Moral Foundation Theory and the Law

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I. INTRODUCTION

> Rather than pursue knowledge, the objective of normative work in general, and moral reasoning in particular, seems much more directed at defending one's prior, subjective views. The game is to never give in no matter the evidence arrayed against you . . . .[1]

Professor Ronald Allen thus laments the current state of moral debate. His remark highlights the problem—moral debate is polarizing and intractable. Debaters simply entrench themselves in their opinions and view their opponents with disdain. In everyday life, this sort of debate has little impact beyond frustrating the participants. But when the participants are lawyers or judges, and the debate occurs in a courtroom, intractable moral debate impacts the parties and the law in egregious ways.

Our Supreme Court, in particular, exhibits the symptoms of collapsed moral debate. In the last three terms, the Court has produced 5–4 decisions at an alarming rate—30% in 2006, 17% in 2007, and 29% in 2008.[2] This division certainly has not gone unnoticed by scholars; Professor Chemerinsky noted that, in the 2007–2008 term, "never did one of the four most conservative Justices . . . vote for a more liberal result in a case defined by ideology."[3] Moreover, the Court has set new lows for

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1. Ronald J. Allen, *Moral Choices, Moral Truth, and the Eighth Amendment*, 31 HARV. J.L. & PUB. POL'Y 25, 27 (2008). Professor Allen, demonstrating his frustration, writes, "Scholarship of this sort is tedious, providing sufficient reason in and of itself, in my subjective opinion, to ban it from constitutional discourse." *Id.* Moreover, "[n]one of the endless efforts to provide general theories of judging and of legislating and of the meaning of the law is worth a damn." *Id.* at 29.

2. Posting prepared by David Carlson for Cornell University Law School Legal Information Institute, Supreme Court 2008–2009 Term Highlights, http://topics.law.cornell.edu/supct/suprem e_court_2008-2009_term_highlights (last visited Apr. 24, 2010).

3. Erwin Chemerinsky, *When It Matters Most, It is Still the Kennedy Court*, 11 GREEN BAG 427, 428 (2008).

the tone of its opinions. The primary example being (of course) *Boume-dienne v. Bush*, where Justice Scalia claimed the majority's opinion would "almost certainly cause more Americans to be killed."[4] This Comment attempts to show not only how judges and lawyers can avoid the pitfalls of intractable moral debate, but also how to use moral argument more effectively. To do this, we will look at a theory of morality presented by a group of psychologists led by Professor Jonathan Haidt of the University of Virginia.

Haidt and his fellow researchers present a framework of morality that does three things: organizes moral categories, explains the roots of those categories, and predicts which moral arguments may carry weight with certain listeners. The psychologists call this framework "moral foundation theory."

Moral foundation theory argues that there are five basic moral foundations: (1) harm/care, (2) fairness/reciprocity, (3) ingroup/loyalty, (4) authority/respect, and (5) purity/sanctity.[5] These five foundations comprise the building blocks of morality, regardless of the culture.[6] In other words, while every society constructs its own morality, it is the varying weights that each society allots to these five universal foundations that create the variety.[7] Haidt likens moral foundation theory to an "audio equalizer," with each culture adjusting the sliders differently.[8] The researchers, however, were not content to simply categorize moral foundations—they have tied the foundations to political leanings. And it is here that moral foundation theory becomes a truly practical tool for the lawyer.

Professor Haidt's research shows that liberals, when making decisions, tend to heavily weigh the first two foundations—harm/care and fairness/reciprocity.[9] Self-identified conservatives, on the other hand, tend to base moral judgments on all five foundations equally—including ingroup/loyalty, authority/respect, and purity/sanctity in the calculus.[10]

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4. Boumediene v. Bush, 128 S. Ct. 2229, 2294 (2008) (Scalia, J., dissenting).

5. Jonathan Haidt & Jesse Graham, *When Morality Opposes Justice: Conservatives Have Moral Intuitions that Liberals May Not Recognize*, 20 SOC. JUST. RES. 98, 99 (2007).

6. *Id.* at 104.

7. *Id.* at 99 ("Cultures vary on the degree to which they build virtues on these five foundations.").

8. *Id. See also* Jonathan Haidt, *What Makes People Vote Republican*, EDGE, Sept. 9, 2008, http://www.edge.org/3rd_culture/haidt08/haidt08_index.html.

9. Jesse Graham, Jonathan Haidt & Brian A. Nosek, *Liberals and Conservatives Rely on Different Sets of Moral Foundations*, 96 J. PERSONALITY & SOC. PSYCHOL. 1029, 1029 (2009).

10. *Id.*

Liberals thus tend to use a narrower range of the moral spectrum than do conservatives.[11]

Further, Haidt suggests that it is this discontinuity between the foundations that liberals consider and the foundations that conservatives consider that leads to moral polarization and intractable arguments. As Professor Haidt puts it, when conservatives express concerns based on the ingroup/loyalty, authority/respect, and purity/sanctity foundations, liberals hear only "theta-waves"—that is, nonsense.[12]

This Comment will use moral foundation theory, and the recognition of this discontinuity between the liberal and conservative moral foundations, to demonstrate how a lawyer can avoid polarizing and intractable moral debates and become more persuasive in the courtroom. To do so, we will look at *Kennedy v. Louisiana*, where the Supreme Court barred capital punishment for child rape.[13] I chose *Kennedy* because the facts of the case touch clearly upon all five moral foundations and because the jurisprudence itself, as we shall see, is so clearly based on moral judgment. Through reading *Kennedy*, I will present both a general and a specific thesis: generally, lawyers and judges should use moral foundation theory to analyze moral motivations, and specifically, the majority in *Kennedy* failed to do this and thus reduced the persuasiveness of its opinion.

Part II will more fully explain moral foundation theory and its evolutionary roots. Part III will present the facts and law of *Kennedy* and discuss the moral foundation implications. Part IV will look at how the use of moral foundation theory can tailor arguments to carry more persuasive weight.

II. Summary of Moral Foundation Theory

Haidt presents moral foundation theory not as a revolutionary change, but as a more nuanced version of previous moral theories.[14] This Part will first outline each of the five moral foundations and discuss their evolutionary purposes. I will then look at Professor Haidt's research on how the moral foundations correlate to political leanings. Lastly, this Part will address the role that morality plays more generally in legal debate by touching on Haidt's theory of moral intuition.

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11. Haidt, *supra* note 8 ("Democrats generally use a much smaller part of the spectrum than do Republicans. The resulting music may sound beautiful to other Democrats, but it sounds thin and incomplete to many . . . .").

12. Haidt & Graham, *supra* note 5, at 99.

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

14. *See* Haidt & Graham, *supra* note 5, at 98–103 (describing the evolution of moral psychology and moral foundation theory's place in the timeline).

A. The Five Foundations

Professor Haidt identifies five moral foundations: (1) harm/care, (2) fairness/reciprocity, (3) ingroup/loyalty, (4) authority/respect, and (5) purity/sanctity.[15] These foundations are, essentially, an umbrella covering the entire realm of moral concerns. Each foundation has its own evolutionary history, its own virtue system, and its own limitations.

1. Harm/Care

Haidt states that the first foundation, harm/care, evolved from a maternal sensitivity to suffering in offspring.[16] Over time, this sensitivity grew from a mere familial trait to a general dislike of suffering.[17]

The harm/care foundation gives rise to specific virtues and vices. Under this foundation, societies value kindness and compassion, and condemn cruelty and aggression.[18] Yet, despite the general tendency to regard cruelty and aggression as vices, the theorists note that "[c]ompassion is not inevitable; it can be turned off by many forces, including the other four systems . . . ."[19] For example, cruelty and aggression may be virtuous when obeying authority or acting out of loyalty to the group.

2. Fairness/Reciprocity

The fairness/reciprocity foundation arises from "cooperation among unrelated individuals" and "alliance formation."[20] In short, this foundation evolved because cooperative groups held an evolutionary advantage over uncooperative groups.[21] From this foundation comes perhaps the most universally recognized virtue—justice.[22] Further, Haidt argues that guilt, anger, and gratitude are derived from this foundation.[23] Again though, foundations may conflict; thus, "self-serving biases" can override concerns about fairness, harm, and justice.[24]

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15. *Id.* at 99.
16. *Id.* at 104.
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*

3. Ingroup/Loyalty

The ingroup/loyalty foundation evolved from "living in kin-based groups."[25] Virtues and emotions relating to trust, patriotism, heroism, and sacrifice arise in this foundation.[26] Here, betrayal, dissent, and criticism of the group are immoral.[27] Interestingly, Haidt explains that when considering the ingroup foundation, resistance to diversity is understandable; it is a weakening of the group. On the other hand, "rituals that strengthen group solidarity (such as the pledge of allegiance)" are viewed as virtuous.[28]

4. Authority/Respect

The authority/respect foundation elevates virtues that facilitate the hierarchical social structure.[29] By valuing authority and respect, social life functions fluidly because the need for physical force and fear decreases, replaced by voluntary deference.[30] Emotions like awe and admiration and the virtues of duty and obedience reflect this foundation.[31] Failure at the top of the hierarchy, i.e., bad leadership, is condemned.[32] Dissent against authority may be seen as immoral and anti-social.[33]

5. Purity/Sanctity

The purity/sanctity foundation is an evolutionary by-product of the emotion of disgust.[34] Haidt states that disgust functions as a "guardian of the body."[35] Disgust deters humans from eating rotting meat, feces, vomit, etc., thereby avoiding sickness.[36] Over time, however, disgust evolved into a social emotion.[37] It governs bodily activity: "those who seem ruled by carnal passions (lust, gluttony, greed, and anger) are seen as debased, impure, and less than human . . . ."[38] But those who deny bodily impulses? They are elevated.[39]

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25. *Id.* at 105.
26. *Id.*
27. *Id.*
28. *Id.*
29 *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.* at 106.
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*

While the above outlines the five moral foundations, it does not explain the broader function of morality. Why have morality at all?

B. The Function of Morality: Suppression of Selfishness

Haidt argues that morality suppresses selfishness and thus enables social groups to function.[40] To achieve this suppression, morality takes two approaches—the *individualizing* approach, and the *binding* approach.[41]

The individualizing approach focuses on teaching each person to respect the rights of others.[42] Haidt argues that the first two foundations—harm and fairness—perform this function, calling them the "individualizing foundations."[43] In other words, when people consider the harm they might cause or the fairness of their actions, they are motivated to act more selflessly. Haidt makes an interesting analogy: this system is "like the legal system writ small. Society is thought to be composed of individuals, all of whom are equal. The purpose of morality is to protect individuals from harming or exploiting each other . . . ."[44]

In contrast, the binding approach attempts to suppress selfishness by strengthening social institutions.[45] By binding individuals into roles and duties that "constrain their imperfect natures," individuals act more selflessly.[46] Haidt argues that the latter three foundations—ingroup/loyalty, authority/respect, and purity/sanctity—equate to the binding approach.[47] The binding moralities are "like the nervous system writ large. Society is thought to be composed of institutions and groups . . . . The purpose of morality is to socialize and reshape individuals who, if left to their own devices, would pursue shallow, carnal, and selfish pleasures."[48]

In sum, Haidt argues that morality evolved to suppress selfishness, and does so through the individualizing approach (justice and fairness) and the binding approach (loyalty, authority, and purity). At this point, a lawyer might find moral foundation theory to be a useful analytical tool. However, Haidt's research produced an interesting connection between

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40. Graham, Haidt & Nosek, *supra* note 9, at 1031.

41. *Id.*

42. *Id.*

43. *Id.*

44. Jesse Graham, Jonathan Haidt & Sarah E. Rimm-Kaufman, *Ideology and Intuition in Moral Education*, 2 EUR. J. DEV.'TL SCI., 269, 271 (2008).

45. Graham, Haidt & Nosek, *supra* note 9, at 1031.

46. *Id.*

47. *Id.*

48. Graham, Haidt & Rimm-Kaufman, *supra* note 44, at 271.

political identity and moral foundations. And it is this connection that makes moral foundation theory a truly practical tool for the lawyer.

C. Moral Foundation Theory and Political Identity

In four studies, Haidt and fellow researchers found that "liberals consistently showed greater endorsement and use of the harm/care and fairness/reciprocity foundations compared to the other three foundations, whereas conservatives endorsed and used the five foundations more equally."[49] Moreover, this division becomes more pronounced the more a person identifies as a liberal or conservative.
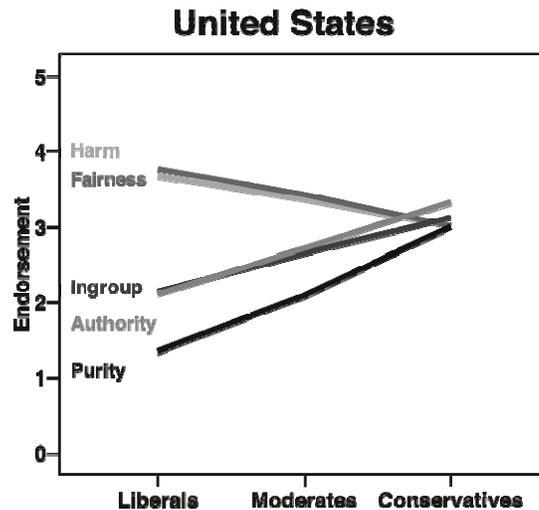

49. Graham, Haidt & Nosek, *supra* note 9, at 1029. The three authors identify these foundations

> not by measuring moral values and factor analyzing them but by searching for the best links between anthropological and evolutionary accounts of morality. Our idea was that moral intuitions derive from innate psychological mechanisms that co-evolved with cultural institutions and practices.
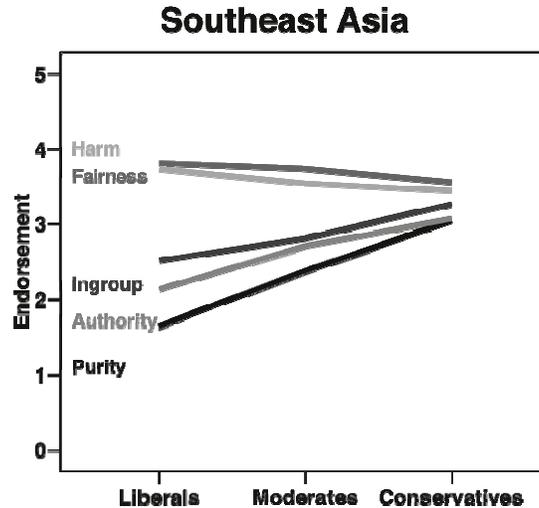>
>   . . . .
>   . . . To find the best candidate foundations [we] surveyed lists of virtues from many cultures and eras, along with taxonomies of morality from anthropology, psychology, and evolutionary theories about human and primate sociality.

Id. (internal citations omitted).

Western Europe
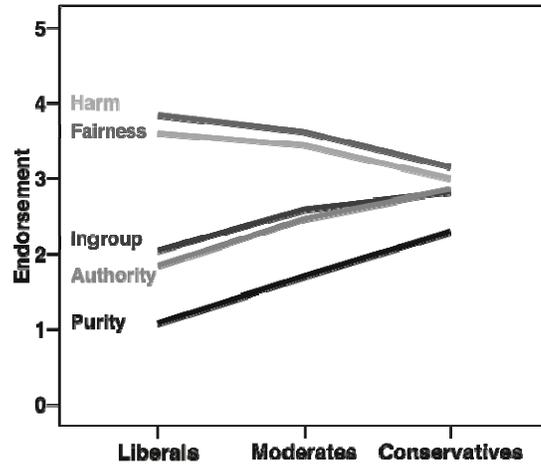
Middle East
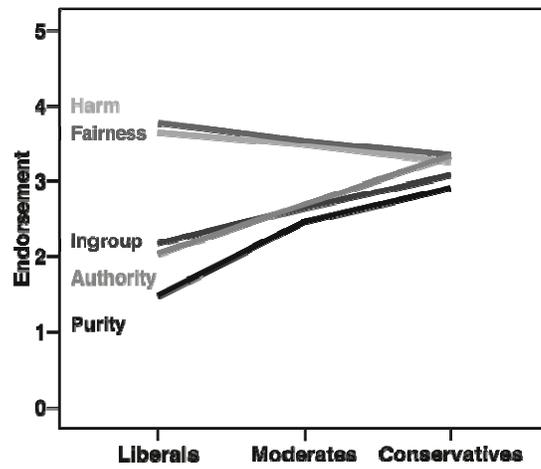
Southeast Asia

United States (N = 85,572); Western Europe (N = 4,128); Middle East (N = 593);
Southeast Asia (N = 645).[50]

In Haidt's words, "[w]hen we limited the analysis to people who had rated themselves using the endpoints . . . people who are, presumably, the most vocal players in the culture war—we found that the differences became quite stark . . . ."[51] Extreme liberals find only the harm and fairness foundations highly relevant in decisionmaking.[52] Extreme conservatives, in contrast, find the loyalty, authority, and purity foundations every bit as crucial as harm and fairness.[53]

This difference in priorities generates much of the discord between liberals and conservatives. Because conservatives have moral concerns that liberals "simply do not recognize as moral concerns," liberals hear what Haidt colorfully describes as "theta waves," or nonsense, when conservatives talk about the loyalty, authority, and purity foundations.[54]

Importantly, Haidt argues that the loyalty, authority, and purity foundations are recognized widely in the world, and that Western liberals are relatively unique in focusing solely on the harm and fairness foundations.[55] The dominant Western liberal definition of the moral domain—

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50. Graphs provided by Professor Jonathan Haidt and Jesse Graham. Additional information can be found at YourMorals.org.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* at 99.

55. Graham, Haidt & Nosek, *supra* note 9, at 1030.

that of Kant, Mill, and Rawls, focusing on rights, justice, and welfare—reduces the moral spectrum.[56] This narrow conception fails to recognize a moral domain encompassing "issues related to food, sex, clothing, prayer, and gender roles" that exists outside Western elites.[57] And in this broader domain, moral violations may occur without harm to anyone.[58]

Moral foundation theory, however, does not say that either liberals or conservatives are correct in their definitions of the moral domain. The theory only describes the moral domain; it says nothing about what is the best definition.

Moral foundation researchers propose the theory as a way to understand our opponents in the culture wars.[59] Haidt offers an example from the July 25, 2005, episode of *The Daily Show*, hosted by Jon Stewart:

> Stewart tried in vain to convince conservative U.S. Senator Rick Santorum that banning gay marriage was an injustice. Quickly realizing the futility of this effort, Stewart remarked, "It is so funny; you know what's so interesting about this is ultimately you end up getting to this point, this crazy stopping point where literally we can't get any further. I don't think you're a bad dude, I don't think I'm a bad dude, but I literally can't convince you." The stopping point Stewart felt was the invisible wall separating liberal and conservative moralities. Santorum's anti-gay-marriage views were based on concerns for traditional family structures, Biblical authority, and moral disgust for homosexual acts . . . . To Stewart, these concerns made about as much sense as the fear of theta waves; it was impossible to see why a decent, moral person (or at least not a bad dude) would want to violate the rights of a group of people who weren't hurting anyone.[60]

For the lawyer though, moral foundation theory provides more than just analytical benefits; it provides persuasive ones. In short, if we know the political leanings of the judge or jury, then we can predict which arguments will carry more weight and which arguments may be ignored. There are, however, some caveats about moral foundation theory.

D. Caveats

First, the foundations can conflict with each other.[61] Therefore, in using moral foundation theory as an analytical and persuasive tool, we

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56. *See Id.*

57. *Id.*

58. *Id.*

59. *See, e.g.*, Haidt & Graham, *supra* note 5, at 111.

60. *Id.*

61. *Id.* at 104. For example, in discussing the harm/care foundation, the authors write, "Compassion is not inevitable, it can be turned off by many forces, including the [other foundations]." *Id.*

must recognize that a given moral question may implicate multiple competing foundations. The analysis can be messy.

Second, Haidt emphasizes that the foundations are malleable. Each culture shapes its own value system. The five moral foundations are just the materials used.

Third, the tendency of liberals to weight the individualizing foundations and conservatives to weight the binding foundations are just that—tendencies. Indeed, the theorists recognize that political views are "multifaceted,"[62] and a one-dimensional political spectrum is overly simplistic.[63] However, moral foundation theory need not be limited to one dimension. The strength of the theory is that, rather than being restricted to a left-right spectrum, it functions in five-dimensions.[64] It thus recognizes "'laissez-faire' conservatives who prize individual liberty," as well as the extreme political left—socialists and communists—who elevate community interest.[65] Furthermore, moral foundation theory does not suggest hard-and-fast rules where an individual, or an act, may fit cleanly into one category.

Lastly, in order for moral foundation theory to be useful to the lawyer or judge, we must accept that the moral personality of judges and jurors substantially affects their decisions. Otherwise, moral foundation theory is essentially worthless. This point is not merely academic. Indeed, now Chief Justice Roberts famously stated in his confirmation hearings that "Judges are like umpires. Umpires don't make the rules; they apply them."[66] Roberts meant, of course, that he was not a judicial activist; his personal opinions did not influence his judicial opinions. Rather, he believed that Justices should permit only the Constitution, statutes, and precedent to affect their votes.

We must ask first whether Roberts's view is desirable, and second, whether it is plausible. As to the first, Professor Michael Moore presents a brief outline of why moral reasoning is necessary for a judge. As to the second, Professor Haidt argues that desirable or not, reactionary moral reasoning happens.

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62. Graham, Haidt & Nosek, *supra* note 9, at 1029.

63. *Id.* at 1029–30.

64. *Id.* at 1030.

65. *Id.*

66. Opening Statements of Judge John G. Roberts, *I Come Before the Committee with No Agenda. I Have No Platform,* N.Y. TIMES, Sept. 13, 2005, *available at* http://www.nytimes.com/2005/09/13/politics/politicsspecial1/13ctext.html.

E. Where Morality Enters the Law

Professor Michael Moore identifies four areas where morality must enter the law. First, and most simply, we use morality to justify the authority of law.[67] Second, morality may enter law explicitly.[68] For example, the law requires judges in many areas to determine what is reasonable or what process is due.[69] Doctrines like unconscionability and good-faith demand moral analysis. Third, morality is used in what Professor Lon Fuller calls "hard cases"—cases of first impression, cases lacking dispositive precedent, cases with conflicting precedent or legal standards, cases where the language of the law suffers from vagueness or ambiguity.[70] In these cases, a judge *must* use moral judgment.[71] Lastly, morality may function as a "safety valve" to override law when, for example, a statute's natural operation would affect an unjust outcome.[72]

Thus, although one might decry activist judges imposing their own idea of morality, moral reasoning necessarily enters the law. The idea of judge-as-umpire is catchy but faulty. In any case, Haidt makes a strong argument that, desirable or not, morality enters reasoning in an irrational way.

Professor Haidt argues that people largely do not reach moral judgments through logical reasoning; rather, they reach judgments through post-hoc rationalization.[73] His research suggests that rather than

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67. *See* Michael Moore, *Four Reflections on Law and Morality*, 48 Wm. & Mary L. Rev. 1523, 1528 (2007). In addition, Professor Moore notes that the debate includes Aquinas and St. Augustine. *Id.* at 1533–34.

68. *Id.* at 1527.

69. *Id.*

70. *Id.* at 1530–31.

71. *Id.* "In such cases, what would we have a judge do? Should he flip coins? Have trial by combat? . . . Surely recourse to morality to decide such cases is not just preferable *but obligatory* . . . ." *Id.* (emphasis added).

72. *Id.* at 1531–32. Moore offers an example: "A federal criminal statute forbids the obstructing or retarding of the passage of the U.S. mail—does that require the punishment of a state sheriff who arrests a murderer on probable cause if that arrest takes place while that murderer was carrying the U.S. mail?" *Id.* at 1533 (citing United States v. Kirby, 74 U.S. 482 (1868)).

73. Jonathan Haidt, *The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment*, 108 Psycho. Rev. 814, 814 (2001) ("[M]oral reasoning does not cause moral judgment; rather, moral reasoning is usually a post hoc construction, generated after a judgment has been reached."). Haidt gives a thought test:

Julie and Mark are brother and sister. They are traveling together in France on summer vacation from college. One night they are staying alone in a cabin near the beach. They decide that it would be interesting and fun if they tried making love. At the very least it would be a new experience for each of them. Julie was already taking birth control pills, but Mark uses a condom too, just to be safe. They both enjoy making love, but they decide not to do it again. They keep that night as a special secret, which makes them feel even closer to each other. What do you think about that, was it OK for them to make love?

logically processing facts and computing moral judgments, we simply react to moral stimuli.[74] Only after arriving at a judgment do we identify the facts, weigh the evidence, and seek to support our conclusion.[75] The reasoning process, Haidt shows, is most often an illusion of objectivity.[76] He calls this immediate, reactionary judgment "moral intuition."[77]

Haidt does not say that logical moral reasoning is impossible; he argues only that moral intuition plays a large, if not dominant, role in the process of forming judgments. And, if Haidt is correct, then understanding the moral motivations of judges and juries, and how to engage those motivations, becomes especially important. If lawyers cannot recognize and engage the moral foundations on which decision-makers base their moral intuition, they are far less likely to create the moral reaction they want. The next Part explores how lawyers may recognize and engage the moral foundations using *Kennedy v. Louisiana* as an example.

III. *Kennedy v. Louisiana* and the Application of Moral Foundation Theory

This Part looks at *Kennedy v. Louisiana* through a moral foundation lens. It separates the facts and law of *Kennedy* into their constituent, moral categories. With that basis, it then suggests why the majority opinion is unpersuasive. In sum, the liberal majority opinion relies (as moral foundation theory predicts) on the harm and fairness foundations and fails to sufficiently address the loyalty, authority, or purity foundations. Moreover, certain legal tests correlate to certain moral foundations, and in doing so, provoke moral responses from the Justices. As we turn here to the facts of the case, the reader may want to pay attention to their own moral reactions.

A. The Facts

Patrick Kennedy was sentenced to die for the aggravated rape of his eight-year-old stepdaughter.[78] As Justice Kennedy wrote for the majori-

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Id. Haidt then asks subjects whether the conduct is morally right or wrong. *Id.* The subjects "point out the dangers of inbreeding" or argue that "Julie and Mark will be hurt, perhaps emotionally." *Id.* When reminded that Julie and Mark used two forms of birth control, and the story clearly states that no harm came of the act, subjects "say something like, 'I don't know, I can't explain it, I just know it's wrong.'" *Id.*

74. *Id.*
75. *See id.*
76. *Id.* at 815.
77. *Id.*
78. Kennedy v. Louisiana, 128 S. Ct. 2641, 2646 (2008).

ty, "Petitioner's crime was one that cannot be recounted in these pages in a way sufficient to capture in full the hurt and horror inflicted . . . ."[79]

On the morning of the rape, Kennedy called his employer at 6:15 a.m. to report that he was unavailable to work.[80] Between 6:30 and 7:30, Kennedy called again asking a co-worker how to remove blood from a white carpet because his daughter "'had just become a young lady.'"[81] At 7:37 a.m., Kennedy called a carpet cleaning company to request urgent assistance in removing bloodstains.[82] At 9:18, approximately three hours after he had reported unavailable for work, Kennedy called 911 and sought medical assistance for his stepdaughter.[83]

The extensive injuries required immediate surgery: the rape had lacerated the victim's vaginal wall and separated her cervix from the back of her vagina, causing the rectum to invade the vaginal structure.[84] The rape tore her perineum from the posterior fourchette to the anus.[85]

In the weeks following, both Kennedy and his stepdaughter claimed that "two neighborhood boys" had committed the rape in the backyard, though the stepdaughter reportedly told a family member that she had in fact been raped by Kennedy.[86] After finding the yard mostly undisturbed, recovering Kennedy's phone calls, and discovering blood on the underside of the victim's mattress, the police arrested Kennedy.[87] The victim later formally accused him.[88] A unanimous verdict followed.[89]

B. Moral Foundation Theory and the Facts

Moral foundation theory provides a lawyer with a comprehensive framework to analyze the moral concerns presented by the grisly facts above. Under the individualizing moralities, the implications are obvious—the harm and unfairness of the rape are spelled out.[90] But the arguments that a lawyer may present under the binding moralities are less obvious. Kennedy has violated so many sacred institutions: his role as a father (ingroup/loyalty, authority/respect, purity/sanctity), his mar-

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79. *Id.*
80. *Id.*
81. *Id.* at 2647.
82. *Id.*
83. *Id.* at 2646.
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.* at 2647.
88. *Id.*
89. *Id.* at 2648.
90. *Id.* at 2658. The Court, in its discussion, acknowledges both the physical and psychological harm: "Rape has a permanent psychological, emotional, and sometimes physical impact on the child." *Id.*

riage (ingroup/loyalty, purity/sanctity), his position of power (authority/respect), and he has succumbed to the basest human act (purity/sanctity).

By using a moral foundation theory analysis, a lawyer can increase the likelihood of presenting the arguments that will carry the most weight with the factfinder, and not just the arguments that carry the most weight with the lawyer. For example, if *Kennedy* were tried in Berkeley, California, one of the most liberal cities in the country,[91] a lawyer would likely focus on arguments rooted in the harm and fairness foundations. Patrick Kennedy physically tortured the victim and treated her as less than a human being. But, if *Kennedy* were tried in Provo, Utah, the most conservative city in the country, a lawyer would give *equal* time to arguments rooted in the loyalty, authority, and purity foundations. Patrick Kennedy violated his paternal role, his marriage vows, and his role in the community with the most disgusting act a person could perform.

In sum, moral foundation theory allows a lawyer to recognize that the facts and arguments that appeal to him may not be the same arguments that appeal most to the factfinder. By analyzing which arguments engage which moral foundations, and correlating those arguments with the moral foundations most likely relied on by the factfinder, a lawyer can be more persuasive. But beyond the facts, a lawyer can identify legal tests that correlate with moral foundations, as demonstrated below.

C. Overview of the Law in Kennedy

In *Kennedy*, the Supreme Court barred capital punishment in child rape cases. This section presents the law in *Kennedy*, the Court's application of that law, and what moral foundation theory tells us about the jurisprudence.

The Court's opinion begins with two general principles: first, punishment should be proportional to the offense,[92] and second, the meaning of the famous Eighth Amendment creed "cruel and unusual" is dynamic.[93] As the Court puts it: "The Amendment draw[s] its meaning from the evolving standards of decency . . . ,"[94] and, "the standard of extreme cruelty . . . embodies a moral judgment. The standard itself re-

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91. Press Release, The Bay Area Center for Voting Research, New Study Ranks America's Most Liberal and Conservative Cities, (Aug. 11, 2005) (on file with author) (ranking Berkeley as the third most liberal city and Provo the most conservative).

92. *Kennedy*, 128 S. Ct. at 2649 (citing Weems v. United States, 217 U.S. 349, 367 (1910)).

93. *Id.*

94. *Id.* (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (citation omitted)).

mains the same, but its applicability must change as the basic mores of society change."[95]

In pursuit of these general principles, the Court uses both an objective and a subjective test. The objective component asks whether there is a *national consensus* against a punishment.[96] The Court gauges this national consensus by tallying the number of states permitting the death penalty for child rape, considering whether there is a trend towards approval or towards rejection, and inquiring about the rate of actual use.[97] The subjective test—*independent judgment*—rests largely on the principle of proportionality.[98] Essentially, the Court must determine if, in its view, the punishment fits the crime.

D. *The Court's Application of the Law in* Kennedy

Each half of the Eighth Amendment analysis—the national-consensus test and the independent-judgment test—implicates a particular moral foundation. The national-consensus test implicates the authority foundation, whereas the independent-judgment analysis implicates the harm and fairness foundations. Moral foundation theory predicts, therefore, that conservatives will tend to value the national-consensus analysis more than liberals. This section discusses why we should correlate the national-consensus and independent-judgment tests with the authority foundation and harm and fairness foundations.

1. The Court's Application of the National-Consensus Test

The national-consensus analysis gauges society's standards through legislative enactments and state practices regarding executions.[99] More simply, if few states apply a punishment, or do so very rarely, then the punishment is likely unconstitutional.[100]

The *Kennedy* Court finds a national consensus against capital punishment for rape of a child because only six jurisdictions impose the

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95. *Id.* (quoting Furman v. Georgia, 408 U.S. 238, 382 (1972)).

96. *Id.* at 2650.

97. *Id.*

98. *Id.* at 2661 ("*Gregg* instructs that capital punishment is excessive when it is grossly out of proportion to the crime or it does not fulfill the two distinct social purposes served by the death penalty: retribution and deterrence of capital crimes."). Any deterrent effect the death penalty has, however, has become so uncertain that the Court does not directly address it. *See* Daniel Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 416 (1999) ("Empirically, deterrence claims are speculative."). Thus, whether a punishment constitutes proper retribution appears to be the sole factor in the independent-judgment analysis.

99. *Kennedy*, 128 S. Ct. at 2650 ("In these cases the Court has been guided by 'objective indicia of society's standards, as expressed in legislative enactments and state practice with respect to executions.'").

100. *See generally* Roper v. Simmons, 543 U.S. 551 (2005).

death penalty on child rapists.[101] Justice Alito's dissent, however, argues that the majority's analysis is flawed.[102] In his view, *Coker v. Georgia*, which struck down capital punishment for rape of an adult in 1977, led state legislatures to believe that capital punishment for any crime short of murder would be unconstitutional.[103] Thus, legislative inaction reflects *Coker*'s shadow rather than any national consensus.

Moral foundation theory compels us to view the national-consensus test as a function of the authority foundation. As described in Part I, the authority/respect foundation is an evolutionary product of "the long history of living in hierarchically-structured ingroups."[104] Plainly, the national-consensus analysis itself concedes a hierarchy. By tallying state legislative action as a gauge of the public's moral compass, the Court implicitly acknowledges that it is the public that is the authority in judging evolving standards of decency, not the Court. The Court's role here is merely to umpire. Because the national-consensus analysis involves the proper functioning of a decision-making hierarchy, it is thus a moral exercise itself, apart from the ultimate issue in the case. In other words, the conservative Justices care not only about the ultimate outcome of the case, but also about the test itself as a moral exercise. Thus, any perceived failure of the liberal majority to properly value the national-consensus analysis may be viewed by the conservative minority as a moral failure, not merely a legal error.

2. The Court's Application of the Independent-Judgment Test

The Court then turns to the second, subjective half of its analysis—independent judgment. The Court, in finding death a disproportionate penalty for the crime of child rape,[105] considers a number of factors, including the roles of retribution and deterrence,[106] the effect of the death penalty process on the victim,[107] and a jury's capacity to decide fairly in the face of such a heinous crime.[108] One fact, however, quite simply do-

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101. *Kennedy*, 128 S. Ct. at 2653 (noting that the forty-five jurisdictions not permitting execution for child rape are far more than needed because precedent found national consensuses when only thirty and forty-two jurisdictions did not permit the penalty in other circumstances).

102. *Id.* at 2665 (Alito J., dissenting) ("[T]he Court relies primarily on the fact that only 6 of the 50 States now have statutes that permit the death penalty for this offense. But this statistic is a highly unreliable indicator of the views of state lawmakers and their constituents.").

103. *See id.* at 2665–67.

104. Haidt & Graham, *supra* note 5, at 105.

105. *Kennedy*, 128 S. Ct. at 2664 (majority opinion) ("These considerations lead us to conclude, in our independent judgment, that the death penalty is not a proportional punishment for the rape of a child.").

106. *Id.* at 2661–64.

107. *Id.* at 2662–63.

108. *Id.* at 2660–61.

minates the rest: no life has been taken.[109] Quoting *Coker*, the Court states that the, "murderer kills . . . the rapist, if no more than that, does not . . . . We have the abiding conviction that the death penalty, which 'is unique in its severity and irrevocability,' is an excessive penalty for the rapist who, as such, does not take a human life."[110] Indeed, when announcing the holding, the Court ignores deterrence, it ignores retribution, it utters not a word on the reliability of the jury; the Court relies on one factor: "[O]ur holding is that a death sentence for one who raped *but did not kill* a child . . . is unconstitutional under the Eighth and Fourteenth Amendments."[111] In sum, the linchpin of the majority opinion is a simple balancing of harms—the harm to the victim and the harm to the perpetrator. One must take a life to receive death.

The conservative wing responds to the independent-judgment test in an interesting way, a way that differs slightly from their precedent. In prior death penalty cases, the conservative wing had "emphatically" rejected the use of independent judgment.[112] But Justice Alito's dissent seems to accept the independent-judgment analysis while simultaneously argueing that the Court has strayed far afield of the proper judicial role.[113] Essentially, Justice Alito acknowledges that the Court must consider, in its own judgment, the fairness of a punishment, but that judgment must be carefully cabined by the authority foundation.

Now that we have seen how the majority and minority differ on the two tests, the moral foundation implications become clear. For the liberal majority, the Court's independent judgment trumps.[114] And the Court's independent judgment demands *lex talionis*—a life for a life—at its most pure. Anything short of that is unconstitutional.

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109. *Id.* at 2659 ("[T]he death penalty should not be expanded to instances where the victim's life was not taken.").

110. *Id.* at 2654 (quoting Coker v. Virginia, 433 U.S. 584, 597–98 (1977) (citation omitted)).

111. *Kennedy*, 128 S. Ct. at 2650–51 (emphasis added). The complete quote reads, "[O]ur holding is that a death sentence for one who raped but *did not kill* a child, and who did not intend to assist another in killing the child, is unconstitutional under the Eighth and Fourteenth Amendments." Justice Alito, as discussed below, will come to the same conclusion. *See infra* text accompanying note 132.

112. Stanford v. Kentucky, 492 U.S. 361, 378 (1989) ("In short, we emphatically reject petitioner's suggestion that the issues in this case permit us to apply our 'own informed judgment' . . . ."). *See also* Roper v. Simmons, 543 U.S. 551, 608 (2005) (Scalia, J., dissenting) (In applying the independent judgment test, "The Court thus proclaims itself sole arbiter of our Nation's moral standards . . . . Because I do not believe that the meaning of our Eighth Amendment, any more than the meaning of other provisions of our Constitution, should be determined by the subjective views of five Members of this Court and like-minded foreigners, I dissent.").

113. *Kennedy*, 128 S. Ct. at 2673 (Alito, J., dissenting) ("Although the Court has much to say on this issue, most of the Court's discussion is not pertinent to the Eighth Amendment question at hand. And once all of the Court's irrelevant arguments are put aside, it is apparent that the Court has provided no coherent explanation for today's decision.").

114. *Id.* at 2650 (majority opinion).

This balancing reflects exactly what moral foundation theory predicts: liberals tend to value harm and fairness above other moral foundations.[115]   In contrast, the conservative minority opinion, relying on the national-consensus test, reflects the importance placed on the authority foundation by conservatives generally.

Moreover, it is here that moral foundation theory provides understanding and de-polarizes the debate. We are inclined to believe that our political opponents emphasize the legal tests that get them to the outcome they want. In other words, we may believe that the liberal wing of the Court is simply anti-death penalty and abuses the independent-judgment test to arrive there. Or, we may believe that the conservative minority is simply pro-death penalty and therefore abuses the national-consensus test to arrive where they want. But moral foundation theory suggests an earnestness to both sides' opinions. The liberal majority is likely to value harm and fairness above other moral concerns; thus, emphasizing the balancing of harms is predictable. And the conservative majority is likely to value respect for authority; thus, the emphasis on the national-consensus test is predictable.

E. Foreign Law

Noticeably absent from the *Kennedy* decision is any reference to parallel foreign law.[116]   Three years earlier, in *Roper v. Simmons*, Justice Kennedy referenced foreign law to support the conclusion that capital punishment for juvenile murderers was unconstitutional.[117]   Justice Scalia vigorously dissented: "Because I do not believe that the meaning of our Eighth Amendment . . . should be determined by the subjective views of five Members of this Court and like-minded foreigners, I dissent."[118]

Roper provoked commentary from both academics and the Justices themselves.[119]   The commentary addresses mainly the precedent[120] and

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115. *See id.*

116. *See generally id.*

117. *Roper*, 543 U.S. at 604.

118. *Id.* at 608 (Scalia, J., dissenting). Justice Scalia also writes: "Though the views of our own citizens are essentially irrelevant to the Court's decision today, the views of other countries and the so-called international community take center stage." *Id.* at 622. Further,

> [t]he Court's parting attempt to downplay the significance of its extensive discussion of foreign law is unconvincing. "Acknowledgment" of foreign approval has no place in the legal opinion of this Court *unless it is part of the basis for the Court's judgment*—which is surely what it parades as today.

Id. at 628.

119. *See, e.g.*, Steven G. Calabresi & Stephanie Dotson Zimdahl, *The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision*, 47 WM. & MARY L. REV. 743 (2005); Frederick Schauer, *Authority and Authorities*, 94 VA. L. REV. 1931 (2008). *See also* Justices Antonin Scalia & Stephen Breyer, Discussion at the American Uni-

the rationality of accepting various authorities in general.[121] Moral foundation theory, however, provokes us to frame this issue—the appropriateness of reference to foreign law—as a fundamentally moral one. It is, of course, quite easy to see how citation to foreign law implicates the authority foundation: doing so acknowledges an authority outside the hierarchy explicitly permitted by the Constitution. Such references also implicate the ingroup/loyalty foundation.

Citing a foreign authority appears to reach outside the group. As discussed in Part II, Professor Haidt argues that the ingroup/loyalty foundation arose from the "long history of living in kin-based groups."[122] Virtues and rituals that celebrate group solidarity are valued.[123] By referencing foreign law, a judge seems to prefer foreigners over one's own tribe. If we accept that moral judgments may arise reactively as moral intuitions rather than reasoned conclusions, we then recognize that these references to foreign law are likely to cause a morally motivated response under the loyalty foundation.

And this divide has not gone unnoticed. Professor Noah Feldman noted the loyalty underpinnings of referencing foreign law in a 2005 New York Times Magazine article:

> One view, closely associated with the Bush administration, begins with the observation that law . . . derives its legitimacy from being enacted by elected representatives of the people . . . . [T]he Constitution is seen as facing *inward*, toward the Americans who made it, toward their rights and their security. For the most part, that is, the rights the Constitution provides are for citizens and provided only within the borders of the country. By these lights, any interpretation of the Constitution that restricts the nation's security or sovereignty—for example, by extending constitutional rights to noncitizens encountered on battlefields overseas—is misguided and even dangerous. In the words of the conservative legal scholars Eric Posner and Jack Goldsmith (who is himself a former member of the Bush administration), the Constitution "was designed to create a more perfect *domestic* order, and its foreign relations mechanisms were crafted to enhance U.S. welfare."
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> A competing view, championed mostly by liberals, defines the rule of law differently: law is conceived not as a quintessentially national phenomenon but rather as a global ideal. The liberal position

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versity Washington College of Law: Constitutional Relevance of Foreign Court Decisions (Jan. 13, 2005) (transcript *available at* http://www.freerepublic.com/focus/news/1352357/posts).

120. *See generally* Calabresi & Zimdahl, *supra* note 119.

121. *See* Schauer, *supra* note 119, at 1935–40.

122. Haidt & Graham, *supra* note 5, at 105.

123. *Id.*

> readily concedes that the Constitution specifies the law for the United States but stresses that a fuller, more complete conception of law demands that American law be pictured alongside international law and other (legitimate) national constitutions. The U.S. Constitution, on this cosmopolitan view, faces *outward*.[124]

Without saying as much, Professor Feldman hit on the moral underpinnings of the divide; conservatives tend to favor the loyalty foundation, and reference to foreign law is thus "misguided and even dangerous." Liberals hear only theta waves.[125]

The true value of moral foundation theory is that it shifts the debate from one of precedent and rationality to one of basic moral motivations. If we do not recognize that we are debating basic moral motivations, we will remain polarized and frustrated.

IV. WHAT THE COURT DID WRONG

> I must be frank in saying that I find the Court's justification for its judgment to be disappointing. Perhaps I was hoping for the impossible. Perhaps I was hoping that in reaching the judgment it reached, the Court would find philosophical resources undiscovered or untapped by moral, political, and legal theorists . . . .[126]

Professor Heidi Hurd is correct: the *Kennedy* opinion is, indeed, disappointing. When the Court relies on only the harm and fairness foundations, the persuasive power of the Court's opinion is only two-fifths of what it might be. By neglecting the loyalty, authority, and purity foundations, the liberal majority allowed the conservative minority to buttress their own position. This Part addresses how the majority might have confronted the loyalty, authority, and purity foundations.

A. Ingroup/Loyalty

After reading the *Kennedy* opinion, one is left with the feeling that the law, the Court, and society betrayed the victim. All three sided with Patrick Kennedy instead of an innocent eight-year-old girl. Upon reading the facts of the case, how can a person not feel angry? How can a person not demand some form of retribution? The death penalty fulfills that demand.

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124. Noah Feldman, *When Judges Make Foreign Policy*, N.Y. TIMES MAG., Sept. 28, 2008, at MM50, *available at* http://www.nytimes.com/2008/09/28/magazine/28law-t.html.

125. *See supra* note 54.

126. Heidi Hurd, *Death to Rapists: A Comment on* Kennedy v. Louisiana, 6 OHIO ST. J. CRIM. L. 351, 351 (2008).

> We are angry at moral agents because we acknowledge that they
> had the freedom to choose and chose wrongly. Anger recognizes
> and respects their freedom, holding them accountable for their
> choices . . . Anger underscores the moral community we share with
> victims and criminals. Crimes have torn the social fabric and de-
> mand justice, payback to condemn the crime, vindicate the vic-
> tim . . . . Where there is no anger, there is no justice and no sense of
> community.[127]

Professors Berman and Bibas rightfully note that our anger underscores a
"sense of community." And by siding with the rapist, by stating that
rape is categorically less harmful than murder, the Court seems to say to
the victim, "it could have been worse." This tears at our sense of com-
munity.

 Moral foundation theory suggests that we are evolutionarily primed
to reject this feeling of betrayal. But according to Professor Haidt's re-
search, conservatives will tend to value the loyalty foundation more than
liberals and will thus give more weight to this feeling of betrayal when
considering the correctness of the *Kennedy* opinion.

 Opponents need to counter this feeling of betrayal. The Court
needed to express that allowing Kennedy to avoid his death sentence in
no way weakened society's anger at the perpetrator or diminished its
sympathy for the victim. Society in no way sided with Patrick Kennedy.
This is not an easy task.

 To perform this feat, the Court could have shifted the emphasis of
the opinion. It might have stressed structural reasons for siding with
Kennedy, as if to say, "the fault lies with our inability to fashion a proper
system." For example, the Court briefly discusses an inability to ensure
consistent application of the penalty.[128] Believing it cannot fashion ag-
gravating and mitigating factors that might constrain an impassioned
jury, the Court argues that the risk of arbitrary application is high.[129]
Thus, there is the feeling that Kennedy escapes his death penalty not be-
cause society has sided with him but because society is simply unable to
fashion a consistently applied penalty. In sum, had certain arguments in
Kennedy been emphasized, the minority's loyalty concerns could have
been mitigated.

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 127. Douglas A. Berman & Stephanos Bibas, *Engaging Capital Emotions*, 102 NW. U. L. REV.
COLLOQUY 355, 360 (2008).
 128. Kennedy v. Louisiana, 128 S. Ct. 2641, 2660 (2008).
 129. *Id.* at 2661. The Court finds that murder is a more quantifiable harm than rape. *Id.*
"[The] imprecision and the tension between evaluating the individual circumstances and consistency
of treatment have been tolerated where the victim dies. It should not be introduced into our justice
system, though, where death has not occurred." *Id.*

B. Authority/Respect

Next, capital punishment performs a clear authority-foundation function.[130]   The death penalty re-asserts a social structure torn by the perpetrator's crime.   This argument must be confronted, rather than dodged by the *Kennedy* majority.

The *Kennedy* majority should have stressed the precarious role of the state in killing its citizens and the need to limit the scope of the death penalty.   The Court has previously stated that the death penalty is reserved for a "narrow category of the most serious crimes."[131]   Drawing on this maxim, the Court should assert that the state has a tenuous role in putting people to death and that the state's authority to do so must be reserved for crimes that unquestionably warrant the penalty.

Moreover, the majority again underutilizes the argument that permitting the death penalty for child rape increases the threat of arbitrary and discriminatory application.   While the arbitrariness argument may seem rooted in the fairness foundation, it can also implicate the authority foundation.   In other words, the Court could have argued that the arbitrary application of the death penalty undermines respect for the laws.   For example, one of the main benefits of the rule announced in *Kennedy* is that it establishes a reasonably clear line—you must kill in order to be killed.   If the Court permits capital punishment for rape, then the law must decide what type of rapes will qualify.   Indeed, Justice Alito's dissenting opinion can be turned on itself.   Justice Alito began his dissent with the following:

> [The Court prohibits the death penalty for child rape] no 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.[132]

So we must ask, of course, how young, how many times, and how much torture must a rapist inflict before his acts warrant the death penalty? The risk of arbitrary application increases, and as it does, respect for the certainty of law falls.

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130. Recall that the authority/respect foundation evolved from hierarchical social structures. *See supra* note 29.

131. Atkins v. Virginia, 536 U.S. 304, 319 (2002).

132. *Kennedy*, 128 S. Ct. at 2665 (Alito, J., dissenting).

C. Purity/Sanctity

The Court briefly implicates the purity/sanctity foundation when noting violation of innocence and childhood,[133] but the foundation is, ironically, the least confronted in a case about rape, childhood, family, and the death penalty.

The Court should have directly acknowledged the difficulty of teaching society the value of human life through killing. The opinion never does so. Nor does the opinion stress the awesomeness of the death penalty itself—the state killing a citizen. While the idea of the sanctity of life in general seems relatively minor to the liberal majority in comparison with the more convincing argument of fairness, Professor Haidt's research suggests that this argument might carry more weight with the conservative minority than believed. At the very least, some acknowledgment was warranted.

The arguments above are just a starting point for how the majority might have used the binding foundations to strengthen its opinion. But we should note that none of the binding foundations fit clearly within our idea of law; they are not based on our ideas of Rawlsian justice; they cannot properly be placed into the Eighth Amendment legal analysis. Despite this, moral foundation theory suggests that these have value beyond what is recognized by the liberal majority.

V. Conclusion

Commentators have recognized that the true capital punishment debate revolves not around rational thought but around emotional reaction.[134] Indeed, there is a growing body of literature devoted to the role of emotion and the law generally, and emotion and capital punishment specifically.[135]

As lawyers, admitting the prominence of moral emotion in the capital punishment debate might trouble us. Law, after all, seeks to infuse

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133. *Id.* at 2658 (majority opinion) ("The attack was not just on her but on her childhood."). The Court also noted that, "'[t]he immaturity and vulnerability of a child, both physically and psychologically, adds a devastating dimension to rape that is not present when an adult is raped.'" *Id.* at 2677 (quoting Melissa Meister, *Murdering Innocence: The Constitutionality of Capital Rape Statutes*, 45 ARIZ. L. REV. 197, 208–09 (2008)).

134. *See* Susan A. Bandes, *Child Rape, Moral Outrage, and the Death Penalty*, 103 NW. U. L. REV. COLLOQUY 17, 17 (2008). On the role of emotion in constitutional interpretation generally see Doni Gewirtzman, *Our Founding Feelings: Emotion, Commitment, and Imagination in Constitutional Culture*, 43 U. RICH. L. REV. 623, 664 (2009) ("It is nearly impossible to discuss the issues at the heart of contemporary constitutional discourse—like abortion, homosexuality, the right to die, or affirmative action—without implicating moral judgment.").

135. *See* Gewirtzman, *supra* note 134, index.

reason into criminal proceedings.[136] But capital punishment, like so many other legal issues, cannot be resolved without recourse to morality and the emotions inspired by violations of the moral code. Professor Susan Bandes writes, "[I]t is important to bring emotion into the legal conversation . . . emotions help explain why people hold the views they do about the death penalty."[137] But where does this leave us? Recognizing that emotion plays a role in legal reasoning is fruitless unless we understand the underpinnings of those emotions. Moral foundation theory, acting like a prism separating moral emotion into its component parts, provides those underpinnings. Once we see what moral foundations our opponents value, we can identify the arguments that will carry persuasive power *with them* rather than simply re-hashing the arguments that carry the most persuasive power *with us*.

This Comment has attempted to demonstrate the legal utility of moral foundation theory. It has looked at how moral foundation theory may improve our understanding of the moral motivations at play in *Kennedy v. Louisiana* and has shown where the majority opinion fell short. The limited purview of this Comment, however, should not imply limits to the use of moral foundation theory. Rather, we hopefully see how this powerful analytical and practical tool could be used in the debates on gun control, terrorism, gay rights, and many others. In our legal debates, moral foundation theory allows us to analyze and categorize the moral motivations of the actors. It allows us to recognize why the arguments we find most persuasive may not carry the same weight for our opponents. It allows us to predict what arguments we are missing and how we might tailor the discourse. In the end, moral foundation theory is a tool of understanding that "illuminate[s] the nature and intractability of moral disagreements in the American 'culture war.'"[138]

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136. *See id.* at 668 (discussing dualism—the view that emotion and reason can be and ought to be separated). "This dualism informs the American cultural model for judicial behavior, which seeks to minimize emotion's influence and delegitimizes its role in constitutional interpretation." *Id.*

137. Bandes, *supra* note 134, at 18.

138. Graham, Haidt & Nosek, *supra* note 9, at 1029.