different periods. In each period the justices encountered a host of novel problems that they attempted, and often failed, to resolve. These strains culminated in *Graham v. Florida*, which, by holding that punishments of incarceration and not just capital punishment can violate evolving standards of decency, represents a considerable shift in the Court’s evolving standards jurisprudence.

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¹ See Michi Momose, *A Case for Hope: Examining Graham v. Florida and Its Implications for Eighth Amendment Jurisprudence*, 33 U. HAW. L. REV. 391, 393 (2010).

² *Weems v. United States*, 217 U.S. 349 (1910).

³ See *infra* Parts VI-VII.

⁴ *Graham v. Florida*, 130 S. Ct. 2011 (2010).

I begin by outlining the categories of proportionality review. I then detail *Graham v. Florida*, summarizing this case's four most important opinions. I discuss some remaining issues in the wake of *Graham*, and conclude that it is long past time for the Court to establish a more objective measure regarding what constitutes evolving standards of decency.

II. CASE TYPES

The Supreme Court has reviewed the cruel and unusual clause in three distinct types of cases. The first of these concern the method of punishment. In the 1879 case of *Wilkerson v. Utah*, for example, the Court concluded execution by firing squad was constitutional.⁵ More recently, in *Baze v. Rees*, the Court upheld the three-drug cocktail used in Kentucky's lethal injection procedure.⁶

The second types of cases concern jury discretion and appellate procedure. In the 1973 case of *Furman v. Georgia*, the Supreme Court struck existing capital punishment statutes for being arbitrarily and capriciously imposed.⁷ This led to the establishment of bifurcated trials and a more rigorous appellate review process.⁸ Subsequent case law has considered what mitigating and aggravating factors can be discussed in capital trials,⁹ and what factors are necessary for appellate courts to consider in such cases.¹⁰

The final strain of cases, which are the focus of this article, center around the excessiveness of punishment, or if certain punishments are disproportionate when

⁵ *Wilkerson v. Utah*, 99 U.S. 130 (1879).

⁶ *Baze v. Rees*, 553 U.S. 35 (2008).

⁷ *Furman v. Georgia*, 408 U.S. 238 (1972).

⁸ See STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* 267 (2002).

⁹ See, e.g., *Lockett v. Ohio*, 438 U.S. 586 (1978) (where the Court held that sentencing authorities must be allowed to consider all possible mitigating evidence).

¹⁰ See, e.g., *Herrera v. Collins*, 506 U.S. 390 (1993) (where the Court held that the discovery of new evidence indicating a person's innocence did not mandate federal habeas relief).

imposed for certain crimes or on particular types of offenders. The Court’s jurisprudence has varied considerably here. The following section details the most important cases, and some of the central questions raised in each.

III. THE PROPORTIONALITY QUESTION: *WILKERSON AND O’NEIL*

The first Supreme Court case to interpret the cruel and unusual punishments clause was *Wilkinson v. Utah*. In this case, a plaintiff sentenced to death for murder argued that being executed by firing squad, rather than by the standard method of hanging, was cruel and unusual.¹¹ While a Court majority admitted it difficult to “define with exactness the extent of this “constitutional provision,” it declared this clause strictly “limited to” banning uniquely painful “modes of punishment” such as being drawn and quartered.¹² The Court denied that execution by firing squad reached this level of cruelty, and held Wilkinson’s mode of death constitutional.¹³

Thirteen years later, a separate challenge emerged in *O’Neil v. Vermont*.¹⁴ In this case, John O’Neill was fined and sentenced to nearly eighty years incarceration for selling liquor without a license.¹⁵ While the majority dismissed O’Neill’s claim for lack of jurisdiction,¹⁶ the dissent, written by Justice Field and joined by Justice Harlan, found O’Neil’s punishment disproportionate and therefore unconstitutional.¹⁷ Justice Field admitted that the cruel and unusual provision generally applied to the method of punishment, such as “the rack and thumbscrew,” or those purposely “attended with acute

¹¹ See *Wilkinson*, 99 U.S. at 132.

¹² *Id.* at 135-136.

¹³ *Id.* at 137 (explaining that “other modes besides hanging were sometimes resorted to at common law.”).

¹⁴ 144 U.S. 323 (1892).

¹⁵ *Id.* at 325.

¹⁶ *Id.* at 335 (“[T]he writ of error must be dismissed for want of jurisdiction in this court.”).

¹⁷ *Id.* at 337 (“It [O’Neil’s punishment] was one which, in its severity, considering the offences of which he was convicted, may justly be termed both unusual and cruel.”).

pain and suffering.”¹⁸ Nevertheless, Field believed that the severity of O’Neill’s sentence was an exception, being “six times as great as a court in Vermont could have imposed for manslaughter, forgery or perjury.”¹⁹ While the Justice gave no historical or textual support for why disproportionate punishments were cruel and unusual, he declared O’Neil’s punishment “greatly beyond anything required by any humane law” and the plaintiff worthy of mercy.²⁰

IV. THE BIRTH OF EVOLVING STANDARDS: *WEEMS, TROP, AND ROBINSON*

Field’s dissent was resuscitated eighteen years later in the landmark case of *Weems v. United States*.²¹ In *Weems*, an American citizen serving in the Philippines,²² was sentenced to fifteen years of *cadena* (or hard labor) and imprisonment for falsifying a government document.²³ According to Justice McKenna’s majority, Weems’s punishment had no parallel in American legislation, and was thus cruel and unusual in both its penalty of hard labor and its “excess of imprisonment.”²⁴ McKenna invoked *Ex Parte Wilson*, which addressed the Fifth Amendment’s provision that “no person shall be held to answer for a capital, or infamous crime” without going before a grand jury.²⁵ In this case, the Court held that infamous crimes could change based on swings in “public opinion

¹⁸ *Id.* at 341.

¹⁹ *Id.* at 339.

²⁰ *Id.* at 341.

²¹ *See Weems*, 217 U.S. at 349.

²² Then an American colony.

²³ A cash book.

²⁴ *See Weems*, 217 U.S. at 377.

²⁵ *Ex Parte Wilson*, 114 U.S. 417 (1885).

from one age to another.”²⁶ If infamous crimes could historically vary, McKenna reasoned that cruel and unusual punishments could as well.²⁷

The dissent, written by Justice White and joined by Justice Holmes, refused to extend cruel and unusual punishments beyond their historical moorings.²⁸ White argued that the majority’s opinion was groundless, relying on a separate amendment and a single dissent from nearly two decades previous.²⁹ According to the Justice, the “cruel punishments against which the bill of rights provided were” exclusively “the atrocious, sanguinary, and inhuman punishments which had been inflicted in the past upon the persons or criminals.”³⁰

Nevertheless, *Weems* was invoked as precedent in the 1958 case of *Trop v. Dulles*.³¹ Here the petitioner had been stripped of his American citizenship for wartime desertion.³² The Court, in an opinion written by Chief Justice Warren, found Trop’s penalty grossly “excessive in relation to the gravity of” his crime.³³ Expanding upon *Weems*,³⁴ Warren declared the “basic concept underlying the Eighth Amendment” nothing less than the “dignity of man,” and stripping an individual of his citizenship was “the total destruction of the individual’s status in organized society.”³⁵ While Warren admitted that gauging a punishment’s excessiveness could be difficult, he stated the cruel

²⁶ *Id.* at 427.

²⁷ *See Weems*, 217 U.S. at 379 (“The clause of the Constitution in the opinion of the learned commentators may be therefore progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice.”).

²⁸ *Id.* at 382.

²⁹ *Id.* at 398-99 (“I find it impossible to fix with precision the meaning which the court gives to that provision.”).

³⁰ *Id.* at 389-90.

³¹ 356 U.S. 86 (1958).

³² *See Trop*, 365 U.S. at 87 (“The petitioner in this case, a native-born American, is declared to have lost his United States citizenship and become stateless by reason of his conviction by court-martial for wartime desertion.”).

³³ *Id.* at 99.

³⁴ And echoing Justice Field in *O’Neil*.

³⁵ *Id.* at 100.

and unusual clause must ultimately “draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”³⁶

Justice Frankfurter wrote in dissent.³⁷ According to Frankfurter, Warren’s insistence “that denationalization is cruel and unusual punishment was to stretch that concept beyond the breaking point.”³⁸ Wartime deserters were executed in the republic’s earliest days, a far more serious punishment than the one here under review.³⁹ The Justice opposed the idea that time brought new meaning into the cruel and unusual clause.

Only four years later, in *Robinson v. California*, Frankfurter’s Eighth Amendment originalism was again rejected.⁴⁰ In this case, the plaintiff had been imprisoned based on a California statute making it a criminal offense for persons to “be addicted to the use of narcotics.”⁴¹ The Court was mindful of narcotic trafficking’s “vicious evils,” but found punishing addicts to be an excessive response.⁴² According to Justice Stewart, addiction was more a disease than a criminal offense; “even one day in prison would be a cruel and unusual punishment for the “crime” of having a common cold.”⁴³

V. EVOLVING STANDARDS CODIFIED: *FURMAN AND GREGG*

While *Weems* and *Robinson* had concerned a punishment’s excessiveness for relatively minor crimes, in *Furman v. Georgia* the state’s most serious sanction, the death penalty, was challenged as cruel and unusual. The *Furman* plurality was unwilling to

³⁶ *Id.* at 101.

³⁷ *Id.* at 114.

³⁸ *Id.* at 125.

³⁹ *Id.* at 125 (“It seems scarcely arguable that loss of citizenship is within the Eighth Amendment’s prohibition because disproportionate to an offense that is capital and has been so from the first year of independence.”).

⁴⁰ *Robinson v. California*, 370 U.S. 660 (1962).

⁴¹ *Id.* at 661.

⁴² *Id.* at 668.

⁴³ *Id.*

declare capital punishment per se unconstitutional. The justices were troubled, however, by capital case's lack of sentencing guidelines. According to Justice Douglas, two offenders who committed the exact same crime could face drastically different penalties, with one being executed and the other imprisoned.⁴⁴ States either needed to make capital sentences less capricious, or cease executing people altogether.

Only Justice Brennan, in a concurrence, directly addressed capital punishment's excessiveness.⁴⁵ Brennan cited *Trop*, stating any punishment that violated evolving standards of decency was cruel and unusual.⁴⁶ Brennan argued that social standards could be measured in two ways: First, by analyzing public opinion,⁴⁷ and second, by evaluating if a given punishment served any penological purpose.⁴⁸ According to the Justice, a punishment was not unconstitutional merely for being pointless, but if the same goal could be achieved through less severe means.⁴⁹ Based on these criteria, Brennan found capital punishment to be categorically disproportionate.⁵⁰

Brennan's test would prove critical to the future of proportionality review. Only four years after *Furman*, in *Gregg v. Georgia*,⁵¹ Justice Stewart used a modified version

⁴⁴ See *Furman*, 428 U.S. at 249-250 ("The death penalty is disproportionately imposed and carried out on the poor, the Negro, and the members of unpopular groups.").

⁴⁵ *Id.* at 257.

⁴⁶ *Id.* at 270.

⁴⁷ *Id.* at 278 ("The question under this principle, then, is whether there are objective indicators from which a court can conclude that contemporary society considers a severe punishment acceptable.").

⁴⁸ Brennan's first prong, that punishments must be in accordance with public opinion, was undoubtedly taken from *Weems*, the first Eighth Amendment case to strike a punishment for its rarity. Brennan's penology prong was likely influenced by *Trop* and *Robinson's* holdings that human dignity was violated by pointless punishments. *Id.* at 279 ("If there is a significantly less severe punishment adequate to achieve the purposes for which the punishment is inflicted, the punishment inflicted is unnecessary, and therefore excessive.").

⁴⁹ See *supra* note _ (Of course, whether this necessarily followed from *Trop* and *Robinson* is open to debate).

⁵⁰ *Id.* at 285 ("[D]eath is today a cruel and unusual punishment."). I do not go over Brennan's actual analysis since his methodology was revised by Stewart in *Gregg*.

⁵¹ Which actually consolidated five different cases, being *Gregg v. Georgia*, 428 U. S. 153 (1976), *Proffitt v. Florida*, 428 U.S. 242 (1976), *Jurek v. Texas*, 428 U.S. 262 (1976), *Woodson v. North Carolina*, 428 U.S. 280 (1976), and *Roberts v. Louisiana*, 428 U.S. 325 (1976).

of Brennan’s excessiveness standard to reinstate capital punishment. Stewart’s *Gregg* plurality compromised between the Court’s liberal and conservative wings. The Court’s liberals, led by Justice Brennan, argued, as they had in *Furman*, that capital punishment violated evolving standards of decency.⁵² The more conservative justices dismissed evolving standards altogether, arguing that capital punishment had been practiced since the nation’s founding and was therefore *prima facie* constitutional.⁵³ Stewart split the difference, accepting the need to gauge evolving standards of decency but finding that this test, contrary to Brennan’s contentions, actually supported upholding the death penalty.

According to Justice Stewart,

When a form of punishment in the abstract (in this case, whether capital punishment may ever be imposed as a sanction for murder) rather than in the particular (the propriety of death as a penalty to be applied to a specific defendant for a specific crime) is under consideration, the inquiry into “excessiveness” has two aspects:⁵⁴

First, the penalty must be supported by the public, and second, “the punishment must not involve the unnecessary and wanton infliction of pain.”⁵⁵ In order to determine public support, Stewart considered two factors: (1) how many states allowed the punishment under review,⁵⁶ and (2) how many juries actively imposed this punishment.⁵⁷

⁵² *Id.* at 230 (“[T]he punishment of death, like punishments on the rack, the screw, and the wheel, is no longer morally tolerable in our civilized society.”).

⁵³ *See, e.g., Woodson*, 428 U.S. at 308 (1976) (Rehnquist, J., dissenting) (“As an original proposition, it is by no means clear that the prohibition against cruel and unusual punishments embodied in the Eighth Amendment... was not limited to those punishments deemed cruel and unusual at the time of the adoption of the Bill of Rights.”).

⁵⁴ *See Gregg*, 428 U.S. at 173.

⁵⁵ *Id.*

⁵⁶ *Id.* at 179-80 (“The most marked indication of society’s endorsement of the death penalty for murder is the legislative response.”).

⁵⁷ *Id.* at 181 (“[T]he jury also is a significant and reliable objective index of contemporary values because it so directly involved.”).

Furthermore, like Brennan, Stewart demanded that punishments needed a clear penological purpose to be constitutional.⁵⁸

At first glance, Stewart's test would seem nearly identical to Brennan's. Both justices stressed the importance of public opinion and the need for punishments to have a penological goal. Brennan and Stewart also required both prongs be met for a sentence to be upheld. The justices' difference lay in what counted as penologically sufficient. According to Brennan, a given punishment was unconstitutional if its goal could be accomplished through less severe means.⁵⁹ Justice Stewart refused to "invalidate a category of penalties" merely "because we deem less severe penalties adequate to serve the ends of penology."⁶⁰ In *Gregg*, for example, Stewart found that society's felt need for retribution and capital punishment's likelihood to deter some murderers were more than adequate to satisfy this prong.⁶¹

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Justice Stewart's test, like Brennan's, left a great deal of questions. First was how many legislative enactments or jury decisions were needed to demonstrate a national consensus.⁶² Second, deciphering a punishment's penological purpose required justices to evaluate policy rather than law, a task they were not obviously qualified to take on.

Finally, the nature of Stewart's distinction between "abstract" and "particular"

⁵⁸ *Id.* at 182 ("[T]he sanction imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering.").

⁵⁹ *See supra* note ____.

⁶⁰ *See Gregg*, 428 U.S. at 182-83.

⁶¹ *Id.* at 187 ("[T]he moral consensus concerning the death penalty and its social utility as a sanction, require us to conclude, in the absence of more convincing evidence, that the infliction of death as a punishment for murder is not without justification.").

⁶² At the time of *Gregg*, at least thirty-five states allowed capital punishment, constituting a clear national consensus to Stewart. *See Gregg*, U.S. 428 at 179-180 ("The legislatures of at least 35 States have enacted new statutes that provide for the death penalty."). Brennan tacitly agreed with this, but nevertheless found capital punishment unconstitutional in violating the penology prong.

punishments, and why they required separate standards of proportionality review, went unaddressed.

VI. EVOLVING STANDARDS AND TYPES OF CRIMES: *COKER, ENMUND, TISON, AND KENNEDY*

Coker v. Georgia was the first case to evaluate evolving standards for non-homicide offenses.⁶³ In this case, the plaintiff contended that capital punishment was disproportionate for the crime of rape.⁶⁴ The Court, in an opinion written by Justice White, agreed. First, of the sixteen states in which rape had been a capital offense prior to 1972, only three kept these statutes in place following *Furman*.⁶⁵ Furthermore, in nine out of ten cases, juries refused to impose the death sentence for this crime.⁶⁶ Regarding the penological prong, White argued that executing rapists was overly retributive. While rape was unquestionably a serious crime, life was not over for the victim.⁶⁷ Executing the rapist, however, was irrevocable.

Justice Powell concurred in the judgment but dissented in part.⁶⁸ Powell agreed that rape was disproportionate in most cases, but felt that the Court overstepped its boundaries by issuing a categorical ruling.⁶⁹ In Powell's view, some violent rapes were

⁶³ *Coker v. Georgia*, 433 U.S. 584 (1977).

⁶⁴ *Id.* at 586 (“Coker was granted a writ of certiorari...that the punishment of death for rape violates the Eighth Amendment.”).

⁶⁵ *Id.* at 594.

⁶⁶ *Id.* at 597.

⁶⁷ *Id.* at 598 (“Life is over for the victim of the murderer; for the rape victim, life may not be nearly so happy as it was, but it is not over and normally is not beyond repair.”).

⁶⁸ *Id.* at 601.

⁶⁹ *Id.* at 601 (“In an opinion that ranges well beyond what is necessary, it holds that capital punishment *always*—regardless of the circumstances—is a disproportionate penalty for the crime of rape.”).

potentially heinous enough to warrant a death penalty,⁷⁰ and a clear national consensus had not yet emerged to suggest otherwise.⁷¹

Chief Justice Burger dissented.⁷² While skeptical of Stewart's evolving standards of decency test, the Chief Justice accepted *Gregg* as precedent.⁷³ Going beyond Powell, however, Burger thought it premature to declare a national consensus existed against executing rapists at all.⁷⁴ The Chief Justice also contended that executing such offenders had a penological purpose. According to Burger, the ultimate penalty potentially deterred such "serious and increasing" dangers to "public safety."⁷⁵

Coker was invoked as precedent five years later in *Enmund v. Florida*, where the Court banned capital punishment for the crime of felony murder during the course of a robbery.⁷⁶ Justice White, once again writing for the majority, observed that only eight states allowed the death penalty for "participation in a robbery in which another robber takes a life."⁷⁷ Furthermore, since 1954, juries had only sentenced a non-triggerman to death in six out of 362 cases.⁷⁸ Regarding the penology prong, White argued that retribution was inherently linked to culpability; if one did not intend to kill his or her victim it was excessive to have him or her executed.⁷⁹ White also dismissed the

⁷⁰ *Id.* at 604 ("It may be that the death penalty is not disproportionate for the crime of aggravated rape.").

⁷¹ *Id.* at 604 ("It has not been shown that society finds the penalty disproportionate for all rapes.").

⁷² *Id.* at 605.

⁷³ *Id.* ("I accept that the Eighth Amendment's concept of disproportionality bars the death penalty for minor crimes.").

⁷⁴ *Id.* at 618 ("The question of whether the death penalty is an appropriate punishment for rape is surely an open one.").

⁷⁵ *Id.* at 621.

⁷⁶ *Enmund v. Florida*, 458 U.S. 782 (1982).

⁷⁷ *Id.* at 789.

⁷⁸ *Id.* at 794.

⁷⁹ *Id.* at 798 ("Enmund did not kill or intend to kill, and thus his culpability is plainly different from that of the robbers who killed; yet the State treated them alike, and attributed to Enmund the culpability of those who killed... This was impermissible under the Eighth Amendment").

possibility that executing such offenders would “measurably deter one who does not kill and has no intention” of doing so.⁸⁰

The issue of felony murder resurfaced in *Tison v. Arizona*.⁸¹ In this case, the plaintiff had participated in a violent crime resulting in someone’s death, but had not committed the murder himself.⁸² Justice O’Connor, writing for the majority, concluded that the plaintiff’s offense could merit the death penalty.⁸³ O’Connor first argued that *Enmund* did not categorically eliminate executions for all types of felony murder.⁸⁴ She then performed a cursory review of evolving standards.⁸⁵ The Justice observed that a majority of states allowed capital punishment for the plaintiff’s offense.⁸⁶ O’Connor concluded that a death sentence was not overly retributive given Tison’s “reckless disregard for human life.”⁸⁷

Kennedy v. Louisiana was the most recent case to consider whether capital punishment was disproportionate for an abstract type of crime.⁸⁸ Although *Coker v. Georgia* had explicitly banned executing offenders who raped adults, this ruling left it unclear if offenders could be executed for child rape. Justice Kennedy wrote for the majority, holding that sentencing these offenders to death was unconstitutional.⁸⁹

Kennedy first observed that only six of thirty-six death penalty states (plus the Federal

⁸⁰ *Id.* at 799.

⁸¹ 481 U.S. 137 (1987).

⁸² *Id.* at 138 (“The question presented is whether the petitioners’ participation in the events leading up to and following the murder of four members of a family makes the sentences of death imposed by the Arizona courts constitutionally permissible although neither petitioner specifically intended to kill the victims and neither inflicted the fatal gunshot wounds.”).

⁸³ *Id.* at 151 (“Only a small minority of those jurisdictions imposing capital punishment for felony murder have rejected the possibility of a capital sentence absent an intent to kill, and we do not find this minority position constitutionally required.”).

⁸⁴ *Id.*

⁸⁵ *Id.* at 152-53.

⁸⁶ *See supra* note ____.

⁸⁷ *Id.* at 157.

⁸⁸ *Kennedy v. Louisiana*, 128 S. Ct. 2641 (2008).

⁸⁹ *Id.* at 2645.

Government) specifically allowed the death penalty for child rapists.⁹⁰ Furthermore, no individual had been executed for this crime since 1964, with Louisiana the only state since *Coker* to even sentence such an offender to death.⁹¹

Justice Kennedy admitted that he was uncertain if executing child rapists served the goals of retribution or deterrence.⁹² The Justice hinted that some child rapes could be so heinous as to potentially deserve the ultimate sanction.⁹³ Children’s unreliable testimony, however, was too subject to “fabrication and exaggeration” to risk the defendant’s life upon.⁹⁴ As for the matter of deterrence, Kennedy contended this policy could actually encourage homicides: The Justice speculated that child rapists might murder their victims in order to better their chances of never being caught and put to death.⁹⁵

Justice Alito’s *Kennedy* dissent echoed Burger’s in *Coker*.⁹⁶ According to Alito, state legislatures did not actually oppose executing child rapists. Rather, they were unsure if *Coker* had banned capital punishment for all rapists or merely those involving adults.⁹⁷ Furthermore, in the last few years five states had made committing child rape a capital crime, actually indicating a growing national consensus *for* executing child rapists.⁹⁸ Alito admitted that jury results were mixed, but noted that Louisiana had sentenced two

⁹⁰ *Id.* at 2653.

⁹¹ *Id.* at 2657.

⁹² *Id.* at 2662 (“It cannot be said with any certainty that the death penalty for child rape serves no deterrent or retributive function.”).

⁹³ *Id.* at 2663 (“Capital punishment does bring retribution, and the legislature here has chosen to use it for this end.”).

⁹⁴ *Id.* at 2663.

⁹⁵ *Id.* at 2664 (“A state that punishes child rape by death may remove a strong incentive for the rapist not to kill the victim.”).

⁹⁶ *Id.* at 2665.

⁹⁷ *Id.* at 2668 (“The *Coker* dicta gave state legislators 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 reliable.”).

⁹⁸ *Id.* at 2669 (pointing out that this “message is very different from the one that the Court perceives.”).

of four, or 50%, of such offenders to death.⁹⁹ In the Justice's view, it was premature to declare that a national consensus had developed either for or against executing child rapists.¹⁰⁰

Regarding the penology prong, Alito acknowledged that murder represented a "unique harm."¹⁰¹ Nevertheless, raping a child could result in victims so brutally injured that life was effectively beyond repair.¹⁰² The Justice cited studies indicating as many as 40% of sexual abuse victims became "seriously disturbed" and were far more likely to commit sex crimes as adults than the average citizen.¹⁰³ Finally, Alito attacked Kennedy's claim that juries were unable to distinguish between child rapists who did and did not deserve to die, contending it was legislatures' role, and theirs alone, to take such considerations into account.¹⁰⁴

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Coker, Enmund, Tison, and Kennedy, like *Furman* and *Gregg* before them, left numerous issues unresolved. The Court was consistent in striking or upholding capital statutes held by at least half the states, or when rarely imposed by juries. What constituted a national consensus in either department, however, remained unclear.¹⁰⁵ Also unclear was the time span in which such a consensus was to be gauged: indeed, if a penalty increases in frequency, as in *Kennedy*, this would caution against treating public opinion as any sort of fixed variable.

⁹⁹ *Id.* at 2672.

¹⁰⁰ *Id.* ("Neither Congress nor juries have done anything that can plausibly be interpreted as evidencing the "national consensus" that the Court perceives.").

¹⁰¹ *Id.* at 2776.

¹⁰² *Id.* at 2677 (quoting *Coker* that "[s]ome victims are so grievously injured physically or psychologically that life is beyond repair.").

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 2677 ("The Court provides no cogent explanation for why this legislative judgment should be overridden.").

¹⁰⁵ 25 states? 26 States? What percentage of juries?

The Court's treatment of the penology prong, or what counts as satisfying the goals of punishment, was even more mystifying. In *Coker* the majority only addressed the goal of retribution, never considering whether executing rapists had a deterrent aspect. Furthermore, while deterrence played some role in the majority's *Kennedy* reasoning, this was based on the Court's a priori judgment rather than any empirical analysis. Indeed, this subjective aspect of gauging evolving standards was even clearer in the Court's decisions to not only ban the death penalty for types of crimes, but entire classes of offenders.

VII. EVOLVING STANDARDS AND CLASSES OF OFFENDERS: *FORD, THOMPSON, STANFORD, ROPER, PENRY, AND ATKINS*

In *Ford v. Wainwright* the Supreme Court expanded its proportionality analysis to include abstract classes of offenders, finding it unconstitutional to execute people who had gone insane while in prison.¹⁰⁶ The majority opinion, written by Justice Marshall, argued that executing such defendants violated both prongs of the evolving standards test. First, no jurisdiction allowed sentencing the mentally insane to death.¹⁰⁷ Second, executing such individuals served no discernible retributive or deterrence purpose.¹⁰⁸ By the very definition of their illness, Marshall argued the insane were neither responsible for their actions nor rational enough to be deterred.¹⁰⁹

The following year the Court took age into account, considering in *Thompson v. Oklahoma* whether capital punishment was constitutional for defendants sixteen and

¹⁰⁶ *Ford v. Wainwright*, 477 U.S. 399 (1986).

¹⁰⁷ *Id.* at 399.

¹⁰⁸ *Id.* at 409.

¹⁰⁹ *Id.* (“The natural abhorrence civilized societies feel at killing one who has no capacity to come to grips with his own conscience or deity is still vivid today.”).

under.¹¹⁰ Justice Stevens, writing for the majority, observed that most legislatures had established no minimum age for imposing the death penalty.¹¹¹ Nevertheless, among the eighteen that had established a threshold, none allowed the execution of anyone under sixteen.¹¹² Jury behavior also indicated hesitancy in sentencing such individuals to death: Stevens admitted that it was impossible to know with any certainty how many persons under sixteen had been executed in the twentieth century, but cited a scholar's work finding the number to be a paltry eighteen to twenty.¹¹³

Regarding the penology prong, Stevens first questioned the retributive aspect of sentencing such young offenders to death.¹¹⁴ The Justice contended that retribution was predicated around punishing fully culpable actors.¹¹⁵ Children's general inability to consider the full consequences of their actions, however, combined with their heightened emotional state, significantly reduced their culpability.¹¹⁶ For these reasons, deterrence was also inapplicable: According to Stevens, the idea of most sixteen-year olds making detailed cost-benefit analyses of their actions was "so remote as to be virtually non-existent".¹¹⁷

¹¹⁰ *Thompson v. Oklahoma*, 487 U.S. 815 (1988).

¹¹¹ *Id.* at 826 ("Most state legislatures have not expressly confronted the question of establishing a minimum age for imposition of the death penalty.").

¹¹² *Id.* at 829 ("When we confine our attention to the 18 States that have expressly established a minimum age in their death penalty statutes, we find that all of them require that all of them require that the defendant have attained at least the age of 16 of the time of the capital offense.").

¹¹³ *Id.* at 832. This is out of a total of approximately 6,000 executions. See ProCon.org, *US Executions from 1608-2002: A Demographic Breakdown of the Executed Population*, <http://deathpenalty.procon.org/view.resource.php?resourceID=004087>.

¹¹⁴ *Id.* at 833.

¹¹⁵ *Id.* at 834 ("It is generally agreed "that punishment should be directly related to the personal culpability of the criminal defendant.").

¹¹⁶ *Id.* at 835 ("Less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult...Inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult.").

¹¹⁷ *Id.* at 837-38.

The dissent, written by Justice Scalia, challenged Stevens's argument point-by-point.¹¹⁸ Scalia admitted that defendants under sixteen were rarely executed.¹¹⁹ This demonstrated nothing to Scalia, however, other than society's belief that only the most heinous of these individuals deserved to die.¹²⁰ Nor were juveniles always irresponsible for their actions: While Scalia admitted that some of these individuals might lack the requisite level of maturity, this was for juries rather than justices to decide upon.¹²¹

Scalia's view triumphed only two years later in *Stanford v. Kentucky*, where the Court found executing those under the age of eighteen to be constitutional.¹²² Scalia, writing for the majority, observed that of the thirty-seven death penalty states, over half permitted executing persons under the age of seventeen.¹²³ The Justice acknowledged that such executions were rare.¹²⁴ As he had before, however, Scalia contended that this reflected societies' belief that juveniles should *rarely*, rather than *never*, be put to death.¹²⁵ Scalia dismissed the penology prong altogether. In the Justice's view, such an analysis relied too heavily on justice's subjective opinions regarding the ends of criminal justice, and was therefore not even worthy of consideration.¹²⁶

¹¹⁸ *Id.* at 859.

¹¹⁹ *Id.* at 870 ("In this century all of the 18 to 20 executions of persons below 16 when they committed crimes occurred before 1948.").

¹²⁰ *Id.* at 871 ("The statistics of executions demonstrate nothing except the fact that our society has always agreed that executions of 15-year old criminals should be rare, and in more modern times has agreed that they (like all other executions) should be rarer still.").

¹²¹ *Id.* ("There is no justification except our own predilection for converting a statistical rarity of occurrence into an absolute constitutional ban.").

¹²² *Stanford v. Kentucky*, 492 U.S. 361 (1989).

¹²³ *Id.* at 371.

¹²⁴ *Id.* at 374 ("[T]he last execution of a person who committed a crime under 17 year of age occurred in 1959.").

¹²⁵ *Id.* ("It is not only possible, but overwhelmingly probably, that the very considerations which induce petitioners and their supporters to believe that death should *never* be imposed on offenders under 18 cause prosecutors and juries to believe that it should *rarely* be imposed.").

¹²⁶ *Id.* at 379 ("[F]or us to judge...on the basis of what we think 'proportionate' and 'measurably contributory to acceptable goals of punishment'...is to replace judges of the law with a committee of philosopher kings.").

Scalia's *Stanford* opinion held for nearly two decades, before formally being overturned in *Roper v. Simmons*.¹²⁷ According to Justice Kennedy's majority, executing capital defendants under the age of eighteen was now grossly disproportionate.¹²⁸ Kennedy observed that twenty states allowed juveniles to be executed, but countered that this event rarely occurred.¹²⁹ Furthermore, Kennedy contended that executing juveniles served no relevant penological purpose.¹³⁰ While Kennedy admitted that certain juveniles were morally culpable, he doubted that juries could adequately distinguish the appropriate levels of maturity.¹³¹ As Kennedy concluded, "the age of eighteen" was where society "draws the line for many purposes between childhood and adulthood, and this age is where "death eligibility ought to rest."¹³²

Predictably, Justice Scalia assailed the majority's logic.¹³³ According to Scalia, there was clearly no national consensus against executing juveniles when over 50% of death penalty states permitted this.¹³⁴ The Justice also attacked the majority's categorical ruling. To Scalia, the contention that juries were incapable of separating culpable from

¹²⁷ 543 U.S. 551 (2005).

¹²⁸ *Id.* at 555.

¹²⁹ *Id.* at 564-65 ("[E]ven in the 20 States without a formal prohibition on executing juveniles, the practice is infrequent.").

¹³⁰ *Id.* at 572 ("[N]either retribution nor deterrence provides adequate justification for imposing the death penalty on juvenile offenders.").

¹³¹ *Id.* at 573-4 ("It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption... If trained psychiatrists with the advantage of clinical testing and observation refrain... from assessing any juvenile under 18 as having antisocial personality disorder, we conclude that States should refrain from asking jurors to issue a far greater condemnation—that a juvenile offender merits the death penalty.").

¹³² *Id.* at 574.

¹³³ *Id.* at 607. Justice O'Connor took a more moderate position, agreeing juveniles' youth made them less culpable than adult offenders, but refusing to categorically hold all juveniles ineligible for the death penalty. *Id.* at 587.

¹³⁴ *Id.* at 609 (Or, as Scalia more colorfully put it, "Words have no meaning if the views of less than 50% of death penalty States can constitute a national consensus.").

inculpable juveniles was both empirically specious and an example of judicial overreach.¹³⁵

The Court's proportionality review of the mentally handicapped has engendered similar divisions. In *Penry v. Lynaugh*, the Court found executing mentally retarded offenders to be constitutional.¹³⁶ Justice O'Connor, writing for the Court majority, observed that only a single state specifically banned executing this class of offenders.¹³⁷ While O'Connor conceded that certain mentally retarded persons undoubtedly had diminished culpability, she felt this was a mitigating factor best left to jury discretion.¹³⁸

Penry was reversed thirteen years later in *Atkins v. Virginia*.¹³⁹ In an opinion written by Justice Stevens and joined by both Justices O'Connor and Kennedy, the Court now ruled a national consensus existed against executing the mentally handicapped.¹⁴⁰ Stevens observed that, while a majority of death penalty states did not specially disallow this practice, there was a clear and consistent trend against it.¹⁴¹ First, nearly ten states had banned executing the mentally handicapped since *Penry*.¹⁴² Second, even among states that allowed such executions, only five had any offenders on death row with IQs less than seventy.¹⁴³

¹³⁵ *Id.* at 620-21 ("This assertion is based on no evidence.").

¹³⁶ *Penry v. Lynaugh*, 492 U.S. 302 (1989).

¹³⁷ *Id.* at 333.

¹³⁸ *Id.* at 340 ("So long as sentencers can consider and give effect to mitigating evidence of mental retardation in imposing sentence, an individualized determination whether "death is the appropriate punishment" can be made in each particular case.").

¹³⁹ 536 U.S. 304 (2002).

¹⁴⁰ *Id.* at 306.

¹⁴¹ *Id.* at 315 ("It is not so much the number of these States that is significant, but the consistency of the direction of change.").

¹⁴² *Id.*

¹⁴³ *Id.* at 316. Seventy being the cut-off point where one was considered mentally handicapped.

The majority of Justice Stevens’s opinion discussed the penological prong of evolving standards.¹⁴⁴ According to the Justice, the mentally handicapped, like juveniles, were clearly less culpable than average citizens, and executing them was therefore unduly retributive.¹⁴⁵ Regarding the goal of deterrence, Stevens argued that the “same cognitive and behavioral impairments that make these defendants less morally culpable” lessened, if not eliminated, any deterrent effect such executions might have.¹⁴⁶ While Stevens hinted that not all the mentally handicapped lacked such culpability, he nevertheless found it necessary to draw a categorical line.¹⁴⁷ Like Kennedy in *Roper*, the Justice argued that only a full ban on executing the mentally handicapped could ensure juries would not mistakenly execute the undeserving.¹⁴⁸

Scalia wrote for the dissenters,¹⁴⁹ labeling the majority’s use of evolving standards a “*post hoc* rationalization” for their subjectively “preferred result.”¹⁵⁰ First, Scalia declared it nothing short of “miraculous” that the Court could, once again, forge a national consensus from a practice allowed in more than half of death penalty states.¹⁵¹ Second, the Justice noted that the Court’s reliance on the “direction of change” was an entirely novel standard, based in neither previous precedent nor on any plausible textual interpretation.¹⁵² Finally, Scalia repeated his earlier contention that juries’ decision to

¹⁴⁴ *Id.* at 318.

¹⁴⁵ *Id.* at 319 (“The lesser culpability of the mentally retarded offender surely does not merit that form of retribution.”).

¹⁴⁶ *Id.* at 320.

¹⁴⁷ *Id.* at 321.

¹⁴⁸ *Id.* (“The risk “that the death penalty will be imposed in spite of factors which may call for a less severe penalty”...is enhanced...by the lesser ability of mentally retarded defendants to make a persuasive showing of mitigation.”).

¹⁴⁹ *Id.* at 337.

¹⁵⁰ *Id.* at 322.

¹⁵¹ *Id.* at 342.

¹⁵² *Id.* at 345.

infrequently impose capital punishment on a class of offenders merely implied that they felt this penalty should be reserved for the most heinous of them.¹⁵³

Regarding the penology prong, Scalia questioned the correlation between deservedness and culpability.¹⁵⁴ While the Justice admitted that mentally handicapped offenders might have reduced culpability, this did not logically entail they were morally blameless.¹⁵⁵ Regardless, Scalia argued these were matters for juries, not justices, to decide upon.¹⁵⁶

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The Court's criterion for dealing with proportionality review for classes of offenders is not altogether clear. *Thompson v. Oklahoma* was the first case to abolish a capital statute found in the majority of states, basing its holding on the infrequency of jury decisions. In *Atkins*, the Court argued that legislative trends were most relevant in gauging a national consensus.¹⁵⁷ Left uncertain was how much movement was needed here, and in what time frame this evaluation should take place. Regarding the infrequency of juries' decisions to execute certain classes of offenders, the majority failed to address Scalia's belief that this was the result of careful discretion rather than uniform disapproval.

The Court's use of the penology prong also went under-explained. First, the Court never detailed why offenders must be *fully* culpable for their punishment to be properly retributive (or how to gauge this.) Regarding deterrence, even if executing juveniles and

¹⁵³ *Id.* at 347.

¹⁵⁴ *Id.* at 350 (“Is there an established correlation between mental acuity and the ability to conform one’s conduct to the law in such a rudimentary manner as murder?”).

¹⁵⁵ *Id.* (“In my experience, the opposite is true: being childlike generally suggests innocence rather than brutality.”).

¹⁵⁶ *Id.* at 354 (quoting Matthew Hale, “The best method of trial, that is possible, of this and all other matters of fact, namely, by a jury of twelve men.”).

¹⁵⁷ As they would later do in *Kennedy*.

the mentally handicapped failed to deter members of these groups, why should it have no impact on “regular” offenders? Why must deterrence have a strictly internal relationship here? The majority’s defense of a categorical ruling was even sketchier, again providing only vague justifications for juries’ incapability of separating deserving from undeserving offenders.

Scalia’s dissents also come off as somewhat disingenuous. Why should a self-proclaimed originalist respect the evolving standards test at all?¹⁵⁸ The Justice seems to want it both ways, criticizing evolving standards foundations while contending only he applies it with the proper rigor.

VIII. PROPORTIONALITY AND INCARCERATION, ROUND I: *RUMMEL AND SOLEM*

As the Court expanded its evolving standards jurisprudence to capital offenders, it also began to consider proportionality requirements for incarceration. A plain reading of *Gregg v. Georgia* would indicate that evolving standards applied equally to capital and non-capital offenses. Here Justice Stewart drew his line of demarcation between punishment in “the abstract” (punishment imposed for a general sanction) and in “the particular” (punishment imposed on a specific defendant for a specific crime.)¹⁵⁹ Indeed, the earliest cases to challenge punishments’ disproportionately, *O’Neil* and *Weems*, revolved around excessive prison terms.

Nevertheless, in *Rummel v. Estelle* a Court majority led by Justice Rehnquist effectively restricted proportionality review to capital cases.¹⁶⁰ In this case, a plaintiff had been given a life sentence under Texas’s three strikes laws for his third offense of

¹⁵⁸ See generally Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CINN. L. REV. 849 (1988-1989).

¹⁵⁹ See *supra* note __.

¹⁶⁰ 445 U.S. 263 (1980).

obtaining \$120.75 under false pretenses.¹⁶¹ According to Justice Rehnquist, the plaintiff's punishment was constitutional; incarceration did not automatically trigger any sort of proportionality requirement.¹⁶²

According to the Chief Justice, capital punishment "differs in kind from any sentence of imprisonment."¹⁶³ For this reason, it "offered limited assistance in deciding" the constitutionality of incarceration.¹⁶⁴ Rehnquist further contended that *Weems* was primarily concerned with the defendant's sentence of hard labor rather than his excessive imprisonment.¹⁶⁵ And while Rehnquist acknowledged that some sentences of incarceration could be so outrageous to be disproportionate, he argued these instances should be "exceedingly rare."¹⁶⁶

Justice Powell dissented, arguing that proportionality review had nothing to do with capital punishment's unique nature.¹⁶⁷ In Powell's view, Rehnquist misinterpreted *Weems*: The *Weems* Court concerned itself with both the plaintiff's length of imprisonment *and* his sentence of hard labor.¹⁶⁸ Furthermore, nothing in the Court's precedent suggested "principles of disproportionality" applicable only to capital cases."¹⁶⁹ Powell thus formulated a narrowed evolving standards of decency test for cases of

¹⁶¹ *Id.* at 263.

¹⁶² *Id.* at 264.

¹⁶³ *Id.* at 272. *Rummel* was invoked as precedent two years later in *Hutto v. Davis*, 452 U.S. 370 (1982), where the Court found that a prison term of 20 years for nine ounces of marijuana possession did not trigger any sort of proportionality review.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 273-4 ("Its finding of disproportionality cannot be wrenched from the extreme facts of that case... The opinion consistently referred jointly to the length of imprisonment and its "accessories" or "accompaniments."").

¹⁶⁶ *Id.* at Fn. 11 (For example, if someone was sentenced to life imprisonment for overtime parking).

¹⁶⁷ *Id.* at 285.

¹⁶⁸ *Id.* at 289-90 ("The Court was attentive to the methods of punishment, but its conclusion did not rest solely upon the nature of the punishment.").

¹⁶⁹ *Id.* at 292-3.

imprisonment:¹⁷⁰ According to Powell, the Court should first consider whether the crime under review seems prima facie “grossly disproportionate” to the punishment meted out.¹⁷¹ Second, the Court should compare the sentence imposed for the same crime in other jurisdictions.¹⁷² Finally, the Court should compare the sentence imposed in the same jurisdiction.¹⁷³ If a sentence violated all three prongs, it was grossly disproportionate and therefore cruel and unusual.¹⁷⁴

Only three years later, Powell was able to command a Court majority in *Solem v. Helm*.¹⁷⁵ In this case, the plaintiff was sentenced to life without parole for his seventh non-violent offense.¹⁷⁶ Powell first reviewed the nature of the defendant’s seventh crime, that of passing a fake check.¹⁷⁷ According to the Justice, this was “one of the most passive felonies a person could commit,” and Helm’s resulting sentence of “life without parole” was therefore prima facie disproportionate.¹⁷⁸ Intra-jurisdictionally, Powell could find no other offender in South Dakota punished as harshly for such a minor crime.¹⁷⁹ Powell next compared the plaintiff’s sentence in South Dakota to those in other jurisdictions.¹⁸⁰ According to the Justice, Helm’s harsh sentence was only possible in two of fifty states, making his punishment inter-jurisdictionally excessive.¹⁸¹ Based on these criteria, Powell concluded that Helm’s sentence was cruel and unusual.¹⁸²

¹⁷⁰ *Id.* at 295.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ 463 U.S. 277 (1983).

¹⁷⁶ *Id.* at 280.

¹⁷⁷ *Id.* at 296.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 298 (“No other crime was punishable so severely on the first offense.”).

¹⁸⁰ *Id.* at 299.

¹⁸¹ *Id.* at 300-01.

¹⁸² *Id.* at 303.

Chief Justice Burger, joined by Justice Rehnquist, wrote in dissent.¹⁸³ According to Burger, the lesson from *Rummel* was simple: “the Eighth Amendment did not authorize courts to review sentences of *imprisonment* (emphasis his) to determine whether they were “proportional” to the crime.”¹⁸⁴ Burger stated that doing otherwise usurped legislative power, launching the Court into “uncharted and uncharitable waters.”¹⁸⁵ Tempting as it may be, the Court had no business “overruling the considered actions of legislatures.”¹⁸⁶

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Regarding whether *Weems* applied proportionality review to non-capital cases, most constitutional scholars have sided with Powell over Rehnquist and Burger.¹⁸⁷ Less clear is why such cases require a narrower standard of review. If the reason for Powell’s modified standards of decency test is that death is different, Justice Powell effectively concedes Rehnquist’s and Burger’s point. Yet Powell makes it clear that the issue of disproportionality applies to both capital and noncapital sentences, seemingly in equal measure. In doing so, however, he fails to clarify what element of these punishments triggers different tiers of proportionality review.

¹⁸³ *Id.* at 304.

¹⁸⁴ *Id.* at 307.

¹⁸⁵ *Id.* at 315.

¹⁸⁶ *Id.* at 317.

¹⁸⁷ See, e.g., John F. Stinneford, *Rethinking Proportionality under the Cruel and Unusual Punishments Clause*, 97 VIRG. L. REV. 899 (2011); Millen Pressly, *Interpretation of the Eighth Amendment—Rummel, Solem, and the Venerable Case of Weems v. United States*, 1984 DUKE L. L. 789 (1984); Margaret Raymond, “No Fellow in American Legislation”: *Weems v. United States and the Doctrine of Proportionality*, 30 VT. L. REV. 251 (2005-2006); Deborah A. Schwartz & Jay Wishingrad, *The Eighth Amendment, Beccaria, and the Enlightenment: An Historical Justification for the Weems v. United States Excessive Punishment Doctrine*, 24 BUFF. L. REV. 783 (1974-1975).

IX. PROPORTIONALITY AND INCARCERATION, ROUND II:
HARMELIN AND EWING

Eight years after *Solem*, the Court abruptly reversed track in *Harmelin v.*

Michigan.¹⁸⁸ A plurality led by Justice Scalia argued that *Solem* was built on a number of hollow premises.¹⁸⁹ First, the framers had understood cruel and unusual punishments as “torturous and brutal” methods of punishment rather than disproportionate penalties.¹⁹⁰ Second, according to Scalia, the holding in *Weems* was ambiguous. It was unclear if the Court majority in this case objected to the imposition of *cadena temporal* (hard labor) or “mere disproportionality.”¹⁹¹ While, for precedent’s sake, Scalia was willing to accept some sort of proportionality review in capital cases, he would “leave it there” and “not extend it further.”¹⁹²

Justice Kennedy’s concurrence,¹⁹³ joined by Justices O’Connor and Souter, did not dismiss *Solem* altogether, but merely contended that Powell’s narrower test in *Solem* went too far. Kennedy argued that *Rummel* and *Solem* shared five principal themes.¹⁹⁴ First, incarceration, as a general matter, was best left to “legislatures, not courts.”¹⁹⁵ Second, the Eighth Amendment did not mandate any single penological goal.¹⁹⁶ Third, divergences in sentences were inevitable, and their existence did not automatically make punishments grossly disproportionate.¹⁹⁷ Fourth, legislatures should be given the benefit of the doubt; if they mandated certain punishments for certain crimes, the Court should

¹⁸⁸ 501 U.S. 957 (1991).

¹⁸⁹ *Id.* at 965 (“*Solem* was simply wrong; the Eighth Amendment contains no proportionality guarantee.”).

¹⁹⁰ *Id.* at 973.

¹⁹¹ *Id.* at 991.

¹⁹² *Id.* at 994.

¹⁹³ *Id.* at 996.

¹⁹⁴ *Id.* at 998-99.

¹⁹⁵ *Id.* at 998.

¹⁹⁶ *Id.* at 999 (“The Eighth Amendment does not mandate adoption of any one penological theory.”).

¹⁹⁷ *Id.* at 1000 (“The circumstance that a State has the most severe punishment for a particular crime does not by itself render the punishment grossly disproportionate.”).

be very cautious in striking these down.¹⁹⁸ Finally, Kennedy argued that *Solem's* three-pronged test should be replaced by a threshold review, requiring justices to only void sentences of incarceration without any “rational basis.”¹⁹⁹

In *Ewing v. California*, Justice O'Connor used Kennedy's threshold requirement to review the sentence of a repeat felon given twenty-five years to life under California's “three strikes law.”²⁰⁰ O'Connor first considered the reasons for California's “three strikes” statute.²⁰¹ In the Justice's view, California legislators were motivated by the goals of incapacitation and deterrence; they sought to both prevent recidivism,²⁰² and warn potential offenders that even relatively minor crimes would not be tolerated.²⁰³ O'Connor next considered the particular case of Ewing, who had stolen \$1,200 worth of property.²⁰⁴ The Justice argued that Ewing's sentence was justified “given “his own long, serious criminal record.”²⁰⁵ O'Connor concluded that Ewing's punishment reflected a “rational legislative judgment, entitled to deference.”²⁰⁶

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Scalia must be given some credit: His *Harmelin* opinion is direct and unambiguous. Indeed, the history of proportionality review would be a great deal less convoluted had Scalia had his way. Unfortunately, the Justice's use of precedent is rather sloppy. Try as he might, Scalia cannot plausibly deny the *Weem's* majority was

¹⁹⁸ *Id.* at 1003 (“[P]roportionality review by federal court should be informed by “objective factors to the maximum possible extent.””).

¹⁹⁹ *Id.* at 1004.

²⁰⁰ *Ewing v. California*, 538 U.S. 11 (2003).

²⁰¹ *Id.* at 24.

²⁰² *Id.* at 25 (“When the California legislature enacted the three strikes law, it made a judgment that protecting the public safety requires incapacitating criminals who have already been convicted of at least one serious or violent crime.”).

²⁰³ *Id.* at 26 (“The State's interest in deterring crimes also lends some support to the three strikes law.”).

²⁰⁴ *Id.* at 28.

²⁰⁵ *Id.* at 30-31.

²⁰⁶ *Id.* at 31,

concerned with the excessiveness, and not just the method, of the plaintiff's punishment. Indeed, this was the very thing that *Weem's* dissenters objected to.²⁰⁷

Justice Kennedy and O'Connor's threshold requirement has the opposite problem, being overly complex. The justices' five common principles in *Rummel* and *Solem* are too vague to lend much guidance. Some of them are empty truisms, such as their statement that punishment is best left to state legislatures. Other contentions, that Powell's *Solem* test was optional, for example, are simply asserted rather than explained or defended.²⁰⁸ Furthermore, the threshold requirement shares the same foundational problem as Powell's *Solem* analysis, offering no explanation for why incarceration requires a lower tier of review than capital punishment.

By asking judges to review the goals of punishment, Kennedy and O'Connor's threshold standard also shares similar problems to the penology prong of evolving standards. Both tests transform judges into political theorists, asking them to select a preferred rationale of punishment and then apply in to a specific case.²⁰⁹ What criteria should judges use, however, when determining if certain penal goals are satisfied? No matter how draconian the results, legislators will always have *some* "rational basis" for passing a particular statute.²¹⁰ The farther the Court wanders into the realm of public

²⁰⁷ See *Weems*, 217 U.S. at 385 ("[T]he court interprets the inhibition against cruel and unusual punishment as imposing upon Congress the duty of proportioning punishment according to the nature of the crime, and casts upon the judiciary the duty of determining whether punishment have been properly apportioned in a particular statute, and if not to decline to enforce it.").

²⁰⁸ See, e.g., *Harmelin*, 501 U.S. at 1019 (White, J., dissenting) ("*Solem* is directly to the contrary, for there the Court made clear that... 'a combination of objective factors [rather than a simple rational basis test] can make such an analysis [of gross disproportionality] possible.'").

²⁰⁹ See, e.g., *Ewing*, 538 U.S. at 32 (Scalia, J., dissenting) ("The plurality is not applying law but evaluating policy.").

²¹⁰ Which is, of course, a larger critique of the "rational basis" test itself (See, e.g., Jeffrey D. Jackson, *Putting Rationality Back into the Rational Basis Test: Saving Substantive Due Process and Redeeming the Promise of the Ninth Amendment*, 45 U. RICH. L. REV. 491 (2011) (for an evaluation of this test and some of its weaknesses)).

policy, the more its decisions risk being predicated by judicial fiat rather than on any principled criteria.

X. THE STRAINS CONVERGE: *GRAHAM V. FLORIDA*

In *Graham v. Florida*, the plaintiff challenged the constitutionality of life without parole for juveniles who had committed a non-homicide offense. The Court encountered a unique circumstance here: Though concerned with the penalty of incarceration, *Graham* involved an abstract class of offenders (juveniles) sentenced for an abstract crime (non-homicide offenses.) It was thus not immediately evident what tier of proportionality the Court should apply.

The majority, led by Justice Kennedy, chose the evolving standards test.²¹¹ Justice Roberts concurred in the Court's judgment, but argued that the threshold review was more appropriate.²¹² Justice Thomas, joined by Justice Scalia, sought to reset the clock entirely, denying the cruel and unusual clause demanded any sort of proportionality review.²¹³ Finally was the brief opinion of Justice Alito, which seemed to implicitly endorse using the evolving standards test, but faulted the majority's lack of rigor in applying this metric.²¹⁴

A. The Majority

Justice Kennedy's majority opinion consisted of three parts. Kennedy first argued that *Graham* required an evolving standards analysis. The Justice then applied this test, arguing that sentencing juveniles to life without parole for non-homicide offenses

²¹¹ See *Graham*, 130 S. Ct. at 2017.

²¹² *Id.* at 2036.

²¹³ *Id.* at 2043.

²¹⁴ *Id.* at 2057. I ignore the opinion of Justice Steven's, which is written solely to support proportionality review in the abstract and combat the preferred results of Justices Scalia and Thomas.

violated both the consensus and penological prongs. Kennedy concluded by justifying the necessity of a categorical ruling.

Justice Kennedy began his opinion by identifying the two classes of proportionality review, the first involving “challenges to the length of term-of-years sentences given all the circumstances in a particular case,” and the second involving “cases in which the Court implements the proportionality standard by certain categorical restrictions on the death penalty.”²¹⁵ Kennedy admitted that, in all previous cases involving incarceration, the Court applied the threshold test.²¹⁶ According to the Justice, however, this test’s usage was not based on the specific punishment of imprisonment, but the Court’s consideration of a particular offender for a particular crime.²¹⁷ Since the present case involved an abstract class of offenders (juveniles) for an abstract penalty (non-homicide crimes), Kennedy posited that evolving standards of decency was the more appropriate standard of review.²¹⁸

According to Kennedy, sentencing juveniles to life without parole for a non-homicide offense violated evolving standards of decency. Regarding the national consensus prong, the Justice recognized that thirty-seven states currently allowed this sentencing practice.²¹⁹ Kennedy observed, however, that such sentences were exceedingly rare: Only 129 juvenile offenders were currently serving life without parole for non-

²¹⁵ *Id.* at 2021.

²¹⁶ *Id.*

²¹⁷ *Id.* at 2022 (“The approach in cases such as *Harmelin* and *Ewing* is suited for considering a gross disproportionality challenge to a particular defendant’s sentence.”).

²¹⁸ *Id.* at 2022-23 (“This case implicates a particular type of sentence as it applies to an entire class of offenders who have committed a range of crimes. As a result, a threshold comparison...does not advance the analysis...the appropriate analysis is the one used in cases that involved the categorical approach.”).

²¹⁹ *Id.* at 2023.

homicide crimes.²²⁰ Furthermore, these offenders were located in only twelve jurisdictions.²²¹

Kennedy then analyzed the penology prong. In *Roper v. Simmons*, the Court established that juveniles were less culpable than adults, and therefore less deserving of capital punishment.²²² According to Kennedy, the penalty of life without parole shared unique similarities to the death penalty. First, both punishments permanently separate the offender from society.²²³ Second, life without parole, like capital punishment, condemns prisoners to die in captivity.²²⁴ Since youths' cognitive immaturity prevented them from fully weighing the costs and benefits of their decisions, deterrence also provided a poor penological justification.²²⁵ Finally, Kennedy rejected the goal of incapacitation: The young have their whole life ahead of them, and thus countless opportunities to eventually change their ways.²²⁶

Justice Kennedy concluded his opinion by justifying the necessity for a categorical ruling.²²⁷ Kennedy admitted that some juveniles' crimes are so heinous many citizens may feel they deserve life without parole.²²⁸ According to the Justice, however, judges and juries lack the requisite expertise to distinguish appropriate levels of

²²⁰ *Id.* at 2024.

²²¹ *Id.*

²²² *Id.* at 2027 (“Life without parole sentences share some characteristics with death sentences that are shared by no other sentences.”).

²²³ *Id.* (“[T]he sentence alters the offender’s life by a forfeiture that is irrevocable.”).

²²⁴ *Id.* (“It deprives the convict of the most basic liberties without giving hope of restoration.”).

²²⁵ *Id.* at 2029 (“They [juveniles] are less likely to take a possible punishment into consideration when making decisions.”).

²²⁶ *Id.* (“To justify life without parole on the assumption that the juvenile offender forever will be a danger to society requires the sentencer to make a judgment that the juvenile is incorrigible. The characteristics of juveniles make that judgment questionable.”).

²²⁷ *Id.* at 2030.

²²⁸ *Id.* at 2031 (a “possible approach ... would allow to account for factual differences between cases and to impose life without parole sentences for particularly heinous crimes.”).

culpability.²²⁹ First, such citizens are not child psychologists, and will therefore have little idea which juveniles are capable of change.²³⁰ Second, juveniles are at a significant disadvantage in criminal proceedings: They often mistrust adults, and are less likely to “work effectively with their lawyers to aid in their defense.”²³¹ Finally, even the most seemingly hardened juvenile may one day reform him or herself. In Kennedy’s view, allowing judges or juries to sentence juvenile offenders to life without parole removes their “opportunity to achieve maturity of judgment and self-recognition of human worth and potential.”²³² According to the Justice, while states “need not guarantee the offender eventual release,” there must exist “some realistic opportunity” of freedom.²³³

B. Chief Justice Roberts

Chief Justice Roberts concurred in the majority’s decision but rejected their underlying reasoning.²³⁴ According to Roberts, the Court had always applied evolving standards to capital cases and the threshold test to matters of incarceration.²³⁵ By basing proportionality review off of whether the plaintiff’s challenge was abstract or narrow, Kennedy argued that the majority adopted a novel criterion “of dubious provenance.”²³⁶

The Chief Justice began his opinion by distinguishing the different criteria for evolving standards and threshold review. While Roberts acknowledged that previous Courts had failed to establish a “clear or consistent path” for applying each test, they had

²²⁹ *Id.* at 2032 (“[I]t does not follow that courts taking a case-by-case proportionality approach could with sufficient accuracy distinguish the few incorrigible juvenile offenders from the many that have the capacity for change.”).

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.* at 2032.

²³³ *Id.* at 2034.

²³⁴ *Id.* at 2036.

²³⁵ *Id.* (“I see no need to invent a new constitutional rule.”).

²³⁶ *Id.*

consistently drawn the line at death.²³⁷ Precedent therefore dictated applying threshold review to the case of incarceration before them.

First, Robert's compared Graham's conduct to the severity of his sentence.²³⁸ The fifteen-year old Graham was sentenced to life without parole for a home invasion robbery. According to Roberts, Graham's youth and immaturity, combined with his difficult upbringing, somewhat lessened his culpability.²³⁹ Furthermore, life without parole is the second-harshes sentence in the criminal justice system, and especially serious for someone of only fifteen.²⁴⁰ Given these factors, Roberts concluded Graham's sentence was, at least *prima facie*, grossly disproportionate.²⁴¹

Roberts then proceeded to an intra-jurisdictional and inter-jurisdictional comparison.²⁴² Intra-jurisdictionally, Florida law rarely sentenced juveniles to more than twenty-five years for burglary or robbery.²⁴³ Inter-jurisdictionally, Florida was unusual in allowing juveniles to be sentenced to life without parole for non-homicide offenses.²⁴⁴ Given the rarity of Graham's sentence both within and outside Florida, as well as his youth and lack of a criminal record, Roberts thus found Graham's punishment unconstitutional.²⁴⁵

While Robert's agreed with the Court's judgment in the case of Graham, he opposed their categorical ruling. In Robert's view, some non-homicide crimes committed

²³⁷ *Id.* at 2037.

²³⁸ *Id.* at 2039.

²³⁹ *Id.* at 2040 (“[H]is lack of prior criminal convictions, his youth and immaturity, and the difficult circumstances of his upbringing...all suggest that he was markedly less culpable than a typical adult who commits the same offense.”).

²⁴⁰ *Id.* (“This is the second-harshes sentence available under our precedent for *any* crime, and the most severe sanction available for nonhomicide offense.”).

²⁴¹ *Id.* (“There is a strong inference that Graham's sentence of life imprisonment without parole was grossly disproportionate.”).

²⁴² *Id.* at 2040-41.

²⁴³ *Id.*

²⁴⁴ *Id.* at 2041.

²⁴⁵ *Id.*

by juveniles (whether violent rapes or near-deadly assaults) may justify life without parole.²⁴⁶ Furthermore, such matters are for juries or judges to decide upon, who are better equipped than nine unelected justices.²⁴⁷ Roberts concluded that the majority erred “in using this case as a vehicle for unsettling our established jurisprudence and fashioning a categorical rule applicable to far different cases.”²⁴⁸

C. Justice Thomas

Justice Thomas, joined by Justice Scalia, disagreed both with the majority’s use of evolving standards and Chief Justice’s Roberts’s application of the threshold test. In Thomas’s opinion, the penalty of incarceration does not require any sort of proportionality review, as the Eighth Amendment’s framers solely concerned themselves with “methods,” rather than the excessiveness, of punishment.²⁴⁹

In principle, Thomas thus rejected proportionality review for both capital and non-capital cases.²⁵⁰ Even given this dubious precedent, however, Thomas argued the majority opinion was incoherent. Previously, the Court had restricted evolving standards to capital cases and the threshold review to incarceration: “Today’s decision” eviscerated “that distinction.”²⁵¹ Even if one accepted applying evolving standards, however, Thomas argued that *Graham*’s challenge failed.²⁵² First, no national consensus existed against sentencing juveniles to life without parole for non-capital offenses. Thirty-seven states

²⁴⁶ *Id.* (“The fact that *Graham* cannot be sentenced to life without parole for his conduct says nothing whatever about” offenders “who commit homicide crimes far more reprehensible than the conduct at issue here.”).

²⁴⁷ *Id.* at 2042 (“[T]he whole enterprise of proportionality review is premised on the “justified assumption that “courts are competent to judge the gravity of an offense, at least on a relative scale. Indeed, “courts traditionally have made these judgment.””).

²⁴⁸ *Id.*

²⁴⁹ *Id.* at 2044.

²⁵⁰ *Id.* (“[T]here is virtually no indication that the Cruel and Unusual Punishments Clause originally was understood to require proportionality in sentencing.”).

²⁵¹ *Id.* at 2046.

²⁵² *Id.* at 2048.

allowed this practice, comprising 74% of the country.²⁵³ Never before had the Court banned a sentencing practice supported by so many states.²⁵⁴ Second, Thomas argued that this sentences' rarity hardly implied the country stood against it. Equally likely was that judges and juries believed such a serious punishment should be only sparingly imposed.²⁵⁵

Regarding the penological prong, Thomas dismissed the majority's claim that Graham's sentence served no legitimate goal of punishment.²⁵⁶ First, life without parole removes some of the most dangerous felons from the streets.²⁵⁷ Second, even the majority recognized such penalties will likely deter potential offenders.²⁵⁸ Finally, while Thomas acknowledged that some juveniles were more culpable than others, this was for juries and judges, not justices, to determine.²⁵⁹

D. Justice Alito

Justice Alito offered an alternative stance to the majority and the dissent. Unlike Roberts, since the petitioner did not ask for the threshold test, Alito saw no reason to apply it here.²⁶⁰ And unlike his fellow dissenters, Alito seemingly accepted the

²⁵³ *Id.*

²⁵⁴ *Id.* at 2049 (“[T]he Court has never banished into constitutional exile a sentencing practice that the laws of a majority, let alone a supermajority, of States expressly permit.”).

²⁵⁵ *Id.* at 2051 (“That a punishment is rarely imposed demonstrates nothing more than a general consensus that it should be just that—rarely imposed. It is not proof that the punishment is one the Nation abhors”).

²⁵⁶ *Id.*

²⁵⁷ *Id.* at 2053 (“[B]y definition, such sentences serves the goal of incapacitation.”).

²⁵⁸ *Id.* (“The Court acknowledges that such sentences will deter future juvenile offenders, at least to some degree.”).

²⁵⁹ *Id.* at 2055 (“The integrity of our criminal justice system depends on the ability of citizens to stand between the defendant and an outraged public and dispassionately determine his guilt and the proper amount of punishment.”).

²⁶⁰ *Id.* at 2058 (“Petitioner argued for only a categorical rule banning the imposition of life without parole on *any* juvenile convicted of a nonhomicide offense. Because petitioner abandoned his as-applied claim, I would not reach that issue.”).

application of evolving standards to non-capital offenses.²⁶¹ The Justice applied this test with greater rigor than the majority, however, siding with Thomas and Scalia in dismissing the plaintiff's challenge.

XI. GRAHAM'S UNCLEAR AFTERMATH

For good or ill, *Graham v. Florida* has altered the nature of the Court's proportionality review. In this paper's final section I address some remaining issues and how these may play into the Court's future jurisprudence in this area.

1. What form of proportionality review is required for what types of cases?

Despite Justice Kennedy's assertions in *Graham*, previous precedent clearly established evolving standards for capital cases and the threshold test for incarceration. This is not to say that *Graham* is without any foundation. Indeed, the very case that engendered the evolving standards review, *Gregg v. Georgia*, based its application around abstract versus individual challenges rather than capital versus non-capital offenses. Rehnquist's *Rummel* majority unequivocally restricted proportionality review to death sentences, however, and *Graham* therefore reverses three decades of precedent.

Perhaps more troubling is the difficulty in drawing a clear line between abstract and individual challenges. Even the narrowest cases can be individualized if presented in a certain light.²⁶² For example, let us take the case of *Ewing*, which Kennedy references as the type of narrow case worthy of only the threshold test. Here the defendant was sentenced to twenty-five years to life for his third offense of stealing three golf clubs.

²⁶¹ *Id.* ("I join Parts I and III of JUSTICE THOMAS's dissenting opinion."). Note that Alito did not endorse part II, which challenged proportionality review altogether.

²⁶² See, e.g., Alison Siegler & Barry Sullivan, "*Death Is Different*" No Longer: *Graham v. Florida* and the Future of Eighth Amendment Challenges to Noncapital Sentences, SUP. CT. REV. 18 (2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1748645 ("[I]t is unclear why a defendant's framing of the issue presented should ever be sufficient by itself to dictate the Court's approach to the substantive issues presented by the case.").

While the majority's narrow reading focused on Ewing's specific crime, one could also present this case more abstractly, as challenging the constitutionality of three strikes laws for minor, non-violent felonies. Indeed, had the Court found Ewing's sentence unconstitutional, they would have established this very thing.

The reverse is also true, or that abstract crimes can be presented individually. *Graham* cites *Kennedy v. South Carolina*, which found it unconstitutional to execute child rapists, as an example of an abstract ruling. In this case, however, the plaintiff need not have challenged the death penalty as categorically excessive for all child rapists, but only in his specific case. It was ultimately the majority's decision to treat this case abstractly.

The Court's decision to apply a threshold standard to *Ewing* and evolving standards to *Kennedy* therefore had little to do with these cases' individual versus abstract nature. Justice Kennedy himself made clear the latter deserved evolving standards review *because* the plaintiff was sentenced to death.²⁶³ Justice Thomas is correct in recognizing that, after *Graham*, "death is different no longer."²⁶⁴ He is also correct in recognizing the reasons for this are not entirely consistent.

2. What is most important to look for in evaluating evolving standards of decency?

Despite nearly four decades of precedent the evolving standards test remains remarkably nebulous, as the standards for gauging a national consensus and adequate penological justifications have altered substantially throughout the years. Unfortunately, *Graham v. Florida* confuses things even further.

²⁶³ See *Kennedy*, 128 S. Ct. at 2650 (discussing why the evolving standards test was used in capital cases).

²⁶⁴ See *Graham*, 130 S. Ct. at 2046.

In *Gregg v. Georgia*, the Court established that a national consensus should be gathered by evaluating state legislation and jury decisions; sentences violated evolving standards of decency if few jurisdictions or juries allowed for them. The raw numbers necessary to satisfy this test, however, were never clarified. In *Coker*, only three states and one out of ten juries sentenced rapists to death.²⁶⁵ *Enmund*, which banned the death penalty for felony murder during the course of a robbery, relied upon a similar consensus, although one more narrow in scope.²⁶⁶

Atkins v. Virginia, which banned the execution of mentally handicapped offenders, blurred this line. In this case, a plurality of states neither banned executing the mentally handicapped nor did juries clearly refuse to impose such sentences.²⁶⁷ The Court merely found a trend against executing such offenders,²⁶⁸ and declared this enough to satisfy a national consensus.

Roper v. Simmons, which invalidated capital punishment for children under eighteen, went beyond even *Atkin*'s loose criteria. Here a majority of states allowed the execution of juveniles,²⁶⁹ and there was a notably slower "rate of change."²⁷⁰ The Court's decision therefore relied on the sheer infrequency of jury sentences.²⁷¹ As Justice Scalia pointed out, the majority failed to address whether this infrequency was based on juries'

²⁶⁵ See *Coker*, 433 U.S. at 594.

²⁶⁶ See *Enmund*, 458 U.S. at 458 (Here eight jurisdictions allowed the death penalty for such crimes, and a study determined that only six out of 312 juries had sentenced such defendants to death).

²⁶⁷ See *Atkins*, 536 U.S. at 314.

²⁶⁸ *Id.* at 316 (Ten states had banned executing the mentally handicapped since *Penry*).

²⁶⁹ See 543 U.S. at 565.

²⁷⁰ *Id.* at 565 ("Impressive in *Atkins* was the rate of abolition of the death penalty for the mentally retarded... By contrast, the rate of change in reducing the incidence of the juvenile death penalty... has been slower.").

²⁷¹ *Id.* at 564-565 ("[E]ven in the 20 States without a formal prohibition on executing juveniles, the practice is infrequent.").

categorical opposition to executing juveniles, however, or conscious decisions to merely restrict it to the most heinous offenders.²⁷²

Only three years later, *Kennedy v. Louisiana*'s majority acknowledged that executing child rapists had actually become more popular.²⁷³ This trend was basically ignored, however, and the majority again fell back on the infrequency of jury sentences.²⁷⁴ In *Graham v. Florida*, a clear majority of states (74%) allowed for sentencing juveniles to life without parole for non-homicide offenses.²⁷⁵ Furthermore, while infrequently imposed, no clear indication suggested that juries categorically opposed this practice. Finally, over the past twenty years legislatures have consistently increased the harshness of juvenile punishments, suggesting a trend in the opposite direction to the majority's.²⁷⁶ Justice Kennedy took little notice of these facts, however, basing his decision on the small amount of juveniles serving life without parole for non-homicide offenses.²⁷⁷ No explanation was given for why this was now the controlling standard.

The penological prong of evolving standards seemed more important to the *Graham* majority. Unfortunately, this provision has an equally flexuous history. In *Coker*, the Court found sentencing rapists to death overly retributive, as such offenders

²⁷² See *Atkins*, *supra* note __.

²⁷³ See 128 S. Ct. at 2666 (“[I]t is true that in the last 13 years there has been change towards making child rape a capital offense.”).

²⁷⁴ *Id.* (Again, however, the majority refused to consider whether such sentence's rarity was based on juries' categorical opposition to executing child rapists or their belief only the most heinous of such offenders should be put to death).

²⁷⁵ See *Graham*, *supra* note __.

²⁷⁶ *Id.* at 2050 (Thomas, J., dissenting) (“States over the past 20 years have consistently *increased* the severity of punishments for juveniles offenders.”).

²⁷⁷ *Id.* at 2023 (“An examination of actual sentencing practices in jurisdictions where the sentence in question is permitted by statute discloses a consensus against its use.”).

did not take their victims' life.²⁷⁸ In *Enmund*, like *Thompson*, *Roper*, and *Atkins*, the Court considered the goal of deterrence as well.²⁷⁹ In *Kennedy*, the majority admitted executing child rapists could be duly retributive and serve as a possible deterrent. Nevertheless, the Court held that this was impossible to decisively determine, and fell back on the national consensus prong in order to ban executing such offenders.²⁸⁰

In *Graham*, the majority also raised, and then quickly dismissed, the relevance of incapacitation.²⁸¹ Left unclear was why this important goal of punishment was irrelevant. Sentencing someone to life without parole is, above all else, a measure of incapacitation. As Justice Thomas recognized, such individuals will never again threaten their communities.²⁸² Furthermore, the Court previously refused to strike a punishment because an equally effective, though less harsh, sentence was available.²⁸³

Ultimately, the majority's decision to dismiss the importance of incapacitation speaks to the larger flaws of the penology prong. This test allows the Court to pick and choose what goal of punishment is most important to them, with no objective criteria to lend much guidance. If a majority of justices are punitive, they will declare this measure satisfied. The *Graham* majority found the statutes before them overly harsh, however, given the immaturity and future potential of juvenile offenders. Scalia's conclusion, that the penology prong asks judges to evaluate policy rather than apply law, is difficult to

²⁷⁸ See *Coker*, *supra* note __.

²⁷⁹ See *Enmund*, *supra* note __.

²⁸⁰ *Kennedy v. Louisiana*, 128 S. Ct. at 2658 (“objective evidence of contemporary values as it relates to punishment for child rape is entitled to great weight, but it does not end our inquiry.”).

²⁸¹ 130 S. Ct. at 2029.

²⁸² See *Graham*, *supra* note __.

²⁸³ See *Gregg*, *supra* note __.

argue with.²⁸⁴ The Court has refused to acknowledge, never mind even discuss, whether this is a good thing.

3. Why does finding evolving standards of decency have been violated necessitate a categorical ruling?

Perhaps nothing inflamed *Graham's* dissenters more than the categorical nature of the majority's ruling. This disagreement pivoted around justices' faith in judge and jury discretion, or whether these actors are capable of separating deserving from undeserving offenders.

The necessity of a categorical ruling has been debated since *Coker*. Here Justice White found executing *all* rapists inherently disproportionate.²⁸⁵ Justice Powell disagreed, arguing that violent rapists should still be death-eligible.²⁸⁶ In *Kennedy v. Louisiana*, Justice Alito challenged the majority's holding that every child-rapist, no matter how heinous their crime, should be spared.²⁸⁷ *Atkins* and *Roper* were decided on similar grounds, categorically banning capital sentences for juveniles and the mentally handicapped.²⁸⁸

The majority's logic has varied here. In *Kennedy*, the Court argued that juries might become so inflamed by the defendant's crime they would fail to think straight.²⁸⁹ In *Atkins* and *Roper*, the majority stated that judges and juries lacked the professional

²⁸⁴ See *Ewing*, *supra* note __.

²⁸⁵ See *Coker*, *supra* note __.

²⁸⁶ See *Coker*, *supra* note __.

²⁸⁷ See *Kennedy*, *supra* note __.

²⁸⁸ See *Atkins*, *supra* note __; *Roper*, *supra* note __.

²⁸⁹ See 128 S. Ct. at 2660-1 ("In this context, which involves a crime that in many cases will overwhelm a decent person's judgment, we have no confidence that the imposition of the death penalty would not be" unconstitutionally "arbitrary.").

expertise to separate culpable from inculpable offenders, and a categorical ban was therefore necessary in order to prevent potential mistakes.²⁹⁰

The dissent has offered two rebuttals, both of which have gone unanswered. First, there is no empirical evidence that juries become overly inflamed by child rape, or are inherently incapable of distinguishing culpable from inculpable offenders.²⁹¹ Indeed, the majority has offered little concrete proof to support their contentions, principally relying on their own subjective (seemingly a priori) judgment.²⁹² If anything, the relative paucity of such offenders on death row would indicate juries take their roles quite seriously regarding these matters.

Even if we recognize the subjectivity of juries' decisions, the need for special safeguards in such cases is unclear. Juries risk being influenced in any emotionally charged case; indeed, this is a risk inherent in nearly any jury trial. The most obvious counter is that capital cases are unique, and therefore require categorical rulings. This argument no longer holds following *Graham*, however, which based proportionality review on abstract challenges rather than capital cases. As Justice Thomas recognized, with incarceration on the table, "no reliable limiting principle remains to prevent the Court from immunizing any class of offenders from the law's third, fourth, fifth, or fiftieth most severe punishments."²⁹³ Thomas's point was not that the Court *will* issue such sweeping measures, but that it no longer has any principled, consistent criteria (other than judicial fiat) for why it should not.

4. What are *Graham*'s larger implications?

²⁹⁰ See *Atkins*, *supra* note __; *Roper*, *supra* note __.

²⁹¹ See *Kennedy*, *supra* note __.

²⁹² See, e.g. *Kennedy*, *supra* note __.

²⁹³ See *Graham*, 130 S. Ct. at 2046.

Numerous scholars have already speculated on what *Graham* implies for the future, and I can add little more here.²⁹⁴ These accounts generally focus on this cases' potential impact on (1) juvenile offenders who have committed homicide, and (2) mentally handicapped offenders sentenced to life without parole for non-homicide crimes.

Ultimately, *Graham* did not rely on the nature of juvenile's crimes, but the infliction of such a severe punishment on such a vulnerable population. According to Justice Kennedy, sentencing juveniles to life without parole destroyed any hope of rehabilitation and the "chance to demonstrate maturity" and "self-recognition of human worth and potential."²⁹⁵ There is no reason (nor does the Court provide one) for why juveniles who commit homicide are somehow beyond such hope.²⁹⁶ *Graham* would therefore seem to open the door to banning life without parole for all juvenile offenders no matter how heinous their crime.

Mentally handicapped offenders and their advocates can also find some hope in *Graham*. *Atkins v. Virginia*, which abolished the death penalty for the mentally handicapped, directly influenced *Roper v. Simmons*'s ban on executing juveniles. *Roper* drew various parallels between these types of offenders, arguing both were less culpable

²⁹⁴ See, e.g., Stinneford, *supra* note 2; Carol S. Steiker and Jordan M. Steiker, *Graham Lets the Sun Shine In: The Supreme Court Opens a Window Between Two Formerly Walled-Off Approaches to Eighth Amendment Proportionality Challenges*, 23 FED. SENT. REP. 1, 79 (2010); Richard S. Frase, *Graham's Good News—and Not*, 23 FED. SENT. REP. 1, 54 (2010); William W. Berry III, *More Different than Life, Less Different than Death*, 71 OHIO ST. L. J. 6, 1109 (2010); Leslie Patrice Wallace, "And I Don't Know Why It Is That You Threw Your Life Away": *Abolishing Life Without Parole, The Supreme Court in Graham v. Florida Now Requires States to Give Juveniles Hope for a Second Chance*, 20 B.U. PUB. INT. L. J. 35 (2010).

²⁹⁵ See *Graham*, 130 S. Ct. at 2032.

²⁹⁶ Unless, of course, one argues that all juveniles who commit murder are somehow categorically different people than those who "merely" attempt murder, commit violent crimes, etc. The Court does not attempt to argue for this distinction, nor do I see how it could reasonably be made.

than the general population.²⁹⁷ If juveniles who commit non-homicide offenses are spared life without parole, expanding this to include the mentally handicapped would thus seem to logically (and legally) follow. Of course, the majority could argue that youth are uniquely malleable, whereas mentally handicapped offenders are already adults and have therefore fully matured. It is unclear, however, how critical a role this reasoning played in the Court's decision. Kennedy took all four types of punishment into account—not just rehabilitation—in finding Graham's sentence penologically unjustified. Of course, this again speaks to the Court's failure to specify what exactly satisfies the penology prong.

XII. CONCLUSION

When Chief Justice Warren declared that punishments must satisfy the evolving standards of society, he likely had little idea where this proclamation would eventually lead. It is equally difficult to imagine that Justices Brennan and Stewart, when formulating how to analyze evolving standards, could foresee this test's distortions. Even if all three judges agreed on the resulting case outcomes, less likely is that they would have much satisfaction in the tangled path to get there.

Of course, just because the Court's proportionality review is convoluted,²⁹⁸ does not mean it should be ended altogether. Justices Scalia and Thomas may be correct in their assertions that the founding fathers, and the earliest courts, solely meant cruel and unusual punishments to restrict brutal and torturous penalties. Nearly a century of precedent clearly recognizes proportionality review, however, nor is the current Court likely to reverse course.

What the Court can, and should do, is establish a more objective standard.

²⁹⁷ *Id.* at 571 (“The same conclusions follow from the lesser culpability of the juvenile offender.”).

²⁹⁸ If not, at times, downright contradictory.

A more objective standard would first establish the difference between abstract and individual offenses. A more objective standard would then better explain what constitutes a national consensus. A more objective standard would isolate what goals of punishment are most important for legislatures to satisfy. Finally, a more objective standard would detail the necessity of categorical rulings, rather than vaguely alluding to jury incompetence. Justice Scalia may overstate the case in his dismissal of evolving standards as little more than a “post hoc rationalization” for the majority’s subjective preferences.²⁹⁹ Until the Court at least attempts to provide a more objective standard of proportionality review, however, his criticism will rightly continue to sting.

²⁹⁹ See *Roper*, *supra* note __.