March 27, 2009


Stephan Lopez, Florida Agricultural and Mechanical University
THE KENNEDY DECISION:
A COLLISION COURSE BETWEEN THE UNITED STATES SUPREME COURT AND THE PEOPLE OF LOUISIANA.

By: Stephan Lopez*
November 24, 2008
I. INTRODUCTION

In Kennedy v Louisiana\(^1\) the U.S. Supreme Court reversed the Louisiana Supreme Court’s imposition of the death sentence on Patrick Kennedy who was found guilty of raping his eight-year-old stepdaughter.\(^2\) In reversing the Louisiana Supreme Court, the Court substituted their independent judgment and their evolving standards of decency for the will of the people of Louisiana; substituting the Court’s independent judgment for the will of the people of Louisiana is a continuing movement by the Court to erode state sovereignty. More significantly, it has left America’s children in a vulnerable position and this may lead to tragic results.

The purpose of this paper is to explore whether child rapists should be sentenced to death. The first part of the paper will first provide a brief history of the death penalty in America which includes death penalty statistics from the modern era.\(^3\) Next the paper focuses on whether the death penalty is cruel and unusual under the Eighth Amendment. This part of the paper discusses whether the death penalty is a proportionate sentence for child rape in light of the holding in Coker v Georgia\(^4\) and whether the death penalty for child rape is a proportionate punishment for Kennedy, as required by Atkins v Virginia\(^5\) and Roper v Simmons.\(^6\)

The second part of the paper focuses on why the author believes that the Court got it wrong in Kennedy. One reason the Court got it wrong was because they interpreted Coker v.

---

\(^{1}\) Stephan Lopez is a Juris Doctorate Candidate at Florida Agricultural and Mechanical University College of Law. He graduated from Florida International University in 2003, with a Masters in Criminal Justice.


\(^{3}\) Id. at 2645.


\(^{6}\) 536 U. S. 304 (2002).

\(^{6}\) 543 U. S. 551 (2005).
Georgia,⁷ to apply to child rape victims.⁸ In Coker, the Court had found the death penalty to be unconstitutio-nal for the rape of “an adult woman.”⁹ The Court never addressed whether the death penalty for the rape of a child was also unconstitutio-nal and this is why some states interpreted Coker as applicable only to adult victims.¹⁰ Louisiana was one of the states that interpreted Coker not to apply to child victims.¹¹ This was due in part, because the Louisiana Supreme Court understood that the public’s awareness of the pervasiveness of child sexual abuse had increased greatly in the 30 years since Coker. The public’s outrage regarding child sexual abuse had also increased during this time and it expressed itself with the enactment of certain laws, such as "Megan’s Laws," which require sex offenders to register and provide notification to the community,¹² The Wetterling Crimes Against Children and Sexually Violent Offender Registration Act,¹³ and The Pam Lychner Sexual Offender Tracking and Identification Act.¹⁴ The Louisiana Supreme Court did not require that a national consensus exist in order to find the death penalty for child rape constitutional.¹⁵ Instead they found, the most crucial step is

---

⁸ Kennedy, 128 S. Ct. at 2658 (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).
⁹ Id.
¹⁰ Id.
¹¹ Kennedy v Louisiana, 957 So. 2d 757, 780 (La. 2007). (In 1977, the Court held that capital punishment for the rape of an adult woman violated the Eighth Amendment)(quoting Coker, 433 U.S. at 584).
¹⁵ Kennedy, 957 So. 2d at 787 (Overall, it appears that approximately 38% of capital jurisdictions (15 of 39, including federal) authorize some form of non-homicide capital punishment, a showing strong enough to suggest that there may be no consensus one way or the other on whether death is an appropriate punishment for any crime which does not result in the death of the victim. However, when the direction of change is considered, clearly the direction is towards the imposition of capital punishment for non-homicide crimes).
looking at what state legislatures are doing with respect to child rape laws. Moreover, the fact that all fifty states or even a great majority of them do not have death on the table as an option for child rape does not mean there is a lack of consensus because there is no magic number that determines whether a consensus exists for or against a prescribed punishment.\(^{17}\) In addition to the five states that allowed the death penalty for child rapists at the time of *Kennedy*. There were thirteen states\(^ {18}\) (not including the federal government)\(^ {19}\) that authorized the death penalty for a variety of non-homicide offenses.\(^ {20}\) The Court should have included these thirteen states, in their consensus analysis. Some states were confused by the decision in *Coker* and this also may have led some states to wait until the Court decided *Kennedy* to enact their death penalty statutes.\(^ {21}\)

Finally, the paper explores whether judicial activism played a role in the *Kennedy* decision. The author explores *Kennedy* and several recent cases where he believes the Court has failed to adhere to the well established principle of *stare decisis* as part of a continuing trend of disregarding state rights. In the author’s opinion this deprives the individual states their inherent rights under the Tenth Amendment to impose the death penalty on their worst of offenders.

\(^{16}\) *Furman* v. Georgia, 408 U.S. 238, 436-437 (Powell, J., dissenting) (In a democracy, the first indicator of the public's attitude must always be found in the legislative judgments of the people's chosen representatives); see also *Atkins*, 536 at 312 (citing *Penry v. Lynaugh*, 492 U.S. 302, 311 (1982)).

\(^{17}\) *Kennedy*, 957 So.2d at 782 (The first part of this test takes into account more than simply a numerical counting of which states among the 38 jurisdictions permitting capital punishment stand for or against a particular capital prosecution).

\(^{18}\) *Id.* (death eligible offenses, treason; Arkansas, Calif., Colorado, Georgia, Illinois, Louisiana, Mississippi, Missouri, Washington; aggravated kidnapping; Co., Idaho, Il., Missouri, Mont.; drug trafficking Fl., Missouri; aircraft hijacking, Ga., Mo.; placing a bomb near a bus terminal, Mo., espionage; New Mexico, aggravated assault by incarcerated, persistent felons, or murderers, Mont.).

\(^{19}\) *Id.* (citing federal death eligible offenses, espionage, 18 U.S.C. § 794; treason, 18 U.S.C. § 2381; Trafficking in large quantities of drugs, 18 U.S.C. § 3591(b)); Attempting, authorizing or advising the killing of any officer, juror, or witness in cases involving a Continuing Criminal Enterprise, regardless of whether such killing actually occurs, 18 U.S.C. § 3591(b)(2)).

\(^{20}\) *Id.*

\(^{21}\) *Kennedy*, 128 S. Ct. at 2672 (Alito, J., dissenting) (of course, the other five capital child rape statutes are too recent for any individual to have been sentenced to death under them).
II. A BRIEF HISTORY OF THE DEATH PENALTY IN AMERICA

It’s difficult to understand why the Court got it wrong in *Kennedy* without stepping back into time for a quick history lesson on the death penalty in America. Britain influenced America’s use of the death penalty more than any other country.\(^{22}\) Laws regarding the death penalty varied from colony to colony.\(^{23}\) While executions for murder, burglary and robbery, and were common, the death sentences for minor offenders were also handed down albeit not often carried out.\(^{24}\) Children were commonly executed for such minor crimes as stealing.\(^{25}\) A sentence of death could be commuted or permanently postponed for reasons such as benefit of clergy, official pardons, pregnancy of the offender or performance of military or naval duty.\(^{26}\) Under these laws, offenses such as striking one’s mother or father, or denying the "true God," were punishable by death.\(^{27}\)

Between 1770 and 1830, 35,000 death sentences were handed down in England and Wales, but only 7,000 executions were carried out.\(^{28}\) Noted historian M Watt Espy’s collection, entitled “Executions in America,” documents more than 15,000 executions in the United states dating back to 1608 and colonial Jamestown.\(^{29}\) Among the unique materials are handwritten ledgers with an alphabetical listing of executed individuals by state and by date from the 1600’s through 1995 and over 1,000 books.\(^{30}\)

\(^{22}\) See, DPIC, *supra* note 3.


\(^{25}\) Id.

\(^{26}\) Id.


\(^{30}\) Id.
During the early to mid-Nineteenth Century some U.S. states began abolishing the death penalty, but most states held onto capital punishment.\(^{31}\) Some states made more crimes capital offenses, especially for offenses committed by slaves.\(^{32}\)

From 1907 to 1917, six states completely outlawed the death penalty and three limited it to the rarely committed crimes of treason and first degree murder of a law enforcement official.\(^{33}\) But by 1920, five of the six states reinstated their death penalty statutes.\(^{34}\) From the 1920s to the 1940s, there was resurgence in the use of the death penalty. This was due, in part, to the writings of criminologists, who argued that the death penalty was a necessary social measure.\(^{35}\)

**Death Penalty Statistics**

From 1930, the first year for which statistics are readily available from the Bureau of Justice Statistics, to 1967, 3,859 persons were executed under civil (that is, nonmilitary) jurisdiction in the United States. During the 1930’s, there were an average of 167 per year.\(^{36}\) During this period of nearly half a century, over half (54%) of those executed were black, 45 percent were white, and the remaining one percent were members of other racial groups -- American Indians (a total of 19 executed from 1930-1967), Filipino (13), Chinese (8), and Japanese (2).\(^{37}\) The vast majority of those executed were men; 32 women were executed from 1930 to 1967.\(^{38}\) Three out of five executions during that period took place in the southern U.S. The state of Georgia had the highest number of executions during the period, totaling 366 --

\(^{35}\) Schabas, William, *The Abolition of the Death Penalty in International Law*, 2nd ed. Cambridge, 1997 (CH, Apr’98); Bohm, supra note 32
\(^{36}\) DPIC, supra note 3.
\(^{38}\) *Id.*
more than nine percent of the national total. Texas followed with 297 executions; New York with 329; California with 292; and North Carolina with 263. Most executions -- 3,334 of 3,859 -- were for the crime of murder; 455 prisoners (12%) were executed for rapes of these prisoners 90 percent were black; 70 prisoners were executed for other offenses.\footnote{Id. (interestingly New York one of the most liberal states in the Union was once in the top three in most executions carried out, and they executed inmates by electric chair. The last execution in New York took place in 1963).}

By the end of the 1960s, all but 10 states had laws authorizing capital punishment, but pressure from those opposed to the death penalty resulted in an unofficial moratorium on executions for several years, with the last execution during this period taking place in 1967.\footnote{History of the Death Penalty & Recent Developments, available at http://justice.uaa.alaska.edu/death/history.html (last visited Nov. 11, 2008).} Prior to this, an average of 130 executions per year occurred.\footnote{Id.}

The constitutionality of the death penalty

From the 1930’s to the present day, constitutional challenges to the death penalty began to surface. The death penalty was challenged on procedural errors, such as denial of counsel\footnote{Hamilton v. Alabama 386 U.S. 52-55 (1961). (Absence of counsel for petitioner at the time of his arraignment violated his rights under the Due Process Clause of the Fourteenth Amendment).}, race-based jury selection\footnote{Patterson v. Alabama 294 U.S 600 (1935) (the failure of the trial court to make an effective appointment of counsel was likewise a denial of due process within the meaning of the Fourteenth Amendment).} coerced confession\footnote{Brown v. Mississippi 297 U.S. 278 (1936).} and prosecutorial misconduct.\footnote{Alcorta v. Texas, 355 U.S. 28, 32 (1957)(prosecutor allowing witness to testify falsely against defendant was denial of due process).} The Court addressed constitutional challenges to penalty schemes in \textit{McGautha v California}\footnote{402 U.S. 183 (1971).}, a 1971 case. The key issue in \textit{McGautha} was whether petitioner's constitutional rights were infringed by permitting the jury to impose the death penalty without any governing standards.\footnote{Id. at 185.} The Court concluded that it did not offend the U.S. Constitution.\footnote{Id. at 207(“In light of history, experience, and the present limitations of human knowledge, we find it quite...".)}
Then in 1972, *Furman v Georgia*\(^{49}\), a plurality opinion effectively overruled *McGautha*, stopping all executions for at least seven years. The Court's one-page *per curiam* opinion held that the imposition of the death penalty in Furman and its related cases constituted cruel and unusual punishment and it violated the Constitution.\(^{50}\) In over two hundred pages of concurring and dissenting opinions, the justices articulated their views.\(^{51}\)

Only Justices Brennan and Marshall believed the death penalty to be unconstitutional in all instances\(^{52}\); Justice Brennan opined, that death penalty was “an unusually severe and degrading punishment, that there was a strong probability that it is inflicted arbitrarily…and that there was no reason to believe that it serves any penal purpose more effectively than the less severe punishment of imprisonment.”\(^ {53}\) Justice Marshall felt that the death penalty was no more a deterrent than life imprisonment; he concluded that the death penalty is constitutionally invalid for two reasons: First, the death penalty is excessive,\(^ {54}\) and second, the American people, fully informed as to the purposes of the death penalty…would reject it as morally unacceptable.\(^ {55}\)

Other concurrences focused on the arbitrary nature with which death sentences have been imposed, often indicating a racial bias against black defendants.\(^ {56}\)

Justice Stewart as one of the majority, wrote:

"These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual."\(^ {57}\) For, of all the people convicted of rapes and murders in 1967

\(^{49}\) 408 U.S. 238 (1972).
\(^{50}\) Id.
\(^{51}\) Id.
\(^{52}\) Id.
\(^{54}\) *Furman*, 408 U.S. at 331-332.
\(^{55}\) Id. at 342-359.
\(^{56}\) Id. at 310 (Stewart, J., concurring) (My concurring Brothers have demonstrated that, if any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race).
and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed.\footnote{Id. at 309.} I simply conclude that the Eight and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.\footnote{Id. at 310.}

Justice Stewart deemed the death penalty in \textit{Furman} “cruel” because it exceeded what legislatures had established as a penalty for most cases\footnote{Id. at 309-310 (Stewart, J., concurring)} and Justice White considered it “unusual” because it exceeded the penalty imposed in most cases.\footnote{Id. 312 (White, J., concurring).}

In his dissent, Chief justice Burger disagreed with Justice White and Justice Stewart’s position that the infrequency, in which the death penalty was imposed, made it arbitrary.\footnote{Id. at 398 (The critical factor in the concurring opinions of both Mr. Justice Stewart and MR. Justice White is the infrequency with which the penalty is imposed. This factor is taken not as evidence of society’s abhorrence of capital punishment -- the inference that petitioners would have the Court draw -- but as the earmark of a deteriorated system of sentencing. It is concluded that petitioners’ sentences must be set aside not because the punishment is impermissibly cruel, but because juries and judges have failed to exercise their sentencing discretion in acceptable fashion).} Chief Justice Burger stated that “this application of words”\footnote{Id.} suggests that capital punishment can be made to satisfy the Eighth Amendment values if its rate of imposition is somehow multiplied.\footnote{Id. (Burger, J., dissenting) (it seemingly follows that the flexible sentencing system created by the legislatures, and carried out by juries and judges, has yielded more mercy than the Eighth Amendment can stand).} Based on this reasoning “it seemingly follows that the flexible sentencing system created by the legislatures, and carried out by juries and judges, has yielded more mercy than the Eighth Amendment can stand.”\footnote{Id.} Justices Harry Blackmun, Powell and Rhenquist, also dissented. They argued that capital punishment had always been regarded as appropriate under the Anglo-American legal tradition for serious crimes and that the text of the Constitution implicitly

\footnote{Id. at 309.}
\footnote{Id. at 310.}
\footnote{Id.}
\footnote{Id. at 309-310 (Stewart, J., concurring)}
\footnote{Id. 312 (White, J., concurring).}
\footnote{Id. at 398 (The critical factor in the concurring opinions of both Mr. Justice Stewart and MR. Justice White is the infrequency with which the penalty is imposed. This factor is taken not as evidence of society’s abhorrence of capital punishment -- the inference that petitioners would have the Court draw -- but as the earmark of a deteriorated system of sentencing. It is concluded that petitioners’ sentences must be set aside not because the punishment is impermissibly cruel, but because juries and judges have failed to exercise their sentencing discretion in acceptable fashion).}
\footnote{Id. (Burger, J., dissenting) (it seemingly follows that the flexible sentencing system created by the legislatures, and carried out by juries and judges, has yielded more mercy than the Eighth Amendment can stand).}
\footnote{Id.}
authorized United States death penalty laws because of the reference in the Fourteenth Amendment to the taking of "life."\textsuperscript{66}

The Court's decision in \textit{Furman}, forced states to rethink their statutes for capital offenses to assure that the death penalty would not be administered in a capricious or discriminatory manner. Several statutes mandating bifurcated trials, with separate guilt-innocence and sentencing phases, and imposing standards to guide the discretion of juries and judges in imposing capital sentences, were upheld in a series of Supreme Court decisions in 1976, led by \textit{Gregg v Georgia}\textsuperscript{67} the case that revived the death penalty.

\textit{Gregg} provided several procedural reforms to the application of the death penalty; the first was bifurcated trials, in which there are separate deliberations for the guilt and penalty phases of the trial.\textsuperscript{68} Only after the jury has determined that the defendant is guilty of capital murder does it decide in a second trial whether the defendant should be sentenced to death or given a lesser sentence of prison time.\textsuperscript{69} Another reform was the practice of automatic appellate review of convictions and sentence.\textsuperscript{70} The final procedural reform from \textit{Gregg} was proportionality review, a practice that helps the state to identify and eliminate sentencing disparities.\textsuperscript{71} Through this process, the state appellate court can compare the sentence in the case being reviewed with other cases within the state, to see if it is disproportionate.\textsuperscript{72}

\begin{itemize}
  \item[\textsuperscript{66}] \textit{Id.} at 283 (The Fifth Amendment declares that if a particular crime is punishable by death, a person charged with that crime is entitled to certain procedural protections. We can thus infer that the Framers recognized the existence of what was then a common punishment. We cannot, however, make the further inference that they intended to exempt this particular punishment from the express prohibition of the Cruel and Unusual Punishment Clause. Nor is there any indication in the debates on the Clause that a special exception was to be made for death…) (Finally, it does not advance analysis to insist that the Framers did not believe in that adoption). \textit{Id}.
  \item[\textsuperscript{67}] 428 U.S. 153 (1976).
  \item[\textsuperscript{68}] DPIC, \textit{supra} note 3.
  \item[\textsuperscript{69}] \textit{Id}.
  \item[\textsuperscript{70}] \textit{Gregg}, 428 U.S. at 206.
  \item[\textsuperscript{71}] \textit{Id}.
  \item[\textsuperscript{72}] \textit{Id}.
\end{itemize}
Gregg held 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.\textsuperscript{73} Failure to satisfy [the disjunctive] was enough to prove the death penalty was disproportional.\textsuperscript{74} Gregg was also an important decision because it held that the imposition of death for the crime of murder in Georgia did not violate the Eight and Fourteenth Amendments.\textsuperscript{75} Gregg recognized that the existence of capital punishment was accepted by the Framers of the Constitution, and, for nearly two centuries, this Court recognized that capital punishment for the crime of murder is not invalid \textit{per se}.\textsuperscript{76} Justice Brennan remained unwavering on his position that the death penalty under all circumstances was unconstitutional.\textsuperscript{77} Justice Marshall announced that his view on the death penalty remained the same.\textsuperscript{78}

By the time Gregg was decided Georgia had amended its statutes to retain the death penalty for six categories of crimes: Murder, kidnapping for ransom or where victim is harmed, armed robbery, rape, treason and aircraft hijacking.\textsuperscript{79} The death penalty for rape under Georgia

\textsuperscript{73} Id. at 173, 183, 187 (joint opinion of Stewart, Powell, and Stevens, JJ.); see also Coker, 433 U.S. at 592 (plurality opinion) ("A punishment might fail the test on either ground").
\textsuperscript{74} Id. (emphasis added).
\textsuperscript{75} Id. at 187 (Stewart, Powell, and Stevens, JJ.) (The punishment of death for the crime of murder does not, under all circumstances, violate the Eighth and Fourteenth Amendments).
\textsuperscript{76} Id. at 176-178; see also Jurek v Texas, 428 U.S. 262, 268 (1976) (holding that intentional and knowing murders committed in five situations: murder of a peace officer or fireman; murder committed in the course of kidnaping, burglary, robbery, forcible rape, or arson; murder committed for remuneration; murder committed while escaping or attempting to escape from a penal institution; and murder committed by a prison inmate when the victim is a prison employee, where eligible for the death penalty under the Texas Scheme); see also, Profitt v Florida, 428 U.S. 242, 243 (concluding that, under the Florida law, the sentencing judge is required to impose the death penalty on all first-degree murderers as to whom the statutory aggravating factors outweigh the mitigating factors Gregg, 428 U.S. at 230 (Brennan, J. dissenting) (quoting Furman, 408 U.S. at 290) (Death is not only an unusually severe punishment, unusual in its pain, in its finality, and in its enormity, but it serves no penal purpose more effectively than a less severe punishment; therefore the principle inherent in the Clause that prohibits pointless infliction of excessive punishment when less severe punishment can adequately achieve the same purposes invalidates the punishment).
\textsuperscript{77} Id. at 231 (Marshall, J., dissenting) (quoting Furman, 408 U.S. at 238,314).
\textsuperscript{78} Id. at 163(quoting Ga.Code Ann. §§ 26-1101, 26-1311 26-1902, 26-2001, 26-2201, 26-3301 (1972)).
Law would later prove disproportionate under *Coker*. This will be covered in greater detail in page 11.

In *Woodson v North Carolina*, another important 1976 case, the Court held that North Carolina’s mandatory death penalty for specific offenses was unconstitutional as it was unduly harsh and unworkably rigid. The reasoning in *Woodson* was based on its failure to adequately address *Furman*’s rejection of unbridled jury discretion in the imposition of death sentences. The Court found three problems with the law: First, the law "depart[ed] markedly from contemporary standards" concerning death sentences. The historical record indicated that the public had rejected mandatory death sentences. Second, the law provided no standards to guide juries in their exercise of "the power to determine which first-degree murderers shall live and which shall die." Third, the statute failed to allow consideration of the character and record of individual defendants before inflicting the death penalty.

*Coker*, the case both sides in *Kennedy* relied on was decided next. In *Coker*, while the defendant was serving various sentences for murder, rape, kidnapping, and aggravated assault, he escaped from a Georgia prison and, in the course of committing an armed robbery and other offenses, raped an adult woman. The Court in *Coker* held that the Eighth Amendment bars not

---

80 *Coker*, 433 U.S. at 584.
81 *Gregg*, 428 U.S. 280.
82 Id. at 310.
83 Id. at 316.
84 *Woodson*, 428 U.S. at 295 (quoting *Witherspoon v. Illinois*, 391 U.S. 510 (1968) ("one of the most important functions any jury can perform" in exercising its discretion to choose "between life imprisonment and capital punishment" is "to maintain a link between contemporary community values and the penal system.")
85 *Woodson*, 428 U.S. at 295 (quoting *Winston v. United States*, 172 U.S. 303 (1899) (the "hardship of punishing with death every crime coming within the definition of murder at common law, and the reluctance of jurors to concur in a capital conviction, have induced American legislatures, in modern times, to allow some cases of murder to be punished by imprisonment instead of by death").
86 Id. at 299 (States have adopted mandatory measures following *Furman*, while others have legislated standards to guide jury discretion appears attributable to diverse readings of this Court's multi-opinioned decision in that case).
87 Id. at 303.
88 *Coker*, 433 U.S. at 605.
only those punishments that are "barbaric," but also those that are "excessive" in relation to the crime committed, and a punishment is "excessive" and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment, and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime.\(^{90}\) The Court also held “that death is a disproportionate penalty for rape [when it] is strongly indicated by the objective evidence of present public judgment, as represented by the attitude of state legislatures and sentencing juries, concerning the acceptability of such a penalty.”\(^{91}\)

Although the Court in \textit{Gregg} had pronounced “though a legislature may not impose excessive punishment”\(^{92}\) it also stated that the legislature, “is not required to select the least severe penalty possible, and a heavy burden rests upon those attacking its judgment.”\(^{93}\) It seems that \textit{Gregg} gave state legislatures more autonomy to apply the death penalty but that \textit{Coker} did not want to extend the same amount of deference. Nevertheless, despite \textit{Coker’s} holding, the death penalty resumed but it was two years after the first death sentence since the moratorium was carried out.\(^{94}\)

John Spenkelink of Florida was the first person to be put to death after executions resumed.\(^{95}\) \textit{Spenkelink}, was a specially controversial case (as most death penalty cases usually are) because he claimed he shot the victim in self defense.\(^{96}\) At one point, he had even been

\(^{89}\) \textit{Id.} at 584.
\(^{90}\) \textit{Id.} at 591-592.
\(^{91}\) \textit{Id.} at 593-597 (noting that Georgia was the only State authorizing the death sentence for rape of an adult woman, that it is authorized for rape in only two other States, but only when the victim is a child, and that, in the vast majority (9 out of 10) of rape convictions in Georgia since 1973, juries had not imposed the death sentence).
\(^{92}\) \textit{Gregg}, 433 U.S. at 174-176.
\(^{93}\) \textit{Id.}
\(^{94}\) \textit{Spenkelink v Florida}, 313 So.2d 666 (1975).
\(^{96}\) \textit{Id.}
offered a life sentence for an admission to second degree murder. Unfortunately for him he withdrew his plea and thus earned himself a date with “Old Sparky”. Spenkelink was executed May 25, 1979.

Between 1979 and the *Kennedy* decision there were several cases in which the Court began substituting its own evolving standards of decency— over the states— to determine the to interpret the Eighth Amendment. For example, In *Atkins* the court held that executing the mentally retarded was excessive because of their diminished capacity. The Court reversed itself from an earlier case in which they ruled that a defendant with the intelligence of a nine or ten year old was fit to receive the ultimate penalty.

In *Roper*, the Court held that the Eight Amendment forbids the imposition of the death penalty on juvenile offenders if at the time of the crime they were under the age of eighteen. Once again the Court was reversing itself from an earlier Kentucky case in which they held that the Eighth Amendment’s prohibition of cruel and unusual punishment did not prevent states from imposing the death penalty on juvenile offenders.

In reaching their conclusion the Court found that a majority of states allowed capital punishment for juveniles aged 16 and 17.

---

97 Id. at 672.
98 *Old Sparky* is the nickname of the electric chairs of Texas, New York, Louisiana, Ohio, Illinois, Kentucky, Georgia, and Florida. It was the nickname of the long-retired electric chair at the now-closed West Virginia State Penitentiary in Moundsville, West Virginia. http://www.wvpentours.com: (last visited Oct. 31, 2008).
100 536 U. S. 304 (2002).
101 Id. at 311-321 (2002). (Holding that executions of mentally retarded criminals are “cruel and unusual punishments” prohibited by the Eighth Amendment).
102 Penry v. Lynaugh, 492 U. S. 302, 312 (1989) (O’connor, J..) (the imposition of the death penalty was not prohibited by virtue of Penry’s mental retardation).
103 *Roper*, 543 U.S. at 551.
104 Stanford v. Kentucky, 492 U. S. 361, 365-374 (1989) (J., Scalia) (the imposition of capital punishment on an individual for a crime committed at 16 or 17 years of age does not constitute cruel and unusual punishment under the Eighth Amendment).
105 Id. at 365-374 (States that allowed Juveniles to be executed between 1976-2005: Texas, Alabama Mississippi Arizona Louisiana, North Carolina, South Carolina, Florida, Georgia, Pennsylvania, Virginia, Nevada, Missouri,
III. LOUISIANA’S DEATH PENALTY STATUTE FOR CHILD RAPE IS NOT CRUEL AND UNUSUAL UNDER THE EIGHTH AMENDMENT.

The Eighth Amendment to the United States Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." It is well established that the Eighth Amendment’s prohibition of cruel and unusual punishments is "progressive, and . . . not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice." The Eighth Amendment’s cruel and unusual punishment clause also provides that the punishment must be proportional.

According to Justice Brennan,

A punishment is deemed 'cruel and unusual', if its:(1) “degrading to human dignity, especially torture”;(2) “inflicted in a wholly arbitrary fashion”; (3) “is clearly and totally rejected throughout society”; (4) is patently unnecessary.”

The court has never held that the death penalty itself is cruel and unusual and in Gregg, Justice Stewart, Justice Powell and Justice Stevens concluded that “the concerns expressed in Furman that the death penalty not be imposed arbitrarily or capriciously can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance, concerns best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of that information.”

Louisiana’s death penalty statute

---

106 U.S. Const. Amend. VIII.
108 Gregg, 428 U.S. at 206 (proportionality review substantially eliminates the possibility that a person will be sentenced to die by the action of an aberrant jury).
109 Furman, 408 U.S. at 281 (Brennan, J., concurring).
110 Gregg, 428 U.S. at 168-187(The punishment of death for the crime of murder does not, under all circumstances, violate the Eighth and Fourteenth Amendments).
111 Id. at 188-195.
for child rape statute was narrowly drafted to include only the worst of all child rapists, those who prey on victims under twelve. In addition, Louisiana has a bifurcated trial for death penalty cases.

A. Louisiana’s Death Penalty for Child Rape Satisfies Both Acceptable Goals of Punishment.

A punishment is excessive and unconstitutional under the Eighth Amendment if it: (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeful and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime.

In Gregg, the Court held that the death penalty was not a constitutionally excessive punishment for intentional murder but reserved the question of the constitutionality of the death penalty when imposed for other crimes. Gregg also held that capital punishment is excessive when it does not fulfill the two distinct social purposes served by the death penalty: retribution and deterrence of capital crimes. The goal of retribution reflects the victim and society’s interests in seeing that the offender is repaid for the harm he caused. Sentencing Kennedy to death would sufficiently serve the goals of retribution because child rape is morally outrageous. “Retribution is no longer the dominant objective of the criminal law, but neither is it a forbidden objective nor one inconsistent with our respect for the dignity of men.”

Child rapists are a class of offenders who, unlike the young or mentally retarded, share no common characteristics tending to mitigate the moral culpability of their crimes, and the goals of

---

113 Id.
114 See, La. C.Cr.P. art. 905.4.
115 Gregg, 428 U.S. at 173.
116 Id. at 187.
117 Id. at 173, 183, 187 (Joint Opinion of Stewart, Powell and Stevens, JJ.)
118 Atkins, 536 U.S. at 304, 319; Furman, 408 U.S. at 308 (Stewart, J., concurring).
119 Gregg, 428 at 183 (citing Williams v. New York, 337 U.S. 241, 248 (1949)).
deterrence and retribution will be served just as well as the execution of first-degree murderers. One who takes another’s life is a murderer; one who rapes a child under the age of twelve murders innocence. The Court has recognized that retribution, “serves an important purpose in promoting the stability of a society governed by law.” The same Court pronounced, “Capital punishment's function in expressing "society's moral outrage at particularly offensive moral conduct . . . is essential in an ordered society that asks its citizens to rely on legal process rather than self-help to vindicate their wrongs.”

Although there is no empirical evidence of the death penalty’s deterrent effect, at least one Justice acknowledged that it “cannot be dismissed with absolute certainty that the death penalty for rape would serve no deterrent or retributive function.” The retribution debate has a religious and non-religious foundation. In the Old Testament, the principle of lex talionis, “an eye for an eye” states that, “whoever takes the life of a human being shall be put to death.”

The Utilitarian belief is that capital punishment has redemptive effects; that executing the offender redeems society by restoring the balance that was lost through his or her act. Proponents also believe the death penalty redeems the victim by reaffirming the victim’s worth. The Court also acknowledged that there are some murderers…for whom…the death

---

120 Kennedy, 957 So.2d at 789 (La. 2007) (noting that the execution of child rapists would serve the goals of deterrence and retribution).
121 Melissa Meister, supra note 12 at 197, 224.
122 Gregg, 428 at 183.
123 Id.
124 Coker, 433 U.S. at 584, 592 (concluding that the death penalty for rape might serve “legitimate ends of punishment” but nevertheless is disproportionate to the crime).
125 Leviticus 24:20 (King James); Exodus 21:24 (King James).
126 Rivkind & Shatz (Citing M. Moore, the Moral Worth of Retribution in F. Schoeman (ed.), Responsibility, Character and Emotions 179 (1987)).
127 Murphy & J. Hampton, Forgiveness and Mercy 125-143 (1988) (arguing that the retributive punishment is the defeat of the wrongdoer by the victim or the victim’s agent (the state) and is required to reaffirm the victim’s self worth after it has been diminished by the wrongdoer).
penalty undoubtedly is a significant deterrent.\textsuperscript{128} The prevailing sentiment in American society is that “there is no greater villain than the sex offender.”\textsuperscript{129}

\textbf{B. Louisiana’s Death Penalty is Proportionate for the Rape of a Child.}

Louisiana relied on the holding in \textit{Coker}, to enact its death penalty statute for child rape.\textsuperscript{130} In \textit{Coker}, the court held that the Eighth Amendment prohibits the death penalty for the rape of a woman.\textsuperscript{131} Two members of the \textit{Coker} majority took the position that the death penalty was always unconstitutional.\textsuperscript{132} Four other Justices, who joined the plurality opinion, suggested that the Georgia capital rape statute was unconstitutional for the simple reason that the impact of a rape, no matter how heinous, was not grave enough to justify capital punishment.\textsuperscript{133} The plurality pronounced that although “Life is over for the victim of the murderer; for the rape victim, life may not be nearly [as] happy as it was, but it is not over and normally is not beyond repair.”\textsuperscript{134} The \textit{Coker} Court did not say that the death penalty for all rape was unconstitutional, only that the death penalty for the rape of an adult woman was.\textsuperscript{135} The Court distinguished between the rape of an adult woman and child.\textsuperscript{136} They made this distinction known by their continuous use of the phrase “adult woman” or “adult female” when discussing the crime or the victim.\textsuperscript{137} Perhaps the Court in \textit{Coker} wanted the states to decide whether to execute child rapists. Maybe they understood the vulnerability of children?

\begin{multicols}{1}
\begin{itemize}
\item \textsuperscript{128} \textit{Id.} at 186.
\item \textsuperscript{130} \textit{Kennedy}, 957 So.2d at 781 (For while \textit{Coker} clearly bars the use of the death penalty as punishment for the rape of an adult woman, it left open the question of which, if any, non-homicide crimes can be constitutionally punished by death).
\item \textit{Coker}, 433 U.S. at 584.
\item \textsuperscript{132} \textit{Id.} at 600 (Brennan, and Marshall, JJ. concurring).
\item \textsuperscript{133} \textit{Id.} at 586 ((White, Stewart, Blackmun, Stevens, JJ., concurring)
\item \textsuperscript{134} \textit{Id.} at 598 (emphasis added).
\item \textit{Coker}, 433 U.S. at 584.
\item \textsuperscript{136} \textit{Id.} at 593-597 ( Distinguishing Georgia as the only state with the death penalty for the rape of an adult woman, and recognizing that two other States, had the death penalty for rape but only when the victim is a child).
\item \textit{Id.} at 584.
\end{itemize}
\end{multicols}
Consistent with the view that children form a protected group, The Louisiana Supreme Court concluded in *State v Wilson*\(^{138}\) that the death penalty for child rape was constitutional.\(^{139}\) They held that “children are a class that need special Protection.”\(^{140}\) The Court in *New York v Ferber*\(^{141}\) also recognized the importance of protecting children, refusing to extend First Amendment protection to child pornography.\(^{142}\) The Court emphasized, “The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance.”\(^{143}\) Even Justice Kennedy has recognized that “[w]hen a child molester commits his offense, he is well aware the harm will plague the victim for a lifetime.”\(^{144}\) As one particular litigant in the Kennedy case wrote in his brief, “Children are profoundly different from adults during infancy, child-hood and early adolescence; they progress through different stages of cognitive and psychosocial development on the way to adulthood and independence.”\(^{145}\)

Furthermore, “as a result of their immaturity, children are mentally and physically unprepared for sexual activity, yet because of their youth and frailty are unable to protect themselves from rape and other sexual abuse by adults.”\(^{146}\) Moreover, statistics suggest that the impact of child sexual abuse may be “particularly profound because of the significant and unexpected betrayal by trusted adults.”\(^{147}\)

\(^{138}\) 685 So.2d 1063(1997).
\(^{139}\) *Id.* at 1070 (given the appalling nature of the crime, the severity of harm inflicted on the victim, and the harm imposed on society, the death penalty is not an excessive penalty when the victim is a child under the age of twelve years old).
\(^{140}\) *Kennedy*, at 957 So.2d at 781.
\(^{142}\) *Id.*
\(^{143}\) *Id.* at 757.
\(^{146}\) *Id.* at 51 n.48.
\(^{147}\) Beth E. Molnar, et.al, *Child Sexual Abuse and Subsequent Psychopathology: Results From the National
According to statistics there are approximately 80,000\textsuperscript{148} incidents of child sexual abuse reported each year, but the number of unreported instances is far greater because the children are afraid to tell anyone what has happened, especially if the transgressor is an acquaintance or a relative.\textsuperscript{149} Although more than half of all sexual abuse survivors do not suffer the most extreme forms of psychiatric trauma, child sexual abuse often negatively affects long-term psychological and social well-being.\textsuperscript{150} Factors that worsen the severity include: younger age at first abuse, less developmental maturity, longer duration of abuse, occurrence of penetration, use of force, abuse by a parent-figure or much older perpetrator, lack of support upon disclosure and absence of a caring non-abusing parent.\textsuperscript{151}

In *Kennedy* the eight-year old victim had to have emergency surgery to repair serious tearing to her perineum and vaginal area.\textsuperscript{152} Compounding those injuries was the victim’s young age, not to mention the mental anguish that she suffered, not only from the attack itself but from her inability to comprehend why her step-father would do this to her. When these aggravating factors are weighed against the facts of *Coker*, the two cases are clearly distinguishable not only in reprehensibility but also in its long term psychological impact on the child.

C. **Finding the Most Deserving of Death by Execution**

In *Roper*, the Court decided that in order to determine if a death penalty statute was proportionate, it had to impose the death penalty on the most culpable and deserving of execution.\textsuperscript{153} The Court also spelled out that capital punishment must “be limited to those

\textsuperscript{150} Id.
\textsuperscript{153} Brief for Respondent, *supra* note 145 at 5 n.6.
\textsuperscript{154} *Roper*, 534 U.S. at 568 (quoting *Atkins*, 536 U.S. at 319).
offenders who commit ‘a narrow category of the most serious crimes’ and whose extreme culpability makes them ‘the most deserving of execution.’”154 The Court had already concluded that putting the mentally retarded to death, violated “the evolving standards of decency…”155 because the mentally retarded had diminished culpability.156 In applying this standard, the Court held in Roper that the execution of juveniles was also violative of the Eighth Amendment because the offender also had diminished personal responsibility for the crime.157 According to the Court, “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.”158

There are two ways a state can "genuinely narrow the class of persons eligible for the death penalty and reasonably justify the imposition of a more severe sentence on the defendant" than on others.159

(1) The Legislature may itself narrow the definition of capital offenses, or (2) the legislature may broadly define capital offenses and provide for narrowing by jury findings of aggravating circumstances at the penalty phase.160 Louisiana chose the first method, in that the legislature narrowly defined the definition of offenses which are punishable by death.161

The Louisiana Supreme Court relied on their previous decision in Wilson, describing child rape as, “devastating, reprehensible, and only second to homicide in terms of seriousness.”162 The fact that Wilson considered murder as the most serious offense163 does not mean that the second most serious offense, child rape did not meet death eligibility. For example

---

154 Atkins, 536 U.S. at 319.
156 Atkins, 536 U.S. at 318 (their deficiencies do not warrant exemption from criminal sanctions but they do diminish their personal culpability).
157 Roper, 534 U.S. at 571–573.
158 Trop, 356 U.S. at 100.
160 Lowenfield, 484 U.S. at 246.
161 Id. at 246 (“Louisiana's capital scheme narrows the class of death-eligible murderers and then at the sentencing phase allows for the consideration of mitigating circumstances and exercise of discretion. The Constitution requires no more”).
162 Wilson, 685 So.2d at 1063.
163 Id.
the court held that "given the appalling nature of the crime, the severity of harm inflicted on the victim, and the harm imposed on society, the death penalty is not an excessive penalty when the victim is a child under the age of twelve years old."  

The Louisiana Supreme Court explained in *Kennedy* that [it], along with the Louisiana Legislature, had accepted the death penalty for child rape because “the aggravated rape of a child contains absolutely no possible mitigating factor.”  

Although many other cases such as car-jackings, home invasions, also contain no mitigating factors, child rape is different because of the vulnerability of the child victims. The Louisiana Supreme Court reasoned it was in the best position to protect vulnerable children from the clutches of rapists. In dicta the court stated, “That the harm caused by child rape not only hurts the child but affects society as well” [and] "we can think of no other non-homicide crime more deserving" of the death penalty.

Finally, Louisiana’s death penalty statute is distinguishable from the death penalty statute in *Woodson*, because it does not call for a mandatory death penalty in all child rape cases; instead it gives the prosecutor the discretion to seek death in child rape cases. When the Court heard arguments in *Kennedy*, prosecutors had sought the death penalty in only five aggravated rape cases and only in two of those cases, *Kennedy* being one of them, did jurors return a death

---

164 Id. at 1070.
165 *Kennedy*, 957 So. 2d at 789 (comparing child rapists to mentally handicapped perpetrators to show how the mentally handicapped are less morally culpable).
166 Brief for Respondent, *supra* note 145 at 51.
167 Id. (quoting Wilson, 685 So.2d at 1063, 1067; See also Melissa Meister, *supra* note 12 at 208-209 (describing the serious effects on child rape victims)).
168 Id. at 789 (quoting Wilson, 685 So.2d at 1067).
169 Id. (emphasis added).
170 Id. at 782.
171 *Kennedy*, 128 S. Ct. at 2672 (Kennedy, J., dissenting) (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). See State v. Dickerson, 01-1287 (La. App. 2002), 822 So. 2d 849 (2002); State v. Leblanc, 01-1322 (La. App. 2001), 788 So. 2d 1255; 2005-1981 (La. Sup. Ct. 2007), 957 So. 2d 757; State v. Davis, Case No. 262,971 (1st Jud. Dist., Caddo Parish, La. 2007)).
sentence.172 These numbers do not indicate that Louisiana sentencing juries are unwilling to impose a sentence of death for the rape of a child but they do show that not every child rapist is likely to get the death penalty.173

D. Kennedy was One of Louisiana’s Worst Offenders, Making Him Death Eligible

When Kennedy committed the crime for which he was sentenced to the death, the capital offense of aggravated rape was narrowly defined to include only rapes committed when the anal or vaginal sexual intercourse was deemed to be without consent of the victim because the victim is a child under twelve.174

With regard to child-victims, the statute essentially defined two categories of the offense: 1) aggravated rapes where the anal or vaginal intercourse was deemed without consent of the victim because the victim was less than twelve years old; 175 and 2) aggravated rapes of children twelve and older, where the anal or vaginal intercourse was deemed without consent of because it was committed under other enumerated circumstances.176 The first category was punishable by death or life imprisonment at hard labor, without probation, parole, or suspension of sentence.177

The second category was punishable by life imprisonment at hard labor, without probation, parole, or suspension of sentence.178 Thus, the statute narrowly defined the offense to provide that only offenders who committed vaginal or anal rapes of children less than twelve years of age were death penalty eligible. Kennedy’s victim, his step-daughter was eight years old when he raped her. He caused her serious physical injuries, inter alia, tearing her vagina,

---

172 Id.
173 Id. (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).
175 § 14:42A(4).
176 §14:42A(1)-(3), (5), & (6).
177 Id. § A(4).
178 Id. § A(1)-(3), (5), & (6).
perineum and causing her anus to protrude to her vagina. Undoubtedly Kennedy violated the statute making his offense a death penalty eligible one, but did he fit within the narrow class of the worst of all offenders?

Kennedy may not be the worst of all offenders if you compare him to Ted Bundy, Florida’s most notorious serial killer, who committed at least thirty murders in four different states or Troy Victorino, who along with several co-defendants bludgeoned six people in Deltona, Florida to death with a baseball bat or Danny Rollins, who murdered and mutilated five students in Gainesville, Florida in 1990. The comparison, however, should be not between the most depraved of killers and child rapists. Instead it should be between child rapists and the rest of the offender population. Under that comparison, child rapists will be near the top of the list and in the author’s opinion that should suffice. Kennedy may not have killed his victim, but he did brutalize her, caused her unspeakable, irreparable harm and he did so without mitigation.

E. Louisiana’s Death Penalty Scheme was Constitutional

Although Louisiana’s capital sentencing law states that “[t]he jury is not required to find any mitigating circumstance in order to make a recommendation of mercy that is binding on the trial court . . . it must…” find a statutory aggravating circumstance before recommending a sentence of death.” The jury must consider and find one aggravating factor and must

---

179 Brief of Respondent, supra note 145 at 21 n.50, Kennedy, 128 S. Ct. at 2641 (The victim was an eight-year-old child, and the petitioner was an adult male weighing over three hundred pounds, according to his March 3, 1998 taped statement. (Rec. Ex. S-27, S-28).
181 Ted Bundy’s killing spree covered the following states: Utah, Washington, Colorado and Florida.  
182 http://www.dc.state.fl.us/ActiveInmates/detail.asp?Bookmark=1&From=list&SessionID=752206667
183 Fiona Steel, the Killer Confesses, available at http://www.trutv.com/library/crime/serial_killers/predators/rolling/15.html (last visited Nov.13, 2008). (Rollins also confessed to having committed a triple homicide in Shreveport, Louisiana a year earlier) Id.
184 Id.
185 Gregg, 428 U.S. at 153 (also describing and upholding Georgia’s sentencing provisions).
consider the mitigating factors during the penalty phase.\footnote{§ 905.5.} Included as aggravating factors are that “the offender was engaged in the perpetration or attempted perpetration of aggravated rape,” and the “the victim was under the age of twelve years . . .”\footnote{§ 905.4(A)(1) and (10).} Some of the mitigating factors the jury must consider include:\footnote{§ 905.5.}

a. The offender has no significant prior history of criminal activity;
b. The offense was committed while the offender was under the influence of extreme mental or emotional disturbance;
c. The offense was committed while the offender was under the influence or under the domination of another person;
d. The offense was committed under circumstances which the offender reasonably believed to provide a moral justification or extenuation for her conduct;
e. At the time of the offense, the capacity of the offender to appreciate the criminality of his conduct or to conform her conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication;
f. The youth of the offender at the time of the offense;
g. The offender was a principal whose participation was relatively minor;
h. Any other relevant mitigating circumstance.\footnote{Id.}

None of the statutory mitigating factors seemed to apply to Kennedy and even if the jury decided to consider relevant the fact that he did not kill his step-daughter, it probably would not have made a difference because there was more than one aggravator.\footnote{Kennedy, 957 So.2d at 790.} Moreover, Louisiana is not a weighing state.\footnote{State v. Hamilton, 681 So. 2d 1217, 1227-28 ((La. 1996).} It does not require capital juries to weigh or balance mitigating factors against aggravating factors, one against the other, according to any particular standard.\footnote{Id.}
IV. A DIRECTION OF CHANGE IS ENOUGH TO FIND DEATH PENALTY FOR THE RAPE OF A CHILD AS PROPORTIONATE.

According to the Court capital punishment can also be disproportionate absent objective indicia of a consensus of societal standards. The Court reviews objective indicia of consensus, as expressed in particular by the enactments of state legislators, before determining, in the exercise of its independent judgment, whether the death penalty is grossly disproportionate. If they find objective indicia against the death penalty in any instance they will find the death penalty disproportionate under the Eighth Amendment. Additionally, in Kennedy the Court reasoned that the number of persons executed for child rape was a good indicator of whether a national consensus existed.

A consensus however, need not be by an overwhelming majority. In Kennedy the Court said that five states enacting the death penalty was not enough to find a national consensus for the death penalty in child rape cases. But in Roper, the Court held that because five states had abolished the death penalty for juvenile offenders, this was enough to find a national consensus for abolishing the death penalty for juveniles. The Louisiana High Court noted that the trend was more compelling than in Roper, because despite the ambiguity over whether Coker...
applied to all rape or just the rape of an adult woman, five states enacted the death penalty for rape. The court indicated that since Louisiana enacted the death penalty statute for child rape, four other states,\textsuperscript{201} also had enacted similar statutes and a fifth state,\textsuperscript{202} retained the statute on the books, but it had ceased to enforce it since 1981.\textsuperscript{203} These four new states allowing capital punishment for child rape gave the Louisiana court evidence of a movement toward granting the death penalty for child rape.\textsuperscript{204} The Louisiana Supreme Court did not find a growing consensus for imposing the death penalty on child rapists but they did not find a trend moving away from it, like the Court found in \textit{Roper} and \textit{Atkins}.\textsuperscript{205}

While it was true that a majority of states did not allow the death penalty for child rape, the Louisiana Supreme Court recognized that many states provided death as punishment for other less heinous non-homicidal crimes.\textsuperscript{206} The Court should have allowed other non-homicide death eligible offenses to be part of the equation.\textsuperscript{207} After all child rape is a non-homicide as are treason, hijacking and drug trafficking. The Louisiana Supreme Court placed child rape as second only to homicides.\textsuperscript{208} The Court also recognized the severity of child rape.\textsuperscript{209} Interestingly, views on the expansion of imposing the death penalty for non-homicidal crimes doubled between 1993-1997.\textsuperscript{210}

\begin{itemize}
  \item \footnote{201}{These four states enacted their death penalty statutes after Louisiana: Oklahoma, South Carolina, Montana, and Georgia.}
  \item \footnote{202}{Buford v. State, 403 So. 2d 943(1981) (holding unconstitutional the imposition of death for child rape).}
  \item \footnote{203}{\textit{Id.} at 951.}
  \item \footnote{204}{\textit{Kennedy}, 957 So.2d at 788.}
  \item \footnote{205}{\textit{Id.} at 753.}
  \item \footnote{206}{\textit{Id.} at 785 (finding a change in direction).}
  \item \footnote{207}{\textit{Id.} at 784 (this analysis should look beyond the child rape penalty provisions of other states and instead should consider all non-homicide capital statutes to determine the national consensus for capital punishment in non-homicide cases).}
  \item \footnote{208}{\textit{Id.} at 789.}
  \item \footnote{209}{\textit{Kennedy}, 128 S. Ct. at 2659 (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.' . . .).}
  \item \footnote{210}{\textit{Kennedy}, 957 So.2d at 786.}
\end{itemize}
Of the thirty-seven states with death penalty statutes, fifteen allowed capital punishment for non-homicidal crimes. If you include the federal government, the death penalty is still available for even more non-homicide crimes and with the exception of rape which was found to be non-death eligible in Coker, the Court has never held the death penalty unconstitutional for most of those other non-homicide crimes. Also absent from the Court’s analysis was the fact that other states were in the process of enacting similar legislation. According to Justice Alito because the Court granted Certiorari, it is possible that this may have prevented more states from enacting similar legislation.

In his dissent to Kennedy, Justice Alito stated that relying on the fact that only six of the fifty states had statutes permitting the death penalty for the rape of a child was an unreliable indicator of the views of state lawmakers and their constituents. His opinion was based on evidence that some states considered implementing the death penalty for child rape as “futile” and “costly”. Ambiguity in interpreting Coker also played a part. In Oklahoma, the opposition to the State’s capital child rape statute argued that Coker had already ruled the death penalty unconstitutional as applied to cases of rape. Likewise, opponents of South Carolina’s capital child-rape law contended that the statute would waste state resources because it would

---

211 Id. At 787-789 (The crimes imposing the death penalty varied including drug crimes in Florida, aggravated kidnapping in four states, and five for sui generis crimes against the government. The federal government imposes the death penalty for 39 different crimes). Id. at 788.

212 Brief of Respondent, supra note 145 at 9, Kennedy, 128 S. Ct. at 2641.

213 Kennedy, 128 S. Ct at 2664 (Alito, J. dissenting) (the Court’s decision in Coker 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).

214 Id.

215 Id. (Alito, J., dissenting) (quoting Coker, 433 U.S. at 584).

216 Id. at 2667.

217 Id. at 2666 (noting that if Justice Powell had interpreted Coker as creating "a bright line between murder and all rapes--regardless of the degree of brutality of the rape…" it was reasonable that some states also saw it that way).

undoubtedly be held unconstitutional.\textsuperscript{219} In Colorado, the Senate voted against it.\textsuperscript{220} In Tennessee, budgetary reasons also prevented the bill from passing\textsuperscript{221}

In the author’s opinion, lacking resources to enact legislation or confusion in the interpretation of a judicial opinion is not tantamount to a lack of consensus amongst the states when it comes to child rape. “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.\textsuperscript{222} 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.\textsuperscript{223} In that atmosphere, legislative inaction is more likely to evidence acquiescence.\textsuperscript{224}

Since \textit{Coker} was decided, reported instances of child abuse had increased so dramatically,\textsuperscript{225} that in response Congress passed legislation requiring states to enact registration systems for convicted sex offenders and to notify the public about persons convicted of the sexual abuse of minors.\textsuperscript{226} All fifty states now have such statutes in place.\textsuperscript{227} Even the District of

\begin{footnotesize}
\begin{enumerate}
\item[\textsuperscript{219}] \textit{Kennedy}, 128 S. Ct. at 2668 (Alito J., dissenting) (quoting Laura Hudson, spokeswoman for the S. C. Victim Assistance Network, as stating that “[w]e don’t need to be wasting state money to have an appeal to the [United States] Supreme Court, knowing we are going to lose it”).
\item[\textsuperscript{220}] Death Too Cruel for Rapists of Children: Appalling 5-4 Decision Again Points to Need for New Court, available at http://www.pardonmyenglish.com/archives/2008/06/death_too_cruel.html (quoting Colorado Senate Appropriations Committee in April voted 6 to 4 against Senate Bill 195, reportedly because it “would have cost about $616,000 for trials, appeals, public defenders, and prison costs”).
\item[\textsuperscript{222}] \textit{Id.} at 2668.
\item[\textsuperscript{223}] \textit{Id.}
\item[\textsuperscript{224}] \textit{Id.}
\item[\textsuperscript{225}] A. Lurigio, M. Jones, & B. Smith, \textit{Child Sexual Abuse: Its Causes, Consequences, and Implications for Probation Practice}, 59 Sep Fed. Probation 69 (1995). (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%).
\item[\textsuperscript{227}] \textit{Kennedy}, 128 S. Ct. at 2668 (Alito, J., dissenting).
\end{enumerate}
\end{footnotesize}
Columbia and twelve other states had enacted residency restrictions for sex offenders.\(^{228}\)

Additionally states have imposed enhanced penalties for sexual offenders, even those states that do not enforce the death penalty. This is sufficient evidence that states regardless of their position on the death penalty, take the rape of children seriously. This trend of enhancing penalties for child rapists should also have been considered by the Court in their national consensus analysis.

Justice Alito further explained that in supporting their “lack of a national consensus” conclusion, the majority based their decision solely on the number of executions in rape cases.\(^{229}\) This was in his opinion misleading, because the majority failed to mention that the last execution for the rape of a child occurred in 1964, and that litigation regarding the constitutionality of the death penalty brought executions to a halt across the board in the late 1960’s.\(^{230}\) In fact that between 1965 and 1966, there were only a total of eight executions for all offenses, and between 1968 until 1977, the year \textit{Coker} was decided. Until 1979,\(^{231}\) there were no executions for any crimes.\(^{232}\)

Take for example the Rosenberg’s\(^{233}\) who were executed for espionage back in 1953, yet to date, the Court has not held that the death penalty for espionage is unconstitutional. Using the majority’s premise, that statistics do matter,\(^{234}\) it is difficult to reconcile why the Court chooses to take into account the number of people executed in their consensus analysis yet they ignore


\(^{229}\) \textit{Id.} at 2672 (Alito, J., dissenting).

\(^{230}\) \textit{Id.} at 2672.

\(^{231}\) \textit{Spenkelink}, 313 So.2d at 666.

\(^{232}\) \textit{Id.}


\(^{234}\) \textit{Kennedy}, 128 S.Ct. at 2641.
statistics in cases involving crimes against the government.\textsuperscript{235} In fact Justice Kennedy even stated in his opinion that crimes against the government and against individuals merit separate consideration.\textsuperscript{236}

Espionage cases are not as serious a crime as the brutal rape of a child. Often times, in espionage cases there is no immediate apparent harm only potential or perceived harm. For example, in 2000, the FBI was investigating a foreign spy service operation for penetrating secret communications between high ranking members of the Clinton administration.\textsuperscript{237} A senior U.S. official familiar with the super-secret counterintelligence operation told an investigative reporter that the security breach had “severe implications”\textsuperscript{238} a second official with direct knowledge stated “We’re not even sure we know the extent of it,”\textsuperscript{239} to date nobody knows what harm came from this spy episode.\textsuperscript{240} When a child is the victim of rape on the other hand, the data suggests they suffer both immediate and long-term physical and psychological harm.\textsuperscript{241}

Moreover, the Court’s “national consensus” analysis was incomplete at best, because in 2006, Congress had made child rape in the military, punishable by death.\textsuperscript{242} The House of Representatives voted to pass this law,\textsuperscript{243} with the Senate’s consent.\textsuperscript{244}

\textsuperscript{235} Id. at 2676 (Alito J., dissenting) (“The Court takes pains to limit its holding to "crimes against individual persons" and to exclude "offenses against the State").
\textsuperscript{236} Kennedy, 128 S. Ct. at 2659 (Kennedy, J.)(We do not address, for example, crimes defining and punishing treason, Espionage, terrorism, and drug kingpin activity, which are offenses against the State).
\textsuperscript{238} Id.
\textsuperscript{239} Id.
\textsuperscript{240} Id.
\textsuperscript{241} Beth E. Molnar, supra note 147 at 753,757.
\textsuperscript{242} Section 552(b) of the National Defense Authorization Act, Pub. L. No. 109-163, 119 Stat. 3136, 3263 (2006)(specifying for an offense under subsection (a)(rape) or subsection (b) (rape of a child), death or such other punishment as a court-martial may direct).
\textsuperscript{244} Id. (The Senate approved it by voice vote. 151 Cong. Rec. S14275(Dec. 21, 2005)).
The Department of Defense (DOD) prepared a report recommending changes to the United Code of Military Justice (UCMJ) that examined the death penalty for child rape.\footnote{www.dod.mil/dodgc/php/docs/subcommittee_reportMarkHarvey1-13-05.doc.} After Congress adopted DOD’s recommendation, the president signed the executive order which amended the Manual for Courts-Martial to provide a new procedure for capital cases.\footnote{Id. (quoting Executive Order13,447, which specifically implemented the child-rape capital provision. 72 Fed. Reg. 56,179 (Sept. 28, 2007). Now, Rule for Courts-Martial 1004(c)(9) (2008) and Manual for Courts-Martial, Part IV, Paragraph 45 (2008), directly allow for the death penalty for child rape.} The new procedure upheld in a 1996 case, called for the finding of at least one aggravating factor, one of them being the rape of a child under twelve.\footnote{Loving v. United States, 517 U.S. 748 (1996) (requiring courts-martial to find at least one aggravating factor before imposing death. See also, R.C.M. 1004(c)(9)(A) (1984)(authorizing the death penalty for the rape of a child under the age of 12).} The Court did not get to consider this information when conducting their consensus analysis.\footnote{Kennedy, 128 S. Ct. at 2641.} In light of this new information, which was missed by all sides in the \textit{Kennedy} case, the State of Louisiana filed a petition for rehearing. But since the Court had granted a rehearing only twenty two times in the past two hundred years, denied it.\footnote{Criminal Justice Legal Foundation, \textit{Crime and Consequences}, available at http://www.crimeandconsequences.com/2008/10/no_rehearing_for_kennedy_1.html (last visited Nov. 10, 2008).}

Finally, another indicator of the Court’s incomplete “national consensus” analysis was its failure to recognize that recent polls suggested support for Louisiana’s law.\footnote{American Voters favor the death penalty for child rape, available at http://www.quinnipiac.edu/x1295.xml?ReleaseID=1194 (last visited Nov. 17, 2008).} One poll conducted by Quinnipiac University eight days before the Court’s decision in \textit{Kennedy}, found that Americans voters favor the death penalty 63% for convicted murderers versus 29% who oppose it.\footnote{Id.} The poll also indicated that 55% of Americans favor the death penalty for child
rapists and 38% oppose it.\textsuperscript{252} Using statistics, which the Court found relevant to finding a lack of consensus in \textit{Kennedy},\textsuperscript{253} makes this poll even more persuasive.

V. JUDICIAL ACTIVISM IN THE SUPREME COURT DECIDED KENNEDY.

David Strauss of the University of Chicago Law School has argued that judicial activism can be narrowly defined as one or more of three possible things:\textsuperscript{254}

- overturning laws as unconstitutional.
- overturning judicial precedent.
- ruling against a preferred interpretation of the constitution.

Based on this definition, and several commentators’ opinions, it seems that the most activist jurist in today’s Court is Justice Kennedy. Kennedy’s flip flopping began in 1989, when he joined Justices O’connor and Scalia in rejecting the claim that the Eighth Amendment prohibited the mentally retarded from being executed.\textsuperscript{255} In 2002, however, he joined in a decision, delivered by Justice John Paul Stevens, that the executions of mentally retarded criminals were "cruel and unusual punishments" prohibited by the Eighth Amendment.\textsuperscript{256}

In 1989, in \textit{Stanford v. Kentucky}\textsuperscript{257} Justice Kennedy agreed with Justice Scalia that the imposition of the death sentence on convicted capital offenders below the age of eighteen years old, did not violate the Eighth Amendment’s protection against cruel and unusual punishment,\textsuperscript{258} and that the Court could not apply their ‘own informed judgment’ regarding the

\textsuperscript{252} Id.
\textsuperscript{253} \textit{Kennedy}, 128 S. Ct. at 2641.
\textsuperscript{255} \textit{Atkins}, 536 U.S. at 311-321
\textsuperscript{256} Id.
\textsuperscript{257} 492 U.S. 361 (1989).
\textsuperscript{258} Id.
desirability of permitting the death penalty for 16- and 17-year-olds. Moreover, Justice Kennedy also found "the sentencing practices of other countries as not relevant.  

In Stanford Justice Kennedy also rejected the importance of foreign opinion but in Roper, sixteen years later he acknowledged the importance of foreign opinion in interpreting the Eighth Amendment. The reasoning Justice Kennedy provided for overruling himself in Stanford, was that the times had changed and that there was a national consensus for banning juvenile executions. Moreover, that states had demonstrated an "evolving standard" against a juvenile death penalty since 1989. Rejecting foreign opinion and then accepting it half a decade later was a dramatic change of position, but why did Justice Kennedy need to support his conclusion with foreign opinion, when the standard created by the Court only required a finding of a national consensus for or against a prescribed punishment?

The irony in Justice Kennedy’s use of foreign opinion in his lack of consensus argument lies with the fact that other countries are no longer giving the U.S. much weight when interpreting their case law. In fact, even the few countries that once did, are citing the Court less frequently. If the rest of the world followed U.S. precedent, then Saudi Arabia would probably not whip women victims of rape because they used poor judgment in befriending their

---

259 Stanford, 492 U.S. at 378. (Kennedy, J.,)
260 Id.
261 Id. (Kennedy, J.,) (emphatically rejecting petitioner's suggestion that the issues in this case allowed the court to apply their 'own informed judgment' regarding the desirability of permitting the death penalty for 16- and 17-year-olds).
262 Roper, 543 U.S. at 572 (Kennedy, J.,) (Noting the abolition of the juvenile death penalty by other nations).
263 Id. (Kennedy, J.,) (The Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed).
264 Id. at 551 (quoting Trop, 356 U. S. 86, 100-101).
265 Adam Liptak, U.S. Court Is Now Guiding Fewer Nations, N.Y. Times, Sep. 17, 2008 at A1 (From 1990 through 2002, for instance, the Canadian Supreme Court cited decisions of the United States Supreme Court about a dozen times a year, an analysis by The New York Times found in the six years since, the annual citation rate has fallen by half, to about six)Id. (Australian state supreme courts cited American decisions 208 times in 1995, according to a recent study by Russell Smyth, an Australian economist By 2005, that number had fallen to 72).
266 Id.
rapists. Iran wouldn’t execute a child who committed his crime at fifteen, three years after
Roper was decided, nor would they execute a twenty one year old, who eight years earlier, at
the age of thirteen had sex with another boy. It is the author’s opinion that foreign opinion
should not play a role in interpreting the United States Constitution.

In a recent article one commentator suggested that since Justice Kennedy and the other
four justices had changed the meaning of the Constitution during the Kennedy case because of
their personal opinions-or claimed perceptions of public and foreign opinion, they were no
longer judges but members of an legislature. He went on to suggest that, “since Justice
Kennedy had made himself a tiber-legislator, he should do as lesser legislators do: He should
stand for reelection.”

VI. THE KENNEDY COURT SUBSTITUTED ITS OWN EVOLVING STANDARDS
OF DEGENCY FOR LOUISIANA’S STANDARDS ENCROACHING ON THE TENTH
AMENDMENT.

The Tenth Amendment to the United States Constitution states the powers not delegated
nor prohibited by it to the States, are reserved to the States respectively, or to the People. The
Amendment establishes that if a particular course of action by the states is not prohibited under
the Constitution, or if the right to undertake an act is not assigned to the national government by
the Constitution, then either the states or the population of the United States have that power.

267 Saad Abedine and Mohammed Jamjoom, Saudi court ups punishment for gang-rape victim, available at
268 Nazila, Fathi, Iran executes 20-year-old who murdered at age 15, available at
269 Iran executes man for having gay sex at 13, available at
(last visited Nov. 4, 2008).
270 Jeffrey, Terence P, Justice Kennedy Should Stand for Reelection, available at
271 Id.
272 Id.
273 U.S. Const. Amend. X.
274 Alan Grant & Edward Ashbee, The Politics Today Companion to American Government, p.43
The Tenth Amendment is the cornerstone of state rights.\textsuperscript{275} It gives states the power to enact laws to regulate behavior and enforce order within its territory, this power is often referred to as \textit{police powers}.\textsuperscript{276} This police power of the State extends to the protection of the lives, limbs, health, comfort and quiet of all persons, and the protection of all property within the State.\textsuperscript{277} Governments are allowed to do what is necessary to provide for the public welfare and the general security.\textsuperscript{278}

The conventional wisdom about the scope of state police powers goes like this: in the early days of the Republic, state regulation was limited by the common law principle of \textit{sic utere tuo ut alienum non laedas} (you should use what is yours so as not to harm what is others'), implying that legitimate regulation existed only to prevent concrete harm to specified interests.\textsuperscript{279} Sometime around the (previous) turn of the century, the story continues, the principle changed from the old \textit{sic utere} to the new principle of \textit{salus populi est suprema lex} (the good of the public is the supreme law), suggesting that states could regulate as they chose so long as they claimed to be working to promote the public safety, welfare, or morality.\textsuperscript{280} Enacting death penalty statutes to protect the public while at the same time fulfilling the two distinct social purposes served by the death penalty, retribution and deterrence\textsuperscript{281} is consistent with this modern view. What is inconsistent is the Court’s failure to recognize that states are in the best position of all to decide how they want to protect the public. This includes deciding whether to execute child rapists.

\begin{itemize}
\item \textsuperscript{275} \textit{Id.}
\item \textsuperscript{276} Christopher G. Tiedeman, \textit{A Treatise on the Limitations of the Police Power in the United States}, at 4-5, (1886) (citing Thorpe v. Rutland R.R., 27 Vt. 140, 149-50 (1854)).
\item \textsuperscript{277} \textit{Id.}
\item \textsuperscript{278} \textit{Id.}
\item \textsuperscript{280} \textit{Id.}
\item \textsuperscript{281} \textit{Gregg}, 428 U.S. at 183.
\end{itemize}
Looking back on Coker, it did much more than nullify a constitutionally protected tradition; it imposed a circumstance where the State of Georgia cannot inflict just punishment upon those who ravaged a child.\(^{282}\) One commentator suggested that this is a particularly loathsome ramification of our activist judiciary.\(^{283}\)

Chief Justice Burger recognized the Court in Coker was substituting their views on the death penalty and who should receive it, for that of the states and in doing so the Court was interfering with states rights.\(^{284}\) In his dissent he pronounced:

```
"T]he Cruel and Unusual Punishments Clause does not give the Members of this Court license to engraft their conceptions of proper public policy onto the considered legislative judgments of the States."\(^{285}\) He went on to say, [T]oday's holding forecloses the very exploration we have said federalism was intended to foster.\(^{286}\)
```

Chief Justice Burger believed that the death sentence imposed in Coker was well within the power reserved to the State.\(^{287}\) Coker and its progeny, which includes the Kennedy decision, seem to have made the Tenth Amendment a hollow doctrine. Since Coker, the Court has consistently chipped away at states rights, often using policy arguments to justify their positions.

In Kennedy, the Court explained that death penalty decisions were unique in its moral depravity and in the severity of the injury that it inflicts on the victim and the public.\(^{288}\)


\(^{283}\) Id.

\(^{284}\) Coker, 584 U.S. at 616 (It will not do to denigrate these legislative judgments as some form of vestigial savagery or as purely retributive in motivation; for they are solemn judgments, reasonably based, that imposition of the death penalty will save the lives of innocent persons. This concern for life and human values and the sincere efforts of the States to pursue them are matters of the greatest moment with which the judiciary should be most reluctant to interfere).

\(^{285}\) Id. at 604.

\(^{286}\) Id. at 618.

\(^{287}\) Id. at 611 ((W]here, as here, the language of the applicable [constitutional] provision provides great leeway, and where the underlying social policies are felt to be of vital importance, the temptation to read personal preference into the Constitution is understandably great. It is too easy to propound our subjective standards of wise policy under the rubric of more or less universally held standards of decency).

\(^{288}\) Coker, 433 U.S. at 598.
The Court seemed to believe that murderers are more morally depraved than child rapists but is every person convicted of capital murder and sentenced to death more morally depraved than the most serious of child rapists? Compare John Spenkelink, the first person executed after the moratorium on the death penalty was lifted to Kennedy. Is it clear that Spenkelink was more morally depraved than the Kennedy? The death penalty is supposed to be reserved for the worst of the worst. There were several mitigating factors to be considered in Spenkelink’s case. There were no mitigating circumstances in Kennedy.

Also consider the following two cases proposed by Justice Alito. 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. 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? In which instance would society find a higher degree of moral depravity in the robbery gone badly or in the brutal rape of an eight year old by her stepfather? At least four Justices and a good

---

289 *Kennedy*, 128 S. Ct. at 2662 (it is appropriate to distinguish between a particularly depraved murder that merits death as a form of retribution and the crime of child rape).
290 *Spenkelink*, 313 So.2d 666 (first person to executed after *Gregg*, 428 U.S. at 153, gave new life to the death penalty).
291 See, Robert Sherill, *Death Trip: The American Way of Execution - Part II*, The Nation, Jan. 8, 2001 (The death penalty is supposed to be reserved for the “worst of the worst” crimes…This was just an ordinary skid-row killing, one trashy nobody killing another trashy nobody in an ordinary fight).
292 *Id.* (Spenkelink’s victim was an adult male, who was a convicted felon, who forced Spenkelink to have sex with him and stole his money).
293 *Kennedy*, 957 So.2d at 789 (child rapists as a class of offenders that…share no common characteristic tending to mitigate the moral culpability of their crimes).
294 *Id.* at 2676 (Alito, J. dissenting)
295 *Id.*
296 *Id.*
297 *Id.*
298 *Enmund v. Florida*, 458 U. S. 782 (1982). (holding that one who participates in the robbery has less culpability than the one who actually does the killing for death penalty purposes).
299 *Kennedy*, 128 S. Ct. at 2662.
300 *Id.* at 2641 ( Roberts, J., Alito, J., Thomas, J., Scalia, J., dissenting).
percentage of the population would agree with the latter scenario.\textsuperscript{301} Those are just two instances out of many possible scenarios, where it may found that someone who kills is less morally depraved than some one who does not kill.

Another Policy argument raised by the Court to justify their conclusion was that death penalty cases were not in the best interests of the child victims because they suggest that it is more painful for child-rape victims to testify when the prosecution is seeking the death penalty.\textsuperscript{302} Is it really more painful to testify against a family member simply because the death penalty is on the table as opposed to a possible life sentence without parole? The Louisiana Supreme Court found these Policy arguments to be irrelevant for \textit{Eighth Amendment} purposes.\textsuperscript{303}

For each policy argument advanced by anti-capital punishment commentators, equally valid responses have been offered by pro-capital punishment commentators.\textsuperscript{304}

Perhaps the most overreaching policy argument of all was that “a State that punishes child rape by death may remove a strong incentive for the rapist not to kill the victim”\textsuperscript{305} In some states however, sexual predators have killed their victims even though the maximum penalty they could have received for raping a child was life in prison,\textsuperscript{306} such as John Couey of Florida who could not have been sentenced to death for raping Jessica Lunsford because of the holding in

\textsuperscript{301} \textit{Id.} at 2676 (Alito J., dissenting) (quoting \textit{Enmund}, at 782) (“I have no doubt that, under the prevailing standards of our society, robbery, the crime that the petitioner in \textit{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”).

\textsuperscript{302} \textit{Id.} at 2672 (Kennedy, J.,).

\textsuperscript{303} \textit{Kennedy}, 957 So.2d at 788


\textsuperscript{305} \textit{Id.}

Buford. 307 Richard Allen Davis of California, 308 the man who killed Polly Klass, likewise could not have been sentenced to death because in California there is no death penalty for the rape of a child. 309 There are some states that offer life without parole for both. 310 What would be the incentive not to kill the child in those instances and perhaps avoid a life sentence by eliminating the only potential witness?

“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.” 311 “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…” 312

VII. CONCLUSION

Alexis de Tocqueville once observed:

"The legislators of the United States, who have made almost all the clauses of the penal code milder, punish rape with death, and there are no crimes that public opinion pursues with more inexorable ardor. That is understandable: since the Americans think nothing more precious than the honor of woman, and nothing more deserving of respect than her independence, they consider that there is no punishment too severe for those who take them away from her against her will.” 313

307 Buford, 403 So. 2d at 943; See also, Fla. Stat. § 775. 082(2) (In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, the court having jurisdiction over a person previously sentenced to death for a capital felony shall cause such person to be brought before the court, and the court shall sentence such person to life imprisonment…).
309 DPIC, supra note 3.
310 Marc Mauer, Ryan King, and Malcolm C. Young, the Meaning of “Life” Long Prison Sentences in Context, p.3 (in Illinois, Iowa, Louisiana, Maine, Pennsylvania, and South Dakota -- all life sentences are imposed without the possibility of parole).
311 Kennedy, 128 S. Ct. at 2673 (Alito, J., dissenting).
312 Id.
America still considers rape an outrageous crime but in the case of child victims, America’s moral outrage is even more convincing. By misinterpreting *Coker* and applying their own evolving standards of decency for that of the people of Louisiana, the Court infringed on Louisiana’s right to exercise their legislative judgment to protect its most defenseless citizens. This result ensured that at the very least, America’s children are now in as vulnerable a position as Kennedy’s child victim was in the hands of her stepfather.