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Jurisprudence That Necessarily Embodies Moral Judgment: The Eighth Amendment, Catholic Teaching, and Death Penalty Discourse

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JURISPRUDENCE THAT NECESSARILY EMBODIES MORAL JUDGMENT: THE EIGHTH AMENDMENT, CATHOLIC TEACHING, AND DEATH PENALTY DISCOURSE

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Despite obvious differences, certain historical and conceptual underpinnings of Catholic death penalty teaching parallel core elements of U.S. death penalty jurisprudence, particularly given the Supreme Court's expansive yet contested moral reasoning in Kennedy v. Louisiana, *which stressed that Eighth Amendment analysis "'necessarily embodies a moral judgment.'"*[1] *This Article compares that jurisprudence with the Catholic Church's present, near-absolute opposition to capital punishment, assessing how the death penalty, as a quintessential law and morality question, implicates overlapping sources of moral reasoning. It then identifies substantive concepts that permit Eighth Amendment jurisprudence and the Catholic perspective to be mutually translated, presenting this approach as a means to advance death penalty discourse.*

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1 Kennedy v. Louisiana, 554 U.S. 407, 419 (2008) (quoting Furman v. Georgia, 408 U.S. 238, 382 (1972) (Burger, C. J., dissenting)).

INTRODUCTION

The legal implications of religion's often contested presence in the public square remain at the forefront of national consciousness. Prominent examples of this within the past year include debate over the Obama administration's decision not to exempt all but a narrow class of religiously-affiliated employers from the new health care law's mandate to provide insurance coverage for contraception,[2] and the Supreme Court's interpretation of the Religion Clauses' application to employment decisions in *Hosanna-Tabor Evangelical Lutheran Church v. EEOC*.[3]

Religion's salience to both the form and substance of important legal debates is no less the case with respect to the death penalty. As Professor David Garland has argued, "religiosity and moralism" are among "recurring themes that feature prominently in the American public sphere . . . [a]nd ha[ve] a bearing on the punishment of offenders and on death penalty politics."[4] Accordingly, "[t]o understand today's American death penalty . . . we must try to see its moral power, its emotional appeal, its claim to be doing justice."[5]

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2 *See, e.g.*, *Contraception and Insurance Coverage (Religious Exemption Debate)*, N.Y. TIMES, (May 21, 2012), http://topics.nytimes.com/top/news/health/diseasesconditionsandhealthtopics/health_insurance_and_managed_care/health_care_reform/contraception/index.html (last visited Oct. 1, 2012) ("The announcement of the new rule set off a political firestorm among religious and conservative groups, who denounced it as a threat to religious freedom. [While t]he rule does not apply to church organizations themselves, but instead to affiliated nonprofit corporations, like hospitals, that do not rely primarily on members of the faith as employees[,] . . . the United States Conference of Catholic Bishops said the compromise still infringed on the religious liberty and conscience of Catholics. . . . [Accordingly, i]n May, 43 Roman Catholic dioceses, schools, social service agencies and other institutions filed lawsuits in 12 federal courts challenging the rule. At least 11 other Catholic and evangelical organizations had already filed similar lawsuits.").

3 132 S. Ct. 694 (2012) (holding that the First Amendment's Establishment and Free Exercise Clauses bar employment discrimination suits by ministers against churches). Professor Michael Stokes Paulsen praised the ruling as "absolutely, completely right" and "a dramatic defense of religious liberty." Michael Stokes Paulsen, *Hosanna in the Highest!*, PUBLIC DISCOURSE: ETHICS, LAW, AND THE COMMON GOOD (Jan. 13, 2012), http://www.thepublicdiscourse.com/2012/01/4541. On the other side of the public square, *The New York Times* editorialized that "[t]he [C]ourt's conception of the ministerial role is more encompassing than it has been defined by state and federal appellate courts," and that "[i]ts sweeping deference to churches does not serve them or society wisely." Editorial, *The Ministerial Exception*, N.Y. TIMES, Jan. 13, 2012, at A22.

4 DAVID GARLAND, PECULIAR INSTITUTION 175 (2010).

5 *Id.* at 7.

In comparing U.S. jurisprudence with Catholic death penalty teaching, this Article aims to contribute to such understanding.[6] Over four years after *Baze v. Rees*[7] ended a brief, de facto national moratorium on executions,[8] the moral, including religious, dimensions of capital punishment remain both poignant and contested.[9] Death penalty opponents succeeded at placing an abolition initiative on the November 2012 ballot in California—both the nation's largest state and the state with the largest population of inmates awaiting execution—and secured over 100 endorsements of repeal from faith and religious organizations.[10] In Connecticut, which in April 2012 became the most recent state to repeal its death penalty statute by legislation, *New York Times* coverage included a photo of religious leaders opposed to capital punishment praying at a rally as Connecticut's Senate debated the abolition bill.[11] Senator Gayle Slossberg, a one-time death penalty proponent, was described as "wrestling with the moral implications of capital punishment" before concluding that its abolition "'set[s us] . . . on the path to the kind of society we really

6 Concerning this Article's definitions of jurisprudence and of Catholic teaching, see *infra* notes 68 and 225–29, respectively, and accompanying text.

7 553 U.S. 35, 40–41 (2008) (plurality opinion).

8 *Id.* at 40–41 (upholding Kentucky's three-drug lethal injection protocol, similar to what all jurisdictions employing it then used). Litigation akin to that in *Baze* led to a de facto national moratorium on executions from September 2007 until shortly after *Baze* was decided in April 2008. *Death Penalty in Flux*, DEATH PENALTY INFO. CTR. (Sept. 7, 2012), http://www.deathpenaltyinfo.org/death-penalty-flux.

9 This Article largely adopts the definition of "moral" as "relating to principles of right and wrong in behavior," "expressing or teaching a conception of right behavior," and/or pertaining to that which is "sanctioned by or operative on one's conscience or ethical judgment" or is "perceptual or psychological . . . in nature or effect." *Moral Definition*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/moral (last visited Sept. 24, 2012).

10 *See Death Row Inmates by State*, DEATH PENALTY INFO. CTR. (Oct. 7, 2012), http://www.deathpenaltyinfo.org/death-row-inmates-state-and-size-death-row-year (indicating that 724 inmates occupied California's death row as of April 1, 2012); *Endorsements from Faith & Religious Organizations* (106), YES ON 34, http://www.safecalifornia.org/about/faith-religious-organizations (last visited Oct. 7, 2012) (providing information on, and endorsing passage of, California Proposition 34, The SAFE ("Savings, Accountability, and Full Enforcement") for California Act). Note that this Article was scheduled to go to press before ballot initiative results were available.

11 *With Senate Vote, Connecticut Is on Track to End Capital Punishment*, N.Y. TIMES, Apr. 6, 2012, at A19 *available at* http://www.nytimes.com/2012/04/06/nyregion/death-penalty-repeal-bill-passes-connecticut-senate.html (displaying photograph of religious leaders praying); *see also States With and Without the Death Penalty*, DEATH PENALTY INFO. CTR. (last visited Oct. 18, 2012), http://www.deathpenaltyinfo.org/states-and-without-death-penalty (listing states with and without the death penalty and, where applicable, the year of abolition).

want for our future.'"[12] Senator Edith Prague, also an initial opponent of repeal who considered the death penalty to be "a moral issue," attributed her changed position to discomfort at the prospect of "'be[ing] part of a system that sends innocent people . . . to the death penalty.'"[13]

In declaring in November 2011 that he would permit no executions to proceed while still in office, Oregon Governor John Kitzhaber explained that he "cannot participate . . . in something [he] believe[s] to be morally wrong."[14] In March 2011, longtime death penalty supporter Governor Pat Quinn expressly acknowledged his Catholic faith in forming his decision to sign a bill abolishing the Illinois death penalty.[15] Whether coincidental or not, the state that abandoned the death penalty prior to Illinois was New Mexico, in 2009, where analysts cited strong religious opposition behind abolition, and where the governor who signed the legislation, Bill Richardson, is also Catholic.[16] New Mexico's predecessor in repeal was New Jersey, in 2007, where death penalty opposition by the Catholic Church—the state's largest denomination—also was among pro-abolition forces.[17]

Religion does impact public thinking about capital punishment. According to the *Pew Forum on Religion and Public Life*, 62% of Americans support capital punishment for murder, and while 22% "with an opinion about the death penalty . . . cite their education as [the] most important" factor, 19% "say that religion is the most important influence on their thinking."[18] Religiousness per se does not necessarily

12 Daniel Altimari and Jon Lender, *Death Penalty Repeal Clears Biggest Hurdle*, HARTFORD COURANT (Apr. 5, 2012), http://articles.courant.com/2012-04-05/news/hc-death-penalty-vote-0405-20120404_1_capital-punishment-death-penalty-prague-and-slossberg (last visited Oct. 7, 2012).

13 *Id.*

14 Press Release, Governor John Kitzhaber, Governor Kitzhaber Issues Reprieve—Calls for Action on Capital Punishment (Nov. 22, 2011), http://cms.oregon.gov/gov/media_room/pages/press_releasesp2011/press_112211.aspx.

15 Samuel G. Freedman, *Faith Was on the Governor's Shoulder*, N.Y. TIMES, Mar. 26, 2011, at A15. Eight years before, Governor George Ryan commuted all Illinois death sentences, also sharing "that his personal religious beliefs deeply influenced his thinking about the [death penalty's] injustice." Erik C. Owens & Eric P. Elshtain, *Religion and Capital Punishment: An Introduction*, *in* RELIGION AND THE DEATH PENALTY 1, 2 (Erik C. Owens et al., eds., 2004).

16 Carol S. Steiker & Jordan M. Steiker, *Cost and Capital Punishment: A New Consideration Transforms an Old Debate*, 2010 U. CHI. LEGAL F. 117, 121–22 (2010).

17 Robert J. Martin, *Killing Capital Punishment in New Jersey: The First State in Modern History to Repeal Its Death Penalty Statute*, 41 U. TOL. L. REV. 485, 498 & n.100, 499 & n.109 (2010).

18 *Public Opinion on the Death Penalty*, PEW FORUM ON RELIGION & PUB. LIFE (Sept. 23, 2011), http://pewforum.org/Death-Penalty/Public-Opinion-on-the-Death-Pen-

predict a given view: majorities of white evangelicals, mainline Protestants, and Catholics favor the death penalty; majorities of black Protestants and Hispanic Catholics do not. But 32% of death penalty opponents—and 31% of Catholic death penalty opponents—cite religion as the top influence on their views, versus 13% among death penalty proponents.[19]

Thus, a broad range of voices fills the death penalty's moral contours. Troy Davis's September 2011 execution illustrates this: his innocence claims, which various courts and Georgia's Board of Pardons and Paroles rejected, spurred 630,000 letters pleading for a stay of execution, and clemency appeals from Pope Benedict XVI, Archbishop Desmond Tutu, former President Jimmy Carter, dozens of members of Congress, and even prominent death penalty supporters.[20] In his final words, Mr. Davis maintained his innocence, urged a "deeper [look] into [ ]his case . . . [to] see the truth," and closed in benediction: "For those about to take my life, may God have mercy on all of your souls. God bless you all."[21]

This Article offers three contributions to this discourse. Part I asserts that because the U.S. death penalty has significant religious roots and resonance, and given how enmeshed *Kennedy v. Louisiana* is in its moral contours, it remains a quintessential law and morality question.[22] But that premise simply begs further inquiry: to what extent might religious sources of moral reasoning be relevant? Parts II and III compare U.S. death penalty jurisprudence and Catholic death penalty teaching, via critical exegesis of *Kennedy* as a text of judicial moral reasoning.[23] This comparison focuses on both the expan-

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alty.aspx. "[F]ewer cite the media or personal experience (15% each)" and "[j]ust 7% say the views of friends or family are the most important influence." *Id.*

19 *Id.*

20 *See* Peter Wilkinson, *World Shocked by U.S. Execution of Troy Davis*, CNN.COM (Sept. 22, 2011, 9:27 PM), http://www.cnn.com/2011/09/22/world/davis-world-reaction; Editorial, *A Grievous Wrong: The Davis Case in Georgia Is Further Proof of the Barbarity of the Death Penalty*, N.Y. TIMES, Sept. 21, 2011, at A30.

21 Statement by Troy Davis (Sept. 21, 2011) *as transcribed in* John Rudolf, *Troy Davis' Last Words Released by Georgia Department of Corrections (Audio)*, HUFFINGTON POST (Oct. 7, 2011, 6:05 PM), http://www.huffingtonpost.com/2011/10/07/troy-davis-execution-last-words_n_1000648.html.

22 *Kennedy* barred the death penalty for child rape not resulting in the victim's death. 554 U.S. 407, 413 (2008).

23 This Article parallels or develops analyses that both pre- and post-date *Kennedy*. Prior to *Kennedy*, Professor Saby Ghoshray compared Catholic teaching with the Court's categorical bans on capital punishment for persons with mental retardation and juvenile offenders, Saby Ghoshray, *Tracing the Moral Contours of the Evolving Standards of Decency: The Supreme Court's Capital Jurisprudence Post-*Roper, 45 J. CATH. LEGAL STUD. 561, 600–06 (2006) (discussing Atkins v. Virginia, 536 U.S. 304 (2002), and

siveness and limitations of *Kennedy*, buttressing the claim that Catholic teaching's relatively recent trajectory towards near-absolute opposition to capital punishment makes it both relevant and potentially useful to the U.S. context, especially because its reasoning is not coterminous with theology. Part IV argues that "translatable" categories of moral reasoning thus permit secular and religious perspectives to be in dialogue, thereby advancing death penalty discourse.

I. LAW, MORALITY, AND CAPITAL PUNISHMENT'S RELIGIOUS DIMENSIONS

For decades, the Supreme Court has affirmed that the Eighth Amendment's ban on cruel and unusual punishment, which governs a large swath of death penalty jurisprudence, "'draws its meaning from the evolving standards of decency that mark the progress of a maturing society.'"[24] In 2008, *Kennedy v. Louisiana* stressed that this jurisprudence "'necessarily embodies a moral judgment.'"[25]

Kennedy's use of this phrase is instructive, and inspired this Article's title. For it appears to adopt, as a principle of constitutional law, Chief Justice Warren E. Burger's passing observation about moral

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Roper v. Simmons, 543 U.S. 551 (2005)), while Professor Michael S. Moore studied moral reasoning dimensions in Supreme Court jurisprudence. *See* Michael S. Moore, *Morality in Eighth Amendment Jurisprudence*, 31 HARV. J.L. & PUB. POL'Y 47 (2008). Following *Kennedy*, an incisive Comment interpreted the case in light of moral foundation theory, proposing that limitations of the majority's moral reasoning are instructive vis-à-vis that theory's potential contributions to legal practice. *See* Colin Prince, Comment, *Moral Foundation Theory and the Law*, 33 SEATTLE U. L. REV. 1293 (2010). More recently, Professor Mary Sigler has critiqued the moral skepticism of the Court's Eighth Amendment jurisprudence, offering as an alternative a defense of the evolving standards of decency framework as consistent with the "political morality" proper to liberal democracy, Mary Sigler, *The Political Morality of the Eighth Amendment*, 8 OHIO ST. J. CRIM. L. 403 (2011), while Professor Shandrea P. Solomon has praised *Kennedy*'s proportionality analysis as consistent with moral foundations of law, justice, and retributivism. *See* Shandrea P. Solomon, *National Consensus, Retributive Theory, and Foundations of Justice and Morality in Eighth Amendment Jurisprudence: A Response to Advocates of the Child Rape Death Penalty Statute in* Kennedy v. Louisiana, 13 SCHOLAR 583 (2011). Professor John F. Stinneford, on the other hand, has severely criticized *Kennedy*'s Eighth Amendment analysis and what he characterizes as the Court's over-reaching therein. *See* John F. Stinneford, *Rethinking Proportionality Under the Cruel and Unusual Punishments Clause*, 97 VA. L. REV. 899 (2011).

24 *Kennedy*, 554 U.S. at 419 (brackets omitted) (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion)) (summarizing Eighth Amendment jurisprudence).

25 *Id.* at 419 (quoting Furman v. Georgia, 408 U.S. 238, 382 (1972) (Burger, C. J., dissenting)).

judgment three dozen years prior in his dissent in *Furman v. Georgia*,[26] where he remarked that "[a] punishment is inordinately cruel, in the sense [relevant to Eighth Amendment analysis], . . . chiefly as perceived by the society so characterizing it. The standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment."[27] By comparison, a majority of the Court in *Kennedy* set forth that the Eighth Amendment "draws its meaning from the evolving standards of decency that mark the progress of a maturing society. *This is because* the standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment."[28] No Supreme Court case prior to *Kennedy* quoted this phrase, much less presented it as central to Eighth Amendment analysis as this Article argues it does.[29]

Shortly before *Kennedy* was decided, Professor Michael Moore argued that "Eighth Amendment jurisprudence reveals that judges continually engage in moral reasoning."[30] *Kennedy* fits his thesis that this jurisprudence consists of "miniature essays in judicial philosophy, so [that] Eighth Amendment interpretation is . . . theorized as a moral enterprise by [its] judges."[31] And of what do its "difficult questions rooted in morality"[32] consist? The Court in *Kennedy* found it to consist of theories of punishment, proportionality, and culpability; inquiry into whether someone "deserves" to die; and the weighing of aggravating or mitigating factors, including an offender's own moral

26 408 U.S. 238 (1972).

27 *Id.* at 382 (Burger, C.J., dissenting). Concerning *Furman*'s precise holding, see *infra* note 114 and accompanying text.

28 *Kennedy*, 554 U.S. at 419 (emphasis added) (citations omitted) (internal quotation marks omitted) (brackets omitted).

29 *Kennedy*'s use of the phrase has greater meaning given its later reiteration outside the death penalty context, as when the Court held that the Eighth Amendment bars life without parole sentences for non-homicide juvenile offenders, requiring juvenile sentences to provide "some realistic opportunity to obtain release." Graham v. Florida, 130 S. Ct. 2011, 2034 (2010). *Graham*—like *Kennedy*, written by Justice Anthony M. Kennedy—reiterated that "courts must look beyond historical conceptions to the evolving standards of decency that mark the progress of a maturing society . . . because the standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment." *Id.* at 2021 (alterations omitted) (citations omitted) (internal quotation marks omitted). The Court recently held that the Eighth Amendment, as interpreted in *Graham*, prohibits a life-sentence without the possibility of parole for juvenile offenders. Miller v. Alabama, 132 S. Ct. 2455, 2469 (2012).

30 Moore, *supra* note 23, at 52.

31 *Id.* at 48.

32 *Id.* at 52

agency.[33] Such are the moral reasoning dimensions of death penalty jurisprudence.

Some scholars and jurists deny the validity of judges' moralizing—including Justice Antonin Scalia, whose views Professor Moore addresses.[34] But Justices do decide cases based on their "independent judgment," at least in part.[35] This Article assesses how *Kennedy* does so quite expansively—even if, in some ways, with insufficient coherence.[36] *Kennedy*'s mixed bag of moral reasoning thus shows how capital punishment remains a law and morality question par excellence.

A. Capital Punishment as a Law and Morality Question

Commentators routinely address capital punishment as a law and morality question. However, it is not always clear what this means. Disagreement between the *Kennedy* majority and dissenters thus may simply echo a broader socio-cultural "search [for] a unifying principle."[37] In any event, broad social discourse is relevant to death pen-

33 *See id.* at 52.

34 *See id.* at 51. *See also* Stinneford, *supra* note 23, at 922 (characterizing the Court's recent Eighth Amendment decisions, including *Kennedy*, as "disingenuous" and "manipulati[ve]" in their application of Justices' own normative judgments). The *Kennedy* dissent, *see infra* Part II.B., also contests the Court's deployment of its own normative judgments.

35 Kennedy v. Louisiana, 554 U.S. 407,421 (2008). *See also id.* at 434 ("'[T]he Constitution contemplates that in the end our own judgment will be brought to bear on the . . . acceptability of the death penalty under the Eighth Amendment."' (quoting Coker v. Georgia, 433 U.S. 584, 597 (1977) (plurality opinion))). (N.B.: this Article follows the practice of some authors and short-cites Roper v. Simmons, 543 U.S. 551 (2005) as *Simmons*, corresponding to the name of the prevailing defendant-respondent. *See, e.g.*, Elisabeth Semel, *Reflections on Justice John Paul Stevens's Concurring Opinion in* Baze v. Rees*: A Fifth* Gregg *Justice Renounces Capital Punishment*, 43 U.C. DAVIS L. REV. 783, 847 (2010). Because some authorities relied on here short-cite it as *Roper*—including *Kennedy*—it should be noted that references to *Roper* or to *Simmons* are to the same case.)

36 Professor John F. Stinneford in particular has criticized the Court's Eighth Amendment jurisprudence as "wildly inconsistent" and having "gone off the rails." John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739, 1740 (2008). He also recently characterized its proportionality analysis per se as "both narrow and unprincipled." Stinneford, *supra* note 23, at 907. *See also* Eric Berger, *In Search of a Theory of Deference: The Eighth Amendment, Democratic Pedigree, and Constitutional Decision Making*, 88 WASH. U. L. REV. 1, 1 (2010) ("[R]ecent Eighth Amendment death penalty case law is in disarray, and the confusion is symptomatic of a larger problem in constitutional doctrine.").

37 *Kennedy*, 554 U.S. at 437 (characterizing the Court's Eighth Amendment case law). Justices Stevens, Souter, Ginsburg, and Breyer joined Justice Kennedy's majority opinion. Chief Justice Roberts and Justices Scalia and Thomas joined Justice Alito's dissent.

alty jurisprudence, which takes "the basic mores of society" into account.[38] But its moral dimensions still require critical analysis: when do moral intuitions give way to the moral reasoning proper to jurisprudence?

For example, *New York Times* editorials cite both justice and morality in repeated calls to abolish the death penalty. Following Ohio's botched attempt in 2009 to execute Mr. Romell Broom by lethal injection, the *Times* declared that the event "reinforced that any form of capital punishment is legally suspect and morally wrong."[39] Twice in September 2011 alone it called for abolition. Citing Troy Davis's execution as evidence of arbitrariness and racial and other inequities, it described the death penalty as "grotesque and immoral."[40] More recently, praising Delaware Governor Jack Markell's decision to commute a death sentence, the *Times* opined that "[i]mposing the death penalty in [that] case, as in any case, would have been grossly unjust."[41] But according to what moral code, or following upon what sort of ethical analysis, does it reach such conclusions?

Individual commentators' reflections on capital punishment provide some clue, invoking, as they do, socially reflexive moral consciousness. Andrew Cohen of *The Atlantic* has affirmed "that capital punishment has a role in the American criminal justice system," but criticizes capital jurisdictions' willingness to overlook "rule of law" restraints on its use, observing that "[i]n America, we aim to give the guilty *more* justice than they deserve. We do so because of how that reflects upon us, not upon how it reflects upon the guilty. And when we fail to do so it says more about us than it does about the condemned."[42] Subsequently, summarizing a 2011 year-end report pegging death penalty support at its lowest level, and opposition at its highest, in nearly forty years, Cohen opined that more people:

> [K]now in their hearts to be true[that t]he death penalty experiment is failing yet again. Undermined by overzealous prosecutors, a

38 *Id.* at 419 (citation omitted) (internal quotation marks omitted).

39 Editorial, *There Is No 'Humane' Execution*, N.Y. TIMES, Dec. 14, 2009, at A30.

40 Editorial, *An Indefensible Punishment: The Death Penalty, Unjust and Arbitrary, Cannot Be Made To Conform to the Constitution*, N.Y. TIMES, Sept. 26, 2011, at A28. The *Times* also called for abolition given statistics indicating racism in the military death penalty. Editorial, *The Military and the Death Penalty, Evidence of Racial Bias Is Further Proof That It's Time To Abolish Capital Punishment*, N.Y. TIMES, Sept. 1, 2011, at A28.

41 Editorial, *A Death Penalty Commutation*, N.Y. TIMES, Jan. 18, 2012, at A20.

42 Andrew Cohen, *The Death Penalty: Why We Fight for Equal Justice*, ATLANTIC MONTHLY (Sept. 19, 2011, 12:00 PM), http://www.theatlantic.com/national/archive/2011/09/the-death-penalty-why-we-fight-for-equal-justice/245101/.

> hobby-horse for incurious politicians, too often taken unseriously [sic] by jurors and witnesses, capital punishment in America has devolved since 1976 into a costly, inaccurate, racially biased, and unseemly proposition.[43]

Professor Ty Alper provocatively argued that two executions on the same night highlighted the death penalty's immorality: Troy Davis's, and, in Texas, that of Lawrence Brewer, a white supremacist convicted of killing James Byrd, Jr., a black man, by tying him to the back of his truck and dragging him to death.[44] Conceding the grotesqueness of Mr. Brewer's crime and his unquestionable guilt, Alper quoted Mr. Byrd's own sister's words: "If I saw [Brewer] face to face, I'd tell him I forgive him for what he did. Otherwise I'd be like him."[45] Proceeding to compare capital punishment to slavery in its "moral[ ] abhorren[ce]," Alper predicted—in words similar to Cohen's—that "[y]ears from now, . . . the death penalty will be condemned because of what it reflects about us, not the individuals the state has killed in our name."[46] Justice John Paul Stevens seems to have concluded as much when he argued that the Court's decision in *Baze* would simply "generate [more] debate not only about [lethal injection protocols'] constitutionality . . . but also about the justification for the death penalty itself."[47]

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43 Andrew Cohen, *The Looming Death of the Death Penalty*, ATLANTIC MONTHLY (Dec. 15, 2011, 9:00 AM), http://www.theatlantic.com/national/archive/2011/12/the-looming-death-of-the-death-penalty/249969/ (citing *The Death Penalty in 2011: Year End Report*, DEATH PENALTY INFO. CTR. (Dec. 2011), *available at* http://www.deathpenaltyinfo.org/documents/2011_Year_End.pdf.

44 Ty Alper, *Why the Execution of a White Supremacist Murderer Matters Too*, HUFFINGTON POST (Sept. 25, 2011, 5:15 PM), http://www.huffingtonpost.com/ty-alper/why-the-execution-of-a-wh_b_980122.html.

45 *Id.*

46 *Id.*

47 Baze v. Rees, 553 U.S. 35, 71 (2008) (Stevens, J., concurring in the judgment). As Professor Elisabeth Semel perceptively observes, "[a]ny analysis of Justice Stevens's rejection of capital punishment in *Baze* cannot lose sight of the fact that his vote was indispensable to the Court's revival of the death penalty in 1976." Elisabeth Semel, *Reflections on Justice John Paul Stevens's Concurring Opinion in* Baze v. Rees*: A Fifth* Gregg *Justice Renounces Capital Punishment*, 43 U.C. DAVIS L. REV. 783, 787 (2010). Moreover, addressing the American Law Institute's 2009 withdrawal of its Model Penal Code's death penalty section, referencing "intractable institutional and structural obstacles to ensuring a minimally adequate system for administering capital punishment," Lance Liebman, *Message from ALI Director Lance Liebman*, AMERICAN LAW INSTITUTE (Oct. 23, 2009), http://www.ali.org/_news/10232009.htm (citing AM. LAW INST., REPORT OF THE COUNCIL TO THE MEMBERSHIP OF THE AMERICAN LAW INSTITUTE ON THE MATTER OF THE DEATH PENALTY 1 (2009), *available at* http://www.ali.org/doc/Capital%20Punishment_web.pdf, Professor Samuel Gross observed that new law students will " 'learn that this . . . group of smart lawyers and judges—the ones whose work they read every

A salient implication of all such critical observations, however, is that asserting the death penalty's status as a law and morality question is one thing. Teasing out what categories of reasoning frame its moral dimensions is another. Against the backdrop of the preceding observations, in what sense does capital punishment reflect upon our society? Or, in what sense is it like slavery, grotesque and immoral, or a moral and practical failure—or not? Taken together, in what sense might such discourse reflect "the evolving standards of decency that mark the progress of a maturing society[?]"[48]

B. Religious Dimensions, and the Catholic Tradition's Relevance

As Part III argues, Catholic death penalty teaching can engage such questions because it employs categories of reasoning directly on point.[49] Before testing that premise, a poignant historical irony adds color to it. On the same day in April 2008, the Supreme Court decided *Baze v. Rees* and heard argument in *Kennedy v. Louisiana*. All having voted in *Baze* to affirm Kentucky's lethal injection protocol, the Court's then five Catholic Justices—Chief Justice John G. Roberts and Justices Antonin Scalia, Anthony M. Kennedy, Clarence Thomas, and Samuel A. Alito—proceeded to a White House dinner honoring Pope Benedict XVI on his first official visit to the U.S. as pope.[50] This was an ironic capstone to the Justices' day, as the Catholic Church is among the most visible of religious bodies to criticize the contemporary death penalty, and specifically in the United States.[51]

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day—has said that the death penalty in the United States is a moral and practical failure.'" Adam Liptak, *Shapers of Death Penalty Give Up on Their Work*, N.Y. TIMES, Jan. 5, 2010, at A11 (quoting Professor Gross).

48 Kennedy v. Louisiana, 554 U.S. 407, 419 (2008) (citation omitted) (internal quotation marks omitted).

49 Catholics make up approximately 23.9% of the U.S. population. PEW FORUM ON RELIGION & PUB. LIFE, U.S. RELIGIOUS LANDSCAPE SURVEY, RELIGIOUS AFFILIATION: DIVERSE AND DYNAMIC 5 (2008), *available at* http://religions.pewforum.org/pdf/report-religious-landscape-study-full.pdf.

Two terminological notes: first, this Article employs *church* as an adjective, *Church* as a noun, which in most instances here abbreviates the "Roman Catholic Church," this Article's focus. This is not meant to overlook that the Catholic Church is one among many Christian Churches. Second, capitalization (Church vs. church) can imply certain theological premises, but none are intended here, as this Article is not theological per se.

50 *Court OKs Lethal Injections; Executions Back On*, NBCNEWS.COM, http://www.msnbc.msn.com/id/24158627/ns/us_news-crime_and_courts// (last updated Apr. 16, 2008, 7:24 PM).

51 B.A. Robinson, *Policies of Religious Groups Towards the Death Penalty*, RELIGIOUS TOLERANCE.ORG, http://www.religioustolerance.org/execut7.htm (last updated Aug. 14, 2012); *see also* U.S. CONFERENCE OF CATHOLIC BISHOPS, A CULTURE OF LIFE AND THE

Whether Catholic critique of capital punishment affects individual Justices' jurisprudence is interesting as a speculative matter, especially because Catholics are now a 6-3 majority on the Court.[52] It may well be irrelevant, in the sense that, as Justice Scalia once quipped in his inimitable way, "[j]ust as there is no 'Catholic' way to cook a hamburger, I am hard-pressed to tell you of a single opinion of mine that would have come out differently if I were not Catholic."[53] But suppose Catholic teaching does affect jurists' personal reflection, even as they presumably prescind from applying it in a formal sense?[54] Or, that it affects moral reflection on the death penalty by many among the near one-quarter of Americans who are Catholic, which research suggests is true.[55] The questions then become: how does Catholic teaching affect such reflection; and how might Catholic teaching thus

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PENALTY OF DEATH: A STATEMENT OF THE UNITED STATES CONFERENCE OF CATHOLIC BISHOPS CALLING FOR AN END TO THE DEATH PENALTY 20 (2005) [hereinafter, USCCB], *available at* http://www.usccb.org/issues-and-action/human-life-and-dignity/death-penalty-capital-punishment/catholic-campaign-to-end-the-use-of-the-death-penalty.cfm ("This Catholic campaign brings us together for common action to end the use of the death penalty, to reject a culture of death, and to build a culture of life.").

52 Commentators took the historically significant fact of Justice Sonia Sotomayor's appointment in 2009, bringing the Court's Catholic membership to an unprecedented six sitting Justices, as an occasion to address the relevance of Justices' religious affiliation. *See, e.g.*, Frances Kissling, *Are Six Catholics Too Many for the Supreme Court?*, SALON (May 31, 2009, 6:29 AM), http://www.salon.com/opinion/feature/2009/05/31/supreme_court (describing how even though she is Catholic, her views differ from some of the other Catholic Justices); *see also* Joan Alpert, *Religion & the Supreme Court: Five Catholics. Two Protestants. Two Jews. Do the Religious Beliefs of Justices Influence Their Legal Opinions?*, MOMENT (Sept. / Oct. 2008), *available at* http://momentmag.com/moment/issues/2008/10/SupremeCourt.html ("Religious background is one of several elements of personality and temperament that may affect leadership styles, the way that a justice interacts with colleagues, and the way that he pursues his agenda, but it does not guarantee that he will vote one way or another." (quoting Jeffrey Rosen)).

53 Justice Antonin Scalia, Address at Villanova University (Oct. 16, 2007) (quoted in David O'Reilly, *Scalia Opines on Faith and Justice*, PHILA. INQUIRER, Oct. 17, 2007, at B5). *See also* Alpert, *supra* note 44 (noting that "Ruth Bader Ginsburg, who frequently disagrees with Scalia, fell firmly into line with him on this one, saying in January 2008 that, if the Jews who preceded her on the Court were known as 'Jewish [J]ustices,' she and [Justice Stephen G.] Breyer, by contrast 'are [J]ustices who happen to be Jews.'").

54 Does Justice Scalia's denial just beg the question? *Compare* George Kannar, *The Constitutional Catechism of Antonin Scalia*, 99 YALE L.J. 1297, 1300 (1990) (speculating how a structured, traditional pre-Vatican II Catholic upbringing affected Justice Scalia's jurisprudence), *with* Donald L. Beschle, *Catechism or Imagination: Is Justice Scalia's Judicial Style Typically Catholic?*, 37 VILL. L. REV. 1329, 1332–33 (1992) (disputing the characterization of Justice Scalia's judicial style as prototypically Catholic).

55 *See supra* notes 18–19 and accompanying text.

be relevant, analytically speaking, to the broad backdrop of U.S. death penalty jurisprudence? This Article engages this second, analytical inquiry.

But is this even an appropriate topic? Catholic death penalty teaching consists of normative claims and moral arguments that church authorities hope will be considered in public policy decision-making.[56] In contrast, U.S. death penalty jurisprudence consists of complex bodies of statutory and constitutional law. So understood, one could argue that academic comparison of the Catholic and U.S. death penalty approaches is conceptually problematic, while applying certain conclusions arising from this descriptive exercise would be constitutionally suspect.[57] Yet, per the First Amendment, citizens may be religious, and express religious views in the public square.[58] Religious bodies' stances on broad social questions are therefore relevant, capital punishment being an example.

Indeed, beside the fact that religion affects many Americans' views on the death penalty,[59] 92% of U.S. adults "believe in the existence of God or a universal spirit,"[60] with 56% describing religion in their lives as "very important" and 26% describing it as "somewhat important."[61] Thus, inasmuch as "the 'spirit of religion' remains a

56 *See* USCCB, *supra* note 51, at 6 ("As *leaders* of a community of faith and as participants in our democracy, we are committed to contribute to a growing civil dialogue and reassessment of the use of th[e] ultimate punishment. The death penalty arouses deep passions and strong convictions. People of goodwill disagree. In these reflections, we offer neither judgment nor condemnation but instead encourage engagement and dialogue, which we hope may lead to re-examination and conversion. Our goal is not just to proclaim a position, but to persuade Catholics and others to join us in working to end the use of the death penalty.").

57 U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."). "The Religion Clauses apply to the States by incorporation into the Fourteenth Amendment." Elk Grove Unified School Dist. v. Newdow, 542 U.S. 1, 8 n.4 (2004) (citing Cantwell v. Connecticut, 310 U.S. 296, 303 (1940)).

58 U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . ."). First Amendment protections of speech are likewise enforced against state action per the Fourteenth Amendment. Gitlow v. New York, 268 U.S. 652, 666 (1925). As Professor William Marshall has argued, the free exercise of religion bears directly on the freedom of speech, and both have proper public dimensions—the "freedom of expression and free exercise provid[ing] a unitary protection for individual liberty." William P. Marshall, *Solving the Free Exercise Dilemma: Free Exercise as Expression*, 67 MINN. L. REV. 545, 546–47 (1983).

59 *See supra* notes 18–19 and accompanying text.

60 PEW FORUM ON RELIGION & PUB. LIFE, U.S. RELIGIOUS LANDSCAPE SURVEY, RELIGIOUS AFFILIATION: DIVERSE AND POLITICALLY RELEVANT 5 (2008), *available at* http://religions.pewforum.org/pdf/report2-religious-landscape-study-full.pdf.

61 *Id.* at 23.

powerful force in shaping the views and values of the American people,"[62] religious sources of moral reasoning inform many citizens' moral judgments.[63] Given that context, and because death penalty jurisprudence both engages social mores and "necessarily embodies a moral judgment,"[64] religious moral reasoning's methodological orientation may assist in framing certain issues that that jurisprudence entails. To this point, Professors Paul H. Robinson and John M. Darley have cited research indicating that "most judgments about criminal liability and punishment for serious wrongdoing are intuitional rather than reasoned."[65] To the extent that intuitions about justice also are both highly nuanced and widely shared across diverse demographic groups,[66] various frames of moral reasoning, including religious ones, may foster critical reflection on otherwise-inchoate intuitions concerning capital punishment.

Religion's relevance stems from two further observations relating broad public attitudes to jurisprudence per se. First, although moral reasoning is not the exclusive domain of religion or theology, the latter employ forms of moral reasoning. Various authors have surveyed the terrain of religion, morality, and law.[67] The point to stress here is

62 *Id.* at 1 (attributing the phrase "spirit of religion" as having been "penned" by Alexis de Tocqueville).

63 Concerning correlation of rates of religious belief to religious tenets' influence on moral reasoning, 78% of U.S. adults "agree that there are clear and absolute standards of right and wrong." *Id.* at 61. 29% "cite religious teachings and beliefs as their biggest influence." *Id.* at 62. A larger share, 52%, "says that they look most to practical experience and common sense when it comes to questions of right and wrong," but concerning sources of moral reasoning apart from personal experience, the 29% who cite religion dwarfs the 9% who cite "philosophy and reason," and the 5% who cite "scientific information." *Id.* The remaining 4% fall in the "Don't know / Refused" category. *Id.* That being said, the Pew survey also—and unsurprisingly—"confirms the close link between Americans' religious affiliation, beliefs and practices, on the one hand, and their social and political attitudes, on the other. . . . The relationship between religion and politics is particularly strong with respect to political ideology and views on [certain] social issues . . . ." *Id.* at 3.

64 Kennedy v. Louisiana, 554 U.S. 407, 419 (2008) (citations omitted) (internal quotation marks omitted).

65 Paul H. Robinson & John M. Darley, *Intuitions of Justice: Implications for Criminal Law and Justice Policy*, 81 S. CAL. L. REV. 1, 1 (2007).

66 *Id.* at 57.

67 *See generally, e.g.*, LAW AND RELIGION IN THEORETICAL AND HISTORICAL CONTEXT (Peter Cane et al., eds., 2008) (collecting essays addressing the interplay of religious concepts of morality and the law); MARTHA C. NUSSBAUM, LIBERTY OF CONSCIENCE (2008) (discussing—through philosophical, legal, historical, and theological analysis—the American tradition of equality of conscience); MICHAEL J. PERRY, RELIGION IN POLITICS: CONSTITUTIONAL AND MORAL PERSPECTIVES (1997) (analyzing, from both constitutional and religious perspectives, the proper role of religion in political dis-

that jurisprudence embraces a legal system's "fundamental elements," which includes "its ethical significance and adequacy[,] . . . bring[ing] together moral and legal philosophy."[68] Religion has made its own contributions to jurisprudence, as Professor Harold Berman has described.[69] This Article explores *Kennedy*'s moral and legal philosophy in its interface with a deep "integrative jurisprudence" that "emphasize[s] that law has to be believed in or it will not work; [that] it involves not only reason and will but also emotion, intuition, and faith."[70] Because U.S. death penalty jurisprudence necessarily embodies moral judgment, it implicates such an integrative jurisprudence, existing against a cultural, historical, and legal backdrop suffused with religion.

Second, religion is salient to death penalty jurisprudence given its own deep religious roots. To start, it would be difficult to overstate the influence of the Bible's *lex talionis* on Western moral norms regarding capital punishment. The classical statement of the *lex talionis* appears in *Exodus* 21:23: "[where] damage ensues, the penalty shall be life for life . . . ."[71] That influence also entails certain ambigu-

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course); JOHN WITTE, JR., & JOEL A. NICHOLS, RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT (3d ed. 2011) (tracing, from colonial times to today, the role of the religious principles of the Founding in the American legal experience); Michael S. Moore, *Four Reflections on Law and Morality*, 48 WM. & MARY L. REV. 1523 (2007) (discussing the role of morality in four distinct areas of the law: the judicial role; the legislative role; the concept of "justice under the law;" and substantive virtue in law).

68 BLACK'S LAW DICTIONARY 932–33 (Bryan A. Garner, ed., 9th ed. 2009) (defining "jurisprudence," "ethical jurisprudence," and "general jurisprudence"); *see also* HAROLD J. BERMAN, LAW AND REVOLUTION vi-vii (1983) (describing positivist jurisprudence's analytical persuasion and expressly political implications, natural law jurisprudence's theoretical, moral-philosophical bent, and historicist jurisprudence's focus on social theory).

69 *See generally* BERMAN, *supra* note 68, at 49–272 (theorizing that law in the West underwent its most significant changes as a result of six revolutions, beginning with the "Papal Revolution" of 1075–1122, which coincided with the Gregorian Reform in the Catholic Church and its "new canon law"—itself the first modern legal system in the West—from which followed a host of secular legal systems that are predecessors of those we have today).

70 *Id.* at vii. Analogously, but with respect to capital punishment, Professor David Garland has characterized his recent study of the American death penalty as "a 'law and society' project that works in [two] directions—studying a social context to better understand a legal institution, but also using a legal institution to better understand society." GARLAND, *supra* note 4, at 16.

71 TANAKH: A NEW TRANSLATION OF THE HOLY SCRIPTURES ACCORDING TO THE TRADITIONAL HEBREW TEXT (Jewish Publication Society, 1985). *See also id.*, *Genesis* 9:6 ("Whoever sheds the blood of man, [b]y man shall his blood be shed; For in His image [d]id God make man."). For a detailed analysis of the *lex talionis*, *see* David Daube, *Lex Talionis*, *in* STUDIES IN BIBLICAL LAW 102 (1947, 1969), *reprinted in* 3 BIBLI-

ities, scholars noting that Jewish and Christian Scriptures' views on the death penalty cut both ways, as it were.[72] Many conclude, especially given modern historical-critical interpretation, that biblical texts taken as a whole are equivocal about the death penalty.[73] Early Christians may have been ambivalent in their own attitudes, as they would have interpreted biblical texts in light of the fact that Jesus' execution was central to their belief, and that many of them faced the same fate as a persecuted minority in the pre-Constantine Roman Empire.[74]

The Bible's influence on capital punishment certainly survived antiquity; millennia-worth of its defenders have cited the Bible for its justification, from ancient Israelites, to Christian authorities, to modern citizens.[75] Also, religious views on the death penalty evolved just as church and state developed, in tandem and in tension, together with their respective legal systems:[76] "basic institutions, concepts, and values of Western legal systems have their sources in religious rituals,

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CAL LAW AND LITERATURE 203–39 (Calum Carmichael ed., Collected Works of David Daube, 2003)).

72 *Compare* E. CHRISTIAN BRUGGER, CAPITAL PUNISHMENT AND ROMAN CATHOLIC MORAL TRADITION 60–62 (2003) (citing numerous death penalty prescriptions in the Torah), *with* JAMES J. MEGIVERN, THE DEATH PENALTY 12 (1997) (arguing that procedural and other protections in Jewish law effectively, and quite considerably, narrowed the death penalty's applicable scope).

The Christian Scriptures, or New Testament, also equivocate. In Matthew's Gospel, Jesus affirms some commandments of the Mosaic law concerning killing and retaliation, but contravenes others. *Matthew* 5:38–39, 43–44, NEW AMERICAN BIBLE (Donald Senior, et al., trans. and eds. 1990) ("You have heard that it was said, '[a]n eye for an eye and a tooth for a tooth.' But I say to you, offer no resistance to one who is evil . . . [and] [y]ou have heard that it was said, '[y]ou shall love your neighbor and hate your enemy.' But I say to you, love your enemies, and pray for those who persecute you"). But in *Romans* 13:1–4, Saint Paul starkly defends the death penalty: "Let every person be subordinate to the higher authorities, for there is no authority except from God, and those that exist have been established by God . . . . But if you do evil, be afraid, for [authority] does not bear the sword without purpose; it is the servant of God to inflict wrath on the evildoer." *Id.*

73 Richard H. Hiers, *The Death Penalty and Due Process in Biblical Law*, 81 U. DET. MERCY L. REV. 751, 834–36 (2004).

74 *See* MEGIVERN, *supra* note 72, at 19–20.

75 *See* BRUGGER, *supra* note 72, at 60; MEGIVERN, *supra* note 72, at 9–10; *see also* B.A. Robinsion, *A Public Debate on Capital Punishment: Further Religious and Moral Considerations*, RELIGIOUSTOLERANCE.ORG, http://religioustolerance.org/execut7a.htm (last updated Aug. 14, 2012) (citing the Southern Baptist Church Assembly's recent declaration, based on biblical reference, of "God['s] authoriz[ation of] capital punishment for murder after the Noahic Flood, validating its legitimacy in human society." (citation omitted)).

76 BERMAN, *supra* note 68, at 50, 87 (observing that legal *systems* per se developed in both the church and in secular states in the early twelfth century and after, with "[t]he creation of modern legal systems [being], in the first instance, a response to

liturgies, and doctrines of the eleventh and twelfth centuries," including "attitudes toward death, sin, punishment, [and] forgiveness."[77] Even if "religious attitudes and assumptions have changed fundamentally" since then, "legal institutions, concepts, and values that have derived from them still survive, often unchanged."[78] Indeed, executions remain highly ritualized, even quasi-religious.[79]

Professor Stuart Banner has portrayed how religious intuitions powerfully informed this nation's earliest death penalty.[80] "Terror, Blood, and Repentance," the first chapter in his history of the U.S. death penalty, concludes by poignantly observing that the death penalty in the colonial and early national eras "fulfilled the moral expectations of most colonial Americans . . . ."[81] Others have documented religion's influence on capital punishment well into the present.[82] And the relevance (or not) of religious moral reasoning even extends to Supreme Court jurisprudence: Justice John Paul Stevens cited anti-death penalty amici briefs filed by U.S. religious communities in 2002 in *Atkins v. Virginia*,[83] which barred the death penalty for persons who have mental retardation.[84]

On the other hand, Chief Justice John Roberts's plurality opinion in *Baze v. Rees* noted that, while "[r]easonable people of good faith disagree on the morality and efficacy of capital punishment,"[85] the precise questions before the Court often require distinguishing the

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revolutionary change within the church and in the relation of the church to the secular authorities").

77 *Id.* at 165.

78 *Id.*

79 Leigh B. Bienan, *Anomalies: Ritual and Language in Lethal Injection Regulations*, 35 FORDHAM URB. L.J. 857, 872 (2008) (describing "rituals and traditions" of U.S. executions, including "statements regarding the prisoner's choice of his method of death, his choice of his final meal, the visit of the religious figure, the solicitation of repentance, the reporting of the prisoner's last words, and the donning of ceremonial clothes").

80 *See* STUART BANNER, THE DEATH PENALTY 5, 23 (2002) (detailing the various uses of the death penalty in the early American colonies).

81 *Id.* at 23.

82 *See generally* Owens et al., *supra* note 15 (compiling modern reflections on the death penalty from various theological perspectives); PEW FORUM, *supra* note 18; (presenting recent survey data on the relationship between respondents' faith and his/her opinion on the death penalty); Robert F. Drinan, *Religious Organizations and the Death Penalty*, 9 WM. & MARY BILL RTS. J. 171 (2000) (documenting the Catholic Church's relatively recent opposition to the death penalty).

83 536 U.S. 305 (2002).

84 *Id.* at 316 n.21 (citing opposition to the death penalty for mentally retarded persons by "widely diverse religious communities within the United States").

85 *Baze*, 553 U.S. at 61 (plurality opinion).

constitutionality of execution procedures from "moral [or] religious" perspectives on the death penalty.[86] But what of the moral judgment that, per a majority in *Kennedy*, necessarily informs death penalty jurisprudence?[87] Furor over Troy Davis's execution signals this question about death penalty jurisprudence's precise moral contours.[88] For example, when courts conclude that review of an innocence claim has met due process requirements, yet substantial questions remain about the defendant's guilt and/or matters like the role of race in adjudicating it, how divorced is the constitutionality of procedure from capital punishment's morality per se, especially given the notion that "death is different"?[89] This Article explores the death penalty as law and morality question, in light of religious and secular moral norms, and the law's own normative values.

C. Capital Punishment, Moral Reasoning, and Comparative Law

In studying the death penalty this way, this Article employs insights from comparative law, which asks whether different legal systems or traditions so diverge as to preclude substantive comparison.[90] As Professor Esin Örücü argues, "[c]omparative law is about communication, and, by providing [a] language [for it,] . . . allows legal scholars to enter into holistic communication."[91] Facilitating such holistic communication is the goal of comparing the moral reasoning language of U.S. death penalty jurisprudence, via *Kennedy v. Louisiana*, with Catholic death penalty teaching. Especially because the latter

86 *Id.* at 41 (plurality opinion) (internal quotation marks omitted).

87 Kennedy v. Louisiana, 554 U.S. 407, 419 (2008).

88 *See* Emily Hauser, *Troy Davis and the Reality of Doubt*, ATLANTIC MONTHLY (Sept. 20, 2011), http://www.theatlantic.com/national/archive/2011/09/troy-davis-and-the-reality-of-doubt/245384/ (observing in the wake of Mr. Davis's case and that of Duane Buck, whose execution was blocked by the Supreme Court in a rebuke to Texas's handling of racial testimony by an expert witness, that fighting against condemned inmates' relief "is saying that [a state's] interest in the finality of its capital judgments is more important than the accuracy of its capital verdicts").

89 *See* Gregg v. Georgia, 428 U.S. 153, 188 (1976) (plurality opinion) ("[W]hile . . . the infliction of the death penalty [does not] *per se* violate[ ] the Constitution's ban on cruel and unusual punishments, . . . the penalty of death is different in kind from any other punishment imposed under our system of criminal justice." (citations omitted)).

90 *See generally, e.g.*, Peter De Cruz, Comparative Law in a Changing World (2d ed. 2007) (providing a comprehensive introduction to comparative law, both historically and in the modern context); COMPARATIVE LAW IN THE 21ST CENTURY (Andrew Harding & Esin Örücü eds., 2002) (discussing both theoretical and substantive areas of comparative law).

91 Esin Örücü, Unde Venit, Quo Tendit *Comparative Law?*, *in* COMPARATIVE LAW IN THE 21ST CENTURY, *supra* note 90 at 15.

envisions itself as speaking "beyond the confines of the Catholic community, [to a] global audience of 'all people of good will,'"[92] such a comparison can support robust discourse about capital punishment's moral contours today.[93]

But because skepticism concerning these premises may remain, following is a juxtaposition of a critical passage from *Kennedy* with a synopsis of Catholic teaching.[94] This reveals several similarities, supporting the claim that substantive comparison is feasible.

92 Kenneth R. Himes, *Introduction*, MODERN CATHOLIC SOCIAL TEACHING 5 (Kenneth R. Himes et al., eds., 2005).

93 Professor William Twining endorses including religious law and entities' relevance to comparative law, William Twining, *Globalisation and Comparative Law*, *in* COMPARATIVE LAW: A HANDBOOK 71 (Esin Örücü & David Nelken eds., 2007), and Professors Andrew Harding and Esin Örücü argue that "comparativists[ ] will regard religion as part of the underlying deeply seated processes that influence the evolving shape of law." COMPARATIVE LAW IN THE 21ST CENTURY, *supra* note 90, at ix.

94 Professor Peter De Cruz has identified linguistic and terminological difficulties, cultural differences, and risks of superimposing common legal patterns or one's own lens of expectations as among the difficulties inherent in comparing different legal systems and traditions—as this Article does—but also argues that such potential pitfalls should not preclude a comparison even of vastly different entities. DE CRUZ, *supra* note 90, at 216–19.

Preliminary Comparison: Kennedy v. Louisiana[95] *and Catholic Teaching*[96]

Kennedy	**A Summary of Catholic Teaching**
[T]he Eighth Amendment's protection against excessive or cruel and unusual punishments flows from the basic precept of justice that punishment for a crime should be graduated and proportioned to the offense. Whether this requirement has been fulfilled is determined . . . by the norms that currently prevail[, and] . . . from the evolving standards of decency that mark the progress of a maturing society. This is because the standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change. Evolving standards of decency must embrace and express respect for the dignity of the person, and the punishment of criminals must conform to that rule[, being] . . . justified under one or more of three principal rationales: rehabilitation, deterrence, and retribution. It is the last of these, retribution, that most often can contradict the law's own ends. This is of particular concern . . . in capital cases. When the law punishes by death, it risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint. For these reasons . . . capital punishment must be limited to those offenders who commit a narrow category of the most serious crimes and whose extreme culpability makes them the most deserving of execution. Though the death penalty is not invariably unconstitutional, the Court insists upon confining the instances in which the punishment can be imposed.	The efforts of the state to curb the spread of behavior harmful to people's rights and to the basic rules of civil society correspond to the requirement of safeguarding the common good. Legitimate public authority has the right and the duty to inflict punishment proportionate to the gravity of the offense. Punishment has the primary aim of redressing the disorder introduced by the offense . . . [and], in addition to defending public order and protecting people's safety, has a medicinal purpose: as far as possible, it must contribute to the correction of the guilty party. Assuming that the guilty party's identity and responsibility have been fully determined, [our] traditional teaching . . . does not exclude recourse to the death penalty, if this is the only possible way of effectively defending human lives against the unjust aggressor. If, however, nonlethal means are sufficient to defend and protect people's safety from the aggressor, authority will limit itself to such means, as these are more in keeping with the concrete conditions of the common good and are more in conformity to the dignity of the human person. [*The sanction of death, when it is not necessary to protect society, . . . diminishes all of us.*] Today, in fact, as a consequence of the possibilities which the state has for effectively preventing crime, by rendering one who has committed an offense incapable of doing harm—without definitely taking away from him the possibility of redeeming himself—the cases in which the execution of the offender is an absolute necessity are very rare, if not practically nonexistent.

95 Kennedy v. Louisiana, 554 U.S. 407, 419–20 (2008) (brackets, paragraph breaks, citations, and internal quotation marks omitted).

96 CATECHISM OF THE CATHOLIC CHURCH §§ 2265–67 (rev. ed., United States Catholic Conference-Libreria Editrice Vaticana, 1997) [hereinafter, CCC] (paragraph

The preceding juxtaposition illustrates how both Eighth Amendment death penalty jurisprudence and Catholic death penalty teaching employ the language of law and morality, incorporating broad themes of jurisprudence concerning authority, tradition, the interests of civil society, and the purposes of punishment. *Kennedy* begins with a threshold affirmance of the death penalty's constitutionality, but articulates a firm presumption limiting its scope to a narrow category of offenders and offenses, circumscribed by notions of seriousness, extreme culpability, and moral desert. The Catholic emphasis on procedural safeguards exists alongside concern about racial bias and a diminished humanity perceived to result from excessively retributive moral intuitions. Both articulate a presumption of restraint in its application, striving to balance broad moral values with appropriate procedural rules. Moreover, a reader who did not know that the second statement is from a religious entity might assume it to be a statutory preamble or policy statement comprising part of a legislative history.

Comparative legal theory addressing law and religion can explain this phenomenon. For, notwithstanding the fact that disestablishment is a key feature of the U.S. legal system, the history of "the law" per se in the West, to which U.S. jurisprudence is an heir, is inextricably linked with religion, as Professor Berman has extensively documented.[97] If anything, that presumably is among the historical factors giving rise to the American ethos of both disestablishment and free exercise.[98] In any event, decades before Professor Berman's contribu-

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breaks and quotations omitted); USCCB, *supra* note 51, at 4 (the italicized, bracketed text above).

97 *See* BERMAN, *supra* note 68 (documenting the Western legal tradition's emergence from the dialectical relationship between secular and religious ideas and institutions); *see also* JAVIER MARTÍNEZ-TORRÓN, ANGLO-AMERICAN LAW AND CANON LAW 168 (1998) (studying how religion and its "moral concepts were transplanted into the legal world").

98 In a recent, incisive study, Professor Alan Brownstein has endorsed reading the religion clauses as "support[ing] and reinforc[ing] each other in critical ways," so as to "assign[ ] considerable value to the right to practice one's faith free from state interference while acknowledging that the affirmative support of religion by government risks the sacrifice of important liberty and equality interests of both believers and non-believers." Alan Brownstein, *The Religion Clauses as Mutually Reinforcing Mandates: Why the Arguments for Rigorously Enforcing the Free Exercise Clause and Establishment Clause Are Stronger When Both Clauses Are Taken Seriously*, 32 CARDOZO L. REV. 1701, 1705 (2011). Professor Brownstein's argument is not without support. As a unanimous Supreme Court recently observed in *Hosanna-Tabor*, while "there can be 'internal tension . . . between the Establishment Clause and the Free Exercise Clause,'" that is not always the case—e.g., where, as in *Hosanna-Tabor*, the government interferes with a religious group's employment of its ministers, such that the clauses operate in

tion to the field, Professor Stephan Kuttner studied the same phenomenon, characterizing as "interpenetration" the historically dialectical relationship between Catholic canon law and secular Western law.[99] This term aptly helps explain why U.S. death penalty jurisprudence and Catholic death penalty teaching—as sketched out above in preliminary form, and as the following analysis fleshes out—sound with a similar tone, if not speak in a similar tongue. The point is not that one mimics, much less replicates, the other. Rather, because they share a deep substantive tradition, their frames of moral reasoning use similar operative premises. They are, that is, translatable. As Professor David Daube has observed:

> Religion borrows from law freely, continuously and from early on, hence can greatly enlighten us as to legal life in successive periods. Law is perhaps partially responsible for the very existence of a normative side of religion—duties, procedures, sanctions—as well as particular manifestations of it: quite compatible with equal indebtedness the other way around.[100]

What, then, do U.S. death penalty jurisprudence, á la *Kennedy*, and Catholic death penalty teaching each say, and what might they say to one another?

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tandem. Hosana-Tabor Evangelical Lutheran Church and School v. Equal Emp't Opportunity Comm'n., 132 S. Ct. 694, 702 (2012) (quoting Tilton v. Richardson, 403 U.S. 672, 677 (1971) (plurality opinion)). The Court proceeded to compare English practices with the diverse approaches to both establishment and free exercise in our colonial and early national experience, observing that the latter both arose from and reacted against that history, all of this being the "background [against which] the First Amendment was adopted." *Id.* at 702–03. *See generally* KENT GREENAWALT, RELIGION AND THE CONSTITUTION (2006) (laying out an expansive exposition of the free exercise of religion and nonestablishment in the United States); JOHN WITTE, JR., & JOEL A. NICHOLS, RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT (3d ed. 2011) (outlining the theological and political movements in the early United States that inspired the First Amendment).

99 *See* STEPHAN KUTTNER, *Some Considerations of the Role of Secular Law and Institutions in the History of Canon Law*, 2 SCRITTI DI SOCIOLOGIA E POLITICA IN ONORE DI LUIGI STURZO 351–61 (1953), *reprinted in* STEPHAN KUTTNER, STUDIES IN THE HISTORY OF MEDIEVAL CANON LAW VI–351–VI-362 (1990) (describing the "general interpenetration" of ecclesiastical and secular law from the fourth to sixteenth centuries as "fundamental" in Western legal and administrative systems and governance structures; doctrines on just war and the use of force; the development of constitutional and international law; and the law governing contracts, corporations, wills and estates, marriage, and private law). Crucially, this was a dialectical process, with components of Catholic canon law and secular Roman law influencing one another. *See id.* at 354–55; *see also* BERMAN, *supra* note 68, at 144 n.53, 187 n.44, 189 & n.46, 190–92 & nn.48–50, 201 & n.7, 205 n.16, 207 n.22 (citing Professor Kuttner's work).

100 David Daube, *Biblical and Postbiblical Law*, *in* 3 BIBLICAL LAW AND LITERATURE, *supra* note 71, at 10.

II. U.S. Death Penalty Jurisprudence

No "American position" on capital punishment can be stated as succinctly as one finds in the *Catholic Catechism*. Its history of practice by various states and the federal government is profoundly diverse,[101] and the constitutional framework governing those practices is "exceedingly complex," as Justice Samuel Alito observed in *Kennedy*.[102] (Others less euphemistically characterize Eighth Amendment jurisprudence as "embarrassing," or "a train wreck."[103]) Nevertheless, it is possible to sketch a general outline of U.S. death penalty jurisprudence through reference to historical highlights, the role of the Model Penal Code's recently withdrawn capital sentencing section (which many death penalty jurisdictions' statutes follow to some degree),[104] and its post-*Kennedy* constitutional status.

A. Historical Background

Evocative of Professor Kuttner's theory of interpenetration, early American law included "vaguely and inaccurately remembered fragments of common law, local law, Mosaic law . . . and Roman law."[105] U.S. death penalty jurisprudence likewise emerged from the Western tradition's broad legal, political, and religious history.[106] Just as "capital punishment [remains] constitutional" in the United States

101 *See generally Part I: History of the Death Penalty*, Death Penalty Info. Ctr., http://www.deathpenaltyinfo.org/part-i-history-death-penalty (last visited Sept. 24, 2012) (outlining the historical progression of the death penalty in America).

102 Kennedy v. Louisiana, 554 U.S. 407, 452 (2008) (Alito, J., dissenting).

103 Stinneford, *supra* note 36, at 1740 (quotations omitted).

104 *See generally* Russell Dean Covey, *Exorcizing Wechsler's Ghost: The Influence of the Model Penal Code on Death Penalty Sentencing Jurisprudence*, 31 Hastings Const. L.Q. 189 (2004) (discussing the theoretical underpinnings of the Model Penal Code, how the States borrowed from the Model Penal Code to create their capital punishment schemes, and the influence of the retributive basis for the death penalty in the Court).

105 Kermit L. Hall et al., American Legal History: Cases and Materials 37 (3d ed., 2005); *see also id.* at 2 ("Americans created their legal order in a spirit of eclectic opportunism, drawing from various sources of law and devising new rules of law when they found nothing suitable in existing systems.").

106 *See generally* Banner, *supra* note 80 (chronicling history of the death penalty in the United States and the theories behind changes in death penalty policies over time); *Part I: History of the Death Penalty*, *supra* note 101 (observing that, while European settlers "brought [with them] the practice of capital punishment," specific "death penalty [laws] varied from colony to colony," though among the first, in Virginia in 1612, were "the Divine, Moral and Martial Laws, which provided the death penalty for even minor offenses").

today,[107] law and morality, together with religion in particular, have been important subtexts from its earliest history to the present.[108] Owing to English common law practice, the death penalty was imposed in the colonies and the early republic for a variety of offenses against persons, property, and morality.[109] Up to the present, U.S. religious groups have stood on both sides of the death penalty debate,[110] while the beliefs of those groups continue to influence their adherents' views.[111] Presumably that is neither culturally insignificant nor politically irrelevant given that thirty-three states, the federal government, and the U.S. military have capital sentencing laws in force, and over 3200 inmates occupy the nation's death rows.[112]

Of pivotal historical and legal significance was the Supreme Court's 1972 invalidation, in *Furman v. Georgia*,[113] of all existing capital sentencing schemes on the ground that its arbitrary and capricious administration violated the Eighth Amendment.[114] Crucial to the

107 Baze v. Rees, 553 U.S. 35, 47 (2008) (plurality opinion) (citing Gregg v. Georgia, 428 U.S. 153, 177 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.)); *cf. Kennedy*, 554 U.S. at 420 ("Though the death penalty is not invariably unconstitutional, the Court insists on confining the instances in which the punishment can be imposed." (citing *Gregg*, 428 U.S. at 153)).

108 *See* MEGIVERN, *supra* note 72, at 299–335 (cataloguing biblical and other religious influences on capital punishment transplanted from Europe to the early American context); *see also* BANNER, *supra* note 80, at 5–23; (discussing death penalty law in colonial America); Owens et al., *supra* note 9 (compiling modern reflections on the death penalty from authors of diverse faiths).

109 *See* BANNER, *supra* note 80, at 5–9.

110 *See* Robinson, *supra* note 51; (cataloguing different religious views on the death penalty); *Part II: History of the Death Penalty*, DEATH PENALTY INFORMATION CENTER, http://www.deathpenaltyinfo.org/part-ii-history-death-penalty (last visited Dec. 9, 2011) (surveying religious organizations' views on the death penalty).

111 *See supra* notes 18–19 and accompanying text.

112 *Facts About the Death Penalty*, DEATH PENALTY INFO. CTR. (Sept. 26, 2012), *available at* http://www.deathpenaltyinfo.org/documents/FactSheet.pdf.

113 408 U.S. 238 (1972).

114 *Furman*'s precise holding is hard to pin down, as it yielded nine opinions spanning over 200 pages. *Furman*, 408 U.S. at 470. The opinion authored by three Justices four years later in *Gregg v. Georgia* summarized *Furman* as invalidating statutes prone to yield arbitrary and capricious death sentences—i.e., those which allowed "juries [to] impose[ ] the death sentence in a way that could only be called freakish." *Gregg*, 428 U.S. at 206 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.). Later revisiting and upholding Georgia's capital punishment statute, the Court quoted *Gregg*'s rule that the "'discretion . . . afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared . . . must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.'" Zant v. Stephens, 462 U.S. 862, 874 (1983) (quoting *Gregg*, 428 U.S. at 189).

decision was its invocation of "evolving standards of decency" to find unconstitutional, as administered, a sanction that had been in place for centuries.[115] Four years later, in *Gregg v. Georgia* and companion cases from Florida and Texas, the Court upheld statutes that had been revised to satisfy *Furman*'s requirement of rationality and consistency in capital proceedings.[116] Rationality and consistency in weighing the ultimate punishment bespeak moral reasoning, as do "evolving standards of decency" as a substantive constitutional principle. Indeed, arguably advancing a rule that capital adjudication proceed as a moral reasoning enterprise, the Court upheld statutes that adequately channeled sentencing discretion,[117] but voided those providing for mandatory death sentences.[118] While the latter approaches may have addressed unbridled discretion, pluralities of the Court concluded they impermissibly removed the ultimate (moral?) question of death—and the individualized determination that the Court saw that that question requires—from any discretionary analysis whatsoever.[119]

Moreover, Professor Banner has argued that capital punishment's "comeback" in popularity and practice after *Gregg* owed to two broad factors operative in social consciousness. First, "capital punishment was a moral imperative," an extension of the principle that "[t]he criminal law 'must remind us of the moral order by which alone we can live'. . . ."[120] Second, this abstract notion of moral order bore overt expression in the sense that inflicting capital punishment met a need "for a collective condemnation of crime."[121] In both respects, the revived American death penalty tapped into certain notions of moral order and the common good that also inform the Catholic worldview, as Part III will argue. Professor Banner's thesis is not stale, as Professor Garland more recently argued:

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115 *Furman*, 408 U.S. at 242 (Douglas, J., concurring) (citing Trop v. Dulles, 356 U.S. 8684, 101 (1958) (plurality opinion) (applying the evolving standards of decency principle not to capital punishment, but to a statute providing for the expatriation of one convicted by military court martial, and thereafter dishonorably discharged, for wartime desertion)); *id.* at 269–70 (Brennan, J., concurring opinion); *id.* at 327, 329 (Marshall, J., concurring opinion).

116 *Gregg*, 428 U.S. at 206–07 (joint opinion of Stewart, Powell, and Stevens, JJ.).

117 *See* Proffitt v. Florida, 428 U.S. 242 (1976) (upholding Florida death penalty statute); Jurek v. Texas, 428 U.S. 262 (1976) (same in Texas).

118 *See* Woodson v. North Carolina, 428 U.S. 280 (1976) (voiding North Carolina death penalty provision); Roberts v. Louisiana, 428 U.S. 325 (1976) (same in Louisiana).

119 *See Woodson*, 428 U.S. at 280.

120 BANNER, *supra* note 80, at 282–83 (quoting WALTER BERNS, FOR CAPITAL PUNISHMENT 173 (1979)).

121 *Id.* at 283.

> We need to think about capital punishment not as a lumbering dinosaur with an ancient physiology but instead as a mobile assemblage of practices, discourses, rituals, and representations that has evolved over time in response to the demands of the social environment and the pressure of competing forces. Doing so reminds us that capital punishment has a history that shapes its forms as well as its uses. And it obliges us to take account of its contemporary incarnation—the institutional arrangements, legal procedures, discursive figures, and dramatic forms that actually exist today.[122]

Today's death penalty, then, requires analytical attention to its resonance with "integrative jurisprudence," to recall Professor Berman's phrase.[123]

Full analysis of current capital jurisdictions' death penalty statutes exceeds this Article's scope. However, brief discussion of Section 210.6 of the Model Penal Code (MPC) is illuminating because statutory schemes like those upheld in *Gregg* took their cue from it,[124] and many still rely, at least in part, on its framework, despite its being withdrawn by the American Law Institute in 2009.[125] Germane to this Article, Section 210.6 requires factfinders to assess properly "moral" categories concerning an offender's relative depravity, culpability, and desert of the ultimate punishment. Key MPC features that are a mainstay of many statutes include its categories of death penalty-eligible homicides and mens rea specifications;[126] its framework of aggravating and mitigating factors for weighing death versus life imprisonment;[127] and its provision for bifurcated proceedings, which arguably focus attention on the moral weight of a sentencing decision in its own right, apart from a legal finding of guilt.[128] *Kennedy v. Louisiana* approvingly referenced such frameworks with respect to capital murder, but concluded they should not be applied or refashioned for pur-

122 GARLAND, *supra* note 4, at 18–19.

123 *See supra* note 68 and accompanying text.

124 *Gregg* extensively referenced the MPC. *See* Gregg v. Georgia, 428 U.S. 153, 185, 189, 191, 194, 195 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.). On its role in capital sentencing statues, see, e.g., BANNER, *supra* note 80, at 269–270; Covey, *supra* note 104; Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 N. CRIM. L. REV. 319, 325 (2007).

125 Concerning the MPC's role in capital sentencing statutes following the American Law Institute's withdrawal of Section 210.6, see Franklin E. Zimring, Editorial, *Pulling the Plug on Capital Punishment*, NAT'L L.J., Dec. 7, 2009, *available at* http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202436026535&slreturn=1&hbxlogin=1.

126 MODEL PENAL CODE § 210.2(1)–(2) (1985).

127 *Id.* § 210.6(3)–(4).

128 *Id.* § 210.6(2).

poses of nonhomicide crimes.[129] Nonetheless, such frameworks' moral premises did carry the day in *Kennedy*'s analysis, with sweeping effect.

B. Eighth Amendment Jurisprudence in Kennedy v. Louisiana

At its core, *Kennedy* held that the Eighth Amendment "bars . . . the death penalty for the rape of a child where the crime did not result, and was not intended to result, in death of the victim."[130] More broadly, and evoking without naming the *lex talionis*, it distinguished "between intentional first-degree murder on the one hand and nonhomicide [sic] crimes against individual persons, even including child rape, on the other," arguing that, while "[t]he latter crimes may be devastating in their harm," they are unequal to homicide "'in terms of moral depravity and of the injury to the person and to the public . . . ."[131] The Court thus did not limit its moral analysis to the petitioner or those like him, but applied an expansive moral reasoning. As Professor Elisabeth Semel has argued, *Kennedy*'s analysis relies on "a moral core" reminiscent of the penetrating—even if not then majority-forming—readings of the Eighth Amendment by Justices William J. Brennan and Thurgood Marshall.[132] The following analysis examines that core, focusing on how the decision: (1) frames the fundamental issue before the Court in moral terms; (2) emphasizes moral dimensions of Eighth Amendment doctrine; and (3) applies that jurisprudence in a manner that bespeaks the Justices' own moral agency.[133] To demonstrate how the text as a whole is an exercise in disputed, and disputable, judicial moral reasoning, the analysis discusses the dissent in tandem.

1. *Kennedy*'s Moral Tone and Context

A threshold textual analysis supports the premise that *Kennedy* is morally focused. The majority opinion employs formulations of the word "moral" eight times; the dissent does so eleven times.[134] Those

129 *See* Kennedy v. Louisiana, 554 U.S. 407, 440–41 (2008).

130 *Id.* at 413.

131 *Id.* at 438 (quoting Coker v. Georgia, 433 U.S. 584, 598 (1977) (plurality opinion)).

132 *See* Semel, *supra* note 47, at 894 & nn.312, 315.

133 Corresponding to each focus area, subsection (1) treats Part I of *Kennedy*, 554 U.S. at 418; subsection (2) treats Part II of *Kennedy*, *id.* at 419–21, and subsection (3) treats Parts III–V of *Kennedy*, *id.* at 422–47.

134 *Compare Kennedy*, 554 U.S. at 418 419, 427, 435, 437, 438 (majority opinion) (twice), *with id.* at 452, 459, 461, 466 (Alito, J., dissenting) (four times), *and id.* at 467 (twice), *and id.* at 469 (twice).

nineteen formulations of "moral" represent an approximate 70% appearance rate compared with iterations of the conceptually analogous "evolving standards of decency," which appear fifteen times in the majority opinion and twelve times in the dissent.[135] By way of comparison, references to proportionality and formulations thereof, which form the substantive core of Eighth Amendment analysis, occur nineteen times (sixteen times in the majority opinion, three times in the dissent)—i.e., just as frequently as formulations of "moral."[136] How, though, does this get fleshed out?

The majority opinion sets a moral tone early on, proceeding from a brief summary of its holding to aver that the petitioner's brutal rape of his eight-year-old stepdaughter "cannot be recounted . . . in a way sufficient to capture in full the hurt and horror inflicted on his victim or to convey the revulsion society, and the jury that represents it, sought to express by sentencing [him] to death."[137] Following a gruesome recitation of facts that would arouse moral indignation in any decent person,[138] it shifts to an ethical assessment of those details' legal significance, characterizing the judgment rendered by the Louisiana court being reviewed as having "reasoned [that] the rape of a child is unique in terms of the harm it inflicts upon the victim and our society."[139] *Kennedy*'s own reasoning is "moral," then, in a first sense,

135 *Compare id.* at 419 (majority opinion) (four times), *and id.* at 420, 421, 434, 435 (twice), *and id.* at 438, 439, 441, 446 (twice), *with id.* at 447, 448 (Alito, J. dissenting) (three times), *and id.* at 452, 454, 455, 458, 459, 460 (twice). This analysis includes variations of "values" as a general synonym for "standards" (of decency), but does not include equivocal uses of the word "standard" in the sense more typical of legal writing, e.g., "standards that would guide [a death penalty case] decisionmaker so the penalty is . . . not imposed in an arbitrary way." *Id.* at 439 (majority opinion).

136 *Compare id.* at 419, 420, 421, 424 (majority opinion) (twice), *and id.* at 426, 427 (twice), *and id.* at 428, 429, 430 (twice), *and id.* at 435, 438, 441, 446, *with id.* at 449, 450, 453 (Alito, J. dissenting). While references to "the Eighth Amendment" appear twenty-five times in the majority opinion, twenty-two times in the dissent. *Compare id.* at 412 (majority opinion) (twice), *and id.* at 413, 418, 419 (six times), *and id.* at 420 (twice), *and id.* at 421 (twice), *and id.* at 424, 426 (twice), *and id.* at 427, 428, 434 (three times), and *id.* at 435, 437, 446, *with id.* at 447, 448 (Alito, J., dissenting (three times), *and id.* at 449 (twice), *and id.* at 450, 451 n.1, 452, 454, 461 (twice), *and id.* at 462, 464 (twice), *and id.* at 465 (twice), *and id.* at 466, 467 469 (three times). But many such references exist for citation purposes, multiple appearances within the course of several sentences, not to mention in formal citations per se, supporting this premise. Thus, that variations on "moral," which is a distinctive substantive theme, occur approximately 40% as frequently as often-boilerplate recitations of the constitutional provision applicable to the case seems not insignificant.

137 *Id.* at 413.

138 *See id.* at 413–15.

139 *Id.* at 418 (citing State v. Kennedy, 957 So. 2d 757, 781 (La. 2007)).

to the extent that the Court contextualizes the case as turning on a proportional assessment of "unique" forms of harm extending to child rape victims and those charged with protecting them.[140] Assessing harm as a basis for judging the proportionality—and thus constitutionality—of a particular punishment ipso facto implies moral reasoning. Moreover, this "common good" dimension to the Court's framing of the issue recalls moral dimensions of death penalty discourse described in Part I, and resonates with the Catholic perspective, as Part III asserts.

The dissent also begins with a moral tone, but with different effect, objecting to the majority's "sweeping" and "[un]sound" holding:

> [N]o matter how young the child, no matter how many times the child is raped, no matter how many children the perpetrator rapes, no matter how sadistic the crime, no matter how much physical or psychological trauma is inflicted, and no matter how heinous the perpetrator's prior criminal record may be.[141]

The dissent underscores the "grievous[ ]" harm not just to "any victim" of rape—especially children—but to "society[ ] . . . as well," given pernicious long-term effects such as "substance abuse, dangerous sexual behaviors[,] . . . inability to relate to others on an interpersonal level, and psychiatric illness."[142] It continues:

> The harm that is caused to the victims and to society at large by the worst child rapists is grave. It is the judgment of the Louisiana lawmakers and those in an increasing number of other States that these harms justify the death penalty. The Court provides no cogent explanation why this legislative judgment should be overridden. Conclusory references to "decency," "moderation," "restraint," "full progress," and "moral judgment" are not enough. . . . [T]he worst child rapists exhibit the epitome of moral depravity[,] and . . . child rape inflicts grievous injury on victims and on society in general.[143]

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140 *See supra* note 9 (citing various definitions of "moral" as, e.g., the "expressi[o]n [of] . . . a conception of right behavior," as well as that which is "operative on one's conscience or ethical judgment," or broadly pertains to the "perceptual or psychological"). Specifically, the majority ascribes to *State v. Kennedy*, 957 So. 2d 757, 781 (La. 2007), the proposition that "*[b]ecause* children are a class that need special protection," the harm that child rape inflicts "upon [both] the victim and . . . [our] society" is "unique," such that precedent precluding the death penalty for the rape of an adult woman should not necessarily preclude it for child rape. *Kennedy*, 554 U.S. at 417–18 (emphasis added) (internal quotation marks omitted).

141 *Kennedy*, 554 U.S. at 447 (Alito, J., dissenting).

142 *Id.* at 468–69.

143 *Id.* at 469.

Both opinions' juxtaposition of tone and context introduces a critical dimension of reading *Kennedy* as a text of judicial moral reasoning. The Court is unified in affirming the case's moral salience; both opinions allude to if not display "moral outrage" and "capital emotions," to use phrases scholars have employed to address capital child rape statutes.[144] But the Court sharply divides as to how that salience should be addressed. This Article argues that what the Court does in *Kennedy*—or in some respects fails to do—turns on moral intuitionism versus moral reasoning. That is, how ought jurisprudence that necessarily embodies moral judgment translate moral intuitions, as exhibited in the texts cited above, into moral reasoning proper to jurisprudence per se? That the dissent argues that putatively "conclusory" moral judgment is insufficient for the Court's decision, even as it inveighs against insufficient accounting for child rape's moral depravity, underscores that its signatories do see the issue as a moral one, but disagree as to the locus of authority in resolving it.[145] The crucial question for the Court, relevant to larger death penalty discourse, is not whether moral judgment is the heart of the matter, but rather who the authoritative moral judge is, and what sources should guide that moral reasoning. *Kennedy*'s summary of Eighth Amendment doctrine underscores this point, but leaves fiercely contested how to resolve it.

2. Moral Reasoning and Eighth Amendment Doctrine

As a threshold matter, "the Eighth Amendment's protection against excessive or cruel and unusual punishments flows from the basic 'precept of justice that punishment for [a] crime should be graduated and proportioned to [the] offense.'"[146] Proportionality analysis requires, at bottom, an exercise of moral reasoning.[147] For,

144 Professor Susan Bandes has argued that *Kennedy* raises larger questions about our society's use of the criminal law to both reflect and implement moral outrage over horrific crimes. Susan A. Bandes, *Child Rape, Moral Outrage, and the Death Penalty*, 103 NW. U. L. REV. 17, 17 (2008); *see also* Douglas A. Berman & Stephanos Bibas, *Engaging Capital Emotions*, 102 NW. U. L. REV. 355, 355–56 (2008) (arguing that capital punishment is not inappropriate for child rape, and that emotions "help[ ] to explain many features of capital-punishment jurisprudence . . . [because they] reflect the public's moral perspective that certain crimes have profound emotional resonance." (footnote omitted)).

145 *See supra* notes 141–43 and accompanying text.

146 *Kennedy*, 554 U.S. at 419 (alterations in original) (quoting Weems v. United States, 217 U.S. 349, 367 (1910)).

147 See discussion of Professor Moore's treatment of Eighth Amendment moral reasoning, *supra* notes 23, 30–32 and accompanying text. *See also* Stinneford, *supra*

the majority continues, "whether [the Constitution's proportionality] requirement has been fulfilled" turns on "norms that 'currently prevail,' "[148] with the "Amendment 'draw[ing] its meaning from the evolving standards of decency that mark the progress of a maturing society.' "[149] Given this "whether" formulation, the Court's analysis is, first, descriptive: does a punishment, assertedly proportionate to an offense, cohere with broad social mores?[150] Professor Michael Moore names this "a third-person judgment" as it concerns "what some other group . . . believes is morally right."[151]

This is not the whole matter, though, implicating the above-noted problem concerning moral authority and moral reasoning sources. Proportionality analysis turns on two considerations, which might be framed as the Court's obligation to consult and then render moral judgments: (1) it must examine " 'objective indicia of society's standards, as expressed in legislative enactments and state practice' "[152] (hereinafter, "objective indicia analysis"); and (2) it must apply "standards elaborated by controlling precedents and by the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose"[153] (hereinafter, "independent judgment analysis"). The precise wording of the latter is unique to *Kennedy*—or was at the time.[154] But both evoke Professor Berman's "integrative jurisprudence," which emphasizes that law must be believable if it is to be administrable, and that this translation involves "reason[,] . . . will[,] . . . emotion, intuition, and faith."[155]

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note 23, at 961–62 (arguing that proportionality ultimately turns on a conception of retributive justice involving normative rather than utilitarian judgments).

148 *Kennedy*, 554 U.S. at 419 (emphasis added) (quoting Atkins v. Virginia, 536 U.S. 304, 311 (2002)).

149 *Id.* (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion)).

150 *Kennedy*'s application of the two-prong test represents the critical rupture between the majority and the dissent, as discussed in subsection (c) below.

151 Moore, *supra* note 23, at 53 (emphasis added).

152 *Kennedy*, 554 U.S. at 421 (quoting Roper v. Simmons, 543 U.S. 551, 563 (2005)) (citing Enmund v. Florida, 458 U.S. 782, 788 (1982); Coker v. Georgia, 443 U.S. 584, 593–97 (1977) (plurality opinion)).

153 *Id.* (citing *Enmund*, 458 U.S. at 797–801; *Coker*, 443 U.S. at 597–600 (plurality opinion); Gregg v. Georgia, 428 U.S. 153, 182–83 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.)). The dissent characterizes much of this dimension of the Court's analysis as "not pertinent to the Eighth Amendment question at hand." *Kennedy*, 554 U.S. at 461 (Alito, J., dissenting).

154 The Court subsequently quoted this rendering of the independent judgment analysis in *Graham v. Florida*, 130 S. Ct. 2011, 2022 (2010).

155 BERMAN, *supra* note 68, at vii. Presumably, Professor Berman means not *religious* faith per se, but affective-intellectual assent to deeply valued norms.

Here *Kennedy* is significant. Because "[c]onsensus is not dispositive" (i.e., in the form of the objective indicia analysis),[156] Justices must proceed from a descriptive, "what-is" account to an interpretive exercise of dynamic moral reasoning. Taken together, the two-pronged proportionality test is a hermeneutical exercise—hermeneutics itself a mode of analysis germane to the law, religion, and moral reasoning.[157] For moving from "what-is" to "what shall be"—the latter in the sense of setting forth a rule of law—itself "necessarily embodies a moral judgment."[158] This is what Professor Moore calls "first-person, committed [moral] judgments," which require grappling with "the nature of the rights protected by the Constitution."[159] On one hand, this precludes judges from imposing simply personal preferences or subjective views—though that is what the dissenting Justices conclude the majority ends up doing.[160] Yet it also requires, among other things, that they be "guided by [more than] the dry recitation of moral shibboleths accepted by others."[161] On the assumption that "surely first, foremost, and always, the job of a judge is to judge," Professor Moore speculated, before the Court decided *Kennedy*, that such judgments "might well . . . be[ ] considerably more nuanced and

156 *Kennedy*, 554 U.S. at 421.

157 Generally speaking, hermeneutics concerns the interpretation and understanding of texts. *See generally* Bjørn Ramberg & Kristin Gjesdal, *Hermeneutics*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, http://plato.stanford.edu/entries/hermeneutics/ (last visited Sept. 24, 2012). In line with characterizing *Kennedy* as a text of judicial moral reasoning that taps into integrative jurisprudence, hermeneutics theory assists this Article's analysis inasmuch as it addresses interpretation in both theology and the law. Traditionally speaking, legal hermeneutics addressed "rules for filling in gaps in a codified law, and hence had a normative character." HANS-GEORG GADAMER, *Hermeneutics and Historicism*, Supplement I *in* TRUTH AND METHOD 505–41, 505 (Joel Weinsheimer & Donald G. Marshall trans., 2d rev. ed. 1990). This filling-in-of-gaps in a manner that has a distinctly normative character is what the *Kennedy* majority appears to be doing, and in this sense its project is both hermeneutical, and not inapposite the sort of enterprise that often occurs in theology, as Part III(C) will explore. *See id.* at 510 (observing that "we can see in the three fields in which hermeneutics has played a part from the beginning—in the historical and philological sciences, in theology, and in jurisprudence—that the critique of historical objectivism or 'positivism' has given new importance to the hermeneutical aspect"). *See also* Francis J. Mootz III, *Faithful Hermeneutics*, 2009 MICH. ST. L. REV. 361, 362–63 (2009) (describing the relevance of Professor Gadamer's work to hermeneutical theory in both the law and in theology, emphasizing that "[l]aw and religion are *activities*" that involve "norm creation" that is "historically-unfolding").

158 *See Kennedy*, 554 U.S. at 419 (quoting Furman v. Georgia, 408 U.S. 238, 382 (1972) (Burger, C.J., dissenting)).

159 Moore, *supra* note 23, at 58, 62 (emphasis added).

160 *See Kennedy*, 554 U.S. at 469 (Alito, J., dissenting).

161 Moore, *supra* note 23, at 63.

responsive to the facts of [a] case," with judges having to "throw[ ] off . . . deference to the moral views of others."[162] As further analysis argues, the Court did exactly that in *Kennedy*.[163] That this sort of jurisprudence can have the "dynamic" effect of precipitating further development of the Court's jurisprudence may well be confirmed by Justice Thomas's post-*Kennedy* dissent in *Graham*, which in its critical characterization of *Kennedy*'s moral reach arguably confirms that *Kennedy*, perhaps more than any case before it, contextualizes proportionality analysis at bottom as a moral undertaking, requiring Eighth Amendment interpreters to approach their task as dynamic moral agents.[164]

That the Court in *Kennedy* defined its task as dynamic moral agency is also seen in how it defines evolving standards of decency—which, as a metaphor, itself implies dynamic process. It is significant how much *Kennedy* turns on assertions and, per the dissent, counter-assertions concerning evolving standards of decency.[165] Moreover, the majority opinion's textual structure subsumes reciting the purposes of punishment to a sweeping assertion of the evolving standards of decency, rooted in a substantive conception of human dignity:

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162 *Id.* at 65.

163 See *infra* subsection (a) for discussion of *Kennedy*'s application of the governing rules. Certainly the dissenting Justices saw this as a case of "for worse," as have critical commentators, including those who defend proportionality analysis generally. *See, e.g.*, Stinneford, *supra* note 23, at 922–23 (characterizing *Kennedy*'s "fictionalized consensus . . . to support its own judgment" as "disingenuous," and its "obvious manipulation [of its analysis] to reach its desired conclusion" posing the risk of "undermin[ing] public respect for judicial review and for the law").

164 As Justice Thomas described *Kennedy*, and the Court's reliance on it in *Graham*:

> The Court . . . openly claims the power not only to approve or disapprove of democratic choices in penal policy based on evidence of how society's standards *have* evolved, but also on the basis of the Court's independent perception of how those standards *should* evolve, *which depends on* what the Court concedes is *necessarily . . . a moral judgment* regarding the propriety of a given punishment in today's society. [But, t]he categorical proportionality review the Court employs in capital cases thus lacks a principled foundation. The Court's decision . . . is significant because it does not merely apply this standard—it remarkably expands its reach. 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.

Graham v. Florida, 130 S. Ct. 2011, 2046 (2010) (Thomas, J., dissenting) (third and fourth emphases added) (internal quotation marks and paragraph break omitted) (quoting *Kennedy*, 554 U.S. at 419).

165 *See supra* note 135 (cataloguing the *Kennedy* opinions' respective references to evolving standards of decency).

> Evolving standards of decency must embrace and express respect for the dignity of the person, and the punishment of criminals must conform to that rule. As we shall discuss, punishment is justified under one or more of three principal rationales: rehabilitation, deterrence, and retribution. It is the last of these, retribution, that most often can contradict the law's own ends. This is of particular concern when the Court interprets the meaning of the Eighth Amendment in capital cases. When the law punishes by death, it risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint.[166]

Parts II(c) and IV will explore the implications of the Court's application of this human dignity precept. Here it suffices to observe that, whatever the majority's invocation of it is taken to mean substantively, human dignity is a prerequisite for weighing the traditional purposes of punishment. This fact, together with the fact that a substantive conception of human dignity resonates with broad and diverse traditions of moral reasoning—it echoes, that is, integrative jurisprudence[167]—implies that, per *Kennedy*, not only judges but perhaps also legislators, in forming the criminal law, must take seriously the extent to which their moral enterprise reflects not simply on offenders' moral desert, but more broadly on how their punishment reflects on the law and on us as a society. This view echoes that component of contemporary Catholic teaching expressing concern for the death penalty's capacity to "diminish[ ] all of us."[168] It also echoes the moral reflections of those asserting that the ultimate punishment ultimately reflects as much on society as on the repugnance of those to whom it is meted out.[169]

What *Kennedy* leaves unclear is how that analysis gets carried out, by whom, and at what stage of judicial review. Along such lines, Professor John Stinneford critiques the Court's proportionality jurisprudence as "incoherent," as rooted in "an ever-shifting definition of excessiveness" and an "evolving standards of decency test [that] has proven itself an unreliable and ineffective measure of cruelty."[170]

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166 *Kennedy*, 554 U.S. at 420 (citations omitted). The opinion extensively discusses the purposes of punishment in the latter part of its analysis. *Id.*, 554 U.S. at 441–47.

167 *See, e.g.*, THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE (David Kretzmer & Eckart Klein eds., 2002); Matthias Mahlmann, *The Basic Law at 60—Human Dignity and the Culture of Republicanism*, 11 GERMAN L.J. 9, 10 (2010) (asserting that "one should not overlook that human dignity has become quite generally a leading principle of the international human rights culture," and citing a number of examples across international law and institutions).

168 *See* USCCB, *supra* note 51.

169 *See supra* notes 42–46 and accompanying text.

170 Stinneford, *supra* note 23, at 899, 968.

Arguing that the Court's approach is untethered to objective standards, he advocates, for such standard, "the size of the gap between prior punishment practice and the new punishment being challenged."[171] Even this test, however, he subjects to the proviso that a punishment significantly exceeding prior practice be justified on a retributive basis.[172] In the end, then, such a resolution merely returns the analysis to a moral core, the standard for which remains one of necessarily moral judgment.[173]

From its restatement of the evolving standards of decency principle, *Kennedy*'s doctrinal summary next casts a related principle, that of narrowing, also in moral terms. Having asserted that evolving standards of decency, read in terms of human dignity, require substantive limits on punishment, *Kennedy* continues:

> For these reasons we have explained that capital punishment must be limited to those offenders who commit a narrow category of the most serious crimes and whose extreme culpability makes them the most deserving of execution. Though the death penalty is not invariably unconstitutional, the Court insists upon confining the instances in which the punishment can be imposed.[174]

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171 *Id.* at 972.

172 *Id.* at 968.

173 Professor Stinneford concedes that the test for cruelty does "involve[ ] an exercise of the Court's own judgment," arguing rather that *this* Court's exercise lacks "constitutional guideposts." *Id.* at 972. He seems to assume that the gap-measuring standard that he proposes will narrow the range of cases ultimately turning on a normative exercise, such that it will be in just a handful of cases that "[t]he Court should also ask whether some change in circumstances relevant to the offender's culpability justifies an increase in the harshness of punishment beyond what prior practice permitted." *Id.* While his proposed reform may narrow the scope of the problem that he identifies, it does not necessarily resolve the moral reasoning framework quandary—i.e., concerning sources and authority—that remains at the core of post-*Kennedy* proportionality analysis.

174 *Kennedy*, 554 U.S. at 420 (internal quotation marks omitted) (quoting Roper v. Simmons, 543 U.S. 551, 568 (2004) (quoting Atkins v. Virginia, 536 U.S. 304, 319 (2002))) (citing Gregg v. Georgia, 428 U.S. 153 (1976)).

Professor Steven F. Shatz cogently describes how the Court's narrowing principle in fact encompasses two distinct but complementary requirements: (1) a "'genuine narrowing' principle" under *Furman* and *Zant*, by which states must use specific, statutory criteria to restrict the class of death-eligible offenders to those who have, per the state's view, committed the most aggravated murders; (2) a "'proportionality' principle" under *Enmund* and *Tison*, by which states cannot apply the death penalty to a particular crime not deemed sufficiently aggravated by a national standard. "In combination, the principles require states to limit death-eligibility to defendants who commit a narrow category of the most serious crimes, the worst of the worst . . . ." Steven F. Shatz, *The Eighth Amendment, the Death Penalty, and Ordinary Robbery-Burglary Murder-*

Kennedy thus characterizes proportionality generally and narrowing specifically—linchpins of death penalty jurisprudence—as moral exercises turning (1) on culpability and desert, and (2) on an insistence on confining the death penalty's scope.[175] The first necessarily pertains to an offender, while the second requires an exercise of authority premised on applying broad concepts—e.g., human dignity—rather than assessing particular cases. Both exercises, particularly the latter, implicate meta-juridical principles—i.e., broad normative or perspectival values that orient positive law.[176] Here, too, the Court as much implicates its own moral agency as exhibits concern for the moral implications of statutory frameworks entrusting factfinders with authority to assess offenders' moral desert. What still remains unclear is how to referee the interplay between social practices' moral implications, and those practices' arbiters' own moral agency.

3. Moral Reasoning and Eighth Amendment Application

The force of *Kennedy*'s moral reasoning lens, and the majority's and dissent's disagreement over how to focus it, particularly emerges in the application of the doctrine just summarized. Three major dimensions flesh out this argument: (a) *Kennedy*'s blurring of the objective indicia and independent judgment analyses; (b) its elevation of human dignity as a moral reasoning value; and (c) its reprise of the purposes of punishment.

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ers: A California Case Study, 59 FLA. L. REV. 719, 722–23 (2007) (citations omitted) (internal quotation marks omitted).

175 *See Kennedy*, 554 U.S. at 420–21 (tracing a thirty-plus-year history of decisions categorically proscribing the death penalty: for crimes carrying a mandatory death sentence (Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (plurality opinion); Roberts v. Louisiana, 428 U.S. 325, 336 (1976) (plurality opinion)); for the rape, or kidnapping and rape, of an adult woman (Coker v. Georgia, 433 U.S. 584, 598 (1977) (plurality opinion); Eberheart v. Georgia, 433 U.S. 917 (1977)); for accomplice liability in felony-murder *simpliciter* (Enmund v. Florida, 458 U.S. at 782 (1982); for persons with mental retardation (*Atkins*, 536 U.S. 304 at 318, 320–21); and for juvenile offenders (*Simmons*, 543 U.S. at 575)). *But see* Tison v. Arizona, 481 U.S. 137, 154–58 (1987) (upholding the death penalty for accomplices in limited circumstances).

176 *See, e.g.*, Jaye Ellis, *Overexploitation of a Valuable Resource? New Literature on the Precautionary Principle*, 17 EUR. J. INT'L L. 445, 458 (2006) ("[A] meta-juridical principle . . . provides a conduit between legal and non-legal forms of normativity."). Of course, a major dilemma in law is whether positivist formulations should rely on meta-juridical themes. *See, e.g.*, Jost Delbrück, *Exercising Public Authority Beyond the State: Transnational Democracy and/or Alternative Legitimation Strategies?*, 10 IND. J. GLOBAL LEGAL STUD. 29, 29 & n.3 (2003) (surveying legal positivism's rejection of meta-juridical theories).

a. Moralizing the Objective Indicia Analysis

The majority opinion sets forth a lengthy objective indicia analysis,[177] reviewing "the history of the death penalty for [child rape] and other nonhomicide crimes, current state statutes and new enactments, and the number of executions since 1964"—all to conclude that "there is a national consensus against capital punishment for the crime of child rape."[178] But the most important kernel of its decision may lie in the fact that, at bottom, the decision turns on the majority's own moral agency.[179] Its objective indicia analysis has its own limitations,[180] plus there are those asserted by the dissent[181] and by critical

177 *See Kennedy*, 554 U.S. at 422–34.

178 *Id.* at 434.

179 *Compare id.* at 434 (observing that, while "objective evidence of contemporary values as it relates to punishment for child rape is entitled to great weight, . . . it does not end [the Court's] inquiry"), *with id.* at 461 (Alito, J., dissenting) ("The Court is willing to block the potential emergence of a national consensus in favor of permitting the death penalty for child rape because, in the end, what matters is the Court's 'own judgment' regarding 'the acceptability of the death penalty.'" (quoting *id.*, 554 U.S. at 434 (majority opinion))).

180 Following its decision in June 2008, the Court addressed the fact that its objective indicia analysis did not account for the fact, brought to its attention in a petition for rehearing, that the U.S. military had a statute permitting the death penalty for child rape. *Kennedy*, 554 U.S. at 426 (observing, in an unnumbered footnote later added to the opinion, that while the Court had not addressed the military statute, that fact was insufficient for rehearing).

181 In dissent, Justice Alito argued, *inter alia*: that the majority failed to establish a national consensus against the death penalty for child rape, and/or, that it insufficiently acknowledged factors other than evolving standards of decency—e.g., interpretations of the reach of the Court's holding in *Coker*, barring capital punishment for the rape of an adult woman—to explain why more states did not have capital child rape statutes; that it was logically faulty to characterize a would-be decision to uphold extant capital child rape statutes as an "extension" of the death penalty; and that the Court's own precedents did not require reading the Eighth Amendment as a unidirectional "ratchet" that interprets a perhaps temporary leniency consensus as the basis for imposing a constitutional rule. *See Kennedy*, 554 U.S. at 448–66 (Alito, J., dissenting). On this last point, the dissent identified as a central fault the majority's resort to its own judgment in such a way as to leave the evolving standards of decency principle essentially *un*principled:

> In terms of the Court's metaphor of moral evolution, [legislative] enactments might have turned out to be an evolutionary dead end. But they might also have been the beginning of a strong new evolutionary line. We will never know, because the Court today snuffs out the line in its incipient stage.

Id. at 461 (Alito, J., dissenting). Justice Thomas's dissent in *Graham* offers a parallel critique. *See supra* note 164 and accompanying text.

scholarship.[182] But beyond that, the Court itself does little to clarify the relationship between the objective indicia and independent judgment analyses, essentially moralizing the former.

After surveying national trends of capital punishment for child rape and comparing that assessment with the Court's earlier treatment of the death penalty for juveniles, vicarious felony murderers, and defendants with mental retardation,[183] the Court takes up a lengthy analysis of *Coker*, which precluded capital punishment for adult rape and, in doing so, reflected on differences between rape and murder.[184] Acknowledging that *Coker*, which yielded a plurality opinion, left questions about this distinction's reach "susceptible" of debate,[185] *Kennedy* characterized *Coker*'s reading of national consensus as being "confirmed [by]" its—i.e., *Coker*'s—own "independent judgment" that, while "[r]ape is without doubt deserving of serious punishment[,] . . . in terms of moral depravity and of the injury to the person and to the public, it does not compare with murder . . . ."[186] It thus arguably identified a basis in precedent for trumping, via its own moral judgment, any remaining ambiguities that might emerge from—or, per the dissent, be read into—the objective indicia analysis.[187] This further supports the

182 Professor Stinneford, for example, has argued that the *Kennedy* majority "c[a]me up with a fictionalized consensus against the punishment to support its own judgment," and that this critical failure matches the "implausib[ility]" of the Court's societal consensus findings, as well, in *Simmons* before it and in *Graham* after it. Stinneford, *supra* note 23, at 922, 973.

183 *Kennedy*, 554 U.S. at 425–26 (citations omitted).

184 *Id.* at 426–31 (discussing Coker v. Georgia, 433 U.S. 584, 592–600 (1977) (plurality opinion)).

185 *Id.* at 428.

186 *Id.* at 427–28 (quoting *Coker*, 433 U.S. at 593); *see also Coker*, 433 U.S. at 597 ("[E]videnc[e of] the attitude of state legislatures and sentencing juries do[es] not wholly determine th[e] controversy [before the Court], for the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.").

187 Objecting to the majority's analysis of *Coker*, Justice Alito argued that "dicta in th[e] Court's decision in *Coker* . . . stunted legislative consideration of the question whether the death penalty for the targeted offense of raping a young child is consistent with the prevailing standards of decency," further observing, as relevant to assessing evidence of the evolving standards of decency, that "conscientious state lawmakers, whatever their personal views about the morality of imposing the death penalty for child rape, may defer to this Court's dicta, either because they respect our authority and expertise in interpreting the Constitution or merely because they do not relish the prospect of being held to have violated the Constitution and contravened prevailing 'standards of decency.'" *Kennedy*, 554 U.S. at 448, 452 (Alito, J., dissenting).

inference that the Court views the ultimate analysis as a normative one.[188]

But the Court's conceptual move underscores rather than resolves the fundamental question about moral authority, its sources, and their alignment within Eighth Amendment jurisprudence. By invoking *Coker*'s "confirmation" language, one reasonably could ask whether the objective indicia analysis is meant to involve simple jurisdiction counting, which the Court ballpark-measures (i.e., "confirms") via the yardstick of its own judgment. Or, could it mean examining with greater scrutiny on what moral reasoning basis there might be movement in one direction or another? The dissent alludes to the potential moral salience—not to mention potentially dispositive value—of such movements,[189] but does not further clarify how, when, or even whether they should figure into the calculus of the Court's own judgment. It is one thing to critique the weight that the majority gives to its own judgment and its reasoning.[190] But short of mustering a majority to overturn the two-prong analysis altogether, the dissent's critique throws stones at a glass house rather than offer a coherent alternative for assessing the relevance of objective indices' own moral salience to independent judgment analysis.

For example, should courts somehow determine whether pro-death penalty movement is a function of temporary "moral panic"—i.e., moral intuitionism alone—rather than of a deliberative social judgment, expressed through legislation, that a particular crime implicates such profound culpability and has such insidious effects as

188 This is confirmed—by way of objection—by the dissent, which argues that "while six new state laws [targeting child rape might not] necessarily establish a 'national consensus' or even . . . [serve as] sure evidence of an ineluctable trend[, i]n terms of the Court's metaphor of moral evolution, these enactments might have turned out to be an evolutionary dead end [*or*] . . . the beginning of a strong new evolutionary line. We will never know, because the Court today snuffs out the line in its incipient stage." *Id.* at 461 (Alito, J., dissenting).

189 *See supra* note 181.

190 *See supra* note 181; *see also Kennedy*, 554 U.S. at 462 (Alito, J., dissenting) ("The Eighth Amendment protects the right of an accused. It does not authorize this Court to strike down federal or state criminal laws on the ground that they are not in the best interests of crime victims or the broader society. The Court's policy arguments concern matters that legislators should—and presumably do—take into account in deciding whether to enact a capital child-rape statute, but these arguments are irrelevant to the question that is before us in this case. Our cases have cautioned against using the aegis of the Cruel and Unusual Punishment Clause to cut off the normal democratic processes, but the Court forgets that warning here." (citations omitted) (quoting Atkins v. Virginia, 536 U.S. 304, 323 (2002) (Rehnquist, C.J., dissenting)) (internal quotation marks omitted)).

to merit the ultimate punishment?[191] Perhaps a finding of the former would justify placing a thumb on the independent judgment scale, while a finding of the latter should preclude it. Were the Court to clarify that a jurisprudence that necessarily embodies moral judgment requires a kind of scrutiny (e.g., akin to rational basis—or even strict—scrutiny, but specified as moral reasoning),[192] it might develop a test worthy of integrative jurisprudence, and more likely to yield greater than five-to-four majorities. But, were such a test to be developed, what substantive norm might guide it? Could human dignity qualify?

b. Human Dignity as a Moral Reasoning Value

Introducing its independent judgment analysis by invoking precedent,[193] *Kennedy* proceeds to explore moral dimensions of the victim's dignity:

> It must be acknowledged that there are moral grounds to question a rule barring capital punishment for a crime against an individual that did not result in death. These facts illustrate the point. Here

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191 As Professor John Stinneford has argued:

> The Cruel and Unusual Punishments Clause . . . does not focus on punishments that are "cruel and rare" but on those that are "cruel and new." This focus on new punishments implies that the core purpose of the Clause is to protect criminal offenders when the government's desire to inflict pain has become temporarily and unjustly enflamed, whether this desire is caused by political or racial animus or moral panic in the face of a perceived crisis. In these situations, the Cruel and Unusual Punishments Clause is supposed to serve as a check on the impulse to ratchet up punishments to an unprecedented degree of harshness.

Stinneford, *supra* note 23, at 907.

192 Here the Court's most recent Eighth Amendment decision is instructive. In holding this past summer in *Miller v. Alabama* that the Eighth Amendment precludes mandatory life without parole sentences for juvenile offenders, the Court noted the following: "Although we do not foreclose a sentencer's ability to make th[e] judgment in homicide cases" that life without parole may be appropriate, "we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." 132 S. Ct. 2455, 2469 (2012) (citation omitted). *Miller* addressed life without parole sentences, not death sentences. Nonetheless, the Court's focus on the sort of scrutiny that sentencers must apply to the most serious punishment applicable in a given context—per *Roper v. Simmons*, 543 U.S. 551, 575 (2005), which held that juvenile offenders cannot qualify for the death penalty—arguably suggests that a sort of moral reasoning "scrutiny" indeed is emerging as a focal point of Eighth Amendment jurisprudence.

193 *Kennedy*, 554 U.S. at 434 (citing *Simmons*, 543 U.S. at 563; Enmund v. Florida, 458 U.S. 782, 797 (1982); Coker v. Georgia, 433 U.S. 584, 597 (1977) (plurality opinion)).

> the victim's fright, the sense of betrayal, and the nature of her injuries caused more prolonged physical and mental suffering than, say, a sudden killing by an unseen assassin. The attack was not just on her but on her childhood. For this reason, we should be most reluctant to rely upon the language of the plurality in *Coker*, which posited that, for the victim of rape, "life may not be nearly so happy as it was," but it is not beyond repair. Rape has a permanent psychological, emotional, and sometimes physical impact on the child. We cannot dismiss the years of long anguish that must be endured by the victim of child rape.[194]

Here the majority affirms the moral valence of insights that stem from the task of assessing criminal acts—a task that, per the dissent, must remain within the ambit of democratic rather than judicial process.[195]

Either approach, though, appropriately characterizes the death penalty as a form of moral expression, acknowledging that the impetus to inflict it stems from some sense of redressing a grossly damaged moral order. Consistent, moreover, with the thesis that *Kennedy* portrays dynamic moral reasoning, the majority follows this statement affirming moral intuitions (i.e., broad, and legitimate, emotions and sensibilities about the repugnance of child rape and the long-term harm it causes), with a reaffirmation that the moral reasoning framework of the Court's jurisprudence (i.e., the rule of law), must guide the Justices' own moral reflection. For the Court emphatically declares that "[i]t does not follow"—i.e., presumably, from moral intuitions alone, no matter how powerful—that capital punishment is a proportionate penalty for [child rape]."[196] Rather:

> The constitutional prohibition against excessive or cruel and unusual punishments mandates that the State's power to punish "be exercised within the limits of civilized standards." Evolving standards of decency that mark the progress of a maturing society counsel us to be most hesitant before interpreting the Eighth Amendment to allow the extension of the death penalty, a hesitation that has special force where no life was taken in the commission of the crime. It is an established principle that decency, in its essence, presumes respect for the individual and thus moderation or restraint in the application of capital punishment.[197]

Here some foundational sense of the offender's human dignity is presented almost as an a priori break on permitting capital punish-

194 *Id.* at 435 (citations omitted) (quoting *Coker*, 433 U.S. at 598).

195 *See supra* note 180.

196 *Kennedy*, 554 U.S. at 435 (emphasis added).

197 *Id.* (citation omitted) (quoting Trop v. Dulles, 356 U.S. 86, 99–100 (1958) (plurality opinion)).

ment, irrespective of the moral repugnance of the crime or of society's desire to validate or recover the dignity of one who has grievously suffered it. And yet, again, we return to a question of authority and standards: what kind of standard—whether constitutional, or moral/ethical—guides the human dignity analysis, whether in this case or others? Here *Kennedy* is woefully opaque. To be sure, deciding a case, at least in part, on premises concerning human dignity was not novel to *Kennedy*. Towards the conclusion of his opinion for the majority in *Simmons* (an important *Kennedy* precursor), Justice Kennedy described the Constitution as "set[ting] forth, and rest[ing] upon, . . . broad provisions to secure individual freedom and preserve human dignity."[198] Moreover, as *Kennedy* develops its independent judgment analysis, it returns to the evolving standards of decency (which might be viewed as a proxy of sorts for dignity), pointing to values enshrined in the Court's jurisprudence that embrace consistency and predictability in the execution of capital judgments, and the due consideration of individual offenders' character and the circumstances of their offense.[199]

But *Kennedy* does not say how these considerations, typically associated with the moral analysis entrusted to sentencing bodies per the *Woodson-Lockett* line of cases, flesh out some conception of human dig-

198 *Simmons*, 543 U.S. at 578; *see also* Maxine D. Goodman, *Human Dignity in Supreme Court Constitutional Jurisprudence*, 84 NEB. L. REV. 740 (2006). With particular attention to *Lawrence v. Texas*, 539 U.S. 558 (2003) (overturning state laws criminalizing adult, same-sex, consensual sodomy), which included multiple references to human dignity—and also was a Justice Kennedy opinion—Professor Goodman has studied the Court's deployment of human dignity as a substantive constitutional principle, which she defines as "a moral status affording individuals rights and standing against state action that demeans, offends, or humiliates." *Id.* at 789. She also notes, however, that its decisions have not provided a clear "means of consistently applying human dignity as an underlying value." *Id.* at 744. Notably, Professor Sheldon Lyke has argued that "*Lawrence* was decided in the shadow of the Eighth Amendment[, with] . . . changes in the Justices' views toward crime, punishment, and decency . . . of great significance to the majority opinion." Sheldon Bernard Lyke, Lawrence *as an Eighth Amendment Case: Sodomy and the Evolving Standards of Decency*, 15 WM. & MARY J. WOMEN & L. 633, 644 (2009).

199 *Kennedy*, 554 U.S. at 435–36 (citing California v. Brown, 479 U.S. 538, 541 (1987) (holding that death penalty statutes must avoid arbitrariness and unpredictability); Godfrey v. Georgia, 446 U.S. 420, 428 (1980) (plurality opinion) (holding that states must narrowly and precisely define aggravating factors used to determine if death is warranted); Lockett v. Ohio, 438 U.S. 586, 604–05 (1978) (plurality opinion) (holding that factfinders must assess "the character and record of the individual offender and the circumstances of the particular offense" (quoting Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (plurality opinion)))).

nity relevant to independent judgment analysis.[200] Perhaps the Court wants to balance punishment's expressive justice vis-à-vis a crime victim's human dignity, on one hand, and an offender's human dignity, on the other. For example, does elevating a human dignity precept mean that (1) absent a moral reasoning calculus that (a) considers an offender's dignity as presumptive fact and then (b) assesses its relevance to the proportionality of punishment decreed for the crime, then (2) otherwise-legitimate moral intuitions about an offender's desert of said punishment (e.g., as the dissent alludes)[201] are constitutionally deficient? If so, it does not say so. Rather, the majority blandly acknowledges that enshrining such values into applicable rules of law yields "tension between general rules and case-specific circumstances [that] ha[ve] produced results not altogether satisfactory."[202] It then further dodges the issue by adverting to, without engaging, some Justices' call to "cease efforts to resolve the tension and simply allow legislatures, prosecutors, courts, and juries greater latitude."[203] For a jurisprudence that necessarily embodies moral judgment, neither the *Kennedy* majority's conceptual framing of the basis for applying its independent judgment, nor dissenting Justices' apparent preference for wholesale majoritarian deference, which merely begs the perennial question concerning the basis for and proper scope of judicial review, provide clear direction.

In a sense, here we observe the Justices struggling—as most thoughtful persons presumably do—with their own moral agency, and with identifying which sources are appropriate and/or relevant to implementing it. Perhaps only history, only the slow development of

200 *See Woodson*, 428 U.S. at 303–04 (describing as "[a] . . . constitutional shortcoming," a "statute['s] . . . failure to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death . . . . A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. *It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.*" (emphasis added) (citations omitted)).

201 *See Kennedy*, 554 U.S. at 447 (Alito, J., dissenting) (alluding to the relevance to punishment of, e.g., particularly sadistic crimes or an offender's heinous criminal record).

202 *Id.* at 436 (citations omitted).

203 *Id.* at 436–37 (citing Walton v. Arizona, 497 U.S. 639, 667–73 (1990) (Scalia, J., concurring in part and concurring in judgment) (arguing that the *Woodson-Lockett* rule requiring consideration of case- and offender-specific circumstances should be abandoned)).

jurisprudence itself—a theme addressed in Part IV—can begin to resolve lacunae such as these. Or maybe imprecision itself, judicial and moral, together with historical experience, point the way. It seems to have for Justice Stevens in *Baze*, and other Justices in earlier cases, who concluded that "the failure to limit these same imprecisions by stricter enforcement of narrowing rules has raised doubts concerning the constitutionality of capital punishment itself."[204]

In any event, the result of *Kennedy*'s moral reasoning analysis is a kind of emperor-has-no-clothes peek at the Justices as dynamic moral agents who remain "in search of a unifying principle"[205] to ensure that their moral reasoning remains judicial moral reasoning, rather than moral reasoning—much less, moral intuitionism—by people who happen to be Justices. Premised on an analogized "moral distinction between a murderer and a robber,"[206] *Kennedy* used the case of an eight-year-old's brutal rape at the hands of her stepfather to set forth a bright-line rule distinguishing murder from all crimes against individuals that do not lead to a victim's death.[207] Although this move may

204 *Id.* at 436–37 (citing Baze v. Rees, 553 U.S. 35, 82–86 (2008) (Stevens, J., concurring in judgment)). In *Baze*, Justice Stevens quoted *Furman v. Georgia*, 408 U.S. 238, 312 (1972) (White, J., concurring), for the proposition "that the imposition of the death penalty represents the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. A penalty with such negligible returns to the State [is] patently excessive and cruel and unusual punishment violative of the Eighth Amendment." *Baze*, 553 U.S. at 86 (Stevens, J., concurring in judgment) (alteration in original) (internal quotation marks omitted). *Kennedy*, 554 U.S. at 437, also cites *Furman*, 408 U.S. at 310–14 (White, J., concurring) and *Callins v. Collins*, 510 U.S. 1141, 1144–45 (1994) (Blackmun, J., dissenting from denial of certiorari), as in line with Justice Stevens's view in *Baze*.

205 *Kennedy*, 554 U.S. at 437. *See also id.* at 440–41 ("[The Court] ha[s] spent more than 32 years articulating limiting factors that channel the jury's discretion to avoid the death penalty's arbitrary imposition in the case of capital murder. Though that practice remains sound, beginning the same process for crimes for which no one has been executed in more than 40 years would require experimentation in an area where a failed experiment would result in the execution of individuals undeserving of the death penalty. Evolving standards of decency are difficult to reconcile with a regime that seeks to expand the death penalty to an area where standards to confine its use are indefinite and obscure.").

206 *Id.* at 438 (internal quotation marks omitted) (citing Enmund v. Florida, 458 U.S. 782, 797 (1982)).

207 *See id.* at 438 ("Consistent with evolving standards of decency and the teachings of our precedents we conclude that, in determining whether the death penalty is excessive, there is a distinction between intentional first-degree murder on the one hand and nonhomicide crimes against individual persons, even including child rape, on the other. The latter crimes may be devastating in their harm, as here, but in terms of moral depravity and of the injury to the person and to the public, they cannot be compared to murder in their 'severity and irrevocability.'" (citation omitted)

offer a unifying principle simply by virtue of presenting a clear rule—and thus represents an appropriate exercise of the Court's judicial authority—both the vehemence of the dissent, not to mention critical commentary on the decision after the fact,[208] made it clear that invoking human dignity did not necessarily buttress the majority's moral authority. Are there, then, any utilitarian or other reasoned grounds for the Court's approach?

c. Reprise of Punishment's Purposes

Following from its rule distinguishing between homicide and nonhomicide crimes, *Kennedy* observes that its "decision is consistent with the justifications offered for the death penalty," which is "excessive" when "grossly out of proportion to the crime or . . . [when it fails to] fulfill the two distinct social purposes served by the death penalty: retribution and deterrence of capital crimes."[209] After briefly conceding—but with little elaboration on the significance of the fact—that "it cannot be said with any certainty that the death penalty for child rape serves no deterrent or retributive function,"[210] the majority offers a lengthy assessment of retribution. From the first premise that retribution "reflects society's and the victim's interests in seeing that the offender is repaid for the hurt he caused," it concludes that retribution "does not justify the harshness of the death penalty" for child rape, reaffirming its insisted distinction between homicide and nonhomicide crimes, not to mention its moral reasoning premises.[211]

Returning to an earlier theme, *Kennedy* observes that retribution extends from the one being punished to his punishers; it reflects on society, in the sense of implicating the fundamental moral question of "whether capital punishment 'has the potential . . . to allow the com-

(internal quotation marks omitted) (quoting Coker v. Georgia, 433 U.S. 584, 598 (1977) (plurality opinion))).

208 Both candidates for president at the time, then-Senator Barack Obama and Senator John McCain, criticized *Kennedy*. *See* Linda Greenhouse, *Justices Bar Death Penalty For the Rape of a Child*, N.Y. TIMES, (June 26, 2008), http://www.nytimes.com/2008/06/26/washington/26scotus.html?pagewanted=all.

209 *Kennedy*, 554 U.S. at 441 (emphasis added) (citing *Coker*, 433 U.S. at 592; Gregg v. Georgia, 428 U.S. 153, 173, 183, 187 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.)). This is a somewhat curious framing of Eighth Amendment analysis—i.e., vis-à-vis its juxtaposition of and proportionality and the various theories of punishment, as Professor Stinneford has argued, *supra* note 23, at 904–05, 908, 914–17, 961–78.

210 *See Kennedy*, 554 U.S. at 441.

211 *Id.* at 442 (citing Atkins v. Virginia, 536 U.S. 304, 319 (2002); *Coker*, 433 U.S. at 597–98 (plurality opinion); Furman v. Georgia, 408 U.S. 238, 308 (1972) (Stewart, J., concurring)).

munity as a whole, including the surviving family and friends of the victim, to affirm its own judgment that the culpability of the prisoner is so serious that the ultimate penalty must be sought and imposed.'"[212] Of course, this merely begs a moral question, and in so setting up that question—i.e., "when does a non-killing justify a killing"—*Kennedy* implicitly invokes the *lex talionis*. Regrettably, though, it says no more about what that invocation means, or should mean, vis-à-vis the purposes of punishment as understood or as expressed in contemporary mores. For a jurisprudence that necessarily embodies moral judgment, this is too large a question to simply leave on the table.

Unsurprisingly, the dissent echoes the majority's affirmation of society's interest in expressing moral outrage at the crime of child rape, but rejects its subsequent conclusion that "[i]t is not at all evident that the child rape victim's hurt is lessened when the law permits the death of the perpetrator."[213] Setting aside a lacuna in the dissent's reasoning—i.e., how that would or would not be evident, not to mention how such evidence would be susceptible of an administrable rule—it is notable that the majority argues that "[s]ociety's desire to inflict the death penalty for child rape by enlisting the child victim to assist it over the course of years in asking for capital punishment [itself] forces a moral choice on the child, who is not of mature age to make that choice."[214] Presumably it sees such a prospect's moral murkiness as grounds for a categorical rule. But does that view flow from moral reasoning, or does it merely express judicial moral fiat? As the dissent trenchantly observes, the majority is content for judicial moral reasoning to remain in search of a unifying principle, but is less content to allow the same for other moral actors—i.e., legislators, and the public whom they represent.[215]

The majority is not unaware of this criticism. In a coda to its expansive reasoning, the majority acknowledges that whether the Court has overstepped its authority is a legitimate question. That is,

212 *Kennedy*, 554 U.S. at 442 (emphasis added) (quoting Panetti v. Quarterman, 551 U.S. 930, 958 (2007)).

213 *Id.* at 442; *cf. id.* at 461–62 (Alito, J., dissenting) (critiquing the majority for being "willing to block the potential emergence of a national consensus in favor of permitting the death penalty for child rape," for "strik[ing] down federal or state criminal laws on the ground that they are not in the best interests of crime victims or the broader society," and for ignoring the precedents' "caution[ ] against using the aegis of the Cruel and Unusual Punishment Clause to cut off the normal democratic processes." (internal quotation marks omitted) (quoting *Atkins*, 536 U.S. at 323 (Rehnquist, C.J., dissenting))).

214 *Id.* at 443 (majority opinion) (emphasis added).

215 *Id.* at 461–62 (Alito, J., dissenting) (developing this critique).

will its "institutional position and its holding . . . have the effect of blocking further or later consensus in favor of the [death] penalty[?]"[216] Has it impermissibly cast the evolving standards of decency as "a one-way ratchet[?]"[217] Has the Court made "it more difficult for consensus to change or emerge[, by] . . . itself becom[ing] enmeshed in the process, part judge and part the maker of that which it judges[?]"[218] In the end, *Kennedy* elides the dissent's criticism—and its resounding "yes!" to these questions. In doing so, however, it does provide a basis for ongoing death penalty discourse.

First, the majority neither confirms nor denies that it is setting forth a one-way ratchet. It concludes somewhat cryptically: "Difficulties in administering the [death] penalty to ensure against its arbitrary and capricious application require adherence to a rule reserving its use, at this stage of evolving standards and in cases of crimes against individuals, for crimes that take the life of the victim."[219] Does this leave the door open for a state to re-enact a capital child rape statute, after extensively documenting shifts in national consensus favoring such a law, on the assumption that, once imposed and challenged, a majority might be persuaded that, at that new "stage of evolving standards," a carefully morally reasoned and sufficiently tailored statute might be upheld notwithstanding *Kennedy*? Probably not, given the clear statements elsewhere in the opinion distinguishing between homicide and nonhomicide crimes. But it is interesting to ask whether the majority meant to end on an open-ended note, or simply ran out of gas.

Second, the majority does rather magisterially set forth the "principle . . . that use of the death penalty be restrained," in keeping with "[t]he rule of evolving standards of decency with specific marks on the way to full progress and mature judgment . . . ."[220] Part of such progress and maturity, it would seem, consists of a sense of "justice [that] . . . preserv[es] the possibility that [a perpetrator] and the system will find ways to allow him to understand the enormity of his

216 *Id.* at 446. (majority opinion).

217 *Id.* at 469 (Alito, J., dissenting); *see also id.* at 466 (observing that "th[e] Court has previously made it clear that '[t]he Eighth Amendment is not a ratchet, whereby a temporary consensus on leniency for a particular crime fixes a permanent constitutional maximum, disabling the States from giving effect to altered beliefs and responding to changed social conditions.'" (quoting Harmelin v. Michigan, 501 U.S. 957, 990 (1991).

218 *Id.* at 446.

219 *Id.* at 447 (emphasis added).

220 *Id.* at 446 (emphasis added).

offense."[221] Arguably, then, the *Kennedy* majority holds out, even if it does not further explicate, hope in the merits of rehabilitation as one of criminal punishment's purposes.[222] In casting rehabilitation as a project of both the offender and "the system" (presumably the proxy for society), *Kennedy* implicates the relationship between justice and mercy.[223] Inasmuch as mercy issues from an authority's own moral reasoning and exercise of discretion,[224] *Kennedy*'s coda reprises the theme that the morality of criminal punishment—especially capital punishment—has as much to do with those who impose it as with those on whom it is imposed. In this way, *Kennedy* appears to evince a sort of faith in society's moral capacity to grapple with the gravest depths and effects of child rape—perhaps, even, a perpetrator's capacity to atone for it. But these remarks are dicta. In so closing, *Kennedy* may not have clarified how this jurisprudence that necessarily embodies moral judgment should proceed. But it does offer a moral vision of sorts, setting forth inchoate dimensions of an integrative jurisprudence. Doing so invites critical comparison with other voices that attempt to do the same. It invites, that is, death penalty discourse. Catholic death penalty teaching can be one such relevant voice.

III. CATHOLIC DEATH PENALTY TEACHING

As used here, Catholic teaching refers to the "substantial body of literature on social questions" propagated by the Roman Catholic

221 *Id.* at 447.

222 *See id.* at 420 (identifying rehabilitation as "one . . . of [punishment's] three principal rationales" (citing *Harmelin*, 501 U.S. at 999 (Kennedy, J., concurring in part and concurring in judgment)).

223 In a lecture given on the occasion of her assumption of the Henry J. Friendly Chair at Harvard Law School, Professor Carol Steiker provocatively explored the relationship between justice and mercy in the Jewish and Christian theological traditions and in U.S. criminal jurisprudence, arguing that a more candid and robust assertion of the role of mercy as a proper exercise of judicial discretion will advance, rather than vitiate, the aims of justice proper to the rule of law—i.e., giving each her or his due. Carol S. Steiker, *The Mercy Seat: Discretion, Justice, and Mercy in the American Criminal Justice System*, *in* THE POLITICAL HEART OF CRIMINAL PROCEDURE 212 (Michael Klarman et. al. eds., 2012).

224 *See id.* at 216 (ascribing to Professor William J. Stuntz's work the proposition that "American criminal justice in our new millennium is in many ways *more* arbitrary, discriminatory, and unbalanced in terms of power than before the advent of . . . discretion-cabining developments" in criminal procedure); *id.* at 222 (arguing for a "'prudential' theory of mercy," on the premise that there is "a place for the exercise of mercy in institutions of criminal justice regardless of which normative theory or theories of punishment that criminal justice is thought to promote").

Church.[225] Formally speaking, this teaching is published under the aegis of church officials or official ecclesiastical bodies. Documents comprising it, though, are "the accepted expression of a [broader] social outlook that the Catholic tradition generates."[226] Thus, while official "Catholic teaching refers . . . to the texts issued by those who hold an official teaching position within the Church," its "influence comes from how the texts have been 'translated' into sermons, lectures, public programs, social movements, acts of charity, just deeds, and peacemaking."[227] Accordingly, this "historical tradition of Catholic social thought" includes, e.g., medieval philosopher-theologian Thomas Aquinas's *Treatise on Law*; international law pioneer Francisco Suarez's *Laws and God the Lawgiver*; English lawyer-saint Thomas More's *Utopia*; twentieth-century New York social activist Dorothy Day's *Catholic Worker* editorials; and other literature by "Catholic thinkers who address social questions of their time from the perspective of faith. All of this and more [represents] . . . Catholic social thought," as related to but distinct from Catholic social teaching.[228] This Article draws upon both but, for more apposite comparison with Eighth Amendment jurisprudence, emphasizes the latter.[229]

225 HIMES, *supra* note 92, at 3. Examples include, PONTIFICAL COUNCIL FOR JUSTICE AND PEACE, COMPENDIUM OF THE SOCIAL DOCTRINE OF THE CHURCH (2004) [hereinafter COMPENDIUM] (explicating key documents and themes of Catholic social teaching); USCCB, *supra* note 51 (setting forth church death penalty teaching in the United States).

226 HIMES, *supra* note 92, at 3.

227 *Id.*

228 *Id.*

229 Concerning sources of Catholic social teaching and respective levels of authority, see Richard R. Gaillardetz, *The Ecclesiological Foundations of Modern Catholic Social Teaching*, *in* MODERN CATHOLIC SOCIAL TEACHING, *supra* note 92, at 72. In descending order, (1) dogma, (2) definitive doctrine, (3) non-definitive but authoritative doctrine, and (4) prudential admonitions related to church discipline represent gradations of Church teaching's authoritative status. *Id.* at 86–90. Applying that analysis, Professor Gaillardetz has described the Church's death penalty teaching—specifically, its "restrictive conditions that must exist in order to justify capital punishment"—as an example of the third level. *Id.* at 89. In other words, it represents a topic-focused specification of broader, more authoritative, universal moral principles—e.g., "the law of love, the dignity of the human person, [and] respect for human life . . . ." *Id.* Accordingly, the teaching is among those having "emerge[d] out of the Church's ecclesial reflection upon universal moral teachings in the light of theological inquiry, the insights of the human sciences, and rational reflection on human experience." *Id.* In this way it is authoritative, but non-dogmatic—meaning it is not considered to be a part of divine revelation, but rather has been "shaped by changing moral contexts and contingent empirical data." *Id.* at 90. The upshot? Catholic believers would be expected to treat the teaching "as more than mere opinion[ ] or pious exhortation," and thus "must strive to integrate [it] into their religious outlook,"

A. Historical Background

Professors E. Christian Brugger and James J. Megivern have comprehensively treated Catholic/Christian death penalty teaching's historical and theological arc, some aspects of which were introduced in Part I.[230] Surveying additional details here facilitates understanding Catholic teaching's present iteration, and the significance of its relatively recent near-abolitionist stance.

The death penalty in early Christianity was situated within an evolving relationship between religious and secular power. Second- and third-century theologians harmonized biblical warrants for the death penalty with endorsements of the state's right to impose it.[231] Once Christianity became the official religion of the Roman Empire this harmonization gave way, by the fifth century, to a "complex intertwining of Christian creed and Roman law definitively mark[ing] 'Imperial Christianity,'" and a concomitant "lethal combination of the Bible and Roman law."[232] Thus came the Church's official endorsement of capital punishment for crimes against the state or the faith—first with, but eventually without, the proviso that it be imposed by non-Christian authorities.[233] Prominent figures like Saint Augustine (354–430) sought to straddle a fine line, endorsing civil authority's right to inflict the death penalty, while preaching tenets of Gospel faith centered on proportional justice, the practice of mercy, and the hope for repentance.[234] Professor Kuttner's theory of religious-secular interpenetration looms large. So, too, we can observe how themes

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though "it is possible to imagine a Catholic who might be unable to accept [the] . . . teaching as reflective of God's will for humankind and [thus] could legitimately withhold giving an internal assent to it." *Id.*

230 *See, e.g.*, BRUGGER, *supra* note 72, at 59–138. Professor Megivern—whose study is not limited to Catholic Christianity—identifies five historical shifts in the Church's approach to the death penalty: (1) the fourth and fifth centuries, when Christianity became the Roman Empire's established religion; (2) the eighth and ninth centuries, when the Western Church allied itself with secular powers; (3) the eleventh to thirteenth centuries, when the ascent of a centralized, monarchical papacy coincided with the rise of theological and canonical reflection on the use of lethal force to combat movements deemed heretical; (4) the fifteenth to seventeenth centuries, when the Protestant Reformation rocked the Western Church, and small groups of Christians began to oppose the religious use of (or imprimatur on) lethal force; and (5) the eighteenth to twentieth centuries, when many forces, both secular and religious, championed, and then gradually effected, abolition of the death penalty in much of the West. MEGIVERN, *supra* note 72, at 3–4.

231 BRUGGER, *supra* note 72, at 75.

232 MEGIVERN, *supra* note 72, at 27–45.

233 *Id.*; *see also* BRUGGER, *supra* note 72, at 74, 84–85.

234 BRUGGER, *supra* note 72, at 89–93; MEGIVERN, *supra* note 72, at 35–45.

from *Kennedy*'s coda, just discussed, echo a deep historico-religious tradition.

The medieval Church's consolidation of power corresponded with an articulation and eventual codification of an explicit pro-death penalty stance, limited only by a ban on clergy participation and an insistence that capital punishment follow from "proper motivation"—i.e., protection of the common good, which again parallels aspects of the preceding analysis of *Kennedy*.[235] Legal commentary such as Gratian's Decretum (1140) affirmed secular powers' right to impose death and provided that, while ecclesiastical authorities could not, they could summon the faithful to defend the faith by coercive, even fatal, means.[236] By the early thirteenth century, Pope Innocent III required a group of heretics reconciling with the Church to accept the Waldensian oath, declaring the non-imputability of mortal sin to civil authorities administering capital punishment.[237] Meanwhile, positivist affirmations of capital punishment found intellectual support in Saint Thomas Aquinas (1225–74), whose Summa Theologica affirmed exceptions to the Decalogue's prohibition against killing—capital sentences among them—on the premise of authority's duty to defend the common good.[238] By the late medieval period, church-state collusion in capital punishment was settled in both theory and practice.[239] Now-notorious extensions of this collusion appeared in the post-Reformation and Renaissance Church, when ecclesiastical authorities unhesitatingly endorsed the crusades and capital punishment for heresy.[240]

Thus, by the time the Roman Catechism was published in 1566, which codified the wide range of doctrine regularized by the Council of Trent (1545–63), Catholic death penalty teaching likewise reached codified form:

> Another kind of lawful slaying belongs to the civil authorities, to whom is entrusted power of life and death, by the legal and judicious exercise of which they punish the guilty and protect the innocent. The just use of this power . . . is an act of paramount obedience to [the Fifth] Commandment which prohibits mur-

235 BRUGGER, *supra* note 72, at 96–112; MEGIVERN, *supra* note 72, at 53–95.

236 BRUGGER, *supra* note 72, at 100–02; MEGIVERN, *supra* note 72, at 88–91. The relevant portions from Gratian's *Decretum* are *Causa XXIII, Questio V* and *Questio VIII*.

237 BRUGGER, *supra* note 72, at 103–07.

238 *Id.* at 108–111. *See* 2 THOMAS AQUINAS, SUMMA THEOLOGICA, pt. II-II, question 64, art. 3, at 1467 (Fathers of the English Dominican Province trans., 1947) (c. 1274).

239 BRUGGER, *supra* note 72, at 112.

240 *Id.* at 119–22 and MEGIVERN, *supra* note 72, at 107–11, offer frank treatments of this history.

> der . . . [and has as its end] the preservation and security of human life. Now the punishments inflicted by the civil authority, which is the legitimate avenger of crime, naturally tend to this end, since they give security to life by repressing outrage and violence.[241]

Interpenetration looms large, presumably explaining, in part, why the summary of Catholic death penalty teaching reproduced in Part I(C), sounds as much like a text of secular jurisprudence as one specifically ecclesiastical.

B. Present Catholic Teaching

Contemporary Catholic death penalty teaching has evolved in a manner akin to jurisprudence. Much of this stems from context: the Roman Catholic Church encompasses a highly organized structure of beliefs and authority, and law occupies a central position.[242] Given these characteristics and their rootedness in the history just surveyed, it is unsurprising that the Church's own law and its commentary on secular law address punishment for intentional homicide. Thus the Code of Canon Law includes penal prescriptions for church members

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241 CATECHISM OF THE COUNCIL OF TRENT FOR PARISH PRIESTS 421 (John A. McHugh & Charles J. Callan trans., 1934). Further discussion of these sections of the Catechism is provided in MEGIVERN, *supra* note 72, at 168 & n.85, 170–71. Catholicism was not unique in reconciling religio-cultural legalism with capital punishment: "The other great Abrahamic religions, Judaism and Islam, have not historically sustained a strong pacifist or abolitionist tradition. Being religions of the law, they [too] encoded support for capital punishment early on . . . ." Jean Bethke Elshtain, *Foreword*, *in* RELIGION AND THE DEATH PENALTY, *supra* note 15, at xi.

242 Vatican City's sovereign status signals the Church's identity as a legal system. *See The Holy See—Vatican City State*, VATICAN CITY STATE, http://www.vatican.va/vatican_city_state/index.htm (last visited Sept. 29, 2012). Its Code of Canon Law serves as a formal legal system governing ecclesiastical order. CODE OF CANON LAW: LATIN-ENGLISH EDITION (Canon Law Society of America trans. 1983). Its Catechism comprehensively surveys core aspects of Catholic belief and practice in a manner akin to Restatements in various fields of the law. *See generally* CCC, *supra* note 96.

That the Church represents a legal culture is attested to by its role in forming, and in being formed by, the broad Western legal tradition, *see generally* HAROLD J. BERMAN, *The Origin of the Western Legal Tradition in the Papal Revolution*, *in* LAW AND REVOLUTION, *supra* note 68, at 50–119, and by the characteristics of order and authority that it retains. For example, documents of the Second Vatican Council (1962–65) have the binding force of law for local Catholic entities throughout the world, governing everything from the Church's religious doctrines and vision for its role in society, to the framework for worship practices, institutional offices, and the identity, role, and responsibilities of clerics, religious orders, and laity. VATICAN COUNCIL II: THE CONCILIAR AND POST CONCILIAR DOCUMENTS (Austin Flannery ed., 1975). An overview of the Church's conception of law appears in CCC, *supra* note 96, §§ 1949–1986, which it defines as "a rule of conduct enacted by competent authority for the sake of the common good." *Id.* § 1951.

who commit homicide,[243] while the Catechism addresses secular authority's responsibilities concerning criminal punishment for murder, outlining theoretical justifications for and both normative and utilitarian arguments against the death penalty.[244]

Given the history recited above, it is particularly noteworthy that Catholic teaching's longstanding premise that civil authority possesses a right to inflict capital punishment has become so conditioned that its present iteration closely approaches the normative threshold of death penalty abolitionism. Contemporary Catholic death penalty teaching encompasses three, interrelated elements:

> [1] a restrictive presumption that the state may impose capital punishment only when necessary to protect human life;
>
> [2] a corollary affirmative presumption, premised on notions of human dignity and the common good, that endorses nonlethal protective force; and
>
> [3] an assumption that contemporary historical realities render rare, "if not practically nonexistent," the likelihood that the first presumption will overcome the second.[245]

Versions of this formulation appear in the Compendium of the Social Doctrine of the Church,[246] the U.S. Catholic bishops' statement advo-

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243 CODE OF CANON LAW, *supra* note 242, canon 1397.

244 *See* CCC, *supra* note 96, §§ 2265–67.

245 *See* CCC, *supra* note 96, § 2267. The *Catechism*'s complete statement follows:

> Assuming that the guilty party's identity and responsibility have been fully determined, the traditional teaching of the Church does not exclude recourse to the death penalty, if this is the only possible way of effectively defending human lives against the unjust aggressor.
>
> If, however, non-lethal means are sufficient to defend and protect people's safety from the aggressor, authority will limit itself to such means, as these are more in keeping with the concrete conditions of the common good and are more in conformity to the dignity of the human person.
>
> Today, in fact, as a consequence of the possibilities which the state has for effectively preventing crime, by rendering one who has committed an offense incapable of doing harm—without definitely taking away from him the possibility of redeeming himself—the cases in which the execution of the offender is an absolute necessity "are very rare, if not practically nonexistent."

Id. (quoting POPE JOHN PAUL II, EVANGELIUM VITAE § 56 (1995)).

246 The COMPENDIUM states that:

> *The Church sees as a sign of hope a growing public opposition to the death penalty*, even when such a penalty is seen as a kind of legitimate defence on the part of society. . . . The growing aversion of public opinion towards the death penalty and the various provisions aimed at abolishing it or suspending its application constitute visible manifestations of a heightened moral awareness.

cating abolition of the death penalty,[247] and in academic commentary.[248]

For purposes of comparing Catholic teaching to U.S. death penalty jurisprudence, elements of the preceding definition merit elaboration. From the premise of "safeguarding the common good," the first presumption asserts that the state has a "[l]egitimate" right and "grave duty" to defend life against unjust aggression,[249] and thus is not "exclude[d from] recourse to the death penalty."[250] But this presumption is restrictive, permitting capital punishment only where an aggressor's identity and guilt have been ascertained, and where execution is "the only possible" effective means for the state to fulfill its protective duty.[251] The teaching does not flesh out what these limitations should look like. But that is unsurprising, for the Church's position is meant to frame the death penalty's moral contours, not provide civil authority with a blueprint for law proper to its sphere.[252]

In any event, restricting the premise that the state has the right to execute people is fleshed out in the teaching's second presumption, asserting that the state should limit itself to nonlethal defensive means sufficiently capable of achieving its protective obligation. This normative prescription includes the important substantive assumption that nonlethal protective means "are more in keeping with the concrete conditions of the common good and [are] more in conformity [to] the dignity of the human person."[253] As the preceding discussion made clear, these norms are a critical hinge for comparing the Catholic and U.S. approaches.

COMPENDIUM, *supra* note 225, § 405 (footnotes omitted) (internal quotation marks omitted).

247 USCCB, *supra* note 51, at 12 ("In its traditional teaching as summarized in the *Catechism of the Catholic Church*, the Church affirms the right and duty of legitimate public authority to inflict punishment proportionate to the gravity of the offense. Recourse to the death penalty is not absolutely excluded: the death penalty is not intrinsically evil . . . . Nevertheless, the Church teaches that in contemporary society where the state has other nonlethal means to protect its citizens, the state should not use the death penalty." (citations omitted) (internal quotation marks omitted)).

248 *See, e.g.*, BRUGGER, *supra* note 72; MEGIVERN, *supra* note 72; Avery Cardinal Dulles, S.J., *Catholic Teaching on the Death Penalty: Has It Changed?*, *in* RELIGION AND THE DEATH PENALTY, *supra* note 15, at 23; Ghoshray, *supra* note 23.

249 CCC, *supra* note 96, §§ 2265–66.

250 *Id.* § 2267.

251 *Id.*; *see also* COMPENDIUM, *supra* note 225, § 405 (stating the same proposition).

252 *See* USCCB, *supra* note 51. Moreover, not providing a more specific blueprint is consistent with the principle, also central to Catholic social teaching, that civil authority occupies its own proper sphere. *See infra* note 267 and accompanying text.

253 CCC, *supra* note 96, § 2267.

The teaching's third component argues that historical developments have made effective, alternative protective means sufficiently available that instances today when capital punishment "is an absolute necessity 'are very rare, if not practically non-existent.'"[254] Notable is this component's combination of utilitarianism with a normative assertion verging on abolitionism,[255] as seen in the U.S. Catholic bishops' iteration of the general teaching:

> [1] The sanction of death, when it is not necessary to protect society, violates respect for human life and dignity.
>
> [2] State-sanctioned killing in our names diminishes all of us.
>
> [3] Its application is deeply flawed and can be irreversibly wrong, is prone to errors, and is biased by factors such as race, the quality of legal representation, and where the crime was committed.
>
> [4] We have other ways to punish criminals and protect society.[256]

Worth noting is the assertion that the death penalty "diminishes" society as a whole (presumably in a moral sense), echoing the commentary by Andrew Cohen and Ty Alper cited earlier, and dicta in *Kennedy*.[257] Nor is the resonance exclusively contemporary: prominent early American jurist and statesman Edward Livingston urged restricting the death penalty in strikingly similar words:

> The right to inflict death exists, but . . . it must be in defense, either of [the] individual or social existence; and it is limited to the case where no other alternative remains to prevent the threatened destruction. Societies have existed without it . . . . In those societies, therefore, it was not necessary. Is there anything in the state of ours that makes it so?[258]

Interpenetration again looms large. For further comparative purposes it is important to highlight meta-juridical themes informing the positivist elements of Catholic teaching, as many echo elements of U.S. death penalty jurisprudence.

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254 *Id.* (quoting EVANGELIUM VITAE, *supra* note 245, § 56).

255 In "renew[ing] [their] call" to end the death penalty, the U.S. Catholic bishops described it as both "unnecessary"—a utilitarian assertion—and "unjustified in our time and circumstances," which is a normative consideration. USCCB, *supra* note 51, at 3.

256 *Id.*

257 *Compare supra* notes 42–46 and accompanying text, *with* Kennedy v. Louisiana, 554 U.S. 407, 420 (2008).

258 MEGIVERN, *supra* note 72, at 304–05.

C. Catholic Teaching as Jurisprudence

Most relevant to this Article's comparative approach to capital punishment as law and morality jurisprudence are Catholic teaching's attention to authority and moral order, human dignity and the common good, and the purposes of punishment. Moreover, their conceptual development in Church teaching over time suggests how that teaching can engage broader death penalty discourse.

1. Summary of Meta-Juridical Themes

The Church's traditional death penalty teaching intertwined transcendent and temporal conceptions of existential order. Civil authority had a duty, in concert with ecclesiastical authority, to ensure that a fallen social order would as closely as possible approximate the perfect order ordained by God.[259] Saint Augustine expressed this view in his "Two Cities" metaphor, envisioning order as the most important characteristic that temporal and religious authority share.[260] Given his generally dim conception of human moral fallibility, authority's role maintaining order was largely coercive.[261] One can see how permissive approaches to capital punishment would accord with such a view.

In contrast, Saint Thomas Aquinas asserted that authority could positively shape order and advance the human condition, conceiving of both civil and ecclesiastical authority in terms of parental solicitude.[262] This metaphor informed justice and punishment.[263] Also crucial was what Aquinas, and the subsequent Catholic tradition, understood to be the integrating principle of natural law.[264] In broad

259 ANDREW SKOTNICKI, CRIMINAL JUSTICE AND THE CATHOLIC CHURCH 39–44 (2008).

260 AUGUSTINE, *The City of God*, *in* POLITICAL WRITINGS 3, 3–201 (Ernest L. Fortin & Douglas Kries eds., Michael W. Tkacz & Douglas Kries trans., 1994).

261 SKOTNICKI, *supra* note 259, at 39–41.

262 *See* SAINT THOMAS AQUINAS, ON THE GOVERNANCE OF RULERS (DE REGIMINE PRINCIPUM) (Gerald B. Phelan trans., 1938); THOMAS AQUINAS, ON LAW, MORALITY, AND POLITICS (William P. Baumgarth & Richard J. Regan eds., Richard J. Regan trans., 2d ed. 2002); ST. THOMAS AQUINAS, *supra* note 238, questions 87, 94, 96, 105; SKOTNICKI, *supra* note 259, at 41–44 (summarizing Aquinas' thoughts in a cogent manner).

263 *See* SKOTNICKI, *supra* note 259, at 41–44.

264 Much of Catholic moral and social teaching stems from the natural law tradition, on the basis of which "the Catholic Church has maintained [that] it is possible to formulate teaching that really does speak to all people in all settings." Himes, *supra* note 92, at 5. This premise is not immune from epistemological and other critiques, akin to those many legal scholars pose to natural law theorists. Here it suffices to assert, simply as a descriptive matter, that part of Catholic death penalty teaching's

strokes, Catholic natural law theory holds that, inasmuch as principles of divine law are inscribed in the order of nature and in human conscience, positive law can articulate rationally discernible, universalizable norms.[265] This approach permitted Aquinas to assert that civil law should not contradict divine law, while affirming that religious and secular spheres possess respective, proper roles.[266]

Drawing on this tradition, Catholic social teaching today, including on the death penalty, endorses an epistemological and juridical distinction between the religious and secular spheres as having proper sources of authority, modes of reasoning, and responsibilities in social order.[267] Theoretically, then, Catholic and secular perspectives can be "translated." The Church's approach to human dignity, human rights, and the common good, as three interrelated principles of moral order meant to inform positive law, represent specific terms of substantive translation.

First, a theological premise—"[t]he Church sees in men and women, in every person, the living image of God"[268]—orients the Church's conception of human dignity. But it also identifies its secular, social dimensions:

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salience lies in its rootedness in the broad Western legal tradition, elements themselves of which are indebted to natural law theory. *See* BERMAN, *supra* note 68, at 144–47.

265 In its simplest form, Catholic natural law theory rests on the premise that human reason bears the capacity to reflect on "nature"—in a sense, the reality of creation, understood to be given by God—and from that reflection to abstract transcendent moral norms and laws the obedience to which, via codification in human positive law, facilitates full human flourishing. *See generally* COMPENDIUM, *supra* note 225, §§ 140–42 (discussing the universal nature of natural law that should be reflected in civil law); Stephen J. Pope, *Natural Law in Catholic Social Teachings*, *in* MODERN CATHOLIC SOCIAL TEACHING, *supra* note 92, at 41. *Cf.* BLACK'S LAW DICTIONARY, *supra* note 68, at 1127 (defining natural law, in part, as "[a] philosophical system of legal and moral principles purportedly deriving from a universalized conception of human nature or divine justice").

266 SKOTNICKI, *supra* note 259, at 42–44.

267 The COMPENDIUM provides:

> *[T]he distinction between the political and religious spheres* . . . is a value that has been attained and recognised by the Catholic Church and belongs to the inheritance of contemporary civilisation . . . . The social doctrine of the Church is not an intrusion into the government of individual countries . . . . *The principle of autonomy involves respect for every religious confession on the part of the State* . . . . *In a pluralistic society, secularity is a place for communication between the different spiritual traditions and the nation.*

COMPENDIUM, *supra* note 225, §§ 571–72 (footnotes omitted) (internal quotation marks omitted). This view is consistent with Catholic teaching's affirmation that the state possesses the right, in principle, to inflict capital punishment.

268 *Id.* § 105.

> [T]he social order and its development must invariably work to the benefit of the human person, since the order of things is to be subordinate to the order of persons, and not the other way around . . . . [Thus i]t is necessary to "consider every neighbour without exception as another self, taking into account first of all his life and the means necessary for living it with dignity." Every political, economic, social, scientific and cultural programme must be inspired by the awareness of the primacy of each human being over society.[269]

That Catholic moral reasoning tenets have explicit social dimensions making them "translatable" to the secular sphere should be evident in this normative counsel.

Church teaching's situation of human dignity within a broad conception of human rights offers further evidence. Following Pope John XXIII's endorsement of "universal, inviolable[,] and inalienable" human rights in his 1963 encyclical *Pacem in Terris*,[270] the Second Vatican Council signaled the Church's engagement of modern human rights theory: "[t]he movement towards the identification and proclamation of human rights is one of the most significant attempts to respond effectively to the inescapable demands of human dignity."[271] Per Catholic social theory, however, both human dignity and human rights necessarily have a social context, framed in terms of the common good, which the Second Vatican Council defined as "the sum total of social conditions which allow people, either as groups or as individuals, to reach their fulfillment more fully and more easily."[272]

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269 *Id.* § 132 (footnotes omitted) (quoting SECOND VATICAN ECUMENICAL COUNCIL, PASTORAL CONSTITUTION ON THE CHURCH IN THE MODERN WORLD [GAUDIUM ET SPES] §§ 26–27 (1965) [hereinafter GAUDIUM ET SPES]) (citing CCC, *supra* note 96, § 2235) (the current available version from the Vatican of GAUDIUM ET SPES is apparently a new translation of the encyclical different from that quoted in the COMPENDIUM).

270 Pope John XXIII, Pacem in Terris: On Establishing Universal Peace in Truth, Justice, Charity, and Liberty § 145 (April 11, 1963).

271 COMPENDIUM, *supra* note 225, § 152 (citing SECOND VATICAN ECUMENICAL COUNCIL, DECLARATION ON RELIGIOUS FREEDOM [DIGNITATIS HUMANAE] § 1 (1965)). *See also* David Hollenbach, *Human Dignity in Catholic Thought* 1, 6, *in* CAMBRIDGE HANDBOOK ON HUMAN DIGNITY (forthcoming, 2012; draft on file with author) (describing as "a remarkable development," historically speaking, "the Roman Catholic community's . . . emerg[ence] as a vigorous global advocate of human rights," and its status as "a participant in what John Rawls has called an 'overlapping consensus' on a public philosophy of human dignity and human rights . . . [allowing] people from diverse religions or cultures [to] reach agreement on the ethical standards for the institutions that structure their lives together").

272 CCC, *supra* note 96, § 1906 (quoting GAUDIUM ET SPES, *supra* note 269, § 76. *See also* COMPENDIUM, *supra* note 225, §§ 164–70 (summarizing the concept of the common good in both church tradition and contemporary sources).

These principles—human dignity, human rights, and the common good—inform Catholic canon law,[273] and are evident in its death penalty teaching.

Indeed, affirming human dignity is part and parcel of authority's protective role, which itself is conceived in terms of ensuring the common good within a broadly integrated moral and political order:

> Considering the human person as the foundation and purpose of the political community means in the first place working to recognise and respect human dignity through defending and promoting fundamental and inalienable human rights: "In our time the common good is chiefly guaranteed when personal rights and duties are maintained." The rights and duties of the person contain a concise summary of the principal moral and juridical requirements that must preside over the construction of the political community. These requirements constitute an objective norm on which positive law is based . . . .[274]

For these reasons, recourse to capital punishment is permissible if it is the only means of securing order, and insofar as it gives way, wherever possible, to nonlethal protective means more in conformity with human dignity. In other words, utilitarian ends such as protecting the body politic are never only utilitarian. Such protection never can be divorced from a corporate, social moral identity, human dignity being its substantive core. Thus, norms for criminal punishment that deeply grapple with human dignity reflect as much on a body politic as on those whom it condemns, to employ a rephrasing of secular legal commentators' view of contemporary capital punishment's socially reflexive moral resonance.[275]

What Catholic death penalty teaching does not spell out is how, in a pluralistic culture with a separation of church and state, civil authority determines, so as to uphold, the substantive content of human dignity lest it remain a mere shibboleth, to recall Professor Moore's moral reasoning analysis.[276] Here this Article's treatment of death penalty jurisprudence echoes the Catholic tradition, and may aid its own development. That this tradition has developed and yet

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273 Pope John Paul II, Address to the Tribunal of the Roman Rota (Feb. 17, 1979), *available at* http://www.vatican.va/holy_father/john_paul_ii/speeches/1979/february/documents/hf_jp-ii_spe_19790217_roman-rota_en.html ("Canon law agrees with and fosters . . . the affirmation of the self as an authentically social being through acknowledgement of and respect for the other as a *person* endowed with universal, inviolable, and inalienable rights and invested with a transcendent dignity.").

274 COMPENDIUM, *supra* note 225, § 388 (footnote omitted).

275 *See supra* notes 42–46 and accompanying text.

276 *See supra* note 161 and accompanying text.

still can, thus serving as a conversation partner to a broader integrative jurisprudence, is a premise that the tradition itself supports, as the following subsection argues.

2. Development of Doctrine

Cardinal John Henry Newman offered the first modern systematic theory of the development of doctrine, a theory important to Catholic theology and social teaching, in 1845 in *An Essay on the Development of Christian Doctrine*,[277] though its theoretical roots stretch back at least to Aquinas.[278] Professor Robert Kennedy has described how versions of the doctrine turn on two analyses: (1) the degree of a teaching's authoritativeness in the Church; and (2) whether a "developed" expression of that teaching represents a basic translation of the tradition into a new language or context, a new formulation for a previously-unaddressed situation, or a reformulation of what came before, in light of or as applied to new realities.[279]

Judge John T. Noonan, Jr., a prominent Catholic scholar and judge of the United States Court of Appeals for the Ninth Circuit, has significantly contributed to this scholarship.[280] His approach is ger-

277 J. H. Newman, *An Essay on the Development of Christian Doctrine*, 84 EDINBURGH REV. 195 (1846).

278 *See generally* JOHN T. NOONAN, JR., A CHURCH THAT CAN AND CANNOT CHANGE (2005) (discussing the change of Catholic moral teaching while keeping its foundation in the Gospels throughout history); Christopher Kaczor, *Thomas Aquinas on the Development of Doctrine*, 62 THEOLOGICAL STUD. 283, 283 (2001) (arguing that Aquinas opened "the door to development" and "foreshadowed" later theological developments).

279 Robert G. Kennedy, *Development of Doctrine in Moral Theology: Can What Was Once Wrong Now Be Right?*, 1 U. ST. THOMAS L.J. 253, 255–57 (2003). Concerning levels of authority accorded to substantive Church teaching, see *supra* note 229 and accompanying text.

280 It should be noted that while Catholic scholars do not universally accept Judge Noonan's approach to doctrinal development, the merits and implications of this intra-Catholic debate are beyond the scope of this Article. *Compare, e.g.*, M. Cathleen Kaveny, *Development of Catholic Moral Doctrine: Probing the Subtext*, 1 U. ST. THOMAS L.J. 234, 235 (2003) (describing Judge Noonan's approach and debates it has triggered), *with* Kennedy, *supra* note 279, at 264–72 (critiquing elements of Judge Noonan's account of evolutionary doctrinal development in the Church's moral theology).

See Silvio Ferrari, *Adapting Divine Law to Change: The Experience of the Roman Catholic Church (with Some Reference to Jewish and Islamic Law)*, 28 CARDOZO L. REV. 53 (2006) for an instructive comparison of change within religious legal systems, distinguishing between particular religions' notions of immutable divine law, and historical and theological forces admitting of change at the level of application. Professor Ferrari also addresses change in death penalty teaching in Jewish law. *Id.* at 54–55.

mane here given his versatility with both the Catholic intellectual tradition and American jurisprudence. As he observes:

> Conditions and practices have at times anticipated the development of moral doctrine within the Church and given rise to the development. An economy based on commercial credit preceded the revision of the rules on usury. The rise of democratic, liberal societies, most notably the United States, preceded Vatican II's Declaration of Religious Liberty. The very general practice of civil divorce preceded the current practice of divorce by papal rescript. The abolition of slavery almost everywhere was in advance of Vatican II's categorical condemnation of slavery.[281]

To summarize: "the development of moral doctrine can and does occur by human experience leading to better understanding of human nature."[282]

This perspective evokes the theory of religious-secular interpenetration. Moreover, inasmuch as Judge Noonan urges that a kind of "deepening"[283] inherent in the development of doctrine, which yields more profound understanding through, in relevant part, the "intellectual, moral, emotional, and social [development] of human beings,"[284] his analysis also evokes Professor Berman's vision of integrative jurisprudence. Both doctrinal development and integrative jurisprudence, then, represent a process that engages a community, guided by its authoritative sources, as these sources are reflected in new understandings of human realities for which those sources have normative value and provide normative direction. As Professor Cathleen Kaveny has argued:

> In both moral theology and law, questions of development cannot be addressed in the abstract; they must be addressed in the relevant context. What, concretely, does this mean? In my view, it puts us to work. We cannot hope to address the pressing questions of our day in the context of [a given] moral tradition without knowing that tradition.[285]

The development of doctrine both describes and helps to explain what has occurred in Catholic death penalty teaching.[286] One need only juxtapose the Roman Catechism of 1566 and the present Cate-

281 NOONAN, *supra* note 278, at 210.

282 *Id.* at 213.

283 *Id.* at 215.

284 *Id.* at 216.

285 Kaveny, *supra* note 280, at 252.

286 *See* BRUGGER, *supra* note 72, at 141 (applying approaches to doctrinal development to Catholic death penalty teaching).

chism to see the historical shift.[287] The former emphasizes the state's protective function and right to impose retributive punishment; the latter includes these assumptions but emphasizes human dignity. This is more than an addition of words. When Pope John Paul II's encyclical letter Evangelium Vitae[288] was published in 1995, then-Cardinal Joseph Ratzinger (now Pope Benedict XVI) characterized the encyclical's death penalty teaching as "important doctrinal progress," acknowledging that it would require revision of the Catechism, which occurred in 1997.[289] Professor Brugger has described Evangelium Vitae's statement of the "very rare, if not practically nonexistent"[290] principle in its reflection on the death penalty as having "received more notice than any other [topic] in the entire [encyclical]."[291]

Scholars debate to what extent the Catechism's revised statement on the death penalty technically represents a development of doctrine.[292] But however it is characterized, a shift occurred.[293] Moreover, it implies that longstanding meta-juridical norms concerning authority, moral order, justice, and punishment are better understood in light of evolving historical context.[294] Interpenetration looms large

287 *Compare* CCC, *supra* note 96, *with* CATECHISM OF THE COUNCIL OF TRENT FOR PARISH PRIESTS PT. III, *supra* note 241.

288 EVANGELIUM VITAE, *supra* note 245.

289 MEGIVERN, *supra* note 72, at 1 (citing *Encyclical Condemns 'Culture of Death': Pope Links Abortion with Death Penalty*, NAT'L CATHOLIC REP., Apr. 7, 1995, at 3).

290 BRUGGER, *supra* note 72, at 11 (quoting EVANGELIUM VITAE, *supra* note 245, § 56).

291 *Id.* at 10.

292 *Compare, e.g.*, BRUGGER *supra* note 72, at 163 (concluding that present teaching consistently applies Catholic tradition to changed historical contexts, while incorporating theoretical premises, such as human rights theory, of more recent vintage), *and* James J. Megivern, *Judge Noonan, Church Change, and the Death Penalty*, 1 U. ST. THOMAS L.J. 274, 277 (2003) (describing Pope John Paul II's approach to the death penalty as one of "remarkable change"), *with* Dulles, *supra* note 248, at 27–28 (critiquing elements of Professor Brugger's analysis, and emphasizing the present doctrine's "*prudential* judgment that . . . the application of the death penalty is held to be undesirable in a society like our own, because of circumstances that would render the application harmful" (emphasis added)).

293 In a 2002 address at Georgetown University, Justice Scalia expressed frustration with the Church's "change" on the death penalty: "No authority that I know of denies the 2,000-year-old tradition of the [C]hurch approving capital punishment . . . . I don't see why there's been a change." Megivern, *supra* note 292, at 275 (alteration in original) (citing Anne Thompson, *Scalia: Stuck in the Past*, WASH. POST, Feb. 26, 2002, at A21)). Professor Megivern has countered Justice Scalia's view, arguing that Church history is hardly univocal in its death penalty teaching or practice. *See* Megivern, *supra* note 292, at 275, 277–78.

294 Megivern, *supra* note 292, at 280–83 (arguing that change in the Church's teaching is due to the post-Vatican II embrace of an historical consciousness, the

given that change in the Catholic teaching can, at least in part, be ascribed to historical realities in which the Church finds itself, not simply that exist within it alone. Catholic teaching has learned from "the world," while its teaching's deep roots in Western jurisprudence and its capacity to employ contemporary categories of jurisprudence mean that schools of thought operative in today's world may be able to learn from its own evolutive process. Part IV addresses this possibility.

IV. Advancing Death Penalty Discourse

"[R]eligious concerns do not exist in a vacuum; they necessarily affect the values encompassed by the freedom of expression."[295] Nor does a death penalty jurisprudence that necessarily embodies moral judgment exist in a vacuum, this Article's comparison demonstrating that such jurisprudence engages moral reasoning values within broad public discourse, with religious perspectives a part. Perhaps for this reason *Kennedy*'s[296] conceptual vagaries can be forgiven. Though even if they are, that is no reason not to improve. If this jurisprudence necessarily embodying moral judgment is to be integrative—i.e., culturally believable or resonant, and judicially administrable—then both its language of human dignity-affirming proportionate punishment and its means of ensuring it must cohere with the evolving standards of decency of "the society so characterizing it."[297] This requires a broad public discourse attentive to varied sources and voices that are both competent and willing to offer moral reasoning perspectives. Religious perspectives that are not sheer fideism, which divorces faith from reason, or fundamentalism, which is unwilling to engage diversity, thus have a role to play.

A. Development of Doctrine and Evolving Standards of Decency

This Article asserts that Catholic death penalty teaching can be one such voice. For it offers considerably more, historically and conceptually, than mere moral exhortation unmoored from the categories of reasoning proper to a secular legal context. It qualifies, that is,

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Church's embrace of human rights theory, and personal leadership by Pope John Paul II, a staunch death penalty foe). *See also* Michael J. Perry, *Capital Punishment and the Morality of Human Rights*, 44 J. Cath. Legal Stud. 1, 2–3 (2005) (situating Catholic death penalty teaching within a broad "global morality" of human-dignity-premised human rights).

295 Marshall, *supra* note 58, at 546.

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

297 Furman v. Georgia, 408 U.S. 238, 382 (1972) (Burger, C.J., dissenting).

as jurisprudence. Moreover, nor is U.S. death penalty jurisprudence a matrix of statutory and case law unswayed by dynamic, meta-juridical categories of moral reasoning—many of which, the preceding analysis shows, resonate not only with the form but, in several instances, with the tone if not substance of Catholic death penalty teaching's own meta-juridical categories. Both, that is, are examples of a jurisprudence that necessarily embodies moral judgment. But if this jurisprudence is to be integrative, intentional discourse is required of its socially, morally conscious interlocutors. Here the Catholic tradition's theory of the development of doctrine can prove helpful.

As discussed, situating a teaching's authority is central to the development of doctrine as an analytical construct. Just as the "jurisprudence" of Catholic death penalty teaching taps into a larger construct of authoritative Church teaching, post-*Kennedy* death penalty jurisprudence could benefit from more clearly demarcating levels of moral authority proper to constructing, describing, and reviewing the evolving standards of decency. Such a project would stress that the relationship between the objective indicia and independent judgment analyses concerns more than jurisdiction counting, and requires assessing the nature of majoritarian judgments. It could, for example, test for and distinguish between necessarily morally reasoned judgments (e.g., a death sentence is proportionate punishment for child rape because "X"), versus intuitional judgments about moral questions (e.g., child rape is among the most depraved of crimes, thus justifying death).

Such an analysis goes to the core issue of authority dividing the *Kennedy* Justices, and arguably has as an analogue in jurisprudence examining whether a challenged state action is impermissibly pretextual. It also may put a greater onus on Justices' exercise of independent judgment, forcing them to articulate substantive moral precepts—e.g., concerning human dignity—in terms of jurisprudence, which could avoid their devolution to mere moral shibboleth-ism. The Catholic theory of the development of doctrine could prove an aid here, as well, given its rootedness in careful assessments of what constitutes doctrine per se.[298] This, too, is an authority question, requiring judges "to judge."[299] And this we need judges to do, since neither political majorities nor their representatives can as efficiently, not to mention as authoritatively, discern and decide how, whether, and when the results of political process cohere with the Constitution.

298 *See generally* NOONAN, *supra* note 278, chs. 28–33 (prescribing various tests for determining a developing teaching's doctrinal authenticity).

299 Moore, *supra* note 23, at 65; *see supra* text accompanying note 162.

To rely on another analogous comparison, Catholic death penalty teaching has—but, only relatively recently—come up with a way to relate human dignity both to a criminal offender's rights, and to the common good as a whole.[300] There is no reason that U.S. death penalty jurisprudence cannot do something similar; indeed, scholars argue that it already has moved, or is moving, that way.[301]

For example, assuming that U.S. death penalty jurisprudence continues decently "to evolve,"[302] analyses akin to Catholic doctrinal development may be useful given its attention to synthetic, historical reflection on moral order, the common good, justice, and equity as fleshing out the meaning of human dignity and its impact on the various justifications for punishment. This may be what we see in those whose long immersion in this jurisprudence leads to them concluding that the death penalty's continued practice cannot be squared with the Constitution's norms. Justice Stevens's statement in *Baze* merits closer scrutiny:

> [C]urrent decisions by state legislatures, by the Congress of the United States, and by this Court to retain the death penalty as a part of our law are the product of habit and inattention rather than an acceptable deliberative process that weighs the costs and risks of administering that penalty against its identifiable benefits, and rest in part on a faulty assumption about the retributive force of the death penalty.[303]

The discursive process that Justice Stevens—then the Court's most senior justice—commends coheres with this Article's thesis. For one could interpret his critique as a reflection on the fact that, in the decades since *Gregg*,[304] the moral reasoning inherent to wrestling with capital punishment itself became instructive, became a tool for work-

300 *See supra* notes 268–271 and accompanying text.

301 *See supra* note 198; *see also* Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169, 169 (2011) (offering an empirical and typological analysis of Supreme Court opinions' employment of the concept of dignity, and arguing that "[f]ew words play a more central role in modern constitutional law without appearing in the Constitution than 'dignity.' The term appears in more than nine hundred . . . opinions, but . . . is a concept in disarray").

302 Goodman, *supra* note 198, at 794. Professor Goodman closes her study of human dignity in constitutional jurisprudence by observing that "our standard of decency continues to evolve," and arguing that "[i]f the evolution is slow, but steady, human dignity will routinely weigh into the Court's constitutional analysis as a value having a constant strength (rather than varying in strength according to popular opinion) during the next fifty years." *Id.* Writing in 2006, Professor Goodman's prediction might be seen as prescient, given this Article's reading of *Kennedy*.

303 Baze v. Rees, 553 U.S. 35, 78 (2008) (Stevens, J., concurring).

304 Gregg v. Georgia, 428 U.S. 153 (1976).

ing through the Court's complex Eighth Amendment jurisprudence.[305] That Justice Scalia, the Court's then next-most-senior member, found Justice Stevens's about-face so disturbing may but reflect the fact that doctrinal development, inasmuch as it is engaged in by a diverse community of interpreters, is neither a predictable process nor a straightjacket.[306] Indeed, the merits and limitations of such a deliberative process as engaged by the Supreme Court rather than legislative bodies are alive in the differences between Justices Stevens and Scalia in *Baze*, and in *Kennedy*'s majority and dissenting opinions.[307]

But this, it would seem, is all the more reason for scholars, lawyers, jurists, and other parties involved in death penalty discourse to engage in a process of clarifying what the evolving standards of decency, and its reference to human dignity, mean and require when authority would inflict the ultimate punishment. For example, Catholic teaching continues to develop retributive theory counter-balanced by restorative emphases.[308] So, too, rehabilitation theory has traction in U.S. jurisprudence—some suggesting that *Kennedy* and another signal Eighth Amendment case, *Panetti v. Quarterman*,[309] augur this development—in which case these developments in both traditions could impact death penalty discourse.[310] As Professor Michael

305 *See* Carol S. Steiker, *The Marshall Hypothesis Revisited*, 52 How. L.J. 525, 554 (2009) ("To the extent that various Justices' partial or total rejection of capital punishment is grounded in their deeper knowledge about the death penalty developed through their long-term exposure to its implementation, then perhaps their 'own judgment' is a helpful guide for discerning 'evolving standards of decency' rather than an evasion of that duty."); *see also* Lyke, *supra* note 198, at 649 (characterizing the evolution of Justice Kennedy's Eighth Amendment views).

306 *Baze*, 553 U.S. at 87–89 (Scalia, J., concurring).

307 Compare the concurring opinions of Justices Stevens and Scalia in *Baze*, 553 U.S. at 71–93, with the rejoinder in Section V of *Kennedy* to what might be termed "judicial fiat" criticisms of the majority's conclusion, *Kennedy*, 554 U.S. at 446–47, versus the dissent's argument that the majority's justifications were unsound. *Id.* at 447 (Alito, J., dissenting).

308 *See, e.g.*, Statement from the United States Conference of Catholic Bishops, Responsibility, Rehabilitation, and Restoration: A Catholic Perspective on Crime and Criminal Justice (Nov. 15, 2000) [hereinafter Responsibility, Rehabilitation, and Restoration], *available at* http://www.usccb.org/issues-and-action/human-life-and-dignity/criminal-justice-restorative-justice/crime-and-criminal-justice.cfm (last visited Sept. 9, 2012).

309 551 U.S. 930 (2006).

310 *See* Dan Markel, *Executing Retributivism:* Panetti *and the Future of the Eighth Amendment*, 103 Nw. U. L. Rev. 1163, 1213 & n.189 (2009) (arguing that a shift in the Supreme Court's thinking on retributivism in *Panetti*, which addressed the legitimacy of the death penalty for those defendants who do not rationally understand why they are being executed, has implications for undermining the death penalty's justifica-

Radelet has argued, the retributive "calculation" of just punishment for murder—or for any crime, for that matter—is unsusceptible of empirical calculation, unlike deterrence and incapacitation arguments. In this respect, capital punishment in particular "becomes more a moral and less a criminological issue."[311]

Having returned to the law and morality question, it is possible now to offer some concluding reflections about translating between moral reasoning paradigms for the purposes of discourse, of "dialogue on crime and corrections, justice and mercy."[312]

B. Translation For Discourse

Given this Article's argument for the necessity of a death penalty discourse more intentionally attuned to the moral dimensions of Eighth Amendment jurisprudence, how will such discourse occur, especially where the signal nuances of its various interlocutors—e.g., "Catholic" versus "American," to paint with a broad brush—differ radically? Professor Gregory Kalscheur has proposed axioms that can guide religious-secular dialogue while upholding the distinctive nature and independence of their respective spheres and institutions.[313] Several of these highlight how discourse concerning the law

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tion, and describing the treatment of retribution and its additional focus on rehabilitation theory in *Kennedy*); Carol S. Steiker, Panetti v. Quarterman*: Is There a "Rational Understanding" of the Supreme Court's Eighth Amendment Jurisprudence?*, 5 OHIO ST. J. CRIM. L. 285, 290 (2007) (arguing that the Court's decision in *Panetti* "leaves us . . . with more global questions about the proper scope of Eighth Amendment constraints on punishment and the methodology for determining that scope").

311 Michael L. Radelet, *The Role of Organized Religions in Changing Death Penalty Debates*, 9 WM. & MARY BILL RTS. J. 201, 209 (2000). As Professor Radelet argues:

> [W]e cannot gather data to prove, one way or another, how much of a given punishment (or benefit) any prisoner (or non-prisoner) "deserves." How much we all deserve, instead, is a cultural determination greatly influenced by prevailing standards of morality.
>
> And since retribution rests on more of a moral base than an empirical one, it is fundamentally a question that religious denominations need to address. The future of the death penalty in the United States will be greatly influenced by how religious leaders and organizations deal with this issue.

Id. at 213–14.

312 Responsibility, Rehabilitation, and Restoration, *supra* note 308, at ¶1.

313 Gregory A. Kalscheur, *John Paul II, John Courtney Murray, and the Relationship Between Civil Law and Moral Law: A Constructive Proposal for Contemporary American Pluralism*, at 2 (Bos. Coll. Law Sch. Pub. Law and Legal Theory Research Paper Series, Research Paper No. 38, (May 21, 2004), *available at* http://ssrn.com/abstract=550201. Professor Kalscheur's proposed six axioms are:

> The distinctions between state and society and public and private morality must be respected.

and the moral intuitions that inform it require a process of translation—a process at the heart of comparative law. In a sense, what is required is a "grammar" consisting of intelligible principles that surface and bring into conversation the content of one and then another language—e.g., "Catholic" and "American" death penalty discourse.[314]

But such conversation is only a beginning, for then the hard work of immersion occurs. The traditions must speak with each other, learning their respective nuances, benefiting from the self-critical reflective processes that immersion stimulates, and articulating new presumptions and applications as a result. Such an iterative process is what the theory of doctrinal development is about and, arguably, what evolving standards of decency are about. Justice Stevens's brief concurring opinion in *Simmons* sets this out:

> Perhaps even more important than our specific holding today is our reaffirmation of the basic principle that informs the Court's interpretation of the Eighth Amendment. If the meaning of that Amendment had been frozen when it was originally drafted, it would impose no impediment to the execution of 7-year-old chil-

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> . . . .
> The moral concerns that govern good lawmaking may sometimes demand that the civil law not be used to restrain every offense against public morality.
> . . . .
> Any evaluation of the degree to which the civil law conforms to the moral law should consider the legal framework in its entirety. It is not sufficient simply to try to enact criminal prohibitions of offenses against public morality.
> . . . .
> The church as a mediating institution has a crucial role to play in bringing moral and religious critique of law and public policy into public conversation. The primary context for this role is the realm of society and culture.
> . . . .
> Moral and religious dialogue is a crucial component of any effort to maintain the connection between the moral order and the civil law.
> . . . .
> [Religious documents that] call for a necessary conformity of the civil law to the moral law can play a constructive role in public policy discourse so long as the claims of the moral law are presented in a way that is publicly accessible and intelligible.

Id. at 28–37.

314 As Professor M. Cathleen Kaveny has argued, with respect to religious claims in public discourse, "careful attention to the actual *function* and *use* of argumentation to persuade others of a particular viewpoint may yield a more nuanced understanding of how religious warrants should be used by believing individuals when arguing in their capacity as citizens." M. Cathleen Kaveny, *Religious Claims and the Dynamics of Argument*, 36 WAKE FOREST L. REV. 423, 429 (2001).

> dren today . . . . The evolving standards of decency that have driven our construction of this critically important part of the Bill of Rights foreclose any such reading of the Amendment. In the best tradition of the common law, the pace of that evolution is a matter for continuing debate . . . .[315]

As Justice Stevens seems to recognize, some iterations will fail the test of translation across time. Others will cast fresh light on new and challenging questions in the same way that any student of a language often discovers that she learns something new, or perceives something deeper, about her own language and the culture that it represents precisely in virtue of the fact that she has brought them into dialogue with another. This is the process, not simply of translation, but of interpenetration.[316] This Article has argued that such a process not only is possible, but in fact already has occurred: a putatively absolute incompatibility of religious perspectives on the death penalty and U.S. death penalty jurisprudence does not bear out. Three proposals now emerge for furthering constructive death penalty discourse.

First, the legal academy would do well to continue to refine the grammar and syntax of death penalty jurisprudence's necessarily moral judgment. Such a project would do well to proceed in an interdisciplinary manner, just as this Article has interwoven historical theology, moral philosophy, and law. In doing so, legal scholars can identify key principles that stem from a variety of traditions of moral reasoning, whether of a religious or broadly humanistic bent. This process can serve to analytically disentangle various threads of cultural moral discourse that the interpenetration phenomenon has brought together, and identify and articulate principles of translation that can assist in clarifying what different contributors to broad social mores bring to the table—or, to the bench, as it were.

Second, it is certainly presumptuous and probably foolhardy to consider advising the Supreme Court on this matter. Nor would this

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315 Roper v. Simmons, 543 U.S. 551, 587 (2005) (Stevens, J., concurring) (citations omitted).

316 As Professor Örücü argues:

> When elements from two different interpretive communities combine, one drawing its understanding from culture and the other from law for instance, they may be able to tap into each other and mesh, bringing the cultural conversation into a broader narrative. This in fact is the fit, and transpositions and creative tuning at the time of transplants are vital for this fit. If communication and conversation are kept moving, then cross-fertilization between the seemingly incompatibles can be facilitated.

Esin Örücü, *Unde Venit, Quo Tendit* Comparative Law? *in* COMPARATIVE LAW IN THE 21ST CENTURY, *supra* note 90, at 16 (internal quotation marks omitted) (citations omitted).

be the first law review article to do so. Thus: the Court would do well to refine what "counts" in Eighth Amendment jurisprudence. The sheer variety of opinions in *Baze* indicates that even more limited legal questions, such as execution methods' legitimacy, engender great controversy, including about capital punishment's justification. The five-votes-to-four decision in *Kennedy* evidences how Justices, in the aggregate, are far from clear about: how the moral reasoning that its precedents require is to proceed; how expansive versus limited that reasoning should be; and of what the Court's "own judgment" consists. Bearing disestablishment values in mind, not to mention its prescriptions, if legal scholars succeed at drafting comprehensive grammars of translation that synthesize the range of religious and non-religious moral intuitions that inform the "mores of society" regarding capital punishment, the Constitution's arbiters would have resources to better articulate how such—and which—broad moral intuitions appropriately play out in applied jurisprudence. *Kennedy*'s specifically-marked evolving standards of decency and human dignity rules are instructive,[317] but they remain as yet controverted and convoluted. This Article's comparative model might offer one example for judicial reflection toward clarifying and developing Eighth Amendment jurisprudence.

Third, this Article has maintained that the death penalty in the United States exists against a complex historical, social, cultural, religious, moral, and legal backdrop. The Supreme Court's jurisprudence repeatedly has emphasized that this backdrop, loosely termed "the mores of society," is an integral component of its jurisprudence. But Justices have disagreed over the legitimate range of sources that should be counted as evidence of such mores, and over when, and according to what criteria, their own judgment should kick in. The project just outlined for the legal academy and the judiciary can only benefit from ongoing, robust study, discussion, and advocacy by all those engaged in death penalty discourse, particularly policy advocates on all sides. As a culturally conditioned, law and morality question par excellence, death penalty jurisprudence neither does nor can exist in a vacuum, separated from the "common" jurisprudence that cultural commentators, voters, policy advocates, crime survivors' and victims' representatives, and offenders themselves might contribute to

317 *See* Kennedy v. Louisiana, 554 U.S. 407, 420 (2008) ("Evolving standards of decency must embrace and express respect for the dignity of the person, and the punishment of criminals must conform to that rule"); *see also id.* at 446 (describing "[t]he rule of evolving standards of decency with specific marks on the way to full progress and mature judgment.").

the conversation. To the extent that Professors Robinson and Darley are correct regarding highly nuanced yet shared moral intuitions regarding the criminal law, discourse can only advance in a fruitful manner to the extent that nuanced intuitions remain in dialogue, learning from one another and articulating cultural norms and mores useful to judicial analysis and reasoning. As this Article's study of capital punishment in Catholic teaching and U.S. jurisprudence demonstrates, both entities, as living traditions, have much to say to one another. Others do, as well.