

**2008 TEACHER'S UPDATE**

to

**CALIFORNIA CRIMINAL LAW:  
CASES AND PROBLEMS  
(2<sup>nd</sup> Edition)**

by Steven F. Shatz

Dear Colleague,

The 2008 Teacher's Update supplements the Teacher's Manual for the casebook with notes and suggested problems from cases decided in the four years since publication of the casebook. I also include edited versions of the California Supreme Court's decisions in *People v. Knoller*, which I would substitute for *People v. Burden* (Casebook, p. 254), and *People v. Superior Court (Decker)*, which overrules, and should be substituted for, *People v. Adami* (Casebook, p. 444), and I include an edited version of the United State Supreme Court's decision last month in *Kennedy v. Louisiana*, which I would substitute for *Coker v. Georgia* (Casebook, p. 712) and *Problem 98* (Casebook, p. 720) and would teach after *Tison v. Arizona* (Casebook, p. 720). I hope you find this material useful, and I welcome your comments, questions and suggestions. I can be reached at [shatzs@usfca.edu](mailto:shatzs@usfca.edu).

Steven F. Shatz  
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## CHAPTER 1 - INTRODUCTION

### ***Additional Problem*** (p. 53)

Students might be asked whether there would be an Eighth Amendment violation if the crime triggering the three strikes penalty was failure to comply fully with sex offender registration requirements (P.C. § 290). In 2005, different districts of the Court of Appeal reached opposite decisions in two three strikes cases involving a violation of § 290 as the third strike. In *People v. Poslof*, 126 Cal.App.4th 92 (2005), the defendant had registered as a sex offender at his primary residence, but he bought a second house and failed to register within five days (as was required), allegedly because he never stayed in that house for five days at a time. The Fourth District found no violation of the Eighth Amendment. In *People v. Carmony*, 127 Cal.App.4th 1066 (2005), the defendant registered as a sex offender when he moved to a new residence, but his birthday occurred a month later, and he failed to update his registration within five days of his birthday (as was required). The Third District found that the defendant's sentence of 25 years to life for such a "technical" violation violated the Eighth Amendment and the state constitution.

### ***Problem 3*** (p. 55)

In *United States v. Booker*, 543 U.S. 220 (2005), the Supreme Court held that the Federal Sentencing Guidelines violated the Sixth Amendment insofar as they permitted the sentencing court to increase a defendant's sentence on the basis of facts found by the judge on a preponderance of evidence standard, rather than by a jury on a standard of proof beyond a reasonable doubt. The Court did not invalidate the Guidelines for all purposes, but instead held:

“[T]he Sentencing Commission remains in place, writing Guidelines, collecting information about actual district court sentencing decisions, undertaking research, and revising the Guidelines accordingly. The district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing.

The courts of appeals review sentencing decisions for unreasonableness.”

543 U.S. at 264. This term, in *Kimbrough v. United States*, \_\_\_ U.S. \_\_\_, 128 S.Ct. 558 (2007), the Court held that a departure from the (now advisory) Guidelines in a crack cocaine case could be justified on the ground that the crack/powder disparity yields a sentence greater than necessary to achieve the Guidelines' purposes.

## CHAPTER 2 - ACT (ACTUS REUS)

### ***Powell v. Texas*** (p. 94)

In *Powell*, Justice White, who cast the fifth vote for the majority, suggested that he might have found an Eighth Amendment violation if the evidence had shown that the defendant was a chronic alcoholic who was not homeless by choice. 392 U.S. at 551. In *People v. Kellogg*, 119 Cal.App.4th 593 (2004), the Court of Appeal addressed that very situation and, in a 2-1 decision, rejected a homeless alcoholic's Eighth Amendment challenge to his conviction for being intoxicated in public ( P.C. § 647(f)). By contrast, in *Jones v. City of Los Angeles*, 444 F.3d 1118 (9th Cir. 2006), the Ninth Circuit held (2-1) that the following Los Angeles ordinance was unconstitutional if enforced at all times and places against homeless individuals:

“No person shall sit, lie or sleep in or upon any street, sidewalk or other public way. The provisions of this subsection shall not apply to persons sitting on the curb portion of any sidewalk or street while attending or viewing any parade ...; nor shall the provisions of

this subsection supply [sic] to persons sitting upon benches or other seating facilities provided for such purpose by municipal authority by this Code ...”

The *Jones* opinion was subsequently vacated and the case dismissed as moot when the parties reached a settlement. 505 F.3d 1006 (9<sup>th</sup> Cir. 2007).

### CHAPTER 3 - MENTAL STATE (MENS REA)

#### ***People v. Wetmore*** (p. 139)

The court in *Wetmore* suggests that the exclusion of psychiatric evidence on diminished capacity might violate due process. (See n.6.) In *Clark v. Arizona*, 548 U.S. 735 (2006), the Supreme Court addressed such a challenge. An Arizona rule barred consideration of expert witnesses’ testimony about a defendant’s mental incapacity due to mental disease or defect on the issue of *mens rea*. The Court, in a 6-3 decision, upheld the rule, concluding that the state had good reasons to for adopting it: (1) to deny the defendant the opportunity to circumvent the proof and presumption rules of the insanity defense; and (2) to limit the use of a kind of psychiatric evidence, which experts themselves find controversial, which has the potential to mislead the fact-finder and which creates the danger that such evidence will be accorded greater certainty than experts claim for it.

#### ***In re Jorge M.*** (p. 153)

The California Supreme Court has continued to wrestle with how to determine, without guidance from the legislature, the appropriate *mens rea* for *malum prohibitum* crimes. In *People v. Salas*, 37 Cal.4th 967 (2006), the defendants were charged with sale of unregistered securities, a felony, and claimed that they had a good faith and reasonable belief that the securities came within an exemption for sales to no more than 35 persons all of whom had a prior business relationship with the sellers. The trial court instructed that their belief was irrelevant, and, since the evidence was that they sold to 48 persons, they were convicted. The supreme court held that the defendants should have been allowed to defend on the grounds of their claimed good faith and reasonable belief, but that, since a defendant has the burden of proof as to any exemption, the defendants here would have the burden of establishing that they were not negligent in believing that the securities were exempt. *People v. King*, 38 Cal.4th 617 (2006) presented a fact situation similar to that in *Jorge M.*. The defendant was convicted of violating P.C. § 12020(a)(1), a wobbler (a crime that may be punished as a felony or misdemeanor), on evidence that he possessed a short-barreled rifle (less than 26 inches in overall length). The trial court had not instructed that the prosecution had the burden of proving any *mens rea* on the part of the defendant as to the length of the rifle despite the defendant’s claim that he did not know the rifle’s length. Justice Kennard, who dissented in *Jorge M.*, wrote the opinion for a unanimous court, holding that an element of the crime, as to which the prosecution had the burden of proof, was the defendant’s actual knowledge of the shortness of the rifle. She distinguished *Jorge M.* on the ground that, unlike the situation in that case, requiring proof of a defendant’s actual knowledge as to the shortness of the rifle would “not impose an unduly heavy burden on the prosecution.” (*Id.* at 643)

#### ***Problem 16*** (p. 162)

After analyzing the statute under the *Jorge M.* factors, the California Supreme Court held that the crime was a strict liability public welfare offense. Nonetheless, relying on *People v. Vogel*, 46

Cal.2d 798 (1956), the court went on to hold that the defendant would be allowed to assert an *affirmative* defense of reasonable mistake of fact. *In re Jennings*, 34 Cal.4th 254 (2004).

#### CHAPTER 4 - THE DEFENSE CLAIM OF “REASONABLE MISTAKE”

**Problem 20** (p. 187)

The California Supreme Court dismissed its grant of review in light of its decision in *People v. Leal*, 33 Cal.4th 999 (2004) (holding that “duress” in the context of forcible lewd acts on a child includes any threat of hardship to the victim but acknowledging that “duress” for purposes of the rape statutes is narrower since “hardship” is excluded from the definition of duress under those statutes). See *People v. Minsky*, 23 Cal.Rptr.3d 694 (2005).

**Additional Problem** (in *Notes and Problem* (p. 196))

Defendant was a member of City’s city council, and she desired to be appointed to the vacant position of city manager. However, City had an ordinance requiring that any council member was ineligible for city employment while on the council and for one year after leaving the council. Defendant notified the other members of the council of her interest in the job and of her proposed salary and terms, and she consulted with City Attorney regarding whether the ordinance could be repealed or whether it was required by state law and whether it would be legal for a council member to become city manager. City Attorney advised Defendant and the council that the ordinance could be repealed and that it would be legal to employ Defendant. The council (without defendant being present) voted to repeal the ordinance and directed City Attorney to meet with Mayor and Defendant about her terms. City Attorney reported back to the council about Defendant’s terms, and the council, altering some of the terms, authorized her hiring. City Attorney drafted the employment contract, which Defendant signed. Defendant is now charged with violating Government Code § 1090 (prohibiting members of legislative bodies having a financial interest in any contract made by the body). What arguments should be made on Defendant’s defense of entrapment by estoppel?

(source: *People v. Chacon*, 40 Cal.4th 558 (2007) – defense rejected because City Attorney, as attorney for the city council and therefore for Defendant, not an independent government official charged with administering the law)

#### CHAPTER 5 - HOMICIDE: INTENTIONAL KILLINGS

**Problem 28** (p. 224)

In *People v. Smith*, 37 Cal.4th 733 (2005), the majority, over a strong dissent by two justices, distinguished *Bland* in the following circumstances. Defendant and Mother were former friends who had experienced a falling out. On the day of the shooting, Mother was seated in the driver’s seat of her parked car with her baby in a carseat in the back seat. Defendant approached the car and exchanged angry words with Mother and Mother’s boyfriend, who entered the car on the passenger side. When the car drove away, Defendant fired a single shot through the back window of the car, the bullet passing within inches of the baby and Mother. Defendant was convicted of attempted murder of both Mother and the baby and challenged the sufficiency of the evidence as to attempted murder of the baby. The court held that, even though Defendant intended to kill Mother and had no  *motive* to kill the baby, his intent also to kill the baby could be inferred from his deliberate firing, his awareness of the baby’s location and the trajectory of

the bullet.

## CHAPTER 6 - HOMICIDE: UNINTENTIONAL KILLINGS

### *People v. Taylor* (p. 253)

In *People v. Valdez*, 126 Cal.App.4th 575 (2005), the defendants were convicted of murder for the killing of a fetus. At trial, they had sought, unsuccessfully, to present medical evidence to the effect that the fetus would not have survived past the second trimester because of a fatal medical condition. The Court of Appeal held: (1) the defendants' medical evidence was properly excluded since it was irrelevant whether the fetus would have survived to term; and (2) a life sentence for killing a non-survivable fetus was not cruel and unusual punishment.

### *People v. Knoller* (Update Case, substituting for *People v. Burden*, p. 254)

This case represents the court's most recent clarification of the meaning of "conscious disregard for life" standard

- ◆ The court holds that, while the *objective* component of implied malice requires that the defendant have engaged in conduct with a high probability of death, the *subjective* component does not require that the defendant have been aware that there was a high probability of death. At the same time, the subjective component is not satisfied by the defendant's awareness only of the risk of serious bodily injury.

#### **Further Discussion:**

- Although the court holds that the prosecution need not prove that defendant was aware of a *high probability* of death in order to prove the subjective component of implied malice, the court does not specify what exactly it is that the prosecution does need to prove to meet the subjective component. Does the prosecution need to prove: that the defendant thought that death was likely? that there was a significant risk of death, but it was not likely? that death was a remote possibility?
- Do the facts support a finding of implied malice even under the correct standard? At what point in time did Knoller act with conscious disregard for human life – when she chose to walk (or even keep) a dangerous dog or when she omitted to care for Whipple after the attack? As to the former theory, the defendant argued that, while the dogs had caused minor injuries to people, there was no indication that they would kill a person, and, as to the latter theory, it is not clear that her failure to seek help contributed to Whipple's death.

### *Additional Problem* (after *People v. Knoller*)

Defendant and Father were the parents of six children, including one-year-old Son. They were separated, and there was a court order prohibiting Father from being at the apartment or having contact with the children unless a third person (other than Defendant) was present. Despite the court orders, Defendant sometimes allowed Father to stay at the apartment. On one of those occasions, at 7:00 in the evening, Son was crying, and Defendant saw Father throw him against the wall. Son stopped crying. In the middle of the night, Son being crying again, and Father punched him in the chest. When Defendant protested, Father told her not to get involved. Defendant then witnessed Father hit Son numerous times. At 6:00 a.m., Father told Defendant to go to bed and he would watch Son. Defendant went to bed, and, an hour later, Son was dead. In the opinion of the pathologist, Son had died from a combination of suffocation, the blunt force

injuries he suffered and an overdose of children's medicine. Defendant is charged with second degree murder (P.C. §§ 187-189). What are the arguments as to whether she is guilty on a theory of implied malice?

(source: *People v. Rolon*, 160 Cal.App.4th 1206 (2008) – held that the defendant could be guilty of second degree murder either as a principal for her failure to act to prevent the death or as an aider and abettor of the father)

**Problem 34** (p. 271)

*People v. Brady*, 129 Cal.App.4th 1314 (2005), is another case where a defendant's reckless conduct on the ground led to a subsequent fatal collision between two pilots responding to the emergency. Defendant and a co-defendant were staying in a trailer in a heavily wooded area (and apparently were manufacturing methamphetamine). Defendant lit a outdoor fire in a fire ring to heat water for a bath, but a piece of paper caught fire and blew out of the ring and ignited a grass fire. Defendant tried unsuccessfully to put out the fire and then fled with the co-defendant. Forestry officials were alerted to the small forest fire and called in air support to drop fire retardant. After making a number of runs, one pilot suddenly approached the drop point from the wrong direction and at the wrong altitude and crashed into another pilot making a drop. Both pilots were killed. The defendants were charged with murder and other crimes, and were convicted of unlawfully causing a fire resulting in great bodily injury (P.C. § 452(a)), with the enhancement that the victims were emergency personnel (P.C. 452.1(a)). The Court of Appeal affirmed Defendant's conviction, rejecting his challenges to the proof and instructions on causation and the trial court's refusal to admit evidence of the errant pilot's recklessness.

**Problem 35** (p. 272)

In *People v. Calhoun*, 40 Cal.4th 398 (2007), a similar drag racing case where one of the racers struck and killed third parties, the California Supreme Court assumed that the defendant, whose car did not strike the victims, was guilty of vehicular manslaughter as an aider and abettor of the other racer.

## CHAPTER 7 - HOMICIDE: KILLINGS IN THE COMMISSION OF ANOTHER CRIME

**Problem 45** (p. 316)

In *People v. Howard*, 34 Cal.4th 1129 (2005), the California Supreme Court concluded that a violation of § 2800.2 was not inherently dangerous to life because "willful or wanton disregard" was so broadly defined as to encompass the commission of clearly non-dangerous Vehicle Code violations, e.g., driving an unregistered vehicle.

**People v. Hansen** (p. 316)

*Hansen* is no longer the California Supreme Court's latest word on the merger rule. In *People v. Robertson*, 34 Cal.4th 156 (2004), the defendant was convicted of second degree murder when he shot in the direction of two men who were stealing parts from his car and (apparently unintentionally) killed one of them. The jury was instructed that it could convict on the basis of the second degree felony-murder rule with P.C. § 246.3 (discharging a firearm in a grossly negligent manner) as the anchor felony. The crime is a "wobbler," punishable as a felony or misdemeanor. The court, in a 4-3 decision, upheld the use of the felony-murder rule. The majority opinion by Chief Justice George is noteworthy for at least two reasons: (1) the majority

expressly altered the court's long-standing rationale for the felony-murder rule when it justified the application of the rule on the ground that it would deter – not just the commission of negligent and accidental killings during the felony – but the commission of the felony itself; and (2) the majority accepted the anomalous result that the defendant was only subject to the strict liability felony-murder rule because he *did not intend* to hit the victim and that, had he *intended* to hit the victim, the merger rule would have applied. Justice Moreno concurred but argued for the elimination of the second degree felony-murder rule (an issue which he said the defendant had failed to raise). The three dissenters each strongly criticized the decision. Justice Kennard would have held that the merger rule applied because the defendant committed the anchor felony without an “independent felonious purpose,” and, in addition, since the felony-murder rule only applies where the defendant intends the felony, she questioned the application of the rule in the case of a felony that can only be committed negligently. Justice Werdeger expressed concern about the anomalous result: “It simply cannot be the law that a defendant who shot the victim with the intent to kill or injure, but can show he or she acted in unreasonable self-defense, may be convicted of only voluntary manslaughter, whereas a defendant who shot only to scare the victim is precluded from raising that partial defense and is strictly liable as a murderer.” Justice Brown’s dissent was the most scathing. Criticizing the court’s repeated inconsistency in applying the second degree felony-murder rule and its subversion of the legislature’s “careful calibration of culpability,” she called for abolition of the rule.

***Additional Problem*** (after *People v. Hansen*, p. 316)

Defendant is a member of a street gang. Two members of a rival gang arrived at Defendant’s house in a car, and words were exchanged. As the car was driving away, Defendant drew a gun and fired at the car. The bullet struck and killed the driver of another car some distance away. Defendant is charged with second degree murder. What arguments should be made as to whether Defendant can be prosecuted on a felony-murder theory with shooting at an occupied motor vehicle (P.C. § 246) as the underlying felony?

(sources: *People v. Bejarano*, 149 Cal.App.4th 975 (2007) (finding merger, distinguishing *Hansen* since the defendant shot at the car with intent to assault and therefore had no independent felonious); *People v. Jones*, 69 Cal.Rptr.3d 132 (2007) (finding no merger because *Hansen* controls). The supreme court has granted a hearing in *Jones*.)

## CHAPTER 9 - PROPERTY CRIMES

***Additional Problem*** (after *People v. Gauze*, p. 407)

Defendant and Wife were having marital problems, and one morning, Wife kicked Defendant out of their house. Later in the morning, Wife gave Neighbor a suitcase, \$50 and a note to deliver to Defendant and asked him to collect a set of house keys from Defendant. The note told Defendant to “get a job, be accountable, and talk to me.” Neighbor delivered the items to Defendant, collected the keys and returned the keys to Wife. That night, Defendant broke into the house, sexually assaulted Wife and kidnapped her. Defendant is charged with various crimes, including burglary (P.C. § 459). What arguments should be made on the burglary charge?

(source: *People v. Gill*, 159 Cal.App.4th 149 (2008) – burglary conviction upheld)

## CHAPTER 10 - INCHOATE CRIMES

***People v. Superior Court (Decker)*** (2007 Update Case, substituting for *People v. Adami*, p. 444)  
The defendant concedes that he had the intent to kill his sister and that he solicited a supposed “assassin” to do the killing. The issue is whether his conversations with the “assassin,” including his making a down payment on the killing, constituted an attempt to commit murder.

- ◆ The court holds that the defendant, whose intent to kill was manifest, did sufficient acts to constitute an attempt because even “slight acts” are sufficient when intent is clear and, in any event, the defendant did “all that he needed to do to accomplish the murders.” Justice Werdegar, in dissent, argues, in effect, that when a defendant solicits another to commit a crime and has no intent to participate in the commission of the crime himself, he cannot be guilty of an attempt unless the person solicited attempts the crime.

### **Further Discussion:**

- The court says that solicitation alone does not constitute an attempt and that solicitation plus payment does not always constitute an attempt. Since payment would clearly constitute at least a “slight act” toward the commission of the crime, is the court suggesting that a different standard applies when the crime is to be committed by another? How should a jury be instructed in the *Decker* situation?
- What is the point of the court’s footnote? It seems to suggest that defendant might have been successful had he argued that the “assassin” had no intention of committing the murders. However, as will be discussed later in the chapter, factual impossibility is no defense to an attempt charge.

### ***Additional Problem*** (after *People v. Rubin*, p. 451)

Students might be presented with the following problem raising First Amendment issues:

Student was a troubled 15-year old who had transferred into High School two weeks previously. On Friday, at the end of his English class, he approached Mary, whom he did not know, and asked, “Is there a poetry club here?” He then handed her two sheets of paper and asked her to read them. On the top page was written, “These poems describe me and my feelings. Tell me if they describe you and your feelings.” On the second page, under a label, “Dark Poetry,” was written the following poem:

#### FACES

Who are these faces around me?  
Where did they come from?  
They would probably become the next doctors or lawyers or something.  
All really intelligent and ahead in their game.  
I wish I had a choice on what I want to be like they do.  
All so happy and vagrant.  
Each original in their own way.  
They make me want to puke.  
For I am Dark, Destructive & Dangerous.  
I slap on my face of happiness, but inside I am evil!!  
For I can be the next kid to bring guns to kill students at school.  
So, Parents, watch your children cuz I'm BACK!

Student had a blank face when he handed the poem to Mary. Upon reading the “Faces” poem, Mary became frightened, handed the poem back and left the campus in fear. Subsequently, Student handed

the same poem to another student, Erin, whom he had spoken with on several occasions. Erin did not read the poem until Monday, when she was called into the principal's office and asked to read it, at which time she became frightened. Student is charged with making criminal threats to Mary and Erin (P.C. § 422). What arguments should be made on whether the poem was a true threat and whether it was protected by the First Amendment?

(source: *In re George T.*, 33 Cal.4th 620 (2004) (holding that poem did not constitute a true threat).

## CHAPTER 12 - AFFIRMATIVE DEFENSES – CHOICE OF EVILS

### **Problem 78** (p. 542)

In *People v. Randall*, 35 Cal.4th 987 (2005), the California Supreme Court affirmed the reversal of the conviction. The court held that imperfect defense of another would negate malice and that the defendant, even though one of the initial wrongdoers, was not barred from asserting the defense because he and his cousin had retreated, and the cousin was now being attacked with excessive force.

## CHAPTER 13 - AFFIRMATIVE DEFENSES – EXCUSES

### **People v. Skinner** (p. 589)

In *Skinner*, the court suggests that reading P.C. § 25(b) to eliminate the *second* prong of the *M’Naghten* test might be unconstitutional. In *Clark v. Arizona*, 548 U.S. 735 (2006), the Supreme Court rejected the defendant's due process challenge to Arizona's definition of insanity, which eliminated the *first* prong of the *M’Naghten* test. The Court expressed doubt that the elimination of the first prong had much significance. "In practical terms, if a defendant did not know what he was doing when he acted, he could not have known that he was performing the wrongful act charged as a crime."

### **Problem 88** (p. 608)

The California Supreme Court upheld the commitment. See *People v. Hurtado*, 28 Cal.4th 1179 (2002).

## CHAPTER 14 - ACCOMPLICE AND CORPORATE VICARIOUS LIABILITY

### **Notes and Problem** (p. 646)

#### *Assisted Suicide and the Constitution.*

In *Gonzales v. Oregon*, 546 U.S. 243 (2006), a case involving the Oregon Death With Dignity Act, the Supreme Court held (6-3) that the Attorney General had exceeded his authority by issuing an Interpretive Rule under the federal Controlled Substances Act to the effect that using controlled substances to assist suicide was not a legitimate medical practice and dispensing or prescribing them for this purpose was unlawful.

## CHAPTER 16 - THE DEATH PENALTY AND THE CONSTITUTION

**Kennedy v. Louisiana** (2008 Update Case substituting for *Coker v. Georgia*, p. 712 and *Problem 98*, p. 720)

The Court holds (5-4) that, in cases of crimes against individuals, the Eighth Amendment prohibits

imposition of the death penalty except as to homicides. The Court, in form at least, reaches this conclusion by applying the two-part test developed in its earlier proportionality cases.

- ◆ Justice Kennedy, writing for the majority, finds that there is a strong national consensus against the death penalty for child rape – 44 states and the Federal Government rejecting the death penalty and only six states allowing it – a stronger consensus even than supported the Court’s rejection of the death penalty in *Enmund*, *Atkins* and *Roper*. Kennedy also points out that there have been no executions for child rape since 1964 and that the defendant is one of only two people sentenced to death for child rape since *Furman*. Justice Alito, writing for the dissenters, disputes the significance of the number of authorizing the death penalty for child rape, pointing out that those six states represent a very recent trend produced by the dramatic increase in reported child sexual abuse and that other states would have adopted similar statutes but for their confusion over scope of the *Coker* decision. He dismisses the paucity of death sentences for child rape on the ground that the statutes are all new, and he cites the fact that two out of the four juries in Louisiana deciding the penalty under the new law voted for death. [These last two points seem dubious to us. While three of the state statutes were enacted in the past two years, the Louisiana and Montana statutes are more than ten years old, and Georgia’s is nine years old, surely enough time for prosecutions to have been brought. And the fact that two out of four juries brought in death verdicts says nothing about the acceptability of the death penalty for child rape absent information about how many cases there were where the prosecution could have sought the death penalty and did not.]
- ◆ In bringing the Court’s “own judgment to bear” on the question, Justice Kennedy expresses doubts that the penalty serves the penological purposes of retribution (because the child rapist is not as depraved as the murderer and does not do as much harm) or deterrence (because of the problem of underreporting of child rape and the risk of encouraging rapists to kill). However, Kennedy adduces other arguments – only loosely related to the issue of penological purpose – against finding the death penalty constitutional: the breadth of the death penalty if applied to child rape and the difficulty of locating narrowing principles, the risk of wrongful convictions (a concern previously raised in *Atkins*), the potential harm to the child victim and the questionable morality of enlisting the child in the pursuit of the death penalty. Justice Alito dismisses most of the majority’s arguments as having nothing to do with an Eighth Amendment proportionality test, eschews (as does the majority) any discussion of whether the death penalty has a deterrent effect in this context and rejects the majority’s retribution analysis. He argues that a child rapist is more depraved than some murderers on whom a death sentence may be imposed and that the harm to the victim, and therefore to society as a whole, is great.

**Further Discussion:**

- The decision describes the issue in the case as being “whether the death penalty is disproportionate to the crime,” applies the Court’s two-part proportionality analysis and cites to the Court’s prior proportionality cases, but is that the whole of the Eighth Amendment argument that Justice Kennedy is making? It seems that he also is arguing that allowing the death penalty for child rape would run afoul of *Furman* itself by creating too great a risk of arbitrariness. His concern seems to be that extending the death penalty to a new category of cases – a category larger than the category of death-eligible murderers – with no already devised limiting factors, and where procedural aspects of the cases in that category create a higher than normal risk arbitrary or erroneous imposition of the death penalty, threatens to undo the Court’s narrowing jurisprudence developed over the last thirty-five years. It is this

concern for sanctioning too broad a death penalty that may account for the majority's decision to draw a bright line barring the death penalty for non-homicidal crimes in lieu of a narrower decision holding this statute unconstitutional but leaving open the possibility of permitting the death penalty for the kinds of more aggravated versions of child rape suggested by Justice Alito.

- Curiously, both opinions cite to the relative indefiniteness of the narrowing aggravators approved in *Arave v. Creech*, 507 U.S. 463 (1993), *Walton v. Arizona*, 497 U.S. (1990) and *Jurek v. Texas*, 428 U.S. 262 (1976) in support of their positions. Justice Kennedy, citing the potential of the standards “to result in some inconsistency of application,” appears to be saying that the Court has already approved a relatively broad death penalty and therefore should not go further. In contrast, Justice Alito argues that there should be no problem for the states to come up narrowing aggravators for child rape at least as definite as those approved by the Court.
- Justice Kennedy cites the unreliability of child witnesses and the likelihood that the victim will be the only percipient witness to the crime as a reason for finding an Eighth Amendment violation – is this a proper factor in an Eighth Amendment analysis? As Justice Alito points out, the concern does not seem to fit within a proportionality analysis. However the concern does seem relevant to the Court's holding that the Eighth Amendment requires “heightened reliability” in the determination of guilt and punishment in a death penalty case. See *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).
- Justice Kennedy, repeating his formulation from *Panetti v. Quarterman*, \_\_\_ U.S. \_\_\_, 127 S.Ct. 2842 (2007), links retribution to the judgment, not only of the community, but also of “the surviving family and friends of the victim” as to whether the death penalty must be imposed. He goes on to state that the question is whether the death penalty “balances” the wrong to the victim and then discusses whether the victim's “hurt is lessened” by a death sentence. Is this victim-centered view of retribution appropriate, or is retribution judged by a community standard?
- What are the implications of this decision, if any, for the constitutionality of the death penalty as applied to particular forms of murder? On the one hand, the Court appears to have drawn a bright line between murder and non-homicide crimes, suggesting the decision has no implications for murder. On the other hand, Justice Kennedy points out the lack of a “unifying principle” to the Court's death penalty jurisprudence and seems to express misgivings about the breadth of the death penalty. He also twice distinguishes child rape from *intentional* murder, as if to suggest that *unintentional* murder also may not justify the death penalty.

**PEOPLE v. KNOLLER**  
41 Cal.4th 139 (2007)

KENNARD, J.

On January 26, 2001, two dogs owned by defendant Marjorie Knoller and her husband, codefendant Robert Noel, attacked and killed Diane Whipple in the hallway of an apartment building in San Francisco. Defendant Knoller was charged with second degree murder (Pen.Code, § 189) and involuntary manslaughter (§ 192, subd. (B)); codefendant Noel, who was not present at the time of the attack on Whipple, was charged with involuntary manslaughter but not murder. Both were also charged with owning a mischievous animal that caused the death of a human being, in violation of § 399.

After a change of venue to Los Angeles County, a jury convicted defendants on all counts. Both moved for a new trial. (See § 1181, subd. 6 [a trial court may grant a new trial when “the verdict or finding is contrary to law or evidence”].) The trial court denied Noel's motion. It granted Knoller's motion in part, giving her a new trial on the second degree murder charge, but denying her motion for a new trial on the other two crimes of which she was convicted (involuntary manslaughter and possession of a mischievous animal that causes death).

With respect to Knoller, whose conviction of second degree murder was based on a theory of implied malice, the trial court took the position that, to be guilty of that crime, Knoller must have known that her conduct involved *a high probability of resulting in the death of another*. Finding such awareness lacking, the trial court granted Knoller's motion for a new trial on the second degree murder conviction.

....

The Court of Appeal reversed the trial court's order granting Knoller a new trial on the second degree murder charge. It remanded the case to the trial court for reconsideration of the new trial motion in light of the Court of Appeal's holding that implied malice can be based simply on a defendant's conscious disregard of the risk of *serious bodily injury to another*. In all other respects, the Court of Appeal affirmed the convictions of both defendants.

Both defendants petitioned this court for review. We granted only Knoller's petition, limiting review to two questions: “(1) Whether the mental state required for implied malice includes only conscious disregard for human life or can it be satisfied by an awareness that the act is likely to result in great bodily injury,” and “(2) Whether the trial court abused its discretion in granting Knoller's motion for new trial under Penal Code section 1181[, subdivision 6].”

With respect to the first issue, we reaffirm the test of implied malice we set out in *People v. Phillips* (1966) 64 Cal.2d 574 and reiterated in many later cases: Malice is implied when the killing is proximately caused by “an act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life.” In short, implied malice requires a defendant's awareness of engaging in conduct that endangers the life of another—no more, and no less.

Measured against that test, it becomes apparent that the Court of Appeal set the bar too low, permitting a conviction of second degree murder, based on a theory of implied malice, if the defendant knew his or her conduct risked causing death *or serious bodily injury*. But the trial court set the bar too high, ruling that implied malice requires a defendant's awareness that his or her conduct had a *high probability* of resulting in death, and that granting defendant Knoller a new trial was justified because the prosecution did not charge codefendant Noel with murder. ...

## I. FACTS AND PROCEEDINGS

[In 1998, Pelican Bay State Prison inmates, Schneider and Bretches, members of the Aryan Brotherhood prison gang, set up a business with two women outside the prison to buy, raise and breed Presa Canario dogs. This breed tends to be very large, and it is “a gripping dog,” used and bred for combat and guarding. The defendants are attorneys who represented one of the two women in a lawsuit over the dogs, and in the resolution of the lawsuit, the defendants acquired two of the Presa Canario dogs, Hera and Bane. Noel took the dogs to a veterinarian for examination and vaccinations and was subsequently warned by him that the dogs were huge and untrained and undisciplined and were therefore dangerous. In April, 2000, the defendants brought Hera to their sixth-floor apartment in San Francisco, and in September, 2000, they brought Bane.

[Between the time Noel and Knoller brought the dogs to their apartment and the date of the mauling of Whipple, there were about 30 incidents of the two dogs being out of control, threatening humans and other dogs. One neighbor was bitten, and several people, including a postal worker, had the dogs snarl and lunge at them. The dogs attacked other dogs, and Noel was seriously injured, requiring surgery and the insertion of steel pins in his hand, when he was bitten by one of the dogs while breaking up a dogfight. Noel and Knoller had trouble controlling the dogs, Knoller admitting in a letter to Schneider that she did not have the upper body strength to handle Bane and was having trouble with Hera. Noel and Knoller ignored all advice they received regarding handling the dogs, including advice from a dog trainer to have the dogs trained and to use a choke collar.]

Mauling victim Diane Whipple and her partner Sharon Smith lived in a sixth-floor apartment across a lobby from defendants. Smith encountered defendants' two dogs as often as once a week. In early December 2000, Whipple called Smith at work to say, with some panic in her voice, that one of the dogs had bitten her. Whipple had come upon codefendant Noel in the lobby with one of the dogs, which lunged at her and bit her in the hand. Whipple did not seek medical treatment for three deep, red indentations on one hand. Whipple made every effort to avoid defendants' dogs, checking the hallway before she went out and becoming anxious while waiting for the elevator for fear the dogs would be inside. She and Smith did not complain to apartment management because they wanted nothing to do with defendants Knoller and Noel.

On January 26, 2001, Whipple telephoned Smith to say she was going home early. At 4:00 p.m., Esther Birkmaier, a neighbor who lived across the hall from Whipple, heard dogs barking and a woman's “panic-stricken” voice calling, “Help me, help me.” Looking through the peephole in her front door, Birkmaier saw Whipple lying facedown on the floor just over the threshold of her apartment with what appeared to be a dog on top of her. Birkmaier saw no one else in the hallway. Afraid to open the door, Birkmaier called 911, the emergency telephone number, and at the same time heard a voice yelling, “No, no, no” and “Get off.” When Birkmaier again approached her door,

she could hear barking and growling directly outside and a banging against a door. She heard a voice yell, “Get off, get off, no, no, stop, stop.” She chained her door and again looked through the peephole. Whipple's body was gone and groceries were strewn about the hallway. Birkmaier called 911 a second time.

At 4:12 p.m., San Francisco Police Officers Sidney Laws and Leslie Forrestal arrived in response to Birkmaier's telephone calls. They saw Whipple's body in the hallway; her clothing had been completely ripped off, her entire body was covered with wounds, and she was bleeding profusely. Defendant Knoller and the two dogs were not in sight.

The officers called for an ambulance. Shortly thereafter, defendant Knoller emerged from her apartment. She did not ask about Whipple's condition but merely told the officers she was looking for her keys, which she found just inside the door to Whipple's apartment.

[Whipple died, having suffered over 77 discrete injuries to her body. The medical examiner stated that, although earlier medical attention would have increased Whipple's chances of survival, she might have died anyway because she had lost one-third or more of her blood at the scene.]

[At trial,] Codefendant Noel did not testify, but he presented evidence of positive encounters between the two dogs and veterinarians, friends, and neighbors. Defendant Knoller did testify in her own defense. She referred to herself, her husband, and Pelican Bay prisoner Schneider as the “triad,” and she spoke of Schneider as her “son.” The two dogs had become a focal point in the relationship. She denied reading literature in the apartment referring to the vicious nature of the dogs. She thought the dogs had no personality problems requiring a professional trainer. She denied receiving or otherwise discounted any warnings about the two dogs' behavior and she maintained that virtually all the witnesses testifying to incidents with the dogs were lying. She said she never walked both dogs together. Ordinarily, she would walk Hera and codefendant Noel would walk Bane, because she had insufficient body strength to control Bane. But after Noel was injured while breaking up a fight between Bane and another dog, Knoller would sometimes walk Bane, always on a leash. She said she had just returned from walking Bane on the roof of the apartment building, and had opened the door to her apartment while holding Bane's leash, when Bane dragged her back across the lobby toward Whipple, who had just opened the door to her own apartment. The other dog, Hera, left defendants' apartment and joined Bane, who attacked Whipple. Knoller said she threw herself on Whipple to save her. She denied that Hera participated in the attack. She acknowledged not calling 911 to get help for Whipple.

Asked whether she denied responsibility for the attack on Whipple, Knoller gave this reply: “I said in an interview that I wasn't responsible but it wasn't for the—it wasn't in regard to what Bane had done, it was in regard to knowing whether he would do that or not. And I had no idea that he would ever do anything like that to anybody. How can you anticipate something like that? It's a totally bizarre event. I mean how could you anticipate that a dog that you know that is gentle and loving and affectionate would do something so horrible and brutal and disgusting and gruesome to anybody? How could you imagine that happening?”

In rebuttal, the prosecution presented evidence that the minor character of defendant Knoller's injuries—principally bruising to the hands—indicated that she had not been as involved in trying to

protect mauling victim Whipple as she had claimed. Dr. Randall Lockwood, the prosecution's expert on dog behavior, testified that good behavior by a dog on some occasions does not preclude aggressive and violent behavior on other occasions, and he mentioned the importance of training dogs such as Bane and Hera *not* to fight.

The jury found Knoller guilty of second degree murder; it also found both Knoller and Noel guilty of involuntary manslaughter and owning a mischievous animal that caused the death of a human being. Both defendants moved for a new trial. The trial court denied Noel's motion. We quote below the pertinent statements by the trial court in granting Knoller's motion for a new trial on the second degree murder count.

The trial court observed: “The law requires that there be a subjective understanding on the part of the person that on the day in question—and I do not read that as being January 26th, 2001 because by this time, with all of the information that had come out dealing with the dogs, the defendants were fully on notice that they had a couple of wild, uncontrollable and dangerous dogs that were likely going to do something bad. [¶] Is the ‘something bad’ death? That is the ultimate question in the case. There is no question but that the something bad was going to be that somebody was going to be badly hurt. I defy either defendant to stand up and tell me they had no idea that those dogs were going to hurt somebody one day. *But can they stand up and say that they knew subjectively—not objectively and that's an important distinction—that these dogs were going to stand up and kill somebody?*” (Italics added.)

The trial court continued: “I am guided by a variety of principles. One of them is that public emotion, public outcry, feeling, passion, sympathy do not play a role in the application of the law. The other is that I am required to review all of the evidence and determine independently rather than as a jury what the evidence showed. I have laid out most of the evidence as it harms the defendants in this case. Their conduct from the time that they got the dogs to the time—to the weeks after Diane Whipple's death was despicable.”

....

The trial court went on: ... When you take everything as a totality, *the question is whether or not as a subjective matter and as a matter of law Ms. Knoller knew that there was a high probability that day, or on the day before on the day after,—I reject totally the argument of the defendants that she had to know when she walked out the door—she was going to kill somebody that morning. The Court finds that the evidence does not support it.*” (Italics added.)

The trial court concluded it had “no choice, ... taking the Legislature's scheme, the evidence that was received, as despicable as it is, but to determine not that [defendant Knoller] is acquitted of second degree murder but to find that on the state of the evidence, *I cannot say as a matter of law that she subjectively knew on January 26th that her conduct was such that a human being was likely to die.*” (Italics added.)

The trial court mentioned another consideration: “The Court also notes a great troubling feature of this case that Mr. Noel was never charged [with murder] as Ms. Knoller was. In the Court's view, given the evidence, Mr. Noel is more culpable than she. Mr. Noel personally knew that she

could not control those dogs. He could not control those dogs. Mr. Noel was substantially haughtier than she was. In brushing off all of the incidents that happened out in the street, Mr. Noel knew as a theological certainty that that dog, which had recently been operated on, was taking medication that had given it diarrhea, was going to go out into the hallway or out into the street possibly, at the hands of Ms. Knoller. He ... left her there to do that. [¶] ... And yet Mr. Noel was not charged [with murder]. Equality of sentencing and the equal administration of justice is an important feature in any criminal court. That played a role as well.” The trial court then granted defendant Knoller's motion for a new trial on the second degree murder count.

....

## II. THE ELEMENTS OF IMPLIED MALICE

Murder is the unlawful killing of a human being, or a fetus, with malice aforethought. (§ 187, subd. (a).) Malice may be express or implied. (§ 188.) At issue here is the definition of “implied malice.”

Defendant Knoller was convicted of second degree murder as a result of the killing of Diane Whipple by defendant's dog, Bane. Second degree murder is the unlawful killing of a human being with malice aforethought but without the additional elements, such as willfulness, premeditation, and deliberation, that would support a conviction of first degree murder. Section 188 provides: “[M]alice may be either express or implied. It is express when there is manifested a deliberate intention to take away the life of a fellow creature. It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.”

The statutory definition of implied malice, a killing by one with an “abandoned and malignant heart” (§ 188), is far from clear in its meaning. Indeed, an instruction in the statutory language could be misleading, for it “could lead the jury to equate the malignant heart with an evil disposition or a despicable character” (*People v. Phillips*) instead of focusing on a defendant's awareness of the risk created by his or her behavior. “Two lines of decisions developed, reflecting judicial attempts ‘to translate this amorphous anatomical characterization of implied malice into a tangible standard a jury can apply.’” (*People v. Nieto Benitez* (1992) 4 Cal.4th 91, quoting *People v. Protopappas* (1988) 201 Cal.App.3d 152.) Under both lines of decisions, implied malice requires a defendant's awareness of the risk of death to another.

The earlier of these two lines of decisions, as this court observed in *Nieto Benitez*, originated in Justice Traynor's concurring opinion in *People v. Thomas* (1953) 41 Cal.2d 470, which stated that malice is implied when “the defendant for a base, antisocial motive and with wanton disregard for human life, does an act that involves a high degree of probability that it will result in death.” (We here refer to this as the *Thomas* test.) The later line dates from this court's 1966 decision in *People v. Phillips*: Malice is implied when the killing is proximately caused by “an act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life.” (The *Phillips* test.)

In *People v. Watson* (1981) 30 Cal.3d 290, we held that these two definitions of implied

malice in essence articulated the same standard. Concerned, however, that juries might have difficulty understanding the *Thomas* test's concept of "wanton disregard for human life," we later emphasized that the "better practice in the future is to charge juries solely in the straightforward language of the 'conscious disregard for human life' definition of implied malice," the definition articulated in the *Phillips* test. (*People v. Dellinger* (1989) 49 Cal.3d 1212.) The standard jury instructions thereafter did so. ...

### **III. THE COURT OF APPEAL'S TEST FOR IMPLIED MALICE**

As discussed in the preceding part, the great majority of this court's decisions establish that a killer acts with implied malice only when acting with an awareness of *endangering human life*. This principle has been well settled for many years, and it is embodied in the standard jury instruction given in murder cases, including this one. The Court of Appeal here, however, held that a second degree murder conviction, based on a theory of implied malice, can be based simply on a defendant's awareness of the risk of causing *serious bodily injury* to another.

[The court distinguished three cases relied on by the Court of Appeal, concluding that neither *People v. Conley* (1966) 64 Cal.2d 310, nor *People v. Poddar* (1974) 10 Cal.3d 750 addressed the issue presented in the instant case and that any language in *People v. Coddington* (2000) 23 Cal.4th 529 suggesting that knowledge of the likelihood of serious bodily injury permits an inference of implied malice, was inconsistent, not only with the holding in that case, but also with the court's views expressed in other decisions.]

... We conclude that a conviction for second degree murder, based on a theory of implied malice, requires proof that a defendant acted with conscious disregard of the danger to human life. In holding that a defendant's conscious disregard of the risk of serious bodily injury suffices to sustain such a conviction, the Court of Appeal erred.

### **IV. THE TRIAL COURT'S GRANT OF A NEW TRIAL ON THE SECOND DEGREE MURDER CHARGE**

We now turn to the second issue raised by the petition for review—whether the trial court abused its discretion in granting defendant Knoller a new trial on the second degree murder charge. Such an abuse of discretion arises if the trial court based its decision on impermissible factors or on an incorrect legal standard.

In granting Knoller a new trial, the trial court properly viewed implied malice as requiring a defendant's awareness of the danger that his or her conduct will result in another's *death* and not merely in serious bodily injury. But the court's ruling was legally flawed in other respects. As we explain below, the trial court based its ruling on an inaccurate definition of implied malice, and it inappropriately relied on the prosecutor's failure to charge codefendant Noel with murder.

As discussed earlier in part II, this court before its decision in *People v. Dellinger*, had defined implied malice in two similar but somewhat different ways. ...

Here, the trial court properly instructed the jury in accordance with the *Phillips* test. But when

the court evaluated defendant Knoller's new trial motion, it relied on language from the *Thomas* test, and as explained below, its description of that test was inaccurate. The court stated that a killer acts with implied malice when the killer “*subjectively knows*, based on everything, that the conduct that he or she is about to engage in has a *high probability of death* to another human being” and thus the issue in this case was “whether or not as a *subjective* matter and as a matter of law Ms. Knoller *knew* that there was a *high probability*” that her conduct would result in someone's death. (Italics added.) But “high probability of death” is the *objective*, not the *subjective*, component of the *Thomas* test, which asks whether the defendant's act or conduct “involves a high probability that it will result in death.” The *subjective* component of the *Thomas* test is whether the defendant acted with “a base, antisocial motive and with wanton disregard for human life.” Nor does the *Phillips* test require a defendant's awareness that his or her conduct has a *high probability* of causing death. Rather, it requires only that a defendant acted with a “conscious disregard for human life”

As just shown, in treating the objective component of the *Thomas* test as the subjective component of that test, the trial court applied an erroneous definition of implied malice in granting defendant Knoller a new trial on the second degree murder charge.

[The court also was troubled by the fact that the trial judge seemed to base his grant of a new trial at least in part on the different treatment received by the co-defendant Noel. Without deciding whether such consideration was ever appropriate, the court held that it was not appropriate in this case because the differential charging was justified because the defendant was present and nominally in control of the dogs at the time of the killing and Noel was not.]

## V. CONCLUSION AND DISPOSITION

In sum, the trial court abused its discretion in granting defendant Knoller a new trial on the second degree murder charge. That court erroneously concluded both that Knoller could not be guilty of murder, based on a theory of implied malice, unless she appreciated that her conduct created a high probability of someone's death, and that a new trial was justified because the prosecution did not charge codefendant Noel with murder. It is uncertain whether the trial court would have reached the same result using correct legal standards. Moreover, the Court of Appeal, in reversing the trial court's order, also erred, mistakenly reasoning that implied malice required only a showing that the defendant appreciated the risk of serious bodily injury. Under these circumstances, we conclude that the matter should be returned to the trial court to reconsider its new trial order in light of the views set out in this opinion.

....

**PEOPLE v. SUPERIOR COURT (DECKER)**  
41 Cal.4th 1 (2007)

BAXTER, J.

Defendant and real party in interest Ronald Decker has been charged with the attempted willful, deliberate, and premeditated murder of his sister, Donna Decker, and her friend, Hermine Riley Bafiera. According to the evidence offered at the preliminary hearing, Decker did not want to kill these women himself—as he explained, “he would be the prime suspect” and “would probably make a mistake somehow or another”—so he sought the services of a hired assassin.

Decker located such a person (or thought he did). He furnished the hired assassin with a description of his sister, her home, her car, and her workplace, as well as specific information concerning her daily habits. He also advised the assassin to kill Hermine if necessary to avoid leaving a witness behind. Decker and the hired assassin agreed on the means to commit the murder, the method of payment, and the price. The parties also agreed that Decker would pay \$5,000 in cash as a downpayment. Before Decker handed over the money, the assassin asked whether Decker was “sure” he wanted to go through with the murders. Decker replied, “I am absolutely, positively, 100 percent sure, that I want to go through with it. I've never been so sure of anything in my entire life.” All of these conversations were recorded and videotaped because, unknown to Decker, he was talking with an undercover police detective posing as a hired assassin.

Decker does not dispute that the foregoing evidence was sufficient to hold him to answer to the charge of solicitation of the murder of Donna and Hermine but argues that this evidence was insufficient to support a charge of their attempted murder. The magistrate and the trial court, believing themselves bound by *People v. Adami* (1973) 36 Cal.App.3d 452 (*Adami*), reluctantly agreed with Decker and dismissed the attempted murder charges. The Court of Appeal disagreed with *Adami* and issued a writ of mandate directing the respondent court to reinstate the dismissed counts. We granted review to address the conflict and now affirm.

....

**Discussion**

....

Attempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing. The uncontradicted evidence that Decker harbored the specific intent to kill his sister (and, if necessary, her friend Hermine) was overwhelming. Decker expressed to both Wafer and Holston his desire to have Donna killed. He researched how to find a hired assassin. He spent months accumulating cash in small denominations to provide the hired assassin with a downpayment and had also worked out a method by which to pay the balance. He knew the layout of his sister's condominium and how one might enter it surreptitiously. He had tested the level of surveillance in the vicinity of her home and determined it was “not really that sharp.” He chronicled his sister's daily routine at both her home and her office. He offered Holston recommendations on how his sister should be killed and what materials

would be necessary. And, at both meetings with Holston, he insisted that Hermine, if she were present, be killed as well, so as to prevent her from being a witness.

The controversy in this case, as the parties readily concede, is whether there was also a direct but ineffectual act toward accomplishing the intended killings. For an attempt, the overt act must go beyond mere preparation and show that the killer is putting his or her plan into action; it need not be the last proximate or ultimate step toward commission of the crime or crimes, nor need it satisfy any element of the crime. However, as we have explained, “[b]etween preparation for the attempt and the attempt itself, there is a wide difference. The preparation consists in devising or arranging the means or measures necessary for the commission of the offense; the attempt is the direct movement toward the commission after the preparations are made.” (*People v. Murray* (1859) 14 Cal. 159.) “[I]t is sufficient if it is the first or some subsequent act directed towards that end after the preparations are made.” (*People v. Memro* (1985) 38 Cal.3d 658.)

As simple as it is to state the terminology for the law of attempt, it is not always clear in practice how to apply it. As other courts have observed, “[m]uch ink has been spilt in an attempt to arrive at a satisfactory standard for telling where preparation ends and attempt begins.” [Citation.] ‘Both as fascinating and as fruitless as the alchemists’ quest for the philosopher’s stone has been the search, by judges and writers, for a valid, single statement of doctrine to express when, under the law of guilt, preparation to commit a crime becomes a criminal attempt.’” (*Minshew v. State* (Ala.Crim.App. 1991) 594 So.2d 703.) Indeed, we have ourselves observed that “none of the various ‘tests’ used by the courts can possibly distinguish all preparations from all attempts.” (*People v. Memro, supra.*)

Although a definitive test has proved elusive, we have long recognized that “[w]henver the design of a person to commit crime is clearly shown, slight acts in furtherance of the design will constitute an attempt.” (*People v. Anderson* (1934) 1 Cal.2d 687 [attempted robbery]). Viewing the entirety of Decker’s conduct in light of his clearly expressed intent, we find sufficient evidence under the slight-acts rule to hold him to answer to the charges of attempted murder.

....

... [A]t the time Decker handed Holston the downpayment on the murder, Decker’s intention was clear. It was equally clear that he was “actually putting his plan into action.” (*People v. Dillon* (1983) 34 Cal.3d 441.) Decker had secured an agreement with Holston to murder Donna (and, if necessary, her friend Hermine); had provided Holston with all the information necessary to commit the crimes; had given Holston the \$5,000 downpayment; and had understood that “it’s done” once Holston left with the money. These facts would lead a reasonable person to “believe a crime is about to be consummated absent an intervening force”—and thus that “the attempt is underway.” Indeed, as Justice Epstein noted for the Court of Appeal, “[t]here was nothing more for Decker to do to bring about the murder of his sister.” Although Decker did not himself point a gun at his sister, he did aim at her an armed professional who had agreed to commit the murder.<sup>1</sup>

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<sup>1</sup> Decker does not argue here that the attempted murder charges must be dismissed because, notwithstanding Decker’s own conduct, Detective Holston never intended to commit the murders.

As contrary authority, Decker relies on *Adami*, which affirmed the dismissal of an attempted murder charge on similar facts, and relies also on the small number of out-of-state majority and minority opinions that have followed *Adami*. In *Adami*, the defendant sought to have his wife killed because she had stolen money from him. He agreed on a price with an undercover police agent posing as an assassin and supplied the agent with a photograph of the victim, a description of the victim and her residence and vehicles, and other pertinent information. The defendant gave the police agent \$500 as a downpayment and announced he was not going to change his mind. *Adami* declared that these acts “consisted solely of solicitation or mere preparation” and concluded, in accordance with the “weight of authority,” that “solicitation alone is not an attempt.”

We perceive several flaws in *Adami's* analysis.

First, the opinion makes no mention of the slight-acts rule, which has long been the rule for attempted crimes in California. Indeed, *Adami's* progeny make no pretense of reconciling their analysis with the slight-acts rule and instead explicitly reject it.

Decker argues that the slight-acts rule should not be applied to the crime of attempted murder, but his argument lacks legal or logical support. Our adoption of the slight-acts rule in *People v. Anderson, supra*, was supported by a citation to *Stokes v. State* (Miss. 1908) 46 So. 627, which is “[o]ne of the leading cases in the United States on attempt to commit a crime” (*Duke v. State* (Miss. 1976) 340 So.2d 727) and which (like the present case) involved a defendant who hired another to perform a murder. The cases on which Decker relies thus conflict not only with California law, but also with the “fairly general agreement . . . that slight acts are enough when the intent to murder is clearly shown.” (Annot., What Constitutes Attempted Murder (1974) 54 A.L.R.3d 612.) Indeed, where (as here) the crime involves concerted action—and hence a greater likelihood that the criminal objective will be accomplished—there is a *greater* urgency for intervention by the state at an *earlier* stage in the course of that conduct. Had Decker struck an agreement with and paid earnest money to a real hired killer, he could have been prosecuted for conspiracy to commit murder, which is punishable to the same extent as the completed crime of first degree murder. Because of the fortuity that Decker's hired killer was actually an undercover detective, Decker faces the much less serious charge of attempted murder. Neither Decker nor the dissent has offered any reason for us create an exception to the slight-acts rule for attempted murder, especially in *Stokes's* classic formulation where the attempt involves concerted action with others, merely so that Decker's maximum potential punishment may be further reduced.

Second, *Adami* has misconceived the issue under these circumstances to be “whether the solicitation itself was sufficient to establish probable cause to believe that defendant attempted the murder.” Decker similarly expends considerable effort to convince us that ““solicitation of another to commit a crime is an attempt to commit that crime if, but only if, it takes the form of urging the other to join with the solicitor in perpetrating that offense, not at some future time or distant place, but here and now, and the crime is such that it cannot be committed by one without the cooperation and submission of another.”” But a solicitation requires only that a person invite another to commit or join in an enumerated crime (including murder) with the intent that the crime be committed. (Pen.Code, § 653f.) The solicitation is complete once the request is made and is punishable “irrespective of the reaction of the person solicited.” (*In re Ryan N.* (2001) 92 Cal.App.4th 1359.) In this case, the solicitation was complete early in Decker's first conversation with Holston, when

he asked Holston to kill Donna. But the People do not contend that this request was sufficient to prosecute Decker for attempted murder. They argue instead that the solicitation, in combination with Decker's subsequent conduct, revealed his plan to have Holston murder Donna (and, if necessary, her friend Hermine) and that Decker put this plan into operation no later than the point at which he completed the agreement with Holston, finalized the details surrounding the murders, and paid Holston \$5,000 in earnest money.

The issue, then, is not whether “solicitation alone” is sufficient to establish an attempt, but whether a solicitation to commit murder, combined with a completed agreement to hire a professional killer and the making of a downpayment under that agreement, can establish probable cause to believe Decker attempted to murder these victims. A substantial number of our sister states have held that it can. [citing cases from Arizona, Georgia, Louisiana, Nebraska, New Hampshire, New York, Virginia, Washington and West Virginia]. Additional jurisdictions have held that a solicitation to murder, in combination with a completed agreement to hire a professional killer and further conduct implementing the agreement, can similarly constitute an attempted murder. We find these authorities persuasive.

Third, *Adami* mistakenly assumes that there can be no overlap between the evidence that would tend to prove solicitation to murder and that which would tend to prove attempted murder. Indeed, Decker asserts that these are “mutually exclusive crimes.” But it could not be plainer, as Chief Justice Holmes put it, that while “preparation is not an attempt,” nonetheless “*some* preparations may amount to an attempt.” (*Commonwealth v. Peaslee* (Mass. 1901) 59 N.E. 55, italics added.) Conduct that qualifies as mere preparation and conduct that qualifies as a direct but ineffectual act toward commission of the crime exist on a continuum, “since all acts leading up to the ultimate consummation of a crime are by their very nature preparatory.” (*State v. Sunzar* (N.J.Super. 1999) 751 A.2d 627.) The difference between them “is a question of degree.” (*Commonwealth v. Peaslee, supra*) There is thus no error in resting a finding of attempted murder in part on evidence that *also* tends to establish solicitation to commit murder and vice versa. After all, even under Decker's analysis, evidence of a solicitation to commit murder can tend to support a finding of attempted murder if the defendant then “provides the hit man the instrument or other means to procure the death.” Decker offers no principled basis for a different result when the hit man already has a weapon and the defendant instead begins payment under the contract to kill.

Fourth, we reject the contention, endorsed by Decker and by *Adami*'s progeny, that there is “no persuasive reason” why a solicitation to commit murder “should be treated differently under the law merely because part of the agreed upon fee has passed hands. There is no greater proximity, no significantly greater likelihood of consummation, and no act of a nature other than incitement or preparation inherent in the solicitation itself.” As the People point out, though, a downpayment on a contract to murder serves the same purpose as a downpayment on any other type of contract. It evidences the solicitor's “seriousness of purpose” and makes the object of the contract “closer to fruition.” It blinks reality to equate the threat posed by an individual who has merely invited another, perhaps unsuccessfully, to commit murder with the threat posed by an individual who has already reached an agreement with a hired killer to commit murder, finalized the plans, and made the downpayment under the contract to kill. But for Holston's status as an undercover detective, it is likely that Decker's conduct would have resulted in the murder of these victims. Where, as here, the defendant's intent is unmistakable, “the courts should not destroy the practical and

common-sense administration of the law with subtleties as to what constitutes preparation and what constitutes an act done toward the commission of a crime.” (*People v. Memro, supra.*)

The purpose of requiring an overt act is that until such act occurs, one is uncertain whether the intended design will be carried out. When, by reason of the defendant's conduct, the situation is “without any equivocality,” and it appears the design will be carried out if not interrupted, the defendant's conduct satisfies the test for an overt act. Here, the record supported at least a strong suspicion that Decker's intent to have his sister (and, if necessary, her friend) murdered was unambiguous and that he had commenced the commission of the crime by doing all that he needed to do to accomplish the murders.

In finding the record sufficient to hold Decker to answer to the charges of attempted murder here, we do not decide whether an agreement to kill followed by a downpayment is *always* sufficient to support a charge of attempted murder. Whether acts done in contemplation of the commission of a crime are merely preparatory or whether they are instead sufficiently close to the consummation of the crime is a question of degree and depends upon the facts and circumstances of a particular case. A different situation may exist, for example, when the assassin has been hired and paid but the victims have not yet been identified. In this case, however, Decker had effectively done all that he needed to do to ensure that Donna and her friend were executed. Accordingly, he should have been held to answer to the charges of attempted murder. We disapprove *People v. Adami* to the extent it is inconsistent with this opinion.

WE CONCUR: GEORGE, C.J., KENNARD, CHIN, MORENO and CORRIGAN, JJ.

Dissenting Opinion by WERDEGAR, J.

My colleagues hold that defendant's conduct in soliciting the murder of his sister, reaching an agreement with a hired assassin to do the killing, and making a downpayment under the agreement establishes probable cause to believe defendant himself attempted the murder. I respectfully dissent. “An attempt to commit a crime consists of two elements: a specific intent to commit the crime, and a direct but ineffectual act done toward its commission.” (Pen.Code, § 21a.) Defendant's conduct in this case does not include “a direct but ineffectual act” done toward the murder's commission. Accordingly, he cannot be guilty of attempted murder.

As we have long recognized, the required act for an attempt under California law must be “directed towards immediate consummation” (*People v. Dillon* (1983) 34 Cal.3d 441) of the crime attempted. As the majority details, defendant's conduct included numerous *indirect* acts toward accomplishing the murder of his sister: he sought the services of a hired assassin; he located a person (actually an undercover police detective) he thought would act as such; he furnished the supposed assassin with a description of his sister, her home, her car and her workplace, as well as specific information concerning her daily habits; he discussed how the murder would be done and how and when he would pay for the work, agreeing to furnish \$5,000 in cash as a downpayment; and, finally, just before he was arrested, he stated he was “absolutely, positively, 100 percent sure, that I want to go through with it” and urged the supposed assassin to do it “as fast as you can.”

I agree with the majority that as evidence defendant harbored the specific intent to kill his sister, these facts are overwhelming. None of them, however, constitutes a *direct* but ineffectual

act done toward the murder's commission. (Pen.Code, § 21a.) As the majority states, defendant “did not himself point a gun at his sister”; neither did he otherwise directly menace her. Instead, he relied on the person he thought had agreed to commit the murder to do the actual deed.<sup>1</sup> The direct preparatory acts was the person he sought to engage as his agent-not the ultimate, intended victim of the scheme.

We previously have stated that for attempt, it must be “clear from a suspect's acts what *he* intends to do....” (*People v. Dillon, supra*, italics added.) In this case, what defendant intended to do was have his sister killed *by someone else*. Defendant's own conduct did not include even “slight” acts toward actual commission of the murder. That he hired another, supplied him with information, and paid him a downpayment only highlights his intention not to perform the act himself.

The California cases the majority purports to rely on generally involve single actors, i.e., defendants who acted directly on their victims. These cases simply confirm that for attempt a defendant must have committed a direct act toward commission of the crime. Defendant here committed no direct act toward commission of the murder, since his scheme interposed a third party between himself and his intended victim, and the third party never acted. The majority goes astray in applying to this solicitation-of-murder case, where action by another person was required to effectuate (or attempt) the intended killing, principles applicable when an offense is intended and attempted by a single individual.

Although defendant's conduct went beyond the minimum required for solicitation, for purposes of attempt law his arrangements constitute mere preparation. Reprehensible as they were, his acts “did not amount to any more than the mere arrangement of the proposed measures for [the] accomplishment” of the crime. (*People v. Adami* (1973) 36 Cal.App.3d 452.) This is because, as a logical matter, they did no more than “leave the intended assailant only in the condition to commence the first direct act toward consummation of the defendant's design.” To do all one can to motivate and encourage another to accomplish a killing—even to make a downpayment on a contract to kill—while blameworthy and punishable, is neither logically nor legally equivalent to attempting the killing oneself. In concluding to the contrary, the majority blurs the distinction between preparation and perpetration the Legislature intended by requiring that an attempt include a direct act. (Pen.Code, § 21a.) The majority's supportive reasoning likewise conflates the two separate elements of attempt, specific intent and direct act: “Viewing the entirety of [defendant's] conduct *in light of his clearly expressed intent*, we find sufficient evidence under the slight-acts rule

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<sup>1</sup> Although the majority asserts defendant “did aim at [his sister] an armed professional who had agreed to commit the murder,” the armed professional referred to (i.e., the detective) only *pretended* to agree so that in fact there was no agreement, though defendant thought there was. This absence of actual agreement presumably is why the case was not prosecuted as a conspiracy. (See *People v. Jurado* (2006) 38 Cal.4th 72, 120 [“ ‘A conviction of conspiracy requires proof that the defendant and another person had the specific intent to agree or conspire to commit an offense, as well as the specific intent to commit the elements of that offense, together with proof of the commission of an overt act “by one or more of the parties to such agreement” in furtherance of the conspiracy’ ”].)

to hold him to answer to the charges of attempted murder.” As a court, we are not authorized to ignore the statutory requirements.

The majority's criticisms of *Adami* are unpersuasive. The majority faults *Adami* for not mentioning the slight acts rule, but since the *Adami* court concluded no “appreciable fragment of the crime charged was accomplished,” the rule had no application. Nor, contrary to the majority's account, did *Adami* assume that evidence of solicitation cannot also be evidence of attempt. *Adami* simply held that hiring a murderer, planning the murder, and making a downpayment logically constitute “solicitation or mere preparation,” not attempted murder.

Confronted with statutory language and judicial precedent contrary to its conclusion, the majority relies on out-of-state cases. Several of these interpret attempt statutes distinguishable from our own. Others involve more than a completed agreement with a hired killer, including a direct act *toward the victim*. The remaining cases are in my view mistaken for the same reason the majority is mistaken: they implicitly allow that a defendant may be guilty of attempt when no direct act toward the commission of the crime has been done. Courts in some other jurisdictions have, as the majority fails to acknowledge, maintained the distinction between preparation and attempt in cases similar to this.

Had the supposed assassin hired to kill defendant's sister actually attempted to kill her, defendant would be punishable under Penal Code section 31 as a principal in the offense, either as an aider and abettor or as a conspirator. But in this case, neither defendant nor the supposed assassin took a direct act toward commission of the offense. Defendant's conduct was confined to encouraging and enabling his intended agent to kill (or attempt to kill), but the detective with whom he dealt took no such action. There was no attempt.

For the foregoing reasons, I dissent.

## KENNEDY v. LOUISIANA

\_\_\_ U.S. \_\_\_, \_\_\_ S.Ct. \_\_\_, 2008 U.S. LEXIS 5262 (2008)

Justice KENNEDY delivered the opinion of the Court.

The National Government and, beyond it, the separate States are bound by the proscriptive mandates of the Eighth Amendment to the Constitution of the United States, and all persons within those respective jurisdictions may invoke its protection. Patrick Kennedy, the petitioner here, seeks to set aside his death sentence under the Eighth Amendment. He was charged by the respondent, the State of Louisiana, with the aggravated rape of his then-8-year-old stepdaughter. After a jury trial petitioner was convicted and sentenced to death under a state statute authorizing capital punishment for the rape of a child under 12 years of age. This case presents the question whether the Constitution bars respondent from imposing the death penalty for the rape of a child where the crime did not result, and was not intended to result, in death of the victim. We hold the Eighth Amendment prohibits the death penalty for this offense. The Louisiana statute is unconstitutional.

### I

Petitioner's crime was one that cannot be recounted in these pages in a way sufficient to capture in full the hurt and horror inflicted on his victim or to convey the revulsion society, and the jury that represents it, sought to express by sentencing petitioner to death. At 9:18 a.m. on March 2, 1998, petitioner called 911 to report that his stepdaughter, referred to here as L. H., had been raped. He told the 911 operator that L.H. had been in the garage while he readied his son for school. Upon hearing loud screaming, petitioner said, he ran outside and found L.H. in the side yard. Two neighborhood boys, petitioner told the operator, had dragged L.H. from the garage to the yard, pushed her down, and raped her. Petitioner claimed he saw one of the boys riding away on a blue 10-speed bicycle.

[When police arrived, they found L.H. bleeding profusely from the vaginal area. She had been very seriously injured and required emergency surgery. In the weeks following the rape, both petitioner and L.H. reiterated the story petitioner had first told to the police. Nevertheless, eight days after the rape, on the basis of substantial evidence contradicting petitioner's story – including a call he made between 6:30 and 7:30 a.m. to ask a colleague how to get blood out of a white carpet because his daughter had “just become a young lady” – police arrested him. On June 22, 1998, L.H., for the first time, told her mother that petitioner had raped her.]

The State charged petitioner with aggravated rape of a child under La. Stat. Ann. § 14:42 and sought the death penalty. [The statute defined aggravated rape of a child as “anal or vaginal sexual intercourse” with a victim under the age of twelve years and, in combination with La. Code Crim.Proc. Art. 905.4 (aggravating circumstances), made one convicted of the crime death-eligible.]

The trial began in August 2003. L.H. was then 13 years old. She testified that she “ ‘woke up one morning and Patrick was on top of [her].’ ” She remembered petitioner bringing her “[a] cup of orange juice and pills chopped up in it” after the rape and overhearing him on the telephone saying she had become a “young lady.” L.H. acknowledged that she had accused two neighborhood boys

but testified petitioner told her to say this and that it was untrue.

The jury having found petitioner guilty of aggravated rape, the penalty phase ensued. The State presented the testimony of S. L., who is the cousin and goddaughter of petitioner's ex-wife. S.L. testified that petitioner sexually abused her three times when she was eight years old and that the last time involved sexual intercourse. She did not tell anyone until two years later and did not pursue legal action.

The jury unanimously determined that petitioner should be sentenced to death. The Supreme Court of Louisiana [distinguishing *Coker v. Georgia*, 433 U.S. 584, 97 S.Ct. 2861 (1977)] affirmed.

....

We granted certiorari.

## II

The Eighth Amendment, applicable to the States through the Fourteenth Amendment, provides that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” The Amendment proscribes “all excessive punishments, as well as cruel and unusual punishments that may or may not be excessive.” *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242 (2002). The Court explained in *Atkins* and *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183 (2005), that the Eighth Amendment's protection against excessive or cruel and unusual punishments flows from the basic “precept of justice that punishment for [a] crime should be graduated and proportioned to [the] offense.” *Weems v. United States*, 217 U.S. 349, 30 S.Ct. 544 (1910). Whether this requirement has been fulfilled is determined not by the standards that prevailed when the Eighth Amendment was adopted in 1791 but by the norms that “currently prevail.” *Atkins*. The Amendment “draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society.” *Trop v. Dulles*, 356 U.S. 86, 78 S.Ct. 590 (1958) (plurality opinion). This is because “[t]he standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change.” *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726 (1972) (Burger, C. J., dissenting).

Evolving standards of decency must embrace and express respect for the dignity of the person, and the punishment of criminals must conform to that rule. As we shall discuss, punishment is justified under one or more of three principal rationales: rehabilitation, deterrence, and retribution. It is the last of these, retribution, that most often can contradict the law's own ends. This is of particular concern when the Court interprets the meaning of the Eighth Amendment in capital cases. When the law punishes by death, it risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint.

For these reasons we have explained that capital punishment must “be limited to those offenders who commit ‘a narrow category of the most serious crimes’ and whose extreme culpability makes them ‘the most deserving of execution.’” *Roper* (quoting *Atkins*). Though the death penalty is not invariably unconstitutional, see *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909 (1976), the

Court insists upon confining the instances in which the punishment can be imposed.

Applying this principle, we held in *Roper* and *Atkins* that the execution of juveniles and mentally retarded persons are punishments violative of the Eighth Amendment because the offender had a diminished personal responsibility for the crime. The Court further has held that the death penalty can be disproportionate to the crime itself where the crime did not result, or was not intended to result, in death of the victim. In *Coker*, for instance, the Court held it would be unconstitutional to execute an offender who had raped an adult woman. And in *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368 (1982), the Court overturned the capital sentence of a defendant who aided and abetted a robbery during which a murder was committed but did not himself kill, attempt to kill, or intend that a killing would take place. On the other hand, in *Tison v. Arizona*, 481 U.S. 137, 107 S.Ct. 1676 (1987), the Court allowed the defendants' death sentences to stand where they did not themselves kill the victims but their involvement in the events leading up to the murders was active, recklessly indifferent, and substantial.

In these cases the Court has been guided by “objective indicia of society's standards, as expressed in legislative enactments and state practice with respect to executions.” *Roper*; see also *Coker* (plurality opinion) (finding that both legislatures and juries had firmly rejected the penalty of death for the rape of an adult woman); *Enmund* (looking to “historical development of the punishment at issue, legislative judgments, international opinion, and the sentencing decisions juries have made”). The inquiry does not end there, however. Consensus is not dispositive. Whether the death penalty is disproportionate to the crime committed depends as well upon the standards elaborated by controlling precedents and by the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose.

Based both on consensus and our own independent judgment, our holding is that a death sentence for one who raped but did not kill a child, and who did not intend to assist another in killing the child, is unconstitutional under the Eighth and Fourteenth Amendments.

### III

#### A

The existence of objective indicia of consensus against making a crime punishable by death was a relevant concern in *Roper*, *Atkins*, *Coker*, and *Enmund*, and we follow the approach of those cases here. The history of the death penalty for the crime of rape is an instructive beginning point.

In 1925, 18 States, the District of Columbia, and the Federal Government had statutes that authorized the death penalty for the rape of a child or an adult. Between 1930 and 1964, 455 people were executed for those crimes. To our knowledge the last individual executed for the rape of a child was Ronald Wolfe in 1964.

In 1972, *Furman* invalidated most of the state statutes authorizing the death penalty for the crime of rape; and in *Furman*'s aftermath only six States reenacted their capital rape provisions. Three States—Georgia, North Carolina, and Louisiana—did so with respect to all rape offenses. Three States—Florida, Mississippi, and Tennessee—did so with respect only to child rape. All six statutes

were later invalidated under state or federal law.

Louisiana reintroduced the death penalty for rape of a child in 1995. Under the current statute, any anal, vaginal, or oral intercourse with a child under the age of 13 constitutes aggravated rape and is punishable by death. Mistake of age is not a defense, so the statute imposes strict liability in this regard. Five States have since followed Louisiana's lead: Georgia (1999); Montana (1997); Oklahoma (2006); South Carolina (2006); and Texas (2007). Four of these States' statutes [those of Montana, Oklahoma, South Carolina, Texas] are more narrow than Louisiana's in that only offenders with a previous rape conviction are death eligible. Georgia's statute makes child rape a capital offense only when aggravating circumstances are present, including but not limited to a prior conviction.

By contrast, 44 States have not made child rape a capital offense. As for federal law, Congress in the Federal Death Penalty Act of 1994 expanded the number of federal crimes for which the death penalty is a permissible sentence, including certain nonhomicide offenses; but it did not do the same for child rape or abuse. ...

[Whether Georgia should be included in the list of states authorizing the death penalty for rape of a child and whether Florida should be excluded from the list is subject to dispute.]

Definitive resolution of state-law issues is for the States' own courts, and there may be disagreement over the statistics. It is further true that some States, including States that have addressed the issue in just the last few years, have made child rape a capital offense. The summary recited here, however, does allow us to make certain comparisons with the data cited in the *Atkins*, *Roper*, and *Enmund* cases.

When *Atkins* was decided in 2002, 30 States, including 12 noncapital jurisdictions, prohibited the death penalty for mentally retarded offenders; 20 permitted it. When *Roper* was decided in 2005, the numbers disclosed a similar division among the States: 30 States prohibited the death penalty for juveniles, 18 of which permitted the death penalty for other offenders; and 20 States authorized it. Both in *Atkins* and in *Roper*, we noted that the practice of executing mentally retarded and juvenile offenders was infrequent. Only five States had executed an offender known to have an IQ below 70 between 1989 and 2002; and only three States had executed a juvenile offender between 1995 and 2005.

The statistics in *Enmund* bear an even greater similarity to the instant case. There eight jurisdictions had authorized imposition of the death penalty solely for participation in a robbery during which an accomplice committed murder, and six defendants between 1954 and 1982 had been sentenced to death for felony murder where the defendant did not personally commit the homicidal assault. These facts, the Court concluded, “weigh[ed] on the side of rejecting capital punishment for the crime.”

The evidence of a national consensus with respect to the death penalty for child rapists, as with respect to juveniles, mentally retarded offenders, and vicarious felony murderers, shows divided opinion but, on balance, an opinion against it. Thirty-seven jurisdictions—36 States plus the Federal

Government—have the death penalty.\* As mentioned above, only six of those jurisdictions authorize the death penalty for rape of a child. Though our review of national consensus is not confined to tallying the number of States with applicable death penalty legislation, it is of significance that, in 45 jurisdictions, petitioner could not be executed for child rape of any kind. That number surpasses the 30 States in *Atkins* and *Roper* and the 42 States in *Enmund* that prohibited the death penalty under the circumstances those cases considered.

## B

[Justice Kennedy rejected the argument that the failure of more states to make child rape a capital crime stemmed from the legislatures’ misreading of *Coker* as barring the death penalty for all non-homicide crimes. He pointed out that the *Coker* plurality several times described the issue and the Court’s holding as concerning only the constitutionality of the death penalty for rape of “an adult woman” or “adult female,” and he argued that there was no evidence that state legislatures were confused by the holding and that, had the legislatures looked for guidance to the courts, they would have found that “[t]he state courts that have confronted the precise question before us have been uniform in concluding that *Coker* did not address the constitutionality of the death penalty for the crime of child rape.”]

We conclude on the basis of this review that there is no clear indication that state legislatures have misinterpreted *Coker* to hold that the death penalty for child rape is unconstitutional. The small number of States that have enacted this penalty, then, is relevant to determining whether there is a consensus against capital punishment for this crime.

## C

Respondent insists that the six States where child rape is a capital offense, along with the States that have proposed but not yet enacted applicable death penalty legislation, reflect a consistent direction of change in support of the death penalty for child rape. Consistent change might counterbalance an otherwise weak demonstration of consensus. But whatever the significance of consistent change where it is cited to show emerging support for expanding the scope of the death penalty, no showing of consistent change has been made in this case.

Respondent and its *amici* identify five States where, in their view, legislation authorizing capital punishment for child rape is pending. It is not our practice, nor is it sound, to find contemporary norms based upon state legislation that has been proposed but not yet enacted. There are compelling reasons not to do so here. Since the briefs were submitted by the parties, legislation in two of the five States [Colorado and Mississippi] has failed. In Tennessee, the house bills were rejected almost a year ago, and the senate bills appear to have died in committee. In Alabama, the recent legislation is similar to a bill that failed in 2007. And in Missouri, the 2008 legislative session has ended, tabling the pending legislation.

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\* [Justice Kennedy ignores statutes governing crimes in the United States military that, on an interim basis, make rape and child rape capital crimes. See Pub.L. 109-163, Div. A, Title V, § 552(b). – Ed.]

Aside from pending legislation, it is true that in the last 13 years there has been change towards making child rape a capital offense. This is evidenced by six new death penalty statutes, three enacted in the last two years. But this showing is not as significant as the data in *Atkins*, where 18 States between 1986 and 2001 had enacted legislation prohibiting the execution of mentally retarded persons. Respondent argues the instant case is like *Roper* because, there, only five States had shifted their positions between 1989 and 2005, one less State than here. But in *Roper*, we emphasized that, though the pace of abolition was not as great as in *Atkins*, it was counterbalanced by the total number of States that had recognized the impropriety of executing juvenile offenders. When we decided *Stanford v. Kentucky*, 492 U.S. 361, 109 S.Ct. 2969 (1989), 12 death penalty States already prohibited the execution of any juvenile under 18, and 15 prohibited the execution of any juvenile under 17. Here, the total number of States to have made child rape a capital offense after *Furman* is six. This is not an indication of a trend or change in direction comparable to the one supported by data in *Roper*. The evidence here bears a closer resemblance to the evidence of state activity in *Enmund*, where we found a national consensus against the death penalty for vicarious felony murder despite eight jurisdictions having authorized the practice.

#### D

There are measures of consensus other than legislation. Statistics about the number of executions may inform the consideration whether capital punishment for the crime of child rape is regarded as unacceptable in our society. These statistics confirm our determination from our review of state statutes that there is a social consensus against the death penalty for the crime of child rape.

Nine States—Florida, Georgia, Louisiana, Mississippi, Montana, Oklahoma, South Carolina, Tennessee, and Texas—have permitted capital punishment for adult or child rape for some length of time between the Court's 1972 decision in *Furman* and today. Yet no individual has been executed for the rape of an adult or child since 1964, and no execution for any other nonhomicide offense has been conducted since 1963.

Louisiana is the only State since 1964 that has sentenced an individual to death for the crime of child rape; and petitioner and Richard Davis, who was convicted and sentenced to death for the aggravated rape of a 5-year-old child by a Louisiana jury in December 2007, are the only two individuals now on death row in the United States for a nonhomicide offense.

After reviewing the authorities informed by contemporary norms, including the history of the death penalty for this and other nonhomicide crimes, current state statutes and new enactments, and the number of executions since 1964, we conclude there is a national consensus against capital punishment for the crime of child rape.

#### IV

#### A

As we have said in other Eighth Amendment cases, objective evidence of contemporary values as it relates to punishment for child rape is entitled to great weight, but it does not end our inquiry. “[T]he Constitution contemplates that in the end our own judgment will be brought to bear

on the question of the acceptability of the death penalty under the Eighth Amendment.” *Coker* (plurality opinion). We turn, then, to the resolution of the question before us, which is informed by our precedents and our own understanding of the Constitution and the rights it secures.

It must be acknowledged that there are moral grounds to question a rule barring capital punishment for a crime against an individual that did not result in death. These facts illustrate the point. Here the victim's fright, the sense of betrayal, and the nature of her injuries caused more prolonged physical and mental suffering than, say, a sudden killing by an unseen assassin. The attack was not just on her but on her childhood. For this reason, we should be most reluctant to rely upon the language of the plurality in *Coker*, which posited that, for the victim of rape, “life may not be nearly so happy as it was” but it is not beyond repair. We cannot dismiss the years of long anguish that must be endured by the victim of child rape.

It does not follow, though, that capital punishment is a proportionate penalty for the crime. The constitutional prohibition against excessive or cruel and unusual punishments mandates that the State's power to punish “be exercised within the limits of civilized standards.” *Trop* (plurality opinion). Evolving standards of decency that mark the progress of a maturing society counsel us to be most hesitant before interpreting the Eighth Amendment to allow the extension of the death penalty, a hesitation that has special force where no life was taken in the commission of the crime. It is an established principle that decency, in its essence, presumes respect for the individual and thus moderation or restraint in the application of capital punishment.

To date the Court has sought to define and implement this principle, for the most part, in cases involving capital murder. One approach has been to insist upon general rules that ensure consistency in determining who receives a death sentence. See *California v. Brown*, 479 U.S. 538, 107 S.Ct. 837 (1987) (“[D]eath penalty statutes [must] be structured so as to prevent the penalty from being administered in an arbitrary and unpredictable fashion.” At the same time the Court has insisted, to ensure restraint and moderation in use of capital punishment, on judging the “character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.” *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978 (1976) (plurality opinion).

The tension between general rules and case-specific circumstances has produced results not all together satisfactory. See *Tuilaepa v. California*, 512 U.S. 967, 114 S.Ct. 2630 (1994) (“The objectives of these two inquiries can be in some tension, at least when the inquiries occur at the same time”); *Walton v. Arizona*, 497 U.S. 639, 110 S.Ct. 3047 (1990) (SCALIA, J., concurring in part and concurring in judgment) (“The latter requirement quite obviously destroys whatever rationality and predictability the former requirement was designed to achieve”). This has led some Members of the Court to say we should cease efforts to resolve the tension and simply allow legislatures, prosecutors, courts, and juries greater latitude. See *id.* (advocating that the Court adhere to the *Furman* line of cases and abandon the *Woodson-Lockett* line of cases). For others the failure to limit these same imprecisions by stricter enforcement of narrowing rules has raised doubts concerning the constitutionality of capital punishment itself. See *Baze v. Rees*, 553 U.S. \_\_\_, 128 S.Ct. 1520 (2008) (Stevens, J., concurring in judgment); *Furman*, (White, J., concurring); *Callins v. Collins*, 510 U.S. 1141, 114 S.Ct. 1127 (1994) (Blackmun, J., dissenting from denial of certiorari).

Our response to this case law, which is still in search of a unifying principle, has been to insist upon confining the instances in which capital punishment may be imposed. See *Gregg* (joint opinion of Stewart, Powell, and Stevens, JJ.) (because “death as a punishment is unique in its severity and irrevocability,” capital punishment must be reserved for those crimes that are “so grievous an affront to humanity that the only adequate response may be the penalty of death” (citing in part *Furman* (Brennan, J., concurring); *id.* (Stewart, J., concurring))).

Our concern here is limited to crimes against individual persons. We do not address, for example, crimes defining and punishing treason, espionage, terrorism, and drug kingpin activity, which are offenses against the State. As it relates to crimes against individuals, though, the death penalty should not be expanded to instances where the victim's life was not taken. We said in *Coker* of adult rape:

“We do not discount the seriousness of rape as a crime. It is highly reprehensible, both in a moral sense and in its almost total contempt for the personal integrity and autonomy of the female victim .... Short of homicide, it 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.” (plurality opinion).

The same distinction between homicide and other serious violent offenses against the individual informed the Court's analysis in *Enmund*, where the Court held that the death penalty for the crime of vicarious felony murder is disproportionate to the offense. The Court repeated there the fundamental, moral distinction between a “murderer” and a “robber,” noting that while “robbery is a serious crime deserving serious punishment,” it is not like death in its “severity and irrevocability.”

Consistent with evolving standards of decency and the teachings of our precedents we conclude that, in determining whether the death penalty is excessive, there is a distinction between intentional first-degree murder on the one hand and nonhomicide crimes against individual persons, even including child rape, on the other. The latter crimes may be devastating in their harm, as here, but “in terms of moral depravity and of the injury to the person and to the public,” *Coker*, they cannot be compared to murder in their “severity and irrevocability.”

In reaching our conclusion we find significant the number of executions that would be allowed under respondent's approach. The crime of child rape, considering its reported incidents, occurs more often than first-degree murder. Approximately 5,702 incidents of vaginal, anal, or oral rape of a child under the age of 12 were reported nationwide in 2005; this is almost twice the total incidents of intentional murder for victims of all ages (3,405) reported during the same period. Although we have no reliable statistics on convictions for child rape, we can surmise that, each year, there are hundreds, or more, of these convictions just in jurisdictions that permit capital punishment. Cf. Brief for Louisiana Association of Criminal Defense Lawyers et al. as *Amici Curiae* 1-2, and n. 2 (noting that there are now at least 70 capital rape indictments pending in Louisiana and estimating the actual number to be over 100). As a result of existing rules, only 2.2% of convicted first-degree murderers are sentenced to death. But under respondent's approach, the 36 States that permit the death penalty could sentence to death all persons convicted of raping a child less than 12 years of age. This could not be reconciled with our evolving standards of decency and the necessity to constrain the use of the death penalty.

It might be said that narrowing aggravators could be used in this context, as with murder offenses, to ensure the death penalty's restrained application. We find it difficult to identify standards that would guide the decisionmaker so the penalty is reserved for the most severe cases of child rape and yet not imposed in an arbitrary way. Even were we to forbid, say, the execution of first-time child rapists, or require as an aggravating factor a finding that the perpetrator's instant rape offense involved multiple victims, the jury still must balance, in its discretion, those aggravating factors against mitigating circumstances. In this context, which involves a crime that in many cases will overwhelm a decent person's judgment, we have no confidence that the imposition of the death penalty would not be so arbitrary as to be "freakis[h]," *Furman* (Stewart, J., concurring). We cannot sanction this result when the harm to the victim, though grave, cannot be quantified in the same way as death of the victim.

It is not a solution simply to apply to this context the aggravating factors developed for capital murder. The Court has said that a State may carry out its obligation to ensure individualized sentencing in capital murder cases by adopting sentencing processes that rely upon the jury to exercise wide discretion so long as there are narrowing factors that have some "common-sense core of meaning ... that criminal juries should be capable of understanding." *Tuilaepa, supra*. The Court, accordingly, has upheld the constitutionality of aggravating factors ranging from whether the defendant was a "cold-blooded, pitiless slayer," *Arave v. Creech*, 507 U.S. 463, 113 S.Ct. 1534 (1993), to whether the "perpetrator inflict[ed] mental anguish or physical abuse before the victim's death," *Walton*, to whether the defendant "would commit criminal acts of violence that would constitute a continuing threat to society," *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.). All of these standards have the potential to result in some inconsistency of application.

As noted above, the resulting imprecision and the tension between evaluating the individual circumstances and consistency of treatment have been tolerated where the victim dies. It should not be introduced into our justice system, though, where death has not occurred.

Our concerns are all the more pronounced where, as here, the death penalty for this crime has been most infrequent. We have developed a foundational jurisprudence in the case of capital murder to guide the States and juries in imposing the death penalty. Starting with *Gregg*, we have spent more than 32 years articulating limiting factors that channel the jury's discretion to avoid the death penalty's arbitrary imposition in the case of capital murder. Though that practice remains sound, beginning the same process for crimes for which no one has been executed in more than 40 years would require experimentation in an area where a failed experiment would result in the execution of individuals undeserving of the death penalty. Evolving standards of decency are difficult to reconcile with a regime that seeks to expand the death penalty to an area where standards to confine its use are indefinite and obscure.

## B

Our decision is consistent with the justifications offered for the death penalty. *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.

As in *Coker*, here it cannot be said with any certainty that the death penalty for child rape serves no deterrent or retributive function. This argument does not overcome other objections, however. The incongruity between the crime of child rape and the harshness of the death penalty poses risks of overpunishment and counsels against a constitutional ruling that the death penalty can be expanded to include this offense.

The goal of retribution, which reflects society's and the victim's interests in seeing that the offender is repaid for the hurt he caused, does not justify the harshness of the death penalty here. In measuring retribution, as well as other objectives of criminal law, it is appropriate to distinguish between a particularly depraved murder that merits death as a form of retribution and the crime of child rape.

There is an additional reason for our conclusion that imposing the death penalty for child rape would not further retributive purposes. In considering whether retribution is served, among other factors we have looked to whether capital punishment “has the potential ... to allow the community as a whole, including the surviving family and friends of the victim, to affirm its own judgment that the culpability of the prisoner is so serious that the ultimate penalty must be sought and imposed.” *Panetti v. Quarterman*, 551 U.S. \_\_\_, 127 S.Ct. 2842 (2007). In considering the death penalty for nonhomicide offenses this inquiry necessarily also must include the question whether the death penalty balances the wrong to the victim.

It is not at all evident that the child rape victim's hurt is lessened when the law permits the death of the perpetrator. Capital cases require a long-term commitment by those who testify for the prosecution, especially when guilt and sentencing determinations are in multiple proceedings. In cases like this the key testimony is not just from the family but from the victim herself. During formative years of her adolescence, made all the more daunting for having to come to terms with the brutality of her experience, L.H. was required to discuss the case at length with law enforcement personnel. In a public trial she was required to recount once more all the details of the crime to a jury as the State pursued the death of her stepfather. And in the end the State made L.H. a central figure in its decision to seek the death penalty, telling the jury in closing statements: “[L. H.] is asking you, asking you to set up a time and place when he dies.”

Society's desire to inflict the death penalty for child rape by enlisting the child victim to assist it over the course of years in asking for capital punishment forces a moral choice on the child, who is not of mature age to make that choice. The way the death penalty here involves the child victim in its enforcement can compromise a decent legal system; and this is but a subset of fundamental difficulties capital punishment can cause in the administration and enforcement of laws proscribing child rape.

There are, moreover, serious systemic concerns in prosecuting the crime of child rape that are relevant to the constitutionality of making it a capital offense. The problem of unreliable, induced, and even imagined child testimony means there is a “special risk of wrongful execution” in some child rape cases. *Atkins*. This undermines, at least to some degree, the meaningful contribution of the death penalty to legitimate goals of punishment. Studies conclude that children are highly susceptible to suggestive questioning techniques like repetition, guided imagery, and selective reinforcement.

Similar criticisms pertain to other cases involving child witnesses; but child rape cases present heightened concerns because the central narrative and account of the crime often comes from the child herself. She and the accused are, in most instances, the only ones present when the crime was committed. And the question in a capital case is not just the fact of the crime, including, say, proof of rape as distinct from abuse short of rape, but details bearing upon brutality in its commission. Although capital punishment does bring retribution, and the legislature here has chosen to use it for this end, its judgment must be weighed, in deciding the constitutional question, against the special risks of unreliable testimony with respect to this crime.

With respect to deterrence, if the death penalty adds to the risk of non-reporting, that, too, diminishes the penalty's objectives. Underreporting is a common problem with respect to child sexual abuse. [Citing studies showing that 88% of minor female rape victims did not report the rape to authorities] Although we know little about what differentiates those who report from those who do not report, one of the most commonly cited reasons for nondisclosure is fear of negative consequences for the perpetrator, a concern that has special force where the abuser is a family member. The experience of the *amici* who work with child victims indicates that, when the punishment is death, both the victim and the victim's family members may be more likely to shield the perpetrator from discovery, thus increasing underreporting. As a result, punishment by death may not result in more deterrence or more effective enforcement.

In addition, by in effect making the punishment for child rape and murder equivalent, a State that punishes child rape by death may remove a strong incentive for the rapist not to kill the victim. Assuming the offender behaves in a rational way, as one must to justify the penalty on grounds of deterrence, the penalty in some respects gives less protection, not more, to the victim, who is often the sole witness to the crime. It might be argued that, even if the death penalty results in a marginal increase in the incentive to kill, this is counterbalanced by a marginally increased deterrent to commit the crime at all. Whatever balance the legislature strikes, however, uncertainty on the point makes the argument for the penalty less compelling than for homicide crimes.

Each of these propositions, standing alone, might not establish the unconstitutionality of the death penalty for the crime of child rape. Taken in sum, however, they demonstrate the serious negative consequences of making child rape a capital offense. These considerations lead us to conclude, in our independent judgment, that the death penalty is not a proportional punishment for the rape of a child.

## V

Our determination that there is a consensus against the death penalty for child rape raises the question whether the Court's own institutional position and its holding will have the effect of blocking further or later consensus in favor of the penalty from developing. The Court, it will be argued, by the act of addressing the constitutionality of the death penalty, intrudes upon the consensus-making process. By imposing a negative restraint, the argument runs, the Court makes it more difficult for consensus to change or emerge. The Court, according to the criticism, itself becomes enmeshed in the process, part judge and part the maker of that which it judges.

These concerns overlook the meaning and full substance of the established proposition that

the Eighth Amendment is defined by “the evolving standards of decency that mark the progress of a maturing society.” *Trop* (plurality opinion). Confirmed by repeated, consistent rulings of this Court, this principle requires that use of the death penalty be restrained. The rule of evolving standards of decency with specific marks on the way to full progress and mature judgment means that resort to the penalty must be reserved for the worst of crimes and limited in its instances of application. In most cases justice is not better served by terminating the life of the perpetrator rather than confining him and preserving the possibility that he and the system will find ways to allow him to understand the enormity of his offense. Difficulties in administering the penalty to ensure against its arbitrary and capricious application require adherence to a rule reserving its use, at this stage of evolving standards and in cases of crimes against individuals, for crimes that take the life of the victim.

The judgment of the Supreme Court of Louisiana upholding the capital sentence is reversed. This case is remanded for further proceedings not inconsistent with this opinion.

*It is so ordered.*

Justice ALITO, with whom THE CHIEF JUSTICE, Justice SCALIA, and Justice THOMAS join, dissenting.

The Court today holds that the Eighth Amendment categorically prohibits the imposition of the death penalty for the crime of raping a child. This is so, according to the Court, no matter how young the child, no matter how many times the child is raped, no matter how many children the perpetrator rapes, no matter how sadistic the crime, no matter how much physical or psychological trauma is inflicted, and no matter how heinous the perpetrator's prior criminal record may be. The Court provides two reasons for this sweeping conclusion: First, the Court claims to have identified “a national consensus” that the death penalty is never acceptable for the rape of a child; second, the Court concludes, based on its “independent judgment,” that imposing the death penalty for child rape is inconsistent with “ ‘the evolving standards of decency that mark the progress of a maturing society.’” Because neither of these justifications is sound, I respectfully dissent.

I

A

I turn first to the Court's claim that there is “a national consensus” that it is never acceptable to impose the death penalty for the rape of a child. The Eighth Amendment's requirements, the Court writes, are “determined not by the standards that prevailed” when the Amendment was adopted but “by the norms that ‘currently prevail.’” (quoting *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242 (2002)). In assessing current norms, the Court relies primarily on the fact that only 6 of the 50 States now have statutes that permit the death penalty for this offense. But this statistic is a highly unreliable indicator of the views of state lawmakers and their constituents. As I will explain, dicta in this Court's decision in *Coker v. Georgia*, 433 U.S. 584, 97 S.Ct. 2861 (1977), has stunted legislative consideration of the question whether the death penalty for the targeted offense of raping a young child is consistent with prevailing standards of decency. The *Coker* dicta gave state legislators and others good reason to fear that any law permitting the imposition of the death penalty

for this crime would meet precisely the fate that has now befallen the Louisiana statute that is currently before us, and this threat strongly discouraged state legislators—regardless of their own values and those of their constituents—from supporting the enactment of such legislation.

[Justice Alito argued that the *Coker* plurality’s summary—“We have the abiding conviction that the death penalty ... is an excessive penalty for the rapist who, as such, does not take human life”—although dicta, implied that the death penalty for *any* rape would have been unconstitutional. He cited to state court opinions and commentators who, while recognizing the limits of the *Coker* holding, assumed that the logic of the decision would bar imposition of the death penalty for any non-homicide crime. He concluded that “the *Coker* dicta gave state legislators a strong incentive not to push for the enactment of new capital child-rape laws even though these legislators and their constituents may have believed that the laws would be appropriate and desirable,” and, in support of that point, he cited to opponents’ contentions that the recent Oklahoma and Texas child-rape bills were unconstitutional under *Coker*.]

## C

Because of the effect of the *Coker* dicta, the Court is plainly wrong in comparing the situation here to that in *Atkins* or *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183 (2005). *Atkins* concerned the constitutionality of imposing the death penalty on a mentally retarded defendant. Thirteen years earlier, in *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934 (1989), the Court had held that this was permitted by the Eighth Amendment, and therefore, during the time between *Penry* and *Atkins*, state legislators had reason to believe that this Court would follow its prior precedent and uphold statutes allowing such punishment.

The situation in *Roper* was similar. *Roper* concerned a challenge to the constitutionality of imposing the death penalty on a defendant who had not reached the age of 18 at the time of the crime. Sixteen years earlier in *Stanford v. Kentucky*, 492 U.S. 361, 109 S.Ct. 2969 (1989), the Court had rejected a similar challenge, and therefore state lawmakers had cause to believe that laws allowing such punishment would be sustained.

When state lawmakers believe that their decision will prevail on the question whether to permit the death penalty for a particular crime or class of offender, the legislators’ resolution of the issue can be interpreted as an expression of their own judgment, informed by whatever weight they attach to the values of their constituents. But when state legislators think that the enactment of a new death penalty law is likely to be futile, inaction cannot reasonably be interpreted as an expression of their understanding of prevailing societal values. In that atmosphere, legislative inaction is more likely to evidence acquiescence.

## D

If anything can be inferred from state legislative developments, the message is very different from the one that the Court perceives. In just the past few years, despite the shadow cast by the *Coker* dicta, five States have enacted targeted capital child-rape laws. If, as the Court seems to think, our society is “[e]volving” toward ever higher “standards of decency,” these enactments might represent the beginning of a new evolutionary line.

Such a development would not be out of step with changes in our society's thinking since *Coker* was decided. During that time, reported instances of child abuse have increased dramatically;<sup>2</sup> and there are many indications of growing alarm about the sexual abuse of children. In 1994, Congress enacted the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program, 42 U.S.C. § 14071, which requires States receiving certain federal funds to establish registration systems for convicted sex offenders and to notify the public about persons convicted of the sexual abuse of minors. All 50 States have now enacted such statutes. In addition, at least 21 States and the District of Columbia now have statutes permitting the involuntary commitment of sexual predators, and at least 12 States have enacted residency restrictions for sex offenders.

Seeking to counter the significance of the new capital child-rape laws enacted during the past two years, the Court points out that in recent months efforts to enact similar laws in five other States have stalled. These developments, however, all took place after our decision to grant certiorari in this case, which gave state legislators reason to delay the enactment of new legislation until the constitutionality of such laws was clarified. And there is no evidence of which I am aware that these legislative initiatives failed because the proposed laws were viewed as inconsistent with our society's standards of decency.

On the contrary, the available evidence suggests otherwise. For example, in Colorado, the Senate Appropriations Committee in April voted 6 to 4 against Senate Bill 195, reportedly because it “would have cost about \$616,000 next year for trials, appeals, public defenders, and prison costs.” Likewise, in Tennessee, the capital child-rape bill was withdrawn in committee “because of the high associated costs.” ... Thus, the failure to enact capital child-rape laws cannot be viewed as evidence of a moral consensus against such punishment.

## E

Aside from its misleading tally of current state laws, the Court points to two additional “objective indicia” of a “national consensus,” but these arguments are patent makeweights. The Court notes that Congress has not enacted a law permitting the death penalty for the rape of a child, but due to the territorial limits of the relevant federal statutes, very few rape cases, not to mention child-rape cases, are prosecuted in federal court. Congress' failure to enact a death penalty statute for this tiny set of cases is hardly evidence of Congress' assessment of our society's values.

Finally, the Court argues that statistics about the number of executions in rape cases support its perception of a “national consensus,” but here too the statistics do not support the Court's position. The Court notes that the last execution for the rape of a child occurred in 1964, but the

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<sup>2</sup> From 1976 to 1986, the number of reported cases of child sexual abuse grew from 6,000 to 132,000, an increase of 2,100%. By 1991, the number of cases totaled 432,000, an increase of another 227%. In 1995, local child protection services agencies identified 126,000 children who were victims of either substantiated or indicated sexual abuse. Nearly 30% of those child victims were between the age of four and seven. There were an estimated 90,000 substantiated cases of child sexual abuse in 2003.

Court fails to mention that litigation regarding the constitutionality of the death penalty brought executions to a halt across the board in the late 1960's. In 1965 and 1966, there were a total of eight executions for all offenses, and from 1968 until 1977, the year when *Coker* was decided, there were no executions for any crimes. The Court also fails to mention that in Louisiana, since the state law was amended in 1995 to make child rape a capital offense, prosecutors have asked juries to return death verdicts in four cases. In two of those cases, Louisiana juries imposed the death penalty. This 50% record is hardly evidence that juries share the Court's view that the death penalty for the rape of a young child is unacceptable under even the most aggravated circumstances.<sup>7</sup>

## F

In light of the points discussed above, I believe that the “objective indicia” of our society's “evolving standards of decency” can be fairly summarized as follows. Neither Congress nor juries have done anything that can plausibly be interpreted as evidencing the “national consensus” that the Court perceives. State legislatures, for more than 30 years, have operated under the ominous shadow of the *Coker* dicta and thus have not been free to express their own understanding of our society's standards of decency. And in the months following our grant of certiorari in this case, state legislatures have had an additional reason to pause. Yet despite the inhibiting legal atmosphere that has prevailed since 1977, six States have recently enacted new, targeted child-rape laws.

I do not suggest that six new state laws necessarily establish a “national consensus” or even that they are sure evidence of an ineluctable trend. In terms of the Court's metaphor of moral evolution, these enactments might have turned out to be an evolutionary dead end. But they might also have been the beginning of a strong new evolutionary line. We will never know, because the Court today snuffs out the line in its incipient stage.

## II

### A

The Court is willing to block the potential emergence of a national consensus in favor of permitting the death penalty for child rape because, in the end, what matters is the Court's “own judgment” regarding “the acceptability of the death penalty.” Although the Court has much to say on this issue, most of the Court's discussion is not pertinent to the Eighth Amendment question at hand. And once all of the Court's irrelevant arguments are put aside, it is apparent that the Court has provided no coherent explanation for today's decision.

In the next section of this opinion, I will attempt to weed out the arguments that are not germane to the Eighth Amendment inquiry, and in the final section, I will address what remains.

### B

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<sup>7</sup> Of course, the other five capital child rape statutes are too recent for any individual to have been sentenced to death under them.

A major theme of the Court's opinion is that permitting the death penalty in child-rape cases is not in the best interests of the victims of these crimes and society at large. In this vein, the Court suggests that it is more painful for child-rape victims to testify when the prosecution is seeking the death penalty. The Court also argues that “a State that punishes child rape by death may remove a strong incentive for the rapist not to kill the victim,” and may discourage the reporting of child rape.

These policy arguments, whatever their merits, are simply not pertinent to the question whether the death penalty is “cruel and unusual” punishment. The Eighth Amendment protects the right of an accused. It does not authorize this Court to strike down federal or state criminal laws on the ground that they are not in the best interests of crime victims or the broader society. The Court's policy arguments concern matters that legislators should—and presumably do—take into account in deciding whether to enact a capital child-rape statute, but these arguments are irrelevant to the question that is before us in this case. Our cases have cautioned against using “‘the aegis of the Cruel and Unusual Punishment Clause’ to cut off the normal democratic processes,” *Atkins* (Rehnquist, C. J., dissenting), in turn quoting *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909 (1976), (joint opinion of Stewart, Powell, and Stevens, JJ.), but the Court forgets that warning here.

The Court also contends that laws permitting the death penalty for the rape of a child create serious procedural problems. Specifically, the Court maintains that it is not feasible to channel the exercise of sentencing discretion in child-rape cases, and that the unreliability of the testimony of child victims creates a danger that innocent defendants will be convicted and executed. Neither of these contentions provides a basis for striking down all capital child-rape laws no matter how carefully and narrowly they are crafted.

The Court's argument regarding the structuring of sentencing discretion is hard to comprehend. The Court finds it “difficult to identify standards that would guide the decisionmaker so the penalty is reserved for the most severe cases of child rape and yet not imposed in an arbitrary way.” Even assuming that the age of a child is not alone a sufficient factor for limiting sentencing discretion, the Court need only examine the child-rape laws recently enacted in Texas, Oklahoma, Montana, and South Carolina, all of which use a concrete factor to limit quite drastically the number of cases in which the death penalty may be imposed. In those States, a defendant convicted of the rape of a child may be sentenced to death only if the defendant has a prior conviction for a specified felony sex offense.

Moreover, it takes little imagination to envision other limiting factors that a State could use to structure sentencing discretion in child rape cases. Some of these might be: whether the victim was kidnapped, whether the defendant inflicted severe physical injury on the victim, whether the victim was raped multiple times, whether the rapes occurred over a specified extended period, and whether there were multiple victims.

The Court refers to limiting standards that are “indefinite and obscure,” but there is nothing indefinite or obscure about any of the above-listed aggravating factors. Indeed, they are far more definite and clear-cut than aggravating factors that we have found to be adequate in murder cases. See, e.g., *Arave v. Creech*, 507 U.S. 463, 113 S.Ct. 1534 (1993) (whether the defendant was a “‘cold-blooded, pitiless slayer’”); *Walton v. Arizona*, 497 U.S. 639, 110 S.Ct. 3047 (1990) (whether the “‘perpetrator inflict[ed] mental anguish or physical abuse before the victim's death’”); *Jurek v.*

*Texas*, 428 U.S. 262, 269, 96 S.Ct. 2950 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.) (whether the defendant ““would commit criminal acts of violence that would constitute a continuing threat to society””). For these reasons, concerns about limiting sentencing discretion provide no support for the Court's blanket condemnation of all capital child-rape statutes.

That sweeping holding is also not justified by the Court's concerns about the reliability of the testimony of child victims. First, the Eighth Amendment provides a poor vehicle for addressing problems regarding the admissibility or reliability of evidence, and problems presented by the testimony of child victims are not unique to capital cases. Second, concerns about the reliability of the testimony of child witnesses are not present in every child-rape case. In the case before us, for example, there was undisputed medical evidence that the victim was brutally raped, as well as strong independent evidence that petitioner was the perpetrator. Third, if the Court's evidentiary concerns have Eighth Amendment relevance, they could be addressed by allowing the death penalty in only those child-rape cases in which the independent evidence is sufficient to prove all the elements needed for conviction and imposition of a death sentence. There is precedent for requiring special corroboration in certain criminal cases. For example, some jurisdictions do not allow a conviction based on the uncorroborated testimony of an accomplice. A State wishing to permit the death penalty in child-rape cases could impose an analogous corroboration requirement.

## C

After all the arguments noted above are put aside, what is left? What remaining grounds does the Court provide to justify its independent judgment that the death penalty for child rape is categorically unacceptable? I see two.

### 1

The first is the proposition that we should be “most hesitant before interpreting the Eighth Amendment to allow the *extension* of the death penalty.” (emphasis added). But holding that the Eighth Amendment does not categorically prohibit the death penalty for the rape of a young child would not “extend” or “expand” the death penalty. Laws enacted by the state legislatures are presumptively constitutional, and until today, this Court has not held that capital child rape laws are unconstitutional. Consequently, upholding the constitutionality of such a law would not “extend” or “expand” the death penalty; rather, it would confirm the status of presumptive constitutionality that such laws have enjoyed up to this point. And in any event, this Court has previously made it clear that “[t]he Eighth Amendment is not a ratchet, whereby a temporary consensus on leniency for a particular crime fixes a permanent constitutional maximum, disabling States from giving effect to altered beliefs and responding to changed social conditions.” *Harmelin v. Michigan*, 501 U.S. 957, 111 S.Ct. 2680 (1991) (principal opinion).

### 2

The Court's final—and, it appears, principal—justification for its holding is that murder, the only crime for which defendants have been executed since this Court's 1976 death penalty decisions, is unique in its moral depravity and in the severity of the injury that it inflicts on the victim and the public. But the Court makes little attempt to defend these conclusions.

With respect to the question of moral depravity, is it really true that every person who is convicted of capital murder and sentenced to death is more morally depraved than every child rapist? Consider the following two cases. In the first, a defendant robs a convenience store and watches as his accomplice shoots the store owner. The defendant acts recklessly, but was not the triggerman and did not intend the killing. See, e.g., *Tison v. Arizona*, 481 U.S. 137, 107 S.Ct. 1676 (1987). In the second case, a previously convicted child rapist kidnaps, repeatedly rapes, and tortures multiple child victims. Is it clear that the first defendant is more morally depraved than the second?

The Court's decision here stands in stark contrast to *Atkins* and *Roper*, in which the Court concluded that characteristics of the affected defendants—mental retardation in *Atkins* and youth in *Roper*—diminished their culpability. Nor is this case comparable to *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368 (1982), in which the Court held that the Eighth Amendment prohibits the death penalty where the defendant participated in a robbery during which a murder was committed but did not personally intend for lethal force to be used. I have no doubt that, under the prevailing standards of our society, robbery, the crime that the petitioner in *Enmund* intended to commit, does not evidence the same degree of moral depravity as the brutal rape of a young child. Indeed, I have little doubt that, in the eyes of ordinary Americans, the very worst child rapists—predators who seek out and inflict serious physical and emotional injury on defenseless young children—are the epitome of moral depravity.

With respect to the question of the harm caused by the rape of child in relation to the harm caused by murder, it is certainly true that the loss of human life represents a unique harm, but that does not explain why other grievous harms are insufficient to permit a death sentence. And the Court does not take the position that no harm other than the loss of life is sufficient. The Court takes pains to limit its holding to “crimes against individual persons” and to exclude “offenses against the State,” a category that the Court stretches—without explanation—to include “drug kingpin activity.” But the Court makes no effort to explain why the harm caused by such crimes is necessarily greater than the harm caused by the rape of young children. This is puzzling in light of the Court's acknowledgment that “[r]ape has a permanent psychological, emotional, and sometimes physical impact on the child.” As the Court aptly recognizes, “[w]e cannot dismiss the years of long anguish that must be endured by the victim of child rape.”

The rape of any victim inflicts great injury, and “[s]ome victims are so grievously injured physically or psychologically that life is beyond repair.” *Coker* (opinion of Powell, J.). “The immaturity and vulnerability of a child, both physically and psychologically, adds a devastating dimension to rape that is not present when an adult is raped.” Meister, *Murdering Innocence: The Constitutionality of Capital Child Rape Statutes*, 45 Ariz. L.Rev. 197 (2003). Long-term studies show that sexual abuse is “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.” C. Bagley & K. King, *Child Sexual Abuse: The Search for Healing* (1990).

It has been estimated that as many as 40% of 7- to 13-year-old sexual assault victims are considered “seriously disturbed.” A. Lurigio, M. Jones, & B. Smith, *Child Sexual Abuse: Its Causes, Consequences, and Implications for Probation Practice*, 59 Sep Fed. Probation 69 (1995). Psychological problems include sudden school failure, unprovoked crying, dissociation, depression, insomnia, sleep disturbances, nightmares, feelings of guilt and inferiority, and self-destructive

behavior, including an increased incidence of suicide.

The deep problems that afflict child-rape victims often become society's problems as well. Commentators have noted correlations between childhood sexual abuse and later problems such as substance abuse, dangerous sexual behaviors or dysfunction, inability to relate to others on an interpersonal level, and psychiatric illness. Victims of child rape are nearly 5 times more likely than nonvictims to be arrested for sex crimes and nearly 30 times more likely to be arrested for prostitution.

The harm that is caused to the victims and to society at large by the worst child rapists is grave. It is the judgment of the Louisiana lawmakers and those in an increasing number of other States that these harms justify the death penalty. The Court provides no cogent explanation why this legislative judgment should be overridden. Conclusory references to “decency,” “moderation,” “restraint,” “full progress,” and “moral judgment” are not enough.

### III

In summary, the Court holds that the Eighth Amendment categorically rules out the death penalty in even the most extreme cases of child rape even though: (1) This holding is not supported by the original meaning of the Eighth Amendment; (2) neither *Coker* nor any other prior precedent commands this result; (3) there are no reliable “objective indicia” of a “national consensus” in support of the Court's position; (4) sustaining the constitutionality of the state law before us would not “extend” or “expand” the death penalty; (5) this Court has previously rejected the proposition that the Eighth Amendment is a one-way ratchet that prohibits legislatures from adopting new capital punishment statutes to meet new problems; (6) the worst child rapists exhibit the epitome of moral depravity; and (7) child rape inflicts grievous injury on victims and on society in general.

The party attacking the constitutionality of a state statute bears the “heavy burden” of establishing that the law is unconstitutional. That burden has not been discharged here, and I would therefore affirm the decision of the Louisiana Supreme Court.