

Death to Rapists: A Comment on *Kennedy v. Louisiana*

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No matter how much life-long physical damage a man inflicts while raping a three-year old little girl, no matter how ritualistically he tortures her over hours or days, no matter how delicious he finds her sobbing agony and how coolly indifferent he is to her desperate need for subsequent care, no matter whether he has stolen her away from all she knows and kept her naked, starved, and terrorized in a pitch dark hole in the ground, no matter how many victims he has similarly brutalized or how often he repeats his cruelty with the same terrorized victim, so long as she survives the torment, he has a constitutional right to live out his natural life free of the threat that death will be visited upon him in punishment. In its rawest form, this is the Supreme Court's holding in *Kennedy v. Louisiana*.¹ And the more raw it becomes as one contemplates the fiendish ways in which people can hurt others—particularly those who are vulnerable and helpless—in ways that leave them a hair's breadth from death. What could possibly make sense of continuing to permit the imposition of the death penalty, while prohibiting it for “crimes against individuals” that do not result in death?² This is the justificatory task that burdens Justice Kennedy and the majority of the Court in the lengthy and sure-to-be landmark opinion that resolves thirty years of confusion over whether the Court's prohibition of the death penalty in cases of adult rape (announced in its 1977 decision in *Coker v. Georgia*³) extends to cases of child rape.

I cannot say whether the Court was right or wrong in its final judgment that only the loss of a life justifies the taking of a life. But I must be frank in saying that I find the Court's justification for its judgment to be disappointing. Perhaps I was hoping for the impossible. Perhaps I was hoping that in reaching the judgment it reached, the Court would find philosophical resources undiscovered or untapped by moral, political, and legal theorists, resources that would allow it to construct a

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¹ *Kennedy v. Louisiana*, 128 S. Ct. 2641 (2008).

² Oddly, the Court draws a distinction between “crimes against individuals” and criminal “offenses against the State” (despite there being a long scholarly history of explaining the distinction between criminal and civil wrongs, generally, in terms of the former being wrongs “against the State,” leaving one wondering how the Court would now characterize the criminal/civil distinction). *Id.* at 2659. The Court thus exempts from the scope of its holding the eligibility of capital punishment for “crimes defining and punishing treason, espionage, terrorism, and drug kingpin activity.” *Id.*

³ *Coker v. Georgia*, 433 U.S. 584 (1977).

convincing case for the claim that the penalty of death is morally disproportionate to any crime or set of crimes that does not cause death. And had the Court come out the other way, I would surely have hoped for the same in reverse—for a compelling argument, on the merits, for why some deeds that do not cause death are nevertheless so devilish as to make death a morally fitting (and, therefore, legally available) response. But inasmuch as the Court cannot be expected to crack moral mysteries as old as moral blame and praise itself, I should not have hoped for as much as this.

Still, I am convinced that the Court could have done better than it did. For the Court begins its substantive analysis of the constitutionality of capitalizing rape by engaging in a tedious exercise in legal bean counting, all in an effort to establish that there is a national consensus against employing the death penalty in response to child rape. Without morally motivating this tiresome task (except in the most glib of ways discussed below), it arithmetically tabulates such things as how many jurisdictions have capitalized child rape, how many have not, how many have proposed to do so, how many have reversed course on doing so, how many have executed child rapists, how many would do so if capitalizing child rape were plainly declared to be constitutional, and so on. And past the point at which the exasperated reader would have the Court stop recounting what others think and instead reveal what it thinks, the Court articulates a disorganized, sometimes redundant, sometimes conflicting, hodgepodge of pedestrian arguments in an effort to advance an independently persuasive justification for why it joins in the discovered consensus that the death penalty cannot be justified for a crime that has not resulted in death.

Inasmuch as I am not prepared to dispute the Court's ultimate conclusion that the state ought not to visit death on those who do not cause it, the most I can offer to those seeking a greater appreciation of the Court's analysis is an enquiry into the theoretical assumptions that would make best sense of the Court's various empirical, moral, and procedural preoccupations within its opinion. By asking whether the Court's relatively low-level arguments respond to higher-level claims about the demands of morality on citizens and officials and the function of the criminal justice system, it may be possible to attribute to the Court a theory of punishment that can make sense of its willingness to confine its death penalty jurisprudence to crimes that result in death. (But as I conclude, I doubt it.)

Let me begin by asking whether what I have called the Court's "bean counting" can be given a moral motivation that elevates its justificatory relevance. The Court itself explains the significance of its survey of jurisdictional approaches to the punishment of child rape by invoking the mantra that the Eighth Amendment's proscription of "excessive" and "cruel and unusual punishments" must be interpreted in light of "the evolving standards of decency that mark the progress of a maturing society."⁴ As Justice Kennedy repeats, "the standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral

⁴ *Kennedy*, 128 S. Ct. at 2642 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change.”⁵

But what does it mean to say that the Eighth Amendment must be interpreted in light of society’s basic mores? What kind of a claim is this?—a meta-ethical one?—a first-order moral one?—a political one?—an evidentiary one? I can think of a number of ways to make sense of this claim that the mores of society fix, or help to fix, the extension of the Constitution’s terms, but none of them make good sense of how the Court drafts its opinion or ultimately argues for the unconstitutionality of capital punishment in cases of child rape.

First and most obviously, the Court might implicitly embrace a version of moral relativism, equating what is moral with what society believes is moral. On such a view, one must necessarily seek the opinion of the community on any legal question that requires a moral judgment, for the community’s attitude is dispositive of the moral issue on which the legal question turns. Skepticism about the objectivity of moral judgments has characterized the jurisprudence of prominent members of the Supreme Court for a century. Apparently persuaded by Oliver Wendell Holmes’ insistence that, on pain of being “a brooding omnipresence in the sky,”⁶ morality must be only the “instinctive preferences and inarticulate convictions”⁷ of a society, such justices have sought to substitute armchair empiricism about public opinion for moral theorizing. Such a substitution has the advantage of converting moral judgments into sociological enquiries that help to insulate the Court against charges of judicial activism. But if the conviction that moral answers reside in the beliefs of society best explains why the Court in *Kennedy* began its opinion with a fastidious tabulation of evidence of those beliefs, it becomes hard to make sense of why it then went on to write Part IV of its opinion—the Part that outlines the Court’s own views about the acceptability of the death penalty in cases of child rape.

One might, of course, believe that the Court was simply applying a formula that has become rote in Eighth Amendment cases, attaching its kitchen sink of arguments in Part IV to its legal bean counting in Part III as a means of having something to say for itself beyond what it extracted from legislative evidence of public opinion. But what one really suspects is that rather than letting the national consensus that the Court distilled in Part III do the heavy moral lifting, the exact opposite is the case: namely, the Court counted its legal beans (distinguishing and dismissing some) in an effort to “discover” a national consensus that matched its own independent judgment of the moral legitimacy of capitalizing child rape (and other crimes that do not result in death). For if the Court genuinely thought that community sentiment fixed the extension of the Eighth Amendment’s prohibitions, it would surely have been less dismissive of the claims made by the state of

⁵ *Id.* at 2649 (quoting *Furman v. Georgia*, 408 U.S. 238, 382 (1972)).

⁶ *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917).

⁷ O.W. HOLMES, *THE COMMON LAW* 32 (Mark DeWolfe Howe ed., The Belknap Press of Harvard University Press 1963) (1881).

Louisiana and its *amici* that a number of jurisdictions might have capitalized child rape in recent years had not the ambiguity of *Coker's* reach made lawmakers wary of the constitutionality of so doing. And the Court would seemingly have been considerably more interested both in the fact that legislation capitalizing child rape was pending in a number of jurisdictions at the time that it granted certiorari in *Kennedy*, and in the possibility that such legislation subsequently stalled not because of community doubt about its moral legitimacy, but because of legislative doubt about its constitutionality—doubt engendered by the Court itself.⁸

So if the Court cannot be assigned the meta-ethical view that the morality of a practice is fully determined by society's views about it, we are returned to the question of why the Court's legal bean counting is of moral relevance. A second explanation would attribute to the Court a first-order ethical view—one that takes the preferences of the community as the touchstone of right action, not because the community believes that its preferences should carry the day, but because, as a matter of objective morality, those preferences should do so. Preference utilitarians, for example, are not moral relativists, for they do not take preferences to govern the morality of practices only if the majority of society believes that they should; rather, they take it to be objectively true that morality demands that the good be maximized, and they unpack what is good in terms of people's preferences. Were we to attribute to the Supreme Court an allegiance to a brand of preference utilitarianism, we might make sense of why it has so preoccupied itself with determining the community's consensus on the question of the legitimate scope of capital punishment.

As I shall make clear in the course of this Comment, there is a significant utilitarian stripe that cuts through the Court's opinion. But again, if the relevance of the Court's enquiry into the views of the public derived from its implicit embrace of anything like a pure form of preference utilitarianism, the Court would have considered the moral legitimacy of capitalizing child rape to have been exhausted at the close of Part III of its opinion, for it would have found no meaningful enquiry to be had beyond that of determining society's punitive preferences. Moreover, were a court persuaded that majority sentiment ought to decide moral questions of the sort at stake in *Kennedy*, it would surely have difficulty making any sense of its own judicial review, for nothing tabulates preferences better than democratic political institutions and free markets. Its best

⁸ Of course, the real problem with assigning to the Court a commitment to moral relativism is not that it would effectively make the writing of Part IV a puzzle; it is that its moral reliance on Part III would make its opinion thoroughly indefensible. For in its absolutist insistence that nothing in morality is absolute, relativism is conceptually indefensible; and in its reduction of moral claims to mere autobiographical descriptions, relativism fails to capture the universal experience that in condemning a practice as unjust, one is doing more than the conceptual equivalent of reporting whether one likes one's lunch. For a lengthy treatment of the historical role of relativism in American jurisprudence and the numerous grounds upon which relativism philosophically founders, see Heidi M. Hurd, *Relativistic Jurisprudence: Skepticism Founded on Confusion*, 61 S. Cal. L. Rev. 1417 (1988).

means of effecting laws that match societal preferences would surely have been to let states have their way on the issue of capitalizing child rape, as on other issues of moral importance. That the Court went on to other arguments against imposing death on those who have not killed suggests either that it does not take the community's sentiments to be exhaustive of morality's concerns or it considers itself to be a better barometer of societal sentiments than are legislators and the enactments that they pass.

A third explanation for the Court's enquiry into how far the "evolving standards of decency" have evolved rests on claims about majority rights, rather than on claims about majority preferences. On this account, the Court's concern for society's attitudes is not a product of the view that morality is relative to those attitudes, and it is not a response to the notion that, as an objective matter, morality makes right whatever will maximize society's preferences. Rather, the Court's search for consensus is a function of believing that citizens have a right, grounded in the value of autonomy, to govern themselves as they see fit. Inasmuch as valuing democracy entails valuing the ability of the majority to resolve moral quandaries according to its own views, even when those may be (gravely) in error, a court that is obligated to respect democracy and the checks that it places on "judicial lawmaking" is obligated to take seriously the sentiments of the majority when resolving a contentious question. The Court may thus have sought out the legislative trajectory on the use of capital punishment in cases of child rape as a result of a commitment to majoritarianism and the political mechanisms of democracy and the separation of powers upon which it depends.

But if this was the Court's motivation for its careful tabulation of jurisdictional experiments with the capitalization of child rape, the Court would have to have an answer to John Hart Ely's enduring insistence that "as between courts and legislatures, it is clear that the latter are better situated to reflect consensus."⁹ In Ely's view, courts should interpret the Constitution not as an embodiment of specific substantive values, but as the guarantor of a political process which, if carefully protected, generates necessarily just results. As he famously argued, if the process by which equally valid values compete is kept democratic, then whatever the outcome of the competition, it will be fair and just in the only sense of those terms that Ely recognized. His remarkable optimism about the power of democratic process was a reflection of a deep-seated worry that nothing else can reliably rescue individuals from judicial tyranny. For the Court to invoke the value of democracy as a justification for substituting its own assessment of the majority's will for the expression of that will through democratic legislation, it would again have to be able to offer a compelling rejoinder to Ely that would make plausible the claim that the Court is better situated to know the minds of citizens than are their elected representatives, and that it is thus entitled to substitute its own assessment of community preferences for the expressions of

⁹ JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 67 (1980).

those preferences in state legislation. This would seem an improbable hurdle to mount.

Certainly the Court could invoke the standard refrain that the point of judicial review is to check the tyranny of *the majority* so that the exercise of democracy does not result in the trampling of personal rights. The Court could legitimately fear that persons convicted of heinous offenses against society's most vulnerable members might well be in need of protection against the wrath of a community intent on extracting more than a pound of flesh for every pound taken. But if this were the Court's fear, it would be hard to make sense of why it insists that "objective evidence of contemporary values as it relates to punishment for child rape is entitled to great weight."¹⁰ After all, if rights are at stake, why would it matter how many people might want to trample them? Surely the Court did not write Part III (which independently assesses the community's sentiments concerning the punishment of child rapists as evidenced by state legislation and execution statistics) either because it believed that rights can be trumped by a majority if the majority is large enough, or because it believed that rights should be balanced, weighed, compromised, or massaged when so doing will appease a significant majority. But then, why *did* the Court begin its lengthy opinion with an independent evaluation of the community's attitude toward capitalizing child rape, rather than moving directly to its own assessment of the values, rights, and duties put at stake by such legislation?

A final explanation for the Court's tedious parsing and comparing of jurisdictional differences in the legislative treatment of child rapists would attribute epistemic weight, rather than meta-ethical, ethical, or political weight, to societal attitudes. On this account, what society believes about a moral matter like capitalizing child rape is not constitutive of the morality of the matter, and what society prefers does not exhaust what the majority is permitted to do, either as a matter of morality or as a matter of political right. But inasmuch as two heads are better than one (and thousands are better than nine), the Court does well to seek the "evolving standards" of society in the hope that they have evolved far enough to be true, and therefore informative of the moral issues at stake. On this interpretation, the "great weight" that is owed to the "objective evidence of contemporary values" is psychological, not moral. Society's beliefs provide valuable evidence upon which the Court can rely when amassing available information by which to make informed decisions.

But exactly what are contemporary values evidence *of* in the *Kennedy* case? If Part III is best interpreted as an analysis of evidence material to a legal question before the Court, exactly what is that question? It would seem obvious to think that a time-slice of the "evolving standards of decency" would be evidence of the demands of decency itself when it comes to the punishment of wrongdoers. That is, it would seem obvious to propose that the Court is interested in "the basic mores of society" because those mores cast light on what it means for punishment

¹⁰ *Kennedy*, 128 S. Ct. at 2664.

to be “excessive,” “cruel,” or “unusual.” But the Court does not clearly use its finding “that there is a national consensus against capital punishment for the crime of child rape” as evidence of anything that one could imagine it being evidence of; that is, it does not treat the finding as evidence that capital punishment is undeserved by child rapists, nor does it treat the finding as evidence that capital punishment is unnecessary as a means to achieving further socially beneficial ends beyond that of achieving retribution. Those are surely concerns that the Court pursues on its own in Part IV. But it makes no evidentiary use, obvious or otherwise, of its discovery of a national consensus on the question of capital punishment in child rape cases. Rather, it treats its finding as an end in itself, encasing it in the unmotivated vacuum that is Part III of its opinion. One wonders what the Court would have done had it found a national consensus the opposite way; for given its failure to put to use the national consensus that it found, one can imagine it treating such a fact as an interesting sociological phenomena without obvious connection to the concerns that both the Court and centuries of criminal law scholars have taken to be central to justifying punishment.

Absent an ability to distill a clear moral or legal motivation for the Court’s enquiry into society’s mores in Part III, let us turn to its analysis in Part IV. When the Court finally turns to the merits of the question of the constitutionality of capitalizing rape, it embarks upon a disjointed and meandering discussion of a laundry list of considerations, not all of which are compatible, many of which are ill-conceived, and few of which appear appropriate to deciding whether death is a *constitutional* response to child rape, as opposed to a wise response. The Court begins with a reiteration that “*Gregg* instructs that capital punishment is excessive when it is grossly out of proportion to the crime *or* it does not fulfill the two distinct social purposes served by the death penalty: retribution and deterrence of capital crimes.”¹¹ I confess that I cannot make conceptual sense of this disjunctive formula. If retribution demands that punishment be proportionate to an offender’s just deserts—as it does—then how could a punishment ever be grossly out of proportion to a crime while still serving the purpose of retribution? The formula, crafted in the disjunctive manner that it is, conceptually contemplates the possibility that disproportionate punishment could be compatible with retribution; and as such, it literally makes no sense.

Perhaps the Court imagines the (quite plausible) possibility of a punishment that serves the purpose of deterrence but is grossly out of proportion to the crime, and hence, undeserved. If this is what the Eighth Amendment prohibits as excessive, then the formula articulated by the Court in *Gregg*, and reiterated by the Court in *Kennedy*, could be simplified to require that death be deserved before being constitutional under the Eighth Amendment. But this interpretation does not allow us to articulate with clarity the Court’s theory of punishment, for its repetition of *Gregg*’s reference to the “two distinct social purposes served by the

¹¹ *Id.* at 2664 (quoting *Gregg v. Georgia*, 428 U.S. 153, 173, 183, 187 (1976) (second emphasis added)).

death penalty” leaves ambiguous whether these conditions are individually necessary and only jointly sufficient, or individually sufficient, or simply individually significant but not necessary at all. What if death is proportionate to the crime that was committed so as to satisfy the demands of desert, and therefore the goal of retribution, but no deterrence at all will be achieved by imposing it? What if death is not *grossly* disproportionate to the crime, but is nevertheless a greater penalty than is deserved (so as to fail to match the demands of retribution) and is entirely without deterrent effect? What if a penalty falls far short of the offender’s just deserts (so as to be far less than would be required for retribution) and has only trivial deterrent effects? If we interpret the Eighth Amendment to bar *grossly* undeserved punishments, we remain without a clear answer to these questions so long as we remain in doubt about the necessity and/or sufficiency of the Court’s “two distinct social purposes” of punishment.

Nothing the Court explicitly says in *Kennedy* will give 1Ls any aid when they are asked these questions in their first-year criminal law courses. Indeed, by the end of its opinion, the Court has referenced and discussed not just two distinct social purposes of punishment, but (as explained below) four, all of which respond to quite separate theories of punishment that cannot be harmonized with one another without fudging their factors. If what it does by way of analysis reveals what it believes about the essential function or functions of punishment, then we are entitled to assign to the Court what criminal law scholars label a “mixed theory of punishment.” According to most versions of the mixed theory, two conditions are necessary and only jointly sufficient for the justification of punishment: the punishment must be deserved and it must result in a net gain in other good consequences. Most mixed theorists combine the prohibition against undeserved punishment with the requirement that punishment also achieve a net gain in social utility—for example, by deterring future crimes either on the part of the offender or on the part of those who would copy-cat his deed, by providing a vehicle for the cathartic expression of social outrage, by reinforcing the social contract so as to bolster the resolve of those who are prepared to sacrifice liberty so long as they can be assured that others will do the same, by expressing an educative message about the value of the victim and her interests, etc. On this theory then, utility-maximization is the accelerator and desert is the brake. Persons may not be punished if they are undeserving, and they may not be punished more than they deserve, but they ought not to be punished at all if no social gain can be achieved through their pain, and subject to the limits imposed by their just deserts, they ought to be punished only to the extent that their punishment can be thought to serve the greater good.

The Court’s opinion in *Kennedy* certainly canvasses the sorts of concerns that a traditional mixed theorist would raise about whether capitalizing rape would produce a net gain in social utility. The Court worries, for example, that by making the punishment for child rape equivalent to the punishment for murder,

offenders will have reduced incentives to leave their victims alive.¹² It speculates that inasmuch as child rape offenders are in many cases relatives and friends of the victim, the imposition of capital punishment will encourage rather than discourage the victim's protection of the offender, and will thereby increase rather than decrease the incidence of sexual assaults on children.¹³ And it produces a litany of administrative problems with capitalizing rape that are designed to suggest, in part, that American courts and prisons would be overwhelmed if the floodgates were opened to the capital prosecution of child rapists (of whom there were twice as many as there were intentional murderers in 2005).¹⁴ Those who reject a mixed theory of punishment precisely because they do not believe that considerations of social utility should trump considerations of desert can thus properly worry that the Court's decision in *Kennedy* well-illustrates the limitations of a mixed theory.

The Court's opinion, however, suggests a mixed theory that is even more mixed than the one that is standardly-described in criminal law theory. For the Court makes a good deal of considerations that reveal concerns not just for retribution and the maximization of utility, but also for corrective justice and rehabilitation. While it makes a dog's supper of these separate purposes, conflating some and simply throwing others in for good measure, there can be no doubt that the pursuit of each of these four purposes could confound the pursuit of the others. For example, the Court conflates the goal of retribution with the goal of corrective justice, analyzing what is owed an offender as a matter of desert by enquiring into what will help to lessen the hurt to the victim.¹⁵ It then goes on to make a good deal of the trauma that may be caused to child rape victims by requiring them to spend their years of adolescence and young adulthood reliving their brutalization in the repeated testimonials that are required to prosecute capital cases.¹⁶ But whether an offender's punishment will help or hurt a victim is the concern of those who believe that punishment should serve the goal of correcting the injustice done to the victim, rather than delivering the deserts justly owed an offender, or achieving his rehabilitation, or maximizing utility summed across society. How restorative (or how traumatic) a penalty is to a victim is neither here nor there from the perspective of retribution, for the goal of retribution is not (ideally) to make the victim whole (a goal that is thought to be better served by the torts system), but rather, to make the offender suffer in proportion to the suffering he has caused. And the goal of sparing a victim the trauma of testimony may be squarely at odds with sparing her community the prospect of further crime, for the more victims are insulated from the grueling prospects of having to relive their private wrongs in public, the more offenders are emboldened to commit crimes against those who share the privacy of their homes. And there is certainly no

¹² *Kennedy*, 128 S. Ct. at 2664.

¹³ *Id.* at 2663–64.

¹⁴ *Id.* at 2657–61.

¹⁵ *Id.* at 2662.

¹⁶ *Id.* at 2662.

reason to think that what will prove most restorative (or at least minimally harmful) to a victim matches what will be necessary to effect the moral, psychological, and economic rehabilitation of the offender.

Consider a second example of the way in which the Court mixes into its justificatory recipe ingredients that make its opinion altogether too rich. The Court maintains that in many cases “justice is not better served by terminating the life of the perpetrator rather than confining him and preserving the possibility that he and the system will find ways to allow him to understand the enormity of his offense.”¹⁷ Why the offender’s understanding of the enormity of his offense is important is obscure, although one could invent accounts that resonated, in turn, with the goals of retribution, utility-maximization, or corrective justice. One might think that an offender receives his just deserts only when he is psychologically forced to confront the horror of what he has done to another human being—an account that ties the offender’s recognition of the gravity of his offense with the goal of achieving retribution. One might think, in the alternative, that the interests of society are best served by first educating offenders to the wickedness of their ways and then allowing them to return to society as productive members who can effectively proselytize the virtues of being law-abiding—an explanation that appeals to traditional utilitarian goals. Or one might think that the wrongs done to victims are either subjectively or objectively best vindicated when victims are accorded the satisfaction of knowing that their assailants have come to a full realization of the devastation they have caused—an account that traces the good of punishment to the good of corrective justice. But inasmuch as the Court references early in its opinion a concern for rehabilitation as a separate goal of punishment, one suspects that its stated goal of allowing offenders to live for the realization of their wrongdoing reflects a desire to “mix” the concern for retribution with the concern for rehabilitation.¹⁸ Such a goal targets not the good of the victim, nor the good of society, nor the good of giving people what they are due. It rather makes the moral, psychological, social, and economic welfare of the wrongdoer a priority in determining the nature and gravity of any punitive response.

So even if punishment is capped by the requirement that it be deserved—or in the Court’s more questionable formulation, by the requirement that it not be *grossly* undeserved—the Court’s opinion leaves us to wonder what this requirement must be “mixed” with in order for a penalty—and particularly, the penalty of death—to avoid Eighth Amendment concerns. One might conclude, then, that the Court’s kitchen sink of considerations suggests that it embraces a multifaceted mixed theory that makes a penalty justified only if it mutually satisfies all four goals of retribution, utility-maximization, corrective justice, and rehabilitation. But this would be a crazy view, for all too often, as I have illustrated, these goals demand conflicting results, and in such instances, a multifaceted mixed theory would leave one without the ability to justly punish

¹⁷ *Id.* at 2665.

¹⁸ *Id.* at 2649–50.

someone who has done a grievous wrong. But shy of thinking that all of the Court's inquiries are directed at conditions that are necessary for the just infliction of punishment, what conditions are we to draw from its opinion as core conditions that must be met before a penalty is rightly deemed to violate the Eighth Amendment's core prohibitions?

One might think that we could sort the wheat from the chaff by examining the legitimacy of pursuing each of these goals through the imposition of punishment, discarding those that ultimately cannot be defended as legitimate pursuits of the criminal justice system. Certainly, each of the three objectives that the Court mixes with retribution has haunting problems to which the Court seems oblivious. Consider the Court's concern for the degree to which capitalizing rape will hurt rather than help victims—a concern that best resonates with a theory that considers punishment justified only if it will help to achieve corrective justice; that is, the restoration of the victim to her *ex ante* position, or to a position of moral equivalence, through the forced disgorgement of benefits illicitly stolen from her by her offender. First, in what sense is a corrective justice theory, construed as the objectivist would construe it, different from a retributive justice theory, which holds that the punishment of an offender is justified if and only if the offender deserves the punishment? If victims are (objectively) vindicated if and only if their offenders receive their just deserts—as measured by whether their unjust enrichment was eradicated—regardless of whether they feel vindicated or are in any appreciable way psychologically restored as a result of the punishment, then it would seem that corrective justice theory is not an autonomous theory of punishment that can justify anything other than what is justified by retributive justice theory. The Court could simply demand that punishments be matched to the just deserts of offenders, and *a fortiori*, it would satisfy the demands of an objectively construed corrective justice theory.

Second, how, and by what objective measure, is an offender unjustly enriched by a crime so that his punishment can strip him of, and return to the victim, a benefit that he illicitly stole? It is easy to characterize a theft as a crime of unjust enrichment: one who steals a million dollar Ferrari has unjustly enriched himself by a million dollars, and his victim is vindicated when the car or its value has been restored to him. But how are we to characterize and measure the unjust enrichment of the flasher, the kidnapper, the rapist, and the vandal?

Third, in what sense could the imprisonment of such offenders go any distance toward returning their victims to their *ex ante* positions? One understands how dollars could go some distance towards achieving compensation, since dollars have some ability (albeit imperfectly) to buy back what might have been stolen from the victim through the crime (her health, psychic repose, lost earnings, etc.). But, of course, this is the task of tort law. If corrective justice theory is going to constitute a theory of criminal punishment that does not, by its own logic, spell the collapse of criminal law into tort law, then it is going to have to explain how an offender's years in prison disgorges to his victim something that goes some distance toward making her whole again, and that does so in a manner that cannot

better be accomplished through tort damages.

Finally, this task of connecting punishment to just compensation might be an intelligible one if the corrective justice theorist were to invoke a *subjective* measure of the punishment required to achieve the vindication of the victim. Certainly, the Court in *Kennedy* appears to be preoccupied not with the question of what might objectively vindicate a child victim, but with the question of what might subjectively help or harm her. A subjective theory of corrective justice would make the question of punishment analogous to the question that is, in principle, asked in tort law in order to fix the appropriate level of damages: namely, at what point would the plaintiff have been indifferent between the harm done to her and a given cash payment? It is the plaintiff's subjective indifference curve that provides the obvious measure of when and how a given damage award makes her psychologically whole, such that she is no worse off by virtue of having been harmed and compensated than she would have been had the harm (and ensuing compensation) never occurred. But even if there comes a point at which a person would be indifferent between keeping her hand and receiving dollars for its loss (a dubious prospect), it is hard to imagine that there is any meaning in the suggestion that persons (at least those devoid of masochistic tendencies) would ever be indifferent between retaining bodily security and seeing someone punished for its loss.

And finally, even if the Court's "mixture" of corrective justice and retribution precludes the possibility of grossly over-punishing an offender, we have to worry that the mix can result in intolerable under-punishment. Suppose that a victim denies any need of vindication. Citing the virtue of turning the other cheek, she implores the court not to punish her own brutal rapist. In the face of her manifest lack of need for vindication (indeed, in the face of her manifest need to be merciful to one who showed her no mercy as a means of recovering her sense of self), ought the court to let her offender go free? It would seem that there is simply no getting around the vexing problem that corrective justice theories, by their seeming need to attend to what would permit the victim the kind of psychic repose she enjoyed prior to the offense, appear to license punishments disproportionate to desert.

The same kinds of complaints can be made about the other theoretical contenders at which the Court waves its hand in justifying the refusal to allow states to capitalize child rape. For both the concern for maximizing social utility and the concern for rehabilitating an offender can compete with the goal of punishing the offender in proportion to the wrong that he has committed, and each can dictate punishments that defy the other. An offender who has found God and renounced his past may require little rehabilitation, but a light penalty might both offend against the demands of retribution and inhibit efforts of deterrence. And inversely, a light penalty may be all that is needed to prevent recidivism or curtail copy-cattng by others, even as it does nothing to effect a rehabilitating change in the offender's character or dispositions.

These sorts of complaints have motivated a number of prominent criminal law scholars to eschew mixed theories of punishment in favor of a pure theory of

retributivism. And despite the *Kennedy* Court's lengthy foray into a bramble bush of considerations peripheral to those of the retributivist, one cannot help but suspect at the end of the day that it is the Court's core conviction that death is undeserved by anyone who does not cause death that best explains the Court's decision. For if it really sought to elevate utilitarian, corrective justice, or rehabilitative considerations to a prominent place in its Eighth Amendment jurisprudence, one would have expected that it would have done more than write up those considerations in the ill-organized, under-theorized, and often conflated manner in which it treats them.

And more tellingly, if the Court thought that death could ever be deserved by offenders who do not cause death, it would seemingly have explored with greater curiosity the possibility of identifying a defensible set of aggravating circumstances that would suffice to distinguish between those rapists who are deserving of death and those who are not. As Justice Alito points out in his crisp and compelling dissent, it would seemingly be possible to point to a number of factors which alone or in tandem might make the death penalty deserved, *if* one thinks it could ever be deserved in cases of child rape: the age of the victim, the history of recidivism of the offender, whether the victim was kidnapped, whether the victim was severely physically injured in the course of the rape; whether the victim was raped repeatedly; or whether there were multiple victims.¹⁹ For the Court to insist that careful attention to these factors would inevitably leave the administration of the death penalty "arbitrary," "freakish," and "imprecise"²⁰ is unpersuasive—unless, of course, one ultimately concludes that the Court does not believe that death is *ever* deserved by someone who has left his victims alive.

Amidst the cacophony of other arguments, the Court says just this. Quoting *Coker*, Justice Kennedy writes:

Short of homicide, [rape] is the 'ultimate violation of self.' . . . [But] [t]he murderer kills; the rapist, if no more than that, does not. . . . We have the abiding conviction that the death penalty, which 'is unique in its severity and irrevocability,' is an excessive penalty for the rapist who, as such, does not take human life.²¹

One wonders why the Court felt the need to say more. After all, even if the Court does not embrace a pure theory of retributivism (and thereby somehow hopes or believes that it will not be pressed to answer the theoretical complaints with a mixed theory), it clearly takes an offender's just deserts to constitute a check on how much punishment can be used to achieve other goals beyond that of retribution. And if it firmly believes that those who do not kill do not deserve to be killed, why did this not settle the question without need for lengthy discussions

¹⁹ *Id.* at 2674 (Alito, J., dissenting).

²⁰ *Id.* at 2661.

²¹ *Id.* at 2659 (citing *Coker*, 433 U.S. at 597–98).

about the effects of capital prosecutions on victims or on society's interests in cost-effectively deterring crime?

The answer is surely that the Court ultimately lacked a sound *argument* for its judgment that death is disproportionate to rape, however egregious or repeated. Indeed, it lacked any principle from which it could construct an argument for its judgment. And the absence of such a principle reveals what I take to be the greatest challenge to retributivism—which is the question of whether it can defend, in any principled way, claims about the proportionality of particular punishments to the particular harms culpably caused by particular offenders. The principle of *Lex Talionis* is a powerful answer to the challenge that punishments cannot be matched to offenses: an eye for an eye, a tooth for a tooth, a life for a life. Surely to get back what you give is the most intuitive notion of getting your just deserts.

But no retributivist wants to defend the claim that the state ought generally to be in the business of perpetrating the horrors on offenders that match in kind the horrors that they perpetrated on their innocent victims. No one believes that the state ought to satisfy the demands of retributivism by torturing the torturer, raping the rapist, or flashing the flasher. And what would it mean to be treasonous to the traitor or to perpetrate mail fraud on the mail frauder (not to mention to child-rape the child rapist!)?

Yet once the retributivist leaves a principle that exactly matches the punishment to the offense, what allows the retributivist to say that seven months, seven years, or seventeen years is the just reward of one who commits the crime of check-kiting? What principle works to match differential losses of liberty with crimes of differential severity that is not inherently arbitrary? The traditional answer of the retributivist is to reject the claim implicit in this criticism that punishments must be absolutely proportionate to their punishments. Instead, the answer goes, punishments are justified if they are comparatively proportionate to their crimes. Thus, if crimes are rank-ordered from most serious to least serious—from murder to jay-walking—and if punishments are then assigned to each crime in descending order of severity, it is immaterial whether tax fraud gets seven years or seventeen years, so long as it gets a punishment proportionately identical to identically serious crimes, and proportionately less than the next most serious crime, and greater than the next less serious crime. That seventeen years in prison may not match our Platonic conception of what check-kiting merits is not a legitimate complaint if embezzlement receives twenty years and mail fraud fourteen years and check-kiting is proportionately more serious than the latter and less serious than the former; and so on with regard to all other crimes, from the least serious to the most serious.

Perhaps by repairing to comparative proportionality those who seek to effectuate retribution through state-administered punishment can allay fears of moral arbitrariness. Certainly to the extent that just punishment is largely a function of equal treatment, a system of comparative proportionality will ensure that like cases are treated alike, and different cases are treated proportionately differently. But I find retributivists' often blithe assumption that comparative

proportionality will rescue them from arbitrariness to be optimistic, at best, and hypocritical, at worst. Imagine a society that articulates and enforces very few criminal prohibitions. It makes crimes of murder, rape, kidnapping, theft, defamation (considering it as serious to “steal” another’s reputation as to steal his television), and vandalism. It assigns the death penalty to murderers and gives life for rape, 50 years for kidnapping, 45 years for theft, 40 years for defamation, and 35 years for vandalism. Can the gossip legitimately complain when imprisoned for 45 years for falsely calling her neighbor dishonest? It would seem not, at least if the test of just punishment is whether the crime is punished proportionately to other crimes. For while it would seem, in absolute terms, extraordinary to be locked away for the bulk of one’s productive life for a petty slur, there can be no complaint that the punishment is disproportionate to other punishments. But inasmuch as the moral force of retributivism lies in its concern for matching punishments to just deserts, it seems a fatal flaw to then declare that judgments of comparative proportionality are close enough for government work.

Perhaps it is because all of the goals we have set for our criminal justice system invite seemingly damning problems that the Court flits amongst them, content to wave its juridical hand at them without admitting or engaging with any of their problems. Certainly the Court seems to hope that if all of its various considerations favor the conclusion that child rape should not be capitalized, it need do no work to examine the core suppositions of each in order to resolve the potential tensions and problems that could be a product of their marriage. It thus happily discovers that the majority of society shares its view about the illegitimacy of capitalizing rape (as if that, by itself, were morally significant), and it finds considerations of retribution, utility, corrective justice, and rehabilitation supportive of its conclusion. Like a bad 1L exam written by a student who indulges the timeless temptation to throw all of the semester’s arguments against the proverbial wall in the hope that some will stick, the Court’s opinion appears to offer something to everyone. But in the end, it offers nothing to those who hoped that the Court could clearly articulate a conceptually coherent and morally compelling account of how punishments can be made the moral match of their offenses.

