

**STATE LEGISLATURES AND SOLVING THE EIGHTH  
AMENDMENT RATCHET PUZZLE**

*Jeffrey Omar Usman\**

ABSTRACT

*The United States Supreme Court's evolving standards of decency jurisprudence has come to be understood as having forged an irreversible one-way ratchet moving only toward greater leniency. The seemingly irreversible ratchet emerges both from practical challenges for state legislatures in pursuing stricter sanctions under the evolving standards of decency framework of analysis and an underlying assumption that moral evolution in criminal justice only moves towards lesser not greater sanctions. This Article offers a challenge to the latter assumption, the view that moral evolution can only be towards lesser not greater sanctions being imposed. This Article also attempts to provide a solution to the practical problem of the Eight Amendment ratchet puzzle, rendering reversible the seemingly irreversible ratchet. In doing so, the Article sets forth two critical mechanisms—contingent legislation and the active use of resolutions—which if utilized by state legislatures will enable them to more effectively engage in a constitutional dialogue with the United States Supreme Court in defining societal evolving standards of decency.*

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## INTRODUCTION

In theory, “[t]he Eighth Amendment is not a ratchet, whereby a temporary consensus on leniency for a particular crime fixes a permanent constitutional maximum, disabling the States from giving effect to altered beliefs and responding to changed social conditions.”<sup>1</sup> In practice, however, it appears that “[s]ociety’s moral evolution is constitutionally treated as a one-way ratchet . . . away from the use of capital punishment.”<sup>2</sup> Nor is the narrowing of the discretion afforded to legislatures with regard to criminal sanctions limited to constricting the application of the death penalty. To the contrary, the Supreme Court’s one-way ratchet reaches as far as its jurisprudence does in finding a sanction to be inconsistent with society’s evolving standards of decency. Thus, the reach of the one-way ratchet extends beyond circumscribing application of the death penalty to curtailing, for example, the ability of states to impose life-sentences for juvenile offenders for non-homicide offenses,<sup>3</sup> to impose non-individualized mandatory juvenile life sentences,<sup>4</sup> and to impose life sentences as the predominant form of sanction for juveniles who perpetrate homicide offenses.<sup>5</sup>

As an illustration of the operation of the one-way ratchet, in *Kennedy v. Louisiana*,<sup>6</sup> the United States Supreme Court found that Louisiana’s child rape death penalty statute was unconstitutional because it contravened society’s

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<sup>1</sup> *Harmelin v. Michigan*, 501 U.S. 957, 990 (1991) (opinion of Scalia, J.).

<sup>2</sup> J. Richard Broughton, *Kennedy and the Tail of Minos*, 69 LA. L. REV. 593, 605 (2009).

<sup>3</sup> See *Graham v. Florida*, 560 U.S. 48, 82 (2010) (finding that imposition of life without the possibility of parole sentences on juvenile offenders for non-homicide offenses violates the Eighth Amendment to the United States Constitution by running contrary to constitutional standards informed by society’s evolving standards of decency).

<sup>4</sup> See *Miller v. Alabama*, 567 U.S. 460, 469, 476–77, 489 (2012) (finding that imposition of life without the possibility of parole sentences on juvenile offenders for homicide offenses in absence of an individualized sentencing hearing that provides an opportunity to consider aggravating and mitigating circumstances violates the Eighth Amendment to the United States Constitution by running contrary to the constitutional standards established by the society’s evolving standards of decency).

<sup>5</sup> See *Montgomery v. Louisiana*, 136 S. Ct. 718, 732–36 (2016) (interpreting *Miller v. Alabama* as a substantive rather than a procedural change, in part, based upon the conclusion that the decision substantially imposes requirements that mandate that life sentences for homicide offenses need not only be arrived at through an individualized process but also should be rare, requiring a filtering akin to second-stage capital filtering designed to only impose such sentences for the worst offenses and offenders).

<sup>6</sup> 554 U.S. 407 (2008).

evolving standards of decency.<sup>7</sup> As a result, other than by means of “a constitutional amendment, [the] only way for capital child rape to become constitutional would be through a new evolving national consensus in favor of such a punishment.”<sup>8</sup> The structural challenge as observed by Professor Eric Posner is that the United States Supreme Court’s jurisprudence inhibits the development of such a new consensus by creating “[t]he Eighth Amendment Ratchet Puzzle.”<sup>9</sup> Professor Posner has artfully described that puzzle as follows:

If people in the various states change their mind and come to believe that the punishment is justified, legislatures will not be able to enact the punishment without violating the Constitution. It seems likely that they will therefore not bother, and so a new consensus in the other direction cannot get started. Perhaps, in the rare instances when a national consensus will develop quickly, dozens of states will enact the law even though it violates the Constitution, and courts will recognize a change in the consensus. But this is likely to be rare, and it loads the dice against national consensus developing in favor of harsher punishments.<sup>10</sup>

This quandary led Benjamin Wittes of the Brookings Institute to question what happens, as with executing child rapists, when states want to open the door for a practice that has been decades in disuse. Is the Eighth Amendment a one-way ratchet—a device that can remove punishments from the policy table but which never puts them back on it—or is there some mechanism by which the court can acknowledge that societal mores sometimes evolve in a more punitive direction?<sup>11</sup>

The United States Supreme Court’s Eighth Amendment jurisprudential framework has been largely understood to create a one-way ratchet, affording no workable solution for the states to solve the ratchet puzzle.<sup>12</sup> For example, Professor Tonja Jacobi has observed that the Supreme Court’s analysis “irreversibly imposes rules based on a potentially fleeting consensus” functioning as an “irreversible ratchet, increasingly restricting the application

<sup>7</sup> *Id.* at 421, 435, 446 (concluding that application of the death penalty to offenders who commit the crime of child rape is an unconstitutional violation of the Eighth Amendment by imposing a sentence contrary to society’s evolving standards of decency for the type of offense).

<sup>8</sup> Douglas A. Berman, *In Alabama, the Kennedy Case Did Not End Talk of the Death Penalty for Child Rape*, SENT’G L. & POL’Y (Feb. 16, 2009, 7:48 AM), [http://sentencing.typepad.com/sentencing\\_law\\_and\\_policy/2009/02/in-alabama-the-kennedy-case-did-not-end-talk-of-the-death-penalty-for-child-rape.html](http://sentencing.typepad.com/sentencing_law_and_policy/2009/02/in-alabama-the-kennedy-case-did-not-end-talk-of-the-death-penalty-for-child-rape.html).

<sup>9</sup> Eric Posner, *The Eighth Amendment Ratchet Puzzle in Kennedy v. Louisiana*, SLATE: CONVICTIONS (June 25, 2008, 11:06 AM), [http://www.slate.com/blogs/convictions/2008/06/25/the\\_eighth\\_amendment\\_ratchet\\_puzzle\\_in\\_kennedy\\_v\\_louisiana.html](http://www.slate.com/blogs/convictions/2008/06/25/the_eighth_amendment_ratchet_puzzle_in_kennedy_v_louisiana.html).

<sup>10</sup> *Id.*

<sup>11</sup> Benjamin Wittes, *Unusual Nonsense*, THE NEW REPUBLIC, Apr. 28, 2008, <https://newrepublic.com/article/64856/unusual-nonsense>.

<sup>12</sup> EVAN J. MANDERY, CAPITAL PUNISHMENT IN AMERICA: A BALANCED EXAMINATION 237 (2d ed. 2011) (characterizing the “existing doctrine” regarding the Eighth Amendment “as a one-way ratchet”).

of the death penalty”<sup>13</sup> or other prohibited sanctions that run afoul of the Supreme Court’s evolving standards of decency jurisprudence.

This Article attempts to provide a solution to the Eight Amendment ratchet puzzle, rendering reversible the seemingly irreversible ratchet. In doing so, the Article sets forth two critical mechanisms, contingent legislation and the active use of resolutions, which if utilized by state legislatures will enable them to more effectively engage in a constitutional dialogue with the United States Supreme Court with regard to defining societal evolving standards of decency. To provide background for the discussion herein, this Article begins in Part I by tracing the historical origins and evolution of the prohibition upon cruel and unusual punishment with a special emphasis on the development of proportionality analysis. In exploring the evolution of the prohibition upon cruel and unusual punishment, Part I journeys from the constitutional measure’s English Bill of Rights origins to the emergence of the modern interpretive jurisprudential framework for Eighth Amendment analysis, the evolving standards of decency, which have framed the proportionality analysis. Part II of the Article provides an overview of the mechanics for how the Supreme Court determines society’s evolving standard of decency. Part III of the Article challenges the commonly held, but inaccurate, assumption that when considering the evolving standards of decency the arc of history is linear and societal moral evolution is necessarily a movement towards greater leniency. In Part IV, this Article briefly addresses the policy distortion that the one-way ratchet can produce and then explains how contingent legislation can be used by state legislatures in seeking to reverse the seemingly one-way ratchet fashioned by the Supreme Court’s evolving standards of decency jurisprudence. Part V explains why the Compact Clause of the Constitution does not pose a barrier to the use of contingent legislation as a mechanism for state legislatures to more effectively engage with the Supreme Court through joint action. Part VI briefly addresses how the active use of resolutions by state legislators can further supplement the effectiveness of contingent legislation as means of more effectively empowering state legislators to engage with the Supreme Court in defining society’s evolving standards of decency.

#### I. HISTORICAL ORIGINS AND EVOLUTION OF THE PROHIBITION UPON CRUEL AND UNUSUAL PUNISHMENT

The Eighth Amendment to the United States Constitution guarantees that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor

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<sup>13</sup> Tonja Jacobi, *The Subtle Unraveling of Federalism: The Illogic of Using State Legislation as Evidence of an Evolving National Consensus*, 84 N.C. L. REV. 1089, 1123 (2006).

cruel and unusual punishments inflicted.”<sup>14</sup> As with the other first ten amendments to the United States Constitution, the Eighth Amendment emerged out of the struggle over ratification in the state conventions<sup>15</sup> and through James Madison’s leadership in the First Congress.<sup>16</sup> For a number of reasons including the absence of a Bill of Rights, there was especially strong concern that Virginia, a critical state to the survival of the fledgling American experiment, would not ratify the Constitution.<sup>17</sup> Federalists, including Madison, had not thought inclusion of such rights was necessary, and in-fact thought listing a series of individual rights would actually undermine individual liberty.<sup>18</sup> However, as the leading tactician for ratification of the United States Constitution at Virginia’s state ratification convention, Madison strategically agreed to the state convention recommending constitutional amendments so long as ratification of the Constitution in Virginia was not made contingent upon adoption of these proposed amendments.<sup>19</sup> A majority of the Virginia ratification convention, despite the presence of two leading anti-federalists Patrick Henry and George Mason, would eventually embrace this approach, ratifying the Constitution and submitting proposed amendments to be considered by the First Congress.<sup>20</sup>

George Mason served as a principal drafter of the Virginia ratification convention’s proposed amendments to Congress.<sup>21</sup> Mason’s proposals would influence other state ratifying conventions, providing “the template for many of

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<sup>14</sup> U.S. CONST. amend. VIII.

<sup>15</sup> See, e.g., PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–1788, at 255–319 (2011) (detailing the history of the Virginia ratification convention); Kurt T. Lash, *The Inescapable Federalism of the Ninth Amendment*, 93 IOWA L. REV. 801, 808 (2008) (noting that the Bill of Rights provisions all have their roots in proposals submitted by state ratifying conventions); see also *infra* Part I (addressing the emergence of the Eighth Amendment out of the proposals submitted by the Virginia ratifying convention).

<sup>16</sup> See RICHARD LABUNSKI, JAMES MADISON AND THE STRUGGLE FOR THE BILL OF RIGHTS 178–240 (2006) (tracing Madison’s stewardship of the Bill of Rights through the First Congress); see also LANCE BANNING, THE SACRED FIRE OF LIBERTY: JAMES MADISON AND THE FOUNDING OF THE FEDERAL REPUBLIC 280–90 (1995) (same).

<sup>17</sup> Celia Rumann, *Tortured History: Finding Our Way Back to the Lost Origins of the Eighth Amendment*, 31 PEPP. L. REV. 661, 676–77 (2004).

<sup>18</sup> See JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 288–338 (1996) (exploring the debate between federalists and anti-federalists over inclusion of individual rights in the Constitution); see also Richard Primus, *The Limits of Enumeration* 124 YALE L.J. 576, 621–22 (2014) (explaining that Madison and others believed that enumeration would allow Congress to deny individual rights).

<sup>19</sup> See MAIER, *supra* note 15, at 298 (addressing the tactical evolution of Madison’s position on proposed amendments); James F. Kelley, Note, *The Uncertain Renaissance of the Ninth Amendment*, 33 U. CHI. L. REV. 814, 819 (1966).

<sup>20</sup> MAIER, *supra* note 15, at 225–27, 305–06; see also Paul Finkelman, *James Madison and the Bill of Rights: A Reluctant Paternity*, 1990 SUP. CT. REV. 301, 327 (1990) (recounting Madison’s promise to consider adopting a bill of rights should Virginia ratify the Constitution).

<sup>21</sup> H. Richard Uviller & William G. Merkel, *The Second Amendment in Context: The Case of the Vanishing Predicate*, 76 CHI.-KENT L. REV. 403, 434 (2000).

the proposals for amendments that emerged from the state ratifying conventions.”<sup>22</sup> In drafting the proposed amendments, Mason, who had also played a critical role in drafting the Virginia Declaration of Rights, drew extensively thereupon including for the prohibition against cruel and unusual punishments.<sup>23</sup> Mason had borrowed the cruel and unusual punishment language of the Virginia Declaration of Rights from the language of the English Bill of Rights.<sup>24</sup> In the First Congress, it would be Madison who would serve as the principal pen of the Bill of Rights.<sup>25</sup> In formulating what was to become the Eighth Amendment, Madison drew upon the Virginia ratification convention’s proposal.<sup>26</sup> Madison’s “only modification of Virginia’s [proposed] amendment . . . was to substitute an imperative ‘shall not’ for the more hortatory ‘ought not to.’”<sup>27</sup> Madison’s proposed amendment moved through the Congressional debates and adoption by the states without alteration, becoming the Eighth Amendment to the United States Constitution.<sup>28</sup> Thus, the prohibition on cruel and unusual punishment in the United States Constitution traces its roots to the English Bill of Rights via Virginia’s Declaration of Rights.

Enacted on December 16, 1689, the English Bill of Rights declared that “excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”<sup>29</sup> Traditionally historians viewed the treason trials of the Bloody Assizes of 1685 as having “spurred the adoption of the English Bill of Rights containing the progenitor of [the Eighth Amendment]

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<sup>22</sup> Ashutosh Bhagwat, *The Democratic First Amendment*, 110 NW. U. L. REV. 1097, 1100 (2016).

<sup>23</sup> Rumann, *supra* note 17, at 678. In fact, the language of the Eighth Amendment was taken directly from the Virginia Declaration of Rights article I, section 9 (1776). Jack Balderson, Jr., Comment, *Temporal Units of Prosecution and Continuous Acts: Judicial and Constitutional Limitations*, 36 SAN DIEGO L. REV. 195, 215 (1999) (citing VA. DECLARATION OF RIGHTS, art. I, § 9 (1776)).

<sup>24</sup> Balderson, Jr., *supra* note 23 at 215–16 (citing ENGLISH BILL OF RIGHTS, 1689, 1 W. & M. sess. 2, c. 2 (Eng.)).

<sup>25</sup> See Paul L. Joffe, *Conscience and Interest: Law, Rights, and Politics in the Struggle to Confront Climate Change and the New Poverty*, 6 RUTGERS J.L. & PUB. POL’Y 269, 304 n.132 (2009) (noting that Madison served as “a principal draftsman” of the Bill of Rights); L. Ray Patterson & Craig Joyce, *Copyright in 1791: An Essay Concerning the Founders’ View of the Copyright Power Granted to Congress in Article I, Section 8, Clause 8 of the U.S. Constitution*, 52 EMORY L.J. 909, 942 (2003) (stating that Madison was the “principal drafter” of the Bill of Rights).

<sup>26</sup> See Michael D. Dean, *State Legislation and the “Evolving Standards of Decency”: Flaws in the Constitutional Review of Death Penalty Statutes*, 35 U. DAYTON L. REV. 379, 384 (2010) (explaining that one of the provisions Madison presented “to the First Congress” was Virginia’s “‘cruel and unusual punishments’ provision” which subsequently became the Eighth Amendment).

<sup>27</sup> Laurence Claus, *The Antidiscrimination Eighth Amendment*, 28 HARV. J.L. & PUB. POL’Y 119, 128 (2004).

<sup>28</sup> Elizabeth Salisbury Warren, Note, *The Case for Applying the Eighth Amendment to Corporations*, 49 VAND. L. REV. 1313, 1327 (1996).

<sup>29</sup> *Furman v. Georgia*, 408 U.S. 238, 243 (1972) (Douglas, J., concurring) (citing ENGLISH BILL OF RIGHTS, 1689, 1 W. & M., sess. 2, c. 2 (Eng.); 8 ENGLISH HISTORICAL DOCUMENTS: 1660-1714, at 122 (Andrew Browning ed. 1953)).

prohibition against cruel and unusual punishments.”<sup>30</sup> Over the course of Lord Chief Justice George Jeffreys’ reign of terror, known as the Bloody Assizes,

[n]obody knows how many hundreds of men, innocent or of unproved guilt, [were] sent to their deaths in the pseudo trials that followed [the Duke of] Monmouth’s . . . attempt to seize the throne. . . . Mere death was considered much too mild for the villagers and farmers rounded up in these raids. The directions to a high sheriff were to provide an ax, a cleaver, “a furnace or cauldron to boil their heads and quarters, and soil to boil therewith, half a bushel to each traitor, and tar to tar them with, and a sufficient number of spears and poles to fix their heads and quarters” along the highways. One could have crossed a good part of northern England by their guidance.<sup>31</sup>

However, beginning in the 1960s, a historical reinterpretation began to emerge that it was not so much the Bloody Assizes but instead the Titus Oates affair as to which the English Bill of Rights was more heavily oriented.<sup>32</sup>

Titus Oates, a Protestant cleric, gave perjured testimony accusing a number of Catholics of conspiring to overthrow King Charles II.<sup>33</sup> His testimony resulted in their convictions and executions; tragically, it was discovered too late that Oates had lied.<sup>34</sup> Fifteen innocent men had already died.<sup>35</sup> In 1685, Oates was convicted of perjury.<sup>36</sup> At his sentencing, Lord Chief Justice Jeffreys, who had also presided over the Bloody Assizes, “deemed it unfortunate

<sup>30</sup> *Id.* at 317 (Marshall, J., concurring) (citing 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION 650 (5th ed. 1891) (1833)).

<sup>31</sup> *Id.* at 254 (Douglas, J. concurring) (quoting IRVING BRANT, THE BILL OF RIGHTS: ITS ORIGIN AND MEANING 154–55 (1965)). By way of further background:

The Bloody Assizes followed the failed attempt by Charles II’s illegitimate son, the Duke of Monmouth, to overthrow his uncle, James II, as King. Monmouth was executed, as were hundreds of his supporters. Judge Jeffreys, Chief Justice of the King’s Bench, presided over the trials of the rebels. Some rebels were transported to penal servitude in the West Indies. Many rebels, however, were sentenced to gruesome death penalties, including drawing and quartering, hanging until not quite dead, disembowelment, beheading, and burning alive. Further, the property of those found guilty was forfeited to the Crown. Pamphlets recounting the names and sufferings of the victims were published as part of the ‘revolutionary propaganda’ during the Glorious Revolution of 1688.

Archibald Cox, *The Independence of the Judiciary: History and Purposes*, 21 U. DAYTON L. REV. 565, 569 n.11 (1996) (citations omitted).

<sup>32</sup> See, e.g., Harmelin v. Michigan, 501 U.S. 957, 968–75 (1991) (opinion of Scalia, J.) (addressing the changing historical understanding of the “cruell and unusuall Punishments” provision of the English Bill of Rights with regard to Bloody Assize and the Titus Oates affair); Furman v. Georgia, 408 U.S. at 274–75 n.17 (Brennan, J. concurring) (noting that the same provision arose in response to the Oates’ case); *Furman*, 408 U.S. at 318 n.13 (Marshall, J., concurring) (acknowledging Professor Granucci’s view that the trial of Titus Oates was the impetus behind the adoption of the clause); see also Ingraham v. Wright, 430 U.S. 651, 664 (1977) (“Historians have viewed the English provision as a reaction either to the ‘Bloody Assize,’ the treason trials conducted by Chief Justice Jeffreys in 1685 after the abortive rebellion of the Duke of Monmouth, or to the perjury prosecution of Titus Oates in the same year.”).

<sup>33</sup> Michael J. Zydney Mannheim, *When the Federal Death Penalty Is “Cruel and Unusual,”* 74 U. CIN. L. REV. 819, 833 (2006).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

that the death penalty could no longer be imposed for perjury, but asserted that ‘crimes of this nature are left to be punished according to the discretion of the court, so far as that the judgment extend not to life or member.’<sup>37</sup> Oates was sentenced to “pay a fine of two thousand marks, to be defrocked, to be pilloried four times annually, to be whipped ‘from Aldgate to Newgate’ on May 20 to be whipped ‘from Newgate to Tyburn’ on May 22, and to life imprisonment.”<sup>38</sup> Thus, despite the legislative prohibition on imposing the death penalty for perjury, Lord Chief Justice Jeffreys imposed precisely such a penalty, for he “did not expect Oates to survive the whipping.”<sup>39</sup>

Just as division exists over whether the English Bill of Rights should be considered to be a reaction primarily to the Bloody Assizes or to the Oates affair, the interpretation given to the meaning of the English Bill of Rights in seeking to understand the Eighth Amendment’s prohibition on cruel and unusual punishment has been correspondingly divided. Justice Antonin Scalia in *Harmelin v. Michigan* and Justice Edward White in his dissent in *Weems v. United States* offer strong arguments against the English Bill of Rights having included proportionality review within the restriction on cruel and unusual punishment.<sup>40</sup> However, Justice Powell writing for the Court in *Solem v. Helm* offered a strong retort:

The English Bill of Rights repeated the principle of proportionality in language that was later adopted in the Eighth Amendment: “excessive Baile ought not to be required nor excessive Fines imposed nor cruell and unusuall Punishments inflicted.” Although the precise scope of this provision is uncertain, it at least incorporated “the longstanding principle of English law that the punishment . . . should not be, by reason of its excessive length or severity, greatly disproportionate to the offense charged.”<sup>41</sup>

This same view was embraced by the joint opinion in *Gregg v. Georgia*: “The English version appears to have been directed against punishments unauthorized by statute and beyond the jurisdiction of the sentencing court, as well as those disproportionate to the offense involved.”<sup>42</sup> This understanding of the

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 833–34.

<sup>40</sup> See *Harmelin v. Michigan*, 501 U.S. 957, 968–75 (1991) (opinion of Scalia, J.) (arguing that the provision of the English Bill of Rights was designed to prohibit illegal sentences like those imposed on Oates rather than disproportionate punishments in general); *Weems v. United States*, 217 U.S. 349, 390–93, 390 n.1 (1910) (White, J. dissenting) (arguing that the English Bill of Rights was designed to guard against illegal punishments like those inflicted on Oates).

<sup>41</sup> *Solem v. Helm*, 463 U.S. 277, 285 (1983) (alteration in original) (citations omitted) (quoting RICHARD L. PERRY, *SOURCES OF OUR LIBERTIES* 236 (1959)) (citing 4 WILLIAM BLACKSTONE, *COMMENTARIES* \*16–19).

<sup>42</sup> 428 U.S. 153, 169–70 (1976) (opinion of Stewart, Powell, & Stevens, JJ.) (citing Anthony F. Granucci, “*Nor Cruel and Unusual Punishments Inflicted:*” *The Original Meaning*, 57 CALIF. L. REV. 839, 860 (1969)).

English Bill of Rights, as reflecting at least in part an opposition to disproportionate sentencing, owes greatly to the historical scholarship of Professor Anthony Granucci and his 1969 article, which was published in the *California Law Review*, “*Nor Cruel and Unusual Punishments Inflicted: The Original Meaning*.”<sup>43</sup>

Granucci’s scholarship, however, offers support for both sides of the proportionality debate, for according to Granucci, “Americans at the time of the founding misinterpreted the English punishments clause as being concerned with particularly gruesome methods of punishment, perhaps because they were misled by an erroneous reading of Blackstone.”<sup>44</sup> The Framers of the Bill of Rights “assumed that the modes of punishment inflicted in the Bloody Assizes, including quartering and embowelling, were the motivation for the cruel and unusual provision of the English Bill.”<sup>45</sup> Recalling that the cruel and unusual punishment guarantee arrived in the United States Constitution by way of Virginia’s Declaration of Rights, we may turn to Patrick Henry and George Mason from the committee that advanced the language eventually used by Madison to further enliven the original understanding of the prohibition on cruel and unusual punishment. Both addressed the language as prohibiting barbaric punishments and torture but neither referenced proportionality. Patrick Henry stated:

In this business of legislation, your members of Congress will loose the restriction of not imposing excessive fines, demanding excessive bail, and inflicting cruel and unusual punishments. These are prohibited by your declaration of rights. What has distinguished our ancestors?—That they would not admit of tortures, or cruel and barbarous punishment. But Congress may introduce the practice of the civil law, in preference to that of the common law. They may introduce the practice of France, Spain, and Germany—of torturing, to extort a confession of the crime. They will say that they might as well draw examples from those countries as from Great Britain, and they will tell you that there is such a necessity of strengthening the arm of government, that they must have a criminal equity, and extort confession by torture, in order to punish with still more relentless severity. We are then lost and undone.<sup>46</sup>

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43 See Joshua E. Kastenberg, *An Enlightened Addition to the Original Meaning: Voltaire and the Eighth Amendment’s Prohibition Against Cruel and Unusual Punishment*, 5 TEMP. POL. & CIV. RTS. L. REV. 49 (1995) (noting that “all of Furman’s concurring opinions cited Anthony F. Granucci’s important 1969 article”); Michael P. O’Shea, *Purposeless Restraints: Fourteenth Amendment Rationality Scrutiny and the Constitutional Review of Prison Sentences*, 72 TENN. L. REV. 1041, 1073–74 n.203 (2005) (noting White’s reliance on Granucci’s article in *Harmelin*).

44 Note, *Original Meaning and Its Limits*, 120 HARV. L. REV. 1279, 1290 (2007) (citing Granucci, *supra* note 42, at 860–65).

45 Stephen T. Parr, *Symmetric Proportionality: A New Perspective on the Cruel and Unusual Punishment Clause*, 68 TENN. L. REV. 41, 46 (2000).

46 Rumann, *supra* note 17, at 677 (quoting 3 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 447–48 (Jonathan Elliott ed., 2d ed. 1888) (1827)).

Similarly, addressing an argument that the Virginia Declaration of Rights did not safeguard against torture, Mason added that “the worthy gentleman was mistaken in his assertion that the bill of rights did not prohibit torture . . . . Another clause of the bill of rights provided that no cruel and unusual punishments shall be inflicted; therefore, torture was included in the prohibition.”<sup>47</sup> As noted by the joint opinion in *Gregg v. Georgia*, whereas the English Bill of Rights included a restriction on disproportionate sentencing, “[t]he American draftsmen, who adopted the English phrasing in drafting the Eighth Amendment, were primarily concerned . . . with proscribing ‘tortures’ and other ‘barbarous’ methods of punishment.”<sup>48</sup> It was the method of punishment that was squarely in the Framers’ focus.<sup>49</sup> It appears that “[t]he American clause . . . originally prohibited only ‘tortuous or barbaric punishments’ . . . [and] was not intended by the Framers to prohibit excessive punishments.”<sup>50</sup>

A rejoinder, however, has been offered pointing towards a broader understanding of the Framers’ intentions. Essentially, this view arises from honoring the Framers’ object—securing the traditional rights of Englishmen. These rights included restrictions on disproportionate punishment. Thus, as noted by the Supreme Court in *Solem v. Helm*, “[w]hen the Framers of the Eighth Amendment adopted the language of the English Bill of Rights, they also adopted the English principle of proportionality. Indeed, one of the consistent themes of the era was that Americans had all the rights of English subjects.”<sup>51</sup> It has been argued that “[t]he founding generation’s failure to have more public conversations about what the Eighth Amendment meant suggests that many of its members were uncritically claiming a liberty of their heritage, and expected it to mean what it had always meant.”<sup>52</sup> In other words, “the American framers and ratifiers understood themselves simply to be incorporating the English provision, whatever its content, into American law.”<sup>53</sup> Therefore, the argument is that even if the Framers did not understand that proportionality review was part of the restriction shaped by the English guarantee against cruel and unusual punishment, they, nevertheless, incorporated this restriction by seeking to preserve the traditional rights and liberties of Englishmen.

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47 3 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 452 (Jonathan Elliott ed., 2d ed. 1888) (1827).

48 *Gregg v. Georgia*, 428 U.S. 153, 169–70 (1976) (opinion of Stewart, Powell, & Stevens, JJ.) (citing Granucci, *supra* note 42, at 842).

49 See Note, *The Cruel and Unusual Punishment Clause and the Substantive Criminal Law*, 79 HARV. L. REV. 635, 636–37 (1966) (arguing that the Framers designed the Eighth Amendment to eliminate cruel methods of punishment).

50 Michael J. O’Connor, Note, *What Would Darwin Say?: The Mis-Evolution of the Eighth Amendment*, 78 NOTRE DAME L. REV. 1389, 1392 (2003).

51 463 U.S. 277, 285–86 (1983).

52 Claus, *supra* note 27, at 134.

53 Note, *Original Meaning and Its Limits*, *supra* note 44, at 1290.

The United States Congress on August 17, 1789 addressed Madison's proposal for a constitutional amendment that would eventually become the Eighth Amendment to the United States Constitution.<sup>54</sup> Only two members of Congress, both from the House of Representatives, were recorded as rising to speak on the merits of the cruel and unusual punishment prohibition, and both of them were opponents thereof.<sup>55</sup> Representative William Smith<sup>56</sup> of South Carolina "objected to the words 'nor cruel and unusual punishments;' the import of them being too indefinite."<sup>57</sup> Representative Samuel Livermore of New Hampshire offered the following critique:

The clause seems to express a great deal of humanity, on which account I have no objection to it; but as it seems to have no meaning in it, I do not think it necessary. What is meant by the terms excessive bail? Who are to be the judges? What is understood by excessive fines? It lies with the court to determine. No cruel and unusual punishment is to be inflicted; it is sometimes necessary to hang a man, villains often deserve whipping, and perhaps having their ears cut off; but are we in future to be prevented from inflicting these punishments because they are cruel? If a more lenient mode of correcting vice and deterring others from the commission of it could be invented, it would be very prudent in the Legislature to adopt it; but until we have some security that this will be done, we ought not to be restrained from making necessary laws by any declaration of this kind.<sup>58</sup>

With no additional recorded debate, the Eighth Amendment to the United States Constitution was approved.<sup>59</sup> Accordingly, as noted by Justice William O. Douglas, "the debates of the First Congress on the Bill of Rights throw little light on [the] intended meaning" of the prohibition of cruel and unusual punishment.<sup>60</sup> We do, however, know that "the death penalty was legal in all thirteen states in 1789, and, one year later, the First Congress itself

<sup>54</sup> See Claus, *supra* note 27, at 128 (recounting the proceedings of the vote on the proposed amendment).

<sup>55</sup> See William J. Brennan, Jr., Lecture, *Constitutional Adjudication and the Death Penalty: A View from the Court*, 100 HARV. L. REV. 313, 323 (1986) (concluding that scholars cannot know which punishments the framers considered cruel or unusual given the scarcity of contemporary congressional debate on the subject); see also Raoul Berger, *Death Penalties and Hugo Bedau: A Crusading Philosopher Goes Overboard*, 45 OHIO ST. L.J. 863, 868–69 (1984) (discussing the Framers' possible mindset while adopting the Eighth Amendment).

<sup>56</sup> Representative William Smith of South Carolina was originalist in terms of constitutional construction; he believed that

"the words" of the text were to be interpreted based on "the general sense of the whole nation at the time the Constitution was formed . . . [B]y referring to the contemporaneous expositions of that instrument, when the subject was viewed only in relation to the abstract power . . . we should come at the truth."

Robert N. Clinton, *Original Understanding, Legal Realism, and the Interpretation of "This Constitution,"* 72 IOWA L. REV. 1177, 1199 (1987).

<sup>57</sup> Claus, *supra* note 27, at 128 (quoting 1 ANNALS OF CONG. 754 (Joseph Gales ed., 1789)).

<sup>58</sup> *Id.* (quoting 1 ANNALS OF CONG. 754 (Joseph Gales ed., 1789)).

<sup>59</sup> *Id.* (citing 1 ANNALS OF CONG. 754 (Joseph Gales ed., 1789)).

<sup>60</sup> *Furman v. Georgia*, 408 U.S. 238, 244 (1971) (Douglas, J., concurring).

enacted legislation which punished by death the crimes of murder, robbery, rape, and forgery of public securities.”<sup>61</sup>

The first judicial attempts at defining cruel and unusual punishment in the United States arose not in federal courts but in state courts. These early forays into interpreting the constitutional prohibition upon cruel and unusual punishment provide a meaningful sense of the early judicial understanding thereof in the United States. In considering these early state court decisions, there is cause for caution insofar as there exists a question of whether cruel and unusual means the same thing under the respective state constitutions as it does under the federal constitution, especially given that states were not at this time obligated to adhere to the Eighth Amendment.<sup>62</sup> However, there is little to suggest that state courts of the era regarded cruel and unusual punishment as potentially meaning something different under their state constitutions than the federal constitution,<sup>63</sup> which would be a greater concern for post-1970s decisions in light of modern judicial state constitutional judicial federalism.<sup>64</sup> Ultimately, these early state court opinions offer valuable insight into the American judiciary’s early understanding of the prohibition upon cruel and unusual punishment.

In 1824 the General Court of Virginia ruled that the cruel and unusual punishment restriction was applicable to the mode of punishment and not to determining whether the punishment was excessive.<sup>65</sup> In reflecting upon this conclusion, it is worth recalling that the Virginia Bill of Rights, the interpretation of which was before the General Court of Virginia, provided

<sup>61</sup> Alan I. Bigel, *Justices William J. Brennan, Jr. and Thurgood Marshall on Capital Punishment: Its Constitutionality, Morality, Deterrent Effect, and Interpretation by the Court*, 8 NOTRE DAME J.L. ETHICS & PUB. POL’Y 13, 34 (1994).

By the first Crimes Act of the United States, forgery of public securities, or knowingly uttering forged public securities with intent to defraud, as well as treason, murder, piracy, mutiny, robbery, or rescue of a person convicted of a capital crime, was punishable with death; most other offenses were punished by fine and imprisonment; whipping was part of the punishment of stealing or falsifying records, fraudulently acknowledging bail, larceny of goods, or receiving stolen goods; disqualification to hold office was part of the punishment of bribery; and those convicted of perjury or subornation of perjury, besides being fined and imprisoned, were to stand in the pillory for one hour, and rendered incapable of testifying in any court of the United States.

*Ex parte Wilson*, 114 U.S. 417, 427 (1885) (citing Act of April 30, 1790, ch. 9, 1 Stat. 112–17 (1790); *Mr. Justice Wilson’s Charge to the Grand Jury in 1791*, in 3 WILSON’S WORKS 380–81 (n.d.)).

<sup>62</sup> Cf. Jeffrey Omar Usman, *Defining Religion: The Struggle to Define Religion Under the First Amendment and the Contributions and Insights of Other Disciplines of Study Including Theology, Psychology, Sociology, the Arts, and Anthropology*, 83 N.D. L. REV. 123, 165 (2007) (making a corresponding observation regarding the term “religion” in the First Amendment and state constitutions).

<sup>63</sup> Cf. *id.* (making a similar observation concerning the First Amendment and state constitutions).

<sup>64</sup> Cf. Jeffrey Omar Usman, *The Game is Afoot: Constitutionalizing the Right to Hunt and Fish in the Tennessee Constitution*, 77 TENN. L. REV. 57, 98–101 (2009) (tracing the rise of judicial federalism starting in the 1970s).

<sup>65</sup> *Aldridge v. Commonwealth*, 4 Va. (2 Va. Cas.) 447, 449–50 (1824).

the basis for the Eighth Amendment. In reaching its conclusion, the General Court of Virginia stated:

As to the ninth section of the Bill of Rights, denouncing cruel and unusual punishments, we have no notion that it has any bearing on this case. That provision was never designed to control the Legislative right to determine *ad libitum*<sup>66</sup> upon the *adequacy* of punishment, but is merely applicable to the modes of punishment. We had existed for a considerable time as a community, regulated by Laws guarded by Penal sanctions, when this Bill of Rights was declared. We consider these sanctions as sufficiently rigorous, and we knew that the best heads and hearts of the land of our ancestors, had long and loudly declaimed against the wanton cruelty of many of the punishments practised in other countries; and this section in the Bill of Rights, was framed effectually to exclude these, so that no future Legislature, in a moment perhaps of great and general excitement, should be tempted to disgrace our Code by the introduction of any of those odious modes of punishment.<sup>67</sup>

The Georgia Supreme Court also concluded that it was province of the legislature, not the courts, to determine whether a punishment was excessive and that the prohibition of cruel and unusual punishment was addressed to the mode of punishment, not the proportionality thereof.<sup>68</sup> The Georgia Supreme Court stated:

Whether the law is unconstitutional, a violation of that article of the Constitution which declares excessive fines shall not be imposed nor cruel and unusual punishments inflicted, is another question. The latter clause was, doubtless, intended to prohibit the barbarities of quartering, hanging in chains, castration, etc. When adopted by the framers of the Constitution of the United States, larceny was generally punished by hanging; forgeries, burglaries, etc., in the same way, for, be it remembered, penitentiaries are of modern origin, and I doubt if it ever entered into the mind of men of that day, that a crime such as this witness makes the defendant guilty of deserved a less penalty than the Judge has inflicted. It would be an interference with matters left by the Constitution to the legislative department of the government, for us to undertake to weigh the propriety of this or that penalty fixed by the Legislature for specific offenses. So long as they do not provide cruel and unusual punishments, such as disgraced the civilization of former ages, and make one shudder with horror to read of them, as drawing, quartering, burning, etc., the Constitution does not put any limit upon legislative discretion.<sup>69</sup>

The Virginia and Georgia courts' interpretation of the restriction upon cruel and unusual punishment is broadly reflective of the analysis of their sister state courts that addressed the meaning of the prohibition upon cruel and unusual punishment during the 1800s. For example, the North Carolina Supreme Court determined that extreme deference to the legislature was necessary when interpreting this restriction:

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<sup>66</sup> Ad libitum is Latin for "[a]t pleasure." *Ad libitum*, BLACK'S LAW DICTIONARY (10th ed. 2014).

<sup>67</sup> *Aldridge*, 2 Va. (2 Va. Cas.) at 449–50.

<sup>68</sup> See *Whitten v. State*, 47 Ga. 297, 301 (1872) (holding that the Eighth Amendment was designed to prohibit certain types of punishments rather than disproportional ones).

<sup>69</sup> *Id.*

No doubt the principles of humanity sanctioned and enjoined in this section ought to command the reverence and regulate the conduct of *all* who owe obedience to the constitution. But when the legislature, acting upon their oaths, . . . prescribe the punishments to be inflicted in case of crime; as the reasonableness or excess, the justice or cruelty of these are necessarily questions of discretion, it is not easy to see how this discretion can be supervised by a co-ordinate branch of the government. Without attempting a definitive solution of this very perplexing question, it may at least be safely concluded that unless the act complained of (which it would be almost indecent to suppose) contains such a flagrant violation of all discretion as to show a disregard of constitutional restraints it cannot be pronounced by the judiciary *void* because of repugnancy to the constitution.<sup>70</sup>

In 1855, the Supreme Judicial Court of Massachusetts went even further than the North Carolina Supreme Court: “The question whether the punishment is too severe, and disproportionate to the offence, is for the legislature to determine.”<sup>71</sup> Similarly, the California Supreme Court in 1860 determined that “[t]he power over the whole subject of punishment for crime is vested in the Legislature. The only limitation upon its exercise is the inhibition against the infliction of cruel and unusual punishments, which are held to mean those of a barbarous character, and unknown to the common law.”<sup>72</sup> Nine years later, the Supreme Court for the New Mexico Territory offered the following assessment:

The word cruel, as used in the amendatory article of the constitution, was no doubt intended to prohibit a resort to the process of torture, resorted to so many centuries as a means of extorting confessions from suspected criminals, under the sanction of the civil law. It was never designed to abridge or limit the selection by the law-making power of such kind of punishment as was deemed most effective in the punishment and suppression of crime. . . . However averse the court may be to this mode of punishment, it cannot authorize the court in disregarding and annulling the law providing for the punishment of this crime, and, until repealed, it is the duty of the court to enforce it.<sup>73</sup>

In other words, the earliest interpretations of the prohibition upon cruel and unusual punishment reflect either an extremely deferential view of the court’s role in proportionality analysis, as illustrated by the North Carolina Supreme Court, or more commonly a determination that the restriction upon cruel and unusual punishment excludes certain methods of punishment but does not empower courts to conduct a proportionality review.

Unlike its state counterparts, “[i]n the century following the Eighth Amendment’s ratification in 1791, the Supreme Court rarely commented on

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70 State v. Manuel, 20 N.C. (4 Dev. & Bat.) 144, 162 (1838).

71 Commonwealth v. Hitchings, 71 Mass. (5 Gray) 482, 486 (1855).

72 State v. McCauley, 15 Cal. 429, 455 (1860).

73 Garcia v. Territory of New Mexico, 1 N.M. 415, 418–19 (1869).

[the Eighth Amendment's] meaning and applicability."<sup>74</sup> In fact, the Supreme Court did not interpret the Cruel and Unusual Punishment Clause on the merits until 1878<sup>75</sup> when the Court considered *Wilkerson v. Utah*.<sup>76</sup> The Court via its *Wilkerson v. Utah* decision limited the reach of Cruel and Unusual Punishment Clause to excluding particularly barbaric punishments with its analysis "focused on the historical recognition of cruel punishments rather than on contemporary standards."<sup>77</sup> In *Wilkerson v. Utah*, the Court considered the arguments of a defendant who had been sentenced to death under a statute that provided that "any person convicted of murder in the first degree 'shall suffer death,'" and that "the several sections of this code, which declare certain crimes to be punishable as therein mentioned, devolve a duty upon the court authorized to pass sentence to determine and impose the punishment prescribed."<sup>78</sup> With *Wilkerson* having been found guilty of first degree murder, the trial court utilized its discretion to determine the method of execution; the defendant would be publicly shot.<sup>79</sup> In reviewing a challenge to this sentence as being cruel and unusual, the Supreme Court noted that "[d]ifficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted."<sup>80</sup> However, the Court concluded that it was "safe to affirm that punishments of torture . . . and all others in the same line of unnecessary cruelty, are forbidden by that amendment to the Constitution."<sup>81</sup> Publicly shooting *Wilkerson* did not, however, violate the prohibition against cruel and unusual punishment.<sup>82</sup>

The Supreme Court's next foray into interpreting the prohibition upon cruel and unusual punishment arose a little over a decade later. The defendant in *In re Kemmler* invoked the protections of the Eighth Amendment to argue "the character of the penalty," that is the use of electrocution as the method by which he was to be executed, constituted a cruel and unusual punishment in violation of the Eighth Amendment.<sup>83</sup> The Supreme Court noted that "[p]unishments are cruel when they involve torture or a lingering death, but the punishment of death is not cruel, within the meaning of that word as used

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<sup>74</sup> Brian W. Varland, *Marking the Progress of a Maturing Society: Reconsidering the Constitutionality of Death Penalty Application in Light of Evolving Standards of Decency*, 28 HAMLINE L. REV. 312, 314 (2005).

<sup>75</sup> See John F. Stinneford, *The Original Meaning of "Cruel,"* 105 GEO. L.J. 441, 481 (2017) (explaining that the United States Supreme Court did not consider whether a punishment ran afoul of the Eighth Amendment until 1878).

<sup>76</sup> 99 U.S. 130 (1878).

<sup>77</sup> Varland, *supra* note 74, at 314–15.

<sup>78</sup> *Wilkerson*, 99 U.S. at 132.

<sup>79</sup> *Id.* at 131.

<sup>80</sup> *Id.* at 135–36.

<sup>81</sup> *Id.* at 136.

<sup>82</sup> *Id.*

<sup>83</sup> 136 U.S. 436, 441–42 (1890).

in the Constitution. It implies there something inhuman and barbarous, something *more than the mere extinguishment of life*.<sup>84</sup> The Supreme Court accepted the New York state courts' analysis that electrocution may be unusual, insofar as it was then new, but that because it was enacted as part of legislative effort to utilize a more humane means of execution it certainly could not be said to be cruel.<sup>85</sup> Accordingly, death by electrocution did not constitute cruel and unusual punishment and did not violate the Eighth Amendment.<sup>86</sup>

Though Chief Justice Warren's 1958 plurality opinion in *Trop v. Dulles* is often referenced as the origin point for the concept of an evolving standard of what constitutes cruel and unusual punishment, rightly the tale begins with Supreme Court's decision half-a-century earlier in *Weems v. United States*.<sup>87</sup> Prior to *Weems*, the Supreme "Court interpreted the Cruel and Unusual Punishment Clause only to prohibit modes of punishment that were barbaric and cruel."<sup>88</sup> *Weems* incorporated proportionality review into the Court's analysis of cruel and unusual punishment.<sup>89</sup> The *Weems* Court was not addressing a capital case but instead a sentence in the Philippines, then under the control of the United States, imposing a harsh punishment for the crime of falsifying a public document.<sup>90</sup> To be guilty of the offense, it was

not necessary that there be any fraud nor even the desire to defraud, nor intention of personal gain on the part of the person committing it, that a falsification of a public document be punishable; it is sufficient that the one who committed it had the intention to pervert the truth and to falsify the document, and that by it damage might result to a third party.<sup>91</sup>

The minimum sentence for this offense consisted of "confinement in a penal institution for twelve years and one day, a chain at the ankle and wrist of the offender, hard and painful labor, no assistance from friend or relative, no marital authority or parental rights or rights of property, no participation even in the family council."<sup>92</sup>

In addressing the offense and its harsh punishment, the Court observed of the Cruel and Unusual Punishment Clause that it "may be . . . progressive,

<sup>84</sup> *Id.* at 447 (emphasis added).

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 448–49.

<sup>87</sup> 217 U.S. 349 (1910).

<sup>88</sup> Douglas L. Simon, *Making Sense of Cruel and Unusual Punishment: A New Approach to Reconciling Military and Civilian Eighth Amendment Law*, 184 MIL. L. REV. 66, 70 (2005).

<sup>89</sup> Chris Baniszewski, Comment, *Supreme Court Review of Excessive Prison Sentences: The Eighth Amendment's Proportionality Requirement*, 25 ARIZ. ST. L.J. 929, 941 (1993) ("Although *Weems v. United States* was not the first Supreme Court case to address the proportionality principle, it was the first case in which the Court suggested that the Eighth Amendment contains a proportionality principle." (footnote omitted)).

<sup>90</sup> Paul Weems, convicted of having falsified a public and official document, listed sums of money as having been paid out on an official ledger that were not. *Weems*, 217 U.S. at 362–63.

<sup>91</sup> *Id.* at 363.

<sup>92</sup> *Id.* at 366.

and is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice.”<sup>93</sup> The Court offered a living constitution interpretive understanding of the Eight Amendment prohibition on cruel and unusual punishment as a restriction that grows and changes with the nation and the times:

Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, “designed to approach immortality as nearly as human institutions can approach it.” The future is their care and provision for events of good and bad tendencies of which no prophecy can be made. In the application of a constitution, therefore, our contemplation cannot be only of what has been but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality. And this has been recognized. The meaning and vitality of the Constitution have developed against narrow and restrictive construction.<sup>94</sup>

Using this evolving interpretive approach, the Court determined that the punishment was cruel and unusual.<sup>95</sup> The reach of the *Weems* Court’s evolving proportionality jurisprudence, however, remained limited for decades because (1) the unusual character of the punishment, especially the conditions of confinement and the accessory civil penalties such as stripping parental, marital, and property rights suggested that this was perhaps a method of punishment case;<sup>96</sup> (2) the Supreme Court itself was disinclined to return to or extend *Weems*;<sup>97</sup> and (3) Justice White’s dissent in *Weems* effectively attacked

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<sup>93</sup> *Id.* at 378.

<sup>94</sup> *Id.* at 373.

<sup>95</sup> *Id.* at 372–78, 382.

<sup>96</sup> See Baniszewski, *supra* note 89, at 941 (describing the unusually harsh penalty inflicted on *Weems*); Parr, *supra* note 45, at 52–53 (positing that, because of the unusual penalty in *Weems*, the Court cabined its holding to the facts of the case); Charles Walter Schwartz, *Eighth Amendment Proportionality Analysis and the Compelling Case of William Rummel*, 71 J. CRIM. L. & CRIMINOLOGY 378, 385 (1980) (arguing “that the most reasonable reading of *Weems* is that the various factors discussed coalesced in both condition and intensity of punishment to violate the eighth amendment’s prohibition.”).

<sup>97</sup> See Baniszewski, *supra* note 89, at 942 (explaining that the ambiguous reasoning in *Weems* diminished its precedential value); James S. Campbell, *Revival of the Eighth Amendment: Development of Cruel-Punishment Doctrine by the Supreme Court*, 16 STAN. L. REV. 996, 1006–07 (1964) (lamenting that the Court gave *Weems* only occasional treatment until 1962); Norman J. Finkel, *Prestidigitation, Statistical Magic, and Supreme Court Numerology in Juvenile Death Penalty Cases*, 1 PSYCHOL. PUB. POLY & L. 612, 616 (1995) (explaining that the Court rarely revisited *Weems* despite its significance).

the majority determination that the prohibition on cruel and unusual punishment included a role for the courts in conducting a proportionality review.<sup>98</sup>

While a malleable rather than fixed Eighth Amendment and proportionality review were first accepted by the Supreme Court in *Weems*, it is in another non-capital case in which the interpretive structure of the modern Eighth Amendment jurisprudential framework was forged. Recognizing that the *Weems* Court had found that the words of the Eighth Amendment “are not precise, and that their scope is not static,” the plurality in *Trop v. Dulles* concluded that the cruel and unusual punishment provision, accordingly, “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”<sup>99</sup> The Court in *Trop* had before it the conviction of Albert Trop, a soldier who deserted during a time of war and who was punished with losing his citizenship.<sup>100</sup> The Court found that Trop could not be deprived of his citizenship.<sup>101</sup> The plurality offered two foundations for this determination: (1) a person could voluntarily renounce their citizenship, but, the government did not have the power to remove someone’s citizenship, and (2) rendering an individual stateless constituted cruel and unusual punishment.<sup>102</sup> It is the later basis in which the Court evoked the concept of evolving standards of decency to support its conclusion, laying the foundation for subsequent Eighth Amendment jurisprudence.<sup>103</sup>

## II. ASSESSING THE EVOLVING STANDARDS OF DECENCY

The emergence of proportionality review ensures that “the Eighth Amendment bars not only those punishments that are ‘barbaric’ but also

<sup>98</sup> Paul R. Baier, *The Supreme Court, Justinian, and Antonin Scalia: Twenty Years in Retrospect*, 67 LA. L. REV. 489, 520 n.108 (2007) (recounting Justice Scalia’s acknowledgment that he had borrowed the argument from Justice White’s *Weems* dissent to formulate his own dissent from an Eighth Amendment case); Michael P. O’Shea, *Purposeless Restraints: Fourteenth Amendment Rationality Scrutiny and the Constitutional Review of Prison Sentences*, 72 TENN. L. REV. 1041, 1056 (2005) (crediting Justice White’s dissent as a “powerful originalist analysis”); Parr, *supra* note 45, at 51–52 (describing Justice White’s vociferous dissent from the *Weems*).

<sup>99</sup> *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958) (plurality opinion).

<sup>100</sup> *Id.* at 87–91; *see also* Simon, *supra* note 88, at 72 (explaining that Trop’s desertion as a U.S. soldier in French Morocco resulted in his statelessness).

<sup>101</sup> *Trop*, 356 U.S. at 100–03 (plurality opinion).

<sup>102</sup> *Id.* at 92–93, 102–04; *see also* Michael J. O’Connor, *supra* note 50, at 1393–94 (summarizing the holding and reasoning in *Trop*). Justice Brennan, who authored the concurring opinion in the case, did not rely upon the cruel and unusual foundation but instead concluded that the punishment simply did not bear a rational relationship to the power that Congress was supposedly utilizing to impose this sanction. *Trop*, 356 U.S. at 105–14 (Brennan, J. concurring).

<sup>103</sup> *See, e.g.*, Varland, *supra* note 74, at 316–17 (explaining that *Trop*’s “evolving standards of decency” would provide the accepted framework in death penalty cases); David J. Pfeffer, Comment, *Depriving America of Evolving Its Own Standards of Decency?: An Analysis of the Use of Foreign Law in Eighth Amendment Jurisprudence and Its Effect on Democracy*, 51 St. Louis U. L.J. 855, 870 (2007) (stating that “*Trop v. Dulles* set the standard by which ‘cruel and unusual punishment’ is examined by the Supreme Court”).

those that are ‘excessive’ in relation to the crime committed.”<sup>104</sup> Assessing proportionality in accordance with evolving societal standards of decency ensures that courts assess whether “[a] claim that punishment is excessive . . . not by the standards that prevailed in 1685 when Lord Jeffreys presided over the ‘Bloody Assizes’ or [even] when the Bill of Rights was adopted, but rather by those that currently prevail.”<sup>105</sup>

In order to interpret the constitutional prohibition on cruel and unusual punishment, the Supreme Court has “established the propriety and affirmed the necessity of referring to ‘the evolving standards of decency that mark the progress of a maturing society’ to determine which punishments are so disproportionate as to be cruel and unusual.”<sup>106</sup> This provides for a “flexible and dynamic” approach to the Eighth Amendment.<sup>107</sup> Its shifting parameters are driven by “an assessment of contemporary values concerning the infliction of a challenged sanction.”<sup>108</sup>

However, understanding that evolving societal standards of decency emerge from contemporary values does not answer the question of how courts are to determine what those values are. Framing the parameters of this exploration, the Supreme Court has delineated its role: “[O]ur job is to identify the ‘evolving standards of decency’; to determine, not what they should be, but what they are.”<sup>109</sup> It is extremely important that “these Eighth Amendment judgments should not be, or appear to be, merely the subjective views of individual Justices.”<sup>110</sup> Accordingly, “this assessment does not call for a subjective judgment. It requires, rather, that we look to objective indicia that reflect the public attitude toward a given sanction.”<sup>111</sup> Thus, “[p]roportionality review under those evolving standards should be informed by ‘objective factors to the maximum possible extent.’”<sup>112</sup>

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<sup>104</sup> *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion).

<sup>105</sup> *Atkins v. Virginia*, 536 U.S. 304, 311 (2002); *see also* *Ford v. Wainwright*, 477 U.S. 399, 406 (1986) (“[T]he Eighth Amendment’s proscriptions are not limited to those practices condemned by the common law in 1789.” (citing *Gregg v. Georgia*, 428 U.S. 153, 171 (1976) (opinion of Stewart, Powell, & Stevens, JJ.))).

<sup>106</sup> *Roper v. Simmons*, 543 U.S. 551, 561 (2005) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)).

<sup>107</sup> *Gregg*, 428 U.S. at 171 (opinion of Stewart, Powell, & Stevens, JJ.).

<sup>108</sup> *Id.* at 173.

<sup>109</sup> *Stanford v. Kentucky*, 492 U.S. 361, 378 (1989) (emphasis omitted).

<sup>110</sup> *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion).

<sup>111</sup> *Gregg*, 428 U.S. at 173 (opinion of Stewart, Powell, & Stevens, JJ.).

<sup>112</sup> *Atkins v. Virginia*, 536 U.S. 304, 312 (2002) (quoting *Harmelin v. Michigan*, 501 U.S. 957, 1000 (1991) (Kennedy, J., concurring)); *see also* *Rummel v. Estelle*, 445 U.S. 263, 274–75 (1980) (emphasizing the importance of focusing on objective factors).

The *Coker v. Georgia* Court in 1977 explained that objective factors included “public attitudes concerning a particular sentence,” “legislative attitudes,” and “the response of juries reflected in their sentencing decisions.”<sup>113</sup> The Supreme Court, however, has in later years indicated that “[t]he clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country’s legislatures.”<sup>114</sup> The Supreme Court reiterated this conclusion in *Atkins v. Virginia* wherein the Court noted that it had “pinpointed that the ‘clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country’s legislatures’”<sup>115</sup> and again in *Roper v. Simmons*.<sup>116</sup> In assessing whether a national consensus exists, the Supreme Court has indicated that “[i]t is not so much the number of these States that is significant, but the consistency of the direction of change.”<sup>117</sup> The Court, however, has cautioned that “the objective evidence, though of great importance, [does] not ‘wholly determine’ the controversy, ‘for the Constitution contemplates that in the end [the Court’s] own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.’”<sup>118</sup>

Through this last component, the Supreme Court reflects upon the “culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question.”<sup>119</sup> The Court has taken the view that “a punishment is ‘excessive’ and unconstitutional if it . . . makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering.”<sup>120</sup> The Court’s “test has turned to ideas about penology and proportionality, considering the cruel and unusual nature of the . . . penalty imposed on a class of offenders by the penalty’s furtherance of deterrence and retribution and by its proportionality to the severity of the offender’s crime and to his culpability.”<sup>121</sup> The Court has, however, never utilized its “own judgment” in contravention of what it has found to be the objective measure of society’s contemporary moral values as a basis for striking down legislation under the Cruel and Unusual Punishment Clause. Nor would the Court be on solid ground in

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<sup>113</sup> *Coker*, 433 U.S. at 592.

<sup>114</sup> *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989), *abrogated by* *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

<sup>115</sup> *Atkins*, 536 U.S. at 312 (quoting *Penry*, 492 U.S. at 331).

<sup>116</sup> *Roper v. Simmons*, 543 U.S. 551, 564 (2005) (“The beginning point is a review of objective indicia of consensus, as expressed in particular by the enactments of legislatures that have addressed the question. These data give us essential instruction.”).

<sup>117</sup> *Atkins*, 536 U.S. at 315; *see also Roper*, 543 U.S. at 566 (using the same language).

<sup>118</sup> *Atkins*, 536 U.S. at 312 (quoting *Coker v. Georgia*, 433 U.S. 584, 597 (1977) (plurality opinion)).

<sup>119</sup> *Graham v. Florida*, 560 U.S. 48, 67 (2010).

<sup>120</sup> *Coker*, 433 U.S. at 592.

<sup>121</sup> *See* Susan M. Raeker-Jordan, *Parsing Personal Predilections: A Fresh Look at the Supreme Court’s Cruel and Unusual Death Penalty Jurisprudence*, 58 ME. L. REV. 100, 103 (2006) (discussing the death penalty).

doing so given that the constitutional ballast for the living constitution analysis of its evolving standards jurisprudence is that the government is acting in contravention of society's contemporary moral values in a manner that is cruel and unusual. If a state legislature is not acting in contravention of contemporary moral values as objectively assessed, then the living constitution evolving standards of decency based prohibition loses its grounding.

### III. MORAL EVOLUTION IS NEITHER LINEAR NOR NECESSARILY TOWARDS LESS STRINGENT PUNISHMENT

The concept of “moral progress is . . . deeply embedded in American culture”<sup>122</sup> and part of the cultural undercurrent animating the Court's Eighth Amendment jurisprudence. The evolving standards of decency can be envisioned as a judicial embrace of a progressivist view of history, a constant march, with perhaps a few setbacks, towards reducing sanctions by a morally evolved people through a societal realization of the excesses of punishment.<sup>123</sup> As a descriptive matter, “a characterization of history as sequential and progressive, moving inevitably toward more humane and enlightened attitudes, is not accurate. Cyclic processes are far closer to the truth.”<sup>124</sup> Offering a cautionary analysis of the progressive leniency understanding of evolving standards of decency in the context of capital punishment, which is one of the most inviting targets for the linear assumption, Justice Sandra Day O'Connor in *Thompson v. Oklahoma* offered evidence of contrary historical development:

The history of the death penalty instructs that there is danger in inferring a settled societal consensus from statistics like those relied on in this case. In 1846, Michigan became the first State to abolish the death penalty for all crimes except treason, and Rhode Island soon thereafter became the first jurisdiction to abolish capital punishment completely. In succeeding decades, other American States continued the trend towards abolition, especially during the years just before and during World War I. Later, and particularly after World War II, there ensued a steady and dramatic decline in executions—both in absolute terms and in relation to the number of homicides occurring in the country. In the 1950's and 1960's, more States abolished or radically restricted capital punishment, and executions ceased completely for several years beginning in 1968.

In 1972, when this Court heard arguments on the constitutionality of the death penalty, such statistics might have suggested that the practice had become a relic, implicitly rejected by a new societal consensus. Indeed, counsel urged the Court to conclude that “the number of cases in which the death

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<sup>122</sup> DALE JAMIESON, MORALITY'S PROGRESS: ESSAYS ON HUMANS, OTHER ANIMALS, AND THE REST OF NATURE 19 (2002).

<sup>123</sup> See, e.g., Krista L. Patterson, *Acculturation and the Development of Death Penalty Doctrine in the United States*, 55 DUKE L.J. 1217, 1224–30 (2006) (describing the United States following a European trend toward the abolition of the death penalty).

<sup>124</sup> STEPHEN P. HINSHAW, THE MARK OF SHAME: STIGMA OF MENTAL ILLNESS AND AN AGENDA FOR CHANGE 54 (2007).

penalty is imposed, as compared with the number of cases in which it is statutorily available, reflects a general revulsion toward the penalty that would lead to its repeal if only it were more generally and widely enforced.” We now know that any inference of a societal consensus rejecting the death penalty would have been mistaken. But had this Court then declared the existence of such a consensus, and outlawed capital punishment, legislatures would very likely not have been able to revive it. The mistaken premise of the decision would have been frozen into constitutional law, making it difficult to refute and even more difficult to reject.<sup>125</sup>

Justice O’Connor’s examples are extremely important, but interestingly not the earliest illustration of the ebb and flow of the American experience with regard to the death penalty. America’s colonial history reveals that opposition to the death penalty and strict limits thereupon in the seventeenth century, including extremely progressive policies in Pennsylvania and Rhode Island, were supplanted by a dramatic expansion of the death penalty during the eighteenth century.<sup>126</sup> Examples of this ebb and flow can be traced much deeper into pages of history and far beyond the borders of the United States. For example, in recent years, there have been increasing calls for embracing the death penalty in non-capital punishment countries in response to rising crime rates in Latin America, even for non-homicide offenses, with public opinion strongly supporting application of the death penalty for kidnapping in Mexico, for child rape in the Dominican Republic, and for the rape of children and adults in Peru, among others.<sup>127</sup>

The language of the Eighth Amendment jurisprudential framework—evolving standards of decency, maturing society, and more humane justice—“evoke a teleological conception of history in which human society grows more enlightened with the march of time.”<sup>128</sup> The view is essentially that “humanity is making steady, if uneven and ambivalent, progress toward greater freedom, equality, prosperity, rationality, or peace.”<sup>129</sup> That history does not move in such a march is certainly not a bad side to have in a debate<sup>130</sup> with the atrocities

<sup>125</sup> *Thompson v. Oklahoma*, 487 U.S. 815, 854–55 (1988) (O’Connor, J., concurring) (citations omitted).

<sup>126</sup> See Davison M. Douglas, *God and the Executioner: The Influence of Western Religion on the Death Penalty*, 9 WM. & MARY BILL RTS. J. 137, 155 n.94 (2000) (noting that while in Pennsylvania “confined the death penalty to murder and treason” and Rhode Island constrained application of the death penalty to “relatively few crimes” the “number of capital crimes in the American colonies sharply increased during the eighteenth century”).

<sup>127</sup> See ROGER HOOD & CAROLYN HOYLE, *THE DEATH PENALTY: A WORLDWIDE PERSPECTIVE* 374 (4th ed. 2008) (contrasting societal endorsement of the death penalty with these countries’ outlawing of the death penalty).

<sup>128</sup> Gabriel S. Sanchez, Comment, *Towards a Post-Historicist Punishments Clause Jurisprudence*, 56 DEPAUL L. REV. 1321, 1330 (2007).

<sup>129</sup> WENDY BROWN, *POLITICS OUT OF HISTORY* 6 (2001).

<sup>130</sup> See, e.g., DAVID HACKETT FISCHER, *HISTORIANS’ FALLACIES: TOWARD A LOGIC OF HISTORICAL THOUGHT* 122–23 (1970) (highlighting the fallacy of false interpolation as resting on the false premise that events flow in a consistent manner over time); CHARLES A. KUPCHAN, *THE END OF THE*

of the Twentieth-Century serving as Exhibit A and the environmental degradation and tribalism of the Twentieth-First Century as Exhibit B.

Even if one accepts a generally progressive movement of history and that this movement manifests itself in the arena of criminal law in the United States, critical misplaced assumptions, nevertheless, undercut the conclusion that the moral evolution of criminal sanction is linear and that evolution is necessarily towards greater leniency. One significant error is the assumption that “the basic questions can be settled once and for all, so that the answers to these questions can be taught to children, so that subsequent generations simply can build up the solutions found out by earlier generations, without bothering any longer about the basic questions.”<sup>131</sup> This reflects overconfidence in the moral superiority of the present that finds nothing to learn from a past that has been transcended and a future that has already been reached. Application of severe sanctions, such as the death penalty for an adult or life imprisonment for a juvenile offender, pose basic questions of criminal justice that do not lend themselves to such definitive transgenerational resolution. They are questions that will be, and should be, re-asked by subsequent generations rather than definitively resolved. The nature of a living constitution which undergirds the evolving standards of decency framework should anticipate exactly that. Failure to acknowledge this is to undercut the entire tenor of the evolving standards doctrine by assuming the type of static society that is inherently at odds with the evolving standards of decency doctrine itself.

Moral evolution is simply more complex than the linear sense of historical development allows. As an illustration, in his seminal text *The Death Penalty: An American History*, venerable Professor Stuart Banner makes a politically controversial assertion regarding Colonial Americans from whom we have evolved on the issue of capital punishment and their contemporary reviewers:

The standard approach to the history of the death penalty in the United States has been a smug condescension to the past, a refusal even to try to understand. The times were rude and life was cheap, we tell ourselves. The people of the seventeenth and eighteenth centuries did not think as independently as we do; they were still shackled by oppressive political and religious traditions they were not yet able to throw off. But this story is a caricature of early modern thought, invented (as we will see) by capital punishment’s later opponents. Executing a fellow human being was just as momentous in the seventeenth and eighteenth centuries as it is today. Colonial Americans were not blindly following tradition. They pondered the death penalty and the purposes it served,

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AMERICAN ERA: U.S. FOREIGN POLICY AND THE GEOPOLITICS OF THE TWENTY-FIRST CENTURY 304 (2002) (describing “history as having a cyclical as well as an evolutionary character”).

<sup>131</sup> Sanchez, *supra* note 128, at 1331 (emphasis omitted) (quoting Leo Strauss, *The Living Issues of German Postwar Philosophy* (1940), in HEINRICH MEIER, LEO STRAUSS AND THE THEOLOGICO-POLITICAL PROBLEM 115, 123 (Marcus Brainard trans., 2006)).

just as Americans do today. But because of the institutional structure and prevailing religious beliefs of their time, capital punishment could serve a broader set of purposes than it serves today.<sup>132</sup>

Darwinian theory does not posit that evolution brings improvement or even that greater complexity results; rather, it is predicated on adaptability and ability to survive and reproduce within the environment.<sup>133</sup> Banner's observation is more in accord with a Darwinian evolution than a progressivist historical interpretation of the death penalty. An observation from Justice Scalia fits neatly within this context and identifies a problem that a progressivist interpretation of history can cause when interpreting the cruel and unusual punishment guarantee, and which stands at the epicenter of this Article: "[T]he Eighth Amendment is not a ratchet, whereby a temporary consensus on leniency for a particular crime fixes a permanent constitutional maximum, disabling the States from giving effect to altered beliefs and responding to changed social conditions."<sup>134</sup> Changes in both beliefs and social conditions drive evolving views of criminal sanction, and American society has not arrived at a point of end of change for either.

Additionally, the direction of moral evolution under the progressivist assumption is assumed to be only one way towards greater leniency. Thus, when the Supreme Court "sees a minority of legislatures supporting tougher death penalty rules, those legislators are stragglers who have not yet 'seen the light.'"<sup>135</sup> However, as Professor Tonja Jacobi cautions,

those stragglers may just as easily be innovators, who are ahead of the curve rather than behind it. The Court's depiction of minority state legislatures as stragglers stems from its apparent assumption that there is only one direction in which a civilized society will "evolve," that of gradually reducing the application of the death penalty.<sup>136</sup>

This creates a major complication for the evolving standards of decency jurisprudence in trying to hold the ratchet so that it only moves one way. For as Professor Jacobi well states, in terms of applying the evolving standards of decency justification, "[i]t would be unprincipled for the Court to selectively look only to movements in popular opinion against the death penalty"<sup>137</sup> or

<sup>132</sup> STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* 5–6 (2002).

<sup>133</sup> See Bailey Kuklin, *Evolution, Politics and Law*, 38 VAL. U. L. REV. 1129, 1226 (2004) (explaining that Darwinism does not "impl[y] necessary superior fitness value in complex life forms" nor that evolutionary change constitutes an improvement outside of "being better able to survive and reproduce"); Ellen E. Sward, *Justification and Doctrinal Evolution*, 37 CONN. L. REV. 389, 391 & n.7 (2004) (describing the erroneous assumption many theorists had about Darwinism, incorrectly believing "evolution was a drive toward ever-better organisms").

<sup>134</sup> *Atkins v. Virginia*, 536 U.S. 304, 349 (2002) (Scalia, J., dissenting) (quoting *Harmelin v. Michigan*, 501 U.S. 957, 990 (1991)).

<sup>135</sup> Jacobi, *supra* note 13, at 1122.

<sup>136</sup> *Id.* (footnote omitted).

<sup>137</sup> *Id.*

for that matter any other sanction prohibited by the Court pursuant to its application of the doctrine.

Removing the issue from the more emotionally laden and deeply intransigent intellectual judgments held by so many with regard to the questions surrounding the death penalty allows for more readily seeing that movement towards more severe sanction is not and should not invariably be regarded as morally regressive. Quite to the contrary, the transition toward more severe sanction can be a moral evolution. In other words, more severe sanction can be supported as a moral evolution in decency rather than a regression as illustrated by the examples of moral advance through increased sanctions with regard to domestic violence, white-collar crime, and environmental crimes, among others.

While each has its own moral evolutionary account, the first example, domestic violence, serves to illustrate the broader point. Traditionally under the common law, wives were the property of their husbands and subject to “chastisement.”<sup>138</sup> Husbands were able to employ violence as a means of family control, and governmental intervention was thought to be an inappropriate interference of the state into the family sphere.<sup>139</sup> Some states began to criminalize “wife-beating,” but the laws were rarely enforced and sanctions were imposed only in the most extreme cases.<sup>140</sup> Political reform has converted domestic violence into an issue of concern and attention for prosecutors and resulted in the imposition of criminal sanction.<sup>141</sup> Even more recently, there has been a movement from leniency toward imposition of more substantial punishment for perpetrators of acts of domestic violence.<sup>142</sup> While there are a wide variety of theories on the best way to address the serious domestic violence problem in the United States, many would reasonably see the criminalization of, then actual prosecution of, and then the imposition of more substantial sentences for transgressors as a moral evolution in addressing domestic violence. This view could reasonably be held even though this moral evolution is not towards leniency but instead toward more substantial punishment for offenders.

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<sup>138</sup> Betsy Tsai, Note, *The Trend Toward Specialized Domestic Violence Courts: Improvements on an Effective Innovation*, 68 *FORDHAM L. REV.* 1285, 1288 (2000).

<sup>139</sup> *See id.* at 1288–89 (explaining under Old English common law a husband was allowed to beat his wife with a stick no bigger than his thumb without interference from the court because state engagement in addressing such behavior was deemed improper interference in the family sphere).

<sup>140</sup> *Id.* at 1289.

<sup>141</sup> *See id.* at 1290–91 (describing the change in how society viewed domestic violence, from a family matter that was not “suitable for prosecution” to a crime that required specialized prosecution units, intervention programs, and reform to protective orders).

<sup>142</sup> *Id.* at 1291 (detailing the domestic violence legislation passed in many states in the 1990s that had “more stringent policies on arrest, prosecution, and incarceration of perpetrators”).

Nor has society arrived at an end to its moral evolution such that no new additional more stringent sanctions will be unwarranted. Scholarly and political discourse continue to advance many and varied arguments for imposition of increased punishment as part of a moral evolution on addressing societal problems. As examples, commentators have called for increasing sanctions for the solicitation of minors,<sup>143</sup> for environmental crimes,<sup>144</sup> and for animal abuse,<sup>145</sup> among other offenses. Such increases in sanction may well reflect a moral evolution despite running contrary to the assumption that evolution is a linear progressive movement that is necessarily toward greater leniency.

In returning to the stygian swamps of capital litigation, the Supreme Court's *Kennedy v. Louisiana*<sup>146</sup> decision provides a useful example of a decision that may not in future years continue to reflect society's evolving moral judgment. With the justices splitting five to four, the Court ruled that the Eighth Amendment to the United States Constitution prohibits applying the death penalty to child rapists.<sup>147</sup> The Court reached this conclusion pursuant to its evolving standards of decency jurisprudence with the majority finding that there exists "a national consensus against capital punishment for the crime of child rape."<sup>148</sup>

The reasoning employed by the majority has left many unpersuaded, including some scholars who are largely sympathetic with Supreme Court's jurisprudence imposing greater limitations on states under the Eighth Amendment. Reflecting upon the majority opinion, Professor Heidi Hurd stated, "I must be frank in saying that I find the Court's justification for its judgment to be disappointing."<sup>149</sup> Professor Laurence Tribe, who noted that he had long expressed misgivings regarding "both [the] wisdom and [the] constitutionality" of the death penalty, struck a more strident tone in his criticism.<sup>150</sup> Professor Tribe explained his objections as follows:

Many who applauded the court's . . . ruling did so not on the basis of the court's . . . trend-spotting rationale but, rather, on the premise that any way of containing the spread of capital punishment—such as by confining its use

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<sup>143</sup> See Emma Lord, Note, *Stop Punishing the Victim: Why California Should Reform Its Current Prostitution Laws and Adopt the Swedish Approach to Combat Sex-Trafficking*, 44 SW. L. REV. 599, 614 (2015) (arguing that "California should increase prison sentences for solicitation of a minor").

<sup>144</sup> See Susan F. Mandiberg, *Locating the Environmental Harm in Environmental Crimes*, 4 UTAH L. REV. 1177, 1179 (2009) (advocating for the addition of criminal statutes to combat environmental crimes).

<sup>145</sup> Kirsten E. Brimer, Comment, *Justice for Dusty: Implementing Mandatory Minimum Sentences for Animal Abusers*, 113 PA. ST. L. REV. 649, 651 (2008) (supporting mandatory minimums for animal abuse).

<sup>146</sup> 554 U.S. 407 (2008).

<sup>147</sup> *Id.* at 413.

<sup>148</sup> *Id.* at 434.

<sup>149</sup> Heidi M. Hurd, *Death to Rapists: A Comment on Kennedy v. Louisiana*, 6 OHIO ST. J. CRIM. L. 351, 351 (2008).

<sup>150</sup> Laurence H. Tribe, Opinion, *The Supreme Court Is Wrong On the Death Penalty*, WALL ST. J. (July 31, 2008), <https://www.wsj.com/articles/SB121746018426398797>.

to murderers and traitors—is a good idea. But even those who harbor serious doubts about capital punishment should feel duty-bound to oppose carve-outs from its reach that denigrate certain classes of victims, or that arbitrarily override democratic determinations that such victims deserve maximum protection.

If a legislature were to exempt the killers of gay men or lesbians from capital punishment, even dedicated death penalty opponents should cry foul in the Constitution's name. So too, should they cry foul when the judiciary holds the torturers or violent rapists of young children to be constitutionally exempt from the death penalty imposed by a legislature judicially permitted to apply that penalty to cop killers and murderers for hire. In doing so, the court is imposing a dubious limit on the ability of a representative government to enforce its own, entirely plausible, sense of which crimes deserve the most severe punishment.

To be sure, holding the line at murder and treason gives the judiciary a bright line that blurs once one says a legislature may include other offenses in its catalogue of what it deems the most heinous of all crimes. But the same may be said of virtually any bright line. Placing ease of judicial administration above respect for democracy and for principles of equal justice under law is inexcusable.

The Eighth Amendment's cruel and unusual punishment clause should not be construed in a manner that puts it on a collision course with the 14th Amendment's equal protection clause. The Supreme Court would do well to take that overriding consideration into account as it decides whether to revisit its seriously misinformed as well as morally misguided ruling.<sup>151</sup>

Taking a similar view of the majority opinion, Professor J. Richard Broughton made the bold assertion that the majority's reasoning "undermine[s] both the Court's legitimacy and the functioning of the political processes in a constitutional democracy."<sup>152</sup> Professor Doug Berman also added his voice to those "troubled by the result in *Kennedy*"<sup>153</sup> and declared that he "consider[ed] the *Kennedy* decision to be misguided as a matter of constitutional law and policy."<sup>154</sup>

Writing in dissent, and joined by Chief Justice Roberts and Justices Scalia and Thomas, Justice Alito's dissection of the majority opinion was quite effective. Professor Orin Kerr described it as "pretty devastating,"<sup>155</sup> and Professor Broughton similarly found the dissent "persuasive on many fronts."<sup>156</sup>

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<sup>151</sup> *Id.*

<sup>152</sup> Broughton, *supra* note 2, at 625.

<sup>153</sup> Douglas A. Berman, *Add Prof. Tribe to Those Urging Rehearing in Kennedy*, SENT'G L. & POL'Y (July 31, 2008, 1:42 PM), [http://sentencing.typepad.com/sentencing\\_law\\_and\\_policy/2008/07/add-prof-tribe.html](http://sentencing.typepad.com/sentencing_law_and_policy/2008/07/add-prof-tribe.html).

<sup>154</sup> Douglas A. Berman, *What Will (or Should) SCOTUS Do on the Kennedy Rehearing Petition?*, SENT'G L. & POL'Y (Sept. 22, 2008, 2:20 PM), [http://sentencing.typepad.com/sentencing\\_law\\_and\\_policy/2008/09/what-will-or-sh.html](http://sentencing.typepad.com/sentencing_law_and_policy/2008/09/what-will-or-sh.html).

<sup>155</sup> Orin Kerr, *Kennedy v. Louisiana, VOLOKH CONSPIRACY* (June 25, 2008, 9:10 AM), <http://volokh.com/posts/1214399430.shtml>.

<sup>156</sup> Broughton, *supra* note 2, at 600.

Professor Broughton found that Justice Alito's dissent "offers a compelling response to the majority's national consensus analysis and demonstrates why capital child rape legislation can just as adequately narrow the class of death-eligible offenders as statutory sentencing procedures for capital murder."<sup>157</sup>

With the opinion released during the lead-up to the 2008 Presidential nominating conventions, the Court's decision was greeted with similar reactions from both of the soon to be official nominees of the Democratic and Republican parties.<sup>158</sup> Then Senator Barack Obama stated, "I think that the rape of a small child, 6 or 8 years old, is a heinous crime, and if a state makes a decision under narrow, limited, well-defined circumstances, that the death penalty is at least potentially applicable, that does not violate our Constitution."<sup>159</sup> The future President expressed disagreement with the Court's "blanket prohibition" on executing child rapists.<sup>160</sup>

Also responding in opposition to the Supreme Court's decision, Senator John McCain indicated that he found "[t]hat there is a judge anywhere in America who does not believe that the rape of a child represents the most heinous of crimes, which is deserving of the most serious of punishments" to be "profoundly disturbing."<sup>161</sup> Senator McCain characterized the Court's decision as "an assault on law enforcement's efforts to punish these heinous felons for the most despicable crime."<sup>162</sup> The prompt public responses of the nominees of both major political parties were "presumably not [issued] out of a desire to contravene society's 'standards of decency' in the middle of a presidential race."<sup>163</sup>

Public opinion polling with regard to the death penalty and child rape suggests that there is strong support for the death penalty as an appropriate sanction.<sup>164</sup> It is far from unthinkable that future legislatures could conclude that the death penalty should be available as a potential sanction for offenders who commit the crime of rape of child under the age of 12, the Louisiana provision that the Supreme Court found contrary to society's contemporary moral values.

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<sup>157</sup> *Id.*

<sup>158</sup> See Linda Greenhouse, *Supreme Court Rejects Death Penalty for Child Rape*, N.Y. TIMES (June 26, 2008), <https://nyti.ms/2z6rHNC> (reporting the negative reactions both presidential candidates had towards the Court's decision to not allow capital punishment in a case of rape of a child).

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> Anthony Dick, *Constitutional Torture*, NAT'L REV. (July 1, 2008), <http://www.nationalreview.com/node/224905/print>.

<sup>164</sup> See John Hanley, *The Death Penalty*, in PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY 108, 137 n.29 (Nathaniel Persily et al. eds., 2008) (noting that public opinion polls conducted in 1985, 1991, and 1997 indicated that 10%, 47%, and 65% of respondents, respectively, believed the death penalty was appropriate punishment for sexual abuse of children).

In considering whether change could be consistent with evolving standards of decency, it is important to consider the component of the Court's analysis exercising its own judgment that looks at offense and offender in light of the retribution and deterrence criminal justice objectives. In determining whether a punishment is disproportionate, the Court has observed that "a punishment is 'excessive' and unconstitutional if it . . . makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering."<sup>165</sup> As for retribution and consideration of excess, the Court has observed that sanction should be commensurate with the societal sense of the nature of the offense:

Punishment is the way in which society expresses its denunciation of wrong doing; and, in order to maintain respect for law, it is essential that the punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them. It is a mistake to consider the objects of punishment as being deterrent or reformatory or preventive and nothing else . . . . The truth is that some crimes are so outrageous that society insists on adequate punishment, because the wrong-doer deserves it, irrespective of whether it is a deterrent or not.<sup>166</sup>

Retired Judge Alex Kozinski of the Ninth Circuit Court of Appeals found a strident voice to describe the role of retribution in capital punishment:

Whatever qualms I had about the efficacy of morality of the death penalty were drowned out by the pitiful cries of the victims screaming from between the lines of dry legal prose . . . .

. . . .

Brutal facts have immense power; they etched deep marks in my psyche. Those who commit such atrocities, I concluded, forfeit their own right to live. We tarnish the memory of the dead and heap needless misery on their surviving families by letting the perpetrators live.<sup>167</sup>

Standing at the "heart of the retribution rationale" under the Court's analysis is the offender's culpability.<sup>168</sup> "[J]ustice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender."<sup>169</sup> The Supreme Court

<sup>165</sup> *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion).

<sup>166</sup> *Gregg v. Georgia*, 428 U.S. 153, 184 n.30 (1976) (opinion of Stewart, Powell, & Stevens, JJ.) (quoting ROYAL COMM'N ON CAPITAL PUNISHMENT, MINUTES OF EVIDENCE, Dec. 1, 1949, at 207 (1950)).

<sup>167</sup> Alex Kozinski, *Tinkering with Death*, in DEBATING THE DEATH PENALTY: SHOULD AMERICA HAVE CAPITAL PUNISHMENT? THE EXPERTS FROM BOTH SIDES MAKE THEIR CASE 1, 2-4 (Hugo Bedau & Paul Cassell eds., 2004).

<sup>168</sup> *Tison v. Arizona*, 481 U.S. 137, 149 (1987); see Russell Dean Covey, *Exorcizing Wechsler's Ghost: The Influence of the Model Penal Code on Death Penalty Sentencing Jurisprudence*, 31 HASTINGS CONST. L.Q. 189, 227-28 (2004) (explaining retributive punishment is backwards looking because it determines punishment based on the actions of the individual offender).

<sup>169</sup> *Pennsylvania ex rel. Sullivan v. Ashe*, 302 U.S. 51, 55 (1937).

has rejected an approach to the death penalty that “accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense [which thereby] excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind.”<sup>170</sup> Failure to do so would wrongly “treat[] all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.”<sup>171</sup> Simply stated, a “criminal sentence must be directly related to the personal culpability of the criminal offender.”<sup>172</sup> Accordingly, the appropriate retributive punishment will measure the offense and the offender’s culpability and punish in accordance therewith.<sup>173</sup> The offender is thus punished under retributive theory because he or she “deserve[s] it.”<sup>174</sup>

It is the personal culpability aspect that moved the Court’s retribution analysis, barring the death penalty in *Ford v. Wainwright*,<sup>175</sup> *Atkins*,<sup>176</sup> and *Roper*.<sup>177</sup> In those decisions, the Court concluded respectively that people who are mentally ill, intellectually disabled, and juveniles are categorically not as culpable as non-mentally ill or non-intellectually disabled adults. While concerns about culpability may certainly be applicable in individual cases of child rape, the mental incapacities in terms of the ability to think and reason that were critical to the Supreme Court’s analysis in *Ford*, *Atkins*, and *Roper* are simply not present with regard to child rapists as a class. There is nothing about being a child rapist that would of necessity make people less responsible for their actions. Accordingly, with the retributive purpose not being undermined in terms of capacity, child rapists will have to find their reprieve in the severity of the crime because as a group they cannot find it in a lack of mental or intellectual capacity.

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<sup>170</sup> *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (plurality opinion).

<sup>171</sup> *Id.*

<sup>172</sup> *Tison v. Arizona*, 481 U.S. 137, 149 (1987).

<sup>173</sup> See Covey, *supra* note 168, at 227 (explaining that a retributivist approach to punishment seeks to render punishments proportional to the injury caused and the offender’s culpability).

<sup>174</sup> See *Furman v. Georgia*, 408 U.S. 238, 304 (1972) (Brennan, J., concurring) (noting “retribution in this context means that criminals are put to death because they deserve it”).

<sup>175</sup> See *Ford v. Wainwright*, 477 U.S. 399, 405–10 (1986) (holding “[t]he Eighth Amendment prohibits the State from inflicting the penalty of death upon a prisoner who is insane”).

<sup>176</sup> See *Atkins v. Virginia*, 536 U.S. 304, 318–21 (2002) (explaining that if a death penalty sentence is not appropriate for an average murderer, then “the lesser culpability of the [intellectually disabled] offender surely does not merit that form of retribution”).

<sup>177</sup> See *Roper v. Simmons*, 543 U.S. 551, 569–75 (2005) (determining that juvenile offenders cannot be subject to the death penalty because “neither retribution nor deterrence provides adequate justification for imposing the death penalty on juvenile offenders”).

In terms of the nature of the offense, the Court engages for its retribution analysis with an examination of whether the punishment “is grossly out of proportion to the severity of the crime.”<sup>178</sup> In other words, in considering the child rape example, the question is whether the application death penalty is grossly disproportionate to the crime of child rape. Throughout most of history of western civilization, rape has been a crime punished by death; this practice continued in the United States well into the mid-twentieth century before application of the death penalty for the crime of raping an adult was prohibited by the Supreme Court in *Coker*.<sup>179</sup> In the immediate wake of *Coker*, it was noted that “it is conceivable that the rape of children may be distinguished from that of adults on the ground that it is typically more harmful to the victim and involves a higher degree of moral depravity.”<sup>180</sup> There exists in support of this contention a viscerally powerful argument that this distinction is strongly grounded:

The broken and bruised body of a small child after a rape, the emotional devastation the child will endure after the incident, the psychological terror the child may experience—all of these traits leave a lasting impression on society, and it is this pain that society may focus on when calculating the moral culpability of a rapist of children.<sup>181</sup>

In his concurrence in *Coker*, Justice Powell suggested that the death penalty might still be proportionate for the crime of aggravated rape with accompanying “excessive brutality or severe injury” or “an outrageous rape resulting in serious, lasting harm to the victim.”<sup>182</sup> With apologies for engaging in this disturbing discussion, it becomes necessary to turn then to the severity of the crime of child rape. It is important to note that the degree of force involved in an act of penetration of a child “will likely cause severe damage to the more delicate and underdeveloped body of a child.”<sup>183</sup> Child sexual abuse can cause damage to internal organs.<sup>184</sup> Physical problems resulting from the rape of a child include “abdominal pain, vomiting, urinary tract infections, perineal bruises and tears, pharyngeal infections, and venereal disease.”<sup>185</sup> Approximately thirty percent of girls that are raped suffer infections that are so

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<sup>178</sup> *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion).

<sup>179</sup> See J. Richard Broughton, “On Horror’s Head Horrors Accumulate”: A Reflective Comment on Capital Child Rape Legislation, 39 DUQ. L. REV. 1, 1–4 (2000).

<sup>180</sup> David J. Karp, Comment, *Coker v. Georgia: Disproportionate Punishment and the Death Penalty for Rape*, 78 COLUM. L. REV. 1714, 1727–28 (1978).

<sup>181</sup> Jennifer L. Cordle, Note, *State v. Wilson: Social Discontent, Retribution, and the Constitutionality of Capital Punishment for Raping a Child*, 27 CAP. U. L. REV. 135, 153 (1998).

<sup>182</sup> *Coker*, 433 U.S. at 603–04 (Powell, J., concurring).

<sup>183</sup> Broughton, *supra* note 179, at 28.

<sup>184</sup> LEIZEL ANGUELOVA, WORKING WITH ADULT SURVIVORS OF CHILDHOOD SEXUAL ABUSE § 1.4.1 (2018); cf. James F. Anderson et al., *Child Sexual Abuse: A Public Health Issue*, 17 CRIM. JUST. STUD. 107, 109 (2004).

<sup>185</sup> Yale Glazer, *Child Rapists Beware! The Death Penalty and Louisiana’s Amended Aggravated Rape Statute*, 25 AM. J. CRIM. L. 79, 87–88 (1997).

severe, they are forced to undergo hysterectomies,<sup>186</sup> and child rape may increase chances of the early onset of cervical cancer.<sup>187</sup> As adults, child sex abuse victims are two and half times more likely to have pelvic pain and pelvic inflammatory disorder and breast diseases “ranging from fibrocystic changes to cancer.”<sup>188</sup> As an individual illustration of the physical harm caused by child rape, the eight year old girl raped by Patrick Kennedy, the defendant in *Kennedy v. Louisiana*, suffered from profuse vaginal bleeding: “Her entire perineum was torn and her rectum protruded into her vagina.”<sup>189</sup> Even after being treated by a pediatric surgeon, she had to be “fed gallons of stool softener through a tube to permit her to begin defecating again.”<sup>190</sup>

The psychological trauma inflicted upon the victims of child rape is also severe. “A significant body of research has demonstrated that child physical and sexual abuse are significant risk factors for many mental health disorders and problems, and that substantial proportions of children who are victims of physical or sexual abuse develop serious emotional and behavioral difficulties.”<sup>191</sup> Forty percent of victims between the ages of seven to thirteen years of age are considered to be seriously disturbed according to standardized measures of psychopathology.<sup>192</sup> Long-term psychological and behavioral effects of child sexual abuse may include low self-esteem, depression, anxiety, fear, hostility, chronic tension, eating disorders, sexual dysfunction, self-destructive or suicidal behavior, post-traumatic stress disorder, dissociation, repeated victimization, running away, criminal behavior, academic problems, substance abuse, and prostitution.<sup>193</sup> As an illustration of these effects, child sexual abuse victims are thirty times more likely to be arrested at some point in their lives for prostitution.<sup>194</sup> Additional impacts include “insomnia, sleep disturbances, nightmares, compulsive masturbation, loss of

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<sup>186</sup> *Id.* at 88 n.53 (citing CHRISTOPHER BAGLEY & KATHLEEN KING, CHILD SEXUAL ABUSE: THE SEARCH FOR HEALING 119 (1990)).

<sup>187</sup> Melissa Meister, Note, *Murdering Innocence: The Constitutionality of Capital Child Rape Statutes*, 45 ARIZ. L. REV. 197, 209 (2003) (citing BAGLEY & KING, *supra* note 186, at 52).

<sup>188</sup> ILL. COAL. AGAINST SEXUAL ASSAULT, EMOTIONAL AND PHYSICAL EFFECTS OF SEXUAL ASSAULT 52 (2007), [www.icasa.org/docs/emotional\\_and\\_physical\\_effects\\_-\\_draft-4.doc](http://www.icasa.org/docs/emotional_and_physical_effects_-_draft-4.doc).

<sup>189</sup> *State v. Kennedy*, 957 So. 2d 757, 761 (La. 2007).

<sup>190</sup> *Id.* at 761 n.4.

<sup>191</sup> NAT'L CRIME VICTIMS RESEARCH & TREATMENT CENTER & CTR. FOR SEXUAL ASSAULT & TRAUMATIC STRESS, CHILD PHYSICAL AND SEXUAL ABUSE: GUIDELINES FOR TREATMENT 7 (2003), <http://docplayer.net/3631355-Child-physical-and-sexual-abuse-guidelines-for-treatment.html>.

<sup>192</sup> Arthur J. Lurigio et al., *Child Sexual Abuse: Its Causes, Consequences, and Implications for Probation Practice*, FED. PROBATION, Sept. 1995, at 69, 70.

<sup>193</sup> See KURT CONKLIN, ADVOCATES FOR YOUTH, CHILD SEXUAL ABUSE I: AN OVERVIEW OF STATISTICS, ADVERSE EFFECTS, AND PREVENTION STRATEGIES 2–3 (2012), <http://www.advocatesforyouth.org/publications/publications-a-z/410-child-sexual-abuse-i-an-overview> (identifying many of these harmful effects of child sexual abuse).

<sup>194</sup> Lurigio, *supra* note 192, at 70.

toilet training, sudden school failure, and unprovoked crying.”<sup>195</sup> Many of the studies addressing the effects of child sexual abuse define such abuse more broadly than the criminal statutes, but as significant as those impacts are, “[t]he effects of child sexual abuse are even more profound . . . when the victimization involves force and genital contact.”<sup>196</sup> The severe psychological injury extends throughout the victim’s adult life.<sup>197</sup> Frequently “[c]hild victims never learn healthy ways to express their sexuality; as adult survivors, they may turn to dangerous sexual behaviors, experience sexual dysfunctions, or avoid sex altogether.”<sup>198</sup>

Perhaps the greatest perceived harm of this crime is not the physical or mental pain, but something that is difficult to categorize and impossible to quantify, a spiritual toll in the form of a loss of childhood innocence. In calculating the severity of this offense, this harm should not be ignored. This crime casts a pall over our society. With the crime of child rape having emerged from dark societal corners, parents have become extremely concerned, indeed fearful, of their children becoming victims.<sup>199</sup> The social effects of this appear in parents limiting their children’s freedom in everything from playing outside to surfing the internet. A corrosive impact on communities and an undermining of children’s independence flow from this heightened state of fear. Simply stated, this offense “undermines the community[’s] sense of security.”<sup>200</sup> Nor are parents’ concerns wholly irrational. According to the Department of Justice, one in seven victims of sexual assault in the United States is under the age of six, and approximately 12% of all forcible rapes and nearly 54% of all acts of forcible sodomy are committed against children under the age of eleven.<sup>201</sup>

Not surprisingly, special protection of age-based vulnerable classes is already common in death penalty legislation with the homicide victim being elderly or a child often serving as an aggravating factor making the crime

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<sup>195</sup> Meister, *supra* note 187, at 209 (citing HANDBOOK ON SEXUAL ABUSE OF CHILDREN: ASSESSMENT AND ISSUES 6–7 (Lenore E. Auerbach Walker ed. 1988)).

<sup>196</sup> Lurigio, *supra* note 192, at 70.

<sup>197</sup> See Gavin Andrews et al., *Child Sexual Abuse*, in 2 COMPARATIVE QUANTIFICATION OF HEALTH RISKS 1851–55 (Gavin Andrews et al. eds., 2004), [www.who.int/publications/cra/chapters/volume2/1851-1940.pdf](http://www.who.int/publications/cra/chapters/volume2/1851-1940.pdf) (discussing the adult health effects of child sexual abuse).

<sup>198</sup> Lurigio, *supra* note 192, at 70–71.

<sup>199</sup> See, e.g., Amy Adler, *The Perverse Law of Child Pornography*, 101 COLUM. L. REV. 209, 211 (2001) (describing a growing societal fear of child sexual abuse); *Leading Cases*, 117 HARV. L. REV. 226, 268 (2003) (stating that child sexual abuse has begun to occupy the minds of the nation’s pundits, academics, parents, and communities).

<sup>200</sup> *State v. Kennedy*, 957 So. 2d 757, 789 n.39 (La. 2007) (quoting *State v. Wilson*, 685 So. 2d 1063, 1070 (La. 1996)).

<sup>201</sup> HOWARD N. SNYDER, U.S. DEPT’ OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SEXUAL ASSAULT OF YOUNG CHILDREN AS REPORTED TO LAW ENFORCEMENT: VICTIM, INCIDENT, AND OFFENDER CHARACTERISTICS 2 (2000).

death penalty eligible.<sup>202</sup> This result follows from a desire to afford greater protection to these vulnerable classes and the conclusion that a perpetrator's "willingness to exploit vulnerability often reveals an especially heinous disregard for the humanity of others."<sup>203</sup> Distinguishing *Coker*, which barred application of the death penalty for rape of an adult, the Louisiana Supreme Court noted that "[w]hile the rape of an adult female is in itself reprehensible, the legislature has concluded that rape becomes much more detestable when the victim is a child."<sup>204</sup> It has been argued that "[t]he immaturity and vulnerability of a child, both physically and psychologically, adds a devastating dimension to rape."<sup>205</sup> The physical, psychological, and spiritual harms to the child victim and the harm to the community render child rape an extraordinarily severe crime.

As for the question of deterrence, while this rationale has fallen into disfavor among many among the members of the Supreme Court,<sup>206</sup> with the retribution justification in a period of ascendancy, deterrence has certainly not been wholly ignored.<sup>207</sup> While the conflicting evidence on whether the death penalty, as employed, actually has any deterrent effect has troubled members of the Supreme Court,<sup>208</sup> the Court's ultimate decision on whether deterrence exists has turned on the intellectual and psychological capacity of the

<sup>202</sup> See, e.g., ALA. CODE § 13A-5-40(a)(15) (West, Westlaw through 2017 Reg. Sess.) (designating as a capital offense murder of a victim less than fourteen years of age); NEV. REV. STAT. § 200.033(10) (West, Westlaw through 2017 Reg. Sess.) (listing murder of a victim less than fourteen years of age as an aggravating circumstance for first degree murder); TENN. CODE ANN. § 39-13-204(i)(1) (West, Westlaw through 2017 First Reg. Sess.) (declaring that the murder of one younger than twelve by one older than eighteen is an aggravating circumstance); see also Jeffrey L. Kirchmeier, *Casting a Wider Net: Another Decade of Legislative Expansion of the Death Penalty in the United States*, 34 PEPP. L. REV. 1, 32 (2006) (observing that several states have expanded aggravating factors in capital sentencing out of concern for children and the elderly); Terry A. Maroney, *The Struggle Against Hate Crime: Movement at a Crossroads*, 73 N.Y.U. L. REV. 564, 612 (1998) (noting that several states, following *Furman* and *Gregg*, allow the imposition of the death penalty on those convicted of murdering children); Kenneth W. Simons, *On Equality, Bias Crimes, and Just Deserts*, 91 J. CRIM. L. & CRIMINOLOGY 237, 248 n.27 (2001) (explaining that some states consider a child victim an aggravating circumstance in capital sentencing).

<sup>203</sup> Simons, *supra* note 202, at 248.

<sup>204</sup> *Wilson*, 685 So. 2d at 1066.

<sup>205</sup> Meister, *supra* note 187, at 209.

<sup>206</sup> See Covey, *supra* note 168, at 224–26 (explaining that several Justices have expressed skepticism that the death penalty can be justified on a deterrence theory and that the case law reflects a preference for a retributivist theory).

<sup>207</sup> See *Roper v. Simmons*, 543 U.S. 551, 571–72 (2005) (criticizing a deterrence-based justification for imposing the death penalty on juveniles); *Atkins v. Virginia*, 536 U.S. 304, 319–20 (2002) (finding unpersuasive a deterrence-based justification for imposing the death penalty on people with intellectual disabilities).

<sup>208</sup> See, e.g., *Roper*, 543 U.S. at 571–72 (2005) (finding the absence of evidence "of special concern"); *Ring v. Arizona*, 536 U.S. 584, 614–15 (2002) (Breyer, J., concurring) ("I note the continued difficulty of justifying capital punishment in terms of its ability to deter crime, to incapacitate offenders, or to rehabilitate criminals.").

category of offender under consideration in comparison with typical criminal offenders rather than on empirical studies of the death penalty and crime.<sup>209</sup> Because the Court's assessment of deterrence turns upon this fulcrum, the deterrence analysis and the above discussed retribution culpability analysis become functional equivalents.<sup>210</sup> As previously noted, though there certainly may be individual offenders like the mentally ill, intellectually disabled, or juveniles, who are categorically impaired in their capacity to understand the severity of their offense, there is no such generally applicable limitation on the capacity of child rapists as a class. Accordingly, just as there is no lessened culpability, there is no reason that the penalty cannot, under the Court's deterrence capacity analysis framework, function to deter child rapists.

The point of the above discussion regarding the crime of child rape is not to argue that the Court was wrong in concluding that the State of Louisiana transgressed contemporary moral standards by providing that child rapists were potentially subject to the death penalty. The Court may well have been right. Instead the discussion helps to demonstrate that, even assuming the Supreme Court was correct in its assessment, it is far from clear that contemporary societal moral values will hold in stasis in opposition to the death penalty for child rapists. To the contrary, state legislatures in the future could reasonably reach a contrary conclusion as a part of an evolving moral standard in considering how offenders who commit the crime of child rape should be punished.

#### IV. CONTINGENT LEGISLATION AS A TOOL EMPOWERING STATE LEGISLATURES

But were changed beliefs and conditions to lead to such a legislative judgment, state legislators would run squarely into the one-way ratchet problem. To reiterate Professor Eric Posner's apt description of the practical problems with reversing the one-way ratchet:

If people in the various states change their minds and come to believe that the punishment is justified, legislatures will not be able to enact the punishment without violating the Constitution. It seems likely that they will therefore not bother, and so a new consensus in the other direction cannot get started. Perhaps, in the rare instances when a national consensus will develop quickly, dozens of states will enact the law even though it violates the Constitution, and courts will recognize a change in the consensus. But this

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<sup>209</sup> See, e.g., *Roper*, 543 U.S. at 571–72 (comparing the culpability of juveniles to that of adults); *Ring*, 536 U.S. at 614–15 (Breyer, J., concurring) (arguing that studies fail to demonstrate that capital punishment is an effective deterrent).

<sup>210</sup> See *Roper*, 543 U.S. at 571–72 (proffering that the lack of deterrence evidence is “of special concern” given juvenile’s lesser culpability); *Atkins*, 536 U.S. at 318–21 (weighing the lesser culpability of people with intellectual disabilities with the tenuousness of retribution and deterrence-based justifications for subjecting this population to capital punishment).

is likely to be rare, and it loads the dice against national consensus developing in favor of harsher punishments.<sup>211</sup>

Under the pressure of the one-way ratchet, legislative hesitancy to pass legislation that runs afoul of existent evolving standards jurisprudence may not be driven by a continuing substantive concurrence with the standard of contemporary morality as assessed by the Supreme Court in a prior decision. Such legislative acquiescence may instead result from a sense that contrary legislation would be found unconstitutional.

In light of the ability of evolving standards to swing both towards greater leniency and more substantial sanction, this one-way ratchet creates policy distortion. Professor Mark Tushnet has suggested that “policy distortion occurs when the legislature acts within the range of policies it believes is available to it, mistakenly believing that the policy they prefer is outside that available range.”<sup>212</sup> Where “legislators mistakenly believe that the permissible range is smaller than it actually is, they may choose a policy that is less desirable, from their own point of view, than one that the courts would allow them to adopt.”<sup>213</sup> This misunderstanding may arise

because not all legislators are well-advised about the norms the courts have articulated . . . [and] groups have an interest in characterizing judicially articulated norms in the way most favorable to their positions. On nearly every issue, some group will have an interest in arguing that a particular policy proposal lies outside the permissible range.<sup>214</sup>

As a result, “[l]egislators concerned about not enacting unconstitutional laws or worried about the cost of defending a fairly litigable policy that the courts might reject may give these arguments more weight than they deserve.”<sup>215</sup> Furthermore, a legislature that experiences “uncertainty as to the constitutionality of its enactments may delay or weaken them so as to avoid the political embarrassment or financial cost of a determination of unconstitutionality.”<sup>216</sup>

In seeking to reverse what seems to be a one-way ratchet and avoid policy distortion, it is important to acknowledge that no state in isolation will be able to demonstrate a trend establishing an evolving standard of decency against a sanction previously prohibited by the Supreme Court. States must move together rather than alone. The most important tool for empowering states to move together, and thereby to enable states to reverse the seeming

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<sup>211</sup> Posner, *supra* note 9.

<sup>212</sup> Mark Tushnet, *Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty*, 94 MICH. L. REV. 245, 270 (1995).

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> Jonathan D. Persky, Note, “Ghosts That Slay”: A Contemporary Look at State Advisory Opinions, 37 CONN. L. REV. 1155, 1172 (2005).

irreversibly one-way ratchet, is a tool that states are already using in other ways and for other purposes: contingent legislation.

Legislation is contingent where a legislature passes a statute but provides that “it takes effect only upon the happening of a given fact or identifiable future contingency.”<sup>217</sup> In other words, where “a law takes effect only on the happening of some future event that is not certain to occur (or is not certain to occur at a specific time), it is contingent legislation.”<sup>218</sup> Until the condition occurs, the legislation rests in a dormant slumber.<sup>219</sup> Typically statutory provisions take effect upon some future specified calendar date.<sup>220</sup> As observed by Professor Gary Lawson, there is, however, “no evident reason why that effective date cannot be determined by some event other than celestial motions.”<sup>221</sup>

Where contingent legislation is used, determination of whether the future contingency has occurred is generally a task assigned to an agency, often the agency charged with responsibility for administering the statutory measure.<sup>222</sup> However, the determination of whether the contingency has arisen can also be assigned to other members of the executive or judicial branches of government.<sup>223</sup> The conditioning of a statutory provision going into effect upon the occurrence of a future event, with the determination of whether the contingency has been satisfied being made by an executive or judicial branch official, has not been regarded as an improper delegation of legislative power.<sup>224</sup> To the contrary, the determination of whether the contingency has arisen is thought to be consistent with the exercise of core executive and judicial functions.<sup>225</sup>

In approving of the use of contingent legislation, the Wisconsin Supreme Court observed that

[w]here an act is clothed with all the forms of law, and is complete in and of itself, it may be provided that it shall become operative only upon some certain act or event, or, in like manner, that its operation shall be suspended; and the fact of such act or event, in either case, may be made to depend upon the ascertainment of it by some other department, body, or officer, which is essentially an administrative act.<sup>226</sup>

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<sup>217</sup> Jim Rossi, *Dynamic Incorporation of Federal Law*, 77 OHIO ST. L.J. 457, 483 (2016); see also Amy Coney Barrett, *Suspension and Delegation*, 99 CORNELL L. REV. 251, 292 (2014) (describing contingent legislation as “legislation taking effect upon satisfaction of some condition rather than a date certain”).

<sup>218</sup> Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 363 (2002).

<sup>219</sup> Francis C. Amendola et al., *Conditional and Contingent Legislation*, 16 C.J.S. CONSTITUTIONAL LAW § 330 (2016).

<sup>220</sup> Lawson, *supra* note 218, at 363.

<sup>221</sup> *Id.* at 364.

<sup>222</sup> Rossi, *supra* note 217, at 483.

<sup>223</sup> Lawson, *supra* note 218, at 364.

<sup>224</sup> F. Scott Boyd, *Looking Glass Law: Legislation by Reference in the States*, 68 LA. L. REV. 1201, 1273 (2008).

<sup>225</sup> Lawson, *supra* note 218, at 364.

<sup>226</sup> *Dowling v. Lancashire Ins. Co.*, 65 N.W. 738, 739 (Wis. 1896).

In other words, so long as it is not the content of the legislation that is contingent but instead the question of if and when the statute will go into effect that is contingent, the contingent measure will be considered, though dormant, to constitute validly passed legislation.<sup>227</sup> The Washington Supreme Court's analysis is reflective of other state judiciaries in addressing separation of powers challenges to contingent legislation:

[C]onditioning the operative effect of a statute upon a future event specified by the Legislature does not transfer the state legislative power to render judgment to the persons or entity capable of bringing about that event. The Legislature, itself, determines the statute would be expedient only in certain circumstances. The power to make this judgment is not transferred merely because the circumstances may arise at the discretion of others. The substance of the act is complete in itself and the Legislature is the body which rendered the judgment as to the expediency of conditioning the operation of the statute upon the specified event.<sup>228</sup>

Contingencies upon which a statute's effectiveness have turned include adoption of an amendment to a state constitution,<sup>229</sup> the availability of federal funding,<sup>230</sup> compliance by private entities with certain safety regulations,<sup>231</sup> creation of a municipal planning commission,<sup>232</sup> and enacting of certain types of taxing measures by county commissioners,<sup>233</sup> among a wide variety of other conditions. In some respects, constitutional amendatory conditions stand as particularly interesting corollaries for the evolving standards related legislation insofar as

[i]t is the general rule in this country that a legislature has power to enact a statute not authorized by the existing constitution of that State when the statute is passed in anticipation of an amendment to its constitution authorizing it or which provides that it shall take effect upon the adoption of an amendment to its constitution specifically authorizing and validating such statute.<sup>234</sup>

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<sup>227</sup> Boyd, *supra* note 224, at 1273.

<sup>228</sup> Amalgamated Transit Union Local 587 v. State, 11 P.3d 762, 794–95 (Wash. 2000) (quoting *Brower v. State*, 969 P.2d 42, 49 (Wash. 1998)).

<sup>229</sup> See, e.g., *Smigiel v. Franchot*, 978 A.2d 687, 692–99 (Md. 2009) (describing an amended provision of the Maryland Constitution); *In re Thaxton*, 437 P.2d 129, 131 (N.M. 1968) (discussing the repeal of a provision in the New Mexico Constitution); *Henson v. Ga. Indus. Realty Co.*, 142 S.E.2d 219, 223–24 (Ga. 1965) (describing a provision passed into Georgia Law).

<sup>230</sup> See *Opinion of the Justices*, 44 So. 2d 1196, 1196–97 (Ala. 1977) (finding constitutional legislation contingent upon federal appropriations).

<sup>231</sup> See Sofia Ranchordás, *Innovation Experimentalism in the Age of the Sharing Economy*, 19 LEWIS & CLARK L. REV. 871, 876 (2015) (discussing sunrise clauses which requires parts of statutes or regulation which to come into effect upon compliance with safety regulations).

<sup>232</sup> See *City of Chicago v. Central Nat'l Bank*, 125 N.E.2d 94, 96–98 (Ill. 1955) (examining a legislative provision that allowed municipalities to construct certain facilities with the approval of a plan commission).

<sup>233</sup> See *Okey v. Walton*, 302 N.E.2d 895, 900–02 (Ohio Ct. App. 1973) (hearing a state constitutional challenge to a law that allowed counties to levy a property transfer tax with approval of the board of county commissioners).

<sup>234</sup> *Henson*, 142 S.E.2d at 223–24.

State courts have consistently concluded “that a statute which is expressly made contingent upon the adoption of a constitutional amendment is valid even where, as here, the Legislature would have had no power to so act in absence of the amendment.”<sup>235</sup> Such enactments are similar to the circumstance confronted when legislating under the pall of a contrary prior ruling from the Supreme Court interpreting the evolving standards of decency in a manner that stands in opposition to the legislature’s preferred policy approach.

Another recurring basis of contingency, and one that provides a model for states for reversing the one-way ratchet, is conditioning legislation going into effect upon adoption of corresponding legislation by other states either through reciprocal arrangements or with effectiveness contingent upon adoption by a specified number of states.<sup>236</sup> Approving of the propriety of utilizing a contingency that turns upon the actions of another state government, the Kansas Supreme Court observed:

In all these cases it is the law of the home government which is enforced, and the action of the foreign government only makes the contingency upon which the law becomes operative. There is no difference in principle between such contingency and any other which may be provided for in the statute. In all such cases it is the duty of the officer charged with the execution of the law to inquire as to the facts, and ascertain whether the contingency named has arrived, and if so to enforce the mandate . . . .<sup>237</sup>

Contingency being tied to the actions of other states can be seen in wide variety of legislative schemes with examples including everything from state regulation related to pest control,<sup>238</sup> the dairy industry,<sup>239</sup> and the operation of libraries<sup>240</sup> to the creation of the Multistate Tax Commission, which only became effective upon adoption by seven states.<sup>241</sup> Perhaps the most prominent example in recent years of adoption by other states as a condition upon which legislation going into effect turns is the National Popular Vote Interstate Compact. This legislative initiative makes use of the authority granted to state legislatures under Article II, Section 1, Clause 2 of the United States Constitution to “appoint, in such Manner as the Legislature thereof may direct” the state’s electors to the Electoral College. The states that adopt the National Popular Vote Interstate Compact agree to appoint electors not based upon which candidate garners the most votes in their state but instead

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<sup>235</sup> *Busch v. Turner*, 161 P.2d 456, 459 (Cal. 1945).

<sup>236</sup> See Robert W. Bennett, *State Coordination in Popular Election of the President Without a Constitutional Amendment*, 5 GREEN BAG 2D 141, 147 (2002) (noting that “ample precedent for state legislation where effectiveness is contingent on action by other states”).

<sup>237</sup> *Phoenix Ins. Co. v. Welch*, 29 Kan. 672, 678 (Kan. 1883).

<sup>238</sup> GA. CODE ANN. § 2-7-130 (2016) (West, Westlaw through 2017 Sess.) (providing that measure does not go into effect until enacted by five states).

<sup>239</sup> N.Y. AGRIC. & MKTS. LAW § 258-kk (McKinney, Westlaw through L. 2018, chapter 1).

<sup>240</sup> OR. REV. STAT. § 357.340 (West, Westlaw through 2017 Reg. Sess.).

<sup>241</sup> *U.S. Steel Corp. v. Multistate Tax Comm’n*, 434 U.S. 452, 454 (1978).

to the winner of the national popular vote.<sup>242</sup> The legislation does not, however, become effective upon adoption but instead only upon reaching a critical point at which the states adopting the measure control the appointment of the majority of electors to the Electoral College.<sup>243</sup> Or in the words of Article IV, Clause 1 of the National Popular Vote Interstate Compact, “This agreement shall take effect when states cumulatively possessing a majority of the electoral votes have enacted this agreement in substantially the same form and the enactments by such states have taken effect in each state.”<sup>244</sup> As explained by Dean Vikram Amar:

[Because of] states not wanting to deemphasize local preferences in favor of a nationally popular candidate unless other states are willing to do so also, the NVP Plan by its own terms would not become effective until and unless a combination of states representing a majority of the Electoral College denominator—that is, states whose Electoral College allotments when combined equal 270 or more—sign on.<sup>245</sup>

Contingent legislation is even more important in empowering states to demonstrate evolution in the direction of imposing a sanction previously barred under the evolving standards of decency. An individual state could, acting independently, allocate the state’s electoral votes to the winner of the national popular vote. An individual state in isolation could not, however, demonstrate a change in societal moral standards with regard to imposition of a previously prohibited sanction.

To help delineate the mechanics of how contingent legislation would operate in the evolving standards context, it is helpful to work through an example. Assume state legislators in State X want to reinstate as a potential sentence life without the possibility of parole for a juvenile offender over the age of sixteen who commits the crime of rape involving both kidnapping and torture if it is determined by the appropriate sentencing authority (judge or jury) to be the proper sanction after an individualized sentencing hearing. Currently, pursuant to the United States Supreme Court’s decision in *Graham v. Florida*, such a sanction is unconstitutional when imposed upon a juvenile offender because the crime is not a homicide offense.<sup>246</sup> Despite this constitutional bar, it is not difficult to conceive that a state legislature could in future years conclude such a sanction is appropriate and, in fact, view the more severe sanction as a moral evolution either based on a retribution or deterrence analysis. If rendered immediately effective, the measure would certainly be

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<sup>242</sup> See Bennett, *supra* note 236, at 144–47 (arguing that a state compact to allocate electoral votes according to the national popular vote would survive a compact clause challenge).

<sup>243</sup> Vikram David Amar, *Constitutional Change and Direct Democracy: Modern Challenges and Exciting Opportunities*, 69 ARK. L. REV. 253, 264 (2016).

<sup>244</sup> CAL. ELEC. CODE § 6921 (West 2017).

<sup>245</sup> Amar, *supra* note 243, at 264.

<sup>246</sup> 560 U.S. 48, 74 (2010).

struck down as being unconstitutional. After all, this sanction is not available to state legislatures pursuant to *Graham v. Florida*.<sup>247</sup> Thus, the legislature of the enacting state would need to provide that its measure does not become effective until a specified number of states enact measures that are substantially similar to the provision enacted by State X. In terms of determining whether the contingency has been satisfied, while it is unnecessary to assign responsibility to the same executive branch figure in each state, it would be prudent to do so. The legislature thus could charge the state's Attorney General with responsibility for monitoring legislation in other states to determine if the specified number of states had enacted substantially similar legislation.

Three additional components would be helpful in ensuring that the states were moving forward together rather than alone or with insufficient company. While none of these are absolutely essential, they are all likely to be of assistance given the significant challenge of seeking to reverse the seemingly irreversible one-way ratchet. One, as an extra precaution a component, could be added to the contingency limitation providing that the measure does not become effective until the substantial similarity is verified by the requisite number of Attorneys General assessing the language of their own respective state provisions. Two, given the importance of notice, the legislation should require that the Attorney General shall provide notice to the legislature, the governor, state prosecutors, and the public that the measure has become effective. Three, with regard to such legislation, the measure could become effective on the same date after the occurrence of the contingency (for example: the first July 1st following notification).

One of the challenges in designing the mechanics of such legislation is identifying the appropriate number of states necessary to reverse the ratchet. Based upon existing Supreme Court precedent, sixteen states seems an appropriate, though admittedly somewhat arbitrary, choice. As discussed below, the Supreme Court has already found sixteen states adopting legislation to constitute strong objective evidence of an evolution in society's standard of decency sufficient to constitute a basis for reversing prior precedent—though one moving toward leniency. Based upon the Supreme Court's decision in *Roper v. Simmons*,<sup>248</sup> an argument can be made in support of the view that a smaller number could reverse the ratchet so long as the movement is exclusively in one direction. In *Roper v. Simmons*,<sup>249</sup> the Court reversed its earlier decision in *Stanford v. Kentucky*<sup>250</sup> finding a change in societal evolving

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<sup>247</sup> *Id.*

<sup>248</sup> 543 U.S. 551 (2005).

<sup>249</sup> *Id.*

<sup>250</sup> 492 U.S. 361 (1989).

standards of decency over the course of sixteen years with only four additional states abandoning the death penalty<sup>251</sup> for juveniles but where all the movement was in one direction towards abandonment of the death penalty for juveniles.<sup>252</sup> Or as stated by the *Roper* Court,

The number of States that have abandoned capital punishment for juvenile offenders since *Stanford* is smaller than the number of States that abandoned capital punishment for the [intellectually disabled] after *Penry*; yet we think the same consistency of direction of change has been demonstrated. Since *Stanford*, no State that previously prohibited capital punishment for juveniles has reinstated it.<sup>253</sup>

Another reason that this small number was sufficient in *Roper*, which will not be present in seeking to reverse the ratchet, is the *Roper* Court was impressed that this shift was into headwinds of “special force in light of the general popularity of anticrime legislation and in light of the particular trend in recent years toward cracking down on juvenile crime in other respects.”<sup>254</sup>

Thus, to find more solid ground for reversal of direction, it is helpful to look at a case wherein the Supreme Court viewed the objective evidence of change in society’s standard of decency as overwhelming. The Supreme Court found sixteen states adopting legislation to prohibit application of the death penalty as to a certain class of offenders (intellectually disabled persons) constituted strong objective evidence of a changed societal evolving standard of decency sufficient to reverse its previous evolving standards ruling of *Penry v. Lynaugh*<sup>255</sup> thirteen years later in *Atkins v. Virginia*.<sup>256</sup>

States working collaboratively so as to strengthen their voice in the constitutional dialogue with the Supreme Court over defining societal evolving standards of decency is greatly aided by the existence of active cooperative state governmental organizations and victims’ advocacy groups that are national in scope. Organizations like the National Association of Attorneys General,<sup>257</sup> the National Conference of State Legislatures,<sup>258</sup> the National Governors Association,<sup>259</sup> and the National District Attorneys Association<sup>260</sup>

<sup>251</sup> See Corinna Barrett Lain, *Deciding Death*, 57 DUKE L.J. 1, 33 (2007) (explaining that only four legislatures had abolished the juvenile death penalty in the six years preceding *Roper*’s 2005 decision).

<sup>252</sup> *Roper*, 543 U.S. at 566.

<sup>253</sup> *Id.*

<sup>254</sup> *Id.* (citation omitted).

<sup>255</sup> 492 U.S. 302 (1989).

<sup>256</sup> *Atkins v. Virginia*, 536 U.S. 304, 314–15, 321 (2002); see also Roderick M. Hills, Jr., *The Individual Right to Federalism in the Rehnquist Court*, 74 GEO. WASH. L. REV. 888, 892–93 (2006) (arguing that The Court’s shift in opinion was the result of the changing “national mores” reflected in state legislatures).

<sup>257</sup> NAT’L ASS’N OF ATT’YS GEN., <http://www.naag.org/> (last visited Jan. 27, 2018).

<sup>258</sup> NAT’L CONF. OF STATE LEGISLATURES, <http://www.ncsl.org/> (last visited Jan. 27, 2018).

<sup>259</sup> NAT’L GOVERNORS ASS’N, <https://www.nga.org/cms/home.html> (last visited Jan. 27, 2018).

<sup>260</sup> NAT’L DISTRICT ATT’YS ASS’N, <http://www.ndaa.org/> (last visited Jan. 27, 2018).

all provide powerful networking opportunities for states to disseminate information and communicate in seeking to advance their favored criminal justice approaches against the strong undertow of contrary Supreme Court evolving standards of decency precedent. Another important practical aspect for advancing such legislation emerges from victims' rights advocacy groups having found in recent years a stronger voice in state government.<sup>261</sup> A multitude of victims' rights organizations function on a national stage and are well positioned to help advance contingent legislation imposing more substantial sanction. These include, for example, the National Alliance of Victims' Rights Attorneys & Advocates,<sup>262</sup> the National Center for Victims of Crime,<sup>263</sup> and the National Organization for Victim Assistance<sup>264</sup> as well as groups that organize around advocating for victims of particular crimes.<sup>265</sup> The existing structure of active inter-governmental collaboration that exists among state governments and the emergence of national in scope victims' advocacy organizations provide realistic forums for working collaboratively and political muscle for advancing contingent legislation on multiple fronts.

#### V. CONDITIONAL LEGISLATION DOES NOT VIOLATE THE COMPACT CLAUSE

While a literal interpretation of the Compact Clause of the United States Constitution could potentially pose a barrier to the conditional legislative solution advanced in this Article, the approach advanced herein does not violate the Compact Clause. The Compact Clause provides, in part, that “[n]o State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State.”<sup>266</sup> A literal reading of the Compact Clause would, as observed by the Supreme Court, “require the States to obtain congressional approval before entering into any agreement among themselves, irrespective of form, subject, duration, or interest to the United States.”<sup>267</sup> Recognizing the problems with such an understanding and not persuaded that was the purpose of this constitutional provision, “the Supreme Court has definitively rejected a literalist interpretation of” the Compact Clause.<sup>268</sup>

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<sup>261</sup> See Susan A. Bandes, *Victims, “Closure,” and the Sociology of Emotion*, 72 LAW & CONTEMP. PROBS. 1, 10 (2009) (noting the increasing political influence of victims' rights organizations).

<sup>262</sup> NAT'L ALLIANCE OF VICTIMS' RTS. ATT'YS & ADVOCS., <http://www.navra.org/> (last visited Jan. 27, 2018).

<sup>263</sup> NAT'L CTR. FOR VICTIMS OF CRIME, <https://victimsofcrime.org/> (last visited Jan. 27, 2018).

<sup>264</sup> NAT'L ORG. FOR VICTIMS ASSISTANCE, <https://www.trynova.org/> (last visited Jan. 27, 2018).

<sup>265</sup> *E.g.*, RAPE, ABUSE & INCEST NAT'L NETWORK, <https://www.rainn.org/> (last visited Jan. 27, 2018).

<sup>266</sup> U.S. CONST. art. I, § 10, cl. 3.

<sup>267</sup> *U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 459 (1978).

<sup>268</sup> *Fraser v. Fraser*, 415 A.2d 1304, 1305 (R.I. 1980).

In seeking to understand the intended purpose and scope of the Compact Clause, the Federalist Papers offer a less than edifying explanation of this constitutional measure. Madison observed in Federalist 44 that the “particulars of this clause fall within reasonings which are either so obvious, or have been so fully developed, that they may be passed over without remark.”<sup>269</sup> Though evidently “the contours of the terms were clear to the Framers, they soon ceased to be so to subsequent interpreters.”<sup>270</sup>

The Supreme Court settled in the 1890s upon a functionalist interpretation of the Compact Clause and has not since waived from this understanding of the provision. Writing for the Court in 1893 in *Virginia v. Tennessee*, Justice Stephen Field observed regarding the Compact Clause that “it is evident that the prohibition is directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States.”<sup>271</sup> This understanding in many respects harkens to a prohibition contained in the Articles of Confederation that “[n]o two or more States shall enter into any treaty, confederation or alliance whatever between them, without the consent of the United States, in Congress assembled, specifying accurately the purposes for which the same is to be entered into, and how long it shall continue.”<sup>272</sup> Under the Supreme Court’s interpretive approach, in contradistinction to a literal interpretation, not all interstate compacts and agreements in absence of congressional authorization violate the Compact Clause.

For Justice Field and the post-1893 Supreme Court, “[s]tate agreements . . . should be subject to the constitutional requirement of congressional consent only if they threaten to encroach upon the full and free exercise of federal authority.”<sup>273</sup> With this understanding in place, “the twentieth century witnessed a marked expansion in the number, subject, and form of such agreements.”<sup>274</sup> Professor Duncan Hollis has observed that in a post-New Deal America, “interstate compacts become mechanisms for states to share information and to jointly study, and even regulate, various collective action or coordination problems.”<sup>275</sup>

The challengers in the 1978 case of *United States Steel Corp. v. Multistate Tax Commission* asked the Supreme Court to restrain this growing use of such measures and to reject Justice Field’s narrow understanding of limitations

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269 THE FEDERALIST NO. 44, at 229–30 (James Madison) (Ian Shapiro, ed. 2009).

270 Note, *The Compact Clause and the Regional Greenhouse Gas Initiative*, 120 Harv. L. Rev. 1958, 1969 (2007).

271 148 U.S. 503, 519 (1893).

272 ARTICLES OF CONFEDERATION of 1781, art. VI, para. 2.

273 Michael S. Greve, *Compacts, Cartels, and Congressional Consent*, 68 MO. L. REV. 285, 300 (2003).

274 Duncan B. Hollis, *Unpacking the Compact Clause*, 88 Tex. L. Rev. 741, 763 (2010).

275 *Id.*

imposed by the Compact Clause.<sup>276</sup> The challengers' specific target was the Multistate Tax Commission.<sup>277</sup> The Multistate Tax Commission had come into existence following the adoption of the Multistate Tax Compact by seven states and played a significant role in the administration of state taxation in those states that adopted the Multistate Tax Compact.<sup>278</sup> The Multistate Tax Commission had become a powerful mechanism for states accomplishing what they could not independently achieve in addressing issues of taxation with large multi-state companies.<sup>279</sup> The Supreme Court unambiguously refused the challengers' invitation to circumscribe the use of state compacts and instead deeply entrenched Justice Field's interpretation of

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<sup>276</sup> *U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 459–60 (1978).

<sup>277</sup> *Id.* at 454–59.

<sup>278</sup> The Supreme Court explained the Multistate Tax Commission in *U.S. Steel Corp. v. Multistate Tax Commission* as follows:

The Multistate Tax Compact was drafted in 1966 and became effective, according to its own terms, on August 4, 1967, after seven States had adopted it. By the inception of this litigation in 1972, 21 States had become members. . . .

[T]he Multistate Tax Compact . . . symbolized the recognition that, as applied to multistate businesses, traditional state tax administration was inefficient and costly to both State and taxpayer. In accord with that recognition, Art. I of the Compact states four purposes: (1) facilitating proper determination of state and local tax liability of multistate taxpayers, including the equitable apportionment of tax bases and settlement of apportionment disputes, (2) promoting uniformity and compatibility in state tax systems, (3) facilitating taxpayer convenience and compliance in the filing of tax returns and in other phases of tax administration, and (4) avoiding duplicative taxation.

To these ends, Art. VI creates the Multistate Tax Commission, composed of the tax administrators from all the member States. Section 3 of Art. VI authorizes the Commission (i) to study state and local tax systems, (ii) to develop and recommend proposals for an increase in uniformity and compatibility of state and local tax laws in order to encourage simplicity and improvement in state and local tax law and administration, (iii) to compile and publish information that may assist member States in implementing the Compact and taxpayers in complying with the tax laws; and (iv) to do all things necessary and incidental to the administration of its functions pursuant to the Compact.

Articles VII and VIII detail more specific powers of the Commission. Under Art. VII, the Commission may adopt uniform administrative regulations in the event that two or more States have uniform provisions relating to specified types of taxes. These regulations are advisory only[.] Each member State has the power to reject, disregard, amend, or modify any rules or regulations promulgated by the Commission. They have no force in any member State until adopted by that State in accordance with its own law.

Article VIII applies only in those States that specifically adopt it by statute. It authorizes any member State or its subdivision to request that the Commission perform an audit on its behalf. The Commission, as the State's auditing agent, may seek compulsory process in aid of its auditing power in the courts of any State that has adopted Art. VIII. Information obtained by the audit may be disclosed only in accordance with the laws of the requesting State. Moreover, individual member States retain complete control over all legislation and administrative action affecting the rate of tax, the composition of the tax base (including the determination of the components of taxable income), and the means and methods of determining tax liability and collecting any taxes determined to be due.

Article X permits any party to withdraw from the Compact by enacting a repealing statute.

*U.S. Steel Corp.*, 434 U.S. at 454–57.

<sup>279</sup> *Id.*

Compact Clause into the Court's jurisprudence, constructing a more formalized legal test to be applied to give effect thereto.<sup>280</sup> The Court declared that

the test is whether the Compact enhances state power *quoad* the National Government. This pact does not purport to authorize the member States to exercise any powers they could not exercise in its absence. Nor is there any delegation of sovereign power to the Commission, each State retains complete freedom to adopt or reject the rules and regulations of the Commission. Moreover . . . each State is free to withdraw . . .<sup>281</sup>

In other words, in determining whether interstate compacts or agreements among states violate the Compact Clause, the Court reasoned that interstate compacts, even those that

increase the bargaining power of member states vis-à-vis the federal government would not impinge on federal authority unless the compact (a) authorized member states to do things they could not do in the compact's absence; (b) delegated sovereign powers to an institution established by the Compact; or (c) restricted the ability of states to exit the compact.<sup>282</sup>

None of the aforementioned is applicable to the proposed contingent legislative approach advanced in this Article. States can and do pass criminal law statutes and delineate the sanctions available for violations thereof. States are not exercising any sovereignty belonging to the federal government through imposing criminal sanctions. Additionally, the Court's evolving standards of decency jurisprudence is designed to measure the views of the states collectively. The Supreme Court's evolving standards of decency jurisprudential framework is designed to recognize and honor the trends existing in states, not to set the Court's own standard in contravention of the states' moral judgment. The doctrine is consistent with recognition of the states' role in the system of federalism, not exclusion thereof. Furthermore, the states are not delegating any sovereign powers to an institution created by the Compact. In fact, they are not creating any external institution. States are also free to abandon the legislation at any point. Thus, the contingent legislative approach recommended herein simply does not qualify as an unconstitutional compact or agreement among the states.

Additionally, the contingent legislation approach advanced herein does not appear, pursuant to the Supreme Court's decision in *Northeast Bancorp, Inc. v. Board of Governors of the Federal Reserve System*,<sup>283</sup> to even qualify as a compact for purposes of the Compact Clause. The *Northeast Bancorp, Inc.* Court

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<sup>280</sup> See 3 WILLIAM J. RICH, MODERN CONSTITUTIONAL LAW § 34:9 (3d ed. 2011) (summarizing the Supreme Court's application of Justice Field's approach to Compact Clause cases since the late nineteenth century).

<sup>281</sup> *U.S. Steel Corp.*, 434 U.S. at 473.

<sup>282</sup> Duncan B. Hollis, *The Elusive Foreign Compact*, 73 MO. L. REV. 1071, 1087 (2008).

<sup>283</sup> 472 U.S. 159 (1985).

identified four “classic indicia of a compact” under the Compact Clause including “(i) setting up a regulatory organization or body; (ii) conditioning action on corresponding actions of other participants; (iii) restricting a participant’s ability to modify or repeal its own laws; and (iv) reciprocal constraints on each State’s regulations.”<sup>284</sup> In *Northeast Bancorp, Inc.*, Massachusetts provided that holding companies whose principal place of business was outside Massachusetts could acquire a Massachusetts bank so long as the state wherein the out-of-state holding company principally did business would allow a Massachusetts holding company to do the same in its state.<sup>285</sup> Reciprocity for Massachusetts holding companies by another state legislature being necessary to trigger extension of the favorable Massachusetts measure to out-of-state holding companies was not thought to be sufficient to satisfy the second indicator, the only possible compact category into which the legislative approach proposed herein could fall, under the *Northeast Bancorp, Inc.* decision. As observed by Professor Duncan Hollis: “Without legally binding conditions or deep organizational structures . . . these criteria suggest no compact exists.”<sup>286</sup> Because states are free to withdraw and no deep organizational structures are being created by the contingent legislative proposal set forth herein, it appears that the proposed measure may not even qualify as a compact, much less an unconstitutional compact.

Writing in 1965, Professor David E. Engdahl observed that “[i]n every case since *Virginia v. Tennessee* in which an interstate arrangement has been challenged for lack of congressional consent, it has been held exempt from the consent requirement.”<sup>287</sup> The weight of this point has only increased in accordance with Professor Michael Greve’s observation, writing four decades after Professor Engdahl, that “it appears that no court has ever voided a state agreement for failure to obtain congressional consent.”<sup>288</sup> The conditional legislative proposal advanced in this Article does not violate the Compact Clause.

## VI. RESOLUTIONS AS A SUPPLEMENTAL TOOL EMPOWERING STATE LEGISLATURES

While not as powerful of a tool for engaging with the Supreme Court in seeking to reverse the seemingly irreversible one-way ratchet as contingent legislation, legislative resolutions can also play an important supplemental role in helping to inform the Supreme Court’s understanding of society’s

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<sup>284</sup> Hollis, *supra* note 282, at 1087–88.

<sup>285</sup> 472 U.S. at 164.

<sup>286</sup> Hollis, *supra* note 282, at 1088.

<sup>287</sup> David E. Engdahl, *Characterization of Interstate Arrangements: When Is a Compact Not a Compact?*, 64 MICH. L. REV. 63, 69 (1965).

<sup>288</sup> Greve, *supra* note 273, at 289.

contemporary moral values. The Supreme Court interprets states' failure to provide for a sanction as reflecting a moral judgment against the imposition thereof.<sup>289</sup> That is often a questionable interpretation, and sometimes simply false. States often reject sanctions not because of a moral judgment against the measure but instead for other reasons. As observed by Professors Carol S. Steiker and Jordan M. Steiker, "[t]he high cost of administering the death penalty has become a prominent—perhaps the most prominent—issue in contemporary discussions about whether the penalty should be limited or abolished."<sup>290</sup> States are also inhibited from imposing sanctions because of policy distortion related to uncertainty about Supreme Court precedent and the Court's future rulings applying the evolving standards analysis. In other words, a state legislature's failure to provide for a more adverse sanction may not reflect a moral view that the punishment is unwarranted.<sup>291</sup> Instead, the failure to provide for such a sanction may reflect a legislature's sense that the punishment is too costly or a concern that the sanction would be found to be unconstitutional by the courts.

Instead of the Supreme Court simply interpreting the absence of imposition of sanction in state legislation as a moral judgment against that sanction, states are well equipped as cases move through the judicial system arriving at the United States Supreme Court to provide a clear indication of their views on the evolving standards of decency questions being considered by the high court. A state legislature can utilize resolutions to dialogue with the Supreme Court. Instead of the Court presuming the state's reasons, they can make those reasons express. Thus, for example, states can express that, while they do not provide for a particular sanction for the type of offense or offender, their state's failure to do so does not reflect a moral judgment that such sanction is cruel or unusual. While unlikely to be afforded the same weight as legislation that has taken effect, the use of resolutions can be helpful in providing greater clarity regarding the moral judgements which are or which are not actually being reached by the states on matters of criminal justice.

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<sup>289</sup> See Roderick M. Hills, Jr., *Counting States*, 32 HARV. J.L. & PUB. POL'Y 17, 20 (2009) (criticizing the Court's failure to assess the purpose behind state legislatures' abolition of a given punishment); Jacobi, *supra* note 13, at 1127–29 (arguing that it is difficult to assess the intent of legislative prohibition or inaction concerning criminal punishments).

<sup>290</sup> Carol S. Steiker & Jordan M. Steiker, *Cost and Capital Punishment: A New Consideration Transforms an Old Debate*, U. CHI. LEGAL F., 2010, at 117, 118.

<sup>291</sup> Hills, *supra* note 289, at 20 (observing "[t]hat a state legislator rejects a punishment, after all, might have nothing to do with the legislator's assessment that the punishment is cruel. The legislator might instead simply believe that the punishment is administratively costly [or] leads to excessive litigation").

## CONCLUSION

The conventional wisdom is understandably that the Supreme Court's evolving standards of decency jurisprudence has created a one-way ratchet. This one-way ratchet only tightens and restricts the discretion afforded to state legislatures always and only moving towards greater leniency and away from stricter sanction. But state legislatures are not as powerless as they may seem. In isolation, states cannot hope to turn the ratchet. Individually they lack the strength to show an evolution in society's moral standards, but working collaboratively they can exert much greater force in a dialogue with the Supreme Court over contemporary societal moral standards. The tools of collaborative state action in this context are not incredibly complex, contingent legislation and the active use of resolutions. The existent cooperative governmental associations provide critical networking forums to make use of these tools more than a theoretical possibility. The increased influence of national victims' rights organizations helps to provide the political muscle.

The Supreme Court's evolving standards of decency jurisprudence is an expressly living constitution honoring framework of constitutional analysis. "A 'living constitution' is one that evolves, changes over time, and adapts to new circumstances, without being formally amended."<sup>292</sup> The Supreme Court has created a jurisprudential framework that links a living Eighth Amendment prohibition upon cruel and unusual punishment to contemporary moral standards. These standards do not, however, move exclusively in a linear manner or only towards greater leniency. Moral evolution can be towards increased sanction. If the Constitution is a living document and its Eighth Amendment framework draws its vitality from contemporary standards, then the Court must be prepared, if states use the right tools, to allow the ratchet to turn both ways.

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<sup>292</sup> DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 1 (2010).

