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National Consensus, Retributive Theory, and Foundations of Justice and Morality in Eighth Amendment Jurisprudence: A Response to Advocates of the Child Rape Death Penalty Statute in *Kennedy v. Louisiana*.

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**NATIONAL CONSENSUS, RETRIBUTIVE THEORY, AND
FOUNDATIONS OF JUSTICE AND MORALITY IN
EIGHTH AMENDMENT JURISPRUDENCE:
A RESPONSE TO ADVOCATES OF THE
CHILD RAPE DEATH PENALTY STATUTE
IN *KENNEDY V. LOUISIANA***

SHANDREA P. SOLOMON*

I. Introduction.....	584
II. Eighth Amendment Jurisprudence and Rape.....	586
III. <i>Kennedy v. Louisiana</i>	597
IV. Philosophical Principles of Proportionality in Criminal Punishment.....	600
V. Proportionality of the Death Penalty for Child Rape.....	601
A. Acceptable Goals of Punishment.....	602
B. Severity of the Crime and Seriousness of the Offense.....	605
VI. Evolving Standards of Decency?.....	607
A. Capital Child Rape Statutes Do Not Protect Child Victims From Possible Death at the Hand of the Rapist.....	609
B. Capital Punishment May Result in an Increased Unwillingness of Child Victims to Report the Crime(s).....	611
C. Exposing the Child to a Capital Trial May Also Discourage Reporting and Prevent the Healing Process From Progressing.....	612
VII. Conclusion.....	614

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I. INTRODUCTION

An honest man's daughter, after refusing the sexual advances of her boyfriend and his friend, finds herself beaten bloody and hospitalized with her jaw wired shut. Her father, outraged at the crime perpetrated against his only child, pleads with her godmother's husband, a local crime boss, to kill her attackers. The reply? "That I cannot do. You are being carried away."¹ Instead, the order is to beat the boys as they had beaten the girl.²

This familiar scene appears early in Mario Puzo's novel, *The Godfather*, and opens the Oscar-winning film of the same name.³ The relevant point is that, even when a Mafia boss is the judge, the punishment must match the offense.

In 2008, the United States Supreme Court decided *Kennedy v. Louisiana*,⁴ in which the Court held that the death penalty was unconstitutional as applied to a child rapist.⁵ The Court so held because it found no na-

1. MARIO PUZO, *THE GODFATHER* 30–32 (1969). After the judge suspended the boys' jail sentence, Bonasera sought Don Carleone's assistance to find justice for his daughter. *Id.* at 30. When Don Carleone asks Bonasera his definition of justice, Bonasera responds, "An eye for an eye." *Id.* at 32. Don Carleone, however, disagrees with Bonasera's rationale arguing that the punishment is too extreme for the crime because the boys did not murder his daughter. *Id.*

2. *See id.* at 30–33, 66 (providing an order that restores justice rather than murderous revenge). After being beaten by the two boys, Bonasera's daughter's suffered two black eyes, a broken nose, and a shattered jaw. *Id.* at 30.

3. *Id.* at 29–33; *THE GODFATHER* (Paramount Pictures 1972) (portraying the American legal system as ineffective at protecting immigrant families against crime). As the opening scene of the movie, this exchange between a reputable businessman and the underworld boss demonstrates for the audience the popularity of the mafia and its source of strength. *THE GODFATHER* (Paramount Pictures 1972). The underworld is shown to be attractive to first generation Italian immigrants who were clawing out an existence in their new world. *Id.* The Godfather garners strength and respect among the Italian community because he is willing to distribute justice for hire in exchange for the cooperation of legitimate businessmen. *Id.*

4. 554 U.S. 407 (2008). Louisiana convicted a man of raping his eight-year-old step-daughter and sentenced him to death. *Id.* at 412–13. The Louisiana Supreme Court affirmed the sentence, finding that United States Supreme Court precedent did not preclude the execution of child-rapists. *Id.* at 417–18. Louisiana considered children to be a class of people deserving special protection which justified the execution of sexual predators who violate young boys and girls. *Id.* at 418.

5. *Id.* at 413. When police arrived at the home of the raped child, they found the young girl swaddled in a bloody blanket on her bed and bleeding profusely from her vagina. *Id.* The police were unable to obtain a reliable DNA sample because the petitioner had wiped clean the girl's pubic area. *See id.* The pediatric forensic expert who inspected the girl after the sexual assault stated that the injuries she sustained were the worst he had ever encountered. *Id.* at 414.

tional consensus in favor of the death penalty for such a crime, and because it found that the death penalty was disproportionate to the crime.⁶

The Court's decision has sparked debate among scholars and commentators—even President Obama—about whether the Court reached the right decision and whether the Court appropriately justified its decision. The debate over the Court's findings about national consensus and proportionality demonstrates that the foundations of law and justice are at odds with many modern Americans' notions of morality and the death penalty.

In this Article, I respond to these critics of the *Kennedy* decision, and argue the Court's holding was correct. The Court's "national consensus" justification may have been inaccurate, especially considering that at the time of the decision, three states had recently enacted laws providing for the death penalty in child rape cases.⁷ Even so, the decision reinforced and reinvigorated the foundations of American criminal jurisprudence because it recognized the Eighth Amendment's pursuit of proportionality in criminal punishment.⁸

This Article examines the foundations of law and justice in American jurisprudence to illuminate the Court's decision in *Kennedy*. Drawing on the philosophy of retributivists, primarily Immanuel Kant, this Article embraces the principle that justice is paramount, and that matching punishment to crime furthers the interests of justice.

This Article, like the *Kennedy* case, is limited to the facts of that case.⁹ Furthermore, the discussion proceeds within a framework of several presumptions: that the rape at issue is the first rape conviction for the perpetrator, that the crime was a one-time event, that the rapist did not have a potentially deadly communicable disease (such as HIV), and that the injuries inflicted, though horrific, were limited to the rape itself.

The Article opens with a survey of Eighth Amendment death penalty jurisprudence, particularly as applied to rape. Then, it briefly examines retributivist philosophy with regard to crime and punishment, focusing on Immanuel Kant's articulation. Finally, the Article demonstrates how the

6. *Id.* at 420–34 (explaining that there are limits to when the death penalty can be imposed). The Louisiana statute in question included nonconsensual intercourse with a minor under the age of twelve in its definition of aggravated rape. *Id.* at 416–17, 423. Aggravated rape was normally punishable by life in prison subject to hard labor and without the possibility of parole. *Id.* at 416–17. However, if the victim of the aggravated assault was under twelve-years-old, the District Attorney could seek the death penalty for the rapist. *Id.* at 416.

7. *Id.* at 423–25 (alluding to a possible trend toward allowing the death penalty in child rape cases in Oklahoma, South Carolina, and Texas).

8. *Id.* at 435.

9. See Part III of this Article for a detailed description of the facts in *Kennedy*.

Court's decision in *Kennedy* was consistent with that retributivist philosophy.

II. EIGHTH AMENDMENT JURISPRUDENCE AND RAPE

“Described as ‘confused,’ ‘anarchic,’ ‘vast,’ and ‘a minefield through which . . . perplexed legislators tread at their peril,’ the Supreme Court’s death penalty jurisprudence demonstrates a notorious lack of clarity and frustrates state legislatures that seek to devise constitutionally valid capital punishment laws.”¹⁰ The Eighth Amendment to the United States Constitution, adopted in 1791, states: “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”¹¹ However, in *Weems v. United States*,¹² the Court acknowledged that “[w]hat constitutes a cruel and unusual punishment has not been exactly decided.”¹³ *Weems* was a government official, convicted of falsifying documents and defrauding the government.¹⁴ He was sentenced to fifteen years of hard labor while confined in heavy chains.¹⁵ The Court vacated his sentence and ordered the proceedings against him dismissed.¹⁶ In its decision, the Court noted “that punishment for crime should be graduated and proportioned to [the] offense”¹⁷ and cautioned that the meaning of “cruel and unusual” cannot be confined to what the framers may have meant when the Bill of Rights was drafted.¹⁸ “The clause of the Constitution . . . is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice.”¹⁹

More than forty years later, in *Trop v. Dulles*,²⁰ the Supreme Court expounded on the *Weems* Court’s insight that interpretation of the Eighth Amendment must take into account public opinion and societal interests.²¹ The Court ruled that it would look to “the evolving standards

10. Harvard Law Review Association, *Eighth Amendment—Death Penalty—Weighing of Aggravating and Mitigating Factors*, 120 HARV. L. REV. 144, 144 (2006) (footnotes omitted) (analyzing the Supreme Court’s decision in *Kansas v. Marsh*, 548 U.S. 163 (2006), which reinforced precedent requiring death penalty regimes to narrow “the class of offenders and the admission of mitigating evidence”).

11. U.S. CONST. amend. VIII.

12. 217 U.S. 349 (1910).

13. *Id.* at 368.

14. *Id.* at 357.

15. *Id.* at 357, 381.

16. *Id.* at 382.

17. *Weems*, 217 U.S. at 367.

18. *Id.* at 378.

19. *Id.* at 371 (citation omitted).

20. 356 U.S. 86 (1958).

21. *Id.* 100–01.

of decency that mark the progress of a maturing society” when deciding whether punishment would be considered “cruel and unusual.”²² In *Trop*, a soldier was stripped of his U.S. citizenship as punishment for deserting during World War II.²³ The Court held that the punishment was disproportionate to his crime, excessive in nature, and thus unconstitutional under the Eighth Amendment.²⁴ While neither *Weems* nor *Trop* were death penalty cases, both are part of the foundation of death penalty challenges under the “cruel and unusual” punishment clause of the Eighth Amendment.

In 1972, a divided Court struck down the death penalty under the “cruel and unusual” punishment clause of the Eighth Amendment and halted all executions in the thirty-nine states that had capital statutes.²⁵ The landmark case *Furman v. Georgia*²⁶ drew the Court’s attention to three African-American men on death row: William Henry Furman was convicted in Georgia for murder;²⁷ Lucious Jackson was convicted in Georgia for rape;²⁸ and Elmer Branch was convicted in Texas for rape.²⁹ The juries in each of these three cases were not statutorily required to impose the death penalty, nor were they instructed to consider any aggravating or mitigating factors.³⁰ The decision to impose death was in the jury’s sole and unfettered discretion.³¹

Implementing the death penalty under such jury discretion was consistent with the Supreme Court’s holding in *McGautha v. California*,³² just a year before *Furman*, that jury guidelines for imposition of the death penalty were unnecessary.³³ Despite the obvious consistency in jury discretion, the *Furman* Court reversed course. The 5–4 decision, expressed in nine separate opinions, was that, because of the way capital punishment laws were written and administered, capital punishment was cruel and unusual, thus violating the Eighth and Fourteenth Amendments.³⁴ One

22. *Id.* at 101.

23. *Id.* at 88.

24. *Id.* at 101–02.

25. *See generally* *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam).

26. *Id.*

27. *See id.* at 294–95 (Brennan, J., concurring).

28. *See id.* at 252 (Douglas, J., concurring).

29. *See id.* at 253.

30. *See Furman*, 408 U.S. at 314 (Stewart, J., concurring).

31. *Id.* at 240 (Douglas, J., concurring).

32. 402 U.S. 183 (1971). The Court held, “[i]n light of history, experience, and the limitations of human knowledge in establishing definitive standards, it is impossible to say that leaving to the untrammelled discretion of the jury the power to pronounce life or death in capital cases violates any provision of the Constitution.” *Id.* at 183.

33. *See id.*

34. *See Furman*, 408 U.S. at 239–40 (Douglas, J., concurring).

of the concerns the Court expressed was that the death penalty was being imposed randomly in a manner that sent poor or nonwhite offenders to death row more often than affluent or White offenders.³⁵ The Court determined that unlimited jury discretion was the primary cause of the disparity. Reconciling the five opinions forming the majority, the *Furman* Court declared that capital punishment violates the Eighth Amendment if it is: (1) too severe for the crime; (2) imposed arbitrarily—for example, by juries without guidelines, where some offenders get the punishment and others do not; (3) offensive to society's sense of justice; or, (4) less effective than an alternative penalty.³⁶ The Court's decision in *Furman* effectively ended capital punishment as it existed under many state statutes at the time.³⁷

In light of *Furman*, many state legislatures redrafted their capital punishment statutes. Georgia redrafted its statutes in a manner that provided for a bifurcated trial, required the jury to find at least one aggravating circumstance and consider any mitigating circumstances, and provided for an expedited review of proportionality by the state Supreme Court.³⁸ The constitutionality of this newly structured death penalty statute was presented to the Supreme Court in the matter of *Gregg v. Georgia*³⁹ just a few years after *Furman*.⁴⁰

Georgia took the position that these safeguards ensured courts did not impose the death penalty arbitrarily and did not offend the community's sense of justice because juries were not given unfettered discretion and were instructed about what they can and must consider before imposing death as the penalty for the crime at issue.⁴¹ Further, the requirement of judicial review for all death penalty cases ensured the penalty would be reviewed for proportionality to determine whether the penalty was too severe for the crime and whether there was a more effective penalty

35. *Id.* at 250–52.

36. *See generally id.*

37. *Coker v. Georgia*, 433 U.S. 584, 593 (1977) (“*Furman* then invalidated most of the capital punishment statutes in this country, including the rape statutes, because, among other reasons, of the manner in which the death penalty was imposed and utilized under those laws.”).

38. *Gregg v. Georgia*, 428 U.S. 153, 153 (1976) (holding that implementation of the death penalty for the crime of murder did not violate the Eighth and Fourteenth Amendments on every occasion). In *Gregg*, the criminal defendant was charged with armed robbery and murder. *Id.* at 158. The jury found Gregg guilty of killing and robbing two men while hitchhiking in Florida. *Id.* at 159. The trial was submitted to the jury in two stages: the guilt stage and the penalty stage. *Id.* at 160.

39. *Id.*

40. *Id.* at 153–54 (revisiting the scheme for imposition of the death sentence).

41. *Id.* at 196–98.

available to punish the offender.⁴² The Supreme Court agreed and approved Georgia's capital punishment sentencing structure.⁴³

At the time the Court reviewed *Gregg*, it also reviewed the capital punishment statutes of four other states: Florida, Texas, Louisiana, and North Carolina.⁴⁴ Florida's and Texas' death penalty statutes survived the Court's scrutiny,⁴⁵ but Louisiana's and North Carolina's did not, primarily because their statutes made the death penalty mandatory in certain instances, taking away discretion from the jury altogether.⁴⁶

While the Court did not provide specific criteria for the states to satisfy, we can extract two identifiable standards from these decisions. First, the statutory scheme must provide objective criteria to direct and limit the sentencing discretion of the judge or jury, and the sentence must be reviewed by a higher court to ensure objectivity.⁴⁷ Second, the defendant's character and record must be considered before imposing a sentence of death.⁴⁸ Just a few short years after the Court effectively ended it, the death penalty made its comeback into the U.S. criminal justice system, but not without further Court review and discussion about its appropriateness under the Eighth Amendment.

42. *See id.* at 198–99.

43. *Gregg*, 428 U.S. at 207.

44. *See Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Woodson v. North Carolina*, 428 U.S. 280, 284–85 (1976) (considering whether North Carolina's statute requiring the death penalty for individuals convicted of first-degree murder violates a defendant's Eighth and Fourteenth Amendment rights); *Roberts v. Louisiana*, 428 U.S. 325, 328 (1976) (assessing the constitutionality of the Louisiana law requiring the death penalty in cases of first-degree murder, even where the jury is able to consider a lesser charge).

45. *Proffitt*, 428 U.S. at 242; *Jurek*, 428 U.S. at 262.

46. *See Woodson v. North Carolina*, 428 U.S. 280, 286–87, 299 (1976) (reviewing the North Carolina statute which sentenced an unwilling accomplice to death); *Roberts*, 428 U.S. at 329, 334 (assessing the constitutionality of Louisiana's mandatory imposition of the death penalty when defendant is convicted of first degree murder).

47. *Compare Gregg*, 428 U.S. at 196–99 (requiring Georgia juries to consider various factors in the punishment phase and discussing the automatic appeal process for defendants sentenced to death), *and Proffitt*, 428 U.S. at 250–51 (explaining Florida trial judges are to weigh eight aggravating factors against seven mitigating factors before determining whether a sentence of death should be imposed, followed by an automatic appeal), *and Jurek*, 428 U.S. at 271–72 (stating that a system that did not allow juries to consider mitigating factors when considering the death penalty was unacceptable), *with Woodson*, 428 U.S. at 286–87, 299, 301 (stating North Carolina's mandatory death penalty for murder convictions was inconsistent with the Eighth and Fourteenth Amendments), *and Roberts*, 428 U.S. at 329, 334–36 (determining Louisiana's mandatory death penalty for first-degree murder convictions was unconstitutional).

48. *Compare Gregg*, 428 U.S. at 196–99, *and Proffitt*, 428 U.S. at 250–51, *and Jurek*, 428 U.S. at 271–72, *with Woodson*, 428 U.S. at 286–87, 299, 301, *and Roberts*, 428 U.S. at 329, 334–36.

In 1977, five years after *Furman* was decided, the Court heard Anthony Coker's case, in which he received the death penalty for rape, kidnapping, and aggravated assault.⁴⁹ He committed these offenses after escaping from a Georgia prison where he was serving a life sentence for murder, rape, kidnapping, and aggravated assault.⁵⁰ Despite the aggravating circumstances of Coker's prior criminal history, and the fact that he committed the offenses at issue while an escapee from the Georgia prison system, the Court held that capital punishment was grossly disproportionate to the crime of rape.⁵¹

Moreover, the Court ruled cruel and unusual punishment under the Eighth Amendment included punishment that was excessive in relation to the crime committed.⁵² The Court set forth a two prong test to determine excessiveness.⁵³ A "punishment is 'excessive' and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime."⁵⁴ The Court further declared that objective factors should be the primary influence on Eighth Amendment death penalty judgments.⁵⁵ Objective factors are those measurable factors that are not based on the subjective opinions of individual Justices, but instead include "the public attitudes concerning a particular sentence[—]history and precedent, legislative attitudes, and the response of juries reflected in their sentencing decisions."⁵⁶ The Court found that capital punishment for the crime of rape could contribute to the goals of a retributive system,⁵⁷ but it was grossly out of proportion to the severity of the crime considering objective factors like public attitudes—thus it failed to pass the second prong of the test set forth by the Court.⁵⁸

49. *Coker v. Georgia*, 433 U.S. 584 (1977) (holding that the death penalty for rape was unconstitutional under the Eighth Amendment).

50. *Id.*

51. *See generally id.*

52. *Id.* at 591–92.

53. *Id.* at 592.

54. *Coker*, 433 U.S. at 592 (emphasis added).

55. *Id.* (rejecting the notion that the subjective views of judges should be the main standard for evaluating Eighth Amendment judgments).

56. *Id.*

57. *See id.* at 597–98 (agreeing that the crime of rape "is without doubt deserving of serious punishment").

58. *See id.* at 593–97 (identifying the lack of societal consensus in favor of allowing the death penalty in rape cases, based on a majority of juries refusing to impose the death penalty in rape cases and a majority of state legislatures failing to provide for such a penalty).

In its analysis of the objective factors related to the second prong, the Court reviewed the history of rape statutes and inferred that both public and legislative attitudes tended to indicate that the death penalty for rape of an adult woman was not considered an acceptable punishment.⁵⁹ As the Court stated, “At no time in the last 50 years have a majority of the States authorized death as a punishment for rape.”⁶⁰ The *Coker* Court stated:

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. Although it may be accompanied by another crime, rape by definition does not include the death of or even the serious injury to another person. 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.⁶¹

Between 1964 and 2003, no defendant was executed in a non-homicide case, even where a statute would have allowed it.⁶² This reluctance of society to carry out the death penalty for non-homicide crimes would appear to indicate that contemporary society finds death an unacceptable punishment for those crimes. However, the Supreme Court’s death pen-

59. *Coker v. Georgia*, 433 U.S. 584, 596–98 (1977) (explaining the process by which the Court arrived at its decision). At the time of the Court’s decision, Georgia had sentenced five rapists to death since the year 1973, leaving the harshest punishment for the most extreme cases. *Id.* at 596–97. Even though juries imposed death penalties for rape in those cases, the Court concluded that in the vast majority of instances, juries did not recommend capital punishment. *Id.* at 597. The legislative aversion to capital punishment for rape served as further confirmation to the Court that the death penalty is simply too harsh of a punishment for rape. *Id.*

60. *Id.* at 593. By the mid-1920s, capital punishment for rape was authorized by federal law as well as in eighteen states and the District of Columbia. *Id.* By 1971, just before *Furman*, federal law still sanctioned death sentences for rape while the number of states that did so decreased to sixteen. *Coker*, 433 U.S. at 593. After *Furman* invalidated most capital punishment statutes, a majority of states enacted their own death penalty laws for certain crimes only. *Id.* at 593–94; see, e.g., *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam).

61. *Coker*, 433 U.S. at 598.

62. See *Kennedy v. Louisiana*, No. 07-343, DEATH PENALTY INFORMATION CENTER (April 16, 2008), <http://www.deathpenaltyinfo.org/kennedy-v-louisiana-no-07-343> (providing statistics, reports, and newsletters about past and current uses of the death penalty). The federal government has its own laws on the death penalty, separate from the individual states. *Part II: History of the Death Penalty*, DEATH PENALTY INFORMATION CENTER, <http://www.deathpenaltyinfo.org/part-ii-history-death-penalty> (last visited Oct. 22, 2010) (discussing the federal death penalty).

alty jurisprudence has not only concentrated on what crimes are death-eligible, but which offenders are eligible for capital punishment.

In 1982, the Supreme Court held in *Enmund v. Florida*⁶³ that, in applying the death penalty, the “punishment must be tailored to [the] personal responsibility and moral guilt” of the defendant.⁶⁴ Earl Enmund participated in a robbery that resulted in the death of Eunice and Thomas Kersey.⁶⁵ Enmund did not pull the trigger, or even carry a weapon during the robbery attempt; he waited in the getaway car while his two accomplices robbed, and then shot, the two victims.⁶⁶ The Court held that the Eighth Amendment prohibits executing a defendant who “aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed.”⁶⁷ The *Enmund* Court noted, “It is fundamental that ‘causing harm intentionally must be punished more severely than causing the same harm unintentionally.’”⁶⁸ There is no more

63. 458 U.S. 782 (1982) (involving a felony murder charge resulting from a botched robbery attempt in which the defendant, Enmund, drove the car after his accomplices shot and killed an elderly couple).

64. *Id.* at 801 (finding the imbalance between punishment and crime violates the Eighth Amendment); see also James S. Liebman, *Slow Dancing with Death: The Supreme Court and Capital Punishment, 1963–2006*, 107 COLUM. L. REV. 1, 43–44 (2007) (highlighting the emphasis placed on intent by the Supreme Court in *Enmund*).

65. *Enmund*, 458 U.S. at 784 (illustrating the scene of the killings where Eunice Kersey tried to defend her husband, who was being threatened at gunpoint, by shooting at Enmund’s two accomplices who then fatally shot both Eunice and Thomas Kersey).

66. *Id.* at 784, 786 (discussing Enmund’s limited involvement in the robbery and the treatment given to the minimal evidence by the Florida Supreme Court in upholding the first-degree murder conviction under the felony-murder rule).

67. *Id.* at 797.

For purposes of imposing the death penalty, Enmund’s criminal culpability must be limited to his participation in the robbery, and his punishment must be tailored to his personal responsibility and moral guilt. Putting Enmund to death to avenge two killings that he did not commit and had no intention of committing or causing does not measurably contribute to the retributive end of ensuring that the criminal gets his just deserts.

Id. at 801.

68. *Id.* at 798 (quoting H.L.A. Hart, *Punishment and the Elimination of Responsibility*, in PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 158, 162 (1968)). The Supreme Court considered Florida’s application of the felony murder rule to be fundamentally in error when Enmund’s culpability was so clearly different from the other defendants. *Id.* Additionally, the Court looked at the likelihood that a killing would occur during the course of a robbery in examining the proportionality of punishment to blame in Enmund’s case. *Id.* at 799. Robbery statistics and national crime data both indicated that less than one percent of robberies were likely to involve a homicide. *Id.* at 799–800. Not only does this small chance of a murder occurring further support Enmund’s showing of lesser culpability for the murders, but it also illustrates the futility of applying a felony-murder punishment in an attempt to deter robberies. *Id.* at 798–99.

severe punishment than execution, so in basing its opinion on this principle, the *Enmund* Court established that the death penalty cannot be imposed on someone who did not intend to kill.⁶⁹ Five years later, in another felony murder case, the Court clarified that the culpability requirement for imposing the death penalty can be satisfied by the defendant's "major participation in the felony," and his or her "reckless indifference to human life."⁷⁰

In *Stanford v. Kentucky*,⁷¹ the Supreme Court held it was constitutionally acceptable to execute defendants who committed their offenses when they were juveniles because there was not a national consensus against the practice.⁷² The Court looked to the actions of state legislatures and noted that twenty-two of the thirty-seven death penalty states permitted the death penalty for sixteen-year-old offenders and that twenty-five of the thirty-seven permitted it for seventeen-year-old offenders.⁷³ The Court decided these numbers failed to constitute a national consensus sufficient to label imposing the death penalty on juvenile offenders "cruel and unusual."⁷⁴

69. *Id.* at 797.

70. *Tison v. Arizona*, 481 U.S. 137, 158 (1987) (finding that the Arizona Supreme Court incorrectly applied the ruling of *Edmund v. Florida* when it upheld the death penalty for two accomplices to murder). Petitioners Ricky and Raymond Tison helped devise and execute a plan to break their father (Gary Tison) and his cellmate (Randy Greenwalt), both convicted murderers, out of an Arizona jail. *Id.* at 139. After smuggling guns into the prison the Petitioners, along with their father, Greenwalt, and another brother flagged down a family desiring to steal their car. *Id.* at 139–40. After driving the family of four, including a two-year-old child, into the desert the testimony showed that Petitioners' father and Greenwalt shot all four captives. *Id.* at 140–41. In a joint trial for crimes connected to the prison break and police shootout, Petitioners and Greenwalt were found guilty. *Id.* at 141. Each man was tried independent of the others for the murders under the Arizona felony-murder statute, which mandates that a murder that occurs during the commission of a robbery or kidnapping is a capital offense. *Id.* The Court remanded the case finding that the Arizona Supreme Court's acceptance of foreseeability of harm as intent to kill was erroneous under *Edmund*. *Id.* at 150.

71. 492 U.S. 361 (1989), *abrogated by* *Roper v. Simmons*. 543 U.S. 551 (2005).

72. *Id.* at 380 (holding the Eighth Amendment is not violated by imposing the death penalty on defendants aged sixteen and seventeen because there is no discernible historical or modern societal consensus against such a punishment), *abrogated by* *Roper v. Simmons*, 543 U.S. 551 (2005).

73. *Id.* at 370. The method by which the defense argued against the death sentence was by stating that it went against the "evolving standards of decency that mark the progress of a maturing society." *Id.* at 379 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (emphasis in original)).

74. *Id.* at 370–71.

However, the Supreme Court again changed course in 2005 with *Roper v. Simmons*.⁷⁵ In *Roper*, the Supreme Court determined that “evolving standards of decency” prohibit the execution of defendants who committed their crimes while they were under age eighteen.⁷⁶ The Court reported there were thirty states that exclude the death penalty for individuals under age eighteen; of those thirty, twelve completely rejected it, and eighteen kept the juvenile death penalty, but excluded juveniles through “express provision or judicial interpretation.”⁷⁷ Further, in the sixteen years since *Stanford*, only six states had executed defendants on the basis of crimes committed as juveniles, and in the ten years prior to *Roper*, only three had done so.⁷⁸ Additionally, of the states that permitted the death penalty for juveniles when the Court decided *Stanford*, five had since abandoned it by legislative action or judicial decision.⁷⁹ The Court also looked at international treatment of the death penalty for juveniles and noted the United States was the only nation that continued to officially sanction death sentences for juvenile offenders.⁸⁰ A similar

75. See 543 U.S. 551, 568 (2005) (considering whether individuals convicted of capital crimes under the age of eighteen may be sentenced to death). Christopher Simmons was seventeen years old when he murdered Shirley Crook. *Id.* at 556. Simmons and another teenager broke into Crook’s home, tied her up, and drove her in her own vehicle to a state park. *Id.* With her head covered in a towel, her hands and feet bound with electrical wire, and her face wrapped in duct tape, the young men threw her over the bridge, drowning her. *Id.* at 556–57. After bragging to friends about the killing, Missouri police arrested Simmons and he was charged with burglary, stealing, kidnapping, and first degree murder. *Id.* at 557. Simmons’ age put him outside the range to be tried as a juvenile, so he was tried as an adult and sentenced to death. *Id.* at 557–58. The Missouri Supreme Court set aside the sentence, and the Supreme Court of the United States affirmed. *Id.* at 559–60.

76. See *id.* at 563, 567–68 (examining previous courts’ inquiries into the changing opinions of the general populace regarding the use of the death penalty in specific instances and holding that societal consensus weighed against imposing the death penalty on juveniles).

77. *Id.* at 564.

78. *Id.* at 564–65.

79. *Roper*, 543 U.S. at 565.

80. *Id.* at 575 (examining international perspective on the death penalty for instruction on interpretation of the Eighth Amendment). The Court noted that Article 37 of the United Nations Convention on the Right of the Child expressly prohibited the death penalty for defendants under eighteen. *Id.* at 576. At the time of this hearing, the United States and Somalia were the only two countries who had not ratified Article 37. *Id.* The Court further noted that, besides the United States, only seven countries—Pakistan, Iran, Yemen, Saudi Arabia, Nigeria, China, and the Democratic Republic of Congo—had carried out juvenile executions since 1990. *Id.* at 577. Special attention was given to the United Kingdom because of the historic ties it holds with the United States and the origin of the Eighth Amendment. *Id.* at 578. The Court emphasized the fact that the United Kingdom abolished the death penalty *before* any international covenants addressed the issue. *Id.* In fact, the United Kingdom had acknowledged the problem with the juvenile death penalty as early as 1930. *Id.*

change in course occurred in cases of capital punishment for the mentally retarded.

In 1989, the same year as *Stanford v. Kentucky*,⁸¹ the Supreme Court heard the case of *Penry v. Lynaugh*.⁸² The Court determined that imposing the death penalty on mentally retarded defendants did not violate the Eighth Amendment.⁸³ The Court again turned to legislative action and pointed out that only two states had enacted laws banning the imposition of the death penalty on mentally retarded persons and that “the two state statutes prohibiting execution of the mentally retarded, even when added to the 14 states that have rejected capital punishment completely, do not provide sufficient evidence at present of a national consensus.”⁸⁴

However, a decade later, in *Atkins v. Virginia*,⁸⁵ the Supreme Court abrogated *Penry* and determined that “evolving standards of decency” had made executing the mentally retarded unconstitutional.⁸⁶ The *Atkins* Court noted that eighteen states and the federal government already banned the practice of executing the mentally retarded.⁸⁷ The Court also explained that even in states that permit the execution of the mentally retarded, such executions were rarely carried out.⁸⁸ Thus, the Court deemed another application of the death penalty unconstitutional after a review of society’s evolving standards of decency.⁸⁹

In summary, the landmark cases of *Furman*⁹⁰ and *Gregg*⁹¹ created two basic rules for capital sentencing regimes; as long as states abided by these directives, their capital systems operate in a constitutionally sound manner.⁹² First, a death penalty system must “rationally narrow the class of death-eligible defendants”; second, it must “permit a jury to render a reasoned, individualized sentencing determination based on a death-eligible defendant’s record, personal characteristics, and the circumstances of his crime.”⁹³ Additionally, after consulting the nation’s evolving stan-

81. 492 U.S. 361 (1989).

82. 492 U.S. 302 (1989), *abrogated by* *Atkins v. Virginia*, 536 U.S. 304 (2002).

83. *Id.* at 335.

84. *Id.* at 334.

85. 536 U.S. 304 (2002) (abrogating the *Penry* Court’s holding that execution of juvenile offenders does not violate the Eighth Amendment).

86. *Id.* at 321.

87. *See id.* at 314–15.

88. *Id.* at 316.

89. *See id.* at 312, 321.

90. *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam).

91. *Gregg v. Georgia*, 428 U.S. 153 (1976) (upholding Georgia’s scheme for the imposition of the death penalty).

92. *Kansas v. Marsh*, 548 U.S. 163, 173–74 (2006) (citing *Furman*, 408 U.S. at 238 and *Gregg*, 428 U.S. at 153).

93. *Id.*

dards of decency, the Court has chosen to allow capital punishment only for the most blameworthy defendants—the mentally ill,⁹⁴ the mentally retarded,⁹⁵ and those offenders who were under age eighteen at the time of the offense⁹⁶ are not eligible for capital punishment. The Court has condoned the death penalty for the killer, or the felony accomplice who attempts to kill, intends to kill, or displays a reckless indifference to human life.⁹⁷ The Court has expressly prohibited the crime of rape from the capital sentencing landscape.⁹⁸

However, some states are passing laws that challenge the Supreme Court's death penalty jurisprudence and will likely test the nation's evolving standards of decency. In 1995, Louisiana became the first state to enact legislation that provided for imposition of the death penalty for the rape of a child under the age of twelve.⁹⁹ Since then, Florida, Montana, Georgia, South Carolina, Oklahoma, and Texas have followed.¹⁰⁰ On the other hand, California, Mississippi, Maryland, and Virginia have all considered bills designed to apply the death penalty to people who commit sex crimes against children but declined to enact such legislation.¹⁰¹ Furthermore, at the time of the *Kennedy* case, only two people in the United

94. *Ford v. Wainwright*, 477 U.S. 399, 409–10 (1986).

95. *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

96. *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

97. *Tison v. Arizona*, 481 U.S. 137, 158 (1987) (clarifying the intent to kill requirement established in *Edmund*).

98. *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (“We have concluded that a sentence of death is grossly disproportionate and excessive punishment for the crime of rape and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment.”).

99. See LA. REV. STAT. ANN. § 14:42(D)(2) (West 2007).

100. See FLA. STAT. ANN. § 794.011(2)(a) (West 2007) (Governor Jeb Bush suspended all executions on December 15, 2006 after a botched execution required a second injection of the lethal chemicals); MONT. CODE ANN. § 45-5-503(3)(c)(i) (West 2007) (enacted in 1997, allows for the death penalty in cases where the defendant has been convicted for the second time of rape involving serious bodily injury); GA. CODE ANN. § 16-6-1 (West 2007) (amended in 1999 to allow for the death penalty when the victim of the rape is under the age of ten); S.C. CODE ANN. § 16-3-655(c)(1) (West 2007) (passed in 2006, allows for the death penalty in cases where the defendant is convicted for a second time of the rape of a child under the age of eleven); TEX. PENAL CODE ANN. § 12.42(c)(3) (West 2007) (passed by the Legislature and signed by the Governor in 2007); see also *Baze v. Rees*, 553 U.S. 35, 63 (2008) (stipulating that lethal injection does not violate the Eighth Amendment and that the Supreme Court defers to state legislatures in determining what constitutes humane punishment).

101. See Assem. B. 35, 1999 Leg., Reg. Sess. (Cal. 1999) (bill died pursuant to Article IV of the state constitution); S.B. 271, 1998 Leg., Reg. Sess. (Va. 1998) (bill not carried over after session adjournment); H.B. 543, 1997 Leg., Reg. Sess. (Miss. 1997) (bill died in committee); S.B. 127, 1996 Leg., 410th Sess. (Md. 1996) (imposing the maximum penalty of life without possibility of parole on those convicted of certain child sexual offenses and kidnapping).

States had been sentenced to death for the crime of rape, both in Louisiana: Patrick Kennedy and Richard Davis.¹⁰²

III. *KENNEDY V. LOUISIANA*

The facts in *Kennedy* were and are troubling. Patrick Kennedy, who was 43-years-old at the time his case went to the Supreme Court, is a Black man with an eighth grade education and an IQ of 70.¹⁰³ On March 2, 1998, Mr. Kennedy called 911 to report the rape of his eight-year-old stepdaughter.¹⁰⁴ The girl told police, medical staff, investigators, and psychologists, “that two teenage boys . . . had dragged her into the yard from the garage and forcibly raped her.”¹⁰⁵ She provided a specific account of the rape during a three-hour interview conducted by a social worker and psychologist.¹⁰⁶ She described the clothing the teenagers wore, the bike belonging to one of the rapists, and the young men’s body types.¹⁰⁷ Within days of the attack, police officers located a bike and a shirt matching the description the victim gave.¹⁰⁸ After locating the owner of the items, police decided that the teenager was not a viable suspect because the bike’s tires were flat, rendering the bike inoperable, and the boy was more heavy-set than muscular, as the eight-year-old victim had described him.¹⁰⁹ The young man even lied about his whereabouts on the day of the rape and never provided the police with an alibi.¹¹⁰ Nevertheless, police turned their attention to Mr. Kennedy, the easiest target for their investigation.¹¹¹

Mr. Kennedy’s wife told police that she could not imagine her husband abusing or raping her daughter.¹¹² Mrs. Kennedy maintained her belief in her daughter’s account: two teenage boys dragged her into the yard and raped her.¹¹³ In mid-March 1998, Mr. Kennedy was arrested and

102. Associated Press, *Supreme Court Weighs Death Penalty for Child Rapists*, FOXNEWS.COM (April 15, 2008), <http://www.foxnews.com/story/0,2933,351351,00.html> (portraying the mixed emotions felt by society in cases involving child rape).

103. Petition for Writ of Certiorari at 4, *Kennedy v. Louisiana*, 554 U.S. 407 (2008) (No. 07-343), 2007 WL 2688267 at *4.

104. *Id.*

105. *Id.* at *4–5

106. *Id.* at *5.

107. *Id.*

108. Petition for Writ of Certiorari at 5, *Kennedy v. Louisiana*, 554 U.S. 407 (2008) (No. 07-343), 2007 WL 2688267 at *5.

109. *Id.*

110. *Id.*

111. *Id.*

112. *See id.* at *6.

113. Petition for Writ of Certiorari at 6, *Kennedy v. Louisiana*, 554 U.S. 407 (2008) (No. 07-343), 2007 WL 2688267 at *6.

charged with raping his stepdaughter.¹¹⁴ Yet, both the girl and her mother stood by his side.¹¹⁵ On April 7, 1998, Child Protection Services (CPS) removed the girl from her mother's care; its reasoning was that "[M]rs. Kennedy believes the story that her daughter tells her about two strangers dragging her from the garage and raping her on the side of their house."¹¹⁶ CPS workers felt that they "needed to 'protect[] [the victim] from these negative influences' from her mother and described 'treatment' as being necessary because: 'allegations of sexual abuse by step-father; mother is denying abuse; child has alleged other perpetrators, however evidence points to step-father.'"¹¹⁷ The police found no DNA evidence at the scene, on the girl's clothes, or on her person to indicate that Mr. Kennedy was the perpetrator.¹¹⁸ Instead, police were relying on circumstantial evidence, perceived inconsistencies in the girl's version of events, and Mr. Kennedy's actions that did not comport with their expectations of what a person in a similar situation would do—a standard he could not possibly meet given his education and level of intelligence.¹¹⁹

CPS advised Mrs. Kennedy they would return her daughter only when Mrs. Kennedy could "'be objective concerning evidence' of the rape."¹²⁰ The CPS workers encouraged Mrs. Kennedy to tell her daughter that she believed Mr. Kennedy committed the rape.¹²¹ Faced with a prolonged, and perhaps permanent, separation from her daughter, who was already undergoing an extraordinarily traumatic period in her life, Mrs. Kennedy told her daughter that she suspected Mr. Kennedy was the man who had raped her.¹²² She also encouraged the girl to change her account of the rape, saying it would be "okay" to tell people Mr. Kennedy raped her.¹²³ Two and a half months later, CPS returned the young girl to her mother and required both to attend joint counseling supervised by CPS and prosecutors in Mr. Kennedy's case.¹²⁴ Still, the victim did not change her story.¹²⁵ Twenty months after the rape, in December 1999, the young girl finally gave into the pressure, changed her story, and told the state's in-

114. *See id.*

115. *See id.*

116. *Id.*

117. *Id.*

118. Petition for Writ of Certiorari at 6, *Kennedy v. Louisiana*, 554 U.S. 407 (2008) (No. 07-343), 2007 WL 2688267 at *7.

119. *Id.* at *5–7, *4.

120. *Id.* at *6.

121. *Id.*

122. *Id.*

123. Petition for Writ of Certiorari at 6, *Kennedy v. Louisiana*, 554 U.S. 407 (2008) (No. 07-343), 2007 WL 2688267 at *6.

124. *Id.*

125. *See id.*

investigators that Mr. Kennedy was the one who raped her.¹²⁶ She was unable, however, to give specifics, only that it happened in her bed in the early morning and that she fainted soon after the rape.¹²⁷

Jury selection in Mr. Kennedy's trial began on August 8, 2003, and continued from August 11 through August 15.¹²⁸ "The trial court dismissed forty-four potential jurors because 'they would not consider capital punishment either generally or for an offense of aggravated rape.'" ¹²⁹ However, the trial commenced on August 15 once the twelve-member jury was impaneled.¹³⁰ The jury reached a unanimous verdict on August 25, 2003, finding Mr. Kennedy guilty of aggravated rape of a child under the age of 12.¹³¹ On May 22, 2007, the Louisiana Supreme Court affirmed Kennedy's death sentence, rendered by the jury in August 2003 under the authority provided by Louisiana's capital child rape statutes.¹³²

The United States Supreme Court overturned Patrick Kennedy's death sentence as unconstitutional under the Eighth Amendment.¹³³ The Court held that the death penalty is inappropriate for the crime of child rape because the national consensus is against imposing the death penalty

126. *See id.*

127. *Id.* at *7.

128. *Louisiana v. Kennedy*, 957 So. 2d 757, 760 (La. 2007), *rev'd* 554 U.S. 407 (2008) (recounting the case history leading up to the Louisiana Supreme Court's holding). By the time of the trial, more than five years had passed since the rape occurred and nine had passed by the time the case reached the Louisiana Supreme Court. *Id.* Although the Louisiana Supreme Court ultimately affirmed Kennedy's death sentence, it did agree with the defendant that the trial court should have disallowed an adult witness from testifying under a "lustful disposition exception" that she was also raped by the defendant sixteen years before the current incident. *Id.* at 760 n.3. In regard to the victim's statements accusing Kennedy as her rapist, a videotaped interview was admitted into trial in place of face-to-face confrontation. *Id.* at 772. The Sixth Amendment protects a defendant's right to confront his accuser but, as the Court in *Kennedy* determined, "it is not an absolute right." *Id.* Louisiana is not alone in its adoption of special procedures for children testifying in cases of abuse and requires any such testimony to meet strict statutory requirements. *Id.* at 773–74.

129. Petition for Writ of Certiorari at 7, *Kennedy v. Louisiana*, 554 U.S. 407 (2008) (No. 07-343), 2007 WL 2688267 at *7.

130. Compare *Louisiana v. Kennedy*, 957 So. 2d 757, 760 (La. 2007), *rev'd* 554 U.S. 407 (2008), with Petition for Writ of Certiorari at 7, *Kennedy v. Louisiana*, 554 U.S. 407 (2008) (No. 07-343), 2007 WL 2688267 at *7.

131. *Louisiana v. Kennedy*, 957 So. 2d 757, 760 (La. 2007), *rev'd* 554 U.S. 407 (2008).

132. *Id.* at 793 (acknowledging that this was the first time the death penalty was assigned for this crime since the state revised its aggravated rape law). In handing down its decision, the Louisiana Supreme Court stated that the terrible nature of this crime distinguished it from other aggravated rape cases where the death penalty is not utilized or even requested. *Id.*

133. *Kennedy v. Louisiana*, 554 U.S. 407, 413 (2008) (holding that Louisiana's statute allowing for the execution of child-rapists who do not kill the victim violates the Eighth Amendment of the U.S. Constitution).

for that crime, and because evolving standards of decency in a civilized society do not support application of the death penalty in that context.¹³⁴

The national consensus justification, though important, is not dispositive of the Eighth Amendment inquiry,¹³⁵ and is not relevant to the analysis in this Article. The analysis and justification relevant to this Article is the Court's independent judgment of proportionality, including consideration of evolving standards of decency.¹³⁶

IV. PHILOSOPHICAL PRINCIPLES OF PROPORTIONALITY IN CRIMINAL PUNISHMENT

The concept of proportionality rests upon the notion that a criminal should lose his rights to the extent he deprives another of his rights; Immanuel Kant calls it the "Principle of Equality."¹³⁷ This principle requires justice to remain in balance, with the punishment carrying the same weight as the crime for which it is imposed.¹³⁸ Kant writes that to maintain the Principle of Equality, we must view the criminal as having committed the crime against himself, and he must bear punishment accordingly.¹³⁹ This standard, which Kant calls the Right of Retaliation, is the only standard by which a society can ensure that it performs justly.¹⁴⁰

Kant's point is not that letter-perfect equality between crime and punishment is always possible; for example, if imposing a monetary sanction against a wealthy individual for slander, some additional social penalty may be necessary to achieve the balance in light of the injury the slan-

134. *Id.* at 425–26, 438.

135. *Id.* at 438–39.

136. *See id.* at 420 (highlighting the Court's reasoning that capital punishment is not appropriate in cases involving only the brutal sexual assault of a young child). The Court declared that our society respects individual life and that execution must be accordingly restrained. *See id.* at 434–35. It continued by stating that capital punishment is appropriate only when the particular criminal act demands such a violent end. *Id.* at 437–38. The Court then concluded that the death penalty is not applicable to a child-rapist so long as he does not actually kill the child. *Id.* The dissent, on the other hand, claimed that average American citizens agree that certain sexual assaults against children warrant capital punishment. *Id.* at 461 (Alito, J., dissenting).

137. IMMANUEL KANT, *THE PHILOSOPHY OF LAW: AN EXPOSITION OF THE FUNDAMENTAL PRINCIPLES OF JURISPRUDENCE AS THE SCIENCE OF RIGHT* 196 (W. Hastie trans., T. & T. Clark 1887) (1796) (claiming that the principle of equality is the standard by which any theory of punishment must adhere to); *see* WILLIAM SEAGLE, *MEN OF LAW: FROM HAMMURABI TO HOLMES* 27 (1947).

138. *See* IMMANUEL KANT, *THE PHILOSOPHY OF LAW: AN EXPOSITION OF THE FUNDAMENTAL PRINCIPLES OF JURISPRUDENCE AS THE SCIENCE OF RIGHT* 196 (W. Hastie, trans., T. & T. Clark 1887) (1796).

139. *Id.*

140. *See id.* at 196–97.

dered person has borne.¹⁴¹ Kant's point is, however, that society must maintain balance in the effect of crime and punishment, and that imbalance between crime and punishment is never just.¹⁴²

Kant not only presents the Principle of Equality and Right of Retaliation as a just system of invoking punishment for crimes, but also presents it as the *only* just system.¹⁴³ Any other system of imposing punishment, he writes, is too uncertain to achieve justice.¹⁴⁴ The uncertainty in other systems comes from "other considerations involved in them"¹⁴⁵; for example, the subjectivity and inconsistency of a case-by-case system of criminal punishment, the ineffectiveness of a system in which punishment was too light, or the unfairness of a system in which punishment was too severe.

With regard to the death penalty in particular, Kant writes that death is the only just punishment for murder.¹⁴⁶ The negative implication, supported generally by the Principle of Equality and Right of Retaliation theory, is that death is never a just punishment when the crime did not involve the victim's death.¹⁴⁷

V. PROPORTIONALITY OF THE DEATH PENALTY FOR CHILD RAPE

The Court's decision that the death penalty is disproportionate to the crime of child rape, though not stated in terms of Kant's Principle of Equality and Right of Retaliation theory, is demonstrably consistent with it nevertheless. Stated in terms of the Court's Eighth Amendment jurisprudence, however, imposing the death penalty in this context does not further the accepted goals of criminal punishment, and is inappropriate based on the crime's severity.

The death penalty is the ultimate form of punishment, traditionally reserved for only the most serious crimes involving the intentional and unlawful taking of another human life. The Supreme Court has previously

141. *See id.*

142. *Id.* at 197.

143. *See* IMMANUEL KANT, THE PHILOSOPHY OF LAW: AN EXPOSITION OF THE FUNDAMENTAL PRINCIPLES OF JURISPRUDENCE AS THE SCIENCE OF RIGHT 196–97 (W. Hastie, trans., T. & T. Clark 1887) (1796) (stating that these are the only acceptable theories in exacting punishment, so that not only "the pointer of the Scale of Justice is made to incline no more to the one side than the other," but in addition the court "can definitely assign both the quality and the quantity of a just penalty").

144. *Id.*

145. *See id.* (opining that these other systems are inadequate when ascertaining justice because of a lack of any "principle conformable to the sentence of pure and strict justice").

146. *Id.* at 198 (proclaiming that "whoever has committed Murder, must *die*") (emphasis in original)).

147. *See id.*

ruled that capital punishment for the rape of an adult woman is disproportionate and excessive, and therefore, unconstitutional.¹⁴⁸ The *Coker* Court concluded that proportionality is determined according to the nature of the punishment compared to the crime committed and proportionality is only one prong of the test to determine excessiveness.¹⁴⁹ The Court has provided this guidance to the states: “punishment is ‘excessive’ and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime.”¹⁵⁰ Punishing an individual for a violation of criminal law can be justified on a number of philosophical grounds. “The two dominant rationales for a penal law are the desire for retribution and the utilitarian desire to prevent or deter such violations altogether.”¹⁵¹

A. *Acceptable Goals of Punishment*

The penological goals of the death penalty—retribution and deterrence—must be served before executing child rapists. The Supreme Court noted that, unless the death penalty serves the goal of retribution or deterrence, it “is nothing more than the purposeless and needless imposition of pain and suffering,” which would render it an unconstitutional punishment.¹⁵² For retribution to be a legitimate justification for the death penalty, the Court stressed that it must be proportionate to the defendant’s culpability.¹⁵³

148. *Coker v. Georgia*, 433 U.S. 584, 592 (1977).

149. *See id.*

150. *Id.*

151. Michael O’Donovan, Comment, *Criminalizing War: Toward A Justifiable Crime of Aggression*, 30 B.C. INT’L & COMP. L. REV. 507, 524 (2007) (using the theories of retributivism and utilitarianism to suggest a definition for crimes of aggression within the jurisdiction of the World Criminal Court). While crimes of aggression were added to the jurisdiction of the World Criminal Court in 1998, no agreed upon definition was established; such crimes were left in a state of limbo until the 2009 session. *Id.* at 507. O’Donovan suggests a definition that conforms to the two most common theoretical rubrics for defining criminal offenses, using the Kantian ideal of retribution for violating identifiable social norms and the utilitarian ideal of prevention through the punishment of offenses. *See id.* at 530. O’Donovan suggests that promulgation of a definable offense of state aggression would effectively satisfy both philosophical standpoints by creating a definite norm which, when offended, triggers a retributive response, therefore sending the preventative message that states may no longer use aggression as an acceptable form of statecraft. *See id.*

152. *Coker*, 433 U.S. at 592.

153. *Enmund v. Florida*, 458 U.S. 782, 800 (1982) (emphasizing the ancient requirement that the punishment fit the crime—specifically, the party’s intent or “moral guilt”).

Retribution can involve either balancing the wrong done to the victim or expressing the community's moral outrage toward the offense.¹⁵⁴ However, the basic philosophy of retributivists (like Kant) is that justice must be done, without regard to any other community concerns or causes.¹⁵⁵ Another way of describing retribution is that it emphasizes two corresponding requirements: (1) society is under a duty to demand justice, and (2) justice requires that the punishment must be proportional to the crime.¹⁵⁶

But imposing death upon the defendant when he did not cause a death does not do justice, because the punishment is not proportional to the crime; in essence, society takes more than an eye from the offender as punishment for the eye he took from the victim. Further, it has been reasoned that disproportionate penalties may make prosecutors and sentencers reluctant to seek or impose penalties they see as unjust. "[I]f unnecessarily harsh penalties are imposed, they may still undermine the State's effort to deter more serious crimes because criminals may recognize that once they have exposed themselves to a capital punishment, the State has no further power to punish them."¹⁵⁷ Therefore, while some may argue that death for child rape serves a retributive goal of punishment, society does not do justice by imposing a punishment that is more severe than, and thus disproportionate to, the crime committed.

The *Kennedy* majority recognized that Kennedy's victim endured such terrible suffering at such a young age that she has lost her innocence and that her life will never be the same.¹⁵⁸ That is undoubtedly true, but it is not the same as losing her life. To sentence Patrick Kennedy to death for taking away innocence and changing a life puts the scales of justice out of proportion.¹⁵⁹ It puts too much weight on the punishment, given the nature of the crime.

154. *Roper v. Simmons*, 543 U.S. 551, 571 (2005).

155. IMMANUEL KANT, *THE PHILOSOPHY OF LAW: AN EXPOSITION OF THE FUNDAMENTAL PRINCIPLES OF JURISPRUDENCE AS THE SCIENCE OF RIGHT* 198 (W. Hastie, trans., T. & T. Clark 1887) (1796) (adhering to the resoluteness of ensuring punishment is carried out to those who deserve it). This is clear because:

Even if a Civil Society resolved to dissolve itself . . . the last Murderer lying in the prison ought to be executed before the resolution was carried out. This ought to be done in order that every one may realize the desert of his deeds, and that bloodguiltiness may not remain upon the people; for otherwise they might all be regarded as participators in the murder as a public violation of Justice.

Id.

156. Kent Greenawalt, Commentary, *Punishment*, 74 J. CRIM. L. & CRIMINOLOGY 343, 347–48 (1983).

157. *State v. Gardner*, 947 P.2d 630, 651 (Utah 1997).

158. *Kennedy v. Louisiana*, 554 U.S. 407, 435–36 (2008).

159. *Id.*

Urging imposition of the death penalty for Patrick Kennedy, and those similarly situated, equates the rape survivor's suffering with death. Under Kant's Principle of Equality and Right of Retaliation theory, such a view considers the survivor's life over. Treating her as dead discounts the rest of her life. Although the *Kennedy* dissent and other critics of the majority opinion accurately point out the severe and long-reaching effects of such an experience,¹⁶⁰ the profundity and duration of the crime's effects do not justify a disproportionate penalty.

The majority's critics do not account for the support systems and time available to the survivor, along with her own strength, that could help her lead a satisfying and productive life. To say that her life ended after the rape (in Patrick Kennedy's case, when the survivor was eight-years-old) is to say that the survivor cannot and should not expect to lead a worthwhile life. Not to say that we should neglect the deep and lasting effect that a crime of this nature will have on the survivor, but this argument goes further by taking away the possibility of life beyond the tragedy.

Utilitarians hold a different point of view regarding punishment than do retributivists. The utilitarian position states that the justification for punishment "lies in the useful purpose that punishment serves."¹⁶¹ Jeremy Bentham theorized that individuals determine the actions they take upon whether such actions result in pain or pleasure and the primary goal of society is to maximize the total happiness of the community.¹⁶² In other words, punishment imposed upon criminals must serve the "happiness" of society, and the most useful way to promote society's happiness is to deter future crime. Therefore, the question that must be answered is whether executing the child rapist will enhance the community's happiness, justice, or wealth by deterring similar acts in the future. Because it takes many years, and often decades, to carry out,¹⁶³ the death penalty

160. *Id.* at 466–67 (Alito, J., dissenting); Luke Fraser, Note, *Supreme Court Finds An Inexact Consensus to Spare Child Rapists: A Critical Examination of Kennedy v. Louisiana*, 47 HOUS. L. REV. 215, 238–40 (2010) (criticizing the Supreme Court's use of an antiquated view of the effects of rape on the life of the victim in its decision). Fraser argues that, instead of focusing on data and precedent, the Court should have paid more attention to the "broader attitude of society towards child rapists." Luke Fraser, Note, *Supreme Court Finds An Inexact Consensus to Spare Child Rapists: A Critical Examination of Kennedy v. Louisiana*, 47 HOUS. L. REV. 215, 238 (2010). The author suggested the use of public opinion polls, legislative action on similar crimes, and found tougher sentiment towards child rapists. *Id.*

161. Kent Greenawalt, Commentary, *Punishment*, 74 J. CRIM. L. & CRIMINOLOGY 343, 347 (1983).

162. JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 1–2 (Neill H. Alford et al. eds., 1986) (outlining Bentham's theory of Utility).

163. See, e.g., *Free v. Peters*, 50 F.3d 1362,1362 (7th Cir. 1995), *cert. denied*, 514 U.S. 1034 (1995); *McKenzie v. Day*, 57 F.3d 1493,1494 (9th Cir. 1995) (adopting the reasoning of

has only a small deterrent effect, if any at all. Nevertheless, it is unlikely that the child rapist will consider the potential for death as a punishment *before* raping his child victim. Instead, the reality of the death penalty may only be realized after the rape has occurred and, then, it will likely only encourage the offender to rob his victim of his or her life in order to preserve his chances of saving his own.¹⁶⁴

B. *Severity of the Crime and Seriousness of the Offense*

When evaluating the severity of the crime and the seriousness of the offense, the Supreme Court has advised the lower courts to determine proportionality by weighing three factors, which are consistent with the retributivist position: (1) the severity of the penalty;¹⁶⁵ (2) the gravity of the offense;¹⁶⁶ and (3) the blameworthiness of the defendant.¹⁶⁷ Death is the most severe of all punishments. It is irreversible. Only if the gravity of the rape—a crime that harms both the victim and society—and the blameworthiness of the rapist outweigh the severity of death is the death penalty justified.

The number of children who are abused or raped each year is staggering, but appears to have declined from 1993.¹⁶⁸ “Nearly two-thirds of all

Richmond v. Lewis, 948 F.2d 1473, 1492 (9th Cir.1990)) (holding Richmond’s sixteen-year death row incarceration during his appeals process did not violate the Constitution); Thompson v. State, 3 So.3d 1237, 1238 (Fla. 2009) (denying defendant’s claim that his thirty-one year stay on the death row violated the Eighth Amendment); Booker v. State, 969 So.2d 186, 200 (Fla. 2007) (holding defendant’s thirty-year incarceration on death row does not constitute cruel and unusual punishment).

164. Meryl P. Diamond, Note, *Assessing the Constitutionality of Capital Child Rape Statutes*, 73 ST. JOHN’S L. REV. 1159, 1186–87 (1999); see also Dan M. Kahan, *Between Economics and Sociology: The New Path of Deterrence*, 95 MICH. L. REV. 2477, 2490 (1997) (arguing that even life imprisonment as a penalty for rape is a sentence that will incentivize the rapist to kill his victim).

165. See *Woodson v. North Carolina*, 428 U.S. 280, 303–04 (1976) (finding relevance in the death penalty being “a punishment different from all other sanctions in kind rather than degree” (citation omitted)).

166. See *Coker v. Georgia*, 433 U.S. 584, 598–99 (1977) (comparing the injury and the moral depravity of rape with the injury and moral depravity resulting from the unjustified taking of a human life).

167. See *Enmund v. Florida*, 458 U.S. 782, 798 (1982) (requiring an individual consideration of each particular defendant’s culpability). When the death penalty can potentially be imposed, individualized consideration is a constitutional requirement. *Id.*

168. ANDREA J. SEDLAK ET AL., U.S. DEP’T OF HEALTH & HUMAN SERVS., *FOURTH NATIONAL INCIDENCE STUDY OF CHILD ABUSE AND NEGLECT (NIS-4): REPORT TO CONGRESS, EXECUTIVE SUMMARY 6* (2010), http://www.acf.hhs.gov/programs/opre/abuse_neglect/natl_incident/nis4_report_exec_summ_pdf_jan2010.pdf (showing a marked decrease in child sexual abuse).

forcible rapes occurred during childhood and adolescence;”¹⁶⁹ the National Center on Child Abuse estimates more than 135,000 cases of child sexual abuse occurred between 2005 and 2006.¹⁷⁰ Yale Glazer acknowledged that “[l]ong-term follow-up studies with child sexual abuse victims convinced researchers that sexual abuse was ‘grossly intrusive in the lives of children and is harmful to their normal psychological, emotional, and sexual development in ways which no just or humane society can tolerate.’”¹⁷¹ She also noted that while “it is ‘well known that child sexual abuse leaves lasting scars that often carry from [one] generation to the next,’ the extent of the injuries is ‘often incapable of precise determination.’”¹⁷² Glazer elaborates: “[g]uilt, poor self-esteem, feelings of inferiority, increased suicide attempts, and self-destructive behaviors also accompany incidents of rape and child abuse.”¹⁷³ Rape is undoubtedly traumatic for a child, but it also has a devastating effect on society.

The threat of rape causes fear to pervade society. Glazer asserts “[t]he fear of rape is extremely high among women; women between ages nineteen to thirty-five fear being raped almost twice as much as being murdered.”¹⁷⁴ Society at large also experiences many problems because of rape. “A strong correlation has also been discovered between child sexual abuse and interpersonal problems, delinquency, substance abuse, and adult psychiatric illness.”¹⁷⁵ Furthermore, studies have revealed “a correlation exists between child sexual abuse, child physical abuse, and victim-turned sex offenders.”¹⁷⁶ Finally, it can be expected that rape disrupts the family unit when, as in a majority of cases, the sexual abuse is

169. Donald Dripps et al., *Men, Women and Rape*, 63 *FORDHAM L. REV.* 125, 136 (1994) (footnote omitted).

170. ANDREA J. SEDLAK ET AL., U.S. DEP’T OF HEALTH & HUMAN SERVS., *FOURTH NATIONAL INCIDENCE STUDY OF CHILD ABUSE AND NEGLECT (NIS-4): REPORT TO CONGRESS, EXECUTIVE SUMMARY 5* (2010).

171. Yale Glazer, *Child Rapists Beware! The Death Penalty and Louisiana’s Amended Aggravated Rape Statute*, 25 *AM. J. CRIM. L.* 79, 87 (1997) (quoting CHRISTOPHER BAGLEY & KATHLEEN KING, *CHILD SEXUAL ABUSE: THE SEARCH FOR HEALING 2* (1990)) (advocating for imposition of the death penalty in instances of rape of a child under the age of twelve).

172. *Id.* (quoting *State v. Brown*, 660 So. 2d 123, 125 (La. Ct. App. 1995) (per curiam)) (indicating behavioral problems that result from rape continue after the physical damage has subsided).

173. *Id.* at 88; see CHRISTOPHER BAGLEY & KATHLEEN KING, *CHILD SEXUAL ABUSE: THE SEARCH FOR HEALING 2* (1990).

174. Yale Glazer, *Child Rapists Beware! The Death Penalty and Louisiana’s Amended Aggravated Rape Statute*, 25 *AM. J. CRIM. L.* 79, 89 (1997).

175. *Id.*

176. *Id.*

inflicted upon the child by a close friend or family member.¹⁷⁷ “In intramarital sexual abuse cases, families are often torn apart as a result of the sexual abuse of a child,” and consequently, many social problems follow after such a traumatic destruction of the family unit.¹⁷⁸

Despite the physical, emotional, and psychological trauma suffered by victims of child rape, death is not a proportionate punishment. Rape is certainly a severe crime that causes a great degree of harm; the *Coker* Court noted that “[r]ape is very often accompanied by physical injury to the female and can also inflict mental and psychological damage. Because it undermines the community’s sense of security, there is public injury as well.”¹⁷⁹ The damage child rape inflicts on person and society is at least as great as that inflicted by rape generally, and arguably greater. However, despite the damage caused by rape, the *Coker* Court was clear in its holding that only the taking of a life is eligible for the ultimate, irreversible punishment of death.¹⁸⁰ By the same token, although the damage child rape causes may be greater than that seen with rape generally, the harm is still not an ultimate, irreversible harm. Kant’s Principle of Equality and Right of Retaliation theory would, therefore, not support imposition of the death penalty because the punishment would be out of balance with the crime.¹⁸¹

VI. EVOLVING STANDARDS OF DECENCY?

Justice Oliver Wendell Holmes wrote “[t]he first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community, whether right or wrong.”¹⁸² Perhaps this notion had some influence on the *Trop* Court when it decided that punishment under the Eighth Amendment must conform to “evolving standards of decency.”¹⁸³ In *Kennedy*, the holding rested, in large part, upon the same premises articulated in *Trop*¹⁸⁴ and *Coker*,¹⁸⁵ not solely on the

177. See Victor I. Vieth, *Unto the Third Generation: A Call to End Child Abuse in the United States Within 120 Years (Revised and Expanded)*, 28 *HAMLIN J. PUB. L. & POL’Y (SPECIAL ISSUE)* 1, 53–55 (2006).

178. Yale Glazer, *Child Rapists Beware! The Death Penalty and Louisiana’s Amended Aggravated Rape Statute*, 25 *AM. J. CRIM. L.* 79, 89 (1997).

179. *Coker v. Georgia*, 433 U.S. 584, 597–98 (1977) (footnote omitted).

180. See *id.* at 598.

181. IMMANUEL KANT, *THE PHILOSOPHY OF LAW: AN EXPOSITION OF THE FUNDAMENTAL PRINCIPLES OF JURISPRUDENCE AS THE SCIENCE OF RIGHT* 198 (W. Hastie, trans., T. & T. Clark 1887) (1796).

182. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 41 (1881).

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

184. See *id.* at 101 (recognizing that the Court’s determination as to the constitutionality of a punishment under Eighth Amendment analysis is informed by “evolving standards of decency”).

“national consensus” basis, as argued by critics.¹⁸⁶ First, the Court held that “there is a social consensus against the death penalty for the crime of child rape;” and, second, the Court held the penalty was *disproportionate* based on the Court’s own independent judgment.¹⁸⁷ To determine this second prong, the Court considered whether the punishment at issue comported with “evolving standards of decency.”¹⁸⁸

Under the evolving standards of decency analysis, unconstitutional practices do not generally become constitutional as time progresses, but currently constitutional practices may approach unconstitutionality as society’s standards of decency evolve.¹⁸⁹ Contemporary community sentiment and decency should not necessarily dictate punishment and the Court must tread lightly when looking to such standards when it holds life in its hands.

Following the Kantian notions of justice, the *Kennedy* Court, like the *Coker* Court, seemed to acknowledge that community sentiment can be fleeting, and we should be extremely hesitant to let such sentiment contribute to an irreversible, permanent punishment.¹⁹⁰ Further, we should not allow for a human life to be taken simply as a salve for a community’s anger.¹⁹¹ Individuals should be punished based on the crimes they actually commit—not on the crimes as the public sees them or on the outrage that the public may justifiably express at the result of the crime.¹⁹² “[T]he sentence of the law is to the moral sentiment of the public in rela-

185. *Coker*, 433 U.S. at 597 (noting that evolving standards of decency—referred to as “recent events,” such as legislative acts and jury sentences—strongly confirmed the Court’s own independent judgment with regard to proportionality).

186. See generally *Kennedy v. Louisiana*, 554 U.S. 407 (2008).

187. *Id.* at 433, 438–39.

188. *Id.* at 433, 419–21.

189. See Transcript of Oral Argument at 10, *Atkins v. Virginia*, 536 U.S. 304 (2002) (No. 00-8452), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/00-8452.pdf (noting that the Eighth Amendment is a “one-way ratchet”). For instance, once society has come to a consensus that execution of mentally disabled persons is unconstitutional, there can never be new legislation that sanctions the execution of mentally disabled individuals. *Id.* at 9.

190. See *Kennedy*, 554 U.S. at 420.

191. See IMMANUEL KANT, *THE PHILOSOPHY OF LAW: AN EXPOSITION OF THE FUNDAMENTAL PRINCIPLES OF JURISPRUDENCE AS THE SCIENCE OF RIGHT* 194–98 (W. Hastie trans., T. & T. Clark 1887) (1796); see also *Kennedy*, 554 U.S. at 433, 420 (noting the risks associated with retributive justice: “When the law punishes by death, it risks its own sudden descent into brutality.”).

192. IMMANUEL KANT, *THE PHILOSOPHY OF LAW: AN EXPOSITION OF THE FUNDAMENTAL PRINCIPLES OF JURISPRUDENCE AS THE SCIENCE OF RIGHT* 194–98 (W. Hastie trans., T. & T. Clark 1887) (1796). “Juridical punishment can never be administered merely as a means for promoting another good either with regard to the criminal himself or to civil society . . .” *Id.* Immanuel Kant advocated for the principle that a human being should never be used to satisfy someone else’s purpose. See *id.*

tion to any offen[se] what a seal is to hot wax. It converts into a permanent final judgment what might otherwise be a transient sentiment.”¹⁹³

There is also a danger of randomness associated with applying the death penalty based upon community and victim judgments. Some victims’ families and communities may oppose the death penalty or may be more willing to accept the quick finality of a defendant’s guilty plea. Other families and communities, however, may insist that prosecutors go to trial and pursue the death penalty at all costs. Some defendants, willing to enter a plea agreement with the state, will be punished less severely than those exercising their constitutional right to a trial by a jury of their peers. As a result, one defendant may receive life in prison while another is executed after committing a virtually identical, perhaps even more brutal, crime.

Understandably, society is generally outraged when a child is sexually violated by an adult, and even more so, disgusted when it is discovered that the adult is a father, mother, or trusted family member or friend. However, despite the outrage and disgust over such crimes, a decent and mature society must recognize that utilizing capital punishment for such crimes does not necessarily deter offenders from committing them or protect children from being victimized. Instead, it may place children in greater danger, discourage them from reporting their victimization, subject them to additional emotional trauma, and strain state resources that could be used in other, more beneficial, ways.¹⁹⁴

A. *Capital Child Rape Statutes Do Not Protect Child Victims From Possible Death at the Hand of the Rapist*

Our country’s attention is constantly drawn to the sexual abuse of children; the most heinous and conscience-shocking cases are broadcast by the media to a nationwide audience. Some states have reacted by enacting capital child rape statutes to protect children from sexual predators. The Louisiana Supreme Court distinguished capital punishment for the rape of a child from the rape of an adult woman, possibly to bypass the Supreme Court’s *Coker* decision, by finding that the legislature passed the statute under the notion that “rape becomes much more detestable when the victim is a child [s]ince children cannot protect themselves,

193. JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 80–82 (1883), reprinted in JOSHUA DRESSLER, CASES AND MATERIALS ON CRIMINAL LAW, 41 (3d ed. 2003).

194. See generally Victor I. Vieth, *Unto the Third Generation: A Call to End Child Abuse in the United States Within 120 Years (Revised and Expanded)*, 28 HAMLINE J. PUB. L. & POL’Y (SPECIAL ISSUE) 1 (2006) (detailing a plan to “end child abuse in the United States within three generations”).

the State is given the responsibility to protect them.”¹⁹⁵ Carl Babin, a Louisiana criminal defense attorney, testified before the House of Representatives of the Louisiana State Legislature on behalf of the Louisiana Association of Criminal Defense Lawyers and tried to counter this position before the law passed.¹⁹⁶ He attempted to explain to the Committee that a person committing a rape, when exposed to the potential punishment of death, will have no incentive *not* to kill his victim, if the death penalty awaits him either way.¹⁹⁷ Under capital child rape statutes, a rapist who murders his victim, after raping the victim, is eligible for no greater punishment than if he only rapes the victim and allows him or her to survive the crime. If death is the ultimate punishment, then it seems there is no incentive for child rapists subject to the death penalty to eliminate the best, if not the only, witness to the crime.¹⁹⁸ Although there is no way to measure whether a more severe penalty creates an incentive for rapists to murder their victims in an attempt to reduce the likelihood of being caught, the notion is supported by analogous penalties.

For instance, it is possible to draw a comparison between the potential for violence of those offenders facing mandatory life imprisonment under California’s three strikes laws¹⁹⁹ and the potential for rapists to murder their victims if subject to death.²⁰⁰ The “three strikes” laws are designed to enhance the penalty for a third-time felony offender and have created the potential for “violent attacks on police officers and potential witnesses by a criminal class that would otherwise be unlikely to commit acts of violence.”²⁰¹ In addition, there is fear “that a person facing a mandatory life sentence will be far more likely to resist arrest, to kill witnesses or to attempt a prison escape.”²⁰² Accordingly, if individuals with

195. *State v. Wilson*, 685 So. 2d 1063, 1066–67 (La. 1996).

196. Committee Notes, Administration of Criminal Justice, Debate on House Bill 55, April 19, 1995, Louisiana State Legislature.

197. *Id.*

198. “The rapist may feel he is better off killing the child, therefore ridding himself of the prime witness against him and perhaps escaping detection as the perpetrator of the crime.” Meryl P. Diamond, Note, *Assessing the Constitutionality of Capital Child Rape Statutes*, 73 ST. JOHN’S L. REV. 1159, 1186 (1999); see also Dan M. Kahan, *Between Economics and Sociology: The New Path of Deterrence*, 95 MICH. L. REV. 2477, 2490 (1997) (arguing that even life imprisonment as a penalty for rape is a sentence that will incentivize the rapist to kill his victim).

199. See CAL. PENAL CODE § 667(e)(2)(A) (West 2007).

200. Nkechi Taifa, Symposium, “*Three-Strikes-and-You’re-Out*”—*Mandatory Life Imprisonment for Third Time Felonies*, 20 U. DAYTON L. REV. 717, 724 (1995).

201. Keith C. Owens, Comment, *California’s “Three Strikes” Debacle: A Volatile Mixture of Fear, Vengeance, and Demagoguery Will Unravel the Criminal Justice System and Bring California to Its Knees*, 25 SW. U. L. REV. 129, 157 (1995) (footnote omitted).

202. Nkechi Taifa, “*Three-Strikes-and-You’re-Out*”—*Mandatory Life Imprisonment for Third Time Felonies*, 20 U. DAYTON L. REV. 717, 724 (1995).

two felony convictions are willing to resist arrest, fire shots at police, and kill witnesses, it can also be logically argued that a child rapist in Louisiana would consider killing the victim to avoid the possibility of facing the death penalty, with a witness to corroborate the attack.

Nevertheless, it could be argued child rapists would not murder or seriously injure a child since a majority of these offenses are perpetrated by family members or close friends.²⁰³ Still, scholars have theorized the possibility that perpetrators of rape against children have incentive to murder their victims, and one research study has measured that approximately 10% of child sexual assault has resulted in the murder of the youth victim.²⁰⁴ Statistically it seems that many rapists have no reservations about killing their child victim in the present environment. If the Supreme Court allows capital punishment for child rape, it will be effectively increasing the rapist's incentive to kill.

B. *Capital Punishment May Result in an Increased Unwillingness of Child Victims to Report the Crime(s)*

Family members or friends are often the perpetrators of sexual abuse among children.²⁰⁵ Reports show that family members or acquaintances and friends accounted for a significant majority of child rape.²⁰⁶ The crimes are typically under-reported because victims and innocent family members are concerned about the legal, financial, and emotional consequences of coming forward.²⁰⁷ “A common dynamic of incestuous families is [the] child victims’ hesitancy to divulge the sexual abuse because of their fears of ‘dire consequences to themselves, the abuser or the rest of the family should they disclose the abuse.’”²⁰⁸ “The possibility of the death sentence ‘create[s] an intolerable dilemma for the many children raped by family members or close family friends—to report the crime and

203. See Robert T. Mertens, *Child Sexual Abuse in California: Legislative and Judicial Responses*, 15 GOLDEN GATE U. L. REV. 437, 449 (1985) (arguing that because of personal relationships with their victim, the abuser will draw a line between rape and murder that he will not cross).

204. LAWRENCE A. GREENFELD, BUREAU OF JUSTICE STATISTICS, SEX OFFENSES AND OFFENDERS: AN ANALYSIS OF DATA ON RAPE AND SEXUAL ASSAULT vi (Feb. 1997).

205. Robert T. Mertens, *Child Sexual Abuse in California: Legislative and Judicial Responses*, 15 GOLDEN GATE U. L. REV. 437, 441 (1985).

206. CHILD WELFARE INFORMATION GATEWAY, CHILD ABUSE AND NEGLECT FATALITIES: STATISTICS AND INTERVENTIONS (2010), <http://www.childwelfare.gov/pubs/factsheets/fatality.cfm#perps> (“In 2008, parents, acting alone or with another person, were responsible for 71.0 percent of child abuse or neglect fatalities.”).

207. Charles R. Petrof, *Protecting the Anonymity of Child Sexual Assault Victims*, 40 WAYNE L. REV. 1677, 1691 (1994).

208. DOUGLASS J. BESHAROV, RECOGNIZING CHILD ABUSE: A GUIDE FOR THE CONCERNED 18 (1990).

face the possibility that Daddy or uncle or brother will be put to death, or to continue to endure their pain in silence.’”²⁰⁹ In the amicus brief submitted to the *Kennedy* court, it was noted that a dilemma is also created for the mother of the abused child, “too many [of whom] already turn a blind eye to the horrifying reality of their daughters being raped because of the potential consequences to their husbands, their daughters, and their families.”²¹⁰ It is entirely possible the child rapist can use his potential death sentence to frighten the child and keep him or her from reporting the rape to another adult. This leads to the conclusion that sanctioning use of the death penalty for the rape of a child will further diminish the child’s willingness to report the rape and allow the child rapist to remain at-large and free to rape again. Accordingly, in a society where many children are already reluctant to reveal sexual abuse,²¹¹ particularly if the abuse involves an ongoing relationship with family members, the death penalty for the rape of a child should not be permitted because the potential for further discouragement of reporting subjects these children to continuous harm and exploitation.

C. *Exposing the Child to a Capital Trial May Also Discourage Reporting and Prevent the Healing Process From Progressing*

Another issue that must be considered is that, not only has the child-victim suffered the physical and psychological trauma of the rape itself, but the child must endure the subsequent trial.²¹² Sexual abuse cases are some of the most difficult cases to try and often, the child who has been

209. Yale Glazer, *Child Rapists Beware! The Death Penalty and Louisiana’s Amended Aggravated Rape Statute*, 25 AM. J. CRIM. L. 79, 112 (1997) (footnote omitted).

210. Brief of the Nat’l Ass’n of Soc. Workers et al. as Amici Curiae Supporting Petitioner at 11, *Kennedy v. State of Louisiana*, 554 U.S. 407 (2008) (No. 07-343) (citing works that list incentives to not report the abuse). Mothers of abuse victims may also fear possible destitution, family disintegration, and/or the possibility of increased violence, and consequently not disclose the abuse. *Id.*

211. The actual number of abused children is unknown because countless cases of child abuse go unreported. See BARBARA TATEM KELLEY ET AL., U.S. DEP’T OF JUSTICE—OFFICE OF JUV. JUST. AND DELINQUENCY PREVENTION, *JUVENILE JUSTICE BULLETIN: IN THE WAKE OF CHILDHOOD MALTREATMENT 1* (1997) (explaining the results of a research study that focused on the correlation between childhood maltreatment and adolescent delinquency).

212. See Charles R. Petrof, *Protecting the Anonymity of Child Sexual Assault Victims*, 40 WAYNE L. REV. 1677, 1687 (1994) (arguing that preserving the “anonymity of child sexual assault victims” is a compelling state interest that helps the child victim recover and encourages the child victim’s testimony). One study found sexually assaulted child victims who testify face a protracted healing period compared to child victims who did not testify. *Id.* Because children frequently testify in sexual assault cases, such situations demand special attention. *Id.* Furthermore, because of the sensitive situation, social reactions upon discovery of the child’s victimization can have substantial effects on the psychological

raped is the prosecution's key witness.²¹³ In sexual abuse and child rape trials, the child victim who testifies is often attacked by the defense, accused of fabricating their story of abuse.²¹⁴ It can be argued that because these capital rape statutes involve the death penalty, the child's trauma from the assault is exacerbated by the notion that his or her testimony could result in the death of the person who harmed him or her. Death penalty trials are often long and difficult and, consequently, if children become involved in the judicial process, the horrible experience they have gone through will become even more psychologically traumatizing.²¹⁵ Subjecting a child to a capital trial seemingly precludes a less complicated healing process for the child and would subject the child to more pain.²¹⁶ As important as it is to protect children from child rapists, it is equally important to protect them from any further emotional trauma.

It is questionable whether allowing the death penalty for child rape cases will actually protect the children. As discussed above, the enormity of death penalty litigation is an ordeal that could further traumatize already emotionally fragile child victims. Further, if the rapist does not kill the child to protect himself from being caught or convicted, those perpetrators who are friends or relatives of the victim may use the possibility of death to dissuade the children from reporting sexual abuse thereby subjecting the child to continued abuse. The Supreme Court must carefully consider all of these issues before allowing states to "protect" children with capital rape legislation.

trauma. *Id.* For example, indifference, a generally benign reception to a situation, can result in further psychological trauma when the child has been sexually abused. *Id.*

213. Robert T. Mertens, *Child Sexual Abuse in California: Legislative and Judicial Responses*, 15 *GOLDEN GATE U. L. REV.* 437 (1985).

214. See Debra Whitcomb et al., *The Emotional Effects of Testifying on Sexually Abused Children*, Nat'l Inst. of Justice: Research in Brief (April 1994) (discussing three studies that focused on the effects on sexually abused children testifying at trial).

215. G. Russell Nuce, Comment, *Child Sexual Abuse: A New Decade for Protection of Our Children?*, 39 *EMORY L.J.* 581, 608 (1990). Testifying against a family member can be traumatic to the victim and has been referred to as "system-induced trauma." *Id.* Conversely, there are people who believe confronting their abuser will be "cathartic" for the victim and will provide them the opportunity to assist in the prosecution of their abuser. *Id.* at 609.

216. *Id.* "Of those victims who testified, 73% were found to have significant behavioral problems after their exposure to the criminal justice system." *Id.* (footnote omitted). As the mother of a seven-year-old child who was kidnapped and murdered said, "[t]he death penalty causes family members more pain than other sentences. The continuous sequence of courtroom scenes inherent in death penalty cases only serve to keep emotional wounds raw and in pain for years." JESSE JACKSON & JESSE JACKSON, JR., *LEGAL LYNCHING: RACE, INJUSTICE AND THE DEATH PENALTY* 57-58 (1996).

VII. CONCLUSION

The *Kennedy* Court has reinforced the principle that “[t]he [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”²¹⁷ The Court employed its independent judgment undergirded by its prior decisions in *Trop* and *Coker* to reach its holding in *Kennedy*. Far from being arbitrary as critics argue, the Court’s holding in *Kennedy* rests on the same foundations of freedom from torture and other cruel and excessive punishments which have always informed our Eighth Amendment jurisprudence. It is clear from the Supreme Court’s Eighth Amendment jurisprudence that the death penalty, as applied to child rapists, is excessive and, while it may serve a retributive function, it will not likely deter child rapists and may even encourage them to kill their victims to conceal their acts. Further, this Article has illustrated that a decent and maturing society cannot support capital child rape sentencing schemes because of the potential harm to children such sentencing schemes could cause. The potential for the death penalty being imposed upon the sexual predator may result in children becoming more reluctant to report sexual assaults and place them in danger of being continuing victims of the predator. Therefore, the Supreme Court’s decision in *Kennedy* served two societal goals. It preserved the status quo which prohibited the use of disproportionate punishment on wrongdoers. And, more importantly, it prohibited the imposition of the death penalty upon child rapists in order to better protect the safety and welfare of our children.

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