EIGHTH AMENDMENT STARE DECISIS

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ABSTRACT

In 2008, the United States Supreme Court decided Kennedy v. Louisiana*, holding that the Eighth Amendment barred death sentences for the crime of child rape because such punishments were cruel and unusual. In 2023, Florida passed a statute that directly contravenes this constitutional rule. Under the Florida statute, committing sexual battery against a child is a capital offense.*

In a vacuum, one might expect the Court to strike down Florida's statute as clearly unconstitutional in violation of the Eighth Amendment based on the principle of stare decisis. Traditionally, the concept of stare decisis has referred to the obligation of the Court to follow prior precedent.

The Court's description of the scope of stare decisis stems from its abortion cases. The Court initially explained stare decisis in Planned Parenthood of Southeastern Pennsylvania v. Casey *but arguably loosened its meaning in its decision in* Dobbs v. Jackson Women's Health Organization*. Indeed, the Court's decision in* Dobbs*, in which it reversed the fifty-year-old precedent of* Roe v. Wade *and its successor* Casey*, suggests that the* Kennedy *case could face a similar fate.*

But the Eighth Amendment contains substantive doctrinal characteristics that suggest it is unique with respect to stare decisis. In particular, the Eighth Amendment's relationship to stare decisis is unusual because the premise of the underlying doctrine is that the meaning of the Amendment will change over time. Pursuant to "the evolving standards of decency that mark the progress of a maturing society," the Eighth Amendment expands over time to bar punishments formerly constitutional but now determined to be draconian.

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As such, there become two possibilities with respect to applying stare decisis under the Eighth Amendment. First, stare decisis could mean what it means in other contexts—deferring to precedent and refusing to overrule a prior decision unless it rises to the level of the test previously set forth in Casey *and now articulated in* Dobbs*. Alternatively, stare decisis could mean following the evolving standards of decency doctrine. This approach contemplates that the Amendment would change over time, such that stare decisis would require the overruling of precedent, moving the case law in a progressive, less punitive direction.*

This Article argues for the latter reading. Specifically, the Article makes the novel claim that the Eighth Amendment has its own unique stare decisis doctrine, the doctrine moves in one direction, and such a reading of the Eighth Amendment is consistent with the Court's decision in Dobbs*.*

In Part I, the Article explores the origins of the unique doctrine of Eighth Amendment stare decisis. Part II examines past and future applications of this doctrine. Finally, in Part III, the Article explains why the Court's decision in Dobbs *supports Eighth Amendment Stare Decisis.*

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All bad precedents have originated from good measures.
—Julius Caesar[1]

INTRODUCTION

In 2008, the United States Supreme Court decided *Kennedy v. Louisiana*, holding that the Eighth Amendment barred death sentences for the crime of child rape because such punishments were cruel and unusual.[2] In 2023, Florida passed a statute that directly contravenes this constitutional

1. SALLUST, THE WAR WITH CATILINE / THE WAR WITH JUGURTHA 114 (John T. Ramsey ed., J.C. Rolfe trans., Harvard Univ. Press 2013) (1470) (recounting a speech by Julius Caesar).

2. Kennedy v. Louisiana, 554 U.S. 407, 421 (2008). The Court's decision adopted a categorical constitutional bar, meaning that any imposition of the death penalty for the crime of child rape exceeded the state's power to punish under the Constitution.

rule.[3] Under the Florida statute, raping[4] a child is a capital offense.[5]

In a vacuum, one might expect the Court to strike down Florida's statute as clearly unconstitutional in violation of the Eighth Amendment based on the principle of stare decisis. Traditionally, the concept of stare decisis has referred to the obligation of the Court to follow prior precedent.[6] A concept central to the rule of law, stare decisis presumes the binding nature of a prior decision, except under certain circumstances that allow for the reversing of the precedent to remedy an incorrect decision.[7]

The Court's description of the scope of stare decisis stems from its abortion cases. The Court initially explained stare decisis in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[8] but arguably loosened its meaning in its decision in *Dobbs v. Jackson Women's Health Organization.*[9]

In *Casey*, the Court explained that while stare decisis is "not an 'inexorable command,' "[10] its application relates to "a series of prudential and pragmatic considerations designed to test the consistency of overruling

3. Rose Horowitch, *DeSantis Expands Death Penalty to Include Child Rape, Setting Up Likely Court Challenge*, NBC NEWS (May 2, 2023, 9:01 AM), https://www.nbcnews.com/politics/politics-news/desantis-expands-death-penalty-include-child-rape-setting-likely-court-rcna82413 [https://perma.cc/37M6-LAWL]. Tennessee followed Florida in May 2024, and Alabama, Arizona, Idaho, Missouri, South Carolina, and South Dakota have also considered passing a similar law. *Tennessee Authorizes Death Penalty for Child Sexual Assault in Direct Challenge to Supreme Court Precedent,* DEATH PENALTY INFO. CTR., (Sept. 25, 2024), https://deathpenaltyinfo.org/news/tennessee-authorizes-death-penalty-for-child-sexual-assault-in-direct-challenge-to-supreme-court-precedent [https://perma.cc/C9WU-BLLT]; *Death Penalty for Child Sexual Abuse that Does Not Result in Death*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/facts-and-research/crimes-punishable-by-death/death-penalty-for-child-sexual-abuse-that-does-not-result-in-death [https://perma.cc/R777-PWUW].

4. The Florida statute describes the offense as "sexual battery" against a child. FLA. STAT. § 794.011(2)(a) (2024). For purposes of simplicity, this article refers to sexual "assaults" and "batteries" as "rape." So, all references to "child rape" include sexual assault and battery.

5. *Id*. The statute provides that "A person 18 years of age or older who commits sexual battery upon, or in an attempt to commit sexual battery injures the sexual organs of, a person less than 12 years of age commits a capital felony, punishable as provided in ss. 775.082 and 921.1425."

6. *See, e.g.*, BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 149 (1921). Stare decisis literally means "let the decision stand." *Stare decisis*, BRITANNICA (Dec. 27, 2024), https://www.britannica.com/topic/stare-decisis [https://perma.cc/C9JX-692X].

7. *See, e.g.*, Lewis F. Powell, Jr., *Stare Decisis and Judicial Restraint*, 1991 J. SUP. CT. HIST. 13, 16 (1991); Daniel A. Farber, *The Rule of Law and the Law of Precedents*, 90 MINN. L. REV. 1173, 1173 (2006).

8. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854–55 (1992), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022); *see* Melissa Murray & Katherine Shaw, Dobbs *and Democracy*, 137 HARV. L. REV. 728, 750 (2024) (describing *Casey* as providing the "canonical formulation of the Court's approach to stare decisis").

9. *Dobbs*, 142 S. Ct. 2228 at 2263–65.

10. *Casey*, 505 U.S. at 854 (quoting Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 405 (1932) (Brandeis, J., dissenting)); *see also* Payne v. Tennessee, 501 U.S. 808, 842 (1991) (Souter, J., concurring); Arizona v. Rumsey, 467 U.S. 203, 212 (1984).

a prior decision with the ideal of the rule of law."[11] Specifically, the Court examined (1) whether the central rule has become unworkable;[12] (2) whether the Court could remove the rule's limitation on state power without serious inequity to those who have relied upon it or significant damage to the stability of the society governed by it;[13] (3) whether the law's growth in the intervening years has left the precedent's central rule a doctrinal anachronism discounted by society;[14] and (4) whether the precedent's premises of fact have so far changed as to render its central holding somehow irrelevant or unjustifiable in dealing with the issue it addressed.[15]

But in *Dobbs*, the Court adjusted the stare decisis test, using a five-factor inquiry in deciding to overrule *Roe v. Wade* and *Casey*.[16] Specifically, the Court examined (1) the nature of the court's error, (2) the quality of its prior reasoning, (3) the workability of the current standard, (4) the effect on other areas of law, and (5) the reliance interests in the precedent.[17] One way to read this shift is as a means of freeing the Court to reverse precedents it thinks are normatively incorrect.

Indeed, the Court's decision in *Dobbs*,[18] in which it reversed the fifty-year-old precedents of *Roe v. Wade*[19] and its successor *Casey*,[20] suggests that the *Kennedy* case could face a similar fate if the Court normatively disagrees with the outcome in that case.[21] A more open-ended view of stare decisis, in which the Court places more weight on getting the "right" answer as opposed to following its precedent, could incentivize the Court to focus on policy over precedent.[22]

11. *Casey*, 505 U.S. at 854.
12. *Id.*; Swift & Co. v. Wickham, 382 U.S. 111, 116 (1965).
13. *Casey*, 505 U.S. at 855; United States v. Title Ins. & Tr. Co., 265 U.S. 472, 486 (1924).
14. *Casey*, 505 U.S. at 855; Patterson v. McLean Credit Union, 491 U.S. 164, 173–74 (1989).
15. *Casey*, 505 U.S. at 855.
16. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2263–65 (2022). The *Dobbs* test did not focus on *Casey*; rather it relied on the Court's decisions in *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2478 (2018), and *Ramos v. Louisiana*, 590 U.S. 83, 121–24 (2020) (Kavanaugh, J., concurring).
17. *Dobbs*, 142 S. Ct. at 2265.
18. For a thorough exploration of the *Dobbs* decision and its consequences, see Murray & Shaw, *supra* note 8.
19. Roe v. Wade, 410 U.S. 113 (1973), *overruled by Dobbs*, 142 S. Ct. at 2242.
20. *Casey*, 505 U.S. at 833.
21. *Kennedy*, after all, was a narrow 5–4 decision. Kennedy v. Louisiana, 554 U.S. 407 (2008). And the Court declined to expand the Eighth Amendment in *Jones v. Mississippi*, 593 U.S. 98, 101 (2021).
22. And with the current Court the "right" answer tends to be the "right" answer, meaning that the conservative policy choice is the correct one, irrespective of precedent. In addition to *Roe*, landmark cases such as *Miranda v. Arizona*, *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, and *New York Times Co. v. Sullivan* all face new challenges. Indeed, the Court overruled *Chevron* in June 2024. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024).

Likewise, a cursory glance at the Supreme Court's Eighth Amendment cases suggests that the principle of stare decisis may carry less weight in this context.[23] For instance, the Court reversed its decisions in *Penry v. Lynaugh*[24] and *Stanford v. Kentucky*[25] a mere thirteen and sixteen years later in *Atkins v. Virginia*[26] and *Roper v. Simmons*, [27] respectively.

But the Eighth Amendment contains substantive doctrinal characteristics that suggest it is unique with respect to stare decisis. In particular, the Eighth Amendment's relationship to stare decisis is unusual because the premise of the underlying doctrine is that the meaning of the Amendment will change over time.[28] Pursuant to "the evolving standards of decency that mark the progress of a maturing society," the Eighth Amendment expands over time to bar punishments formerly constitutional but now determined to be draconian.[29]

As such, two possibilities exist for applying stare decisis to Eighth Amendment decisions. First, stare decisis could mean what it means in other contexts—deferring to precedent and refusing to overrule a prior decision unless it rises to the level of the test previously set forth in *Casey* and now articulated in *Dobbs*. Alternatively, stare decisis could mean following the evolving standards of decency doctrine. This approach contemplates that the Amendment would change over time, such that stare decisis would require overruling of precedent, moving the case law in a progressive,[30] less punitive direction.[31]

This Article argues for the latter reading. Specifically, the Article advances the novel claim that the Eighth Amendment has its own unique stare decisis doctrine, the doctrine moves in one direction, and such a reading of the Eighth Amendment is consistent with the Court's decision in *Dobbs*.

23. *See, e.g.*, Meghan J. Ryan, *Does Stare Decisis Apply in the Eighth Amendment Death Penalty Context?*, 85 N.C. L. REV. 847, 855–59 (2007).

24. Penry v. Lynaugh, 492 U.S. 302 (1989), *abrogated by* Atkins v. Virginia, 536 U.S. 304 (2002).

25. Stanford v. Kentucky, 492 U.S. 361 (1989), *abrogated by* Roper v. Simmons, 543 U.S. 551 (2005).

26. *Atkins*, 536 U.S. at 321.

27. *Roper*, 543 U.S. at 578–79.

28. Weems v. United States, 217 U.S. 349, 373 (1910). The original meaning of the Eighth Amendment also contemplates change over time. *See* John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation,* 102 NW. U. L. REV. 1739, 1741 (2008).

29. Trop v. Dulles, 356 U.S. 86, 101 (1958).

30. The majoritarian underpinnings of evolving standards doctrine cut against rule of law concerns. As explored *infra* Part I, the requirement that a plurality of states have abandoned a punishment as a prerequisite to declaring it unconstitutional under the Eighth Amendment means that the change reflects society's consensus as opposed to advancing the constitutional limit beyond it.

31. *Weems*, 217 U.S. at 373; *Trop*, 356 U.S. at 101; *Roper*, 543 U.S. at 560–68 (finding that the evolving standards barred juveniles from execution in contradiction of prior Court decisions). Again, the original meaning also seems to contemplate this one-way ratchet. *See* Stinneford, *supra* note 28.

In Part I, the Article explores the origins of the unique doctrine of Eighth Amendment stare decisis. Part II examines past and future applications of this doctrine. Finally, in Part III, the Article explains why the Court's decision in *Dobbs* supports this reading of the Eighth Amendment and bars reversal of *Kennedy v. Louisiana*.

I. ORIGINS OF EIGHTH AMENDMENT STARE DECISIS

Stare decisis, at its core, reflects a commitment to the rule of law.[32] A vestige of the common law, the idea relates to honoring past decisions for the sake of predictability and consistency.[33] Cases with difficult factual situations challenge this paradigm.[34] When a rule of law generates unfair or inequitable outcomes, courts often elect to change the rule or distinguish the case such that the rule becomes inapplicable.[35]

A more consequential decision, however, relates to a decision to reject the rule itself and replace the rule with a new one.[36] Courts seem hesitant to engage in such a rejection of stare decisis without a strong normative reason for doing so.[37]

Interpreting constitutional language adds an additional wrinkle to the stare decisis calculation.[38] The Court has noted that stare decisis should carry less weight in the constitutional context.[39] This is precisely because the Court is responsible for defining the scope and meaning of the Constitution, which

32. *See, e.g.*, Lewis F. Powell, Jr., *Stare Decisis and Judicial Restraint*, 47 WASH. & LEE L. REV. 281, 288 (1990) ("[E]limination of constitutional stare decisis would represent an explicit endorsement of the idea that the Constitution is nothing more than what five Justices say it is. This would undermine the rule of law."). Of course, this relationship is not absolute. *See*, *e.g.*, South Carolina v. Gathers, 490 U.S. 805, 825 (1989) (Scalia, J., dissenting) ("[W]hen convinced of former error, this Court has never felt constrained to follow precedent. In constitutional questions, where correction depends upon amendment and not upon legislative action this Court throughout its history has freely exercised its power to reexamine the basis of its constitutional decisions." (quoting Smith v. Allwright, 321 U.S. 649, 665 (1944))), *overruled by* Payne v. Tennessee, 501 U.S. 808 (1991); *see also* Farber, *supra* note 7, at 1173–74.

33. *See* Farber, *supra* note 7, at 1177–80; *see also* Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570, 573 (2001); Earl Maltz, *The Nature of Precedent*, 66 N.C. L. REV. 367, 368–69 (1988).

34. *See, e.g.*, Winterbottom v. Wright, (1842) 152 Eng. Rep. 402, 405–06 ("This is one of those unfortunate cases in which . . . it is, no doubt, a hardship upon the plaintiff to be without a remedy, but by that consideration we ought not to be influenced. Hard cases, it has been frequently observed, are apt to introduce bad law.").

35. *See, e.g.*, William O. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 736 (1949); Pearson v. Callahan, 555 U.S. 223, 233 (2009) ("[S]tare decisis is not an inexorable command.") (quoting State Oil Co. v. Khan, 522 U.S. 3, 20 (1997)).

36. *See* cases cited *infra* note 45.

37. *See* sources cited *supra* note 32.

38. *See generally, e.g.*, Fallon, *supra* note 33 at 573.

39. Agostini v. Felton, 521 U.S. 203, 235 (1997); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 326 (1816).

often includes open-ended language.[40] The inability to easily amend the federal Constitution means that the Court's interpretation is not subject to review and will change only when the members of the Court change.[41] When such decisions include placing limits on the power of state legislatures or Congress, the countermajoritarian difficulty arises.[42]

And yet, in *Marbury v. Madison*, the Court made clear that its constitutional role is to engage in such judicial review, deciding who decides the scope and meaning of the Constitution.[43] The Court usually decides that it is its role to determine the meaning of the Constitution.[44] The Court has further explained that when it has made such determinations incorrectly, it has the responsibility to push aside the mandates of stare decisis and change the applicable constitutional rule.[45]

What happens, though, when the precedent itself envisions that the rule will change over time, is different. The Eighth Amendment contemplates that the line between acceptable and unacceptable punishment will shift as society matures.[46] As such, the stare decisis tension at the heart of *Casey* and *Dobbs* dissipates. Instead, applying stare decisis *means* changing the rule.

40. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803); Frederick Schauer, *An Essay on Constitutional Language*, 29 UCLA L. REV. 797, 798–99 (1981).

41. *See, e.g.*, Richard Albert, *The World's Most Difficult Constitution to Amend?*, 110 CALIF. L. REV. 2005, 2007–11 (2022); Kimble v. Marvel Ent., LLC, 576 U.S. 446, 456 (2015).

42. The countermajoritarian difficulty questions the wisdom of five Justices on the Court imposing their own views to strike down laws passed by a democratic majority in the legislature. *See, e.g.*, Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 210–13 (2002); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part II: Reconstruction's Political Court*, 91 GEO. L.J. 1, 1–2 (2002); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of* Lochner, 76 N.Y.U. L. REV. 1383, 1385–86 (2001); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Four: Law's Politics*, 148 U. PA. L. REV. 971, 1011–19 (2000); Barry Friedman, *The History of The Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 336 (1998). *See generally* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962) (framing the countermajoritarian difficulty).

43. *Marbury*, 5 U.S. (1 Cranch) at 177 (establishing the principle of judicial review and according the Supreme Court the power to decide who decides the meaning of the Constitution).

44. *Id.*; Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2262 (2022); *Martin*, 14 U.S. (1 Wheat.) at 326.

45. In *Dobbs*, the Court cites three examples of when ignoring stare decisis is appropriate to overrule prior decisions: (1) *Brown v. Board of Education*, 347 U.S. 483 (1954) (overruling the "separate but equal" doctrine of *Plessy v. Ferguson*, 163 U.S. 537 (1896)); (2) *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (overruling restrictions on the minimum wage law of *Adkins v. Children's Hospital of D.C.*, 261 U.S. 525 (1923) and by implication, the *Lochner v. New York*, 198 U.S. 45 (1905) line of cases); and (3) *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943) (overruling the law compelling high school students to salute the flag previously upheld by *Minersville School Disrict. v. Gobitis*, 310 U.S. 586 (1940)). *Dobbs*, 142 S. Ct. at 2262–63.

46. Weems v. United States, 217 U.S. 349, 373 (1910); Trop v. Dulles, 356 U.S. 86, 101 (1958).

A. THE EVOLVING STANDARDS TEST

The evolving standards test originates from the 1910 case of *Weems v. United States*.[47] In *Weems*, the Court considered whether a punishment of *cadena temporal*—fifteen years of hard labor—for the crime of forgery constituted a cruel and unusual punishment under the Eighth Amendment.[48]

In finding that the *cadena temporal* punishment was unconstitutional, the Court explained its approach to interpreting the Eighth Amendment:

> 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.[49]

The Court added that constitutional provisions "are not ephemeral enactments, designed to meet passing occasions," but instead seek to "approach immortality as nearly as human institutions can approach it."[50]

Almost fifty years later, the Court further developed the concept that the Eighth Amendment did not contain a static meaning, but one that would change over time. In *Trop v. Dulles*, the Court considered the constitutionality of the punishment of loss of citizenship for wartime military desertion.[51] Specifically, the Court considered whether permanently denying Trop a passport constituted a cruel and unusual punishment.[52]

In finding for Trop, the Court explored the meaning of the Eighth Amendment.[53] Citing *Weems*, the Court echoed the idea that "the words of the [Eighth] Amendment are not precise, and that their scope is not static."[54]

47. *Weems*, 217 U.S. at 349. The original understanding of the concepts of both cruel and unusual was that they would change over time. *See* Stinneford, *supra* note 28 at 1741; John F. Stinneford, *The Original Meaning of "Cruel"*, 105 GEO. L.J. 441, 468–71 (2017).

48. *Weems*, 217 U.S. at 380–82. The case occurred in the Philippines, which at the time was a territory of the United States.

49. *Id.* at 373.

50. *Id.*

51. *Trop*, 356 U.S. at 88. The Court explained that the petitioner had escaped from a stockade in Casablanca while serving as a private in the U.S. Army in French Morocco during World War II. His desertion lasted a day, before he willingly surrendered to an army officer. Trop testified that "we had decided to return to the stockade. The going was tough. We had no money to speak of, and at the time we were on foot and we were getting cold and hungry." *Id.* at 87–88.

52. It is worth noting that Trop served three years imprisonment, forfeiture of all pay and allowances, and a dishonorable discharge. *Id.* at 88. The question for the Court was whether the additional consequence of loss of citizenship violated the Eighth Amendment. *Id.* at 99.

53. The Court found the punishment to be inappropriate as "total destruction of the individual's status in organized society" in stripping the "citizen of his status in the national and international political community." *Id.* at 101.

54. *Id.* at 100–01.

As a result, "[t]he [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[55]

Having cemented the idea that the Eighth Amendment would evolve over time in a progressive way, the Court later established a test to determine whether a particular punishment violated society's evolving standards of decency. In *Coker v. Georgia*, the Court developed this test in assessing whether a punishment of death for the crime of rape was constitutional.[56]

As established in *Coker*, the Court's inquiry contains two parts—an objective assessment and a subjective component.[57] The objective determination seeks "guidance in history and from the objective evidence of the country's present judgment" concerning the punishment in question.[58] In *Coker*, the Court looked to the number of jurisdictions that allowed death sentences for the crime of rape, finding that Georgia was the only state allowing that punishment where the victim was an adult woman.[59] Its assessment of the objective indicia also included jury verdicts, which revealed that Georgia juries only imposed death sentences in six out of sixty-three cases involving the crime of adult rape.[60]

After finding that the objective evidence revealed that the punishment of death for rape was inconsistent with the societal standards of decency, the Court "brought to bear" its own independent judgment concerning the constitutionality of the punishment.[61] This judgment constituted an assessment of the proportionality of the punishment in light of the crime committed and the characteristics of the perpetrator.[62] As the Court developed this subjective inquiry in later cases, it increasingly relied on the purposes of punishment—retribution, deterrence, incapacitation, and rehabilitation—to determine whether a punishment was proportionate.[63]

55. *Id.* at 101.

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

57. Although the Court has not framed it this way, one way of understanding this test is that the objective indicia assesses unusualness—whether the punishment is contrary to historical precedent and current practice, while the subjective indicia assesses cruelty—whether the punishment is excessive in light of the applicable purposes of punishment.

58. *Coker*, 433 U.S. at 593.

59. *Id.* at 595–96. Two other states, Florida and Mississippi, allowed the death penalty for rape of a child, but not an adult. *Id.* at 595.

60. *Id.* at 596–97.

61. *Id.* at 597.

62. *Id.* at 598–99 (discussing the proportionality of death as a punishment for rape).

63. *See, e.g.*, *id.* at 597–98; Enmund v. Florida, 458 U.S. 782, 797–801 (1982); Atkins v. Virginia, 536 U.S. 304, 318–21 (2002); Roper v. Simmons, 543 U.S. 551, 568–72 (2005); Kennedy v. Louisiana, 554 U.S. 407, 434–41. This concept of proportionality applies to both retributive and utilitarian purposes of punishment. *See* William W. Berry III, *Separating Retribution from Proportionality: A Response to*

Following the Court's precedents in applying the Eighth Amendment, then, means applying the evolving standards of decency test to determine whether a punishment is cruel and unusual. It is worth noting that the Court initially cabined the application of this test to capital cases, because "death is different."[64] It subsequently expanded the test to include juvenile life-without-parole sentences, because "children are different too."[65]

Practically, this means that stare decisis—following prior precedent—contemplates changing the rule to reflect the evolving standards of society. So, overruling a prior precedent would actually be following the doctrine when the move is from a harsher punishment to a less harsh punishment. The doctrine also makes clear, however, that this concept operates only in one direction—from more severe punishment to less severe punishment.

B. WHY IT MOVES IN ONE DIRECTION

The Court's Eighth Amendment cases demonstrate why the Eighth Amendment only changes in one direction—with increasing limits on the power of state and federal governments to impose draconian punishments. In particular, the Eighth Amendment values of dignity and proportionality underscore this point.[66]

Stinneford, 97 VA. L. REV. IN BRIEF 61, 64–70 (2011) (explaining why proportionality applies to all of the purposes of punishment, not just retribution).

64. *See* Furman v. Georgia, 408 U.S. 238, 286 (1972) (Brennan, J., concurring) ("Death is a unique punishment in the United States."); Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 370 (1995) (crediting Justice Brennan's concurrence in *Furman* as the originator of this line of argument); *see also, e.g.*, Ring v. Arizona, 536 U.S. 584, 616–17 (2002) (Breyer, J., concurring) (explaining that because "death is not reversible," DNA evidence that the convictions of numerous persons on death row are unreliable is especially alarming); Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (noting that death differs from life imprisonment because of its "finality"); Spaziano v. Florida, 468 U.S. 447, 460 n.7 (1984) (stating that "the death sentence is unique in its severity and in its irrevocability"), *overruled by* Hurst v. Florida, 577 U.S. 92 (2016); Gregg v. Georgia, 428 U.S. 153, 187 (1976) ("There is no question that death as a punishment is unique in its severity and irrevocability."); Jeffrey Abramson, *Death-Is-Different Jurisprudence and the Role of the Capital Jury*, 2 OHIO ST. J. CRIM. L. 117, 118 (2004) (discussing the Court's death-is-different jurisprudence and arguing that it requires additional procedural safeguards "when humans play at God").

65. Miller v. Alabama, 567 U.S. 460, 481 (2012). *See generally* CARA H. DRINAN, THE WAR ON KIDS: HOW AMERICAN JUVENILE JUSTICE LOST ITS WAY (2017) (exploring the *Miller* trilogy).

66. The Court has relied on a number of key values to inform its Eighth Amendment jurisprudence. *See, e.g.*, William W. Berry III & Meghan J. Ryan, *Eighth Amendment Values*, *in* THE EIGHTH AMENDMENT AND ITS FUTURE IN A NEW AGE OF PUNISHMENT 61, 61 (Meghan J. Ryan & William W. Berry III eds., 2020). These values include the following: dignity, individualized sentencing, absolute proportionality, comparative proportionality, humanness, non-arbitrariness, and differentness. *Id.* at 61–73.

In its decision in *Trop*, the Court emphasized that "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man."[67] In other words, when the Eighth Amendment bars a particular punishment practice, it reflects the conclusion that a particular punishment treats the defendant "as an object"[68] beyond what society deems as "civilized, decent, and virtuous."[69]

The Court has made clear that it "look[s] to the evolving standards of decency that mark the progress of a maturing society" to "enforce" this "duty of the government to respect the dignity of all persons."[70] If the society matures to find a formerly acceptable form of punishment to violate a person's dignity, then the punishment cannot, by definition, become constitutional again at some later date. Indeed, an undignified punishment or a punishment that objectifies an inmate cannot, at a later date, magically

67. Trop v. Dulles, 356 U.S. 86, 100 (1958). Indeed, the Court has referenced the concept of dignity under the Eighth Amendment repeatedly. *Furman*, 408 U.S. at 274 (Brennan, J., concurring); Sellars v. Beto, 409 U.S. 968, 970 (1972) (Douglas, J., dissenting from denial of certiorari); *Gregg*, 428 U.S. at 173; Estelle v. Gamble, 429 U.S. 97, 102 (1976); Ingraham v. Wright, 430 U.S. 651, 684 n.1 (1977) (White, J., dissenting); Roberts v. Louisiana, 431 U.S. 633, 642–43 (1977) (Rehnquist, J., dissenting); Hutto v. Finney, 437 U.S. 678, 685 (1978); United States v. Bailey, 444 U.S. 394, 423 (1980) (Blackmun, J., dissenting); Rhodes v. Chapman, 452 U.S. 337, 361 (1981) (Brennan, J., concurring in the judgment); Autry v. McKaskle, 465 U.S. 1090, 1091 (1984) (Brennan, J., dissenting from denial of certiorari); *Spaziano*, 468 U.S. at 471 n.5 (Stevens, J., concurring in part and dissenting in part); Glass v. Louisiana, 471 U.S. 1080, 1080 (1985) (Brennan, J., dissenting from denial of certiorari); DeGarmo v. Texas, 474 U.S. 973, 973–74 (1985) (Brennan, J., dissenting from denial of certiorari); Cabana v. Bullock, 474 U.S. 376, 397 (1986) (Blackmun, J., dissenting); Smith v. Murray, 477 U.S. 527, 545–46 (1986) (Stevens, J., dissenting); Ford v. Wainwright, 477 U.S. 399, 406 (1986); McCleskey v. Kemp, 481 U.S. 279, 300 (1987); Thompson v. Oklahoma, 487 U.S. 815, 836 (1988); Stanford v. Kentucky, 492 U.S. 361, 392 (1989) (Brennan, J., dissenting), *abrogated by* Roper v. Simmons, 543 U.S. 551 (2005); Walton v. Arizona, 497 U.S. 639, 675 (1990) (Brennan, J., dissenting), *overruled by* Ring v. Arizona, 536 U.S. 584 (2002); Wilson v. Seiter, 501 U.S. 294, 307 (1991) (White, J., concurring in the judgment); Hudson v. McMillan, 503 U.S. 1, 11 (1992); Campbell v. Wood, 511 U.S. 1119, 1121 (1994) (Blackmun, J., dissenting from the denial of certiorari); Farmer v. Brennan, 511 U.S. 825, 852–53 (1994) (Blackmun, J., concurring); *Atkins*, 536 U.S. at 311–12; Hope v. Pelzer, 536 U.S. 730, 738 (2002); Overton v. Bazzetta, 539 U.S. 126, 138 (2003) (Stevens, J., concurring); *Roper*, 543 U.S. at 560; *Kennedy*, 554 U.S. at 420; Baze v. Rees, 553 U.S. 35, 57 (2008); Graham v. Florida, 560 U.S. 48, 58–59 (2010); Brown v. Plata, 563 U.S. 493, 510 (2011); Woodward v. Alabama, 571 U.S. 1045, 1052 (2013) (Sotomayor, J., dissenting from denial of certiorari); Hall v. Florida, 572 U.S. 701, 708 (2014); Glossip v. Gross, 576 U.S. 863, 977 (2015) (Sotomayor, J., dissenting); Arthur v. Dunn, 580 U.S. 1141, 1154 (2017) (Sotomayor, J., dissenting from denial of certiorari); Moore v. Texas, 581 U.S. 1, 12, 20 (2017); Zagorski v. Haslam, 139 S. Ct. 20, 21 (2018) (Sotomayor, J., dissenting from denial of certiorari); Bucklew v. Precythe, 587 U.S. 119, 133–35 (2019); Coonce v. United States, 142 S. Ct. 25, 31 (2021) (Sotomayor, J., dissenting from denial of certiorari); *see also* Meghan J. Ryan, *Taking Dignity Seriously: Excavating the Backdrop of the Eighth Amendment*, 2016 U. ILL. L. REV. 2129, 2144–56.

68. Rex D. Glensy, *The Right to Dignity*, 43 COLUM. HUM. RTS. L. REV. 65, 96 (2011); Ryan, *supra* note 67, at 2143.

69. Michal Buchhandler-Raphael, *Drugs, Dignity, and Danger: Human Dignity as a Constitutional Constraint to Limit Overcriminalization*, 80 TENN. L. REV. 291, 317 (2013); Ryan, *supra* note 67, at 2143–44.

70. *Moore*, 581 U.S. at 12 (quoting *Hall*, 572 U.S. at 708); *Roper*, 543 U.S. at 560–61 (quoting *Trop*, 356 U.S. at 100–01).

become dignified or civilized, decent, and virtuous. If the "Eighth Amendment's protection of dignity reflects the Nation we have been, the Nation we are, and the Nation we aspire to be," as the Court has explained, that means that over time, the United States will discard more draconian forms of punishment in favor of more humane ones.[71]

A change operating in the other way, from less severe punishment to more severe punishment, contravenes the core principle of the evolving standards.[72] The evolving standards "mark the progress of a maturing society," and increasing punishment severity undercuts that very progress.[73] This is particularly true concerning the punishments at issue—the death penalty and life without parole. Many states[74] and Western nations[75] have abandoned the death penalty, and the United States remains the only nation that allows juvenile life-without-parole sentences.[76] Undoing limits on punishments that most of the rest of the civilized world abolished long ago would reflect a move away from societal maturation and instead embrace societal savagery. Such a move would be the antithesis of promoting human dignity.

A second principle that the Court has linked to the evolving standards of decency—proportionality—similarly demonstrates why the Eighth Amendment only moves in one direction. The Court has explained that the evolving standards test is a tool by which to measure "the requirement of

71. *Hall*, 572 U.S. at 708.

72. The Court has arguably moved in this direction in three cases—*Gregg v. Georgia*, 428 U.S. 153 (1976); *Tison v. Arizona*, 481 U.S. 137 (1987); and *Harmelin v. Michigan*, 501 U.S. 957 (1991). However, a better reading of those cases suggests that those decisions were qualifications of prior decisions, not reversals in the direction of the evolving standards. *See* discussion *infra* Section II.C.

73. *Trop*, 356 U.S. at 101.

74. Twenty-three states and the District of Columbia have abolished the death penalty: Alaska, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Rhode Island, Vermont, Virginia, Washington, West Virginia, Wisconsin. *Facts About the Death Penalty*, DEATH PENALTY INFO. CTR. (Feb. 7, 2025) [hereinafter *Facts About the Death Penalty*], https://dpic-cdn.org/production/documents/pdf/FactSheet.pdf [https://perma.cc/PM5V-DHBB]. Another twelve states have not had an execution in the past decade: California, Idaho, Indiana, Kansas, Kentucky, Louisiana, Montana, Nevada, North Carolina, Oregon, Pennsylvania, Wyoming. And three more have not had an execution in the past five years: Arkansas, Nebraska and Ohio. *States with No Recent Executions*, DEATH PENALTY INFO. CTR. (Dec. 18, 2024), https://deathpenaltyinfo.org/executions/executions-overview/states-with-no-recent-executions [https://perma.cc/73SG-SB9T].

75. All of the European Union and most democratic nations in the world have abandoned the death penalty. *See generally* ROGER HOOD & CAROLYN HOYLE, THE DEATH PENALTY: A WORLDWIDE PERSPECTIVE (5th ed. 2015) (cataloguing the abolition of the death penalty across the world).

76. *See, e.g.*, Joshua Rovner, *Juvenile Life Without Parole: An Overview*, THE SENT'G PROJECT, (Apr. 7, 2023), https://www.sentencingproject.org/policy-brief/juvenile-life-without-parole-an-overview [https://perma.cc/527P-XY92]. Twenty-seven states and the District of Columbia have banned life-without-parole sentences for people under 18, and in another nine states, no one is serving juvenile life-without-parole sentences. *Id.*

proportionality contained within the Eighth Amendment."[77] As with dignity, the Court has long emphasized the concept of proportionality as "central to the Eighth Amendment."[78] That means that when the Court bars particular punishments under the Eighth Amendment, it is because the punishment is excessive in light of the characteristics of the offense[79] or the characteristics of the offender.[80]

Under the evolving standards test, the proportionality inquiry looks at the objective indicia of national consensus in that the sentence is excessive in light of what other jurisdictions permit and impose.[81] And under the subjective indicia, the Court assesses whether the sentence is disproportionate in light of the purposes of retribution, deterrence, incapacitation, and rehabilitation.[82]

For a barred punishment to again be constitutionally permissible, it would mean that the consensus against the punishment has reversed. Such a scenario is unlikely because it would involve states implementing punishment practices in violation of the Constitution. One or more states, like Florida and Tennessee currently, might engage in a barred punishment practice, but such actions would not be enough to create a consensus to allow that kind of punishment again.[83]

77. Enmund v. Florida, 458 U.S. 782, 813 (1982) (O'Connor, J., dissenting).

78. Graham v. Florida, 560 U.S. 48, 59 (2010); *see also* Weems v. United States, 217 U.S. 349, 365–67 (1910); Gregg v. Georgia, 428 U.S. 153, 172–73 (1976); Coker v. Georgia, 433 U.S. 584, 597 (1977); *Enmund*, 458 U.S. at 812–13 (O'Connor, J., dissenting); Tison v. Arizona, 481 U.S. 137, 152 (1987); Harmelin v. Michigan, 501 U.S. 957, 997–98 (1991) (Kennedy, J., concurring in part and concurring in the judgment); Stanford v. Kentucky, 492 U.S. 361, 378–79 (1989), *abrogated by* Roper v. Simmons, 543 U.S. 551 (2005); Penry v. Lynaugh, 492 U.S. 302, 345–46 (1989), *abrogated by* Atkins v. Virginia, 536 U.S. 304 (2002); *Atkins*, 536 U.S. at 311; *Roper*, 543 U.S. at 574; Kennedy v. Louisiana, 554 U.S. 407, 426 (2008); Miller v. Alabama, 567 U.S. 460, 469 (2012); Berry & Ryan, *supra* note 66, at 66–69; William W. Berry III, *Promulgating Proportionality*, 46 GA. L. REV. 69, 74 (2011) [hereinafter Berry, *Promulgating Proportionality*]; William W. Berry III, *Practicing Proportionality*, 64 FLA. L. REV. 687, 689 (2012) [hereinafter Berry, *Practicing Proportionality*]; William W. Berry III, *Procedural Proportionality*, 22 GEO. MASON L. REV. 259, 265 (2015).

79. *See, e.g.*, *Coker*, 433 U.S. at 592 (barring the death penalty for rape); *Kennedy*, 554 U.S. at 413 (barring the death penalty for child rape); *Enmund*, 458 U.S. at 797 (barring the death penalty for some kinds of felony murder).

80. *See, e.g.*, *Atkins*, 536 U.S. at 321 (barring the death penalty for intellectually disabled defendants); *Roper*, 543 U.S. at 578 (barring the death penalty for juveniles).

81. *See, e.g.*, *Graham*, 560 U.S. at 58–59; *Miller*, 567 U.S. at 469.

82. *See, e.g.*, *Coker*, 433 at 597–98; *Enmund*, 458 U.S. at 797–801; *Atkins*, 536 U.S. at 318–21; *Roper*, 543 U.S. at 568–72; *Kennedy*, 554 U.S. at 434–41; *see also* Berry, *supra* note 63, at 61–64 (explaining that proportionality applies to all of the purposes of punishment, not just retribution).

83. One might argue that this is exactly what happened when over forty states passed new death penalty statutes after the *Furman* decision barring the death penalty. *See* Corinna Barrett Lain, Furman *Fundamentals*, 82 WASH. L. REV. 1, 46–48 (2007) (describing the response of states to *Furman*). But the decision in *Furman* was an as-applied decision, not a categorical ban, meaning that the punishment was only unconstitutional because of the way states administered it. *Furman*, 408 U.S. at 239–40. As such,

In addition to a change in national consensus, a reversal would also mean that the concept of proportionality would have a fickle application. When a punishment is excessive, whether in light of retribution or one of the utilitarian purposes of punishment, it cannot magically become proportionate again. The argument would be that the initial determination was incorrect, that the Court defined a proportionate punishment as a disproportionate one.

The cautiousness of the Court's evolving standards doctrine, though, makes such a claim less persuasive. All of its decisions to find punishments disproportionate under the Eighth Amendment have first found a majoritarian objective consensus[84] against the punishment in question before also finding the punishment disproportionate in its own subjective judgment.[85]

A view of the Eighth Amendment as moving only in a more progressive direction is also consistent with its original meaning.[86] As John Stinneford has explained, the concept of "unusual" reflects a notion of longstanding usage.[87] Drawing on the writings of Edward Coke as well as the common law, this original understanding reflected a proscription against cruel innovation—the adoption of newer methods of harsh punishment.[88] The idea is that moving in a harsher direction undoes the original Eighth Amendment meaning of contrary to long usage, even if the evolving standards evolved in a more punitive direction.[89] Under either an evolving standards reading or under an originalist reading, then, it is clear that the Eighth Amendment can change in only one direction—expanding to bar harsh punishments.

the states were not passing laws in contravention of an evolved standard of decency, but rather to remedy the procedural defects in jury sentencing in capital cases. *See* discussion *infra* Section II.C.

84. It is worth noting that the dissenters in some of the Court's Eighth Amendment evolving standards cases have raised issues with the Court's determination of consensus. *See Atkins*, 536 U.S. at 337–38 (Scalia, J., dissenting); *Roper*, 543 U.S. at 607–08 (Scalia, J., dissenting). In particular, the question relates to the proper method of state counting to determine consensus—whether it is the number of states allowing the death penalty that allow the execution of juveniles or intellectually disabled individuals, or the number of states (including abolitionist ones) that allow the practice in question. The question becomes an academic one, however, nearly two decades after the Court's decision, as a national consensus against the practice in question has existed for two decades as a result of the Court's decision.

85. On one level, populating the content of a countermajoritarian constitutional provision like the Eighth Amendment by looking at majoritarian practices seems contradictory, but it has nonetheless been the Court's practice, perhaps as a way to measure "unusualness." William W. Berry III, *Unusual Deference*, 70 FLA. L. REV. 315, 327–38 (2018); *see also* Stinneford, *supra* note 28, at 1816.

86. *See generally* Stinneford, *supra* note 28 (describing the original meaning of the Eighth Amendment).

87. *Id.*

88. *Id.*

89. *Id.*

II. APPLICATIONS OF EIGHTH AMENDMENT STARE DECISIS

While not describing its application of the Eighth Amendment as a unique form of stare decisis, the Court has nonetheless followed this approach on several occasions. And, as discussed, the national consensus continues to evolve.

A. PAST APPLICATIONS

Arguably, the first application of the concept of evolving stare decisis was outside of the Eighth Amendment, before the Court articulated the details of its test in *Coker*. But the discussion begins here because the sentiment is the same—promoting a more progressive, humane form of punishment by placing constitutional limits on a draconian one.

1. *McGautha* and *Furman*

In 1971, the Court considered the constitutionality of the death penalty in two companion cases, *McGautha v. California*[90] and *Crampton v. Ohio*.[91] These challenges made Fourteenth Amendment claims, specifically that the procedures used to impose the death sentences violated due process.[92] Both claimed that the lack of guidance given to the jury determining the sentence allowed the imposition of the death sentence without any governing standards.[93] *Crampton* also challenged the unitary trial procedure in which the jury determined guilt and punishment at the same time.[94]

In a 6–3 decision, the *McGautha* court rejected petitioners' arguments, finding that the Ohio and California sentencing procedures were constitutional.[95] Examining the history of the death penalty, the Court surmised that sentencing discretion in capital cases constituted a form of

90. McGautha v. California, 402 U.S. 183, 186–87 (1971), *reh'g granted*, *vacated*, Crampton v. Ohio, 408 U.S. 941 (1972). McGautha and Wilkinson committed armed robbery, with conflicting testimony about which one of them had murdered a man during the robbery.

91. *McGautha*, 402 U.S. at 183, 192–94. Crampton had murdered his wife after release from a state mental hospital.

92. *Id.* at 185, 196.

93. *Id.* at 185. The judge instructed the *McGautha* jury in the following open-ended way:

> [T]he law itself provides no standard for the guidance of the jury in the selection of the penalty, but, rather, commits the whole matter of determining which of the two penalties shall be fixed to the judgment, conscience, and absolute discretion of the jury. In the determination of that matter, if the jury does agree, it must be unanimous as to which of the two penalties is imposed.

Id. at 190. Similarly, the judge in *Crampton* instructed: "[i]f you find the defendant guilty of murder in the first degree, the punishment is death, unless you recommend mercy, in which event the punishment is imprisonment in the penitentiary during life." *Id*. at 194. The court did not give the jury an additional guidance on what constituted "mercy" or when "mercy" was appropriate. *Id.*

94. *Id.* at 208–09. The problem with a unitary trial is that it requires the defendant to choose between arguing for innocence and arguing for a lesser sentence.

95. *Id.* at 185–86.

mercy, not the application of a generalizable concept or standard.[96] While recognizing the force of petitioners' claim on a general level, the Court nonetheless emphasized the indeterminacy of the task of developing an applicable standard for capital juries.[97] It explained, "[t]o identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability."[98]

Even though the criteria given to the juries in *McGautha* and *Crampton* did not do more than exercise "minimal control" of the jury's "exercise of discretion," the Court found it "quite impossible to say that committing to the untrammeled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution."[99] This was because "[t]he infinite variety of cases and facets to each case would make general standards either meaningless 'boiler-plate' or a statement of the obvious that no jury would need."[100]

Likewise, the Court found that the unitary trial procedure of forcing a defendant to choose between arguing innocence and arguing for mercy did not violate due process because requiring that difficult choice was not a denial of process.[101] For similar reasons, the Court likewise concluded that the unitary trial model did not infringe upon Crampton's Fifth Amendment privilege against self-incrimination.[102]

96. *Id.* at 203–04.

97. *Id.* at 203–05.

98. *Id.* at 204. The Court cited a similar conclusion reached by the British Home Office prior to its abolition of the death penalty:

> The difficulty of defining by any statutory provision the types of murder which ought or ought not to be punished by death may be illustrated by reference to the many diverse considerations to which the Home Secretary has regard in deciding whether to recommend clemency. No simple formula can take account of the innumerable degrees of culpability, and no formula which fails to do so can claim to be just or satisfy public opinion.

Id. at 204–05. Similarly, the Royal Commission on Capital Punishment concluded, "No formula is possible that would provide a reasonable criterion for the infinite variety of circumstances that may affect the gravity of the crime of murder. Discretionary judgment on the facts of each case is the only way in which they can be equitably distinguished." *Id.* at 205.

99. *Id.* at 207. Also important to the Court here was the idea that the alternative—mandatory sentencing—was not a feasible option because of the risk of jury nullification. *Id.* at 199–200. This had occurred when "jurors on occasion took the law into their own hands in cases which were 'willful, deliberate, and premeditated' in any view of that phrase, but which nevertheless were clearly inappropriate for the death penalty." *Id.* at 199.

100. *Id.* at 208.

101. *Id.* at 213. Interestingly, only six states, including California, used bifurcated capital trial and sentencing procedures at the time. *Id.* at 208.

102. *Id.* at 213–17.

Just a year later, the Court considered the constitutionality of the death penalty under the Eighth Amendment in *Furman v. Georgia*.[103] Based on similar arguments to the ones raised in *McGautha*, the Court held 5–4 that the death penalty was unconstitutional as applied.[104]

Unlike the later examples of Eighth Amendment stare decisis, the decision in *Furman* turned on the procedure in question, not the substance.[105] But the idea is the same—moving from a more draconian procedure to a less draconian one. The failure to provide juries guidance on how to differentiate between murderers who should receive the death penalty and those who should not resulted in sentencing outcomes that the Court found to be random and arbitrary.[106] Imposing death sentences in an arbitrary and random manner was particularly troubling because "death is different"—the consequence is severe and irrevocable.[107]

So, the decision in *Furman* followed the underlying principle of the evolving standards of decency—protecting the dignity of criminal defendants by preventing states from subjecting them to arbitrary, random sentencing procedures in capital cases.[108] The Court did not find that the death penalty itself was now cruel and unusual; instead, it was the unprincipled ways that Georgia imposed it that made it unconstitutional.[109] Capital punishment without any jury guidance was the prevailing practice, and the Court found that it no longer constituted a constitutional punishment.[110]

103. Furman v. Georgia, 408 U.S. 238 (1972). *Furman* did not offend traditional notions of stare decisis and did not constitute a direct reversal of *McGautha* largely because the Court decided it on different grounds. The Court in *Furman* found that the lack of jury guidance violated the Eighth Amendment, not Fourteenth Amendment procedural due process as raised in *McGautha*.

104. *Id.* at 239–40. Two of the five Justices—Justice Marshall and Justice Brennan—found that the death penalty was per se unconstitutional, that is, unconstitutional in all situations, not just as applied. *Id.* at 305–06 (Brennan, J., concurring); *id.* at 358–61 (Marshall, J., concurring).

105. The *Furman* decision itself was a short *per curiam* decision, with all five of the Justices in the majority criticizing the approach that Georgia implemented.

106. *Id.* at 309–10 (Stewart, J., concurring); *see id.* at 240 (Douglas, J., concurring); *id.* at 293–95 (Brennan, J., concurring); *id.* at 310–11 (White, J., concurring); *id.* at 314–15 (Marshall, J., concurring).

107. *See* cases cited *supra* note 64.

108. *See* cases cited *supra* note 106.

109. *See* cases cited *supra* note 106.

110. *See* cases cited *supra* note 106.

2. *Penry* and *Atkins*

The Court's cases concerning whether it is constitutional to execute an intellectually disabled[111] offender provide a clear example of the application of Eighth Amendment stare decisis.[112] In *Atkins v. Virginia*, the Court reversed its decision in *Penry v. Lynaugh* as a matter of stare decisis because the standard of decency had changed.[113]

In 1989, the Court decided *Penry*.[114] Penry brutally raped, beat, and stabbed Pamela Carpenter with a pair of scissors, causing her subsequent death a few hours later.[115] A Texas jury sentenced Penry to death despite his claims of intellectual disability and insanity.[116] As part of his habeas appeal, the Court considered whether the Eighth Amendment barred his execution in light of his intellectual disability and resulting diminished culpability.[117]

The Court found no evidence of a national consensus against the execution of intellectually disabled offenders.[118] Only two states and the federal government barred such death sentences.[119] Adding in the fourteen states that barred capital punishment, this meant that sixteen states barred the

111. The Court used the term "mentally retarded" in both cases. In common usage, the term "intellectually disabled" has replaced "mentally retarded" as both a more accurate and less pejorative term. *See, e.g.*, Change in Terminology: "Mental Retardation" to "Intellectual Disability," 78 Fed. Reg. 46499 (Sept. 3, 2013) (to be codified at 20 C.F.R. pts. 404, 416) (changing the Social Security terminology from mental retardation to intellectual disability).

112. *Compare* Penry v. Lynaugh, 492 U.S. 302 (1989), *abrogated by* Atkins v. Virginia, 536 U.S. 304 (2002), *with Atkins*, 536 U.S. at 304 (showing that *Atkins* overruled *Penry* by finding the execution of intellectually disabled inmates to be unconstitutional).

113. *Atkins*, 536 U.S. at 321.

114. *Penry*, 492 U.S. at 302.

115. *Id.* at 307. The brutal nature of the crime potentially played a role in the Court's decision to uphold his death sentence.

116. *Id.* at 310–11. At trial, a clinical psychologist testified that Penry consistently scored between fifty and sixty-three on IQ tests, signifying mild to moderate intellectual disability. *Id.* at 307–08. Aged twenty-two at the time of the crime, Penry had "the ability to learn and the learning or the knowledge of the average 6½ year old kid," and had a social maturity on the level of a nine- or ten-year-old. *Id.* at 308.

117. Penry's claim, while rejected, did have some historical precedent. The Court noted that it was "well settled at common law that 'idiots,' together with 'lunatics,' were not subject to punishment for criminal acts committed under those incapacities." *Id.* at 331; *see also* 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 24–25 (4th ed. 1770) ("The second case of a deficiency in will, which excuses from the guilt of crimes, arises also from a defective or vitiated understanding, *viz.* in an *idiot* or a *lunatic*. . . . [I]diots and lunatics are not chargeable for their own acts, if committed when under these incapacities: no, not even for treason itself. . . . [A] total idiocy, or absolute insanity, excuses from the guilt, and of course from the punishment, of any criminal action committed under such deprivation of the senses . . . ."). The Court found, however, that Penry was not an "idiot" or a "lunatic" because the trial court found him competent and the jury rejected his insanity defense. *Penry*, 492 U.S. at 333.

118. *Penry*, 492 U.S. at 334–35.

119. *Id.* at 333–34. One of the two states, Maryland, had passed such a law but it had not yet gone into effect at the time of the Court's decision. *Id.*

execution of intellectually disabled offenders, falling short of establishing a national consensus.[120]

Similarly, the Court concluded that its own subjective judgment did not bar such sentences.[121] Applying the purposes of punishment, the Court held that the execution of some intellectually disabled individuals could serve the purpose of retribution—the variance among such individuals did not mean that such individuals could never act with the culpability required to receive the death penalty.[122]

Just over a decade later, the Court considered the same question in *Atkins*.[123] It applied its evolving standards of decency test in finding that the Eighth Amendment now prohibited the execution of intellectually disabled offenders.[124]

In its analysis of objective indicia, the Court found a national consensus against executing the intellectually disabled.[125] The Court noted that state legislatures had reacted to its decision in *Penry* as well as the execution of a different intellectually disabled inmate.[126] By 2002, thirty states barred the execution of intellectually disabled offenders, including twelve states that had abolished the death penalty.[127] This number far surpassed the number of states previously barring the punishment in question—a change from sixteen to thirty.[128] The Court also emphasized the direction of the change, a consistent move by state legislatures away from allowing the execution of intellectually disabled offenders.[129] Finally, the Court noted that states had executed only five known offenders with a known IQ under seventy since *Penry*.[130]

120. *Id.* at 334. Similarly, Penry did not offer any evidence concerning jury sentencing outcomes with respect to intellectually disabled offenders. His evidence concerned public opinion polls that showed opposition to the execution of intellectually disabled defendants, but the Court found that insufficient to establish a national consensus. *Id.* at 334–35.

121. *Id.* at 336–39.

122. *Id.* at 337–39.

123. Atkins v. Virginia, 536 U.S. 304 (2002).

124. *Id.* at 321.

125. *Id.* at 313–17.

126. *Id.* at 314.

127. *See* Roper v. Simmons, 543 U.S. 551, 564 (2005) (citing *Atkins*, 536 U.S. at 313–15). Justice Scalia's dissent in *Atkins* took issue with the counting method, instead claiming that eighteen of the thirty-eight death penalty states (forty-seven percent) had banned such executions—not enough to establish a national consensus. *Atkins*, 536 U.S. at 342 (Scalia, J., dissenting).

128. *Atkins*, 536 U.S. at 314–15. The Court noted that seventeen of the states barring the execution of intellectually disabled offenders had done so in the decade since *Penry*. *Id.*

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

130. *Id.* at 316.

With respect to the subjective indicia, the Court concluded that none of the purposes of punishment justified the execution of intellectually disabled offenders.[131] The reduced culpability of intellectually disabled offenders meant that death sentences for those individuals did not satisfy the purpose of retribution.[132] With respect to deterrence, the Court also concluded that the execution of intellectually disabled offenders was unlikely to deter other intellectually disabled individuals from committing homicides.[133]

In overruling its decision in *Penry*, the Court did not address the concept of stare decisis as a hurdle that it had to overcome.[134] This is because the Court majority did not view the decision in *Atkins* as overturning precedent.[135] Instead, the *Atkins* decision *followed* precedent—the precedent of the evolving standards of decency doctrine—in reaching a different outcome. The decision in *Atkins* did not constitute an abrogation of a prior position; it constituted a foreseeable evolution in the application of a constitutional principle.[136]

3. *Stanford* and *Roper*

The Court's decision in *Roper v. Simmons*, three years after *Atkins*, provides another example of the application of Eighth Amendment stare decisis. *Roper* held that the execution of juveniles—offenders under the age of eighteen at the time of the homicide—violated the Eighth Amendment,[137] reversing the Court's decision in *Stanford v. Kentucky*, which had allowed

131. *Id.* at 318–20.

132. *Id.* at 319. From a just deserts perspective, retribution requires punishment proportional to the offender's culpability and the harm caused. *See, e.g.*, ANDREW VON HIRSCH & ANDREW ASHWORTH, PROPORTIONATE SENTENCING: EXPLORING THE PRINCIPLES 4 (2005).

133. *Atkins*, 536 U.S. at 319–20. The Court also focused on the likelihood of error as a reason for abolishing the execution of intellectually disabled offenders. The likelihood of false confessions and the offender's inability to aid the lawyer in his defense rested at the heart of this concern. *Id.* at 319–21. Interestingly, the Court in *Atkins* did not address the broader question of whether the holding applied to mental illness as well as intellectual disability. And it failed to even define intellectual disability, leaving that determination up to individual states. For an exploration of possible applications of *Atkins* to mentally ill offenders through the intersection of the Eighth and Fourteenth Amendments, see Nita A. Farahany, *Cruel and Unequal Punishment*, 86 WASH. U. L. REV. 859, 903–14 (2009).

134. Compare this silence to the lengthy discussions in Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) and Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

135. Rather, the Court viewed its decision, in part, as a reflection of the deliberations of "the American public, legislators, scholars, and judges" and the "consensus" against executing intellectually disabled offenders. *Atkins*, 536 U.S. at 307.

136. The Court has revisited the specific application of *Atkins* twice, providing more guidance on what tests a state may use to determine whether a defendant's condition rises to the level of intellectual disability. In *Hall v. Florida*, the Court struck down Florida's approach, which relied only on the IQ of the offender to make the determination as to intellectual disability. Hall v. Florida, 572 U.S. 701, 724 (2014). And in *Moore v. Texas*, the Court held that Texas' use of antiquated science in determining intellectual disability violated the Eighth Amendment. Moore v. Texas, 581 U.S. 1, 20–21 (2017).

137. Roper v. Simmons, 543 U.S. 551, 578–79 (2005).

the execution of seventeen-year-old defendants.[138]

In its first consideration of age and capital sentences, the Court held in *Thompson v. Oklahoma* that the execution of a fifteen-year-old defendant violated the Eighth Amendment under its evolving standards of decency test.[139] Under its objective indicia, the Court found that eighteen states set the minimum age for a capital sentence at sixteen years old.[140] When combined with the fourteen states that had abolished capital punishment, the Court counted thirty-two jurisdictions that barred the execution of defendants under the age of sixteen.[141] The Court also looked to jury verdicts and found less than twenty instances of executions of individuals who committed capital crimes under age sixteen.[142] And none of those verdicts had been after 1948, in the forty years prior to the case.[143]

With respect to the subjective indicia, the Court highlighted the diminished culpability of juvenile offenders as a basis for finding that retribution did not support the execution of a fifteen-year-old offender.[144] It also found that deterrence did not support executing those under the age of sixteen who committed crimes; offenders over the age of sixteen had committed ninety-eight percent of homicides.[145]

In *Stanford v. Kentucky*, the Court found that the evolving standard of decency that had reached under-sixteen-year-old offenders had not reached sixteen and seventeen-year-olds.[146] The Court held that the Eighth Amendment did not bar the execution of Stanford, who was seventeen when he committed murder.[147]

With respect to the objective indicia, the Court found that most states permitted capital punishment for sixteen-year-olds.[148] Fifteen states rejected the death penalty for offenders under seventeen years old and twelve for

138. Stanford v. Kentucky, 492 U.S. 361, 380 (1989), *abrogated by Roper*, 543 U.S. at 551.
139. Thompson v. Oklahoma, 487 U.S. 815 (1988).
140. *Id.* at 829.
141. *Id.* at 826–27. The Court also pointed to international practices where many countries had abolished the death penalty, and others barred juveniles from receiving the death penalty. *Id.* at 830–31.
142. *Id.* at 832.
143. *Id.*
144. *Id.* at 836–37.
145. *Id.* at 837. The Court also noted the unlikelihood of under-sixteen offenders engaging in a cost-benefit analysis as well as the remote possibility of execution as additional reasons why deterrence did not support death sentences for fifteen year olds. *Id.* at 837–38.
146. Stanford v. Kentucky, 492 U.S. 361, 380 (1989), *abrogated by* Roper v. Simmons, 543 U.S. 551 (2005).
147. *Id.*
148. *Id.* at 371.

offenders under eighteen years old.[149] The Court also rejected the evidence that few juries had sentenced under-eighteen-year-old offenders to death because so few under-eighteen-year-old offenders had committed capital crimes.[150]

In applying the subjective indicia, the Court found no conclusive evidence supporting a determination with respect to either retribution or deterrence.[151] And the Court did not really engage with this idea because it had found that a national consensus against executing sixteen- and seventeen-year-olds did not exist.[152]

Sixteen years later, the Court decided *Roper*, following the same Eighth Amendment stare decisis approach used in *Atkins* to find that death sentences for juvenile offenders were cruel and unusual punishments.[153] As in *Atkins*, the application of the majoritarian objective indicia commenced with counting the state laws, and like *Atkins*, thirty states prohibited the execution of juvenile offenders (twelve of which banned the death penalty altogether).[154] Also like *Atkins*, the Court in *Roper* was assessing whether the evolving standards of decency provided enough evidence of changed circumstances to reverse its prior decision in *Stanford*.[155] The Court also noted the presence of objective evidence moving toward ending juvenile executions, although only five states (as compared to sixteen in *Atkins*) had abandoned the juvenile death penalty since *Stanford*.[156] Also, no state had reinstated the juvenile death penalty since *Stanford*.[157]

149. *Id.* 371–72. The Court noted that these numbers were more similar to *Tison v. Arizona*, 481 U.S. 137 (1987), which did not expand limits on the death penalty for felony murder, as opposed to *Coker v. Georgia*, 433 U.S. 584 (1977) and *Enmund v. Florida*, 458 U.S. 782 (1982), which did expand the Eighth Amendment.

150. *Stanford,* 492 U.S. at 373–74.

151. *Id.* at 377–78.

152. *Id.* at 377. Justice Scalia's view here that the Court should not use the Eighth Amendment to restrict punishments outside of national consensus is an outlier in the Court's Eighth Amendment cases. *See, e.g.*, Atkins v. Virginia, 536 U.S. 304, 318–21 (2002); Roper v. Simmons, 543 U.S. 551, 568–72 (2005); Kennedy v. Louisiana, 554 U.S. 407, 434–41 (2008).

153. *Roper*, 543 U.S. at 578–79.

154. *Id.* at 564–65.

155. *Id. Stanford* held that the execution of seventeen-year-old offenders did not violate the Eighth Amendment. *Stanford*, 492 U.S. at 380.

156. *Roper*, 543 U.S. at 565. Even though the change in *Roper* was less pronounced than in *Atkins*, the Court still emphasized that it found it "significant."

157. *Id.* at 565–66. One other important aspect of the decision in *Roper* bears mentioning. At the end of its analysis, the Court also cited to the relevance of international standards and practices in determining the meaning of the evolving standards. *Id.* at 575–78; *see* David Fontana, *Refined Comparativism in Constitutional Law*, 49 UCLA L. REV. 539, 546–47 (2001). In particular, the Court emphasized that the United States was the only country in the world that permitted the juvenile death penalty. *Roper*, 543 U.S. at 575.

With respect to the subjective standards, the Court developed the idea that juveniles were offenders that, by definition, possessed a diminished level of culpability.[158] Specifically, the Court cited (1) the lack of maturity and undeveloped sense of responsibility, (2) the susceptibility of juveniles to outside pressures and negative influences, and (3) the unformed nature of juveniles' character as compared to adults.[159]

In light of the diminished level of culpability, the purposes of punishment, in the Court's view, failed to justify the imposition of juvenile death sentences.[160] Such death sentences failed to achieve the purpose of retribution in light of the diminished culpability.[161] Likewise, the Court concluded that execution of juveniles did not achieve a deterrent effect—offenders with diminished capacity will be unlikely to be susceptible to deterrence.[162] In addition, the Court found no evidence that a juvenile death sentence would add any deterrent value beyond that achieved by a life-without-parole sentence.[163]

As with *Atkins*, the decision in *Roper* is a clear example of the principle of Eighth Amendment stare decisis. The Court followed its precedent—the evolving standards of decency—in finding that the national consensus and its subjective judgment demonstrated that the execution of juveniles constitutes a cruel and unusual punishment. As such, the decision in *Roper* to overrule *Stanford* constituted an application of Eighth Amendment stare decisis, reflecting the Court's interpretation of the Eighth Amendment.

4. Death Is Different and Juveniles Are Different

A final important example of the Court's application of Eighth Amendment stare decisis relates to its use in the juvenile life-without-parole context in *Graham v. Florida*.[164] Here, the Court found that a principle underlying its evolving standards of decency—differentness—had evolved to include another category of cases.[165]

158. *Roper*, at 569–70.
159. *Id.*
160. *Id.* at 570–71.
161. *Id.* at 571.
162. *Id.* at 571–72.
163. *Id.*
164. Graham v. Florida, 560 U.S. 48 (2010).
165. *See, e.g.*, William W. Berry III, *Eighth Amendment Differentness*, 78 MO. L. REV. 1053, 1073–75 (2013) (arguing that the juvenile life-without-parole differentness opens the door to other forms of differentness).

For over thirty years after *Furman*, the Court had cabined its application of evolving standards to capital cases.[166] The Court's reasoning for this bright line focused on the idea that "death is different."[167] As a punishment, death was unique both in terms of its severity—the most severe punishment available—and its irrevocability—one cannot undo a death sentence after an execution.[168]

In *Graham v. Florida*, the Court considered whether the Eighth Amendment forbid life-without-parole sentences for juvenile offenders in non-homicide cases.[169] Building upon its decision in *Roper*, the Court applied the evolving standards of decency to cases of juvenile life without parole in barring such sentences in non-homicide cases.[170]

The Court further clarified its expansion of the differentness principle to include juvenile life-without-parole cases in *Miller v. Alabama*, in which it struck down mandatory juvenile life-without-parole sentences under the Eighth Amendment.[171] The Court in *Miller* explained that while death is different, "children are different too."[172]

As with its other applications of Eighth Amendment stare decisis, the Court in the juvenile life-without-parole cases relied on both objective and subjective understandings of the nature of juvenile offenders. The Court in *Graham* emphasized that only eleven states allowed life-without-parole sentences for juveniles in non-homicide cases.[173] Both cases also expanded on the conversation from *Roper* concerning the reduced culpability of

166. *See, e.g.*, Atkins v. Virginia, 536 U.S. 304, 318–21 (2002); *Roper*, 543 U.S. at 568–72; Kennedy v. Louisiana, 554 U.S. 407, 434–41 (2008).

167. *See* cases cited *supra* note 64. The Court has often echoed this principle. *See, e.g.*, Gregg v. Georgia, 428 U.S. 153, 187 (1976) ("There is no question that death as a punishment is unique in its severity and irrevocability."); Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (explaining that death differs from life imprisonment because of its "finality"); Spaziano v. Florida, 468 U.S. 447, 460 n.7 (1984) ("[T]he death sentence is unique in its severity and in its irrevocability . . . ."), *overruled by* Hurst v. Florida, 577 U.S. 92 (2016); Ring v. Arizona, 536 U.S. 584, 616–17 (2002) (Breyer, J., concurring in the judgment) (noting that because "death is not reversible," DNA evidence showing that the convictions of numerous persons on death row are unreliable is especially alarming); *see also* Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 MICH. L. REV. 1145, 1145 (2009) (acknowledging the Court's different treatment of capital cases).

168. *See, e.g.*, *Gregg*, 428 U.S. at 187; *Spaziano*, 468 U.S. at 460 n.7.

169. Graham, 560 U.S. at 52–53.

170. *Id.* at 61–62; *id.* at 102 (Thomas, J., dissenting) ("For the first time in its history, the Court declares an entire class of offenders immune from a noncapital sentence using the categorical approach it previously reserved for death penalty cases alone.").

171. Miller v. Alabama, 567 U.S. 460, 465 (2012) (barring mandatory juvenile life-without-parole sentences).

172. *Id.* at 481.

173. *Graham*, 560 U.S. at 64. At the time the United States was one of eleven countries in the world that authorized juvenile life-without-parole sentences and one of two that used them. *Id.* at 80–81. Currently, the U.S. is the only country in the world that allows such sentences. *See* Rovner, *supra* note 76.

juveniles.[174] Juvenile life-without-parole sentences not only make retribution and deterrence less justifiable, but also implicate incapacitation and rehabilitation, with the age of juveniles making change more possible than with older offenders.[175]

The important point here relates to the idea that part of the evolving standards expansion includes punishments other than the death penalty. It is certainly possible that, as society evolves, other kinds of punishment, including life without parole and solitary confinement, might also violate the Eighth Amendment.[176]

B. DISTINGUISHABLE DEVIATIONS

The Court's application of the Eighth Amendment has arguably moved in a more punitive way in a few situations, but careful examination of these cases in context shows that they are distinguishable from the concept of Eighth Amendment stare decisis and do not undermine that concept.

1. *Furman* and *Gregg*

The first example where one might argue that the Court moved in a direction favoring harsher punishment occurred when it reinstated the death penalty in *Gregg v. Georgia*,[177] four years after it had declared it unconstitutional in *Furman*.[178]

The Court in *Furman*, however, with its *per curiam* opinion and five concurrences, did not rule out the future use of the death penalty.[179] Rather, the Court's as-applied decision meant that the states had to remedy the flaw in the death penalty—the random and arbitrary use of it—before using it again.[180]

Importantly, a majority of the Court did not find a consensus against the death penalty,[181] and the response of the states—an overwhelming number

174. *Graham*, 560 U.S. at 68; *Miller*, 567 U.S. at 471–74.

175. *Graham*, 560 U.S. at 71–74; *Miller*, 567 U.S. at 471–74.

176. *See* Berry, *supra* note 165, at 1081–86.

177. Gregg v. Georgia, 428 U.S. 153, 207 (1976) (joint opinion of Stewart, Powell, & Stevens, JJ.) (upholding Georgia's death penalty statute). The Court decided four other cases on the day that it decided *Gregg*. *See* Proffitt v. Florida, 428 U.S. 242, 259–60 (1976) (joint opinion of Stewart, Powell, & Stevens, JJ.) (upholding Florida's death penalty statute); Jurek v. Texas, 428 U.S. 262, 276 (1976) (joint opinion of Stewart, Powell, & Stevens, JJ.) (upholding Texas's death penalty statute); Woodson v. North Carolina, 428 U.S. 280, 301 (1976) (joint opinion of Stewart, Powell, & Stevens, JJ.) (striking down North Carolina's death penalty statute); Roberts v. Louisiana, 428 U.S. 325, 336 (1976) (joint opinion of Stewart, Powell, & Stevens, JJ.) (striking down Louisiana's death penalty statute).

178. Furman v. Georgia, 408 U.S. 238, 239–40 (1972).

179. *Id.*

180. *Id.*

181. *See supra* note 104 and accompanying text.

immediately passing new statutes—supports the idea that, at least at that time, the evolving standard did not bar death sentences.[182]

Even so, a modern examination of the Court's decision in *Gregg* suggests that it is incorrect. This is because the safeguards it believed remedied the problems identified in *Furman* actually were insufficient to do so.[183] The number and diversity of aggravating factors that most states used in their statutes did little to narrow the class of murderers; with felony murder, almost all homicides could still be death-eligible if the prosecutor was so inclined.[184] Equally as important, the comparative proportionality review never occurred as promised, but instead as a diminished form of review that never included cases with life sentences.[185] As a result, the arbitrariness and randomness in jury outcomes persists and is perhaps even worse that it was in 1972.[186]

2. *Enmund* and *Tison*

Another set of cases that might appear to demonstrate a move from less harsh to more harsh punishment are the Court's decisions in *Enmund v. Florida*[187] and *Tison v. Arizona*.[188] These cases, nonetheless, are similarly distinguishable.

In *Enmund*, the Court considered whether a death sentence for a felony murder involving a person who did not kill, attempt to kill, or intend to kill violated the Eighth Amendment.[189] Of the thirty-six jurisdictions that

182. *See supra* note 104 and accompanying text; Lain, *supra* note 83 at 46-48.

183. *See* Glossip v. Gross, 576 U.S. 863, 908–09 (2015) (Breyer, J., dissenting); Callins v. Collins 510 U.S. 1141, 1144 (1994) (Blackmun, J., dissenting from denial of certiorari); William W. Berry III, *Repudiating Death*, 101 J. CRIM. L. & CRIMINOLOGY 441, 442–44 (2011) (explaining how Justices Blackmun, Powell, and Stevens all eventually favored death penalty abolition).

184. Berry, *Promulgating Proportionality*, *supra* note 78, at 104; Jeffrey L. Kirchmeier, *Aggravating and Mitigating Factors: The Paradox of Today's Arbitrary and Mandatory Capital Punishment Scheme*, 6 WM. & MARY BILL RGTS. J. 345, 363 (1998). This is particularly true with respect to the "especially heinous" aggravating factor. *See* Godfrey v. Georgia, 446 U.S. 420, 433 (1980); Zant v. Stephens, 462 U.S. 862, 874 (1983); Lowenfeld v. Phelps, 484 U.S. 231, 241–46 (1988); Walton v. Arizona, 497 U.S. 639, 652–57 (1990), *overruled by* Ring v. Arizona, 536 U.S. 584 (2002); Richard A. Rosen, *The "Especially Heinous" Aggravating Circumstance in Capital Cases—The Standardless Standard*, 64 N.C. L. REV. 941, 988–89 (1986).

185. Walker v. Georgia, 555 U.S. 979, 982–84 (2008) (Stevens J., dissenting from denial of certiorari); Berry, *Practicing Proportionality*, *supra* note 78, at 699–701.

186. *Glossip*, 576 U.S. at 908–09 (Breyer, J., dissenting).

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

188. Tison v. Arizona, 481 U.S. 137, 152–58 (1987).

189. *Enmund*, 458 U.S. at 783–85. *Enmund* involved Sampson and Jeanette Armstrong robbing an elderly couple, Thomas and Eunice Kersey, one morning at the Kersey residence. While Sampson Armstrong was holding Thomas Kersey at gunpoint, Eunice Kersey emerged from the house and shot Jeanette Armstrong. Sampson Armstrong, and possibly Jeanette Armstrong, subsequently shot and killed both Thomas and Eunice Kersey. Earl Enmund played a role as a getaway driver. *Id.* As the Florida

permitted the death penalty at the time, the Court noted that only eight jurisdictions authorized the death penalty for accomplices in felony murder robbery cases like *Enmund* without proof of additional aggravating circumstances.[190] In addition, another nine states allowed death sentences for felony murder accomplices where other aggravating factors were present.[191] The Court found that the legislative practice weighed "on the side of rejecting capital punishment for the crime at issue."[192]

In the second part of the evolving standards test, the *Enmund* Court brought its own judgment to bear, finding that the death sentence was inappropriate for Enmund.[193] Specifically, the Court held that his criminal culpability did not rise to the level required by just deserts retribution to warrant a death sentence.[194] The Court similarly dismissed deterrence as a supporting rationale for a death sentence in Enmund's case.[195]

Finally, it is notable that *Enmund* appeared to focus only on the relevant facts of Enmund's case.[196] The Court did not explicitly create a categorical rule with respect to death sentences for felony murder convictions.[197]

Tison involved the prosecution of two of Gary Tison's sons after their father and an associate brutally murdered a family after stealing their car.[198] The sons participated both in helping Tison break out of prison and in the carjacking.[199] They were not directly present, however, at the moment when

Supreme Court explained, "[T]he only evidence of the degree of his participation is the jury's likely inference that he was the person in the car by the side of the road near the scene of the crimes." *Id.* at 786.

190. *Id.* at 789.

191. *Id.* at 791.

192. *Id.* at 793 (footnote omitted). The Court also considered jury sentences, although those are a difficult proposition given the variety in felony murder cases and state felony murder laws. *Id.* at 794–96.

193. *Id.* at 797.

194. *Id.* at 800–01.

195. *Id.* at 797–801. To be fair, retribution appears to be the only purpose that could justify the death penalty, and it might not even accomplish that. *See infra* Section III.A.

196. *Enmund*, 458 U.S. at 801.

197. *See id.* Notice that the *Enmund* rule excluded cases where there was both no act and no mens rea related to the homicide in question. It did not extend to situations where one element was present but not the other.

198. Tison v. Arizona, 481 U.S. 137, 139–41 (1987). For a chilling account of Gary Tison's escape from prison and subsequent crime spree, see generally JAMES W. CLARKE, LAST RAMPAGE: THE ESCAPE OF GARY TISON (1988).

199. *Tison*, 481 U.S. at 139–40.

their father killed the family[200] and were unaware that he intended to do so.[201]

In assessing the jury's imposition of death sentences on the sons, the *Tison* Court considered whether their punishments violated the Eighth Amendment.[202] The *Tison* Court adopted a new rule—that a capital felony murder is constitutional when the individuals in question are (1) major participants in the felony and (2) exhibit a reckless indifference to human life.[203]

Using the evolving standards of decency doctrine, the Court applied the same counting of state statutes as in *Enmund* but combined the jurisdictions that allowed felony murder for any accomplice with those that only allowed felony murder with additional aggravating circumstances.[204] The Court reasoned that, unlike Enmund, the Tison sons played an active role in the crime (particularly the prison escape), and as a result *both* categories of jurisdictions should count, leading to a finding that only eleven jurisdictions did not allow death sentences in felony murder cases like *Tison*.[205]

The Court's subjective judgment likewise found that the death sentences imposed on the Tison sons were not disproportionate.[206] Specifically, the Court cited that the Tison sons' "reckless indifference to human life" provided the intent to justify a death sentence, even though the sons did not participate in the killing itself.[207] The distinction, then, between the outcomes in *Enmund* and *Tison* was the intent of the felony murder accomplices.[208] Unlike in *Enmund*, the *Tison* Court made clear that the

200. *Id*. at 139–41. The facts are harrowing. Gary Tison, Randy Greenawalt, and the two Tison sons were plotting how to escape from the authorities. They needed a new car to drive to avoid detection by the police. They feigned car trouble on the side of the road. A couple, along with their baby and niece, decided to stop and help. The escapees pulled a gun on the family and forced them into the Tison car, which they drove away from the road. Gary Tison then shot the tires so the family would not be able to drive away. The man in the family asked for water, as they were being left in the desert. Gary Tison sent his two teenaged sons back to the other car to get water. He then brutally shot the parents and the children. A manhunt ensued, and the police captured the sons and Greenawalt. Gary Tison died of exposure in the desert hiding from the police. *Id.*

201. *Id.* Tison's death may have increased the public desire (or at least that of the prosecutor) to seek death sentences for his sons. *See* CLARKE*, supra* note 198, at 263–66.

202. *Tison*, 481 U.S. at 152–58.

203. *See id.* 151–58.

204. *Id.* at 152–55.

205. *Id.* at 151–55. The Court focused on the recklessness demonstrated by the sons in busting Tison out of prison, particularly considering their knowledge of his dangerous character and criminal past.

206. *Id.* at 155–58.

207. *Id.* at 157–58.

208. *Id.* For an argument that a recklessness mens rea should be a prerequisite for imposing capital punishment for felony murder, see Guyora Binder, Brenner Fissell & Robert Weisberg, *Capital Punishment of Unintentional Felony Murder*, 92 NOTRE DAME L. REV. 1141, 1142 (2017). For an argument pertaining to the act requirement, see Guyora Binder, Brenner Fissell & Robert Weisberg,

majority view did not provide a consensus view in favor of eliminating the application of the punishment at issue.[209]

So, the Court's decisions here were not a move toward narrowing the Eighth Amendment. Rather, the Court in *Tison* simply qualified the scope of *Enmund*, which did not even impose a categorical rule in the first place. *Tison* did not overrule *Enmund* but instead reframed the inquiry. Note that the shift with respect to the act requirement moves the inquiry to the relationship of the act of the defendant to the felony, not the homicide.[210] In addition, the *Tison* rule keeps the mens rea connected to the homicide and captures all reckless actors.[211]

3. *Thompson* and *Stanford*

One might perceive that the decisions in *Thompson* and *Stanford*, discussed above, constitute a move away from the evolving standards, but like *Enmund* and *Tison*, the decisions reached parallel, but not overlapping, conclusions. *Thompson* barred the execution of fifteen-year-olds and younger; *Stanford* allowed the execution of sixteen and seventeen-year-olds.[212] In much of the same way that *Tison* clarified the scope of *Enmund*, *Stanford* clarified the scope of *Thompson*.[213]

Unusual: The Death Penalty for Inadvertent Killing, 93 IND. L.J. 549, 553 (2018). *See also* William W. Berry III, *Capital Felony Merger*, 111 J. CRIM. L. & CRIMINOLOGY 605, 612 (2021) (making a novel argument for implementing a new form of the merger doctrine in capital felony murder cases).

209. *Tison*, 481 U.S. at 157–58.

210. While problematic, this is consistent with how states use felony murder. *See* sources cited *supra* note 208.

211. On its face, *Tison* may simply be a case in which hard facts make bad law. *See supra* note 34 and accompanying text. Given the brutality of the murder and the inability to hold Gary Tison responsible, the death sentences the jury imposed are unsurprising.

Even so, one response would have been to create an exception to the *Enmund* rule instead of rewriting it. *See* William W. Berry III, *Rethinking Capital Felony Murder*, JOTWELL (Feb. 12, 2018) (reviewing Binder et al., *supra* note 208), https://crim.jotwell.com/rethinking-capital-felony-murder [https://perma.cc/Y9DQ-6SFW].

The rule could be that the death penalty is unavailable in cases in which there is no act, attempt, or mens rea, unless the defendants otherwise bear some culpability. To the extent that the Tison sons should face the death penalty, it is because they bear serious culpability in helping their father escape prison and providing him with weapons, particularly in light of his violent criminal past.

Indeed, the better reading of these cases is to treat *Enmund* as the rule and *Tison* as an exception. Courts have done the opposite, treating *Tison* as a modification of *Enmund*. The effect has been that the Eighth Amendment does not provide any meaningful limitation in capital felony murder cases.

212. Thompson v. Oklahoma, 487 U.S. 815, 838 (1988); Stanford v. Kentucky, 492 U.S. 361, 380 (1989), *abrogated by* Roper v. Simmons, 543 U.S. 551 (2005).

213. *Stanford*, 492 U.S. at 370–73.

4. *Solem* and *Harmelin*

The final example of the Court arguably narrowing the Eighth Amendment occurs in the cases of *Solem v. Helm*[214] and *Harmelin v. Michigan*.[215] Both of these cases concern the Eighth Amendment doctrine that the Court applies in non-capital, non-juvenile cases—the gross disproportionality doctrine.[216] These decisions parallel the opinions in *Enmund* and *Tison*, with the Court granting relief under the Eighth Amendment in the first case but using the second case to make sure that the outcome in the first case only had a narrow application.

In *Solem v. Helm*, the Court found that the life-without-parole sentence imposed for a bad check in the amount of $100 was grossly disproportionate in violation of the Eighth Amendment.[217] Specifically, the Court explained that the Eighth Amendment required consideration of (1) the gravity of the offense and the harshness of the penalty; (2) the sentences imposed on other criminals in the same jurisdiction; and (3) the sentences imposed for commission of the same crime in other jurisdictions.[218] Applying these concepts, the Court held that Helm's sentence violated the Eighth Amendment because it was a far less severe crime than others for which the life-without-parole punishment—the most serious other than death—had been applied.[219] Even with the recidivist premium, the Court found that the

214. Solem v. Helm, 463 U.S. 277 (1983).

215. Harmelin v. Michigan, 501 U.S. 957 (1991).

216. In the Court's usage, gross disproportionality thus means that the sentence imposed is grossly excessive in light of the criminal actions of the defendant and the applicable purposes of punishments, including utilitarian purposes. Claims for relief under this doctrine almost always fail. *See* Lockyer v. Andrade, 538 U.S. 63, 66–68, 77 (2003) (upholding on habeas review two consecutive sentences of twenty-five years to life for stealing approximately $150 worth of videotapes, where the defendant had three prior felony convictions); Ewing v. California, 538 U.S. 11, 18–20, 30–31 (2003) (plurality opinion) (upholding sentence of twenty-five years to life for stealing approximately $1,200 worth of golf clubs, where the defendant had four prior felony convictions); *Harmelin*, 501 U.S. at 961, 996 (upholding a mandatory life-without-parole sentence for possessing 672 grams of cocaine); Hutto v. Davis, 454 U.S. 370, 370–71, 374–75 (1982) (per curiam) (upholding two consecutive sentences of twenty years for possession with intent to distribute and distribution of nine ounces of marijuana); Rummel v. Estelle, 445 U.S. 263, 266, 285 (1980) (upholding life-with-parole sentence for felony theft of $120.75 by false pretenses, where defendant had two prior felony convictions). *But see Solem*, 463 U.S. at 279–82, 303 (finding unconstitutional, by a 5–4 vote, a life-without-parole sentence for presenting a no-account check for $100, where the defendant had six prior felony convictions). The results are not any more promising at the state level under the Eighth Amendment or its state constitutional analogues. *See* William W. Berry III, *Cruel and Unusual Non-Capital Punishments*, 58 AM. CRIM. L. REV. 1627, 1642–52 (2021) (summarizing state cases in which non-capital, non-juvenile life-without-parole defendants have prevailed under state constitutional Eighth Amendment analogues).

217. *Solem*, 463 U.S. at 279–82, 303.

218. *Id.* at 292.

219. *Id.* at 296–300. A life-without-parole sentence means that the offender is to die in prison with no possibility of release. *See* MARC MAUER, RYAN S. KING & MALCOLM C. YOUNG, THE MEANING OF "LIFE": LONG PRISON SENTENCES IN CONTEXT 4 (2004), http://www.sentencingproject.org/doc/

punishment of life without parole for passing a bad check was grossly disproportionate.[220]

Less than a decade later, however, the Court clarified its test from *Solem*. In *Harmelin*, the Court upheld a mandatory life-without-parole sentence for a first-time offense of possession of 672 grams of cocaine.[221] In a 5-4 decision, the Justices in the majority splintered on the reasoning for the decision.[222] In a clear attempt to narrow *Solem*, Justice Scalia, joined by then-Chief Justice Rehnquist, held that the Eighth Amendment did not contain a proportionality guarantee, and therefore Harmelin's sentence could not be unconstitutionally disproportionate.[223] The controlling plurality, however, found that the Eighth Amendment had a proportionality guarantee,[224] but that Harmelin's sentence was nonetheless proportionate in light of the deference accorded to states in non-capital sentencing.[225] Justice Kennedy determined that the *Solem* three-part analysis remained useful,[226] but a reviewing court should consider the second and third factors—that is, the intra- and inter-jurisdictional analyses—only if "a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality."[227]

publications/inc-meaningoflife.pdf [http://perma.cc/7633-4SZB]; DIRK VAN ZYL SMIT, TAKING LIFE IMPRISONMENT SERIOUSLY IN NATIONAL AND INTERNATIONAL LAW 1 (2002). Life-without-parole sentences are sometimes called "flat life," "natural life," or "whole life" sentences. "Death-in-prison" or "a civil death" is perhaps a more accurate way of characterizing life-without-parole sentences. *See* Michael M. O'Hear, *The Beginning of the End for Life Without Parole?*, 23 FED. SENT'G REP. 1, 5 (2010).

220. *Solem*, 463 U.S. at 296–303.

221. *Harmelin*, 501 U.S. at 961, 996.

222. *Id.* at 960–61.

223. *Id.* at 962–94 (opinion of Scalia, J.).

224. *Id.* at 996–98 (Kennedy, J., concurring in part and concurring in the judgment).

225. *Id.* at 999, 1003, 1008–09. For an argument of why the Court should not accord states such deference, *see* Berry *supra* note 85, at 318.

226. *Harmelin*, 501 U.S. at 1004–05.

227. *Id.* at 1005. The plurality described the tools for the *Solem* analysis as including the following ideas:

> First, the fixing of prison terms for specific crimes involves a substantial penological judgment that, as a general matter, is properly within the province of the legislature, and reviewing courts should grant substantial deference to legislative determinations. Second, there are a variety of legitimate penological schemes based on theories of retribution, deterrence, incapacitation, and rehabilitation, and the Eighth Amendment does not mandate adoption of any one such scheme. Third, marked divergences both in sentencing theories and the length of prescribed prison terms are the inevitable, often beneficial, result of the federal structure, and differing attitudes and perceptions of local conditions may yield different, yet rational, conclusions regarding the appropriate length of terms for particular crimes. Fourth, proportionality review by federal courts should be informed by objective factors to the maximum extent possible, and the relative lack of objective standards concerning length, as opposed to type, of sentence has resulted in few successful proportionality challenges outside the capital punishment context. Finally, the Eighth Amendment does not require strict proportionality between crime and sentence, but rather forbids only extreme sentences that are grossly disproportionate to the crime.

Id. at 959. For an argument that the Court decided *Harmelin* incorrectly, see Berry, *supra* note 85, at 329–32.

Harmelin, then, did not overrule *Solem*. It simply qualified the gross disproportionality test, specifying that failing to pass the first part, which most cases do not, ends the inquiry.[228]

C. FUTURE APPLICATIONS

A cursory examination of recent trends in state punishment practices suggests that the evolving standards have already evolved to reach other kinds of punishments.[229] The most obvious category of punishments is the categorical areas barred in capital cases, but not juvenile life-without-parole cases.[230]

The Court has identified six categories of capital punishment that the Eighth Amendment proscribes: (1) mandatory death sentences;[231] (2) executions of juveniles;[232] (3) executions of intellectually disabled defendants;[233] (4) executions for certain felony murder crimes;[234] (5) executions for the crime of adult rape;[235] and (6) executions for the crime of child rape.[236] The Court has extended some of the categorical punishment bars to juvenile life without parole, covering three of the unconstitutional capital punishment categories—mandatory juvenile life-without-parole

228. *Harmelin*, 501 U.S. at 1004–05.

229. Given the Court's recent decision in *Jones v. Mississippi*, 593 U.S. 98 (2021), in which it declined to expand the Eighth Amendment, one might expect the Court not to find that the evolving standards have moved. But under the concept of Eighth Amendment stare decisis, the Court has an obligation to expand the doctrine when new cases demonstrate that the standards of decency have evolved in light of national consensus and the purposes of punishment.

230. For an exploration of these categories, see William W. Berry III, *Unconstitutional Punishment Categories*, 84 OHIO ST. L.J. 1, 14–24 (2023).

231. Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (striking down North Carolina's mandatory capital statute); Roberts v. Louisiana, 428 U.S. 325, 336 (1976) (striking down Louisiana's mandatory capital statute); *see also* Lockett v. Ohio, 438 U.S. 586, 605 (1978) (finding that the proscription against mandatory sentences also required individual sentencing discretion in capital cases); William W. Berry III, *Individualized Sentencing*, 76 WASH. & LEE L. REV. 13, 22 (2019) (arguing for a broader application of the *Woodson-Lockett* principle).

232. Roper v. Simmons, 543 U.S. 551, 578 (2005) (barring executions of juvenile defendants). *Roper* reversed *Stanford v. Kentucky*, 492 U.S. 361, 370–73 (1989), which had allowed the execution of a seventeen-year-old, and expanded *Thompson v. Oklahoma*, 487 U.S. 815, 838 (1988), which barred executions of defendants fifteen years old and younger. *Roper*, 543 U.S. at 574–75.

233. Atkins v. Virginia, 536 U.S. 304, 321 (2002) (finding death sentences for intellectually disabled offenders unconstitutional); *Roper*, 543 U.S. at 578 (finding death sentences for juvenile offenders unconstitutional); Hall v. Florida, 572 U.S. 701, 704 (2014) (requiring that the intellectual disability determination be more than just IQ); Moore v. Texas, 581 U.S. 1, 5–6 (2017) (requiring that the intellectual disability determination apply modern definitional approaches); *see also* Ford v. Wainwright, 477 U.S. 399, 401 (1986) (finding death sentences for insane individuals unconstitutional).

234. Enmund v. Florida, 458 U.S. 782, 797 (1982) (finding death sentences for some felony murders unconstitutional); Tison v. Arizona, 481 U.S. 137, 157–58 (1987) (clarifying the holding from *Enmund*).

235. Coker v. Georgia, 433 U.S. 584, 592 (1977) (finding death sentences for rape unconstitutional).

236. Kennedy v. Louisiana, 554 U.S. 407, 413 (2008) (finding the death sentences for child rape unconstitutional).

sentences,[237] juvenile life-without-parole sentences for adult rape,[238] and juvenile life-without-parole sentences for child rape.[239]

The other categories the Court should extend the death penalty evolving standards doctrine to are (1) categorical limits on juvenile life-without parole sentences in felony murder cases like in *Enmund* and *Tison*; (2) categorical limits on juvenile life-without-parole sentences for intellectually disabled defendants like in *Atkins*; and (3) a categorical limit on juvenile life-without-parole altogether, mirroring the Court's decision in *Roper* imposing a categorical ban on the death penalty for juveniles.

Beyond these categorical exceptions, three broad categories of punishment seem like future candidates for constitutional bars under Eighth Amendment stare decisis: the death penalty, juvenile life-without-parole sentences, and emerging adult life-without-parole sentences.[240]

1. Death Penalty

The recent move toward death penalty abolition among the states suggests that it may soon reach the evolving standards threshold of national consensus against it, if it has not already.[241] At the time of *Gregg*, thirty-nine states had capital statutes.[242] Currently, twenty-seven states allow capital punishment, but six have gubernatorial holds on executions.[243] Of those twenty-seven states, fifteen have not had an execution in the past five years and thirteen have not had an execution in the past decade.[244] Indeed, only Alabama, Arizona, Florida, Georgia, Mississippi, Missouri, Oklahoma, South Carolina, Utah, Tennessee, and Texas—eleven states—have executed

237. Miller v. Alabama, 567 U.S. 460, 465 (2012) (barring mandatory juvenile life-without-parole sentences); Montgomery v. Louisiana, 577 U.S. 190, 206–13 (2016) (applying the Court's decision in *Miller* retroactively).

238. Graham v. Florida, 560 U.S. 48, 82 (2010) (barring juvenile life-without-parole as a punishment for non-homicide crimes). *See generally* Cara H. Drinan, Graham *on the Ground*, 87 WASH. L. REV. 51 (2012) (exploring the practical consequences of the *Graham* decision).

239. *Graham*, 560 U.S. at 82 (barring juvenile life-without-parole as a punishment for non-homicide crimes).

240. The Court has not applied the evolving standards of decency to its method of execution cases. *See, e.g.*, Glossip v. Gross, 576 U.S. 863, 977 (2015) (Sotomayor, J., dissenting). For an argument that the Court should apply this test to such cases, see William W. Berry III & Meghan J. Ryan, *Cruel Techniques, Unusual Secrets*, 78 OHIO ST. L.J. 403, 405–08 (2017).

241. This move has been coming in recent years. *See* William W. Berry III, *Evolved Standards, Evolving Justices? The Case for a Broader Application of the Eighth Amendment,* 96 WASH. U. L. REV. 105, 144–50 (2018).

242. *State by State*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/states-landing [https://perma.cc/U7M4-PUU8]; *Facts About the Death Penalty*, *supra* note 74.

243. *See* sources cited *supra* note 242.

244. *See* sources cited *supra* note 74.

anyone in the past five years.[245]

And those states are not conducting many executions.[246] For the past five years, fewer than twenty-five executions have occurred each year, with a total of ninety-two in the period from 2019–2023.[247] The direction of change is also clear. Since 2007, ten states have abolished the death penalty.[248] Finally, the number of new death sentences has dropped drastically[249] with the adoption of life without parole in almost every jurisdiction.[250]

With respect to the objective indicia of national consensus, then, the evidence is close if not already there. While there are twenty-seven capital statutes in place, only twenty-one states allow executions currently, and only twelve states have recently executed an offender.[251] The pattern of abolition, including five states in the past decade,[252] and the decline in death sentences also supports this conclusion.[253] International consensus supports a similar conclusion, with the European Union and most Western nations having abolished the death penalty long ago.[254]

With respect to the subjective indicia, it would not be a stretch for the Court to conclude that the death penalty does not serve any of the purposes of punishment.[255] It is certainly possible to conclude that the death penalty

245. *Executions by State and Year*, DEATH PENALTY INFO. CTR. (Oct. 17, 2024) https://deathpenaltyinfo.org/executions/executions-overview/executions-by-state-and-year [https://perma.cc/RWZ6-XLQY]. Of those, Alabama, Missouri, Oklahoma, and Texas are the only states using it on a regular basis. *Id.*

246. *See* sources cited *supra* note 242.

247. *See* DEATH PENALTY INFO. CTR., *supra* note 245.

248. These states include New Jersey (2007), New Mexico (2009), Illinois (2011), Connecticut (2012), Maryland (2013), Delaware (2016), Washington (2018), New Hampshire (2019), Colorado (2020), and Virginia (2021). *See* sources cited *supra* note 242.

249. *2023 Death Sentences by Name, Race, and County*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/facts-and-research/sentencing-data/death-sentences-by-year/2023-death-sentences-by-name-race-and-county [https://perma.cc/L7SM-A2VW] (showing twenty-one new death sentences in 2023 and decreasing trend lines of new death sentences over the past two decades).

250. *See, e.g.*, *Death Sentencing Graphs by State*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/facts-and-research/sentencing-data/state-death-sentences-by-year [https://perma.cc/EY25-MK57]; Note, *A Matter of Life and Death: The Effect of Life-Without-Parole Statutes on Capital Punishment*, 119 HARV. L. REV. 1838, 1838 (2006).

251. *States with No Recent Executions*, DEATH PENALTY INFO. CTR. (DEC. 18 2024), https://deathpenaltyinfo.org/executions/executions-overview/states-with-no-recent-executions [https://perma.cc/L5ME-NK5T].

252. *See* statistics cited *supra* note 248.

253. *See* source cited *supra* note 249.

254. *See* HOOD & HOYLE, *supra* note 75, *passim*.

255. *See, e.g.*, Furman v. Georgia, 408 U.S. 238, 358–61 (1972) (Marshall, J., concurring). Several of the Justices have concluded that abolition is the best solution. *See* Glossip v. Gross, 576 U.S. 863, 908 (Breyer, J., dissenting); Berry, *supra* note 183, at 442–44 (explaining how Justices Blackmun, Powell, and Stevens all eventually concluded that states should abolish the death penalty).

is an excessive punishment for the purpose of retribution.[256] And there is strong evidence that the death penalty does not deter.[257]

2. Juvenile Life Without Parole

If there is evidence that the death penalty has contravened the evolving standards of decency under the Eighth Amendment, there is perhaps even more evidence that juvenile life-without-parole sentences also cross the constitutional line.[258] After the Court's 2012 decision in *Miller v. Alabama*, states have moved consistently in the direction of abolishing juvenile life without parole.[259]

As of 2023, thirty-three states and the District of Columbia have no one serving juvenile life-without-parole sentences, with twenty-eight of those states banning juvenile life without parole.[260] In addition, the number of juvenile life-without-parole sentences has drastically declined over the past decade in light of the Court's decisions in *Graham*,[261] *Miller*,[262] and *Montgomery v. Louisiana*.[263] A survey of the Sentencing Project found 1,465 people serving juvenile life-without-parole sentences in January 2020, a 38% decline from 2016 and a 44% decline from 2012.[264] With respect to international consensus, the United States remains the only country in the

256. Dan Markel, *State, Be Not Proud: A Retributivist Defense of the Commutation of Death Row and the Abolition of the Death Penalty*, 40 HARV. C.R.-C.L. L. REV. 407, 458 (2005).

257. John J. Donohue & Justin Wolfers, *The Death Penalty: No Evidence for Deterrence*, ECONOMISTS' VIEW, Apr. 2006, at 5, https://dpic-cdn.org/production/legacy/DonohueDeter.pdf [https://perma.cc/2B8H-LU34]; Carol S. Steiker, *No, Capital Punishment Is Not Morally Required: Deterrence, Deontology, and the Death Penalty*, 58 STAN. L. REV. 751, 754–56 (2005). The purpose of incapacitation also does not justify the death penalty. *See* William W. Berry III, *Ending Death by Dangerousness: A Path to the De Facto Abolition of the Death Penalty*, 52 ARIZ. L. REV. 889, 894 (2010). And rehabilitation seems beside the point. *But see* Meghan J. Ryan, *Death and Rehabilitation*, 46 U.C. DAVIS L. REV. 1231, 1234–36 (2013).

258. *See* Berry, *supra* note 241, at 143–44.

259. Miller v. Alabama, 567 U.S. 460, 465 (2012); Rovner *supra* note 76.

260. *States that Ban Life Without Parole for Children*, THE CAMPAIGN FOR THE FAIR SENT'G OF YOUTH, https://cfsy.org/media-resources/states-that-ban-juvenile-life-without-parole [https://perma.cc/E4TN-KKQR]. The states that have banned juvenile life without parole are the following: Alaska, Arkansas, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Kansas, Kentucky, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, North Dakota, Ohio, Oregon, South Dakota, Texas, Utah, Vermont, Virginia, Washington, West Virginia, and Wyoming. *Id.* Maine, Missouri, Montana, New York, and Rhode Island allow juvenile life without parole, but have no one serving that sentence. *Id.*

261. Graham v. Florida, 560 U.S. 48, 82 (2010) (barring juvenile life without parole for non-homicide crimes).

262. Miller v. Alabama, 567 U.S. 460, 465 (2012) (barring mandatory juvenile life-without-parole sentences).

263. Montgomery v. Louisiana, 577 U.S. 190, 206–13 (2016) (applying the Court's decision in *Miller* retroactively).

264. Rovner, *supra* note 76.

world that permits juvenile life-without-parole sentences.[265]

In addition to the evidence of national consensus against juvenile life without parole, it is clear that the purposes of punishment do not support these sentences. The diminished culpability of juveniles, as discussed in *Roper*, *Graham*, *Miller*, and *Montgomery*, makes it unlikely that a juvenile would deserve a life-without-parole sentence.[266] The Court has explained this point at length in the context of the juvenile death penalty, juvenile life-without-parole sentences for non-homicide crimes, and mandatory juvenile life-without-parole sentences.[267]

It likewise seems impossible to determine that a juvenile's "crime reflects irreparable corruption" at the time of sentencing, meaning that the utilitarian purposes of deterrence, incapacitation, or rehabilitation would not support such a sentence.[268] In particular, the Court has emphasized the pronounced potential that juveniles have for rehabilitation.[269]

3. Emerging Adult Life Without Parole

A similar, but broader category of young offenders has also garnered judicial interest in the context of state constitutions. The Court in its juvenile life-without-parole cases recognized the diminished capacity and culpability of under-eighteen offenders.[270] But the science supporting this understanding does not draw a bright line at age eighteen.[271] If anything, it

265. *Id.*

266. Roper v. Simmons, 543 U.S. 551, 569–70 (2005); *Graham*, 560 U.S. at 71–74; *Miller*, 567 U.S. at 479–80; *Montgomery*, 577 U.S. at 206–09.

267. *Miller*, 567 U.S. at 471–72 ("Because '[t]he heart of the retribution rationale' relates to an offender's blameworthiness, 'the case for retribution is not as strong with a minor as with an adult.' " (quoting *Graham*, 560 U.S. at 71)); *Graham*, 560 U.S. at 68 ("[J]uvenile offenders cannot with reliability be classified among the worst offenders." (quoting *Roper*, 543 U.S. at 569)); *Roper*, 543 U.S. at 569–70 (explaining that as compared to adults, juveniles have "[a] lack of maturity and an underdeveloped sense of responsibility"; they "are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure"; and their characters are "not as well formed"); Thompson v. Oklahoma, 487 U.S. 815, 835 (1988) (plurality opinion) ("The reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult.").

268. *Roper*, 543 U.S. at 573; *Graham*, 560 U.S. at 68; *Miller*, 567 U.S. at 479–80; *Montgomery*, 577 U.S. at 195, 208–09.

269. *Miller*, 567 U.S. at 471 ("[A] child's character is not as 'well formed' as an adult's; his traits are 'less fixed' and his actions less likely to be 'evidence of irretrievabl[e] deprav[ity].' " (quoting *Roper*, 543 U.S. at 570)); *Graham*, 560 U.S. at 68 ("Juveniles are more capable of change than are adults, and their actions are less likely to be evidence of 'irretrievably depraved character' than are the actions of adults." (quoting *Roper*, 543 U.S. at 570)); *Roper*, 543 U.S. at 570 ("From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed.").

270. *See* Rovner, *supra* note 76.

271. *See, e.g.*, Elizabeth Cauffman & Laurence Steinberg, *Emerging Findings from Research on*

suggests that brain development is not complete until one reaches their late twenties.[272]

As a result, courts have begun to consider emerging adults—offenders aged eighteen to twenty—as similar to juveniles and worthy of the same constitutional protections.[273] A recent case, *Commonwealth v. Mattis*, demonstrates this trend.[274] In *Mattis*, the Massachusetts Supreme Court struck down all life-without-parole sentences for emerging adults, individuals aged eighteen to twenty, under the state constitution.[275]

Adolescent Development and Juvenile Justice, 7 VICTIMS & OFFENDERS 428, 432–34 (2012); Nico U. F. Dosenbach, Binyam Nardos, Alexander L. Cohen, Damien A. Fair, Jonathan D. Power, Jessica A. Church, Steven M. Nelson, Gagan S. Wig, Alecia C. Vogel, Christina N. Lessov-Schlaggar, Kelly Anne Barnes, Joseph W. Dubis, Eric Feczko, Rebecca S. Coalson, John R. Pruett Jr., Deanna M. Barch, Steven E. Petersen & Bradley L. Schlaggar, *Prediction of Individual Brain Maturity Using fMRI*, 329 SCI. 1358, 1359–60 (2010); Catherine Lebel & Christian Beaulieu, *Longitudinal Development of Human Brain Wiring Continues from Childhood into Adulthood*, 31 J. NEUROSCIENCE 10937, 10943–46 (2011); Adolf Pfefferbaum, Torsten Rohlfing, Margaret J. Rosenbloom, Weiwei Chu, Ian M. Colrain & Edith V. Sullivan, *Variation in Longitudinal Trajectories of Regional Brain Volumes of Healthy Men and Women (Ages 10 to 85 Years) Measured with Atlas-Based Parcellation of MRI*, 65 NEUROIMAGE 176, 186–91 (2013); Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCH. 1009, 1014–17 (2003). For an exploration of the complications of constitutional line drawing in this context, see generally William W. Berry III, *Eighth Amendment Presumptive Penumbras (and Juvenile Offenders)*, 106 IOWA L. REV. 1 (2020).

272. *See, e.g.*, Dosenbach et al., *supra* note 271, at 1358–59; Lebel & Beaulieu, *supra* note 271, at 10943–46; Pfefferbaum et al., *supra* note 271, at 186–91.

273. These include restricting mandatory life-without-parole sentences, per *Miller*, and life-without-parole sentences in non-homicide cases, per *Graham*. But courts have not yet extended this concept to capital cases, perhaps because many of the jurisdictions considering these limitations have already abolished the death penalty. *See infra* notes 274–76.

274. Commonwealth v. Mattis, 224 N.E.3d 410 (Mass. 2024). Massachusetts is not alone in recognizing that emerging adult offenders require different treatment from older adult offenders. For example, the District of Columbia provides a chance at sentence reduction for people who were under twenty-five years old when they committed a crime. D.C. CODE § 24-403.03 (2024). In 2019, Illinois enacted a law allowing parole review at ten or twenty years into a sentence for most crimes, exclusive of sentences to life without parole, if the individual was under twenty-one years old at the time of the offense. 730 ILL. COMP. STAT. 5/5-4.5-115 (2024). Effective January 1, 2024, Illinois also ended life without parole for most individuals under twenty-one years old, allowing review after they serve forty years. ILL. PUB. L. NO. 102-1128, § 5 (2022). California has extended youth offender parole eligibility to individuals who committed offenses before twenty-five years of age. CAL. PENAL CODE § 3051 (West 2024). Similarly, in 2021, Colorado expanded specialized program eligibility, usually reserved for juveniles, to adults who were under twenty-one when they committed a felony. H.B. No. 21-1209, Gen. Assemb., Reg. Sess. (Colo. 2021) (enacted). In Wyoming, "youthful offender" programs now offer reduced and alternative sentencing for those under thirty years old. WYO. STAT. ANN. §§ 7-13-1002, -1003 (2024).

275. Other state courts have found similar constitutional restrictions. *See In re* Pers. Restraint of Monschke, 482 P.3d 276, 288 (Wash. 2021) (prohibiting the imposition of mandatory life-without-parole sentences on emerging adults from age eighteen to twenty under the Washington constitution); People v. Parks, 987 N.W.2d 161, 183 (Mich. 2022) (finding mandatory death sentences for eighteen year olds unconstitutional under the Michigan constitution).

In applying the language of its state constitution,[276] the *Mattis* court relied heavily on the Court's Eighth Amendment juvenile cases—*Roper*, *Graham*, and *Miller*—in recognizing the "mitigating qualities of youth."[277] In assessing the contemporary standards of decency, the court looked to science, trends in the state, and trends in other jurisdictions.[278] After explaining why the science overwhelmingly supports treating twenty-year-old offenders like seventeen-year-old offenders,[279] the court looked to examples of how Massachusetts treated emerging adults more like juveniles than adults.[280] It then surveyed other jurisdictions in finding that Massachusetts was only one of ten states that currently requires eighteen- to twenty-year-old offenders convicted of murder to receive life-without-parole sentences.[281]

With Michigan and Washington reaching similar conclusions under their state constitutions, it seems possible that the Court could arrive at a similar place.[282] The first step would be a conclusion that emerging adults were like juveniles in that they would also be "different" for purposes of the Eighth Amendment. Then, the question would be whether a consensus existed. As the *Mattis* court found, most states bar mandatory life-without-parole sentences, suggesting a national consensus with respect to mandatory life-without-parole sentences for emerging adults.[283] A broader application could exist if other states follow the lead of Massachusetts, Michigan, and Washington in barring the imposition of life-without-parole sentences on emerging adults.[284]

276. The Massachusetts Constitution provides that "[n]o magistrate or court of law, shall . . . inflict cruel or unusual punishments." MASS. CONST. pt. 1, art. XXVI. Interestingly, the court used the federal evolving standards of decency instead of a separate state standard, despite the disjunctive language of the state constitution. *See* William W. Berry III, *Cruel State Punishments*, 98 N.C. L. REV. 1201, 1227–32 (2020) (exploring the language of the state punishment clauses and the possible consequences of different linguistic approaches).

277. *Mattis*, 224 N.E.3d at 418–20 (quoting Miller v. Alabama, 567 U.S. 460, 476 (2012)).

278. *Id.*

279. Specifically, the district court made four key factual findings as to emerging adults that warranted treating them like juveniles: (1) diminished impulse control, (2) likelihood of engaging in risk taking in pursuit of a reward, (3) heightened peer influence, and (4) increased capacity for change. *Id.* at 421–24. The court agreed with these findings. *Id.*

280. *Id.* at 424–25. These included the allowing of custody until age twenty-one by the Department of Youth Services, the imposition of dual sentences for youthful offenders, and the establishment of young adult correctional units in state prisons.

281. *Id.* at 427.

282. *See* cases cited *supra* note 275.

283. *Mattis*, 224 N.E.3d at 427.

284. State courts are increasingly finding limits on punishment under their state constitutions. *See In re* Pers. Restraint of Monschke, 482 P.3d 276, 288 (Wash. 2021) (barring mandatory life without parole sentences for emerging adults—eighteen- to twenty-year-olds—under the state constitution); State v. Bassett, 428 P.3d 343, 355 (Wash. 2018) (barring juvenile life-without-parole sentences under the state

The subjective proportionality analysis would be less difficult. The scientific evidence of the similarity between juveniles and emerging adults means that the same arguments from *Roper*, *Graham*, and *Miller* would apply.[285] That means that retribution, deterrence, incapacitation, and rehabilitation might not support the imposition of life-without-parole sentences on emerging adults.[286]

D. THE LIMIT OF EVOLVING STANDARDS

Having mapped out the concept of Eighth Amendment stare decisis and some potential future applications, the next question is whether the doctrine limits the Court, particularly in considering laws that violate the current doctrine, such as the Florida law highlighted at the beginning of the Article. In particular, the issue is whether Eighth Amendment stare decisis would bar the Court from reversing the limits imposed in *Kennedy v. Louisiana*[287] and *Graham v. Florida*.[288]

1. *Kennedy*

As discussed, the Court in *Kennedy* barred the imposition of death sentences for the crime of child rape.[289] Applying the evolving standards demonstrates why the Florida law is unconstitutional. First, the evolving standards only evolve in one direction—from more severe to less severe. If the Eighth Amendment currently limits the harshest punishment for child rapes, the only direction this punishment could move is to less severe—to barring life-without-parole for child rape.

In addition, there is a clear national consensus against the death penalty for child rape as, prior to the Florida and Tennessee laws, no state has sentenced anyone to death for child rape since at least before the Court barred

constitution); People v. LaValle, 817 N.E.2d 341, 367 (N.Y. 2004) (finding that the state death penalty statute violated the New York constitution); Rauf v. State, 145 A.3d 430, 433–34 (Del. 2016) (finding that the Delaware death penalty statute violated the Delaware constitution); State v. Lyle, 854 N.W.2d 378, 380–81 (Iowa 2014) (finding that all mandatory minimum sentences for juveniles violate the state constitution); State v. Kelliher, 873 S.E.2d 366, 370 (N.C. 2022) (holding that any sentence that requires a juvenile offender to serve forty years violates the state constitution); People v. Parks, 987 N.W.2d 161, 164–65 (Mich. 2022) (barring mandatory life-without-parole sentences for eighteen-year-olds); *Mattis*, 224 N.E.3d at 415 (barring life-without-parole sentences for eighteen- to twenty-year-olds and under pursuant to the state constitution); *see also* Berry, *supra* note 276, at 1206.

285. *See* cases cited *supra* note 266.

286. A further step would be to expand the Eighth Amendment to bar all life-without-parole sentences, but the societal consensus seems further away. For an argument for the abolition of life-without-parole sentences, see William W. Berry III, *Life-with-Hope Sentencing*, 76 OHIO ST. L.J. 1051, 1068–81 (2015).

287. Kennedy v. Louisiana, 554 U.S. 407 (2008).

288. *Graham*, 560 U.S. at 48.

289. *Kennedy*, 554 U.S. at 413.

it in 2008.[290] Further, as the Court explained in *Kennedy*, the death penalty for adult rape was rare even before *Coker*, much less for child rape.[291]

The subjective indicia also counsel against the death penalty as a punishment for rape. The Court has made clear in *Coker* and *Kennedy* that death is an excessive punishment in most cases for non-homicide crimes, particularly sex crimes.[292] The Court views death as a punishment for a non-death crime as extending beyond just deserts retribution, as well as being insufficient to accomplish the purpose of deterrence.[293]

2. *Graham*

The analysis for a challenge to the rule in *Graham* would be almost identical. In *Graham*, the Court barred the imposition of life-without-parole sentences in non-homicide cases.[294]

To reverse this decision under the Eighth Amendment stare decisis rule would be impossible, as it would require the Court to move from a less harsh punishment to a harsher one in allowing juvenile life without parole for a non-homicide crime when it was previously unconstitutional.

Likewise, there is a national consensus against imposing life-without-parole sentences for non-homicide crimes committed by juveniles.[295] If anything the evidence is even stronger than in *Graham*, with a majority of states having either banned juvenile life without parole or having no person serving such a sentence.[296]

And the analysis of the subjective indicia would be the same. The diminished culpability of juveniles would mean that juvenile life without parole would be a disproportionate sentence in light of the goals of retribution, deterrence, incapacitation, and rehabilitation.

Under the evolving standards, then, the Court would apply Eighth Amendment stare decisis to strike down any statute, like Florida's, that contravened *Kennedy* or any state statute that contravened *Graham*. The one

290. Florida sought the death penalty in a child rape case after the passage of its new statute, but the defendant pled guilty and received a life-without-parole sentence. *Death Penalty for Child Sexual Abuse that Does Not Result in Death*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/facts-and-research/crimes-punishable-by-death/death-penalty-for-child-sexual-abuse-that-does-not-result-in-death [https://perma.cc/LBM8-UE6W].

291. *Kennedy*, 554 U.S. at 428–29.

292. Coker v. Georgia, 433 U.S. 584, 592, 597–600 (1977); *Kennedy*, 554 U.S. at 435–38.

293. *Coker*, 433 U.S. at 592, 597–600; *Kennedy*, 554 U.S. at 435–38, 441–45.

294. Graham v. Florida, 560 U.S. 48, 82 (2010).

295. As with *Kennedy*, the result of *Graham* was to bar a particular kind of sentence, meaning that no state has imposed such a sentence since 2010.

296. Rovner, *supra* note 76.

possible loophole in this analysis would relate to the Court's decision in *Dobbs*, which articulated the current stare decisis standard. Section III.B eliminates that possibility by demonstrating that Eighth Amendment stare decisis is consistent with the rule in *Dobbs*.

III. WHY *DOBBS* SUPPORTS EIGHTH AMENDMENT STARE DECISIS

In considering whether the Court has latitude to overrule *Kennedy*, the question involves the application of *Dobbs* to Eighth Amendment stare decisis. As demonstrated below, the *Dobbs* approach to stare decisis affirms both the concept of Eighth Amendment stare decisis and the individual decision in *Kennedy*. The *Dobbs* case articulated five factors the Court should consider when weighing whether to follow its prior precedents: (1) the nature of the Court's error, (2) the quality of its prior reasoning, (3) the workability of the current standard, (4) the effect on other areas of law, and (5) reliance interests in the precedent.[297]

A. THE *DOBBS* TEST

It is worth noting that the framework of the evolving standards of decency rests in part on an assessment of majoritarian consensus, despite its purpose of articulating a countermajoritarian right.[298] This means that Court decisions in this area are much less likely to be products of judicial activism as they base their decisions on what they perceive to be the majority practice.[299]

1. The Nature of the Court's Error

While the Court has often had disagreements concerning the application of the evolving standards of decency test, the test itself has never been a point of contention.[300] From the beginning of its Eighth Amendment cases, the Court has been virtually unanimous in its determination that the Eighth Amendment evolves over time, and only moves in one direction—toward

297. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 215, 2261–65 (2022). I am not the only scholar to consider the application of the *Dobbs* test to *Kennedy*. For a less rosy assessment, see Alexandra L. Klein, Kennedy v. Louisiana *and the Future of the Eighth Amendment*, 52 Pepperdine L. Rev. (forthcoming 2025) (exploring the potential for overruling *Kennedy* through the *Dobbs* concept of democratic deliberation via a "devolving" standards of decency approach or a more restricted historical approach).

298. *See* discussion *supra* Part I.

299. Of course, the dissents in the Court's Eighth Amendment cases often argue that these decisions are activist, largely related to disputes concerning state-counting. *See supra* notes 84, 127, 152 and accompanying text.

300. *See* discussion *supra* Part I.

less harsh punishments.[301] A decision ignoring or overruling Eighth Amendment stare decisis as a general principle would constitute a complete disregard of the rule of law.[302]

If there is an error in the evolving standards of decency test, it would relate either to the objective determination of the Court concerning the national consensus for a particular punishment or to the subjective determination of the Court with respect to the purposes of punishment.[303]

With respect to *Kennedy*, finding an error with respect to the objective indicia would be almost impossible. At the time of *Kennedy*, only five states allowed the execution of child rapists.[304] And currently, only two states allow the death penalty for child rape.[305]

To reverse this perception, a national revolution with more than half of the states adopting statutes similar to Florida's statute would be a prerequisite for even raising the objective indicia question.[306] Even then, some additional evidence of state juries sentencing individuals to death for child rape would also be necessary. And as the Court in *Kennedy* indicated, such prosecutions have been rare.[307]

This is exactly the point. Where almost every jurisdiction is unwilling to sanction a particular punishment for a particular crime and juries are unwilling to impose such sentences, the rare jurisdiction with the outlier jury that imposes a death sentence for child rape defies the evolving standards of decency that mark the progress of a mature society.[308]

Moving to the subjective standards, the Court likewise would be unlikely to find that the punishment of the death penalty was a proportionate punishment for child rape. First, the Court has always reached the same conclusion under the subjective standards as it has under the objective standards when it applies the evolving standards of decency test.

Second, the Court has made clear, both in *Coker* and *Kennedy*, that it finds imposing death for a non-homicide sexual crime to be disproportionate.[309] It has consistently found that despite the brutal and scarring nature of sex crimes, such crimes do not result in physical death.[310]

301. *See* discussion *supra* Section I.B.
302. *See* discussion *supra* Section I.B.
303. *See* discussion *supra* Section I.A.
304. Kennedy v. Louisiana, 554 U.S. 407, 423–24 (2008).
305. *See* sources cited *supra* note 3.
306. *Kennedy*, 554 U.S. at 423–34.
307. *Id*.
308. Trop v. Dulles, 356 U.S. 86, 101 (1958); *see* discussion *supra* Part I.
309. Coker v. Georgia, 433 U.S. 584, 592, 597–600 (1977); *Kennedy*, 554 U.S. at 435–38.
310. *Id.*

A punishment of death, then, would be excessive in light of the crime committed.[311] While the anger that many feel toward child sex offenders likely makes that bright line unsatisfying, it is nonetheless the bright line that the Court has chosen twice.[312]

The purposes of punishment support such a determination. If retribution concerns just deserts, and not revenge, then it requires courts to impose a sentence no more than and no less than what the offender deserves based on the culpability of the offender and the harm caused.[313] If the harm caused did not involve death, then it follows that the punishment should not involve death either.[314] Similarly, deterrence does not support death as a punishment for child rape.[315] The marginal deterrence between a death sentence as opposed to a life-without-parole sentence is likely insignificant, particularly in light of the two-decade time gap between sentencing and execution.[316]

Finally, as discussed, the deeper problem here would be that remedying that "error" would violate the core principle of Eighth Amendment stare decisis—that the evolving standards only evolve in one direction.[317] It would involve enabling states to engage in a harsher punishment than before for a particular crime or offender.[318]

2. The Quality of Its Prior Reasoning

The question of the strength of the prior reasoning with respect to Eighth Amendment stare decisis and the evolving standards approach mirrors the question of error. If there is a flaw in the overall structure of the evolving standards paradigm, it is that it relies on majoritarian indicia to inform a countermajoritarian standard.[319] In the Court's cases, this has served as a mechanism to reduce judicial activism and the aggressive substitute of the Court's normative views for those of state legislatures and juries.[320] If anything, it has caused the Court to be entirely too hesitant in

311. *Id.*
312. *Id.*
313. *See* VON HIRSCH & ASHWORTH, *supra* note 132, *passim*.
314. *Coker*, 433 U.S. at 592, 597–600; *Kennedy*, 554 U.S. at 435–38.
315. *Coker*, 433 U.S. at 592, 597–600; *Kennedy*, 554 U.S. at 435–38, 441–45.
316. *NEW RESOURCE: Bureau of Justice Statistics Reports 2021 Showed 21st Consecutive Year of Death Row Population Decline*, DEATH PENALTY INFO. CTR. (Sept. 25, 2024), https://deathpenaltyinfo.org/news/new-resource-bureau-of-justice-statistics-reports-2021-showed-21st-consecutive-year-of-death-row-population-decline [https://perma.cc/36T3-M24P] ("[O]n average, death row prisoners incarcerated as of December 31, 2021, had spent 20.2 years behind bars.").
317. *See* discussion *supra* Section I.B.
318. This would allow, for instance, the execution of juveniles or intellectually disabled offenders—practices previously deemed in violation of the evolving standards of decency.
319. *See* sources cited *supra* note 85 and accompanying text.
320. This is because the Court's subjective judgment always matches the societal consensus.

permitting states to use the draconian sentencing practices that have contributed to mass incarceration.[321]

A likely argument against the reasoning of the evolving standards doctrine would be that the standards should evolve in both directions, allowing punishments to become harsher. The Court cannot achieve such a result without repudiating the entire doctrine. As discussed, the evolving standards doctrine serves to protect human dignity and promote proportionality.[322] Moving toward harsher punishments would undermine both.

To allow movement toward harsher punishments would invert the entire Eighth Amendment and its basic meaning. Instead of being a constitutional protection for individuals against cruel and unusual punishment, the Eighth Amendment would protect the ability of outlier states to engage in extreme punishments disallowed by most other jurisdictions. In other words, reading the Eighth Amendment to allow harsher punishments to reemerge would mean that the Eighth Amendment would *authorize* cruel and unusual punishments—the very thing it proscribes.

As applied to *Kennedy*, these objections would be even more robust. Attacking the underlying reasoning of the evolving standards would mean ignoring both the dignity of the offender and the concept of proportionality. And undoing the outcome in *Kennedy* would sanction the imposition of a cruel and unusual punishment.

The imposition of the death penalty for a child rapist in Florida would be cruel as it is disproportionate in two senses. First, as discussed above, it is an excessive punishment for the crime committed.[323] Second, it is comparatively disproportionate—almost no other child rapist would receive the same punishment.[324]

For the same reason, it would be an unusual punishment in several ways. Not only would it be rare, as almost no other child rapists would receive a death sentence, but it would also be contrary to longstanding practice.[325] Even when the Eighth Amendment allowed the death penalty for child rape, almost no states had such a law, and within those states almost no one received a death sentence.[326]

321. *See* Berry, *supra* note 85, at 321–22.
322. *See* discussion *supra* Section I.B.
323. Coker v. Georgia, 433 U.S. 584, 592, 597–600; Kennedy v. Louisiana, 554 U.S. 407, 435–38 (2008).
324. *See* sources cited *supra* note 185.
325. *See* Stinneford, *supra* note 28, *passim* and accompanying text.
326. *Coker*, 433 U.S. at 595–96; *Kennedy*, 554 at 433–34.

3. The Workability of the Current Standard

The concept of the evolving standards of decency remains very workable. It is a simple two-part test that requires the Court to assess readily available information and then make its own determination, applying criminal law theory to criminal sentences.

In reviewing *Kennedy*, for instance, it will not be difficult to determine how many states authorize the death penalty for child rape. It will similarly be easily ascertainable how many individuals have received death sentences for the crime of child rape.

With respect to the Court's subjective analysis, it will similarly not have difficulty engaging in the analysis of whether a death sentence satisfies the purposes of retribution and deterrence for the crime of child rape.

4. The Effect on Other Areas of Law

The Court's Eighth Amendment stare decisis approach will not have a significant effect on other areas of law. While the Eighth Amendment is not unique in its reliance on jurisdiction counting, it also does not bear particularly on other kinds of constitutional interpretation.[327] While having some similar characteristics to the due process doctrine, the Eighth Amendment does not invoke that doctrine, and that doctrine does not invoke it.[328]

As such, this part of the *Dobbs* test would not have much of an impact on its application to Eighth Amendment stare decisis or the evolving standards doctrine. Upholding *Kennedy* would not create a significant change in other areas; striking it down would not either. The analysis here would pertain simply to the future of the doctrine itself and its application.

Even so, one could imagine tangential effects from overturning the evolving standards doctrine. There are certain parallels with Sixth Amendment jurisprudence in which the doctrines of the Sixth Amendment and Eighth Amendment could inform each other.[329] These relate to the similar constitutional restrictions both amendments have placed on mandatory sentencing schemes.[330]

327. *See generally* Corinna Barrett Lain, *The Unexceptionalism of "Evolving Standards"*, 57 UCLA L. REV. 365 (2009) (explaining that other constitutional provisions also engage in state counting).

328. *Id.*

329. In both contexts, statutory schemes emerged from a concern related to arbitrary and inconsistent sentencing outcomes. These statutory approaches sought to remedy the sentencing problem by imposing mandatory sentencing requirements. The Court subsequently found the mandatory approaches to be unconstitutional. *See* William W. Berry III, *The Sixth and Eighth Amendment Nexus and the Future of Mandatory Sentences*, 99 N.C. L. REV. 1311, 1312–14 (2021).

330. *Id.*

Another possible ripple from abandoning the evolving standards of decency doctrine could relate to juvenile offenders. The concept that juveniles are different from adults extends beyond the Eighth Amendment. In other areas of law, courts and legislatures have chosen to treat juveniles differently from adults. Changing the approach to juveniles under the Eighth Amendment could influence other areas that have adopted similar approaches.

5. The Reliance Interests in the Precedent

Finally, the question becomes whether there are significant reliance interests in the Eighth Amendment stare decisis approach and the evolving standards of decency doctrine. Criminal defendants clearly have an interest in preventing states from subjecting them to draconian punishments. While the Court's limits on states have been few—far fewer than perhaps the national consensus reflects—rolling back those limits could exacerbate expansive uses of the death penalty by outlier jurisdictions and promote unequal punishment. It could also invite small groups of citizens to engage in human rights abuses with no judicial review.

B. THE *DOBBS* REASONING

Implicit in the Court's holding in *Dobbs* is both a disdain for abortion and the Court's prior holdings in *Roe* and *Casey*. For the majority, the decision clearly reflects a view that the Court "got it wrong" in its earlier cases in a fundamental way. On some level, the Court's reasoning was beside the point.[331]

Unlike the culture war terrain of the abortion issue, criminal justice has historically enjoyed a bipartisan consensus of sorts.[332] Liberals and conservatives, for different reasons, both rode the "tough on crime" wave of the 1980s and 1990s to unprecedented levels of mass incarceration.[333] And since the turn of the century, both groups have worked to slowly and incrementally undo some of this trend.[334] The bipartisan First Step Act

331. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2265 (2022); Murray & Shaw, *supra* note 8, at 734.

332. *See generally* DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY (2001); 13TH (Netflix 2016); MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010); MARC MAUER, RACE TO INCARCERATE (2006) (sources that highlight the move toward mass incarceration as a bipartisan issue rather than the product of a single party platform).

333. *See* sources cited *supra* note 332.

334. *See* sources cited *supra* note 332.

provides one example of this consensus.[335]

Outside of *Furman*, the Court's Eighth Amendment decisions have not generated widespread public response or objection.[336] This is in part because the evolving standards doctrine has served to restrict outliers, not advance broad normative change.

Undoing the decision in *Kennedy* would encourage states to engage in draconian punishment practices to test the boundaries of the Eighth Amendment. Florida's statute is unconstitutional on its face. Upholding it would not only undermine the rule of law, but would also encourage state legislatures to disregard the Court's decisions and the evolving standards. This would be different than ignoring stare decisis. It would constitute a repudiation of over one hundred years of jurisprudence.

Further, a significant part of the Court's reasoning in *Dobbs* dealt with its concern with the "disruption of democratic deliberation."[337] The concern related to the use of the constitution to interfere with legislative authority, particularly on issues of "profound importance to the electorate."[338] As shown by the response to the Court's decision in *Furman*, abolition of the death penalty might constitute a similar kind of issue.[339] But it does not appear that the evolving standards of decency generally or the execution of child rapists specifically would fall into this category.

The difference again relates to the majoritarian anchor of the evolving standards of decency. Overruling an Eighth Amendment limit would not restore the power to the people as a general matter. It would give power to a particular state to violate a national, and in some cases international, consensus against a particular punishment practice. Put differently, it would provide a license to certain jurisdictions to violate the individual rights of defendants when an overwhelming majority of jurisdictions accord defendants those very rights.

335. First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194; *An Overview of the First Step Act*, FED. BUREAU OF PRISONS, https://www.bop.gov/inmates/fsa/overview.jsp [https://perma.cc/4HF3-N4X6].

336. *See* Lain, *supra* note 83 at 46-48.

337. Murray & Shaw, *supra* note 8, at 753; Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2265 (2022).

338. Murray & Shaw, *supra* note 8, at 753–54; *Dobbs*, 142 S. Ct. at 2265.

339. *See* Lain, *supra* note 83 at 46-48.

CONCLUSION

Florida's decision to pass a new statute that clearly violates the Eighth Amendment and the Court's decision in *Kennedy* does not change the analysis in the case or under the Constitution. The Court's decision in *Dobbs* does not open the door to such defiance, and it does not support rejection of the Court's precedents.

This Article has demonstrated why, even if the Court thinks the normative outcome in *Kennedy* is wrong, the Court still must strike down the Florida statute if given the opportunity. Specifically, this Article has made the case for a novel reading of the doctrine of stare decisis under the Eighth Amendment. Drawn from the Court's evolving standards of decency doctrine, this Eighth Amendment stare decisis requires the Court to change the rule in cases in which the national consensus has evolved and the Court finds the sentence to be disproportionate.

The Article first developed this concept by explaining the origins of this doctrine and defending the core principle that the evolving standards only evolve from more severe to less severe punishment. The Article then explored past applications of the doctrine, distinguished deviations from the doctrine, highlighted some future applications of the doctrine, and delineated the limits of the doctrine on state legislatures. Finally, the Article concluded by demonstrating how this reading of the Eighth Amendment is consistent with the *Dobbs* decision, both as a doctrinal and theoretical matter.