NOTES & COMMENTS

HALTING THE SUDDEN DESCENT INTO BRUTALITY: HOW *KENNEDY V. LOUISIANA* PRESENTS A MORE RESTRAINED DEATH PENALTY JURISPRUDENCE

by
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In Kennedy v. Louisiana*, a divided United States Supreme Court drew a sharp line between crimes resulting in the death of another and crimes that do not. This line has never been drawn with such clear distinction. While the* Kennedy *Court confirms the constitutionality of the death penalty for aggravated first-degree murder, the opinion also cuts away at the underlying penological principles that justify it.*

This decision is all the more striking because of the attention given in recent years to the role of emotion in capital sentencing and a brand of retributive justice that is based more upon the harm to the victim than on the culpability of the offender and, as such, is a departure from traditional retributive arguments. The Court addresses both the offender-centric and victim-centric aspects of retributive punishment, and rejects their application to the crime of child rape. The Kennedy *decision focuses on many other aspects of the capital punishment debate—the death penalty's continued effectiveness as a deterrent, the utility of the Court's objective indicia analysis, and the Court's own judgment on what extent, if any, emotions should factor in to the determination of proportionate punishment.*

This Note argues that the "foundational jurisprudence" of the Supreme Court imposes limits on the justifications for the death penalty

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such that capital punishment is moving logically, if not doctrinally, towards its end.

I. INTRODUCTION

Perhaps the whole business of the retention of the death penalty will seem to the next generation, as it seems to many even now, an anachronism too discordant to be suffered, mocking with grim reproach all our clamorous professions of the sanctity of life.

Benjamin N. Cardozo[1]

In *Kennedy v. Louisiana*, the Supreme Court held that the death penalty is a disproportionate punishment for the crime of child rape, and therefore unconstitutional under the Eighth Amendment.[2] *Kennedy* is only the latest in a line of decisions where the Court has categorically excluded the punishment of death for crimes that did not result in the

[1] BENJAMIN N. CARDOZO, LAW AND LITERATURE AND OTHER ESSAYS AND ADDRESSES 93–94 (1931).

[2] Kennedy v. Louisiana, 128 S. Ct. 2641, 2650–51 (2008).

loss of life or for criminal defendants who do not possess a sufficiently culpable mental state.

This categorical whittling away of the constitutionally permissible uses of capital punishment reflects the struggle of the American criminal justice system to develop a proportional response to crime—one that is consistent with constitutional principles. However, since *Gregg v. Georgia*,[3] when the Court declared the death penalty constitutional for the crime of homicide, the Court continues to justify the death penalty by citing the principles of deterrence and retribution. Despite confirming these rationales in subsequent death penalty decisions,[4] the Court has yet to give a satisfying explanation as to why the modern death penalty is justified on these grounds.

Because of the particularly divisive nature of this issue, and the voluminous literature produced on the subject, the Court has struggled with a workable standard for proportionality. The test that the Court has established over years of Eighth Amendment challenges requires an independent judgment, ultimately, as well as an examination of objective indicia of public opinion, such as legislative pronouncements and jury returns.[5] However, examinations of the major death decisions shows that there is little agreement on how this objective data should be analyzed and each side has twisted the interpretation to suit their viewpoint. When it comes to assessing the Eighth Amendment, perhaps the most important indicator of constitutionality is the Court's judgment. It is a sobering thought, particularly given that human lives are at stake.

In *Kennedy*, a divided Court excluded an entire category of crime from death-eligibility. Patrick Kennedy was convicted of a horrifying crime—the brutal rape of his eight-year-old stepdaughter. Yet the Court drew a sharp line between crimes that result in the death of another and crimes that do not.[6] This line has not been drawn with such clear distinction before, and the rationale for its placement is still heavily in dispute. There are lingering questions as to the propriety of this new line—is this proportionate, and is it justice?

This Note argues that the "foundational jurisprudence" of the Supreme Court imposes limits on the justifications for the death penalty such that capital punishment is moving logically, if not doctrinally,

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[3] 428 U.S. 153, 169 (1976).

[4] *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 571 (2005) ("We have held that there are two distinct social purposes served by the death penalty: 'retribution and deterrence of capital crimes by prospective offenders.'") (quoting Atkins v. Virginia, 536 U.S. 304, 319 (2002); Tison v. Arizona, 481 U.S. 137, 148 (1987) (citing deterrence and retribution as the two rationales for the death penalty).

[5] *See, e.g.*, *Roper*, 543 U.S. at 567–68.

[6] The Court declined to address crimes against the state where death is not the ultimate result, such as treason or espionage. For now, the death penalty is still constitutional for these crimes. See *infra* note 238 for a brief discussion of the validity of the death penalty for crimes against the state.

towards its end. This is partially due to an aversion to retributive punishment. As Justice Kennedy describes the situation:

> [R]etribution . . . 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.[7]

While the *Kennedy* Court confirms the constitutionality of the death penalty for the crime of aggravated first-degree murder, the opinion simultaneously cuts away the underlying penological principles that justify it. This decision is all the more striking because of the attention given in recent years to the role of emotion in capital sentencing. There has been a call from some quarters for decidedly retributive death sentences. Furthermore, this brand of retributive justice is based less upon the culpability of the offender than the harm to the victim and as such is a departure from traditional retributive arguments. In its sweeping opinion, the Court addresses both the offender-centric and victim-centric aspects of retributive punishment, and rejects their application to the crime of child rape. Recognizing that vengeance is tempting in the context of a heinous crime against a defenseless child, the Supreme Court nonetheless declines the invitation to extend capital punishment to crimes that fall short of homicide, even where those crimes are indeed emotionally wrenching and utterly revolting. To what can this decision be attributed other than the Court's own reluctance to descend into brutality—even if that brutality is, in some measure, deserved?

The *Kennedy* decision brings so many different aspects of the capital punishment debate into focus—the continued effectiveness of the death penalty as a deterrent, the utility of Court's objective indicia analysis, and the Court's own judgment to what extent, if any, emotions should play a role in the determination of proportionate punishment.

Part II of this Note addresses the past and current state of Eighth Amendment jurisprudence as well as defining the terms "deterrence" and "retribution" for the purpose of this discussion.

Part III discusses how the evolving jurisprudence of the Supreme Court has and has not been responsive to society's current views of justice. This includes a discussion of how the *Kennedy* decision used so-called objective indicia to fashion a decision and whether this ultimately had any bearing on the Court's determination of what was a proportional punishment for the crime of child rape.

Part IV discusses how the *Kennedy* Court brought its own conception of justice to bear on the distinction between homicide and non-homicide

[7] *Kennedy*, 128 S. Ct. at 2650.

crimes. Additionally, this Part will discuss the Court's treatment of retributive justice and how this case affects its continued vitality.

Finally, Part V addresses how the death penalty is not supported by any other penological theory besides deterrence and retribution, including incapacitation, rehabilitation, and a victim-centric/expressive theory. This discussion entails a prediction about the future viability of the death penalty in general and advocates for the abolition of the death penalty altogether.

II. SKETCHING THE FOUNDATIONAL JURISPRUDENCE: THE COURT'S PROPORTIONALITY DOCTRINE AND THE ROLE OF DETERRENCE AND RETRIBUTION

The Eighth Amendment has its origins in the English Bill of Rights.[8] It is this language that the Framers adopted in the Eighth Amendment of the United States Constitution. The text of the Eighth Amendment reads: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[9] It is also true that the Framers would have contemplated the bloody history that preceded the enactment of the English Bill of Rights when debating the language and scope of the Eighth Amendment; the ban against disproportionate punishment arises from this history.[10]

[8] Ratified in 1689, the English Bill of Rights established "[t]hat excessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted." An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown (Bill of Rights), 1689, 1 W. & M., c.2, § 10 (Eng.).

[9] U.S. CONST. amend. VIII.

[10] For example, the reign of Henry VIII saw about 72,000 executions, approximately 2,000 per year. RANDALL COYNE & LYN ENTZEROTH, CAPITAL PUNISHMENT AND THE JUDICIAL PROCESS 4 (2d ed. 2001). The methods of execution were gruesome: "boiling, burning at the stake, hanging, beheading, and drawing and quartering." *Id.* The comparatively "more merciful Elizabeth I ordered an average of 800 executions per year." *Id.* The number of capital offenses rose, until there were about 200 capital crimes by the year 1800. *Id.* While there is substantial evidence to indicate that the Framers of the Bill of Rights considered the "cruel and unusual" clause to forbid barbarous or inhuman treatment, Anthony Granucci posits that this stems from a misinterpretation of English legislative history. Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CAL. L. REV. 839, 855 (1969). In his article, Granucci deflates the widely held belief that the English Bill of Rights' prohibition on cruel and unusual punishment resulted from the "Bloody Assize"—where hundreds of people connected to the Monmouth rebellion were executed. *Id.* at 853, 855. The Assize was widely publicized in Puritan propaganda. *Id.* at 854. However, Granucci argues that the clause really was a codification of the common law proportionality principle: "[P]rior to the adoption of the Bill of Rights in 1689 England had developed a common law prohibition against excessive punishments in any form. . . . It is indeed a paradox that the American colonists omitted a prohibition on excessive punishments and adopted instead the prohibition of cruel methods of punishment, which had never existed in English law." *Id.* at 847.

Despite some debate among members of the Supreme Court about the original intent of the Framers and whether proportionality was ever a concern,[11] in *Weems v. United States* the Supreme Court articulated a proportionality principle[12] that has been recognized fairly consistently ever since.[13] The Framers, whether or not they intended a proportionality requirement, surely did not anticipate the revolution in punishment that occurred in the century following the ratification. Punishments moved from a public, shame-based model to private incarceration.[14] In the incarceration model, punishments needed to be proportionate or else the punishment would be "self-defeating."[15] "Proportionality thus was not only a more realistic possibility under the new system of incarceration, it was a theoretical imperative."[16] Incarceration presented an opportunity to "order behavior according to the threat of sanction; if threats bear no rational relationship to offenses, the system cannot function."[17]

A. Proportionality and the Death Penalty

The Supreme Court has taken a particularly active role in assessing whether the death penalty is proportionate to a given offense or offender. The Eighth Amendment contemplates that the test will develop over time. In *Weems*, the Court noted that "[t]ime works changes, brings into existence new conditions and purposes. Therefore a principle, to be vital, must be capable of wider application than the mischief which gave it birth."[18] From this understanding, the Court declared that the Eighth Amendment draws its meaning "from the evolving standards of decency that mark the progress of a maturing society."[19]

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[11] The origins of a proportionality principle can be traced back to the 1892 decision of *O'Neil v. Vermont*, in which three dissenting justices agreed that "[t]he whole inhibition [of the Eighth Amendment] is against that which is excessive . . . ." 144 U.S. 323, 340, 370–71 (1892). This decision was followed by *Weems v. United States* in 1910 which solidified the proportionality principle. 217 U.S. 349, 372–73, 375 (1910). *Also see* Granucci, *supra* note 10, at 842–43.

[12] *Weems*, 217 U.S. at 372–73, 375.

[13] *See* Note, *The Eighth Amendment, Proportionality, and the Changing Meaning of "Punishments"*, 122 HARV. L. REV. 960, 963–64 (2009). This Note explains that through the 1970s the Supreme Court adopted a proportionality requirement for the Eighth Amendment, but subsequent decisions like *Harmelin v. Michigan*, 501 U.S. 957 (1991), have presented historical arguments that weaken this assertion. Despite the debate over whether there is a general proportionality principle embedded in the Eighth Amendment, in the context of the death penalty, it is in force.

[14] *The Eighth Amendment, Proportionality, and the Changing Meaning of "Punishments"*, *supra* note 13, at 968, 974.

[15] *Id.* at 974.

[16] *Id.*

[17] *Id.* at 978 (footnote omitted).

[18] Weems v. United States, 217 U.S. 349, 373 (1910).

[19] Trop v. Dulles, 356 U.S. 86, 101 (1958).

The "evolving standards of decency" test applies to all forms of Eighth Amendment challenges. Because "death is different,"[20] however, the tests applied must ensure that this most severe of punishments is meted out to those offenses and offenders that are the "worst of the worst."[21] Much of the Supreme Court's jurisprudence has been dedicated to determining exactly who qualifies as the "worst of the worst."

In *Gregg v. Georgia*, the Supreme Court upheld the constitutionality of capital punishment.[22] *Gregg* articulated two justifications for the death penalty—deterrence and retribution.[23] If a punishment was unsupported by either or both of these rationales, it was unconstitutionally excessive as "gratuitous infliction of suffering."[24] Since that decision, the Court has found a number of offenses and offenders to be categorically excluded from death eligibility.[25] Categorical exclusions based on the severity of the crime are the "most significant source of narrowing in current doctrine . . . ."[26]

In *Coker v. Georgia*, the court held that capital punishment was disproportionate for the crime of rape.

> Rape is without doubt deserving of serious punishment; but in terms of moral depravity and of the injury to the person and to the public, it does not compare with murder, which does involve the unjustified taking of human life. . . . The murderer kills; the rapist, if no more than that, does not. Life is over for the victim of the murderer; for the rape victim, life may not be nearly so happy as it was, but it is not over and normally is not beyond repair. 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 human life.[27]

The *Coker* opinion drew a distinction between homicide crimes and non-homicide crimes. However, it was unclear whether the bar on capital punishment extended to all rapes or solely rapes of adult women.[28] Until

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[20] Woodson v. North Carolina, 428 U.S. 280, 322 (1976) (Rehnquist, J., dissenting).

[21] *See, e.g.*, Godfrey v. Georgia, 446 U.S. 420, 428 (1980).

[22] 428 U.S. 153, 169 (1976).

[23] *Id.* at 183.

[24] *Id.*

[25] Roper v. Simmons, 543 U.S. 551, 568 (2005) (an offender who was under age 18 at the time of the offense is ineligible for the death penalty); Atkins v. Virginia, 536 U.S. 304, 321 (2002) (mentally retarded offenders are ineligible for the death penalty); Enmund v. Florida, 458 U.S. 782, 788 (1982) (death penalty is inconsistent with the Eighth and Fourteenth Amendments when offender did not kill and was not present at killing); Coker v. Georgia, 433 U.S. 584, 597 (1977) (death penalty is disproportionate for rape of an adult woman).

[26] Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 375 (1995).

[27] *Coker*, 433 U.S. at 598 (citation omitted) (quoting *Gregg*, 428 U.S. at 187).

[28] *See* Kennedy v. Louisiana, 128 S. Ct. 2641, 2666 (2008) (Alito, J., dissenting).

the decision in *Kennedy v. Louisiana*, there had not been a categorical exclusion of a crime since *Coker*.[29] Furthermore, apart from finding that the nature of the harm resulting from rape is fundamentally different than the harm resulting from murder, the Court did not explain to a satisfactory degree why capital punishment for rape did not serve *Gregg*'s twin rationales.[30]

A far more active type of categorical exclusion was focused on the culpability of the offender. The first such decision was *Enmund v. Florida*, which held that a participant with a minor role in a felony murder who does not kill nor intend to kill cannot be eligible for the death penalty.[31] In *Enmund*, because the petitioner only intended to commit a robbery, and robbery is categorically less serious than murder, his mental state was not one deserving of the most severe punishment.[32] By contrast, the Court held in *Tison v. Arizona* that some felony murderers are sufficiently culpable as to deserve a death sentence.[33] *Tison* held that the degree of participation in the crime (a major role as opposed to the minor role played by the petitioner in *Enmund*) and a culpable mental state of reckless indifference to human life was sufficient to render an offender death-eligible.[34] Both these decisions articulate the idea that the offender's individual culpability has a direct relation to the justice or efficacy of the death penalty. In *Enmund*, the twin rationales of deterrence and retribution would not work for an offender who never intended to cause death. He would not be deterred from causing death because he already did not intend to cause death.[35] Likewise, a retributive rationale would fall flat because the petitioner only possessed the mens rea of robbery and therefore deserves less punishment than a murderer.[36]

For similar reasons, the Supreme Court barred the imposition of the death penalty on mentally retarded and juvenile offenders.[37] In *Atkins*, the majority wrote that there was "a serious question" as to whether deterrence or retribution would apply to mentally retarded offenders given their

> diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to

[29] *See* Graham v. Florida, 130 S. Ct. 2011, 2045 (2010) (discussing the categorical exemptions from the death penalty for certain crimes and listing only *Coker* and *Kennedy*).

[30] *See Coker*, 433 U.S. at 618 (Burger, C.J., dissenting).

[31] 458 U.S. 782 (1982).

[32] *Id.*

[33] 481 U.S. 137 (1987).

[34] *Id.* at 158.

[35] *Enmund*, 458 U.S. at 799.

[36] *Id.* at 800–01.

[37] Roper v. Simmons, 543 U.S. 551, 578 (2005) (concerning juvenile offenders); Atkins v. Virginia, 536 U.S. 304, 321 (2002) (concerning mentally retarded offenders).

> understand the reactions of others. . . . [These] deficiencies do not warrant an exemption from criminal sanctions, but they do diminish [mentally retarded offenders'] personal culpability.[38]

In *Roper*, the Court found that three main differences between juvenile and adult murderers warranted their categorical exclusion from death eligibility. Lack of maturity, susceptibility to peer pressure, and the unfixed character of young people "render suspect any conclusion that a juvenile falls among the worst offenders."[39]

The Supreme Court demonstrates the importance of deserved punishment through its narrowing doctrine. This concern appears in other capital punishment decisions that do not impose a categorical bar. For example, in *Lockett v. Ohio* the Court held that the sentencer "not be precluded from considering, *as a mitigating factor*, any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."[40] In *Godfrey v. Georgia*, a case involving the interpretation of aggravating factors, the Court held an overly broad interpretation of the "outrageously or wantonly vile, horrible or inhuman" aggravating factor was in violation of the Eighth Amendment.[41] "The petitioner's crimes cannot be said to have reflected a consciousness materially more 'depraved' than that of any person guilty of murder."[42] The Court's treatment of aggravating and mitigating factors reinforces the idea that the death penalty should be limited to the worst crimes and offenders. The categorical narrowing the Court undertook in *Coker*, *Atkins*, *Roper*, *Enmund,* and now *Kennedy,* coupled with the Court's requirement of individualized sentencing that considers every possible mitigating factor reflects the Court and society's recognition that death is, indeed, different and there is danger in its use as punishment.

B. Deterrence and Retribution

There are many theories for why we punish offenders and why we put some offenders to death. However, the Supreme Court has repeatedly and exclusively recognized deterrence and retribution, starting with *Gregg v. Georgia*, and held that if a punishment does not serve these justifications it is cruelly excessive.[43]

The beginning of any examination of the penological support of capital punishment is the watershed *Gregg* decision, which revived the

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[38] *Atkins*, 536 U.S. at 318 (footnote omitted).

[39] *Roper*, 543 U.S. at 569–70. *See also* Graham v. Florida, 130 S. Ct. 2011, 2027 (2010).

[40] 438 U.S. 586, 604 (1978).

[41] 446 U.S. 420, 432 (1980) (quoting GA. CODE ANN. § 27-2534.1(b)(7) (1978)).

[42] *Id.* at 433.

[43] 428 U.S. 153, 183 (1976).

death penalty after *Furman v. Georgia*.[44] Despite its holding, *Gregg* shows the Court's ambivalence by recognizing the flaws inherent in both the deterrent and retributivist approach.

1. Criticisms of Deterrence

Deterrence, according to the *Gregg* opinion, has an "inconclusive" effect but is "a complex factual issue the resolution of which properly rests with the legislatures . . . ."[45]

> We may nevertheless assume safely that there are murderers, such as those who act in passion, for whom the threat of death has little or no deterrent effect. But for many others, the death penalty undoubtedly is a significant deterrent. There are carefully contemplated murders, such as murder for hire, where the possible penalty of death may enter into the cold calculus that precedes the decision to act.[46]

Over time, the presence or absence of a deterrent effect has been hotly debated. To say the least, the presence of any deterrent effect is no longer a safe assumption. Generally, for a law to have a genuine deterrent effect, it must overcome a number of hurdles inherent within a criminal offender.[47] First, the potential offender must have knowledge of the law and the punishment for the law's transgression.[48] Second, the potential offender must make a rational choice based upon his knowledge of the law. For many criminal offenders, the decision to commit a crime cannot be said to have been the result of rational choice. People who commit crimes are

> likely to have certain individual patterns of thought characterized by impulsivity and risk-seeking behaviour, and to be under the influence of alcohol or drugs at the time they decide to commit crimes. . . . It is difficult to fit this to the image of a person who is affected by complex rational deterrence considerations.[49]

Third, even if the potential offender is aware of the law, and that knowledge is part of his pre-offense calculus, if the perceived benefit

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[44] 408 U.S. 238, 239–40 (1972). *Furman* rendered the death penalty, as it was then applied, unconstitutional. It was a five-to-four decision in which each Justice wrote separately. *Id.* at 239–40. The concerns about arbitrary and capricious application of the death penalty expressed by the concurring Justices in *Furman* led to the creation of the current narrowing doctrine, authorizing capital punishment only for the worst class of offenders. *See id.* at 295, 309–10; Carol S. Steiker & Jordan M. Steiker, *Defending Categorical Exemptions to the Death Penalty: Reflections on the ABA's Resolutions Concerning the Execution of Juveniles and Persons with Mental Retardation*, 61 LAW & CONTEMP. PROBS. 89, 100 (1998).

[45] *Gregg*, 428 U.S. at 184–86.

[46] *Id.* at 185–86.

[47] Paul H. Robinson & John M. Darley, *Does Criminal Law Deter? A Behavioral Science Investigation*, 24 OXFORD J. LEGAL STUD. 173, 174 (2004).

[48] *Id.* at 176.

[49] *Id.* at 181.

outweighs the perceived cost he will still be undeterred.[50] Robinson and Darley note that many offenders overestimate their ability to get away with their crimes, and that the delayed possibility of punishment is frequently outweighed by the present circumstances surrounding the commission of a crime.[51]

It is beyond the scope of this Note to go into much greater detail about the science surrounding a deterrent effect, or lack thereof. However, it is important to note that the people who commit crimes have many characteristics—impulsivity, drug addiction, and susceptibility to group-think—that make it difficult, if not impossible, for a deterrent effect to take hold.[52] Yet some recent studies have shown a strong deterrent effect, leading to the inevitable question: If capital punishment does have a deterrent effect, is it "morally required"?[53] Professors Sunstein and Vermeule argue that if a significant deterrent effect is proven, then the state is morally obligated to impose capital punishment. The heart of this argument is that a government is a unique moral being, and an omission—in this case, lack of a death penalty—has the same moral force as an act.[54] Because up to 18 innocent lives are saved by every execution, they suggest the state's failure to execute is a morally impermissible act.[55]

In response to Sunstein and Vermeule's consequentialist arguments, Professor Carol Steiker articulates the deontologist's perspective in the deterrence debate.[56] Steiker argues that Sunstein and Vermeule's thesis creates the potential for a number of morally *impermissible* slippery slope consequences, such as torture, and ignores the existence of "any such categorical line prohibiting extreme punishments as a moral matter . . . ."[57] Steiker rejects the idea that a state action and a state omission are fundamentally the same. In the criminal law context, the mens rea of an actor is in direct correlation to the actor's culpability. A state that fails to prevent murders has a reckless or, at most, knowing

[50] *Id.* at 182–83.

[51] *Id.* at 185.

[52] *See id.* at 176, 181.

[53] Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 STAN. L. REV. 703, 703, 706 (2005).

[54] *Id.* at 706, 720–21.

[55] *Id.* at 706. The study from which the "eighteen lives" figure comes is Hashem Dezhbakhsh, Paul H. Rubin & Joanna M. Shepherd, *Does Capital Punishment Have a Deterrent Effect? New Evidence from Postmoratorium Panel Data*, 5 AM. L. & ECON. REV. 344, 369 (2003). While the Sunstein and Vermeule article proceeds from an assumption that these studies are accurate in order to discuss the moral implications of a proven deterrent effect, there has been a response from the social science community. For an example of commentary criticizing the findings of these studies, see John J. Donohue & Justin Wolfers, *Uses and Abuses of Empirical Evidence in the Death Penalty Debate*, 58 STAN. L. REV. 791, 794 (2005).

[56] Carol S. Steiker, *No, Capital Punishment is Not Morally Required: Deterrence, Deontology, and the Death Penalty*, 58 STAN. L. REV. 751, 752 (2005).

[57] *Id.* at 754.

mental state; however, a state that executes kills purposefully.[58] But for consequentialists, "there is nothing intrinsically wrong with individuals or governments 'using' the lives of some to promote the greater good, while deontologists insist that when it comes to lives and bodies, individuals have rights against such use that trump the greater good."[59]

A middle ground between the consequentialist and deontological perspectives is possible. Sunstein and Vermeule argue for a rule-based consequentialism—the practice of capital punishment saves lives, therefore it is good and must be applied. This rule-based utilitarianism does not allow for discretion in particular instances, for example, the potential execution of an innocent person. Under a rule-based theory, the practice itself is the good, and must be applied in all circumstances in which it arises. As John Rawls explains:

> [T]here is a way of regarding rules which allows the option to consider particular cases on general utilitarian grounds; whereas there is another conception which does not admit of such discretion except insofar as the rules themselves authorize it. . . . [W]here there is a practice, it is the practice itself that must be the subject of utilitarian principle.
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> It is surely no accident that two of the traditional test cases of utilitarianism, punishment and promises, are clear cases of practices. . . . One fails to see that a general discretion to decide particular cases on utilitarian grounds is incompatible with the concept of a practice . . . .[60]

Yet there is another conception that would allow for a deviation from a standard rule. Act-based utilitarianism permits the weighing of factors that exist in that particular instance.[61] For the most part, an act-based utilitarian will endorse a rule, because individualized act-based determinations are undesirable for a number of reasons.[62] Generally, the act that is correct will subscribe to the rule, what Rawls described as the "summary view" of rules.[63] "[F]ollowing a decision procedure that generally rules out [certain] acts will in the long run and on the whole

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[58] *Id.* at 757.

[59] *Id.* at 761 (footnotes omitted).

[60] John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3, 29–30 (1955). Rawls continues, "[t]here is no inference whatsoever to be drawn with respect to whether or not one should accept the practices of one's society. One can be as radical as one likes but in the case of actions specified by practices the objects of one's radicalism must be the social practices and people's acceptance of them." *Id.* at 32.

[61] *Rule Consequentialism*, STAN. ENCYCLOPEDIA PHIL., http://plato.stanford.edu/entries/consequentialism-rule/.

[62] For example, such act-based decisions require more information than is typically available and are therefore more likely to be mistaken. *Id.*

[63] Rawls, *supra* note 60, at 19 ("If a case occurs frequently enough one supposes that a rule is formulated to cover that sort of case.").

produce better consequences than our trying to run consequentialist calculations on a case-by-case basis."[64]

Ultimately, the idea of an act-based utilitarian option does not erase the problems with a solely deterrence-based approach to capital punishment, since it is impractical and falls back to a general rule-based position more often than not. Furthermore, while the Supreme Court accepts deterrence as a rationale for punishment, at the same time it requires that the punishment be proportional to the individual offender's guilt. This presents clearly how the Supreme Court's two justifications are often contradictory. The deontological approach, retributivism, advocates punishment because the individual offender deserves it, whereas a consequentialist is less concerned with what an individual offender deserves and more concerned with the rippling effects of his execution. Clearly, the consequentialist versus deontologist debate is highly nuanced and deserves far more unpacking than this Note can accommodate. However it is important to note that Sunstein and Vermeule's theories are a minority view among penological theorists, partially because of the inherent possibility of abuse[65] and partially due to the inherent discomfort with "using" people to achieve a desirable social goal.[66] The foundational principle of the Eighth Amendment is, ultimately, human dignity.[67]

While it is necessary to address the deterrence rationale, arguably, the Court has not placed the same level of importance on deterrence as

[64] *Rule Consequentialism*, *supra* note 61.

[65] What if torture deters more than a "humane" execution? Arguably, states would be morally required to adopt barbarous methods of punishment under the consequentialist approach. Sunstein and Vermeule do not articulate a satisfying response to this objection. "State practices of torture might actually increase torture, rather than diminish it, perhaps by weakening the social prohibition on torture. This is an empirical issue, and no evidence, so far as we are aware, either undermines or confirms it. Hence, state torture might be self-defeating if its goal is to reduce private torture." Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 STAN. L. REV. 703, 734 (2005). It is hard to understand why this same argument cannot be extended to the death penalty itself. By sanctioning state killing, is not the state sending a similar message—weakening the social prohibition on killing?

[66] For example, another criticism of the consequentialist approach involves a scenario in which an innocent person is executed. This is not a merely theoretical contingency. *See Innocence and the Death Penalty*, DEATH PENALTY INFO. CENTER, http://deathpenaltyinfo.org/innocence-and-death-penalty (compiling statistics, over 130 exonerations since 1973); *Innocence Project Case Profiles,* INNOCENCE PROJECT, http://www.innocenceproject.org/know/ (over 234 exonerations). A rule-based consequentialist approach would tolerate the execution of an innocent person because the desired life-saving effect would still occur. A retributive approach would not, because an innocent person is not deserving of execution. *See* Steiker, *supra* note 56, at 775.

[67] Kennedy v. Louisiana, 128 S. Ct. 2641, 2649 (2008).

it has on retribution.[68] Apart from the decisions that recognize a certain class of offender as effectively undeterrable,[69] the Court has placed far more emphasis on the retributive justification for the death penalty, largely due to the fact the deterrence may very well not have any demonstrable effect on murder rates.[70]

2. The Traditional Understanding of Retribution

The Court's understanding of retributivism is deliberately simplified because the purpose and justification for a given punishment is generally a legislative choice. Penal philosophers and commentators have filled in many of the gaps in reasoning that support Supreme Court conclusions. This section discusses some of these theories, and ultimately concludes that the Court, when it speaks of retribution in *Kennedy*, is really speaking of vengeance. In *Furman v. Georgia*, Justice Stewart reasoned:

> The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they "deserve," then there are sown the seeds of anarchy—of self-help, vigilante justice, and lynch law.[71]

Gregg adopted this language and confirmed that the Supreme Court worried about the potential for vigilantism, stating, "capital punishment is an expression of society's moral outrage at particularly offensive conduct."[72] At the same time, the Court was equally suspicious of this rationale, stating that a state-sponsored expression of moral outrage "may

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[68] HUGO ADAM BEDAU, THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES 21 (1997) ("Once the death penalty is confined solely to criminal homicide, however, as is substantially true today, it can be more readily defended solely on grounds of just deserts or retribution.").

[69] *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 569 (2005) (impulsivity, lack of maturity, and other factors make youthful offenders less deterrable); Atkins v. Virginia, 536 U.S. 304, 2250–51 (2002) (due to diminished capacity, mentally retarded offenders are less likely to consider death penalty in the pre-crime calculus); Enmund v. Florida, 458 U.S. 782, 799 (1982) (it is impossible to deter an individual who neither kills nor intends to kill in the commission of some other crime).

[70] *See* Robinson & Darley, *supra* note 47, at 174. *See also Law Enforcement Views on Deterrence*, DEATH PENALTY INFO. CENTER, http://deathpenaltyinfo.org/law-enforcement-views-deterrence (noting that law enforcement experts place the death penalty last in list of factors reducing crime); Susan A. Bandes, *The Heart Has Its Reasons: Examining the Strange Persistence of the American Death Penalty*, 42 STUD. L. POL. & SOC'Y 21, 30–31 (2008) [hereinafter Bandes, *Heart*] ("In short, throughout the period during which deterrence was cited as the primary reason to execute, there was little if any reason to believe it worked. By the late 1990s, the public was becoming disenchanted with the notion of deterrence: it saw rising rates of execution yet did not believe crime was decreasing. However, instead of withdrawing support for the death penalty, the populace simply shifted rationales.").

[71] 408 U.S. 238, 308 (1972) (Stewart, J., concurring).

[72] Gregg v. Georgia, 428 U.S. 153, 183 (1976).

be unappealing" and recognizing that "'[r]etribution is no longer the dominant objective of the criminal law.'"[73] Because the rationale for a given punishment was a legislative decision, the Court did not delve too deeply into retribution as a rationale except to say it is not implicitly unconstitutional.[74]

The idea of retributive punishment has evolved since its earlier expression in the Old Testament:

> Envisioning neither mercy nor mitigation of punishment, the *lex talionis* is, by modern standards, extremely harsh; however, it does prescribe a maximum limit on punishment. "*Talio*" is Latin for "equivalent to" or "equal." That the *lex talionis* requires punishment equal to the crime is made clear by a passage from the *Book of Leviticus*: "If a man injures his neighbor, what he has done must be done to him: broken limb for broken limb, eye for eye, tooth for tooth. As the injury inflicted, so must be the injury suffered."[75]

This idea found more modern expression through the work of Immanuel Kant. Kant argued that criminals deserved punishment because they transgressed the agreement of society's members to live free of the violence of the natural state.[76] At the same time, people could not be used as a means to an end, thus Kant opposed the consequentialist theory of punishment. The appropriate punishment is one that fits the punishment to the crime. According to Kant, the only punishment for murder is death:

> If . . . he has committed murder he must *die*. Here there is no substitute that will satisfy justice. There is no . . . likeness between the crime and the retribution unless death is judicially carried out upon the wrongdoer, although it must still be freed from any mistreatment that could make the humanity in the person suffering it into something abominable. —Even if a civil society were to be dissolved by the consent of all its members . . . the last murderer remaining in prison would first have to be executed, so that each has done to him what his deeds deserve and blood guilt does not cling to the people for not having insisted upon this punishment; for otherwise the people can be regarded as collaborators in this public violation of justice.[77]

The Kantian model, then, is to restore a balance that has been lost through the wrongdoer's actions:

> [Murder] can be interpreted as a direct attack on a condition for the existence of collective well-being. . . . [I]t shows the

[73] *Id.* (quoting Williams v. New York, 337 U.S. 241, 248 (1949)).

[74] *Id.*

[75] Granucci, *supra* note 10, at 844 (footnotes omitted) (quoting *Leviticus* 24:19–20, THE JERUSALEM BIBLE 104 (Jones ed. 1966)).

[76] Tom Sorell, *Punishment in a Kantian Framework*, *in* PUNISHMENT AND POLITICAL THEORY 10, 17–18 (Matt Matravers ed., 1999).

[77] Immanuel Kant, *The Metaphysics of Morals* (1797), *in* THE METAPHYSICS OF MORALS 106 (Mary Gregor, ed., 1996).

> compatibility of extreme violence with institutions that are properly understood as excluding it; and so opens those institutions to contempt, or to competition from vigilante groups, which, as in the state of nature, make private judgment the measure of justice.[78]

3. Modern Retributivism

Modern retributivism has moved beyond Kant and the *lex talionis* but there are some features of retributivism that are common to all retributivist theories. Chief among these is the concept of "just deserts." John Rawls wrote, "wrongdoing merits punishment. It is morally fitting that a person who does wrong should suffer in proportion to his wrongdoing. . . . [T]he severity of the appropriate punishment depends on the depravity of his act."[79] Thus a pure retributivist theory holds that an offender must suffer in proportion with his own culpable conduct, not for some other aim such as deterring future crime by others or to ameliorate the harm to the victim, or for wholly impermissible reasons such as the offender's physical characteristics.[80] At some point the meaning of retribution began to embrace the emotions of the community and the victims.

One explanation for this development is our system of democracy. Legislatures must respond to voters, and the voters are not interested in a pure retributivist calculus. As Douglas A. Berman and Stephanos Bibas explain, "lay morality is not a bloodless Kantian categorical imperative, but an emotional, affective judgment."[81] To Berman and Bibas, echoing the concerns of the *Gregg* Court, punishment "channels retributive anger, limiting it to proportional payback and tempering it with neutral adjudicators and punishers. If one squelches the impulse rather than channeling it, people may take the law into their own hands."[82] This argument, that the law is grounded in a "lay morality," has been termed a "neo-retributivist" movement[83]—one that embraces the anger that people feel towards members of the community that transgress the community's laws.[84]

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[78] Sorell, *supra* note 76, at 19.

[79] Rawls, *supra* note 60, at 4–5.

[80] The Eighth Amendment has been described as a "retributivist constraint" and the Supreme Court's proportionality review ensures that an offender does not receive a harsher punishment than he deserves. *See* Youngjae Lee, *Desert and the Eighth Amendment*, 11 J. CONST. L. 101, 101 (2008).

[81] Douglas A. Berman & Stephanos Bibas, *Engaging Capital Emotions*, 102 NW. U. L. REV. COLLOQUY 355, 359 (2008).

[82] *Id.* at 360.

[83] Morris B. Hoffman, *Rediscovering the Law's Moral Roots*, 103 NW. U. L. REV. COLLOQUY 13, 14 (2008).

[84] Berman & Bibas, *supra* note 81, at 360 ("Anger underscores the moral community we share with victims and criminals. Crimes have torn the social fabric and demand justice, payback to condemn the crime, vindicate the victim, and denounce the wrongdoer. Where there is no anger, there is no justice and no sense of community." (footnote omitted)).

Another reason may be increased attentiveness to the harm caused to the victim or the personal culpability of the offender. Paul Robinson has articulated this distinction by describing three distinct kinds of retributive theories: vengeful desert, deontological desert, and empirical desert.[85] Vengeful desert is the heir to *lex talionis* in that it requires the punishment to be in proportion to the harm, "[b]ut even in this diluted form, the primary focus of vengeful desert remains the extent of the harm of the offence."[86] Conversely, deontological desert "transcends the particular people and situation at hand and embodies a set of principles derived from fundamental values . . . and thus will produce justice without regard to the political, social, or other peculiarities of the situation at hand."[87] Deontological desert most closely resembles the pure retributivist theory described above, and has as its locus the culpability of the offender as opposed to the harm he caused. Empirical desert also focuses on the culpability of the offender, but it looks to "the community's intuitions of justice" as divined through empirical study, in determining the appropriate punishment.[88]

Abolitionist deontologists, like Professor Steiker, broaden the desert calculus to include factors that could reduce the culpability of the offender:

> At first glance, a retributive argument might seem like an odd one to make against capital punishment, as it is retributivism that offers some of the strongest arguments *in favor* of the death penalty. . . .
>
> But there is good reason to think that capital punishment—at least as it is imposed in our contemporary society—routinely and inevitably runs afoul of retributivism's bedrock proportionality constraint. It is rarely the case that execution as a form of suffering can confidently be viewed as disproportionate to the harms inflicted on the victims of capital murderers. Rather, the strongest argument for such disproportionality lies in the reduced culpability of most convicted capital offenders . . . . Though capital defendants have usually committed (or participated in) heinous murders, they very frequently are extremely intellectually limited, are suffering from some form of mental illness, are in the powerful grip of a drug or alcohol addiction, are survivors of childhood abuse, or are victims of some sort of societal deprivation (be it poverty, racism, poor education, inadequate health care, or some noxious combination of the above). In such circumstances, it is difficult to say that these defendants deserve all of the blame for their terrible acts; if their families or societies share responsibility—even in some small

[85] Paul H. Robinson, *Competing Conceptions of Modern Desert: Vengeful, Deontological, and Empirical*, 67 CAMBRIDGE L.J. 145, 146 (2008).

[86] *Id.* at 147.

[87] *Id.* at 148.

[88] *Id.* at 149.

> measure—for the tragic results, then the extreme punishment of death should be considered undeserved.[89]

The abolitionist retributivist advocates an understanding of deeper societal factors other than the circumstances of a particular crime; it embodies an understanding of other criticisms of capital punishment, for example, arbitrariness and racial inequality. To the abolitionist retributivist, the death penalty should be abolished because it is unfair on many levels. It is disproportionate because underlying social inequalities create the offender, and in this sense, society in general shares responsibility for the occurrence of the crime.

There is some indication that capital juries are persuaded by these kinds of retributivist arguments. Susan Bandes has discussed how arguments in favor of the death penalty are their most effective when abstract.[90] These pro-death penalty arguments are founded on emotions; Bandes argues that "[t]he 'just deserts' calculus, when the death penalty is at issue, is influenced by media coverage, popular cultural representations of crime, elections and other political pressures, and folk knowledge, all of which tend to traffic in fear, anger and prejudice."[91] Bandes notes that there has been a shift in favor of retributive rationales for capital punishment, "where once it was considered harsh and unenlightened to rely on retributive theory . . . in recent years it has become [more] acceptable and common."[92] Yet, Bandes argues that however undesirable these trends may be, they are inevitable. Similarly, the abolitionist side can embrace the role of emotion in arguing mitigation. "[D]efense attorneys understand how crucial it is that juries hear the more elusive counter-narrative of the defendant's humanity; and that they do not distance themselves from the defendant's pain, the possibility of his redemption, and their own responsibility in determining his fate."[93] When jurors are confronted with mitigation evidence of the kind described by Professor Steiker and with their individual roles in the sentencing process, it can be demonstrably more difficult to impose a violent end on an individual.[94]

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[89] Steiker, *supra* note 56, at 765–67 (footnotes omitted).

[90] Bandes, *Heart*, *supra* note 70, at 42.

[91] *Id.* at 29 (citations omitted).

[92] *Id.* at 38.

[93] *Id.* at 42 (citation omitted). *See also* Berman & Bibas, *supra* note 81, at 363.

[94] Robert Cover has written about the process of judicial legitimation of violence against individual defendants. *See* Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986). In his essay, Cover argues that judicial acts, and also those of jurors, are acts of violence against individuals. "[P]unishment, if it is 'just,' supposedly legitimates the coercion or violence applied. The ideology of punishment may, then, operate successfully to justify our practices of criminal law to ourselves and, possibly, even to those who are or may come to be 'punished' by the law." *Id.* at 1608. From the point of view of a juror, his actions are as an agent of the legal system and his feelings of personal responsibility are diminished. "Persons who act within social organizations that exercise authority act violently without experiencing the normal

The preceding Section outlines only some retributivist perspectives. However, one can distill a few themes from these arguments that have been adopted by the Court and are discussed in *Kennedy v. Louisiana*. The concept of "just deserts" is critical to any deontological theory. The differences between deontological theories arise with regard to what is considered just. For Berman and Bibas, for example, a retributivist rationale founded on the harm to the victim and the community would justify a death sentence for a child rapist.[95] On the other hand, some retributivists see the offender's deserved punishment in light of his personal culpability. Mitigation evidence helps to humanize the offender, and it can be highly effective because it reduces the defendant's personal responsibility by deflecting some blame on his unfortunate circumstances. Jurors are more reluctant to impose a death sentence on a person they pity.[96] A person who has suffered at the hands of an indifferent society is ultimately less deserving of punishment.[97]

But feelings of rage or mercy towards a defendant do not arise in a vacuum. As Susan Bandes astutely notes:

> Moral outrage does not merely well up from the populace; it takes shape in a political and social context. When respected institutions send the insistent message that only the death penalty can . . . honor the worth of the victims of these crimes, that message has consequences. It guides the public to feel moral outrage when it is *deprived* of the death penalty.[98]

As one of these "respected institutions," the Supreme Court assumes a particularly important rule in the continuation of the death penalty, since all lawmakers—courts, and legislatures alike—must be responsive to its mandates. The Court, however, has two conflicting concerns when it decides capital punishment cases. First, the Court must be respectful of its institutional role. Legislatures are the governmental bodies most suited to articulating crimes and punishments. Second, the Court is the protector of constitutional rights, including the ban against cruel and unusual punishment. It must prevent the tyranny of the majority from trampling on the rights of an unpopular minority. And what minority is more unpopular than a person convicted of a horrific crime? These two concerns are reflected in the Court's two-pronged analysis. The Court first nods to popular opinion by way of legislative actions and jury returns. These so-called objective indicia purportedly show whether society's standards of decency have evolved. But the Court ultimately

inhibitions or the normal degree of inhibition which regulates the behavior of those who act autonomously." *Id.* at 1615.

[95] Berman & Bibas, *supra* note 81, at 361–62.

[96] Bandes, *Heart*, *supra* note 70, at 41–42.

[97] Steiker, *supra* note 56, at 766–67.

[98] Susan A. Bandes, *Child Rape, Moral Outrage, and the Death Penalty*, 103 NW. U. L. REV. COLLOQUY 17, 22 (2008) [hereinafter Bandes, *Moral Outrage*].

makes its decision according to its own judgment, which is the second part of the Eighth Amendment test.

III. THE OBJECTIVE INDICIA TEST: GAUGING SOCIETY'S CONCEPTION OF JUSTICE

The first step of the Court's Eighth Amendment analysis is to compile the objective indicia of consensus. This Part discusses the type of data that the Court considers to be relevant, and then discusses the Court's standard treatment of this evidence.

A. Public Opinion Polls and Legislative Enactments

The death penalty is popular.[99] Support for the death penalty peaked in the 1990s, according to the most recent Harris and Gallup polls.[100] Recent years have seen a downshift in support for the death penalty, even though it is supported by over 60% of Americans. A March 18, 2008 Harris Poll found that 63% of Americans "believe[d] in the death penalty"—down from 69% in 2003. Even more notable, however, is that 52% of respondents believed that the death penalty does not have much of a deterrent effect.[101] While this figure has held steady throughout the decade, in 1976, the year of *Gregg*, 59% believed that the death penalty *was* a deterrent.[102] Additionally, the Harris Poll indicates that the recent revelation of wrongful convictions has had a significant effect on American's attitudes toward capital punishment. A startling 95% of survey respondents believed that innocent people are sometimes convicted of murder.[103] And those respondents believed that an average of 12 people out of every 100 convicted are innocent.[104] Of the 95% of respondents who believed innocent people are sometimes convicted, 58% would oppose the death penalty if a "substantial number of

[99] *See* Frank Newport, *In U.S., Two-Thirds Continue to Support the Death Penalty*, GALLUP POLL (Oct. 13, 2009), http://www.gallup.com/poll/123638/in-u.s.-two-thirds-continue-support-death-penalty.aspx [hereinafter GALLUP POLL I]; Lydia Said, *Americans Hold Firm to Support for Death Penalty*, GALLUP POLL (Nov. 17, 2008), http://www.gallup.com/poll/111931/Americans-Hold-Firm-Support-Death-Penalty.aspx [hereinafter GALLUP POLL II]; Regina A. Corso, *Over Three in Five Americans Believe in Death Penalty*, THE HARRIS POLL, Mar. 18, 2008, http://www.harrisinteractive.com/vault/Harris-Interactive-Poll-Research-Over-Three-in-Five-Americans-Believe-in-Death-Penalty-2008-03.pdf [hereinafter HARRIS POLL]. *See generally National Polls and Studies: Pew Poll Reveals Declining Support for the Death Penalty*, DEATH PENALTY INFO. CENTER, http://deathpenaltyinfo.org/national-polls-and-studies.

[100] GALLUP POLL II, *supra* note 99; HARRIS POLL, *supra* note 99.

[101] HARRIS POLL, *supra* note 99.

[102] *Id.*

[103] *Id.*

[104] *Id.* Interestingly, these numbers were not constant over different demographics. Perhaps not at all surprisingly, African-Americans responded that 25% of those convicted were innocent.

innocent people are convicted of murder."[105] Recent Gallup Poll results show 65% of survey respondents are in favor of the death penalty.[106] Like the Harris Poll:

> [P]revious Gallup research has found that most Americans believe the death penalty is not a deterrent to crime. According to a May 2006 Gallup Poll, only 34% said it was a deterrent, while 64% disagreed. Open-ended questions asked in previous years have shown that most Americans who favor the death penalty do so because they believe it provides an "eye for an eye" type of justice.[107]

As the elected representatives, the actions of legislators could just be reflecting the feelings of the American people, but there are reasons to be suspicious of this premise. The influence here is cyclical—elected officials overwhelmingly are in favor of the death penalty because being "tough on crime" is attractive to voters. In recent years there has been an expansion in the number and type of aggravating factors that render a particular homicide death-eligible.[108] These factors are tied to specific events; for example, after the terrorist attacks of September 11, 2001, several states added terrorism-related aggravating factors to their death penalty statutes.[109] This expansion "served more as a political function rather than a fix of an actual criminal justice problem."[110] Additionally, the options presented to voters undoubtedly influence their preferences. As capital punishment is more frequently presented as an option for certain crimes, the more that voters will come to expect or even demand it.[111]

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[105] *Id.*

[106] The most recent Gallup Poll finds that 65% of respondents supported the death penalty. GALLUP POLL I, *supra* note 99.

[107] GALLUP POLL II, *supra* note 99. Another interesting Gallup Poll result is that when life without parole is offered as an alternative to the death penalty, the percentage of people supporting capital punishment decreases. In May 2006, 47% thought the death penalty was the preferred punishment where 48% felt life without parole was preferable. *Id. See also* GALLUP POLL I, *supra* note 99 (same).

[108] *See generally* Jeffrey L. Kirchmeier, *Casting a Wider Net: Another Decade of Legislative Expansion of the Death Penalty in the United States*, 34 PEPP. L. REV. 1, 2 (2006).

[109] *Id.* at 27–28. Other states responded to the tragic school shooting in Littleton, Colorado by adding school violence related aggravating factors. *Id.* at 29–30. Similarly, as society has become more aware of domestic violence issues, the number of death penalty statutes with related aggravating factors has increased. *Id.* at 30.

[110] *Id.* at 33. Kirchmeier discusses a number of reasons why this expansion is problematic. It is too difficult to determine which offenders are truly the worst when almost any murder is covered, it is more expensive to administer such an expansive capital punishment regime, some of the aggravating factors may be unconstitutionally overbroad, too much discretion leads to arbitrary enforcement, and there is an increased risk of wrongful conviction. *Id.* at 36–37. Additionally, the litany of factors do not consider penological goals, but rather "less relevant aspects" such as whether the factor protects "politically powerful classes." *Id.* at 37–38. Most ominously, Kirchmeier says "[t]he problem may lack a political solution." *Id.* at 40.

[111] This relationship has been noted by numerous commentators. *See, e.g.*, Bandes, *Heart*, *supra* note 70, at 38; Bandes, *Moral Outrage*, *supra* note 98, at 22;

The objective indicia analysis, what Professor Heidi Hurd has described as the Court "count[ing] its legal beans," can be twisted around to suit whichever position the Court has decided to take.[112] As a result of the pseudo-objectivity consistently displayed by the Court in this portion of its analysis, some have called for a new test altogether.[113] Despite the controversy over its application, both the majority and the dissent in *Kennedy* discussed and relied upon objective indicia to bolster their moral conclusions.[114] This is typical of the Supreme Court's treatment of this kind of evidence.

B. Supreme Court Case Law Applying Objective Indicia

The *Kennedy* majority, authored by Justice Kennedy, warns that "[c]onsensus is not dispositive," but immediately goes on to say "[t]he existence of objective indicia of consensus . . . was a relevant concern in *Roper*, *Atkins*, *Coker*, and *Enmund*, and we follow the approach of those cases here."[115] This analysis begins with a historical discussion, where the Court notes that no one has been executed for the crime of child rape since 1964.[116] After *Furman* invalidated all death penalty statutes as they were written, only six states reenacted capital rape statutes, all of which

Kenneth W. Simons, *The Relevance of Community Values to Just Deserts: Criminal Law, Punishment Rationales, and Democracy*, 28 HOFSTRA L. REV. 635, 645–46 (2000) ("To be sure, as a matter of political reality, it is understandable that legislators are often willing to vindicate even the unreflective, highly emotional reactions of citizens who are familiar with criminal law issues only as the mass media sensationally reports them. But that is not the most attractive conception of democracy.").

[112] Heidi M. Hurd, *Death to Rapists: A Comment on* Kennedy v. Louisiana, 6 OHIO ST. J. CRIM. L. 351, 353 (2008).

[113] *See The Supreme Court, 2007 Term—Leading Cases*: *Eighth Amendment—Death Penalty—Punishment for Child Rape*, 122 HARV. L. REV. 276, 296 (2008) (calling for the adoption of the dissent's "presumptively constitutional" test).

[114] One could conclude that the Justices see the same information in different lights based upon their own "emotional common sense" which affects how empirical information is interpreted. Simply put, people see what they want to see, and this especially creates difficulty when the empirical basis is inconclusive. *See* Terry A. Maroney, *Emotional Common Sense as Constitutional Law*, 62 VAND. L. REV. 851 (2009).

> The most cynical interpretation is that such instrumentalism is strategic and deliberate: emotional common sense is a stalking horse for precommitments, perhaps ideological ones. But that cynical view is not necessary: it is more consistent with what is known about common sense to presume that the Justices are sincere in expressing what seems to them obvious in any given situation. So when we are in a situation not of empirically *correct* or *incorrect* views but, rather, *conflicting correct* views . . . a Justice's assertions of emotional common sense are best understood as indicators of her underlying normative assessments, based on her worldview.

Id. at 879–80.

[115] Kennedy v. Louisiana, 128 S. Ct. 2641, 2650–51 (2008).

[116] *Id.* at 2651 ("To our knowledge the last individual executed for the rape of a child was Ronald Wolfe in 1964.").

were later invalidated.[117] Yet Louisiana was undeterred by this precedent, nor by the dictates of *Coker*, and it enacted the contested capital punishment for child rape provision in 1995.[118] Louisiana was the first, but shortly thereafter five states enacted similar provisions.[119] Still, the Court counted the numbers and found that 44 states did not have capital child rape provisions.[120]

The Court had earlier invalidated the death penalty for juveniles and mentally retarded offenders with a weaker showing of consensus, at least in terms of comparing practices in different jurisdictions. In *Atkins*, the Court notes that 30 states had prohibited the death penalty for mentally retarded offenders, while 20 states allowed it.[121] In *Roper*, the numbers were identical.[122] The State of Louisiana, and ultimately the dissent, argued that there were two factors that militated against this clear showing of consensus: one was the so-called *Coker* effect, and the other was the direction of the change.

For a case imposing a categorical bar on the imposition of the death penalty, *Coker v. Georgia*[123] was not the pinnacle of clarity. While the *Coker* opinion mentions "adult woman" 14 times in the opinion,[124] the opinion as a whole contained language that was broad enough to invalidate capital punishment for all rapes. While the *Kennedy* majority claims that *Coker* was only ever intended to apply to adult women, the Petitioner argued for the broader reading in its brief, indicating that at least on

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[117] *See* Coker v. Georgia, 433 U.S. 584, 593 (1977); Leatherwood v. State, 548 So. 2d 389, 402–03 (Miss. 1989); Buford v. State, 403 So. 2d 943, 951 (Fla. 1981) (holding state child rape statute unconstitutional). *Leatherwood* did not decide the propriety of the defendant's sentence on constitutional grounds, rather, it determined that a capital sentence for child rape was unauthorized under the state's statutory scheme unless the jury made an express finding that defendant either (1) killed, (2) attempted to kill, (3) intended a killing take place, or (4) contemplated that lethal force would be employed. 548 So. 2d at 403. The defendant's crime in that case, and in *Kennedy*, could not lawfully be punished by a death sentence. It is also notable that there was a concurrence where one member of the court believed the sentence was unconstitutional. *Id.* at 403–06 (Robertson, J., concurring).

[118] LA. REV. STAT. ANN. § 14:42 (2007).

[119] Georgia, see GA. CODE ANN. § 16-6-1 (enacted 1999); Montana, see MONT. CODE ANN. § 45-5-503 (enacted 1997); Oklahoma, see OKLA. STAT. ANN. TIT. 21, § 843.5(K) (enacted 2006); South Carolina, see S.C. CODE ANN. § 16-3-655(C)(1) (enacted 2006); and Texas, see TEX. PENAL CODE ANN. § 12.42(c)(3) (enacted 2007).

[120] *Kennedy*, 128 S. Ct. at 2652. This meant that the Court included non-death penalty states in its calculation. Some members of the Court disagree with the inclusion of non-death penalty states in its count. *See* Roper v. Simmons, 543 U.S. 551, 610–11 (2005) (Scalia, J., dissenting).

[121] Atkins v. Virginia, 536 U.S. 304, 313–15 (2002).

[122] *Roper*, 543 U.S. at 564. In *Enmund*, the numbers were more in line with *Kennedy*: Only eight jurisdictions permitted the death penalty for a robbery where an accomplice committed the murder. Enmund v. Florida, 458 U.S. 782, 789 (1982).

[123] 433 U.S. 584, 597 (1977).

[124] Brief for Respondent at 25, Kennedy v. Louisiana, 128 S. Ct. 2641 (2008) (No. 07-343).

some level, the *Coker* dicta has confused those who have legislated in light of it.[125] The *Kennedy* majority dispenses with this argument by claiming there is insufficient evidence of any such effect.[126]

The *Kennedy* majority was similarly unconvinced by the evidence of a burgeoning consensus. In *Atkins*, the majority wrote, "[i]t is not so much the number of these States that is significant, but the consistency of the direction of change."[127] Again, the *Kennedy* majority's response is essentially that the directional shift is not significant enough to demonstrate a substantial trend. Claiming that "[i]t is not our practice, nor is it sound, to find contemporary norms based upon state legislation that has been proposed but not yet enacted," the majority relies on the numbers comparison and holds that consensus is clearly against this punishment practice.[128] Yet the Supreme Court has stated that legislative enactments are to be given "great weight" because they so directly express the will of the people.[129]

The majority also briefly mentions other measures of consensus, like jury verdicts. Most significantly, no person has been executed for the crime of child rape since 1964, and Louisiana was the only state to impose the new sentence since being the first to enact it in 1995.[130] One reason for the lack of capital rape prosecutions may be that the harsh punishment induces more defendants to plead guilty. The Petitioner's brief says that Louisiana initiated over 180 prosecutions for child rape since the statute was enacted. Of these, there were only five where the prosecutor sought the death penalty, and "[t]o the best of petitioner's knowledge, the State, in *every one* of these cases, has offered the defendant the opportunity to plead guilty in exchange for a sentence of life imprisonment."[131]

For an entirely different conclusion drawn from the same data, one need look no further than the dissent, authored by Justice Alito. Taking the opposite stance on the import of the *Coker* dicta,[132] as well as the

[125] Brief for Petitioner at 19, 20, Kennedy v. Louisiana, 128 S. Ct. 2641 (2008) (No. 07-343).

[126] Kennedy v. Louisiana, 128 S. Ct. 2641, 2655 (2008).

[127] Atkins v. Virginia, 536 U.S. 304, 315 (2002).

[128] *Kennedy*, 128 S. Ct. at 2656–57.

[129] *Id.* at 2657–58.

[130] *Id.* at 2651, 2657.

[131] Brief for Petitioner at 34, Kennedy v. Louisiana, 128 S. Ct. 2641 (2008) (No. 07-343).

[132] The dissent finds the *Coker* effect to be far more important than does the majority and raises a number of interesting points that were omitted by the majority. For example, five other states had stalled the legislative consideration of a capital child rape statute after the Court had granted certiorari to wait for a definitive decision on its constitutionality. *Kennedy*, 128 S. Ct. at 2671 (Alito, J., dissenting). Additionally, Alito argues that the evidence of consensus was much stronger in both *Roper* and *Atkins* because those cases occurred after two cases that had expressly upheld the death penalty for juvenile offenders, *Stanford v. Kentucky*, 492 U.S. 361

"direction of the change" argument, the dissent is not readily dismissed. Alito writes,

> I do not suggest that six new state laws necessarily establish a "national consensus" or even that they are sure evidence of an ineluctable trend. In terms of the Court's metaphor of moral evolution, these 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.[133]

This reasonable disagreement over the presence or absence of national consensus indicates that when the Court ruled it perhaps did not give the objective indicia the "great weight" it so claimed.

C. Critical Analysis of Objective Consensus Finding

The Court's "objective" consensus finding is perhaps not irredeemably subjective. While legislative acts may be suspect because of the nature of politics, community values do have a great deal of importance in deciding whether a punishment serves retributive goals and whether that punishment is proportionate. There is empirical data suggesting that in terms of ranking the severity of crimes in proportion to one another, community standards are surprisingly uniform.[134] One study asked participants to rank different crime scenarios from most severe to least severe. These scenarios required subjects to make nuanced decisions regarding mental state and other factors. The similarities extended across class, race, and gender lines.[135] While this study seems to indicate that people have a general idea of what constitutes the worst crime, it does not indicate what the appropriate end point should be.[136] The structure of the Supreme Court test, first cataloging current community views, and *then* applying the Court's own judgment to those views strongly suggests that the public cannot be trusted to determine the end point.

In light of the test's design, some commentators have questioned the moral relevance of the consensus analysis. Heidi Hurd presents a number of possibilities in her article, and then refutes them. For example, the Court may implicitly accept a moral relativist view, that what the community says is appropriate is the correct penological response.[137] To refute this premise, Hurd need only point to the disagreement over what the numbers mean—"the Court counted its legal beans (distinguishing

(1989), and mentally retarded offenders, *Penry v. Lynaugh*, 492 U.S. 302 (1989). *Kennedy*, 128 S. Ct. at 2669.

[133] *Id.* at 2672–73 (Alito, J., dissenting).

[134] Paul H. Robinson & Robert Kurzban, *Concordance and Conflict in Intuitions of Justice*, 91 MINN. L. Rev. 1829, 1832 (2007).

[135] *Id.* at 1842 & n.35.

[136] *Id.* at 1854–55.

[137] Hurd, *supra* note 112, at 353.

and dismissing some) in an effort to 'discover' a national consensus that matched its own independent judgment."[138] Another reason why the Court's consensus headcount might have moral relevance is the notion of "preference utilitarianism." This viewpoint does not suggest that what the community prefers is necessarily the objectively moral response, but rather it assumes it to be "objectively true that morality demands that the good be maximized, and they unpack what is good in terms of people's preferences."[139] However, had the Court completely adopted this viewpoint, there would have been "no meaningful enquiry to be had beyond that of determining society's punitive preferences."[140] The Court's opinion thus "does not take the community's sentiments to be exhaustive of morality's concerns or it considers itself to be a better barometer of societal sentiments than are legislators and the enactments that they pass."[141] The third explanation for the "legal bean counting" is a respect for the views of the majority, and therefore "the Court's search for consensus is a function of believing that citizens have a right grounded in the value of autonomy, to govern themselves as they see fit."[142] In this sense, the Court as the unelected body "is obligated to take seriously the sentiments of the majority when resolving a contentious question."[143] Ultimately, the Court's consensus analysis is "psychological, not moral"—the Court can claim to have done all it could to divine from the public morass a true indication of society's beliefs, and once it has done so, it is free to ignore them.[144]

The Court's death penalty analysis is confusing. The Court spills a great deal of ink on the question of consensus, and then a great deal more demonstrating why that consensus does not ultimately matter in light of the Court's own judgment. This, however, may not be a normative misstep. There are persuasive reasons why community standards as evinced by the legislature should not determine the ultimate question of appropriate punishment. Some of these reasons have already been discussed, namely the inherently suspect decision-making of elected officials based on the popularity of a "tough on crime" stance. Another

[138] *Id.*

[139] *Id.* at 354.

[140] *Id.*

[141] *Id.* at 355.

[142] *Id.*

[143] *Id.*

[144] *Id.* at 356. Additionally, Hurd claims that the Court does not really use the information it gleans from the so-called objective part of the analysis. "Rather, it treats its finding as an end in itself, encasing it in the unmotivated vacuum that is Part III of its opinion." *Id.* at 357. Hurd's dissatisfaction with the "objective-indicia" analysis is understandable. That both sides could offer persuasive arguments based on the same data undercuts the supposed objectivity. Maroney writes that the Justices, like everyone else, operate from a "default emotional vantage point," demonstrating "a greater willingness to accept record evidence when it conforms to their emotional commitments and to challenge it when it does not." Maroney, *supra* note 114, at 885.

reason may be the distinction between utilitarian and retributive theories of punishment. Utilitarian goals seek to "maximize aggregate human welfare, and many utilitarians understand welfare as the satisfaction of individual preferences."[145] Whereas retributivists, at least as retributivism is frequently defined, are solely concerned with what the offender deserves, according to his own personal culpability.[146] But this Note argues that there has been a shift in retributive understanding, what some have called a "neo-retributivist" movement.[147] This understanding of retributivism places a high premium on emotions and community sentiment—including the desire for vengeance. In ultimately refuting this justification, the *Kennedy* majority used evidence of a consistent trend in the other direction, to undercut neo-retributivism's understandable appeal.[148]

IV. THE COURT'S OWN JUDGMENT: IS IT THE ONLY ONE THAT MATTERS?

In *Kennedy*, after engaging in the legal bean counting required by precedent, the Court exercised its own judgment and, in so doing, seriously damaged the vengeance-based model of retributivism. In a particularly telling passage, Justice Kennedy states,

> [R]etribution . . . 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.[149]

Thus, the Eighth Amendment jurisprudence of the Supreme Court allows for the flexing of serious judicial muscle in determining whether a given punishment is excessive and in contravention of the "cruel and unusual punishment" clause. In the hands of the Justices, the Eighth Amendment functions as a "retributivist constraint."[150] In response to the inevitable criticisms that the Court goes beyond its limited role, namely "becomes enmeshed in the process, part judge and part the maker of that which it judges," the majority claims that the evolving standards of decency test requires "that use of the death penalty be restrained" to prevent brutality.[151]

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[145] Simons, *supra* note 111, at 637.

[146] *Id.* at 637. Simons also notes the distinction between traditional retributivists, who were heavily influenced by community sentiments, and modern retributivists who are more concerned with individual blameworthiness—"principles that have no obvious relationship to popular opinions." *Id.* at 638.

[147] *See* Hoffman, *supra* note 83, at 14.

[148] *See* Hurd, *supra* note 112, at 353.

[149] Kennedy v. Louisiana, 128 S. Ct. 2641, 2650 (2008).

[150] Lee, *supra* note 80, at 101.

[151] *Kennedy*, 128 S. Ct. at 2664–65.

Imposing the death penalty for child rape would expand the scope of capital punishment. Significant to the *Kennedy* Court is that a large number of defendants would be eligible for the death penalty—child rape occurs more frequently than capital murder.[152] Under a retributive account, the number of potential executions does not factor into the decision of what any one person deserves as punishment. If every child rapist deserves death, then every child rapist should be executed. There are many who believe that this is just what the child rapist deserves.

A. Legislative Enactments and Judicial Treatments of Capital Child Rape

For the legislatures and courts that found the death penalty constitutional for the crime of child rape, the overwhelming factor was the vulnerability of child victims. Prior to the *Kennedy* decision, courts, legislators and commentators were divided over the application of the death penalty for the crime of child rape.[153] Proponents uniformly focused on the nature of the victim. It is well established that "'children are a class that need special protection.'"[154]

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[152] *Id.* at 2660. The National Association of Social Workers, writing as amici, estimates that the reported number of victims is between 83,000 and 217,000, and the "actual number of victims is almost certainly much higher than even these numbers would suggest. . . . [A] relatively conservative estimate would be that 500,000 children are sexually abused in America each year." Brief of the Nat'l Ass'n of Soc. Workers et al. as Amici Curiae Supporting Petitioner at 7–8, Kennedy v. Louisiana, 128 S. Ct. 2641 (2008) (No. 07-343) (citations omitted) [hereinafter NASW Amicus Brief]. In a report conducted in 2000, the Bureau of Justice Statistics of the United States Department of Justice found that of reported sexual assaults, over two-thirds of the victims were juveniles. HOWARD N. SNYDER, NATI'L C'TR FOR JUVENILE JUSTICE, SEXUAL ASSAULT OF YOUNG CHILDREN AS REPORTED TO LAW ENFORCEMENT: VICTIM, INCIDENT, AND OFFENDER CHARACTERISTICS 2 (2000), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/saycrle.pdf. The National Crime Victimization Survey, which was—at the time of the report—the comprehensive effort to gather data on sexual assault, ignored child victims, but still found that only one-third of the estimated 300,000 plus sexual assaults in 1996 were ever reported to law enforcement. *Id.* at 1. By contrast, for the same year, 1996, the number of murders and non-negligent homicides combined was 19,645. FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS (1996), *available at* http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/1996. In the Uniform Crime Reports for 2008, the most recent available, there were an estimated 15,433 people were murdered, whereas there were an estimated 78,883 forcible rapes. FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS (2008), http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/1998.

[153] *See, e.g.*, Bridgette M. Palmer, Comment, *Death as a Proportionate Penalty for the Rape of a Child: Considering One State's Current Law*, 15 GA. ST. U. L. REV. 843 (1999) (arguing that the death penalty is a constitutional punishment for the crime of child rape); Melissa Meister, Note, *Murdering Innocence: The Constitutionality of Capital Child Rape Statutes*, 45 ARIZ. L. REV. 197 (2003) (same); *but see* Emily Marie Moeller, Comment, *Devolving Standards of Decency: Using the Death Penalty to Punish Child Rapists*, 102 DICK. L. REV. 621 (1998) (arguing that capital punishment is unconstitutional for child rapists).

[154] *Kennedy*, 128 S. Ct. at 2648 (quoting State v. Kennedy, 957 So. 2d 757, 781 (La. 2007)).

> From a state's point of view, children require increased protection. Imposition of the death penalty for the crime of child rape addresses a state's concern for the welfare of its children and in deterring and punishing those who would prey upon the vulnerability and immaturity of a child.[155]

To bolster their claims regarding the need for the death penalty, some commentators relied on a legislative shift towards harsher punishment of sex offenders by pointing to the prevalence of Megan's Laws,[156] the changes to the Federal Rules of Evidence[157] and other legislation directed at sex offenders. Yet it is hard to see exactly how these arguments bear on whether the death penalty is a constitutional punishment for child rapists—they seem only to bolster the uncontroversial premises that states have a compelling interest in protecting children and that sexual offenses directed at children are heinous crimes.[158]

Some state courts took a different approach and found that these legislative prerogatives were unconstitutional under their constitutions or precluded under their capital sentencing statutes. The highest court in Florida found that the *reasoning* of *Coker v. Georgia* forbade imposition of the death penalty for rape of a child.[159] In Mississippi, the Supreme Court found that the death penalty for rape of a child under 12 was precluded by their own death penalty statute.[160] But notably, the Louisiana Supreme Court upheld the capital child rape statute in *State v. Wilson*.[161] In its opinion, the Louisiana Supreme Court held that the death penalty was not excessive, "[a] 'maturing society', through its legislature has recognized the degradation and devastation of child rape, and the permeation of harm resulting to victims of rape in this age category,"[162] and that it served the dual purposes outlined in *Gregg* of deterrence and retribution. On deterrence, the Louisiana Supreme Court held that the principles of federalism permitted the state legislature to experiment

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[155] Meister, *supra* note 153, at 210.

[156] Megan's Laws require convicted sex offenders to notify the public through sex offender registries. Currently, all 50 states and the federal government have enacted these laws. *Id.* at 214.

[157] Congress changed the Federal Rules of Evidence to allow for the admission of character evidence and prior bad acts evidence. *See* FED. R. EVID. 413; FED. R. EVID. 414. Additionally, Federal Rule of Evidence 415 allows for the admission of propensity evidence in civil child molestation trials.

[158] *See* Reply Brief for Petitioner at 6–7, Kennedy v. Louisiana, 128 S. Ct. 2641 (2008) (No. 07-343) ("Yet the very premise of sex Registration requirements—a premise necessary for their constitutionality . . .—is that they are *non-punitive* measures designed to regulate the behavior of offenders who are not even incarcerated. Consequently, such laws reveal nothing about public attitudes toward punishing sex offenders.") (citations omitted).

[159] Buford v. State, 403 So. 2d 943, 951 (Fla. 1981).

[160] Leatherwood v. State, 548 So. 2d 389, 402 (Miss. 1989) ("[I]t is clear that Miss. Code Ann. § 99-19-101 (Supp. 1988) precludes imposition of the death penalty.").

[161] 685 So. 2d 1063, 1064 (La. 1996).

[162] *Id.* at 1067.

with criminal sanctions. "While Louisiana is the only state that permits the death penalty for the rape of a child less than twelve, it is difficult to believe that it will remain alone in punishing rape by death if the years ahead demonstrate a drastic reduction in the incidence of child rape."[163] On retribution, the court held that there is a need for retribution to prevent self-help.[164] In that vein, the court noted that the legislature "is not required to select the least severe penalty for the crime as long as the selected penalty is not cruelly inhumane or disproportionate to the offense."[165]

While certainly not insensitive to the concerns of the Louisiana Supreme Court in *Wilson*, the *Kennedy* majority rejects the reasoning, and replaces it with a broader homicide-only rule, and a more novel treatment of punishment theories.

B. Drawing the Line Between Homicide and Non-Homicide Crimes

The majority begins its "own judgment" analysis by distinguishing the harm of child rape from the harm at issue in *Coker*, settling the question of whether that decision was the answer to the question at bar:

> Here 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.[166]

In almost the same breath, however, the Court finds that capital punishment is disproportionate for the crime of child rape. But the Court goes even further and declares that the Eighth Amendment prevents an expansion of capital punishment.

> 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.[167]

With this pronouncement, the Court decides the case more broadly than was necessary, drawing a line between death-eligible homicide—aggravated murder—and non-homicide crimes against individuals. After

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[163] *Id.* at 1073.

[164] *Id.*

[165] *Id.* at 1067.

[166] Kennedy v. Louisiana, 128 S. Ct. 2641, 2658 (2008) (quoting Coker v. Georgia, 433 U.S. 584, 598 (1977).

[167] *Id.*

Kennedy v. Louisiana, the death penalty is only constitutional for the most severe and depraved homicides.[168]

The Court gives several explanations for why this bright line is desirable. First, the number of executions would remain level instead of increasing dramatically. As noted earlier, rapes occur more frequently than homicides.[169] Second, the use of narrowing aggravators is not likely to limit the sheer number of death-eligible child rapes.[170] Because of this, the application of the death penalty would be arbitrary because virtually all child rape will fall within the statute. Supreme Court law requires that only the worst offenders be eligible for capital punishment.[171]

> In this context, which involves a crime that in many cases will overwhelm a decent person's judgment, we have no confidence that the imposition of the death penalty would not be so arbitrary as to be "freakish." We cannot sanction this result when the harm to the victim, though grave, cannot be quantified in the same way as the death of the victim.[172]

Third, the Court has painstakingly created a "foundational jurisprudence" applying the death penalty to homicide.[173] The Court would have to start from the bottom, "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."[174]

C. The Court's Novel Treatment of Penological Theories

After finding that the death penalty is categorically disproportionate to the crime of child rape, the Court moves on to the question of

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[168] The Court explicitly reserved judgment on the constitutionality of the death penalty for the crimes of treason, espionage, and other crimes against the state. *Id.* at 2659 ("Our concern here is limited to crimes against individual persons. We do not address, for example, crimes defining and punishing treason, espionage, terrorism, and drug kingpin activity, which are offenses against the State."). For further discussion of the constitutionality of these crimes, see *infra* note 238.

[169] *Kennedy*, 128 S. Ct. at 2660. See *supra* note 152 for a discussion of the relative frequency of murders and sexual assaults.

[170] *Kennedy*, 128 S. Ct. at 2660–61. *See also* Brief for Petitioner at 45–47, Kennedy v. Louisiana, 128 S. Ct. 2641 (2008) (No. 07-343).

[171] *See* Godfrey v. Georgia, 446 U.S. 420, 433 (1980) (reversing a death sentence because petitioner's crime "cannot be said to have reflected a consciousness materially more 'depraved' than that of any person guilty of murder").

[172] *Kennedy*, 128 S. Ct. at 2660–61 (quoting Furman v. Georgia, 408 U.S. 238, 310 (1972)).

[173] *Id.*

[174] *Id. See also* Bandes, *Moral Outrage*, *supra* note 98, at 26 ("The law needs to make a difficult distinction between taking account of what people understandably feel and taking steps to ensure that those feelings don't adversely affect the fairness of the legal process.").

acceptable penological justifications. Again, if the Court so chose, it would not have to address this issue to find the punishment unconstitutional. *Gregg* holds that a punishment is excessive if it is *either* disproportionate *or* does not serve a legitimate penological purpose.[175] But the Court does go further to discuss whether the death penalty is justified by a number of penological rationales and concludes that it is not. These various rationales fall under the rubric of a victim-centered (or harm-centered) view of retribution. The Court says, for its purposes, retribution "reflects society's and the victim's interests in seeing that the offender is repaid for the hurt he caused."[176] Crucially, the Court admits that "capital punishment does bring retribution,"[177] however, the countervailing interests outweigh any legitimacy that this retributive effect would have. As such, the Court ultimately determines that "imposing the death penalty for child rape would not further retributive purposes."[178]

Those countervailing interests noted by the Supreme Court stray from a traditional conception of retribution that focuses on the defendant's individual culpability. Here the Court does not claim that any characteristic inherent in the defendant would mitigate in favor of a less severe penalty. Instead the Court finds that the nature of the crime is simply less depraved than the worst murder. In analyzing the retributive function of capital punishment for child rape, the Court is necessarily conducting a proportionality review. "In measuring retribution, as well as other objectives of criminal law, it is appropriate to distinguish between a particularly depraved murder that merits death as a form of retribution and the crime of child rape."[179] Death, it appears, is different both for the offender and the victim. A living victim must contend with the processes by which the state punishes his or her victimizer. It is this distinction—a living victim versus a deceased victim—that prompts the majority to analyze the harm of the death penalty itself to a victim of child rape.

In this regard, the Court strays again from the traditional retributive calculus to take into account the unique nature of the child victim and his or her role in our capital punishment system. Relying heavily on an amicus brief by the National Association of Social Workers on behalf of Patrick Kennedy, the Court takes the unprecedented step of saying that "[i]n considering the death penalty for nonhomicide offenses this inquiry necessarily also must include the question whether the death penalty balances the wrong to the victim."[180] Perhaps this inquiry is inappropriate. One reason the Court articulates for drawing a line

[175] Gregg v. Georgia, 428 U.S. 153, 173 (1976) (joint opinion of Stewart, J., Powell, J. & Stevens, J.).

[176] *Kennedy*, 128 S. Ct. at 2662.

[177] *Id.* at 2663.

[178] *Id.* at 2662.

[179] *Id.*

[180] *Id.*

between homicide and non-homicide crimes is that death is quantifiable. Not so for the harm to a child victim. It could be, as the *Coker* Court believed, that life is not "beyond repair," or it could be, as the *Kennedy* Court posits, a severe and lasting harm. Despite the inability to quantify the harm, the majority finds that the specter of capital punishment would exacerbate it.[181] As the amici and the majority explain, the protracted nature of capital proceedings is very traumatic for child victims.[182] Additionally, because most sex crimes against children are committed by close family members, the possibility of a death sentence could lead to underreporting.[183] Another reason identified by the Court is that a death sentence may induce child rapists to kill their victims. Any marginal deterrence gained by a different punishment between a rape and a murder would be eliminated.[184] The Court concludes that the death penalty, while it would be "retributive," would not fulfill a *legitimate* goal of punishment because the harm to the victim would increase.[185] To the majority, the Louisiana legislature improperly weighed the factors, and the desire for vengeance against the people who commit these monstrous crimes is not sufficient justification in light of the continuation of harm to the victim, the likelihood of underreporting, and the elimination of any marginal deterrent to kill. This analysis of retribution is unique, as the Court does not typically engage in weighing factors that are irrelevant to determining a perpetrator's "just deserts."

The Court offers a more holistic analysis of penological justifications than whether or not a child rapist deserves death simply by virtue of his crime. The analysis embodies a number of other penological theories under the rubric of retributivism. At least one commentator has criticized the Court's schizophrenic analysis: "by the end of its opinion, the Court has referenced and discussed not just two distinct social purposes of punishment, but . . . four, all of which respond to quite separate theories

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[181] *Id.*

[182] *Id.*; NASW Amicus Brief, *supra* note 152, at 17.

[183] *Kennedy*, 128 S. Ct. at 2663–64; NASW Amicus Brief, *supra* note 152, at 11.

[184] *Kennedy*, 128 S. Ct. at 2664–65; NASW Amicus Brief, *supra* note 152, at 16.

[185] *Kennedy*, 128 S. Ct. at 2665. This flies in the face of the conventional victims' rights platform, which is overwhelmingly in favor of capital punishment. Capital punishment is said to bring closure. *See generally* Vik Kanwar, *Capital Punishment as "Closure": The Limits of a Victim-Centered Jurisprudence*, 27 N.Y.U. REV. L. & SOC. CHANGE 215 (2001–2002). However, the Court, significantly, relied on the amicus brief of the National Association of Social Workers on behalf of Patrick Kennedy. The amicus brief detailed the very significant harm suffered by child victims who are put through long and grueling trial and penalty proceedings. *See* NASW Amicus Brief, *supra* note 152, at 14–19 ("As a general matter, court proceedings increase and extend the harm suffered by the abused children.") Due to the nature of death penalty proceedings, this harm is magnified because, *inter alia*, trials are longer. In Louisiana, capital rape trials averaged 633 days from arrest to disposition, as opposed to 283 days for a non-capital rape case. Victims are also more likely to be called to testify in a capital trial or penalty phase, and the publicity from a capital trial is also likely to further traumatize a child victim. *Id.* at 19–21.

of punishment that cannot be harmonized with one another without fudging their factors."[186] Hurd argues that *Kennedy* relied on elements of corrective justice (concern for the victim), penance (allowing the perpetrator to realize the wrongness of his actions), utility-maximalization and retribution—some of which "demand conflicting results."[187] However, arguably, the Court is simply giving this vitally important question of what punishment is appropriate the careful analysis it deserves. Especially in the context of the death penalty, the Court must be sure that the state takes life for the right reasons. The Eighth Amendment compels this scrutiny: "the Clause is typically understood as playing the role of holding the excessive, and frequently irrational, punitive instincts of 'the people' in check by imposing a moral constraint."[188] The touchstone of the Eighth Amendment is a respect for the dignity of an individual.

Of course, the dignity of the individual contemplated by the Eighth Amendment is the dignity of the person to be punished. But proponents of the capital rape statutes focus the debate on the message that a death sentence would send about the dignity of the victim. Punishment also has an expressive function.[189] In the hands of the state, a punishment represents "legitimized vengefulness" which is more than disapproval of the criminal's act; it is a "kind of vindictive resentment" of the criminal himself.[190] While the symbolic function of punishment is served by the conviction itself, it is an even stronger condemnation of the criminal if the "hard treatment" is death.[191] The *Kennedy* majority believes that any utility of a violent penalty is outweighed by the incalculable harm to the victim and the potential for "freakish" application. However, advocates of the death sentence, like the *Kennedy* dissent, believe the utility of a capital sentence is precisely the expressive message it sends about respect for the victim and the outrage of the community.[192]

> 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 Louisiana

[186] Hurd, *supra* note 112, at 358.

[187] *Id.* at 360.

[188] Lee, *supra* note 80, at 103.

[189] *See generally* Joel Feinburg, *The Expressive Function of Punishment*, *in* A READER ON PUNISHMENT (Antony Duff & David Garland eds., 1994). "[E]xpressive function: punishment is a conventional device for the expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation, on the part either of the punishing authority himself or of those 'in whose name' the punishment is inflicted." *Id.* at 74.

[190] *Id.* at 76. *See also* Cover, *supra* note 94 (arguing that the criminal justice system legitimates violence against an individual).

[191] Feinburg, *supra* note 189, at 89 ("Given our conventions, of course, condemnation is expressed by hard treatment, and the degree of harshness of the latter expresses the degree of reprobation of the former.").

[192] *See* Berman & Bibas, *supra* note 81, at 362 ("The death penalty unequivocally proclaims society's empathy and outrage, that these victims bear no blame and need never fear that their abusers will repeat or keep exploiting their trauma.").

> lawmakers . . . 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.[193]

The dissent feels that the majority is too dismissive of the suffering of the child victim—who is to say that the child rapist is less depraved than some murderers? Perhaps the Court does not adequately explain why child rape is not worse than death. But there is an inherent danger in letting the emotions surrounding this crime dictate the response. As the majority recognizes, this crime is one that would "overwhelm a decent person's judgment."[194] Although some commentators call for an acceptance of emotion in law, "[i]t is one thing to say that the *emotion* deserves respect; it is quite another to say that the particular punishment does."[195] *Kennedy* is remarkable because it so thoroughly discusses the various reasons why the death penalty does not deserve respect in the context of this crime—even if this discussion means straying from the traditional analysis of retribution.

Ultimately, the Court demonstrates its discomfort with the emotional, neo-retributivist justification for the death penalty. The desire for vengeance alone will not suffice, especially when the harm is not quantifiable like a homicide. *Kennedy* indicates that the Court is willing to tolerate the more unsavory emotions surrounding the purpose of capital punishment when the crime resulted in a death, partially because of the "foundational jurisprudence" which limits the application of the death

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[193] *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2677 (2008) (Alito, J., dissenting).

[194] *Id.* at 2661.

[195] Bandes, *Moral Outrage*, *supra* note 98, at 21. *See also* Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269 (1996). Kahan and Nussbaum argue that:

> the disparate approaches to emotion at work in the criminal law stem from a long-standing dispute in Western culture about the nature and educability of the emotions. In this history, two views compete to explain such experiences: what we shall call the mechanistic and the evaluative conceptions of emotion. The mechanistic conception sees emotions as forces that do not contain or respond to thought; it is correspondingly skeptical about both the coherence of morally assessing emotions and the possibility of shaping and reshaping persons' emotional lives. The evaluative conception, in contrast, holds that emotions express cognitive appraisals, that these appraisals can themselves be morally evaluated, and that persons (individually and collectively) can and should shape their emotions through moral education.

Id. at 273. The mechanistic approach is undesirable because it "tend[s] to disguise contentious moral issues," as opposed to the evaluative approach which is "brutally and uncompromisingly honest." *Id.* at 274. This way of thinking about emotions confirms the argument that emotions are important, and indeed inseparable, from a moral judgment but that there are types of emotions that are so overwhelming that they cannot serve as a replacement for a considered moral judgment. When emotions help to evaluate a situation, they serve a permissible function, but not so when they dictate the response.

penalty to the worst murderers. But in the event that the victim is still alive, the potential satisfaction of a death sentence is outweighed by the potential for even further harm caused by the trauma of death penalty proceedings. The Court's analysis describes a new angle on the respect for the victim argument—in this case a desire to spare the child victim further psychological harm.[196] This objective, coupled with a general distaste for vengeance as a theoretical underpinning of the death penalty, demonstrates that the overall theme of the majority's "own judgment" analysis is that of restraint—restraining the application of society's most severe punishment, restraining the potential negative side effects to the living victim, and restraining the emotions that can irreparably taint the fairness of the judicial process.[197]

V. DECLINING THE INVITATION: LIMITING ALTERNATIVE JUSTIFICATIONS FOR THE DEATH PENALTY

The Court's admirable restraint in *Kennedy v. Louisiana* may signal the demise of the death penalty. Since deterrence theory has essentially lost credibility with the American people,[198] the remaining justification for the death penalty is retribution. *Kennedy* is significant because it stopped the expansion of capital punishment in its tracks. Bandes writes that "available punishments frame attitudes about appropriate punishment."[199] The criminal justice system drives expectations, "separat[ing] the vengeful impulse from the legitimate retributive urge."[200] The Court preserved its "foundational jurisprudence" regarding capital punishment for murder and declined to reach the question of capital punishment for non-homicide crimes that are not against

[196] For further discussion of the complex attitudes surrounding the role of the victim in sentencing rationales, see *infra* Part V.B.

[197] In addition to restraint, another attitude that can be used to limit application of the death penalty is mercy. Mercy does not factor into the *Kennedy* Court's analysis, at least not in a direct way. Mercy, according to one commentator, "refers primarily to leniency afforded to criminal offenders on the basis of characteristics that evoke compassion or sympathy but that are morally unrelated to the offender's competence and ability to choose to engage in criminal conduct." Dan Markel, *Against Mercy*, 88 MINN. L. REV. 1421, 1422 n.1 (2004). While the Court is certainly capable of showing mercy, it is unlikely that it did so in this case—the judicial actors most capable of showing mercy are sentencing judges, juries, or executive officials through the use of the pardon power. Interestingly, however, Justice Kennedy has expressed a desire to see more pardons and other direct applications of mercy. "A people confident in its laws and institutions should not be ashamed of mercy." The Honorable Anthony M. Kennedy, Associate Justice, Supreme Court of the United States, Speech at the American Bar Association Annual Meeting (Aug. 9, 2003), *available at* http://www.bard.edu/bpi/lib/db_articles.php?action=getfile&id=99560927.

[198] *See* GALLUP POLL II, *supra* note 99. (finding that Americans have switched rationales from deterrence to retribution as a reason for supporting capital punishment).

[199] Bandes, *Moral Outrage*, *supra* note 98, at 21.

[200] *Id.* at 22.

individuals, like espionage or treason.[201] But the Court said more than simply declaring the death penalty unconstitutional for the crime of child rape. This was the narrow holding of *Kennedy*, but the broader reasoning was that the death penalty is an extreme punishment, it must only be used in the most limited of circumstances, and it must be used for permissible reasons. This Part discusses whether another theory of punishment might support the death penalty, beginning with the established theories of incapacitation and rehabilitation, and concluding with a discussion of the victim-centric "closure" rationale promoted by the victims' rights movement.

A. Rehabilitation and Incapacitation

There are other accepted reasons for imposing punishment. Incapacitation and rehabilitation are two of the most prominent. In the context of the death penalty, rehabilitation does not seem to be applicable. Yet, in *Kennedy*, the majority recognizes it as a theoretical justification of punishment for certain classes of offenders.[202] Justice Kennedy has shown a commitment to the rehabilitative rationale for punishment:

> The debate over the goals of sentencing is a difficult one, but we should not cease to conduct it. Prevention and incapacitation are often legitimate goals. Some classes of criminals commit scores of offenses before they are caught, so one conviction may reflect years of criminal activity. There are realistic limits to efforts at rehabilitation. We must try, however, to bridge the gap between proper skepticism about rehabilitation on the one hand and improper refusal to acknowledge that the more than two million inmates in the United States are human beings whose minds and spirits we must try to reach.[203]

In the context of a death sentence, which seemingly sends the message that the offender is beyond repair, there is scant room to show improvement. Since the offender will not be reintegrated into society, there seems little reason to rehabilitate him. At the same time, it is unconstitutional to execute a person who has no rational understanding

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[201] Kennedy v. Louisiana, 128 S. Ct. 2641, 2659 (2008).

[202] *Id.* at 2649 ("As we shall discuss, punishment is justified under one or more of three principal rationales: rehabilitation, deterrence, and retribution.") There are some murderers who, inarguably, are worse than others. *See* Hugo Adam Bedau, *Abolishing the Death Penalty Even for the Worst Murderers*, *in* THE KILLING STATE: CAPITAL PUNISHMENT IN LAW, POLITICS, AND CULTURE 41, 41–42 (Austin Sarat ed., 1999) (terming such murderers SMR murderers, meaning serial, multiple, or recidivist, and questioning "whether society can reasonably view such a murderer as having a life to live that is on balance more valuable than not" but that "[a]ll but the most prejudiced observers will concede that some (perhaps most) murderers retain more than a shred of human dignity and that some can redeem themselves in their own eyes and in ours at least to some extent").

[203] Kennedy, *supra* note 197.

of the relationship between his impending death and the crime he committed.[204] In *Panetti v. Quarterman*, the majority opinion authored by Justice Kennedy posits: "[C]apital punishment is imposed because it has the potential to make the offender recognize at last the gravity of his crime."[205] In *Kennedy*, this idea of moral rehabilitation is echoed in an argument against the imposition of the death penalty. "In most cases justice is not better served by terminating the life of the perpetrator rather than confining him and preserving the possibility that he and the system will find ways to allow him to understand the enormity of his offense."[206] But *Kennedy* does not characterize remorse as rehabilitation. It is a stretch to say that a legitimate goal of capital punishment, one that could exceed or replace the now-devalued retributive goal, could be to rehabilitate the death row inmate.[207]

Incapacitation is a more viable penological theory for capital punishment but falls short of justification. Prisons are notoriously violent. While the homicide rate in prisons has decreased, the number of inmates has increased.[208] The United States has the world's largest inmate population.[209] If a murderer is incarcerated for life, he could potentially still present a threat to the prison community—including harm to individuals who are in prison for non-violent crimes—as the general prison population is not segregated based on the type of offense

[204] Panetti v. Quarterman, 127 S. Ct. 2842, 2861 (2007).

[205] *Id.* Dan Markel has argued that *Panetti* stands for the Court's commitment to a "communicative account of retribution." However, this account sounds a lot like a rehabilitative account—the communicative retributive theory has the "goal of preserving a chance for an offender to internalize certain values and to evidence that internalization." Markel argues, however, that this is not rehabilitative because it is not directed towards the overall goal of reintroducing the offender into society—merely to avoid the "intrinsic pointlessness" of a punishment. *See* Dan Markel, *Executing Retributivism:* Panetti *and the Future of the Eighth Amendment*, 103 NW. U. L. REV. 1163, 1195–96 (2009).

[206] *Kennedy*, 128 S. Ct. at 2665.

[207] However, the desire to see heinous murderers realize the "enormity" of what they have wrought could offer another justification for limiting the death penalty. Stories of jailhouse conversions capture the public imagination, sometimes swaying public sympathy in favor of the condemned. For an interesting perspective on the jailhouse conversion, see Beverly Lowry, *The Good Bad Girl*, NEW YORKER, Feb. 9, 1998 at 60. Lowry writes about the relationship she developed with Karla Faye Tucker—the "pickaxe murderer"—whose execution caused a furor in Texas. Lowry befriended Tucker after she had undergone a well-publicized conversion to Christianity. "Karla . . . has worked hard to become another, better version of herself, and now, with that work virtually completed, she . . . is about to be gone." *Id.* at 69.

[208] Press Release, Bureau of Justice Statistics, State Prison Homicide Rates Down 93 Percent; Jail Suicide Rates 64 Percent Lower than in Early 1980s (Aug. 21, 2005), *available at* http://www.ojp.usdoj.gov/archives/pressreleases/2005/shspljpr.htm; Press Release, Department of Justice Bureau of Justice Statistics, Growth in the Total Correctional Population During 2008 was the Slowest in Eight Years (Dec. 8, 2009), *available at* http://bjs.ojp.usdoj.gov/content/pub/press/p08ppus08pr.cfm.

[209] Adam Liptak, *Inmate Count in U.S. Dwarfs Other Nations*, N.Y. TIMES, Apr. 23, 2008, at A1.

committed. Arguably then, the only way to effectively incapacitate the homicidal threat is to execute him. There are two problems with this rationale. First, it is difficult to tell in advance who would present this threat. That being the case, some states require a jury to find beyond a reasonable doubt that the offender presents a continuing threat to society before imposing a death sentence.[210] Second, the length of time between a death sentence and an actual execution would minimize any additional incapacitating effect of an execution.[211] Any demonstrably larger incapacitating effect would necessarily be achieved by speeding up the process considerably, so the most dangerous offenders are eradicated before they could commit any new acts of violence. However, our processes forbid this result.[212]

Coupled with the difficulty of sorting out the true recidivist threats from those who would be effectively incapacitated by life without parole, incapacitation alone is unable to support the existence of the death penalty. Conversely, the fact that so many violent offenders are successfully incapacitated through the prison system itself presents compelling arguments against the death penalty. The general public is protected, even without an execution.[213]

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[210] *See, e.g.*, OR. REV. STAT. § 163.150(1)(b)(B) (2009).

[211] The general characteristics of death row facilities throughout the nation possibly provide additional incapacitating effects due to their extreme isolation and enhanced security measures. For a state-by-state breakdown of the conditions of death row, including the presence of security features and length of daily cell-confinement, see Sandra Babcock, *Death Row Conditions*, DEATH PENALTY INFO. CENTER, http://www.deathpenaltyinfo.org/documents/DeathRowConditions.xls. For a general breakdown of the various security levels in federal prisons, see *Prison Types & General Information*, FED. BUREAU OF PRISONS, http://www.bop.gov/locations/institutions/index.jsp. Yet, there is little evidence to suggest that inmates on death row are more dangerous to the prison population than other violent offenders housed in the general population. Consider the rise of "supermax" style prisons or housing units to penalize inmates who do not program appropriately and present a continued threat to the general population. Supermax facilities do have additional incapacitating effects, but this is hardly an argument for the continuance of the death penalty; in fact, it could indicate that the death penalty is unnecessary to protect the safety of the prison population—simply death-row-modeled prison housing would accomplish this. For a comprehensive look at the effectiveness of supermax facilities, their goals and their features, see generally DANIEL P. MEARS, URB. INST.: JUST. POL. CTR., EVALUATING THE EFFECTIVENESS OF SUPERMAX PRISONS (2006).

[212] Individuals convicted of a capital crime have all appeals of right afforded generally to defendants, plus some states impose a heightened appeals process. For example, some states have an automatic appeal to the state supreme court. Even without special capital appeals, the available procedures—direct appeal, state post-conviction, and federal habeas corpus proceedings—are time-consuming, and dramatically extend the time between conviction and execution. *See generally* COYNE & ENTZEROTH, *supra* note 10.

[213] *See* Bedau, *supra* note 202, at 49 ("Anyone who studies the century and more of experience without the death penalty in American abolitionist jurisdictions must conclude that these jurisdictions have controlled criminal homicide and managed their criminal justice system, including their maximum security prisons with life-term

B. The Victim-Centric "Closure" Rationale

An additional rationale for the death penalty that is gaining in prominence is the notion of "closure" for crime victims (or in the case of homicide, secondary crime victims).[214] Under the auspices of empowering victims, the powerful crime victims' rights movement interferes with "an important line of mediation between public prosecution and private expression"[215] and moves towards a "'dangerous return to the private blood feud mentality.'"[216] The rhetoric of the victims' rights movement is overwhelmingly pro-capital punishment, with a few notable exceptions in the guise of the mercy movement.[217] Closure for crime victims as a justification for the death penalty is similar to the expressive theory of capital punishment.[218] The idea of showing respect

violent offenders, at least as effectively as have neighboring death penalty jurisdictions. The public has not responded to abolition with riot and lynching; the police have not become habituated to excessive use of lethal force; prison guards, staff, and visitors are not at greater risk; surviving victims of murdered friends and loved ones have not found it more difficult to adjust to their grievous loss."). Bedau acknowledges that there is a dearth of empirical data measuring the behavior of convicted murderers sentenced to life terms. However, there is a notable lack of evidence contradicting this assertion. *Id.* at 57 n.43. The experience of one recent abolitionist state is telling. Press Release, N.J. Office of the Attorney Gen., Governor Corzine and Attorney General Milgram Announce Dramatic Decline in Homicides in New Jersey as Statewide Violence Reduction Initiative Nets More than 4,200 Arrests in 14 Months (August 4, 2009), http://www.nj.gov/oag/newsreleases09/pr20090804d.html; *Murders Drop in New Jersey Following Moratorium and Abolition of Death Penalty*, DEATH PENALTY INFO. CENTER, http://www.deathpenaltyinfo.org/murders-drop-new-jersey-following-moratorium-and-abolition-death-penalty [hereinafter *Murders Drop in New Jersey*].

[214] *See* Kanwar, *supra* note 185, at 217.

[215] *Id.*

[216] *Id.* at 223 (quoting James M. Dolliver, *Victims' Rights Constitutional Amendment: A Bad Idea Whose Time Should Not Come*, 34 WAYNE L. REV 87, 90 (1987).

[217] It is far more likely that victim impact evidence will advocate for capital punishment. *See, e.g.*, MARKUS DIRK DUBBER, VICTIMS IN THE WAR ON CRIME: THE USE AND ABUSE OF VICTIMS' RIGHTS 191 (2002). Dubber explains, "[c]ourts throughout the nation agree that mitigating victim impact evidence, whether from derivative or from direct victims, must be kept out of capital sentencing hearings at all costs." *Id.* Because the evidence is "merely 'opinion' evidence" it is irrelevant. "Unfortunately, courts have not been nearly as categorical in their condemnation of *aggravating* 'opinion' evidence. Where they have not admitted opinion evidence outright, courts have bent over backward to interpret aggravating victim impact evidence as anything but an opinion regarding the 'victim's' preferred sentence." *Id.* at 191–92 (footnote omitted). *But see, e.g.*, *MVFR's Mission*, MURDER VICTIMS' FAMILIES FOR RECONCILIATION, http://www.mvfr.org/; *About CCV*, CALIFORNIA CRIME VICTIMS FOR ALTERNATIVES TO THE DEATH PENALTY, http://www.californiacrimevictims.org/.

[218] Indeed, the interests of the state and the victim of crime overlap in the sense that both seek justice. The Supreme Court recognized this in *Calderon v. Thomas*, 523 U.S. 538 (1998), when it blended the state's interest and the victim's interest.

> Only with an assurance of real finality can the State execute its moral judgment in a case. Only with real finality can the victims of crime move forward knowing the moral judgment will be carried out. To unsettle these expectations is to

for the victim and demonstrating society's outrage that is embodied in the expressive theory is more easily conceived of as a community-wide vengeful impulse. For a crime victim, closure is a personal goal, one that society condones but in which it cannot participate. But society endorses the notion of personal closure for crime victims.[219] As a result of both federal and state legislation, crime victims, or in the case of homicides, their families, have enumerated rights.[220] Among other rights, crime victims can submit victim impact statements during the penalty phase of a capital proceeding, as well as, in some cases, consult with the prosecutor regarding their preferred punishment.[221] The debate over the proper role of victim impact statements helps explain why a victim-centric closure rationale for punishment is compelling but dangerous, and perhaps also why the Court chose not to take the bait in *Kennedy*.

Victim impact statements are widely accepted but still controversial.[222] Bandes argues that while it seems intuitive that "a

> inflict a profound injury to the "powerful and legitimate interest in punishing the guilty," an interest shared by the State and the victims of crime alike.

Id. at 556 (citation omitted) (quoting Herrera v. Collins, 506 U.S. 390, 421 (1993)).

[219] *See generally* Douglas E. Beloof, *Constitutional Implications of Crime Victims as Participants*, 88 CORNELL L. REV. 282, 283 (2003) (arguing that a "'public sense of justice' supports" a crime victim's right to participate in criminal trials) (quoting Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 127–28 (1998) (Stevens, J., concurring)).

[220] The Federal Crime Victims' Rights Act, 18 U.S.C. § 3771 (2006), presents a typical example of this legislation.

> **(a) RIGHTS OF CRIME VICTIMS.—**A crime victim has the following rights:
>
> **(1)** The right to be reasonably protected from the accused.
>
> **(2)** The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.
>
> **(3)** The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.
>
> **(4)** The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.
>
> **(5)** The reasonable right to confer with the attorney for the Government in the case.
>
> **(6)** The right to full and timely restitution as provided in law.
>
> **(7)** The right to proceedings free from unreasonable delay.
>
> **(8)** The right to be treated with fairness and with respect for the victim's dignity and privacy.

Id. § 3771(a)(1)–(8).

[221] Kanwar relates how Matthew Shepard's family was instrumental in the negotiation of a plea bargain, which spared his killer from a death sentence. Matthew Shepard was a Wyoming teenager who was tortured and murdered for being gay. It was an extremely high-profile case. The decision to spare his killer was attributed to the wishes of Shepard's family. *See* Kanwar, *supra* note 185, at 220–21.

[222] The United States Supreme Court first ruled in *Booth v. Maryland*, 482 U.S. 496 (1987), that victim impact statements were inadmissible in a capital sentencing proceeding, stating "[t]he admission of these emotionally charged opinions as to

multiplicity of voices seems an unmitigated good," inclusion of victim narratives can undermine the criminal justice system.[223] Due to natural sympathy for the victim of a crime, that narrative becomes the dominant one, and as such, the defendant's narrative is "drown[ed] out or preempt[ed.]"[224] Victims' rights advocates argue that this "predicted parade of horribles" has not materialized.[225] From the perspective of the advocates, criminal defendants should be punished based upon the extent of the harm they have caused and impact statements serve the function of articulating and measuring that harm:

> [W]e begin to realize the nearly unbearable heartbreak—that is, the actual and total harm—that the murderer inflicted. Such a realization undoubtedly will hamper a defendant's efforts to escape a capital sentence. But given that loss is a proper consideration for the jury, the statement is not unfairly detrimental to the defendant. Indeed, to conceal such evidence from the jury may leave them with

what conclusions the jury should draw from the evidence clearly is inconsistent with the reasoned decisionmaking we require in capital cases." *Id.* at 508–09. But the Court very quickly overruled their holding in *Booth*, finding that victim impact statements were admissible (so long as they did not direct the jury as to the appropriate sentence). Payne v. Tennessee, 501 U.S. 808 (1991). The *Payne* Court held that admission of victim impact testimony did not render a trial unfair, rather, the opposite was true.

> Human nature being what it is, capable lawyers trying cases to juries try to convey to the jurors that the people involved in the underlying events are, or were, living human beings, with something to be gained or lost from the jury's verdict. Under the aegis of the Eighth Amendment, we have given the broadest latitude to the defendant to introduce relevant mitigating evidence reflecting on his individual personality, and the defendant's attorney may argue that evidence to the jury. . . . We reaffirm the view expressed by Justice Cardozo in *Snyder v. Massachusetts*, [291 U.S. 97, 122 (1934)]: "[J]ustice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true."

Id. at 826–27.

[223] Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361, 382–85 (1996).

[224] *Id.* at 386.

> Victim impact statements evoke not merely sympathy, pity, and compassion for the victim, but also a complex set of emotions directed toward the defendant, including hatred, fear, racial animus, vindictiveness, undifferentiated vengeance, and the desire to purge the collective anger. These emotional reactions have a crucial common thread: they all deflect the jury from its duty to consider the individual defendant and his moral culpability.

Id. at 395 (footnote omitted).

[225] Paul G. Cassell, *Barbarians at the Gates? A Reply to the Critics of the Victims' Rights Amendment*, 1999 UTAH L. REV. 479, 485 (1999). Cassell's article discusses and defends a proposed constitutional amendment protecting victims' rights. This amendment was never passed, but every state and the federal government have passed legislation conferring substantive rights on crime victims. *See* Honorable Jon Kyl, Steven J. Twist & Stephen Higgins, *On the Wings of Their Angels: The Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act*, 9 LEWIS & CLARK L. REV. 581, 588 (2005).

> a distorted, minimized view of the impact of the crime. Victim impact statements are thus easily justified because they provide the jury with a full picture of the murder's consequences.[226]

Thus, one rationale cited by proponents of victim impact statements is that they tend to clarify relevant issues, not obscure them—if the victim is presented as "a shadowy abstraction, the result will be to overstate . . . the cost of capital punishment relative to the benefit."[227] Thus, "[c]orrecting this misimpression is not distorting the decision-making process, but eliminating a distortion that would otherwise occur."[228] But advocates also argue that the victim has an "interest in the imposition of an *appropriate* punishment."[229] This does not necessarily mean the imposition of the death penalty:

> The participant's interest in punishing may be an interest in any or all of the legitimate purposes of punishment, and thus the sentencing recommendation may implicitly reflect a quest for moral desert, incapacitation, retribution, rehabilitation, or deterrence. Victim recommendations cannot be credibly pigeonholed into any single punishment rationale. For example, an effort to define participant recommendations as exclusively retributive fails if the victim seeks mercy rather than death. Moreover, participants may seek specific deterrence or incapacitation to avoid future harm from the same perpetrator, or general deterrence to prevent similar crimes by others. The participant never controls the sentencing decision, but merely provides another perspective to the sentencing authority. A judge or jury still must make the ultimate punishment decision.[230]

Yet, there are some serious concerns that should arise when the victims of crimes become so heavily involved in the process. As Kanwar says, "[t]he earnest desire for inclusion may have the effect of hastening the point at which the sovereign expression enters into a zone of indistinction with private expressivity."[231] The sovereign punishes offenders so that there is no need for private vengeance. This is the vision of retributive punishment articulated in *Gregg*.[232] Because the Eighth Amendment serves as a restraint upon this retributive urge, the possibility of an unencumbered victims' rights movement is truly harrowing. For the same reasons that the Court feels the need to restrict

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[226] Cassell, *supra* note 225, at 490 (footnotes omitted).

[227] *Id.* at 493 (citing David D. Friedman, *Should the Characteristics of Victims and Criminals Count?:* Payne v. Tennessee *and Two Views of Efficient Punishment*, 34 B.C. L. REV. 731, 749 (1993)).

[228] *Id.* Cassell then makes the rather bold claim that "the general tendency of victim impact evidence is to enhance sentence accuracy and proportionality rather than increase sentence punitiveness." *Id.*

[229] Beloof, *supra* note 219, at 288.

[230] *Id.* at 288–89.

[231] Kanwar, *supra* note 185, at 254.

[232] Gregg v. Georgia, 428 U.S. 153 (1976).

the retributive basis for the death penalty in *Kennedy*, the Court should restrict the "closure" rationale. Arguably, the victim who asks for the death penalty does not really offer a reason for capital punishment that is distinct from the retributive reasons discussed by the Supreme Court in *Kennedy*, rather he or she simply offers it from a different perspective. Instead of vengeance, what is now sought is "closure." It is just another word for the same impulse. Thus the idea of bringing closure to victims cannot sustain capital punishment, especially because the purpose and rhetoric of the victims' rights movement has already injected itself into the Supreme Court's analysis and was rejected.

Because of the growing strength of the victims' rights movement, the *Kennedy* Court, both the majority and the dissent, is attentive to victims. While the dissent adopts the pro-capital punishment position of the victims' rights movement,[233] the majority discusses the actual impact of a capital sentence on the victim. As discussed in greater detail in Part IV of this paper, the *Kennedy* majority determines that the death penalty is unjustified for the crime of child rape in part because of the devastating impact it would have on the child victim. The same concerns do not necessarily translate to the secondary victims of a homicide but because of the duration of capital proceedings, the process can be similarly traumatizing to the family members of murder victims.[234] One family member of a murder victim explained, "[y]ou never bury a loved one who's been murdered . . . because the justice system keeps digging them up."[235] Ultimately, the closure discourse offers a hollow promise. The death of the perpetrator does not bring back the loved one. "Considering some reported expressions of grief and closure, it appears that the mere fact of an execution does not necessarily produce the desired feeling of closure that the system seems to want to deliver."[236]

It is a natural and appropriate response to want to comfort people who have suffered, yet the desire for closure must operate within the existing framework, including the one established for capital punishment. It is an insufficient replacement for other penological justifications. Similarly, its effectiveness is suspect. There is scant evidence that executions actually bring closure to secondary victims.[237]

VI. CONCLUSION

Looking at the larger picture, if the death penalty no longer serves acceptable retributive principles, there is little else to recommend it. The

[233] *See* Kennedy v. Louisiana, 128 S. Ct 2641, 2677 (2008) (Alito, J., dissenting).

[234] *See* Eric Schlosser, *A Grief Like No Other*, ATLANTIC MONTHLY, Sept. 1997, at 37. Grief "may be prolonged by the legal system, the attitudes of society, the nature of the crime, and the final disposition of the case." *Id.* at 50–52.

[235] *Id.* at 52.

[236] Kanwar, note 185, at 242.

[237] *Id.* at 242–43.

death penalty's future in the United States is being eroded from many directions, at least for the more commonplace person-to-person crimes.[238]

[238] *Kennedy* leaves open the question of the constitutionality of capital punishment for "offenses against the State." For the moment, however, the death penalty remains constitutional for homicide. The Court chose not to address the issue of certain other non-homicide crimes that are currently punishable by death. *Kennedy*, 128 S. Ct at 2659. Yet the reasoning of *Kennedy* undermines at least one of the remaining non-homicide crimes. Treason and espionage are undoubtedly crimes against the state, as they were categorized in *Kennedy*. Treason is mentioned as a specific crime in the United States Constitution. U.S. Const. art III, § 3 ("Treason against the United States shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt act, or on Confession in open Court."). Historically, traitors were subjected to punishments that were worse than mere death. Ryan Norwood, *None Dare Call It Treason: The Constitutionality of the Death Penalty for Peacetime Espionage*, 87 CORNELL L. REV. 820, 836 (2002).

Espionage is similarly a crime against the state. The death penalty is available for both war and peacetime espionage. The constitutional argument in favor of the death penalty for peacetime espionage is weaker than that for wartime espionage. *See generally id.* Some of the rationales that justify the death penalty in the context of a crime against the state are similar to military law. The military plays a distinctive role in society, one requiring "elasticity of some constitutional principles." Bidish Sarma, *Still in Search of a Unifying Principle: What* Kennedy v. Louisiana *and the Supreme Court's Denial of the State's Petition for Rehearing Signal for the Future*, 118 YALE L.J. POCKET PART 55 (2008), http://www.thepocketpart.org/ylj-online/supreme-court/711-still-in-search-of-a-unifying-principle-what-kennedy-v-louisiana-and-the-supreme-courts-denial-of-the-states-petition-for-rehearing-signal-for-the-future. After the *Kennedy* decision was handed down, the state noticed that the opinion failed to take account of the military's death penalty statute authorizing death for the crime of child rape. The Court denied rehearing, determining that military law would not influence its analysis. This was consistent with the standard Supreme Court treatment of military law. While military law is not relevant when deciding cases about civilian law, the context in which a charge of treason or espionage would arise is similar to the context in which military law is utilized. It is not utilized solely for the vindication of an individual crime, but rather to protect the state and the state's secrets. *Id.*

However, it is debatable whether the drug kingpin death penalty statute will pass constitutional muster. *Kennedy* characterizes the drug kingpin statute as a crime against the state but this categorization is not intuitive. Even the *Kennedy* dissent doubts this conclusion. *Kennedy*, 128 S. Ct. at 2676 (Alito, J., dissenting) ("The Court takes pains to limit its holding to 'crimes against individual persons' and to exclude 'offenses against the State,' a category that the Court stretches—without explanation—to include 'drug kingpin activity.'") Passed as part of the 1994 Federal Death Penalty Act, and codified as 18 U.S.C. § 3591(b), the drug kingpin statute authorizes the death penalty for directing a "continuing criminal enterprise" involving possession of large quantities of drugs or large amounts of money. 18 U.S.C. § 3591(b)(1) (2006). If the crime at issue in the drug kingpin statute is a crime against individuals, as the legislative history suggests, then capital punishment would be barred by both the holding and the reasoning of *Kennedy*. The majority draws a line between homicide and non-homicide. Drug kingpins, as described in § 3591(b)(1) have not committed a homicide. The logic surrounding the enactment is that drug kingpins have caused *deaths* by virtue of selling their illicit products. Congress enacted this provision "argu[ing] somewhat simplistically that drug dealers cause death and are therefore punishable by death," however, in criminal law, there

There are the pronouncements of the Supreme Court in *Kennedy* on the one hand, and, on the other, state legislatures have been voicing their dissatisfaction with capital punishment. On March 18, 2009, New Mexico became the latest state to abolish the death penalty.[239] Now 15 states forbid the practice and more are likely to follow soon.[240] The effectiveness of the death penalty as a crime deterrent is suspect and it serves no rehabilitating or incapacitating purpose that would not be accomplished through a sentence of life without parole.[241] The final, lingering

must be proof of a homicide; "here, Congress seems to do away with such a requirement, making the leap from possessing drugs to causing death without batting an eye." Neil C. Schur, *Assessing the Constitutionality and Policy Implications of the 1994 Drug Kingpin Death Penalty*, 2 TEX. F. ON C.L. & C.R. 141, 155–56 (1996).

Conversely, if the drug kingpin statute is more analogous to treason or espionage then the argument for its constitutionality is not as open to attack. Supporters of the law argue that drug trafficking causes a great public harm and that "[i]t is a scientific certainty that a percentage of persons using the illegal narcotics . . . will die of drug overdoses." Eric Pinkard, *The Death Penalty for Drug Kingpins: Constitutional and International Implications*, 24 VT. L. REV. 1, 11 (1999). But to some commentators, this is a "leap of logic [that] is intolerably huge." Schur, *supra* note 238, at 154. "[T]here is simply no proven connection between a single act of possession and a resultant death." *Id.* To make a comparison, the gravamen of the crime of treason is to levy war against the state and, similarly, for espionage to sell secrets of the state to another sovereign power. There is a possible result of another's death through the actions of a traitor or a spy, but drug kingpins are punished for the fact they have caused death—a fact extrapolated from their possessory crime and not required to be proved at trial. Thus the drug kingpin statute addresses a crime against individuals. While drug addiction is undeniably a public harm, there are numerous reasons why the drug kingpin statute fails as a matter of policy. Perhaps the largest reason is the difficulty of reaching people who reside outside of the United States. Most of the major drug kingpins operate outside of the jurisdictional reach of the United States. Ironically, many countries are unwilling to extradite their citizens because the United States has capital punishment. *See* Pinkard, *supra* note 238, at 16.

[239] *Death Penalty is Repealed in New Mexico*, N.Y. TIMES, Mar. 19, 2009 at A6.

[240] As of March 19, 2010, the following states have abolished the death penalty: Alaska, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, New York, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin (along with the District of Columbia). *Facts about the Death Penalty*, DEATH PENALTY INFO. CENTER, (last updated Aug. 31, 2010), *available at* http://deathpenaltyinfo.org/documents/FactSheet.pdf. A number of other states are considering legislation to curtail or abolish the death penalty, some citing the current economic crisis. *See* Ian Urbina, *In Push to End Death Penalty, Some States Cite Cost-Cutting*, N.Y. Times, Feb. 25, 2009, at A1; John Wagner, *Md. Lawmakers Approve Tighter Death Penalty Rules*, WASH. POST, Mar. 26, 2009, *available at* http://www.washingtonpost.com/wpdyn/content/article/2009/03/26/AR2009032601896.html (describing new stringent evidentiary standards, allowing for a capital prosecution only if DNA evidence, videotaped confession, or video linking the defendant to the homicide are available). See also *Recent Legislative Activity*, DEATH PENALTY INFO. CENTER, http://deathpenaltyinfo. org/recent-legislative-activity#2009, for a list of pending legislation regarding capital punishment.

[241] The experience of one state indicates that abolition can have a positive effect by freeing up limited state resources. New Jersey conducted an extensive study of their death penalty and ultimately concluded that it was ineffective. Since abolition of the death penalty in New Jersey, the murder rate declined, and this effect followed

justification for the death penalty is the human impulse to see vengeance wreaked on those who violently transgress the laws. It is a deep-seated and fundamental urge. The death penalty satisfies the basest aspects of our nature. But this is not the purpose of law. The heart of the Eighth Amendment's bar on "cruel and unusual punishment" is the "evolving standards of decency that mark the progress of a maturing society." Our society is indeed maturing. The death penalty is being recognized for what it is—a vengeful and ill-considered policy—not justice.

almost immediately on the heels of abolition. Press Release, N.J. Office of the Attorney Gen., *supra* note 213 (murders dropped 11% in 2007, the year of the moratorium, and continued to decline throughout 2008 and by an additional 24% in the first half of 2009). "Governor Jon Corzine, who signed the bill abolishing the death penalty, was encouraged by the statistics and attributed the decline to aggressive crime-fighting measures." *Murders Drop In New Jersey*, *supra* note 213.