NOTE

SUPREME COURT FINDS AN INEXACT CONSENSUS TO SPARE CHILD RAPISTS: A CRITICAL EXAMINATION OF *KENNEDY V. LOUISIANA*[*]

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I. INTRODUCTION

> "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."[1]

Despite the State of Louisiana's belief that a defendant who viciously raped his six-year-old stepdaughter deserved the death penalty, five Justices of the U.S. Supreme Court declared the punishment disproportionate to the crime under the Eighth Amendment.[2] In doing so, the Court drew a bright-line distinction between murder and rape, reasoning that the Eighth Amendment prohibited the death penalty when the crime did not result, or was not intended to result, in the victim's death.[3] However, the Court provided no meaningful explanation for its distinction between applying capital punishment to crimes against the state, regardless of the homicidal outcome of the crime, and crimes against individuals for whom a homicidal outcome must occur for the state to impose capital punishment.[4]

In drawing its arbitrary line between state and individual crimes, the Court failed to explain why a person who viciously raped a six-year-old girl, an act which has a profound impact on both the child and society, was not as deserving of the death penalty as one who commits acts of terror. Without such an explanation, the Court's central reasoning in *Kennedy* lends itself to being viewed as mere sophistry, intended to cloak the Justices' subjective views.

At issue in *Kennedy* was Louisiana's capital child-rape statute,[5] a reflection of the recent trend among states permitting

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1. Kennedy v. Louisiana, 128 S. Ct. 2641, 2646 (2008).

2. *Id.* at 2650–51.

3. *Id.* at 2659–60.

4. *Id.* at 2659 ("Our concern here is limited to crimes against individual persons. We do not address, for example, crimes defining and punishing treason, espionage, terrorism, and drug kingpin activity, which are offenses against the State.").

5. LA. REV. STAT. ANN. § 14:42(D)(2) (2007 & Supp. 2010), *invalidated by Kennedy*, 128 S. Ct. 2641.

the use of capital punishment for the crime of raping a minor child.[6] Unfortunately, "[r]ape is one of the fastest growing violent crimes reported in the United States,"[7] where one of every seven sexual assault victims is under the age of six, and 34% of all sexual assault victims are under the age of twelve.[8] An estimated 90,000 substantiated cases of child sexual abuse were reported in 2003 alone.[9] With the increase in the number of reports comes the realization that rape is unique among acts of violence, "shatter[ing] not only a victim's physical well-being but also her emotional world."[10]

Rape causes numerous psychological harms, including depression, fear, and anxiety, along with feelings of betrayal and powerlessness.[11] The effects of rape are more pronounced when the victim is a child, particularly, as in *Kennedy*, when family members are the perpetrators of the crime.[12] Child victims carry feelings of alienation, depression, and stigmatization into adulthood.[13] Moreover, the effects of childhood rape impact society in general, as evidenced by the fact that child rape victims are more likely to be arrested as adults for numerous crimes that affect the communities in

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6. *See, e.g.*, GA. CODE ANN. § 16-6-1 (2007); MONT. CODE ANN. § 45-5-503 (2009); OKLA. STAT. ANN. tit. 21, § 843.5(K) (West Supp. 2010); S.C. CODE ANN. § 16-3-655(C)(1) (Supp. 2009); TEX. PENAL CODE ANN. § 12.42(c)(3) (Vernon Supp. 2009). In 1925, eighteen states authorized the death penalty for the crime of rape of a minor child or adult. *Kennedy*, 128 S. Ct. at 2651 (citing Coker v. Georgia, 433 U.S. 584, 593 (1977)). Between 1930 and 1964, 455 people were executed under such statutes. *Id.* at 2651 (citing 5 HISTORICAL STATISTICS OF THE UNITED STATES 5-262 to -263 tbl.Ec343–357 (Susan B. Carter et al. eds., 2006)). Following *Furman*'s moratorium on the death penalty in 1972, six states reenacted their capital child-rape laws. *Id.* By 1989, all six had been invalidated under state or federal law, and it was not until 1995 that Louisiana reintroduced capital punishment for child rape. *Id.*

7. Yale Glazer, *Child Rapists Beware! The Death Penalty and Louisiana's Amended Aggravated Rape Statute*, 25 AM. J. CRIM. L. 79, 85 (1997).

8. HOWARD N. SNYDER, NAT'L CTR. FOR JUVENILE JUSTICE, SEXUAL ASSAULT OF YOUNG CHILDREN AS REPORTED TO LAW ENFORCEMENT: VICTIM, INCIDENT, AND OFFENDER CHARACTERISTICS 2 (2000), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/saycrle.pdf.

9. ADMIN. ON CHILDREN, YOUTH AND FAMILIES, U.S. DEP'T OF HEALTH AND HUMAN SERVS., CHILD MALTREATMENT 21–22 (2003), *available at* http://www.acf.hhs.gov/programs/cb/pubs/cm03/cm2003.pdf (reporting that there were 906,000 victims of child abuse in 2003, and 9.9% of those victims experienced sexual abuse).

10. Stefanie S. Wepner, Note, *The Death Penalty: A Solution to the Problem of Intentional AIDS Transmission Through Rape*, 26 J. MARSHALL L. REV. 941, 941 (1993).

11. Arthur J. Lurigio, Marylouise Jones & Barbara E. Smith, *Child Sexual Abuse: Its Causes, Consequences, and Implications for Probation Practice*, FED. PROBATION, Sept. 1995, at 69, 71. "From 1976 to 1986, the number of reported cases of child sexual abuse grew from 6,000 to 132,000, an increase of 2100 percent. By 1991, the number of cases totaled 432,000, an increase of another 227 percent." *Id.* at 69 (citation omitted).

12. *Id.* at 70.

13. *Id.* at 71.

which they live.[14] Specifically, child victims are more likely to be perpetrators of sexual assaults when they reach adulthood.[15]

Accordingly, legislatures have brought the issue of child sexual abuse to the forefront of the national agenda.[16] Congress and the states have reacted decisively by enacting tougher sexual abuse statutes aimed at reducing the number of incidents.[17] For instance, states have passed legislation permitting chemical or surgical castration and the involuntary confinement of sexually violent predators.[18] The national government has responded by enacting mandatory reporting statutes to inform local communities of the presence of violent sex offenders.[19] Finally, states have passed more stringent sex offender laws, most notably Jessica's Laws, in reference to the Jessica Lunsford Act first passed in Florida.[20] The Jessica Lunsford Act mandates a minimum sentence of twenty-five years and a maximum of life in prison for first-time child sex offenders.[21]

In the context of stiffer sanctions enacted for sex abusers, Louisiana's capital child-rape statute is the latest evolution in our

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14. *Id.* at 70; *see also* Robert E. Freeman-Longo, *Reducing Sexual Abuse in America: Legislating Tougher Laws or Public Education and Prevention*, 23 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 303, 304 (1997) (characterizing sexual abuse as a social, religious, and political issue). "Research conducted in 1987 suggests that every time one child is sexually abused it costs taxpayers between $138,000 and $152,000." *Id.* at 317.

15. Lurigio, Jones & Smith, *supra* note 11, at 70.

16. Bridgette M. Palmer, Comment, *Death as a Proportionate Penalty for the Rape of a Child: Considering One State's Current Law*, 15 GA. ST. U. L. REV. 843, 844 (1999).

17. *See, e.g.*, TEX. HEALTH & SAFETY CODE ANN. § 841.081 (Vernon Supp. 2009) (requiring involuntary "outpatient treatment and supervision" for certain persons determined to be sexually violent predators); *see also* Freeman-Longo, *supra* note 14, at 311 (noting the increased number of sexual abuse laws passed since the mid-1980s). In addition to tougher sanctions, there has also been a drive toward increased awareness and prevention through sex education. *See id.* at 318 (describing "secondary prevention" techniques such as rape prevention and rape awareness education programs).

18. Freeman-Longo, *supra* note 14, at 314–15; *see also* Kennedy v. Louisiana, 128 S. Ct. 2641, 2670 (Alito, J., dissenting) (citing twenty-one states that permit involuntary confinement of sexual predators).

19. *See, e.g.*, 42 U.S.C. § 14071 (2006) (requiring states receiving federal funds to create a registry of sex offenders). All fifty states have enacted laws requiring sex offender registration or notification to the community upon their release. Roe v. Farwell, 999 F. Supp. 174, 177 n.1 (D. Mass. 1998).

20. *See* 2005 Fla. Sess. Law Serv. ch. 2005-28 (West) (entitling certain amendments to Florida law, including Section 800.04 of the Florida Statutes, the "Jessica Lunsford Act"). Jessica Lunsford was a young Florida girl who was raped and murdered in Feb. 2005 by John Couey, a previously convicted sex offender. *See* Antoinette McGowan, *Jessica Lunsford Trial Opens in Florida*, ASSOCIATED CONTENT, Mar. 2, 2007, http://www.associatedcontent.com/article/165657/jessica_lunsford_trial_opens_in_florida. Thirty-three states have adopted similar legislation based on Florida's model. Summary, *2007 California Criminal Legislation: Meaningful Change, or Preserving the Status Quo?*, 13 BERKELEY J. CRIM. L. 97, 107 n.54 (2008).

21. FLA. STAT. ANN. § 800.04(5)(b) (West Supp. 2009).

society's belief that child rapists are deserving of the death penalty. The *Kennedy* Court, nonetheless, vitiated Louisiana's judgment and held the death penalty disproportionate to the crime of child rape, and thus cruel and unusual under the Eighth Amendment.[22] The Court found a "national consensus" against such punishment based primarily on the relatively small number of states that have enacted capital child-rape laws.[23] Ultimately, it was the Court's "independent judgment" that the death penalty should be reserved for crimes resulting in the victim's death that invalidated capital child-rape laws in Louisiana and five other States.[24]

This Note criticizes the *Kennedy* decision. It will argue that the Court's focus on mathematical totals to arrive at a "national consensus" determination ignores the recent trend of states permitting the use of the death penalty for child rapists. Furthermore, the Court improperly used its independent judgment to draw an unwarranted bright-line distinction between murder and rape. The Note will advocate an extension of the Court's reasoning in *Tison v. Arizona,*[25] to permit the use of capital punishment when a criminal rapes a minor child and displays a reckless indifference to the life of his victim.[26]

Part II of this Note will examine the decision in *Kennedy* along with other significant capital punishment jurisprudence. Part III will examine the "national consensus" and "independent judgment" approach employed in *Kennedy* to strike down Louisiana's capital child-rape statute. Part IV will conclude with an assessment of the effects that *Kennedy* will have on future capital, non-homicidal statutes.

II. CASE RECITATION

Kennedy is the Supreme Court's latest attempt to refine its Eighth Amendment jurisprudence.[27] Since *Furman*, the Court has struggled to define the boundaries of a modern capital sentencing scheme, one that takes into account not only the nature of the

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22. *Kennedy*, 128 S. Ct at 2650–51.

23. *Id.* at 2656.

24. *Id.* at 2657, 2664.

25. Tison v. Arizona, 481 U.S. 137, 157–58 (1987) (holding that substantial participation in a violent felony under circumstances likely to result in the loss of innocent human life may justify the death penalty even absent an "intent to kill").

26. *Cf.* Wepner, *supra* note 10, at 969 (arguing that a rapist who knows he is infected with HIV but nonetheless rapes someone is itself so outrageous and vile an act that it satisfies the Court's Eighth Amendment analysis).

27. The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

crime, but the moral culpability of the defendant as well.[28] The Court has added to the difficulty by turning the constitutionality of criminal sanctions into a political standoff, with *Kennedy* repeating the trend of a 5–4 split along ideological lines.[29]

A. Setting the Stage

By enacting the Eighth Amendment, the Framers were primarily concerned with banning torture and other barbarous punishments such as decapitation and quartering.[30] "[B]ecause those practices had become obsolete, the Eighth Amendment went virtually ignored by American courts until the [nineteenth] century."[31] It was not until the early twentieth century, in *Weems v. United States*, that the Court broadened the scope of the Eighth Amendment to include the prohibition of disproportionately excessive sentences.[32]

1. Modern Jurisprudence. The *Weems* opinion ushered in the Court's noninterpretivist stance toward the Eighth Amendment. Under this view "judges may look to evolving social norms and 'fundamental values' of society as the basis for constitutional judgments."[33] The holding in *Weems* also provided the central reasoning for the seminal case of *Trop v. Dulles*.[34] Focusing on the constitutional issue of cruel and unusual

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28. *See* Mary Sigler, *Contradiction, Coherence, and Guided Discretion in the Supreme Court's Capital Sentencing Jurisprudence*, 40 AM. CRIM. L. REV. 1151, 1161–63 (2003) (discussing the Court's post-*Furman* capital sentencing decisions). Even among the Justices, a consistent stance is not always obtainable. Indeed, Justice Blackmun had a notable change of heart after twenty years of upholding the constitutionality of the death penalty, stating that he felt "morally and intellectually obligated simply to concede that the death penalty experiment has failed." Callins v. Collins, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting). In the same case, Justice Scalia argued that the contradictions in the Court's Eighth Amendment jurisprudence are a result of judicial activism. *See id.* at 1142–43 (Scalia, J., concurring); Sigler, *supra*, at 1151.

29. *Kennedy*, 128 S. Ct. at 2645; *see also* Edward Lazarus, *The Supreme Court Strikes Down the Death Penalty for Juvenile Offenders: A Morally Good Result, A Morally Good Result, Supported by Less-Than-Convincing Legal Reasoning*, FINDLAW, Mar. 3, 2005, http://writ.news.findlaw.com/lazarus/20050303.html ("[T]he legal debate over the death penalty is exposing the unbridgeable divisions inside the Court.").

30. Emily Marie Moeller, Comment, *Devolving Standards of Decency: Using the Death Penalty to Punish Child Rapists*, 102 DICK. L. REV. 621, 624–25 (1998).

31. *Id.* at 625.

32. Weems v. United States, 217 U.S. 349, 366, 382 (1910) (declaring the punishment of twelve years in irons unconstitutionally disproportionate to the crime of falsifying public records).

33. MICHAEL A. FOLEY, ARBITRARY AND CAPRICIOUS: THE SUPREME COURT, THE CONSTITUTION, AND THE DEATH PENALTY 24 (2003) (quoting JETHRO K. LIEBERMAN, A PRACTICAL COMPANION TO THE CONSTITUTION 253 (1999)).

34. Trop v. Dulles, 356 U.S. 86 (1958).

punishment, Chief Justice Warren wrote: "The Court recognized in [*Weems*] that the words of the [Eighth] Amendment are not precise, and that their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[35] The "evolving standards of decency concept" has become the benchmark that the Court uses to evaluate all punishments under the Eighth Amendment.[36]

Thus, to avoid being cruel and unusual, the application of the death penalty must serve a recognized goal of punishment, namely deterrence or retribution.[37] More importantly, the punishment may not be grossly disproportionate to the crime, which is measured by determining whether it is contrary to contemporary standards of decency.[38] The contemporary standard determination requires the Court to make an assessment of society's morals through objective indicia of legislative enactments, willingness of other states to enact similar legislation, and the willingness of juries to impose the death penalty under such statutes.[39]

2. Recent Restrictions. Despite the Court's reaffirmation that the death penalty is not *per se* unconstitutional,[40] the Court's post-*Furman* Eighth Amendment jurisprudence has limited the substantive application of the death penalty. One of the earliest cases to challenge the Court's post-*Furman* jurisprudence was *Coker v. Georgia*.[41] In *Coker,* the Court held that death was a disproportionate penalty for the crime of raping an adult woman, and thus violated the Eighth Amendment.[42] In determining society's standard of decency with respect to capital rape laws, the Court noted that out of thirty-five states that reimplemented the death penalty after *Furman*, only three states authorized the death penalty for the rape of an adult woman.[43] Further, the

35. *Id.* at 100–01 (internal citations omitted).

36. *See* FOLEY, *supra* note 33, at 41–42 (stating that the "evolving standards of decency" concept "may be the benchmark against which all punishments are compared and evaluated").

37. *See id.* at 92 (citing Gregg v. Georgia, 428 U.S. 153, 183 (1976)).

38. *Id.* at 104 (citing Coker v. Georgia, 433 U.S. 584, 593–97 (1977)).

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

40. In *Gregg*, the Court considered "whether the sentence of death for the crime of murder is a *per se* violation of the Eighth and Fourteenth Amendments" and stated that "[f]or nearly two centuries" it has "repeatedly and often expressly . . . recognized that capital punishment is not invalid *per se*." *Gregg*, 428 U.S. 153, 176–78.

41. *Coker*, 433 U.S. at 591.

42. *Id.* at 597.

43. *Id.* at 593–94. Of these three, mandatory death penalty laws were invalidated in

Court drew a bright-line distinction between murder and rape, stating that "in terms of moral depravity and of the injury to the person and to the public, [rape] does not compare with murder."[44] The dissent vigorously contested the Court's arbitrary differentiation between murder and rape, and warned of the implications of foreclosing the opportunity to impose the death sentence even for the vilest of rapes.[45]

Continuing the Court's post-*Furman* approach are two recent cases highlighting the Court's Eighth Amendment cruel and unusual punishment analysis. The first, *Atkins v. Virginia*, held that executing the mentally retarded violated the Eighth Amendment's ban on cruel and unusual punishment.[46] The Court found a national consensus against such a punishment, despite the fact that just thirteen years earlier the Court ruled that the Eighth Amendment did not preclude the execution of mentally retarded defendants.[47] In reviewing the judgment of the legislatures, the Court focused on the fact that eighteen jurisdictions, less than half of the thirty-eight states that permit capital punishment, prohibited the death penalty for mentally retarded defendants.[48] To compensate for the relatively small percentage of states prohibiting such punishment, as compared to earlier cases,[49] the Court stated that "[i]t is not so much the number of these States that is significant, but the consistency of the direction of change."[50]

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two of the states. Roberts v. Louisiana, 428 U.S. 325, 336 (1976); Woodson v. North Carolina, 428 U.S. 280, 286–87, 301 (1976). Therefore, at the time of *Coker*, only Georgia authorized the death penalty for the rape of an adult woman. *Coker*, 433 U.S. at 595–96.

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

45. *Id*. at 605–06, 619 (Burger, C.J., dissenting) (noting that *Coker* involved a defendant serving multiple life sentences for murder and rape, who escaped from jail, broke into the victim's home, and raped her at knifepoint).

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

47. Penry v. Lynaugh, 492 U.S. 302, 340 (1989), *overruled by Atkins*, 536 U.S. 304.

48. *Atkins*, 536 U.S. at 314–16 (noting that eighteen states had passed capital punishment legislation since *Penry*); *see also id.* at 342 (Scalia, J., dissenting) ("The Court . . . extracts a 'national consensus' forbidding execution of the mentally retarded from the fact that 18 States—less than *half* (47%) of the 38 States that permit capital punishment (for whom the issue exists)—have very recently enacted legislation barring execution of the mentally retarded." (citation omitted)).

49. *See* Enmund v. Florida, 458 U.S. 782, 789 (1982) (striking down a capital felony-murder statute where 78% of death penalty jurisdictions prohibited such punishment); *Coker*, 433 U.S. at 595–96 (striking down the use of the death penalty for raping an adult woman where only one state permitted such punishment); *see also* Stanford v. Kentucky, 492 U.S. 361, 370 (1989) (upholding capital punishment against sixteen year old defendants where only 41% of jurisdictions were opposed to such punishment), *abrogated by* Roper v. Simmons, 543 U.S. 551 (2005); Tison v. Arizona, 481 U.S. 137, 138, 154 (1987) (upholding capital punishment statute for participation in a major felony coupled with reckless indifference to loss of life where only 30% of jurisdictions prohibited such punishment).

50. *Atkins*, 536 U.S. at 315.

In *Roper v. Simmons*, the Court again emphasized the number of state legislative enactments in holding that executing juvenile offenders violated the Eighth Amendment's ban on cruel and unusual punishment.[51] In familiar fashion, the Court canvassed the states and found significant the fact that thirty states prohibited the death penalty for juvenile defendants.[52] The Court further noted that juries sentenced juvenile offenders to death in only rare cases, and the execution of juveniles was infrequent.[53]

In both of these significant post-*Furman* cases, the Court strained to apply an almost mathematical formula to society's morals, one that places the balance of the Eighth Amendment on whichever side has the numerical advantage. But *Kennedy's* perpetuation of such numerical games is both misleading and unnecessary.[54]

B. Factual Background

On the morning of March 2, 1998, petitioner Patrick Kennedy called 911 to report that two neighborhood boys raped his stepdaughter, who is referred to as L.H. throughout the case.[55] Police arrived ten minutes later and found L.H. on her bed, bleeding profusely from the vaginal area.[56] She was transported to the hospital for emergency surgery.[57]

In the weeks that followed, L.H. and petitioner maintained that two neighborhood boys dragged L.H. from the garage to the backyard, put a hand over her mouth, pulled down her shorts, and raped her.[58] However, the State's investigation began to draw the accuracy of the petitioner's story into question.[59] Eight days after the crime, petitioner was arrested for the rape of L.H.[60]

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51. *Roper*, 543 U.S. at 564.

52. *Id.*

53. *Id.* at 561, 567.

54. *See Atkins*, 536 U.S. at 353 (Scalia, J., dissenting) (describing the Court's invalidation in that case as "turning the process of capital trial into a game"); *see also infra* Part III (describing the Court's disingenuous efforts to find a national consensus among the myriad of numbers for and against executing child rapists).

55. Kennedy v. Louisiana, 128 S. Ct. 2641, 2646 (2008).

56. *Id.*

57. *Id.* According to an expert, L.H. suffered the most severe sexual assault he had seen in four years of practice. *Id.* L.H. suffered lacerations to the vaginal wall, separating her cervix from the back of the vagina, causing her rectum to protrude into the vaginal structure. *Id.* "Her entire perineum was torn from the posterior fourchette to the anus." *Id.*

58. *Id.* at 2647.

59. *Id.*

60. *Id*.

The evidence revealed that the condition of the backyard was inconsistent with a rape having recently occurred there.[61] Most damaging was the fact that L.H.'s blood was found on the underside of her bedroom mattress, convincing police that the rape had occurred in the bedroom, not the backyard.[62] Further, police discovered that petitioner made several phone calls on the morning of the rape prior to calling 911, waiting an hour and a half before informing the police.[63]

On June 22, 1998, L.H. revealed to her mother for the first time that petitioner had raped her.[64] The State charged petitioner with aggravated rape of a child under Louisiana's capital child-rape statute and sought the death penalty.[65]

C. Procedural History

At trial, L.H. testified that when she awoke that morning the petitioner was on top of her.[66] L.H. acknowledged that she had earlier accused two neighborhood boys of the rape, but now revealed that petitioner had told her to say this and that the earlier accusations were untrue.[67] The jury found petitioner guilty of aggravated rape and unanimously sentenced him to death.[68] The Supreme Court of Louisiana affirmed.[69]

The court rejected petitioner's reliance on *Coker v. Georgia* in arguing that the death penalty was reserved for crimes that resulted in the victim's death.[70] The court reasoned that *Coker* prohibited the use of the death penalty for the rape of an adult woman, but left open the question of whether other non-homicidal crimes could be punished by death.[71] Additionally, the court relied on *Atkins v. Virginia* for the proposition that it is not the "numerical counting" of states that is significant but rather

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61. *Id.*

62. *Id.*

63. *Id.* The first call was to his employer to report that he was unable to come into work that day. *Id.* The second was to a colleague to ask how to get blood out of the carpet, because, according to petitioner, his daughter had "just become a young lady." *Id.* Finally, petitioner called B & B Carpet Cleaning to request assistance in removing blood from his carpet. *Id.*

64. *Id.*

65. *Id.* at 2647–48.

66. *Id.* at 2648.

67. *Id.* L.H. further testified that after the rape occurred, petitioner gave her a cup of orange juice with chopped up pills in it. *Id.*

68. *Id*. During the sentencing phase, another woman, S.L., came forward and testified that petitioner had sexually abused her when she was eight years old. *Id.*

69. State v. Kennedy, 957 So. 2d 757, 793 (La. 2007), *overruled by* 128 S. Ct. 2641.

70. *Id.* at 781.

71. *Id.*

the "*direction* of change."[72] The court noted that of the thirty-eight states that permitted capital punishment, five had made rape of a minor child a capital offense, and nine authorized the death penalty for other non-homicidal crimes.[73] Thus, based on the severity of the crime and the fact that petitioner possessed no personal characteristics that tended to mitigate his moral culpability,[74] the court concluded that imposing the death penalty for the crime of raping a minor child was not disproportionate under the Eighth Amendment.[75]

D. The Supreme Court's Reasoning

Justice Kennedy, who had previously authored the *Roper* decision, wrote the majority opinion.[76] After the Court issued its opinion, new information concerning the federal government's authorization of the death penalty for child rape by members of the armed forces surfaced.[77] Nonetheless, in a modified opinion the Court stated that such evidence did not affect its conclusion, and denied the State's request for a new hearing.[78]

1. Justice Kennedy's Majority Opinion. Justice Kennedy began his opinion with an analysis of the history of the Eighth Amendment.[79] Most notable was Justice Kennedy's reiteration that the Amendment must "draw[ ] its meaning from the evolving standards of decency that mark the progress of a

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72. *Id.* at 783 (citing Atkins v. Virginia, 536 U.S. 304, 315 (2002)).

73. *Id.* at 785–86.

74. In *Roper* and *Atkins*, the Supreme Court struck down the use of the death penalty for minors and the mentally retarded, finding those defendants less culpable and thus not fit for the death penalty. Roper v. Simmons, 543 U.S. 551, 572–73 (2005); *Atkins*, 536 U.S. at 317–18.

75. *Kennedy*, 957 So. 2d at 788–89, *overruled by* 128 S. Ct. 2641 (2008).

76. *Kennedy*, 128 S. Ct. at 2641. Justice Kennedy has been dubbed the "man in control" of the Court's Eighth Amendment jurisprudence. He often cast the deciding vote between the Court's two opposing blocks, with Chief Justice Roberts and Justices Scalia, Thomas, and Alito on one side, and Justices Stevens, Souter, Ginsberg, and Breyer on the other. Christopher Dunn, *Justice Kennedy: The Man in Control of the Death Penalty*, N.Y. CIV. LIBERTIES UNION, Aug. 8, 2007, http://www.nyclu.org/node/1311. Out of the seven death penalty cases in the Court's 2006 term, each case split 5–4 along the lines of the two camps, with Justice Kennedy casting the deciding vote. *Id.*

77. National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 552, 119 Stat. 3136, 3263. The Department of Defense prepared a report recommending certain changes to the Uniform Code of Military Justice in which it specifically highlighted Louisiana's capital child-rape statute, and this report led to the signing of Executive Order 13,447, enacting the military's capital child-rape provision on Sept. 28, 2007. Petition for Rehearing at 2–3, Kennedy v. Louisiana, 128 S. Ct. 2641 (2008) (No. 07-343), *reh'g denied*, 129 S. Ct. 1 (2008).

78. Kennedy v. Louisiana, 129 S. Ct. 1, 1–2 (2008).

79. *Kennedy*, 128 S. Ct. at 2649–51.

maturing society."[80] Justice Kennedy explained that while the death penalty is not invariably unconstitutional, it must be reserved for the most serious offenders whose moral culpability renders them deserving of the death penalty.[81]

The Court's determination, according to Justice Kennedy, must be guided by "objective indicia of society's standards, as expressed in legislative enactments and state practice with respect to executions."[82] However, "[c]onsensus is not dispositive"; the Eighth Amendment's proportionality inquiry must also consider the Court's precedent and the Court's own understanding and interpretation of the Eighth Amendment.[83]

The Court began its national consensus inquiry by noting that following *Furman*'s invalidation of state capital punishment statutes, six states reenacted their capital rape statutes.[84] In 1995, Louisiana reenacted its capital child-rape statute.[85] Five states have since followed Louisiana's lead by enacting similar capital child-rape laws.[86] In contrast, forty-four states have not made the rape of a minor child a capital offense.[87] Nor did the federal government include child rape when it extended the number of crimes eligible for capital punishment under the Federal Death Penalty Act.[88] With these numbers in hand, the Court began a comparison of the statistics involved in *Atkins* and *Roper*.[89]

At the time *Atkins* was decided, thirty states prohibited the death penalty for mentally retarded defendants.[90] Similarly,

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80. *Id.* at 2649 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)).

81. *Id.* at 2650 (quoting Roper v. Simmons, 543 U.S. 551, 568 (2005)).

82. *Id.* (quoting *Roper*, 543 U.S. at 563).

83. *Id.*

84. *Id.* at 2651. All six were later invalidated under state or federal law. *Id.* Several were invalidated because they imposed a mandatory death sentence, including Louisiana's, while others were struck down on state-law grounds. *See, e.g.*, Roberts v. Louisiana, 428 U.S. 325, 336 (1976) (striking down Louisiana's mandatory death penalty statute); Leatherwood v. State, 548 So. 2d 389, 402–03 (Miss. 1989) (striking down Mississippi's capital child-rape statute on state-law grounds).

85. LA. REV. STAT. ANN. § 14:42(D)(2) (2007 & Supp. 2010), *invalidated by Kennedy*, 128 S. Ct. 2641. Under the statute, any anal, vaginal, or oral intercourse with a child under the age of thirteen constitutes aggravated circumstances rendering the defendant eligible for the death penalty. *Id.*

86. *Kennedy*, 128 S. Ct. at 2651. Those states are Georgia, Montana, Oklahoma, South Carolina, and Texas. *Id.* The Florida Supreme Court has held that the death penalty was disproportionate to the crime of raping a minor child under Florida's state constitution. Buford v. State, 403 So. 2d 943, 951 (Fla. 1981).

87. *Kennedy*, 128 S. Ct. at 2652.

88. *Id.*

89. *Id.* at 2652–53.

90. *Id.* at 2652. However, twelve of the thirty states that prohibited it were non-capital jurisdictions, so the actual split was twenty allowing and eighteen prohibiting. *Id.* at 2652–53.

when *Roper* was decided thirty states prohibited the death penalty for juveniles.[91] Further, in *Enmund v. Florida*,[92] only eight jurisdictions had death penalty statutes for participation in a robbery where an accomplice committed murder.[93] In the instant case, with only six states permitting the execution of child rapists, Justice Kennedy concluded that the national consensus towards capital child-rape statutes "shows divided opinion but, on balance, an opinion against it."[94]

Justice Kennedy then addressed respondent's claim regarding the states' "erroneous understanding of th[e] Court's Eighth Amendment jurisprudence."[95] Respondent claimed that the states had read *Coker* too expansively in applying it to child rape, rather than adhering to *Coker's* narrow application of adult rape.[96] This expansive reading accounted, according to respondent, for the relatively few number of states that enacted capital child-rape statutes.[97] Justice Kennedy acknowledged that certain passages of the *Coker* opinion may have suggested a blanket prohibition of capital punishment for rape.[98] But in the context of the opinion, Justice Kennedy found the argument "unsound."[99]

Justice Kennedy noted that the *Coker* Court framed the issue as whether the death penalty was disproportionate "with respect to rape of an adult woman."[100] Moreover, Justice Kennedy explained, the *Coker* Court repeated the phrase "an adult woman" or "an adult female" eight times throughout the opinion.[101] Thus, Justice Kennedy concluded that "*Coker* has not blocked the emergence of legislative consensus" with regard to the enactment of capital child-rape statutes.[102] Accordingly,

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91. *Id.* at 2653. Again, twenty states permitted such executions, while twelve of the thirty states that prohibited them were non-capital jurisdictions. *Id.*

92. Enmund v. Florida, 458 U.S. 782, 801 (1982) (striking down the use of the death penalty for felony murder where the defendant did not kill, attempt to kill, or intend to kill his victim).

93. *Kennedy*, 128 S. Ct. at 2653.

94. *Id.*

95. *Id.* (quoting Brief of Amici Curiae Missouri Governor Matt Blunt and Members of the Missouri General Assembly in Support of Respondent at 10, Kennedy v. Louisiana, 128 S. Ct. 2641 (2008) (No. 07-343)).

96. *Id.* at 2653–55.

97. *Id.* at 2654–55.

98. *Id.* at 2654. Specifically, Justice Kennedy noted the distinction drawn by the Court between murderers and all rapists. *Id.* (quoting Coker v. Georgia, 433 U.S. 584, 598 (1977)).

99. *Id.* at 2653.

100. *Id.* at 2654 (quoting *Coker*, 433 U.S. at 592).

101. *Id.*

102. *Id.* at 2655. Nevertheless, Justice Kennedy did acknowledge that there was "some contrary authority." *Id.* But, he dismissed it as mere dicta from a state's supreme court, or statements from a state's intermediate court that were later superseded by the

Justice Kennedy found the small number of states that have enacted capital child-rape statutes relevant as to whether a national consensus had formed against the use of the death penalty for child rape.[103]

The respondent claimed that the small number of states with capital child-rape statutes was irrelevant under the Court's opinion in *Atkins*.[104] Rather, respondent insisted, it is the direction of change that is significant.[105] According to respondent, the fact that six states had enacted capital child-rape statutes, and several states were considering such legislation, "reflect[ed] a consistent direction of change in support of the death penalty for child rape."[106]

Even though Justice Kennedy acknowledged that a consistent direction of change might counterbalance the relatively few number of states that have enacted such legislation, he opined that "no showing of consistent change has been made in this case."[107] Rather, Justice Kennedy found that the current statistics were similar to those in *Enmund*, where the Court found a national consensus against capital felony murder despite the eight jurisdictions that had recently enacted such legislation.[108] Thus, based on the totality of the small number of states with capital child-rape statutes and the number of executions for child rape,[109] the Court concluded that there was "a national consensus against capital punishment for the crime of child rape."[110]

Despite all the data, "in the end [the Court's] judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment."[111] Justice Kennedy distinguished child rape from adult rape noting that rape has a permanent psychological, emotional, and sometimes physical impact on the child.[112] The Court, however, concluded that it does

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state's supreme court. *Id.* Finally, Justice Kennedy read Florida's invalidation of its capital child-rape laws under state law as "extending the reasoning but not the holding of *Coker*." *Id.* at 2655–56.

103. *Id.* at 2656.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* at 2656. Justice Kennedy dismissed the fact that several states had legislation authorizing capital punishment for child rape pending, concluding that it was not "sound" to find contemporary norms in legislation not yet enacted. *Id.*

108. *Id.* at 2657.

109. According to the Court, no state had executed a defendant for rape since 1964. *Id.*

110. *Id.* at 2657–58.

111. *Id.* at 2658 (quoting Coker v. Georgia, 433 U.S. 584, 597 (1977)).

112. *Id.*

not follow that death is a proportionate penalty.[113] Justice Kennedy noted that the Court must be hesitant in approving such sanctions where no life has been taken in the commission of the crime.[114] He explained that though the Court "is still in search of a unifying principle," its practice has been to reserve the death penalty for a narrow category of crimes and offenders.[115]

Justice Kennedy did point out that the Court's concern in the instant case was limited to crimes against the individual.[116] The Court declined to address crimes against the government that did not result in death, such as espionage, terrorism, and drug kingpin activity.[117] In the limited context of crimes against the individual, the Court determined that the death penalty should be reserved for only those crimes where the life of the victim has been taken.[118]

Justice Kennedy concluded by highlighting other "serious systemic concerns" that could undermine the goals of punishment, including unreliable, induced, and even imagined child testimony.[119] Further, such an extreme penalty for the perpetrator, especially a family member, might lead to underreporting.[120] Finally, the Court argued that when the state punishes child rapists with the death penalty, the state removes any incentive for the rapist not to kill its victim.[121] Taken in sum, the Court concluded that in its own independent judgment, "the death penalty is not a proportional punishment for the rape of a child."[122]

2. Justice Alito's Dissenting Opinion. Justice Alito attacked the Court's opinion on two grounds: the national consensus determination and the independent judgment that death is not a proportionate punishment to child rape.[123] Justice Alito began by

113. *Id.*

114. *Id.*

115. *Id.* at 2659.

116. *Id.*

117. *Id.*

118. *Id.* The Court stated that child rape may be devastating in its harm, but "'in terms of moral depravity and of the injury to the person and to the public,' [it] cannot be compared to murder in [its] 'severity and irrevocability.'" *Id.* at 2660 (citation omitted) (quoting Coker v. Georgia, 433 U.S. 584, 598 (1977)).

119. *Id.* at 2663.

120. *Id.* at 2663–64.

121. *Id.* at 2664.

122. *Id.*

123. *Id.* at 2665 (Alito, J., dissenting). Justice Alito chastised the Court's conclusion that death was disproportionate "no matter how young the child, no matter how many times the child is raped, no matter how many children the perpetrator rapes, [and] no

undermining the Court's reliance on the small number of states with capital child-rape laws by pointing to the broad reasoning of the *Coker* opinion.[124] This opinion, according to Justice Alito, stifled state legislatures from enacting capital child-rape statutes.[125]

Specifically, Justice Alito pointed to the bright line drawn by several members of the plurality opinion between murder and all rapes, "regardless of the degree of brutality of the rape or the effect upon the victim."[126] According to Justice Alito, this sharp distinction is exactly how state courts have interpreted the *Coker* decision.[127] In other words, *Coker* "gave state legislators a strong incentive not to push for the enactment of new capital child-rape laws."[128]

Accordingly, Justice Alito asserted "the Court is plainly wrong in comparing the situation here to that in *Atkins* or *Roper*."[129] Justice Alito reasoned that in both cases the Court had previously rejected similar challenges,[130] and thus state legislatures had reason to believe that further enactments would be upheld.[131] In contrast, the *Coker* decision led state legislatures to believe that the enactment of capital child-rape statutes would be futile.[132] Thus, the small number of states with capital child-rape laws is more likely evidence of acquiescence with the *Coker* opinion than "an expression of their understanding of prevailing societal values."[133]

Despite *Coker*, several states have enacted capital child-rape statutes, which, according to Justice Alito, may reflect a "new

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matter how sadistic the crime." *Id.*

124. *Id.* at 2665–66.

125. *Id.*

126. *Id.* at 2666 (quoting Coker v. Georgia, 433 U.S. 584, 603 (1977) (Powell, J., dissenting in part)).

127. *Id.* at 2666 (quoting Buford v. State, 403 So. 2d 943, 951 (Fla. 1981)) (noting that the reasoning of *Coker* caused the Florida Supreme Court to hold that a sentence of death is grossly disproportionate to the crime of child rape); *see also* People v. Hernandez, 69 P.3d 446, 464 (Cal. 2003) ("Although the high court did not expressly hold [in *Coker*] that the Eighth Amendment prohibits capital punishment for *all* crimes not resulting in death, the plurality stressed that the crucial difference between rape and murder is that a rapist 'does not take human life.'" (quoting *Coker*, 433 U.S. at 598)).

128. *Kennedy*, 128 S. Ct. at 2668 (Alito, J., dissenting). Justice Alito pointed to the comments of state legislatures in Oklahoma and Texas in trying to enact such legislation, where opponents argued that "*Coker*'s reasoning doomed the proposal." *Id.*

129. *Id.* at 2669.

130. Thirteen years prior to *Atkins*, the Court ruled that states were not prohibited from executing the mentally retarded. Penry v. Lynaugh, 492 U.S. 302, 340 (1989), *overruled by* Atkins v. Virginia, 536 U.S. 304 (2002). Sixteen years before *Roper*, the Court ruled that states were authorized to sentence juvenile defendants to death. Stanford v. Kentucky, 492 U.S. 361, 380 (1989), *abrogated by* Roper v. Simmons, 543 U.S. 551 (2005).

131. *Kennedy*, 128 S. Ct. at 2669 (Alito, J., dissenting).

132. *Id.*

133. *Id.*

evolutionary line."[134] Such an evolution would not be at odds with society's attitude toward child sexual abuse since the *Coker* decision.[135] Indeed, Justice Alito noted that the "growing alarm about the sexual abuse of children" had reached national levels.[136] Thus, the small number of states that have enacted capital child-rape statutes cannot be viewed as a moral consensus against such punishment.[137]

Justice Alito next addressed "the Court's irrelevant arguments," referring to the Court's independent judgment regarding the Eighth Amendment.[138] According to Justice Alito, the majority was willing to "block the potential emergence of a national consensus in favor of permitting the death penalty for child rape" based on the Court's subjective analysis that it was not in the best interest of the victim.[139] But, in the end, Justice Alito maintained that these arguments were not relevant to an Eighth Amendment inquiry as to whether the death penalty was a cruel and unusual punishment.[140]

Further, in addressing the Court's systemic and procedural concerns, Justice Alito asserted that such concerns did not "provide[ ] a basis for striking down all capital child-rape laws no matter how carefully and narrowly they are crafted."[141] Based on the narrowly drawn capital child-rape statutes of four other states, Justice Alito found that it would "take[ ] little imagination" to create factors that would limit the number of eligible child rapists for the death penalty.[142] These factors,

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134. *Id.*

135. *Id.*

136. *Id.* at 2670. Justice Alito cited the Sexually Violent Registration Program, 42 U.S.C. § 14071 (2000 & Supp. V), that requires states to establish registration systems for convicted sex offenders, statutes permitting the involuntary commitment of sexual predators, and residency restrictions for sex offenders. *Kennedy*, 128 S. Ct. at 2670 (Alito, J., dissenting).

137. *Kennedy*, 128 S. Ct. at 2671 (Alito, J., dissenting). Nor is the lack of executions of child rapists since 1964, according to Justice Alito, evidence of a national consensus against such a punishment because *Furman* put a moratorium on the death penalty in the late 1960's. *Id.* at 2672.

138. *Id.* at 2673.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.* at 2674. In Montana, Oklahoma, South Carolina, and Texas, a child rapist can only be sentenced to death if the defendant has a prior conviction of felony sexual assault. *See* MONT. CODE ANN. § 45-5-503(3)(c) (2009) ("If the offender was previously convicted of [a felony sexual offense] . . . the offender shall be . . . punished by death . . . ."); OKLA. STAT. ANN. tit. 21, § 843.5(K) (West Supp. 2010) ("[A]ny parent or other person convicted of forcible . . . rape . . . of a child under fourteen (14) years of age subsequent to a previous conviction for any offense of forcible . . . rape . . . of a child under fourteen (14) years of age shall be punished by death . . . ."); S.C. CODE ANN.

Justice Alito concluded, were far more concrete than other narrowing factors that the Court had recently upheld in the context of capital murder, including "whether the defendant was a 'cold-blooded, pitiless slayer.'"[143]

Finally, Justice Alito addressed the Court's concern about limiting the use of the death penalty for the most serious offenders and crimes, specifically confining its use to crimes in which the victim dies. Justice Alito attacked the Court's presumption that murderers are more morally depraved than child rapists, characterizing child rapists as the "epitome of moral depravity."[144] Although murder presents a unique harm to the victim, Justice Alito highlighted the Court's failure to explain why that harm is sufficient to warrant the death penalty while the harm caused by the rape of a child is not.[145] He concluded by asserting that "[c]onclusory references to 'decency' [and] 'moderation'" are not enough to overcome the grave harm that child rapists inflict upon their victims and society.[146] Accordingly, Justice Alito found that the punishment of death is not categorically disproportionate, under the Eighth Amendment, to the crime of child rape.[147]

III. ANALYSIS AND CRITICISM

The *Kennedy* decision is poorly reasoned and wrongly decided. The Court's finding of a national consensus against capital child-rape laws, confirmed by the Court's independent judgment, ignores its own precedent and dismisses a small but growing trend of states enacting capital child-rape laws.

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§ 16-3-655(C)(1) (Supp. 2009) ("If [the defendant] has previously been convicted of . . . first degree criminal conduct with a minor who is less than eleven years of age . . . he must be punished by death or life imprisonment."); TEX. PENAL CODE ANN. § 12.42(c)(3) (Vernon Supp. 2009) ("[A] defendant shall be punished with a capital felony if it is shown on the trial of [felony sexual offense] that a defendant has previously been finally convicted of a [felony sexual offense] if the victim of the offense is younger than fourteen years of age.").

143. *Kennedy*, 128 S. Ct. at 2674 (Alito, J., dissenting) (quoting Arave v. Creech, 507 U.S. 463, 471 (1993)). Justice Alito described several factors that could limit the number of child rapists eligible for the death penalty. *Id.* These factors included whether the victim was kidnapped, whether the victim suffered severe physical injury, whether the victim was raped multiple times, and whether there were multiple victims. *Id.*

144. *Id.* at 2676.

145. *Id.* at 2676. Justice Alito pointed to several harmful effects of child rape, including the severe psychological and emotional impact; he also noted an increased correlation between sexual abuse and school failure, substance abuse, suicide, and the likelihood of arrest as an adult. *Id.* at 2676–77.

146. *Id.* at 2677. Justice Alito also took issue with the Court's limited focus on crimes against individuals, stating that the Court provides no rationale as to why crimes against the state should be excluded from the analysis. *Id.* at 2676.

147. *Id.* at 2677.

A. The Court's National Consensus Calculation Is Misleading

Based on several previous capital jurisprudence cases, the Court begins its analysis by canvassing state legislation in search of a national consensus.[148] This objective indicia, the Court proclaims, is the best evidence of such a consensus.[149] But the reasoning behind the Court's proclamation is misplaced. The Court assumes that the road to national consensus is only a two-way street: if a state has enacted capital child-rape laws, it favors executing child rapists; and if a state has failed to enact capital child-rape legislation, it is against executing child rapists.[150] However, as noted by Justice Alito, there are several extraneous factors that may have influenced a state legislature to refrain from enacting capital child-rape statutes.[151] Such factors include budgetary concerns and the lack of state mechanisms to enforce and apply such punishment.[152] Most notably, however, is the *Coker* decision itself.

1. Coker *Impeded State Efforts to Enact Capital Child-Rape Laws*. Despite the *Kennedy* Court's strained efforts to limit the holding of *Coker* to prohibiting the execution of adult rapists,

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148. *Id.* at 2651–53 (majority opinion); *see also supra* notes 84–94 and accompanying text (describing Justice Kennedy's national consensus analysis).

149. *Kennedy*, 128 S. Ct. at 2650. Adding to the confusion is the Court's failure to articulate the level of "consensus" necessary to form a national consensus. *See* Ronald Turner, *The Juvenile Death Penalty and the Court's Consensus-Plus Eighth Amendment*, 17 GEO. MASON U. CIV. RTS. L.J. 157, 170 (2006) (outlining several dictionary definitions of the term consensus, including "[g]eneral agreement or concord," "collective unanimous opinion," and "[a]n opinion or position reached by a . . . majority will"); *see also* Ernest A. Young, *Foreign Law and the Denominator Problem*, 119 HARV. L. REV. 148, 154 (2005) (asserting that the divide between states permitting the juvenile death penalty "hardly fits the common understanding of 'consensus'" as a collective unanimous opinion); Sarah Cardwell, Note, Atkins v. Virginia*: "[I]n the End Our Own Judgment Will Be Brought to Bear . . .*", 55 BAYLOR L. REV. 829, 854 (2003) (questioning whether "the combined populations of the States was a factor in the determination of what constituted a national consensus or whether it was simply the number of states as a whole").

150. The Court limited its search for evidence of a national consensus to enacted state legislation and dismissed the fact that five other states have pending legislation authorizing the death penalty for child rape. *See Kennedy*, 128 S. Ct. at 2643 ("[I]t is not this Court's practice, nor is it sound, to find contemporary norms based on legislation proposed but not yet enacted."). This is in sharp contrast to *Atkins*, which considered proposed legislation, vetoed legislation, and polling data of Americans in analyzing a state's decision to apply capital punishment to mentally retarded defendants. Atkins v. Virginia, 536 U.S. 304, 314–15, 317 n.21 (2002).

151. *Kennedy*, 128 S. Ct. at 2671 (Alito, J., dissenting) (outlining state budgetary concerns involved with the implementation of capital child-rape laws, and asserting that there is no evidence that state legislative initiatives failed because they were viewed as inconsistent with society's standard of decency).

152. *Id.*

the *Coker* opinion is not so clear-cut. Throughout the opinion are several suggestions that the Court's holding is applicable to all rapists.[153] More illuminative is the fact that Justice Powell read the opinion in such a manner.[154] If it is reasonable for a Supreme Court Justice to read the opinion so broadly then certainly some states could have done so as well. Indeed, the Florida Supreme Court read *Coker* to be applicable to all rapists when it struck down its capital child-rape laws.[155] Thus, the fact that other states have failed to enact similar legislation cannot be the ultimate proof of a national consensus against executing child rapists. Rather than discovering a national consensus against capital child-rape laws, the Court prevented the emergence of a new evolutionary trend before it had the opportunity to gain momentum.

2. The Court Misinterpreted Atkins*'s Standard for Determining a National Consensus*. Even if some consensus could be determined by the relatively small number of states that permit the execution of child rapists, the fact that a present majority of states have failed to enact capital child rape laws is ultimately immaterial under the Court's recent Eighth Amendment jurisprudence. According to the Court's precedent in *Atkins*, it is the direction of change that is significant, not the bare numbers.[156] However, rather than recognizing the trend toward enacting such punishments, the Court returned to playing a numbers game.[157] The Court noted that the "data" is not as significant as in *Atkins*, where eighteen states enacted statutes prohibiting the execution of the mentally retarded between 1986 and 2001.[158] In doing so, the Court simply dismissed the fact that, since 1995, five states

153. *See, e.g.*, Coker v. Georgia, 433 U.S. 584, 592 (1977) ("We have concluded that a sentence of death is grossly disproportionate and excessive punishment for *the crime of rape* and is therefore forbidden." (emphasis added)); *id.* at 598 ("[T]he death penalty . . . is an excessive penalty for *the rapist* who . . . does not take human life." (emphasis added)); *id.* at 600 ("It is difficult to accept the notion, and we do not, that the rapist . . . should be punished more heavily than the deliberate killer as long *as the rapist does not himself take the life of his victim*." (emphasis added)).

154. *See id.* at 603 (Powell, J., dissenting in part) (stating that the plurality draws a bright line between murder and all rapes, regardless of the degree of brutality or the effect upon its victim). The implication is that the death penalty may be imposed only on those crimes that result in death. *Id.* at 621 (Burger, C.J., dissenting).

155. Buford v. State, 403 So. 2d 943, 951 (Fla. 1981).

156. Atkins v. Virginia, 536 U.S. 304, 315 (2002).

157. *Id.* at 348 (Scalia, J., dissenting) (suggesting that the majority's reliance on national consensus is part of a game by which the majority substitutes its own judgment for that of society).

158. Kennedy v. Louisiana, 128 S. Ct. 2641, 2656 (2008).

have joined Louisiana in enacting capital child-rape laws; concluding "no showing of consistent change has been made in this case."[159]

However, one of the most striking examples of the Court shaping numbers in its favor is the Court's comparison to the statistics in *Roper*.[160] In *Roper*, the rate of change was recognizably slower than the prohibition against executing mentally retarded defendants found in *Atkins*.[161] At the time of the *Roper* decision, only five states had changed their position in the sixteen years since the *Stanford* decision permitted the execution of juveniles.[162] But the *Kennedy* Court dismissed the slow rate of capital abolition in *Roper*, and in turn any comparison to the *Kennedy* data, by stating that such a pace is counterbalanced by the "total *number* of States" prohibiting the execution of juveniles.[163] Again the Court has returned to the safety of its numbers.[164] Such a statement, however, is entirely

159. *Id.*

160. *Id.* at 2653. A further example can be found when the Court noted the lack of executions that had been carried out against child rapists as evidence of a national consensus. *Id.* at 2643–44. The Court went on to note that over 5,700 child rapists would be eligible for execution nationwide under Louisiana's approach, and that this "could not be reconciled with our evolving standards of decency and the necessity to constrain the use of the death penalty." *Id.* at 2660. The Court seems to be trying to have it both ways: using the fact that jurors infrequently sentence child rapists to death as evidence of a national consensus against applying capital punishment, and by the same token, asserting that jurors would execute too many child rapists under Louisiana's approach. However, the fact that jurors infrequently sentence juveniles or child rapists to death may demonstrate only that jurors are able to understand, and take into account, mitigating circumstances. *See* Elizabeth Gray, Comment, *Death Penalty and Child Rape: An Eighth Amendment Analysis*, 42 ST. LOUIS U. L.J. 1443, 1467–68 (1998) (noting that the rarity in which jurors have sentenced rapists to death reflects the success of procedural safeguards demanded by *Furman*). Further, the fact that Louisiana has only sought the death penalty in four cases of child rape in over ten years demonstrates the state's commitment to reserving the death penalty for only the most serious offenders. *Kennedy*, 128 S. Ct. at 2672 (Alito, J., dissenting).

161. Roper v. Simmons, 543 U.S. 551, 595–97 (2005) (O'Connor, J., dissenting).

162. *Id.* at 565.

163. *Kennedy*, 128 S. Ct. at 2657 (emphasis added). Carol S. Steiker & Jordan M. Steiker, Atkins v. Virginia*: Lessons from Substance and Procedure in the Constitutional Regulation of Capital Punishment*, 57 DEPAUL L. REV. 721, 723 (2008) (asserting that in both *Atkins* and *Roper*, "a minority of death penalty states forbade the challenged practice, yet the Court relied upon the direction and speed of change toward prohibition and other, nonlegislative indicia of contemporary values . . . in discerning an emerging consensus that such executions were excessive").

164. The Court, however, failed to recognize that state laws carry a presumption of validity. *See* Rodriguez v. State, 93 S.W.3d 60, 69 (Tex. Crim. App. 2002) (stating that when a court reviews the constitutionality of a statute, it presumes the statute is valid, the legislature acted reasonably, and the individuals challenging the statute bear the burden of proving it unconstitutional). Therefore, the question becomes not whether there is a national consensus in favor of executing child rapists, but whether there is a consensus *against* such punishment. *See* Stanford v. Kentucky, 492 U.S. 361, 373 (1989) ("It is not the burden of [the

misleading and self-serving. In *Roper*, the "total number of states" against executing juveniles was thirty (including twelve that prohibited the death penalty altogether), the exact same number as in *Atkins*.[165] But in *Atkins*, the Court found the numbers less significant than the direction of change.[166]

Moreover, in *Stanford*, the Court refused to prohibit the execution of juveniles, based in part on the fact that twenty-five states permitted such executions.[167] Under such a rubric, the *Kennedy* Court erroneously read the *Roper* opinion, dealing with the same issue as in *Stanford*, as stating that it was the total number of states *prohibiting* such executions in the sixteen years since *Stanford* that made the difference.[168]

If the *Stanford* Court failed to find the fact that twenty-five states prohibited the execution of juveniles significant, surely it was not just the fact that there were now thirty states against executing juvenile defendants that the *Roper* Court found compelling. Rather, it was the direction of change, albeit a small one, that made the difference between *Stanford* and *Roper*.[169] The *Roper* court recognized this fact by considering the "change [of five states] from *Stanford* to this case to be significant" and declaring that "the same consistency of direction of change ha[d] been demonstrated" as that in *Atkins*.[170] Thus, the change of five states is significant, not the overall numbers, which are too small to make a real difference in light of the *Stanford* decision dismissing similar numbers.

The *Kennedy* Court wants it both ways: pointing to the overall numbers when the change is slow[171] and pointing to the

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state], however, to establish a national consensus approving what their citizens have voted to do; rather, it is the 'heavy burden' of [the defendant] to establish a national consensus *against* it." (internal citation omitted)), *abrogated by Roper*, 543 U.S. 551.

165. *Roper*, 543 U.S. at 564. Several Justices have chastised the Court for counting those states that have abandoned the death penalty altogether in calculating a national consensus. *See, e.g.*, *id.* at 610–11 (Scalia, J., dissenting) (describing the counting of non-death penalty states as similar to "including old-order Amishmen in a consumer-preference poll on the electric car"; of course they don't prefer it, but it has no relevance to the issue at hand).

166. Atkins v. Virginia, 536 U.S. 304, 315 (2002).

167. *Stanford*, 492 U.S. at 370–71. *Stanford* was decided before the Court's direction-of-change standard was espoused in *Atkins*.

168. *Kennedy*, 128 S. Ct. at 2657.

169. The *Roper* Court noted that "[s]ince *Stanford*, no State that previously prohibited capital punishment for juveniles has reinstated it." *Roper*, 543 U.S. at 566. The Court asserted that the failure to reinstate the death penalty for juveniles, coupled with a growing trend of abolishing the death penalty for juveniles, carried "special force" in determining a national consensus. *Id.*

170. *Id.* at 565–66.

171. *Kennedy*, 128 S. Ct. at 2657.

direction of change when the rate is high.[172] However, based on *Atkins*, the Court was misguided in relying on the total numbers to dismiss and overcome the slow rate of change in *Roper*, and consequently to defeat the small rate of change in *Kennedy*. The Court asserts that it is simply not a trend comparable to that in *Roper*.[173] But the Court confuses its mathematical jargon of "rate," "pace," and "total numbers."[174] It forgets that in *Kennedy*, six states had enacted capital child-rape laws since 1995, one *more* than the number of changed states in *Roper* prohibiting the execution of juveniles since *Stanford*.[175] Thus, it was not the rate or direction of change the Court was relying on in *Kennedy* to vitiate Louisiana's law (how could it be, given the smaller number of state changes in *Roper*), but rather the overall numbers, an exercise deemed unsound in *Atkins*.[176]

However, the Court did recognize some inkling of a trend taking place by acknowledging "that in the last 13 years there has been change towards making child rape a capital offense."[177] The only rationale to be drawn from the Court's conclusion is that the *Kennedy* trend was not comparable to that in *Roper* because it lacked the *numbers* to back it up. But again, the Court ignored *Atkins*. *Atkins* did not hold that the trend must be evidenced by an overwhelming margin or even by a majority of the states, rather the trend need be merely "consistent."[178] Under such a rubric, it is hard to imagine the trend in *Kennedy* being

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172. *Id.* at 2656 (explaining that there has been no showing of consistent change to allow the death penalty in rape cases).

173. *Id.* at 2657. *But see Roper*, 543 U.S. at 612 (Scalia, J., dissenting) (reading the majority opinion as finding "a legislative change in four states . . . 'significant' enough to trigger a constitutional prohibition"); Coker v. Georgia, 433 U.S. 584, 613 (1977) (Burger, C.J., dissenting) (suggesting a trend could be evidenced by a change in just two states).

174. *Kennedy*, 128 S. Ct. at 2656–57.

175. *Id.* at 2672 (Alito, J., dissenting); *Roper*, 543 U.S. at 565.

176. *See* Atkins v. Virginia, 536 U.S. 304, 315 (2002) (suggesting the overall number of states was not significant in its determination, but rather the "consistency of the direction of change"). Further, just as the *Roper* Court found a "simple explanation" for the small number of changed states (namely, that twelve states already prohibited the execution of juveniles under the age of eighteen at the time of *Stanford*), so too is there a simple explanation in *Kennedy*: the *Coker* decision. *Roper*, 543 U.S. at 566. This is not to say that the *Roper* court was focusing on the total numbers, but the Court recognized that the trend had been in motion for some time and now had reached its head. The *Kennedy* Court, however, failed to give the trend of executing child rapists the same latitude to develop. *See Kennedy*, 128 S. Ct. at 2672–73 (Alito, J., dissenting).

177. *Kennedy*, 128 S. Ct. at 2656 (majority opinion). A trend by definition is "a general direction in which something is *developing* or *changing*." THE NEW OXFORD AMERICAN DICTIONARY 1805 (2001) (emphasis added).

178. *Atkins*, 536 U.S. at 315 ("It is not so much the number of these States that is significant, but the consistency of the direction of change.").

anything other than consistently leaning toward making child rape a capital offense.[179]

3. The Court Failed to Take into Account Modern Views Regarding Rape and Its Impact. Rather than focusing on raw numbers to determine a national consensus, the Court would have been better served in noting[180] the broader attitude of society towards child rapists. For example, the Court could have looked toward the general attitudes of the broader community, such as tougher legislation toward sexual predators and an increased awareness of the impacts of child rape.[181] Such an inquiry would not be at odds with recent precedent. In *Atkins*, the Court looked to proposed legislation, vetoed legislation, and an Illinois Commission recommendation.[182] The Court also considered polling data of Americans, the broader social and professional consensus, religious organizations, and finally the entire world community, which "[lent] further support" to the legislative evidence.[183]

Had the Court undertaken a similar analysis, it would have found an increased awareness of the serious effects that rape inflicts upon child victims and the national effort to enact

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179. Specifically, there is a complete absence of states enacting legislation prohibiting the execution of child rapists, as the states in *Atkins* and *Roper* did with regard to mentally retarded and juvenile defendants. *See Roper*, 543 U.S. at 566 ("[N]o State that previously prohibited capital punishment for juveniles has reinstated it."); *Atkins*, 536 U.S. at 315–16 (noting the "large number of States prohibiting the execution of mentally retarded persons"). In contrast, six states expressly asserted that the most severe child rapists are deserving of the death penalty, while no state has enacted legislation prohibiting the execution of child rapists. *Kennedy*, 128 S. Ct. at 2656.

180. Explicit in the evolving standards of decency doctrine is the flawed idea that society's standards can evolve in one direction only, towards restricting the use of the death penalty. But the Court fails to explain why society's "maturation" in recognizing the unique harms of child rape does not carry with it the force to impose the most severe of punishments.

181. *See supra* notes 11–21 and accompanying text (describing the recognized impacts of rape since *Coker*). The majority opinion expressed a fear that the death penalty would deter child victims from reporting the crime to law enforcement. *Kennedy*, 128 S. Ct at 2663–64. However, the Court failed to recognize that reports of child sexual abuse have dramatically increased, despite the fact that some defendants would be eligible for a life sentence in some states. *See* FLA. STAT. ANN. § 800.04(5)(b) (West 2007) (mandating a minimum sentence of 25 years and a maximum sentence of life imprisonment for first-time child sex offenders); Lurigio, Jones & Smith, *supra* note 11, at 69 (reporting that the number of reported cases of child sexual abuse rose from 6,000 to 132,000 between 1976 and 1986, an increase of 2100%).

182. *Atkins*, 536 U.S. at 315 & nn.16–17. Chief Justice Rehnquist's dissent chastises the majority's reliance on such data. *Id.* at 322 (Rehnquist, C.J., dissenting).

183. *Id.* at 316 n.21 (majority opinion); *see also Roper*, 543 U.S. at 566 (acknowledging that the trend toward cracking down on juvenile crime carried "special force" in the Court's national consensus determination).

tougher sanctions for sexual predators, including child rapists.[184] However, *Kennedy* relied on the outdated reasoning and understanding of rape announced in *Coker*. Throughout the *Coker* opinion, decided in 1977, the Court diminished the effects that rape inflicts upon adult women.[185] Specifically, after describing the attack by Mr. Coker, which included breaking into the victim's house, and kidnapping and raping her at knifepoint, the Court concluded that "Mrs. Carver was unharmed."[186] Such a statement belittles the long term effects of rape on the victim and ignores the impact that such brutal attacks have on society.[187] Based on the Court's practice of judging the constitutionality of criminal sanctions through society's evolving standards of decency, the Court should have also re-examined society's attitude toward women when analyzing Louisiana's capital rape legislation. In failing to do so, *Kennedy*'s reliance on *Coker* simply perpetuates an outdated notion of rape that ignores the brutal harms Louisiana sought to curtail by enacting its capital child-rape law.

In contrast, there is now a firm understanding of rape's severe impact on society and the mental and physical effects inflicted on rape victims.[188] Society has also realized that the effects are more pronounced when the victim is a child.[189] Aside from the psychological and emotional damage, when the victim is as young as L.H. was at the time of her attack, the physical damage can be lasting as well.[190]

State and national legislatures have recognized the need to enact tougher sanctions against sexual predators and to bring increased awareness of their presence to the community.[191] Further, legislation also has been geared toward increased protection of young children and laws aimed at securing their testimony in court.[192] Perhaps most illustrative of a true national

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184. *See supra* notes 11–21 and accompanying text.

185. *See* Coker v. Georgia, 433 U.S. 584, 598 (1977) ("[I]n terms of moral depravity and of the injury to the person and to the public, [rape] does not compare with murder.").

186. *Id.* at 587. The Court also stated that "rape by definition does not include the death of or even the serious injury to another person," and that the rape victim's "life may not be nearly so happy as it was, but it is not over and normally is not beyond repair." *Id.* at 598.

187. *See supra* notes 11–21 and accompanying text (describing the social cost of rape).

188. *See* Freeman-Longo, *supra* note 14, at 321–22 (discussing the "devastating effects" of sexual abuse).

189. Lurigio, Jones & Smith, *supra* note 11, at 70.

190. *Id.* at 70–71.

191. Freeman-Longo, *supra* note 14, at 304, 311–13.

192. *See, e.g.*, FED. R. EVID. 414 (making admissible evidence of prior similar offenses in prosecutions for child molestation); FED. R. EVID. 415 (making admissible evidence of

consensus regarding the punishment of child rapists is the fact that the national government permits the execution of members of the armed forces who rape minor children.[193] Overall, such evidence points to a trend recognizing the severity of child rape and the need for tougher penalties. Part of that trend is the fact that six states determined the crime to be so severe as to deserve the death penalty. The *Kennedy* Court points to no evidence to contradict these points, nor does the Court attempt to assess the general attitudes of society. Rather it stubbornly relies on the small number of states that authorize capital punishment for child rape in finding a national consensus against capital child-rape laws.

B. The Court's Use of Its "Independent Judgment" Trumped the Reasoned Decisions of State Legislatures

Throughout its post-*Furman* jurisprudence, the Court has repeatedly stated that objective factors should be used to the maximum extent possible, as compared to the Justices' own preferences, in determining a national consensus.[194] The plurality opinion in *Stanford* "emphatically rejected" the suggestion that the Court should bring its own judgment to bear on the acceptability of the juvenile death penalty.[195]

Nonetheless, *Kennedy* ignored the Court's precedent, and in the end it was the Justices' independent judgment that decided the constitutionality of Louisiana's capital child-rape law. As Chief Justice Rehnquist noted in *Atkins*, such reasoning "resembles a *post hoc* rationalization for the majority's subjectively preferred result rather than any objective effort to ascertain the content of an evolving standard of decency."[196] In doing so, the Court failed to articulate why nine unelected justices are more astute at ascertaining the nation's moral stance toward executing child rapists than democratically elected state legislatures.

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similar acts or prior incidents in civil cases involving sexual assault or child molestation).

193. National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 552, 119 Stat. 3136, 3263.

194. *See* Coker v. Georgia, 433 U.S. 584, 592 (1977) ("Eighth Amendment judgments should not be, or appear to be, merely the subjective views of individual Justices."); Gregg v. Georgia, 428 U.S. 153, 175–76 (1976) ("[I]n a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people." (quoting Furman v. Georgia, 408 U.S. 238, 383 (1972) (Burger, C.J., dissenting))).

195. Stanford v. Kentucky, 492 U.S. 361, 377 (1989), *abrogated by* Roper v. Simmons, 543 U.S. 551 (2005).

196. Atkins v. Virginia, 536 U.S. 304, 322 (2002) (Rehnquist, C.J., dissenting).

In elevating its independent judgment to constitutional priority, the Court "substitut[ed] its policy judgment for that of the state legislature," thereby trumping fundamental principles of federalism, which grant to the states the right to punish their criminals.[197] As noted in *Harmelin v. Michigan*, states are permitted wide latitude in punishing their criminals, so long as the punishment serves a recognized goal, such as deterrence or retribution.[198] However, the Court's current national consensus determination inhibits state experimentation[199] and subjects the legislative capacity of one state to the whims of others.[200] A wholesale prohibition of executions for entire classes of crimes and defendants eliminates the legislative capacity of other states in this regard.[201] Further, the incorporation of state prohibitions into the Constitution impermissibly allows certain states to extend their power and influence beyond their borders and into national policy.[202]

Kennedy is simply the latest incident where the Court's independent judgment has become the deciding factor in the face of less than convincing evidence of a national consensus. The Court has unjustly set a precedent of drawing constitutional distinctions when the personal preferences of the Justices conflict with state legislatures.[203] Such a practice not only lends credence to a nonexistent national consensus, but also jeopardizes the integrity and independence of the judiciary by becoming entangled in competing political and social pressures.[204] The

197. *Coker*, 433 U.S. at 604 (Burger, C.J., dissenting).

198. Harmelin v. Michigan, 501 U.S. 957, 989–90 (1991) (noting the wide latitude that each state has in determining crimes and appropriate punishments). In *Harmelin*, the Court upheld a mandatory sentence of life imprisonment for the possession of 672 grams of cocaine. *Id.* at 961, 995–96.

199. *See* Tonja Jacobi, *The Subtle Unraveling of Federalism: The Illogic of Using State Legislation as Evidence of an Evolving National Consensus*, 84 N.C. L. REV. 1089, 1106 (2006) (arguing that a fundamental ideal of the Federalist Papers was that diverse practices among the states would protect against the tyranny of the majority).

200. *See id.* at 1104 (characterizing the counting of states in determining a national consensus as "contrary to principles of federalism, . . . highly subjective and open to manipulation, and . . . so indeterminate in its application as to be meritless and misleading").

201. *Id.* at 1105.

202. *Id.* at 1109 (citing McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 429 (1819)) ("[T]he sovereignty of any state does not extend beyond its borders to powers over the nation generally; only the national government can have that power.").

203. As one author notes, "The Court should be loathe to dictate to the states what constitutes cruel and unusual punishment when the state and its citizens have not concretely and unambiguously done so." Cardwell, *supra* note 149, at 859.

204. *See* Gregg v. Georgia, 428 U.S. 153, 175 (1976) (declaring that the judiciary's independence is jeopardized "when courts become embroiled in the passions of the day" (quoting Dennis v. United States, 341 U.S. 494, 525 (1951))).

Court has recognized the improvidence of inserting its subjective preference in other controversial legislation, including abortion and gay rights, and the Court should similarly reject any attempt to do so in the area of capital punishment.[205]

Responding to the argument that the Court's judgment should be brought to bear on Eighth Amendment issues, Justice Scalia noted in *Roper* that such a rule has never been solidly laid down, but only espoused in dicta and repudiated as unsound in *Stanford*.[206] This is for good reason, according to Justice Scalia, because the Eighth Amendment is not an ordinary rule of law, but rather the Court has fashioned it as an ever-changing evolution of society's standards of decency.[207] And thus, "it makes no sense for the Justices then to *prescribe* those standards rather than discern them from the practices of our people."[208] Rather, the judgment of the legislature should be viewed as a reasoned and sincere effort to protect society, and the Court should be most reluctant to interfere.[209]

IV. CONCLUSION

The keynote of the Court's post-*Furman* jurisprudence, highlighted by the central reasoning in *Kennedy*, is that murder is different.[210] Accordingly, the argument goes, our justice system should reserve executions for only those crimes that take the life of the victim. In reality, the death penalty is reserved only for the vilest of killers, rather than for all murderers. Thus, it cannot be argued that the difference between a murderer and a rapist is based on whether or not there is a dead victim. Rather, in both murder and rape, the crime should evidence a seriously depraved criminal in order for the defendant to be morally deserving of the death penalty. It is the nature in which the crime is committed,

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205. *See* Lazarus, *supra* note 29 (revealing the Court's "morally persuasive activism" under the Eighth Amendment, as compared to other areas of law).

206. Roper v. Simmons, 543 U.S. 551, 615–16 (2005) (Scalia, J., dissenting); *see also* Lazarus, *supra* note 29 (describing the conservatives justices' concern "that the 'evolving standards of decency' test ha[s] simply become an excuse for liberal justices to rewrite the Constitution according to their own personal views of right and wrong").

207. *Roper*, 543 U.S. at 616.

208. *Id*.

209. *See* Coker v. Georgia, 433 U.S. 584, 616–17 (1977) (Burger, C.J., dissenting) ("Th[e] 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*." (quoting Roberts v. Louisiana, 428 U.S. 325, 355 (1976) (White, J., dissenting))).

210. *See* Kennedy v. Louisiana, 128 S. Ct. 2641, 2659–60 (2008) (distinguishing between intentional first-degree murder and non-homicidal crimes against individuals, and concluding that the latter crimes cannot compare to murder in its severity and irrevocability).

rather than the end result, that should be the deciding factor in rendering a defendant eligible for the death penalty. Based on the brutal impact of rape, the same arguments should hold especially true when applied to child rapists. Arguably, the "deliberate viciousness of the rapist may be greater than that of the murderer."[211] To prevent the execution of child rapists "regardless of the degree of brutality of the rape or the effect upon the victim" is therefore to ignore the realities of the crime.[212]

Nonetheless, the *Kennedy* decision perpetuates the erroneous trend of the Supreme Court—drawing arbitrary distinctions among certain classes of defendants and crimes.[213] The *Kennedy* opinion was based in part on the bare fact that murder results in the death of the victim, and rape does not.[214] However, the Court failed to adequately explain why this distinction is relevant or has constitutional significance. Rather, *Kennedy* relied on the outdated notions of rape espoused in *Coker* thirty years earlier, and therefore failed to take into account the realities of the crime. Accordingly, the Court's stark distinction between murder and rape is unwarranted and only adds to the confusion created when the Court exempts entire classes of defendants.[215]

The exemption of entire classes of defendants in *Atkins* and *Roper* was justified on the grounds of the defendants' lack of moral reprehensibility.[216] Child rapists, however, can make no such claim. Thus, there should be no categorical prohibition against executing child rapists, but rather the Court should leave it to the jurors to weigh the mitigating evidence, just as jurors are required to do in all capital murder cases.[217]

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211. *Coker*, 433 U.S. at 603 (Powell, J., dissenting in part).

212. *Id.*

213. *Cf.* Steiker & Steiker, *supra* note 163, at 722–23 (commenting on the Court's change from procedural to substantive rulings, specifically *Atkins*'s ban on executing mentally retarded defendants and *Roper*'s ban on executing juveniles under eighteen years of age).

214. *See supra* notes 111–18 and accompanying text.

215. *See* Steiker & Steiker, *supra* note 163, at 724 (noting that the ban on executing persons with mental retardation "has spawned extensive, intricate, and bitterly contested litigation," with states differing in their definitions of mental retardation).

216. *See* Roper v. Simmons, 543 U.S. 551, 571 (2004) (referencing the "diminished culpability of juveniles" in finding "the penological justifications for the death penalty apply to them with lesser force than to adults"); Atkins v. Virginia, 536 U.S. 304, 318–20 (2002) (arguing that the behavioral and cognitive impairments of mentally retarded defendants render them incapable of processing the possibility of execution as a penalty, and therefore undeserving of the death penalty); *see also* Douglas A. Berman, *Distinguishing Offense Conduct and Offender Characteristics in Modern Sentencing Reforms*, 58 STAN. L. REV. 277, 285 (2005) (spotlighting the greater focus in modern sentencing decisionmaking on offense conduct rather than offender characteristics).

217. However, the *Kennedy* Court stated that jurors would be overcome by the

The Court has already carved out exceptions to its murder-is-different jurisprudence, by declaring that defendants who do not kill or even attempt to kill, may nonetheless be eligible for the death sentence.[218] The reasoning behind such a distinction is that a defendant who acts recklessly and indifferently to human life is as morally culpable as an intentional murderer.[219] It is not hard to imagine a scenario where the *Tison* reasoning could just as easily be extended to child rapists. For example, a defendant who knows he is infected with HIV but nonetheless rapes a child;[220] or a convicted sex offender who repeatedly rapes and tortures multiple child victims.[221]

Recognizably, rape does not physically kill the victim. But the moral reprehensibility of child rape cannot be said to be less than a reckless non-shooter. Thus, a state should be permitted to reserve the death penalty for the most heinous of child rapists, including those as brutal as in *Kennedy*, and for those perpetrators who rape multiple children, or repeatedly rape a single child. The Court has fashioned limiting factors in the context of murder, and despite the Court's reluctance to do so in *Kennedy*, the Court should extend the same protection to child rape victims as it affords to murder victims.

Luke Fraser

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brutality of the crime and therefore incapable of reaching a rational decision. Kennedy v. Louisiana, 128 S. Ct. 2641, 2660–61 (2008). This is yet another example of the Court finding jurors deficient in performing their task. *See Roper*, 543 U.S. at 572–73 (claiming jurors will be unable to appreciate the defendant's youth when contemplating the death penalty); *Atkins*, 536 U.S. at 321 (suggesting that jurors may be more likely to wrongfully convict a mentally retarded criminal defendant). The *Atkins* conclusion is especially ironic, because it is the jurors who, in some cases, determine whether the defendant is mentally retarded. *See* Steiker & Steiker, *supra* note 163, at 727–28 (describing a Texas jury's seven-part inquiry, including whether the defendant is capable of lying effectively, a factor not part of any professional standard).

218. *See* Tison v. Arizona, 481 U.S. 137, 154 (1987) ("[S]ubstantial participation in a violent felony under circumstances likely to result in the loss of innocent human life may justify the death penalty even absent an 'intent to kill.'").

219. *Id.* at 157.

220. *See* Wepner, *supra* note 10, at 969.

221. *See Kennedy*, 128 S. Ct. at 2676 (Alito, J., dissenting).