Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

KENNEDY *v*. LOUISIANA

CERTIORARI TO THE SUPREME COURT OF LOUISIANA

No. 07–343. Argued April 16, 2008—Decided June 25, 2008; modified October 1, 2008

Louisiana charged petitioner with the aggravated rape of his then-8-year-old stepdaughter. He was convicted and sentenced to death under a state statute authorizing capital punishment for the rape of a child under 12. The State Supreme Court affirmed, rejecting petitioner's reliance on *Coker* v. *Georgia*, 433 U. S. 584, which barred the use of the death penalty as punishment for the rape of an adult woman but left open the question which, if any, other nonhomicide crimes can be punished by death consistent with the Eighth Amendment. Reasoning that children are a class in need of special protection, the state court held child rape to be unique in terms of the harm it inflicts upon the victim and society and concluded that, short of first-degree murder, there is no crime more deserving of death. The court acknowledged that petitioner would be the first person executed since the state law was amended to authorize the death penalty for child rape in 1995, and that Louisiana is in the minority of jurisdictions authorizing death for that crime. However, emphasizing that four more States had capitalized child rape since 1995 and at least eight others had authorized death for other nonhomicide crimes, as well as that, under *Roper* v. *Simmons*, 543 U. S. 551, and *Atkins* v. *Virginia*, 536 U. S. 304, it is the direction of change rather than the numerical count that is significant, the court held petitioner's death sentence to be constitutional.

Held: The Eighth Amendment bars Louisiana from imposing the death penalty for the rape of a child where the crime did not result, and was not intended to result, in the victim's death. Pp. 8–36.

1. The Amendment's Cruel and Unusual Punishment Clause "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop* v. *Dulles*, 356 U. S. 86, 101. The standard for extreme cruelty "itself remains the same,

but its applicability must change as the basic mores of society change." *Furman* v. *Georgia*, 408 U. S. 238, 382. Under the precept of justice that punishment is to be graduated and proportioned to the crime, informed by evolving standards, 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.' " *Roper, supra,* at 568. Applying this principle, the Court held in *Roper* and *Atkins* that the execution of juveniles and mentally retarded persons violates the Eighth Amendment because the offender has a diminished personal responsibility for the crime. The Court also has found the death penalty disproportionate to the crime itself where the crime did not result, or was not intended to result, in the victim's death. See, *e.g., Coker, supra; Enmund* v. *Florida*, 458 U. S. 782. In making its determination, the Court is guided by "objective indicia of society's standards, as expressed in legislative enactments and state practice with respect to executions." *Roper*, *supra,* at 563. Consensus is not dispositive, however. Whether the death penalty is disproportionate to the crime also depends on the standards elaborated by controlling precedents and on the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose. Pp. 8–10.

2. A review of the authorities informed by contemporary norms, including the history of the death penalty for this and other nonhomicide crimes, current state statutes and new enactments, and the number of executions since 1964, demonstrates a national consensus against capital punishment for the crime of child rape. Pp. 11–25.

(a) The Court follows the approach of cases in which objective indicia of consensus demonstrated an opinion against the death penalty for juveniles, see *Roper, supra,* mentally retarded offenders, see *Atkins, supra,* and vicarious felony murderers, see *Enmund, supra.* Thirty-seven jurisdictions—36 States plus the Federal Government—currently impose capital punishment, but only six States authorize it for child rape. In 45 jurisdictions, by contrast, petitioner could not be executed for child rape of any kind. That number surpasses the 30 States in *Atkins* and *Roper* and the 42 in *Enmund* that prohibited the death penalty under the circumstances those cases considered. Pp. 11–16.

(b) Respondent's argument that *Coker*'s general discussion contrasting murder and rape, 433 U. S., at 598, has been interpreted too expansively, leading some States to conclude that *Coker* applies to child rape when in fact it does not, is unsound. *Coker*'s holding was narrower than some of its language read in isolation indicates. The *Coker* plurality framed the question as whether, "with respect to rape of an adult woman," the death penalty is disproportionate punishment, *id.,* at 592, and it repeated the phrase "adult woman" or "adult

female" eight times in discussing the crime or the victim. The distinction between adult and child rape was not merely rhetorical; it was central to *Coker*'s reasoning, including its analysis of legislative consensus. See, *e.g., id.,* at 595–596. There is little evidence to support respondent's contention that state legislatures have understood *Coker* to state a broad rule that covers minor victims, and state courts have uniformly concluded that *Coker* did not address that crime. Accordingly, the small number of States that have enacted the death penalty for child rape is relevant to determining whether there is a consensus against capital punishment for the rape of a child. Pp. 17–22.

(c) A consistent direction of change in support of the death penalty for child rape might counterbalance an otherwise weak demonstration of consensus, see, *e.g., Atkins,* 536 U. S., at 315, but no showing of consistent change has been made here. That five States may have had pending legislation authorizing death for child rape is not dispositive because it is not this Court's practice, nor is it sound, to find contemporary norms based on legislation proposed but not yet enacted. Indeed, since the parties submitted their briefs, the legislation in at least two of the five States has failed. Further, evidence that, in the last 13 years, six new death penalty statutes have been enacted, three in the last two years, is not as significant as the data in *Atkins*, where 18 States between 1986 and 2001 had enacted legislation prohibiting the execution of mentally retarded persons. See *id.,* at 314–315. Respondent argues that this case is like *Roper* because, there, only five States had shifted their positions between 1989 and 2005, one less State than here. See 543 U. S., at 565. But the *Roper* Court emphasized that the slow pace of abolition was counterbalanced by the total number of States that had recognized the impropriety of executing juvenile offenders. See *id.,* at 566–567. Here, the fact that only six States have made child rape a capital offense is not an indication of a trend or change in direction comparable to the one in *Roper*. The evidence bears a closer resemblance to that in *Enmund*, where the Court found a national consensus against death for vicarious felony murder despite eight jurisdictions having authorized it. See 458 U. S., at 789, 792. Pp. 22–24.

(d) Execution statistics also confirm that there is a social consensus against the death penalty for child rape. Nine States have permitted capital punishment for adult or child rape for some length of time between the Court's 1972 *Furman* decision and today; yet no individual has been executed for the rape of an adult or child since 1964, and no execution for any other nonhomicide offense has been conducted since 1963. Louisiana is the only State since 1964 that has sentenced an individual to death for child rape, and petitioner and

another man so sentenced are the only individuals now on death row in the United States for nonhomicide offenses. Pp. 24–25.

3. Informed by its own precedents and its understanding of the Constitution and the rights it secures, the Court concludes, in its independent judgment, that the death penalty is not a proportional punishment for the crime of child rape. Pp. 25–37.

(a) The Court's own judgment should be brought to bear on the death penalty's acceptability under the Eighth Amendment. See, *e.g., Coker, supra*, at 597. Rape's permanent and devastating impact on a child suggests moral grounds for questioning a rule barring capital punishment simply because the crime did not result in the victim's death, but it does not follow that death is a proportionate penalty for child rape. The constitutional prohibition against excessive or cruel and unusual punishments mandates that punishment "be exercised within the limits of civilized standards." *Trop,* 356 U. S., at 99–100. Evolving standards of decency counsel the Court to be most hesitant before allowing extension of the death penalty, especially where no life was taken in the commission of the crime. See, *e.g., Coker,* 433 U. S., at 597–598; *Enmund*, 458 U. S., at 797. Consistent with those evolving standards and the teachings of its precedents, the Court concludes that there is a distinction between intentional first-degree murder on the one hand and nonhomicide crimes against individuals, 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 compare to murder in their "severity and irrevocability," *id,* at 598. The Court finds significant the substantial number of executions that would be allowed for child rape under respondent's approach. Although narrowing aggravators might be used to ensure the death penalty's restrained application in this context, as they are in the context of capital murder, all such standards have the potential to result in some inconsistency of application. The Court, for example, has acknowledged that the requirement of general rules to ensure consistency of treatment, see, *e.g., Godfrey* v. *Georgia*, 446 U. S. 420, and the insistence that capital sentencing be individualized, see, *e.g., Woodson* v. *North Carolina*, 428 U. S. 280, have resulted in tension and imprecision. This approach might be sound with respect to capital murder but it should not be introduced into the justice system where death has not occurred. The Court has spent more than 32 years developing a foundational jurisprudence for capital murder to guide the States and juries in imposing the death penalty. 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 un-

deserving of death. Pp. 25–32.

(b) The Court's decision is consistent with the justifications offered for the death penalty, retribution and deterrence, see, *e.g., Gregg* v. *Georgia*, 428 U. S. 153, 183. Among the factors for determining whether retribution is served, the Court must look to whether the death penalty balances the wrong to the victim in nonhomicide cases. Cf. *Roper, supra,* at 571. It is not at all evident that the child rape victim's hurt is lessened when the law permits the perpetrator's death, given that capital cases require a long-term commitment by those testifying for the prosecution. Society's desire to inflict death for child rape by enlisting the child victim to assist it over the course of years in asking for capital punishment forces a moral choice on the child, who is not of mature age to make that choice. There are also relevant systemic concerns in prosecuting child rape, including the documented problem of unreliable, induced, and even imagined child testimony, which creates a "special risk of wrongful execution" in some cases. Cf. *Atkins*, *supra*, at 321. As to deterrence, the evidence suggests that the death penalty may not result in more effective enforcement, but may add to the risk of nonreporting of child rape out of fear of negative consequences for the perpetrator, especially if he is a family member. And, by in effect making the punishment for child rape and murder equivalent, a State may remove a strong incentive for the rapist not to kill his victim. Pp. 32–37.

4. The concern that the Court's holding will effectively block further development of a consensus favoring the death penalty for child rape overlooks the principle that the Eighth Amendment is defined by "the evolving standards of decency that mark the progress of a maturing society," *Trop,* 356 U. S., at 101. Confirmed by the Court's repeated, consistent rulings, this principle requires that resort to capital punishment be restrained, limited in its instances of application, and reserved for the worst of crimes, those that, in the case of crimes against individuals, take the victim's life. Pp. 37–38.

957 So. 2d 757, reversed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which STEVENS, SOUTER, GINSBURG, and BREYER, JJ., joined. ALITO, J., filed a dissenting opinion, in which ROBERTS, C. J., and SCALIA and THOMAS, JJ., joined.