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# The Supreme Court's Rationale in Capital Cases: A One Way Street?

Kimberly Bliss\*

## I. Introduction

On June 25, 2008, the Supreme Court held in the case of *Kennedy v. Louisiana* that the Eighth Amendment<sup>1</sup> prohibited the state of Louisiana from imposing the death penalty for the rape of a child where the crime did not result and was not intended to result in the child's death.<sup>2</sup> This decision, which invalidated a number of state laws that allowed the death penalty in some instances of child rape,<sup>3</sup> was decided on the basis of the Court's interpretation of cruel and unusual punishment in light of "the evolving standards of decency that mark the progress of a maturing society."<sup>4</sup> The Supreme Court's use of this standard in capital cases in

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1. U.S. CONST. amend. VIII. The Eighth Amendment of the Constitution prohibits the Federal Government from imposing excessive bail, excessive fines and cruel and unusual punishments. The prohibition of cruel and unusual punishment has been extended to state governments through the Fourteenth Amendment. *Robinson v. California*, 370 U.S. 660 (1962).

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

3. The result of the decision in *Kennedy* was to invalidate state laws allowing for the imposition of the death penalty in Louisiana, Texas, Florida, Montana, Oklahoma and South Carolina. *Id.* See LA. REV. STAT. ANN. § 14:42 (D)(2) (Supp. 1996), *invalidated by Kennedy v. Louisiana*, 128 S. Ct. 2641 (2008); TEX. PENAL CODE ANN. § 12.42(c)(3) (Vernon Supp. 2007), *invalidated by Kennedy v. Louisiana*, 128 S. Ct. 2641 (2008); TEX. PENAL CODE ANN. § 22.021(a) (Vernon Supp. 2007); MONT. CODE ANN. § 45-5-503(3)(c)(i) (2007), *invalidated by Kennedy v. Louisiana*, 128 S. Ct. 2641 (2008); OKLA. STAT. tit. 10, § 7115(K) (Supp. 2007), *invalidated by Kennedy v. Louisiana*, 128 S. Ct. 2641 (2008); S.C. CODE ANN. § 16-3-655 (C)(1) (Supp. 2007), *invalidated by Kennedy v. Louisiana*, 128 S. Ct. 2641 (2008); FLA. STAT. ANN. § 794.011(2) (2007), *invalidated by Buford v. Florida*, 403 So. 2d 943 (Fla. 1981). It is worthwhile to note that the Florida Supreme Court, in invalidating the portion of the Florida statute that authorized the death penalty for child rape, relied on the Court's reasoning in *Coker* and expanded from rape of an adult woman to child rape. *Buford*, 403 So. 2d at 950 (citing *Coker v. Georgia*, 433 U.S. 584 (1977)).

4. *Kennedy*, 128 S. Ct. at 2649 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)). The Court held in *Trop* that the provision of Section 401(g) of the Nationality Act of 1940, authorizing expatriation of a person who had been convicted by military court martial of wartime desertion, violated the Eighth Amendment prohibition on cruel and unusual punishment. 356 U.S. at 114.

light of the decision in *Kennedy* has engendered criticism from the media, politicians, and other commentators on the ground that the Supreme Court is usurping the role of the legislature in defining the mores of society.<sup>5</sup> This criticism by the media and others is supported by Justice Alito's dissent, which in effect moves beyond the decision in *Kennedy* to question whether the Court's position in past cases has and will ultimately influence its current and future decisions.<sup>6</sup>

This Note contends that the process employed by the Supreme Court in deciding Eighth Amendment capital cases is decidedly biased. The result of the procedural bias in the standard utilized by the Court is an almost certain outcome of increased prohibition on capital punishment. Part I will explore the standard that the Supreme Court has utilized in deciding Eighth Amendment capital punishment cases. Part II will examine the Supreme Court's recent decision in *Kennedy v. Louisiana*. This section will also look at the Supreme Court's decision in *Coker v. Georgia*<sup>7</sup> and explore the possible influence that the decision in *Coker* had on the Court's decision in *Kennedy*. Part III will look at the impact that the *Kennedy* decision has had on current legislative enactments and could have on future legislative freedom in the arena of death penalty legislation. This Note will conclude by showing that in continuing to utilize the current analytical framework, the Supreme Court, itself, is becoming so intertwined in its own process that the result is a predetermined unidirectional evolution of the concept of what constitutes cruel and unusual punishment.

## II. Eighth Amendment Jurisprudence in Capital Cases

The Eighth Amendment of the Constitution prohibits the imposition of cruel and unusual punishment.<sup>8</sup> This prohibition of cruel and unusual punishment, which has been applied to the states through the Fourteenth

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5. Senator John McCain called the decision "an assault on law enforcement's efforts to punish these heinous felons for the most despicable crime." Linda Greenhouse, *Supreme Court Rejects Death Penalty for Child Rape*, N.Y. TIMES, June 26, 2008, available at <http://www.nytimes.com/2008/06/26/washington/26scotuscnd.html>. President Obama, then-Senator Obama, stated that he thought "that the rape of a small child, 6 or 8 years old, is a heinous crime, and if a state makes a decision under narrow, limited, well-defined circumstances, that the death penalty is at least potentially applicable, that does not violate our Constitution." *Id.*

6. *See generally Kennedy*, 128 U.S. at 2665 (Alito, J., dissenting). Justice Alito was joined in his dissent by Chief Justice Roberts, Justice Scalia, and Justice Thomas.

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

8. U.S. CONST. amend. VIII.

Amendment's due process clause,<sup>9</sup> has not been interpreted to be a stagnant, frozen concept, but one that is both flexible and dynamic. It is an ever-changing concept based on society's "evolving standards of [common] decency."<sup>10</sup> In applying this evolving standard of decency to capital cases, the Supreme Court has repeatedly held that the death penalty is not *per se* unconstitutional as a cruel and unusual punishment under the Eighth Amendment, but that there is a limit on the instances and circumstances where the death penalty can be properly imposed.<sup>11</sup> In effect, capital punishment, as the most severe penalty, should be "limited to those offenders who commit a narrow category of the most serious crimes and whose extreme culpability makes them the most deserving of execution."<sup>12</sup>

In attempting to quantify society's "evolving standards of common decency," the Supreme Court has utilized a two-step approach in analyzing death penalty regulations. First, the Court looks to objective evidence to determine whether there exists a national consensus in regards to the regulation in question.<sup>13</sup> After the determination of the existence or non-existence of a national consensus, the Court then proceeds to utilize its own independent judgment and determines whether the death penalty is a proportionate punishment to the crime that has been committed.<sup>14</sup>

In determining the existence or non-existence of national consensus, the Court looks towards "objective indicia that reflect the public attitude

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9. *See* *Robinson v. California*, 370 U.S. 660 (1962) (applying the Eighth Amendment to the state of California via the Fourteenth Amendment and holding that California law authorizing a ninety day jail sentence for being addicted to the use of narcotics was in violation of the prohibition on cruel and unusual punishments).

10. *Trop v. Dulles*, 356 U.S. 86, 101 (1958). *Accord* *Furman v. Georgia*, 408 U.S. 238, 382 (1972) (stating that the standard to be utilized "remains the same, but its applicability must change as the basic mores of society change"); *Weems v. United States*, 217 U.S. 349, 378 (1910) (asserting that the Eighth Amendment prohibition "is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice").

11. *Kennedy*, 128 U.S. at 2650. *See* *Gregg v. Georgia*, 428 U.S. 153 (1976) (upholding the Georgia statute that provided for a bifurcated process in death penalty cases); *Furman v. Georgia*, 408 U.S. 238 (1972) (resulting in state death penalty statutes being held unconstitutional because the statutes in question allowed judges and juries broad discretion in imposing the death penalty).

12. *Roper v. Simmons*, 543 U.S. 551, 568 (2005) (internal quotation and citation omitted).

13. *See Roper*, 543 U.S. at 564; *Atkins v. Virginia*, 536 U.S. 304, 312 (2002); *Enmund v. Florida*, 458 U.S. 782, 788 (1982); *Coker v. Georgia*, 433 U.S. 584, 593 (1977).

14. *See Roper*, 543 U.S. at 563; *Atkins*, 536 U.S. at 312; *Coker*, 433 U.S. at 597.

toward a given sanction.”<sup>15</sup> The Court has regarded such variables as state practice—including state sentencing decisions by juries and the number of executions that have been carried out—current legislative enactments, and both the direction and consistency of change in legislative enactments.<sup>16</sup> In the landmark case of *Atkins v. Virginia*,<sup>17</sup> after observing that thirty states had legislation prohibiting the death penalty for those deemed mentally retarded and that only five offenders had been executed with a known IQ under seventy, it was determined that there was a national consensus supporting the conclusion that the imposition of the death penalty on those who were classified as mentally retarded was unconstitutional as a violation of the Eighth and Fourteenth Amendments.<sup>18</sup> Similarly, in *Roper v. Simmons*,<sup>19</sup> the Supreme Court observed that in 1989, twenty-two out of the thirty-seven states imposing the death penalty permitted execution for sixteen-year-old offenders and twenty-five of those thirty-seven states allowed the death penalty for seventeen-year-olds.<sup>20</sup> By 2005, however, eighteen of the states allowing the death penalty prohibited, by statute or case law, the execution of juveniles.<sup>21</sup> While the Supreme Court observed that twenty states still had statutes allowing for the execution of juveniles, it was noted that there was a consistent direction of change in legislative enactments concerning the minimum age for a death penalty sentence.<sup>22</sup> The Court found it notable that since 1989, “no State that previously prohibited capital punishment for juveniles” had reinstated it.<sup>23</sup> This trend showed consistency in the direction of change, leading the Court to conclude that a national consensus existed. The Court, thereafter, held that the imposition of the death penalty on individuals under the age of eighteen was unconstitutional as cruel and unusual punishment under the Eighth and Fourteenth Amendments.<sup>24</sup>

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15. *Gregg*, 428 U.S. at 173.

16. *See Gregg*, 428 U.S. at 179-81 (considering the legislative response of the thirty-five states that reenacted statutes providing for the death penalty after the Court’s previous decision in *Furman v. Georgia* and the number of individuals sentenced to death since *Furman*); *Atkins*, 536 U.S. at 314-16; *Enmund*, 458 U.S. at 790-800; *Roper*, 543 U.S. at 564-68.

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

18. *Id.* at 314-17.

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

20. *Roper*, 543 U.S. at 562; *Stanford v. Kentucky*, 492 U.S. 361, 362 (1989).

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

22. *Id.* at 565.

23. *Id.* at 566.

24. *Id.* at 578.

After determining the existence of a national consensus, the Supreme Court then utilizes its own independent judgment to decide “[w]hether the death penalty is disproportionate to the crime committed . . . .”<sup>25</sup> This approach follows the view that “the Constitution contemplates that in the end [the Supreme Court’s] own judgment will be brought to bear on the question of acceptability of the death penalty under the Eighth Amendment.”<sup>26</sup> In reaching a conclusion as to the proportionality of the death penalty under the circumstances, the Court considers whether the legislation in question serves the important social purposes of deterrence and retribution.<sup>27</sup> For without contribution to one of those social purposes, the death penalty “is nothing more than the purposeless and needless imposition of pain and suffering.”<sup>28</sup>

In utilizing its own independent judgment to determine whether the death penalty under given circumstances serves such important social purposes as to justify its use, the Court considers the type of criminal conduct that is sought to be punished with death. It has been said that “capital punishment is an expression of society’s moral outrage at particularly offensive conduct.”<sup>29</sup> “[T]he decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community’s belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death.”<sup>30</sup> The death penalty, as a mechanism of retribution, is said to serve an important purpose in a society that is built on law and order rather than self-help for perceived wrongs.

The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they ‘deserve,’ then there are sown the seeds of anarchy – of self-help, vigilante justice, and

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25. *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2650 (2008).

26. *Coker v. Georgia*, 433 U.S. 584, 597 (1977).

27. *Gregg v. Georgia*, 428 U.S. 153, 183 (1976); *Enmund v. Florida*, 458 U.S. 782, 798 (1982).

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

29. *Gregg*, 428 U.S. at 183.

30. *Id.* at 184.

lynch law.<sup>31</sup>

In *Atkins* and *Roper*, however, the Court looked beyond the type of offense being committed; it looked to the characteristics and the moral culpability of the criminal offender facing the death penalty.<sup>32</sup> Even when the type of crime committed is classified as wanton, vile, and particularly offensive, unless the perpetrator has demonstrated a certain level of understanding, maturity and culpability, the criminal conduct may not be classified as morally reprehensible enough as to warrant the imposition of the death penalty.<sup>33</sup> “Retribution is not proportional if the law’s most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree . . . .”<sup>34</sup> As a result, certain classes of criminal offenders, such as individuals under the age of eighteen and those classified as mentally retarded, have been found to lack the requisite culpability, and as such, the death penalty for those classes of individuals has been deemed to violate the Eighth Amendment.<sup>35</sup>

In addition to the type of offense and the character of the offender who is sought to be punished with death, the Court has looked to evaluate the worth of the death penalty as a deterrent against future criminal behavior.<sup>36</sup> The Court has repeatedly acknowledged that deterrence is a complex factual issue and that the “assessment of the efficacy of various criminal penalty schemes” is an appropriate legislative matter.<sup>37</sup> Despite this acknowledgment, the value of the death penalty as a deterrent is an important factor in the Court’s consideration of death penalty statutes.<sup>38</sup> In considering this factor, the type of crime and the character of the criminal offender are once again evaluated. The Court looks to see whether there would be a decrease in the occurrence of the criminal behavior for which the imposition of death penalty is being sought as a sanction. In *Gregg v. Georgia*, the Court noted an

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31. *Furman v. Georgia*, 408 U.S. 238, 308 (1972).

32. *Roper v. Simmons*, 543 U.S. 551 (2005); *Atkins v. Virginia*, 536 U.S. 304 (2002).

33. *Roper*, 543 U.S. at 557, 568-72.

34. *Id.* at 571.

35. *Roper*, 543 U.S. 551; *Atkins*, 536 U.S. 304.

36. The use of the death penalty as a deterrent to future criminal behavior is a separate consideration than the use of the death penalty to incapacitate the actual criminal offender, and therefore, as a result, prevent the crimes that the executed criminal may have potentially committed in the future.

37. *Roper*, 543 U.S. at 571; *accord Gregg v. Georgia*, 428 U.S. 153, 186 (1976).

38. *Roper*, 543 U.S. 551; *Atkins*, 536 U.S. 304.

almost ten percent increase in the number of murders, from 18,520 to 20,400, in the three years after the decision in *Furman v. Georgia* was announced.<sup>39</sup> While the Court did not find this increase conclusive of the death penalty's effect as a deterrent, it was concluded that while they "may nevertheless safely assume that there are murderers, such as those who act in passion, for whom the threat of death has little or no deterrent effect," there are those "carefully contemplated murders, such as murder for hire, where the possible penalty of death may well enter into the cold calculus that precedes the decision to act."<sup>40</sup> For these types of murders the Court concluded that the death penalty could serve as a deterrent.

This assessment of the death penalty's use as a deterrent and means of retribution are the guiding force behind the utilization of Supreme Court's own independent judgment in Eighth Amendment capital cases. Combined with evidence of the existence or non-existence of a national consensus, the Supreme Court has decided throughout the past thirty some years that the death penalty is unconstitutional when imposed on individuals under the age of eighteen, those classified as mentally retarded, and those offenders who were convicted of committing vicarious felony murder.<sup>41</sup>

### III. *Coker v. Georgia* and *Kennedy v. Louisiana*

In 1977, the Supreme Court in *Coker v. Georgia* held that the imposition of the death penalty for the rape of an adult woman, without the victim's resulting death, was unconstitutional.<sup>42</sup> The result of this decision was to overturn a Georgia statute that allowed the sentence of death for rape of an adult woman.<sup>43</sup> The Court in *Coker* looked to the

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39. *Gregg*, 428 U.S. at 186. The decision in *Furman* had the effect of invalidating almost all death penalty statutes and as such caused a moratorium of the death penalty.

40. *Id.* at 185-86.

41. *Roper*, 543 U.S. 551; *Atkins*, 536 U.S. 304; *Enmund v. Florida*, 458 U.S. 782 (1982).

42. *Coker v. Georgia*, 433 U.S. 584 (1977). Petitioner Coker, while serving various sentences for murder, rape, kidnapping, and aggravated assault, escaped from prison in August of 1974. *Id.* at 587. After the escape from prison, Coker entered the Carver house, obtained a knife from the kitchen, tied up Mr. Carver, took all of Mr. Carver's money and proceeded to rape Mrs. Carver. *Id.* After raping Mrs. Carver, Coker drove away in the Carver family car taking Mrs. Carver with him. *Id.* Coker was apprehended not long after by the police. *Id.* He was subsequently charged with escape, armed robbery, motor vehicle theft, kidnapping, and rape. *Id.* The defendant was convicted on these charges and was sentenced to death on the rape charge after a jury found that there had been aggravating circumstances. *Id.*

43. *Id.* See GA. CODE ANN. § 26-2001 (1972), *invalidated by Coker v. Georgia*, 433

history of the death penalty as a punishment for the crime of rape. In 1925, eighteen states as well as the District of Columbia and the Federal Government had statutes that allowed the death penalty in cases of rape of either an adult or a child.<sup>44</sup> In 1972, however, the Supreme Court decided the case of *Furman v. Georgia*,<sup>45</sup> which had the result of invalidating most of the state statutes that authorized the death penalty for the crime of rape. After the decision in *Furman*, only six states reenacted their statutes authorizing the death penalty for rape.<sup>46</sup> Yet by 1977, only Georgia had a valid statute authorizing the death penalty for adult rape.<sup>47</sup> The plurality in *Coker* also noted that in the majority of cases, juries had not imposed the death penalty for rape when they had the opportunity. The Court concluded on the basis of this history and “objective evidence of the country’s present judgment concerning the acceptability of death as a penalty for rape of an adult woman” that the death penalty as punishment for the rape of an adult woman where the woman was not killed was unconstitutional as a violation of the Eighth and Fourteenth Amendments.<sup>48</sup>

Fast forward over thirty years to 2008 and the Supreme Court was faced with a very similar issue: whether the imposition of the death penalty for the crime of child rape where the victim was not killed violated the Eighth Amendment’s prohibition on cruel and unusual punishment. On March 2, 1998, Patrick Kennedy called 911 to report that his eight-year-old stepdaughter had been raped.<sup>49</sup> It was originally reported to the local police that the rape was committed by two neighborhood boys who had allegedly dragged the victim from the garage of her home.<sup>50</sup> Due to inconsistencies in the victim’s original version of the rape and other conflicting evidence in the alleged crime scene, police arrested Patrick Kennedy eight days after the rape.<sup>51</sup>

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U.S. 584 (1977).

44. *Coker*, 433 U.S. at 593.

45. *Furman v. Georgia*, 408 U.S. 238 (1972).

46. *Coker*, 433 U.S. at 594.

47. *Id.* at 595-96.

48. *Id.* at 593.

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

50. *Id.*

51. It was originally alleged that the rape had occurred in the side yard of the Kennedy house. *Id.* at 2647. Upon inspection of the side yard, police found that the area was largely undisturbed but for a small patch of blood. *Id.* Additionally, police found blood on the underside of the victim’s mattress. *Id.* Police also discovered that Kennedy had made two phone calls: one to a colleague asking how to get blood out of a white carpet and the second to a carpet cleaning company requesting assistance in removing blood stains from a carpet. *Id.* These phone calls were placed over an hour before the

Patrick Kennedy was charged under Louisiana law with the aggravated rape of his then eight-year-old stepdaughter.<sup>52</sup> After a jury found Patrick Kennedy guilty of aggravated rape, he was sentenced to death under a state statute that authorized capital punishment for the rape of a child who was under twelve years of age.<sup>53</sup> The Louisiana Supreme Court upheld Patrick Kennedy's conviction and sentence, rejecting the contention that *Coker* barred the use of the death penalty as a punishment for rape.<sup>54</sup> The Louisiana Supreme Court "distinguished the rape of a child from the United States Supreme Court's decision in *Coker*. For while *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."<sup>55</sup>

The Supreme Court granted *certiorari*. "Based both on consensus and [their] own independent judgment, [the Court's] holding [was] that [the] death sentence for one who raped but did not kill a child, and who did not intend to assist another in killing the child, is unconstitutional under the Eighth and Fourteenth Amendments."<sup>56</sup> In reaching this conclusion, the Supreme Court looked once again to objective evidence to determine whether a national consensus existed in regards to the death penalty as punishment for the crime of child rape, where the child was neither killed nor was intended to be killed. The Court looked to the history of the death penalty for the crime of rape as its starting point in determining whether there was a national consensus. In 1925, eighteen states had statutes that authorized the death penalty for the rape of a child.<sup>57</sup> Between the years of 1930 and 1964, four hundred and fifty-five individuals were executed for rape.<sup>58</sup> It was in 1964 that the last known

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phone call to 911. *Id.*

52. *Id.*

53. LA. REV. STAT. ANN. § 14:42 (D)(2) (Supp. 1996), *invalidated by* Kennedy v. Louisiana, 128 S. Ct. 2641 (2008). The statute provides that "[a]ggravated rape is a rape committed . . . where the anal or vaginal sexual intercourse is deemed to be without lawful consent of the victim because it is committed under any one or more of the following circumstances . . . [such as] [w]hen the victim is under the age of twelve years. LA. REV. STAT. ANN. § 14:42 (A)(4) (Supp. 1996). The statute further provides that "if the victim was under the age of twelve years . . . [a]nd if the district attorney seeks a capital verdict, the offender shall be punished by death or life imprisonment . . . in accordance with the determination of the jury. LA. REV. STAT. ANN. § 14:42 (D)(1).

54. *Kennedy*, 128 S. Ct. at 2648.

55. *Louisiana v. Kennedy*, 957 So. 2d 757, 781 (La. 2007).

56. *Kennedy*, 128 S. Ct. at 2650-51.

57. *Id.* at 2651.

58. *Id.*

individual was executed for the rape of a child.<sup>59</sup>

After the decision in *Furman*, which had the effect of invalidating most state statutes that authorized the death penalty for the crime of rape, six states revised and reinstated their capital rape statutes.<sup>60</sup> By the end of 1977, all six of these statutes were invalidated.<sup>61</sup> In 1995, the state of Louisiana reenacted the death penalty for the rape of a child under the age of twelve.<sup>62</sup> Since 1995, five other states have enacted legislation allowing for the death penalty in some instances of child rape: Georgia, Montana, Oklahoma, South Carolina, and Texas.<sup>63</sup> The statutes in Montana, Oklahoma, South Carolina, and Texas make child rape a capital offense when the offender has a previous rape conviction.<sup>64</sup> Georgia's statute had the effect of making child rape a capital crime when aggravating circumstances existed.<sup>65</sup> Under Georgia's statute, aggravating circumstances included factors, such as the prior record of conviction for a capital offense, the crime being committed while the offender was engaged in another capital crime or in the commission of burglary or arson in the first degree, the crime being committed for the purpose of receiving money, or the crime was outrageously vile or inhuman.<sup>66</sup>

The Court in reaching a conclusion about the existence of a national consensus compared this data with that in *Atkins*, *Roper*, and *Enmund*. In *Atkins*, the Court noted that thirty states prohibited the death penalty for mentally retarded individuals.<sup>67</sup> In *Roper*, there was a similar amount of states prohibiting the imposition of the death penalty on those under the age of eighteen.<sup>68</sup> In *Enmund*, only eight jurisdictions allowed the imposition of the death penalty for participation in a robbery during the course of which an accomplice committed murder.<sup>69</sup> In comparison, the Court found that the six states allowing for the imposition of the death

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59. *Id.* Ronald Wolfe was executed in 1964.

60. *Id.* Georgia, North Carolina, and Louisiana reenacted their statutes for all rape offenses. Florida, Mississippi, and Tennessee reenacted their statutes only in respect to child rape. *Id.*

61. *Id.* The decision in *Coker* invalidated the last of the six statutes that had been reenacted.

62. *Id.* The statute later was modified to allow for the death penalty for the rape of a child less than thirteen years of age, instead of twelve.

63. *Id.*

64. *Id.*

65. GA. CODE ANN. § 17-10-30(b) (Supp. 2007).

66. GA. CODE ANN. § 17-10-30(b)(1-11) (Supp. 2007).

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

68. *Id.*

69. *Id.*

penalty in cases of child rape was not evidence of a national consensus.

The evidence of a national consensus with respect to the death penalty for child rapists, as with respect to juveniles, mentally retarded offenders, and vicarious felony murderers, shows divided opinion but, on balance, an opinion against it. Thirty-seven jurisdictions – 36 States plus the Federal Government – have the death penalty. As mentioned above, only six of those jurisdictions authorize the death penalty for rape of a child. Though our review of national consensus is not confined to tallying numbers of States with applicable death penalty legislation, it is of significance that, in 45 jurisdictions, petitioner could not be executed for child rape of any kind. That number surpasses the 30 States in *Atkins* and *Roper* and the 42 States in *Enmund* that prohibited the death penalty under the circumstances those cases considered.<sup>70</sup>

It was acknowledged that an otherwise consistent direction of change in legislative enactments might otherwise “counterbalance an otherwise weak demonstration of consensus,” but the Court ultimately determined that there had been no showing that a consistent change had occurred.<sup>71</sup>

Beyond the consideration of legislative enactments, state practice in regards to executions and jury sentencing decision also factored into the determination of the non-existence of a national consensus. It was found highly significant that while nine states had permitted the death penalty for rape for some period of time between 1972 and 2008, no state had executed any individual for the rape of either an adult or a child since 1964. The Court noted that at the time of its decision there were only two individuals on death row in the United States for non-homicide crimes.<sup>72</sup> Based on this objective evidence, the Supreme Court concluded that there was no national consensus in support of capital punishment for the crime of child rape. To the contrary, it was the conclusion of the Supreme Court that there was a national consensus *against* the imposition of the death penalty for the rape of a child.

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70. *Id.* at 2653.

71. *Id.* at 2656.

72. *Id.* at 2657. Besides Patrick Kennedy, Richard Davis has also been convicted of the aggravated rape of a five-year-old child and sentenced to death by a Louisiana jury. *Id.*

Having concluded that there was a national consensus against the use of capital punishment as a penalty for the crime of child rape, the Court went on to utilize its own independent judgment. It was recognized that the victim of child rape would suffer from potentially permanent psychological and emotional damage.<sup>73</sup> Despite this recognition of the far-reaching impact of child rape on its victim, the Court found that “there [was] a distinction between intentional first-degree murder on the one hand and nonhomicide crimes against individual persons, even including child rape, on the other.”<sup>74</sup> This distinction lies in the fact that murder is irrevocable in its effect. Likewise, the Court views capital punishment as unique and the most severe of all punishments for its irrevocability.

Further, the Court took into consideration the number of instances of reported child rape versus that of first-degree murder.<sup>75</sup> The Court notes that “approximately 5,702 incidents of vaginal, anal, or oral rape of a child under the age of 12 were reported nationwide in 2005.”<sup>76</sup> This number was twice the amount of “total incidents of intentional murder for victims of all ages (3,405) reported during the same period.”<sup>77</sup> This significantly large pool of offenders who would potentially be subject to capital punishment conflicts with the principle behind many of the Court’s decisions that use of the death penalty should be narrowed to only the most depraved offenders. The Court also expressed concern that the characteristics of the crime of child rape could potentially overwhelm a juror’s judgment, leading to the arbitrary imposition of the death penalty.<sup>78</sup>

Looking towards the death penalty’s possible effect as a deterrent against future instances of child rape, the Supreme Court weighed into the balance the fact that child sexual abuse is underreported. “[O]ne of the most commonly cited reasons for the nondisclosure [of child rape] is the fear of negative consequences for the perpetrator . . . .”<sup>79</sup> This fear has increased relevance when the alleged perpetrator is a family member. In the reasoning of the Court, the fear of the consequences for the perpetrator is increased when capital punishment is an option. This increased fear, due to the availability of the death penalty as a potential

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73. *Id.* at 2658.

74. *Id.* at 2660.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* at 2661.

79. *Id.* at 2664.

sanction, would possibly lead to a decrease in disclosure of child rape. This decrease in disclosure would be counterproductive to any possible deterrent benefits derived from the utilization of the death penalty. “In addition, by effectively making the punishment for child rape and murder equivalent, a State that punishes child rape by death may remove a strong incentive for the rapist not to kill the victim.”<sup>80</sup> These concerns, supported by evidence of a national consensus, led the majority to conclude that the death penalty as a sanction for child rape where the victim was not killed violated the Eighth and Fourteenth Amendments.<sup>81</sup>

The conclusion drawn by the Court that there existed a national consensus against the use of the death penalty as a sanction for child rape was contested by Justice Alito’s dissent. “In assessing current norms, the Court relies primarily on the fact that only 6 of the 50 states now have statutes that permit the death penalty for this offense. But this statistic is a highly unreliable indicator of the views of state lawmakers and their constituents.”<sup>82</sup> As a result of the Court’s decision in *Coker*, legislatures have been stunted in their consideration of the matter. While the holding in *Coker* was specific to the unconstitutionality of the death penalty for the rape of adult women, the *dicta* and reasoning behind the opinion suggested that the death penalty would be unconstitutional in all instances of rape where the victim was not killed. Justice Alito’s dissent lists the numerous state court decisions that have misconstrued the *Coker* decision.<sup>83</sup> In *Utah v. Gardner*, it was said “[t]he *Coker* holding leaves no room for the conclusion that any rape, even an ‘inhuman’ one involving and aggravated battery but not resulting in death, would constitutionally sustain imposition of the death penalty.”<sup>84</sup> Likewise, in *Merrow v. Georgia*, it was determined that while Georgia law continued to “prescribe that the death penalty may be imposed for some crimes (e.g., armed robbery, rape, kidnapping with bodily injury)” that “constitutional decisional law prescribes that the death penalty cannot be imposed where no death results.”<sup>85</sup>

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80. *Id.*

81. *Id.* at 2665 (Alito, J., dissenting).

82. *Id.*

83. *Id.* at 2666 (Alito, J., dissenting).

84. *Id.* at 2667 (Alito, J., dissenting) (quoting *Utah v. Gardner*, 947 P.2d 630, 653 (Utah 1997)).

85. *Merrow v. Georgia*, 601 S.E.2d 428, 429-30 (Ga. Ct. App. 2004) (citing *Coker v. Georgia*, 433 U.S. 584 (1977)). In 2008 prior to the decision in *Kennedy*, the Georgia Supreme Court recognized that the United States Supreme Court had not yet “addressed whether the death penalty is unconstitutionally disproportionate for the crime of raping a child.” *Georgia v. Velazquez*, 657 S.E.2d 838, 840 (Ga. 2008). The statement in

Even those courts that did not misconstrue the holding in *Coker* recognized that *Coker* raised doubts as to whether statutes that allowed for the death penalty for non-homicide crimes could be constitutionally sustained.<sup>86</sup> In *People v. Hernandez*, the California Supreme Court recognized that the decision in *Coker* raised “serious doubts that the federal Constitution permitted the death penalty for any offense not requiring the actual taking of human life.”<sup>87</sup> And in *People v. Huddleston*, the Illinois Supreme Court also recognized that “the constitutionality of state statutes that impose[d] the death penalty for nonhomicide crimes [was] the subject of debate.”<sup>88</sup> These doubts as to the constitutionality of capital punishment for non-homicide crimes such as child rape were further fostered by the Court’s decision in *Eberheart v. Georgia*, where the Court vacated the death penalty for the crime of aggravated kidnapping, and their decision in *Enmund*, where the use of the death penalty as a sanction for those vicariously involved in felony murder was held unconstitutional.<sup>89</sup>

For the past three decades, these interpretations [and doubts] have posed a very high hurdle for state legislatures considering the passage of new laws permitting the death penalty for the rape of the child. The enactment and implementation of any new state death penalty statute—and particularly a new type of statute such as one the specifically targets the rape of young children—imposes many costs. There is the burden of drafting an innovative law that must take into account this Court’s exceedingly complex Eighth Amendment jurisprudence . . . . And if the law is eventually overturned, there is the burden of new proceedings on remand . . . . Accordingly, the *Coker* dicta gave state legislators a strong incentive not to push for the enactment of new capital child-rape laws even though these legislators and their constituents may have believed that the laws would be appropriate and

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*Velazquez*, while clarifying the position of the Georgia Supreme Court, does not discount the argument that many courts have misconstrued the holding in *Coker*.

86. See *People v. Hernandez*, 30 Cal. 4th 835, 867 (2003); *Leatherwood v. State*, 548 So. 2d 389, 406 (Miss. 1989).

87. *Hernandez*, 30 Cal. 4th at 867.

88. *People v. Huddleston*, 816 N.E.2d 322, 341 (Ill. 2004).

89. *Eberheart v. Georgia*, 433 U.S. 917, 917 (1977). *Enmund v. Florida*, 458 U.S. 782 (1982).

desirable.<sup>90</sup>

This suppression of the natural development of legislative enactments can be seen in the arguments made by the opposition to proposed capital rape statutes in Oklahoma, South Carolina, and Texas.<sup>91</sup> In all three states, opponents argued that the statutes would be wasteful and doomed, as the *Coker dicta* suggested that these statutes would be held unconstitutional.<sup>92</sup> Keith Hampton, a spokesperson for the Texas Criminal Defense Lawyers Association stated that the then-proposed statute was “not going to be constitutional.”<sup>93</sup> Likewise, Barbara Bergman, President of the National Association of Criminal Defense Lawyers, argued that Supreme Court decisions limited the death penalty to instances where a life was taken.<sup>94</sup> In 2006, in response to the South Carolina Senate passing a bill that authorized the death penalty for defendants convicted twice for the rape of a child under the age of eleven, it was argued that the law “violate[d] the Eighth Amendment’s prohibition on cruel and unusual punishment.”<sup>95</sup>

Legal commentators have also repeatedly expressed the viewpoint that the Supreme Court’s decision in *Coker* could be applied to prohibit the imposition of the death penalty for all rapists regardless of the age of the victim. In one law review article attempting to predict the decision of the Supreme Court in *Kennedy*, it was stated that

the Court’s plurality opinion [in *Coker*] supports one simple conclusion--the death penalty is disproportionate punishment for rape because the victim does not die. Stated alternatively, it is unconstitutional to execute the perpetrator of a crime unless the victim dies. This simple rationale seems to apply as equally to the rape of a child under the age of twelve as it does to the rape of an adult woman.<sup>96</sup>

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90. *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2667-68 (2008).

91. *Id.* at 2668.

92. *Id.*

93. Mike Ward, *Victims Groups, Prosecutors See Problems with Dewhurst Proposal*, STATESMAN, Jan. 22, 2007, <http://www.statesman.com/search/content/region/legislature/stories/01/23/23jessica.html>.

94. *Oklahoma Gov. Approves Death Penalty for Repeat Child Molesters*, FOX NEWS, June 9, 2006, <http://www.foxnews.com/story/0,2933,198931,00.html>.

95. Colin Garrett, *Death Watch: South Carolina Death Penalty for Child Rapists ‘Likely to be Unconstitutional’*, 30 CHAMPION 46 (June 2006).

96. David W. Schaaf, *What if the Victim is a Child? Examining the Constitutionality of Louisiana’s Challenge to Coker v. Georgia*, 2000 U. ILL. L. REV. 347,

In another article that discussed the use of the death penalty for non-homicide crimes, it was argued that by “[c]ombining the Coker reasoning with the logic behind the Enmund decision, the Supreme Court . . . [would] find that the use of the death penalty for a crime which does not involve the death of another human being is grossly disproportionate.”<sup>97</sup> This argument was based on the view that “[t]he plurality in Coker chose to draw a bright-line rule between homicide and non-homicide crimes when it came to the application of the death penalty.”<sup>98</sup> And yet another article claimed that in *Coker*, “the Supreme Court ruled that the imposition of the death penalty for crimes from which no death results violates the cruel and unusual punishment provision of the eighth amendment.”<sup>99</sup> And still, another article noted that “[i]mposing the death penalty for nonhomicides ha[d] been legally troubling since 1977.”<sup>100</sup> As the article explained, it had become so troubling because it was in that year that “the U.S. Supreme Court held in *Coker* . . . that the Eighth Amendment’s ban on cruel and unusual punishment prevents states from executing defendants who rape adult woman.”<sup>101</sup>

With the natural development of legislative enactments curtailed, inaction by state legislatures is not necessarily evidence of a societal view disfavoring capital punishment in child rape cases. In light of the shadow of *Coker*, it seems that more weight should be given to the six states that enacted capital child rape statutes. The actions of those states, despite the doubts created by *Coker* about the constitutionality of the statutes enacted, suggest a deep societal concern about the punishment of child rapists.

This societal concern coincides with the increase in number of reported cases of child sexual abuse since the mid-1970s.<sup>102</sup> In 1976, the number of reported cases of sexual abuse was six thousand.<sup>103</sup> By 1990,

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353-54 (2000).

97. Jeffrey C. Matura, *When Will It Stop? The Use of the Death Penalty for Non-homicide Crimes*, 24 J. LEGIS. 249, 262 (1998).

98. *Id.* at 252.

99. Leigh Dingerson, *Reclaiming the Gavel: Making Sense Out of the Death Penalty Debate in State Legislatures*, 18 N.Y.U. REV. L. & SOC. CHANGE 873, 878 (1991).

100. Michael Higgins, *Is Capital Punishment For Killers Only?*, 83 A.B.A. J. 30, 30 (Aug. 1997).

101. *Id.*

102. Arthur J. Lurigio, Marylousie Jones & Barbara E. Smith, *Child Sexual Abuse: Its Causes, Consequences, and Implications for Probation Practice*, 59 FED. PROBATION 69, 69 (Sept. 1995).

103. *Id.*

there were an estimated one hundred and forty-six thousand cases of child sexual abuse.<sup>104</sup> In 2003, there were an estimated ninety thousand cases of child sexual abuse.<sup>105</sup> As a result, this concern with the sexual abuse of children has manifested itself in the enactment of various statutes that require the registration of convicted sex offenders in all of the fifty states.<sup>106</sup> In addition, many states also have statutes permitting the involuntary commitment of “sexual predators” or statutes that impose residency and employment restrictions on individuals who are convicted sex offenders.<sup>107</sup>

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104. Crimes Against Children Research Center, *Sexual Abuse*, <http://www.unh.edu/ccrc/sexual-abuse/Child%20Sexual%20Abuse.pdf>.

105. *Id.* at 2.

106. *Kennedy*, 128 S. Ct. at 2670. For a list of state statutes, *see id.* at n.3 (*citing* ALA. CODE §§ 13A-11-200, 13A-11-201(1994); ALASKA STAT. §§ 1.56.840, 12.63.010-100, 18.65.087, 28.05.048, 33.30.035 (1995 and 1995 Cum. Supp.); ARIZ. REV. STAT. ANN. §§ 13-3821 to 3825 (1989 and Supp. 1995); ARK. CODE ANN. §§ 12-12-901 to 909 (1995); CAL. PENAL CODE §§ 290 to 290.4 (West Supp. 1996); COLO. REV. STAT. ANN. § 18-3-412.5 (1996); CONN. GEN. STAT. ANN. §§ 54-102a to 54-102r (West Supp. 1995); DEL. CODE ANN. tit. 11, § 4120 (1995); FLA. STAT. ANN. §§ 775.13, 775.22 (West 1992 and Supp. 1994); GA. CODE ANN. § 42-9-44.1 (1994); Act of June 14, 1995, 1995 Haw. Sess. Laws 160; IDAHO CODE ANN. §§ 9-340(1)(f), 18-8301 to 18-8311 (Supp. 1995); ILL. COMP. STAT. ANN. ch. 730 §§ 150/1 to 150/10 (West 2002); IND. CODE §§ 5-2-12-1 to 5-2-12-13 (West Supp. 1995); Act of May 3, 1995, 1995 Iowa Legis. Serv. 146 (West); KAN. STAT. ANN. §§ 22-4901 to 4910 (1995); KY. REV. STAT. ANN. §§ 17.500 to 540 (West Supp. 1994); La. Rev. Stat. Ann. §§ 15:540 to 549 (Supp. 1995); ME. REV. STAT. ANN. tit. 34-A, §§ 11001 to 11004 (Supp. 1995); Act of May 9, 1995, 1995 Md. Laws 142; MASS. GEN. LAWS ANN. ch. 6, § 178D; Act of July 13, 1994, 1994 Mich. Pub. Acts 295; MINN. STAT. § 243.166 (1992 and Supp. 1995); MISS. CODE ANN. §§ 45-33-1 to 45-33-19 (Supp. 1995); MO. REV. STAT. §§ 566.600 to 625 (Supp. 1996); MONT. CODE ANN. §§ 46-23-501 to 507 (1994); NEB. REV. STAT. §§ 4001 to 4014; NEV. REV. STAT. §§ 207.080, 207.151 to 157 (1992 and Supp. 1995); N.H. REV. STAT. ANN. §§ 632-A:11 to A:19 (Supp. 1995); N.J. STAT. ANN. §§ 2c: 7-2 to 7-11 (West 1995); N.M. STAT. ANN. §§ 29-11A-1 to 11A-8 (West Supp. 1995); N.Y. CORRECT. LAW §§ 168 to 168-V (McKinney Supp. 1996); N.C. GEN. STAT. §§ 14-208.5 to 208.10 (Supp. 1995); N.D. CENT. CODE § 12.1-32-15 (Supp. 1995); OHIO REV. CODE ANN. §§ 2950.01 to 2950.08 (West 1997); OKLA. STAT. tit. 57, §§ 582 -84 (Supp. 2003); ORE. REV. STAT. §§ 181.507-519 (1993); Act of Oct. 24, 1995 Pa. Laws 24; R.I. GEN. LAWS § 11-37-16 (1994); S.C. CODE ANN. § 23-3-430; S.D. CODIFIED LAWS §§ 22-22-30 to 22-22-41 (Supp. 1995); TENN. CODE ANN. §§ 40-39-101 to 40-39-108 (2003); TEX. REV. CIV. STAT. ANN. art. 6252-13c.1 (Vernon Supp. 1996); UTAH CODE ANN. §§ 53-5-212.5, 77-27-21.5. (Supp. 1995); VT. STAT. ANN. tit. 13, § 5402; VA. CODE ANN. §§ 19.2-298.1 to 390.1 (1995); WASH. REV. CODE §§ 4.24.550, 9A.44.130, 9A.44.140, 10.01.200, 70.48. 470, 72.09.330 (1992 and Supp. 1996); W. VA. CODE §§ 61-8F-1 to 61-8F-8 (Supp. 1995); WIS. STAT. § 174.45 (Supp. 1995); WYO. STAT. ANN. §§ 7-19-301 to 306 (1995)).

107. *Kennedy*, 128 S. Ct. at 2670. There are twenty-one states with statutes permitting the involuntary commitment of sexual predators. For a list of these twenty-one statutes, *see id.* at n.4 (*citing* ARIZ. REV. STAT. §§ 36-3701 to 3713 (2003 and Supp. 1998); CAL. WELF. & INST. CODE §§ 6600 to 6609. 3 (West 1998 and Supp. 2008); CONN. GEN. STAT. § 17a -566 (1998); FLA. STAT. ANN. §§ 394.910 to 931 (West 2002

This societal concern has grown not only out of the dramatic increase in the number of reported instances of child rape and sexual abuse, but also from the growing awareness of the corresponding physical, psychological and social effects on victims of child rape. The physical problems that result from child rape have been reported as “abdominal pain, vomiting, urinary tract infections, perineal bruising and tearing, pharyngeal infections, and venereal diseases.”<sup>108</sup> There has also been research to suggest that the trauma sustained by a child during rape could be one of the “cause[s] of the early onset cervical cancer.”<sup>109</sup> Beyond the physical effects of child rape, a victim of child rape is likely to suffer from potentially severe psychological problems.

Psychological problems stemming from child rape include depression, insomnia, sleep disturbances, nightmares, compulsive masturbation, loss of toilet training, sudden school failure, and unprovoked crying. The child who has been raped is also subject to feelings of guilt, poor self-esteem, feelings of inferiority, self-destructive behavior, a greater likelihood of becoming a drug or alcohol addict, and increased suicide attempts. Furthermore, evidence suggests that these disturbances follow the child into adulthood.<sup>110</sup>

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and Supp. 2005); 725 ILL. COMP. STAT. §§ 207/1 to 201/99 (2002); IOWA CODE §§ 229A.1 to .16 (Supp. 2005); KAN. STAT. ANN. § 59-29a02 (2004 and Supp. 2005); KY. REV. STAT. ANN. § 202A.051; MASS. GEN. LAWS ch. 123A (1989); MINN. STAT. § 253B.02 (1992); MO. ANN. STAT. §§ 632.480 to 513 (West 2000 and Supp. 2006); NEB. REV. STAT. §§ 83-174 to 83-174.05 (2007); N.J. STAT. ANN. §§ 30:4 -27.24 to 30:4-27.38 (West Supp. 2004); N.D. CENT. CODE § 25-03.3 (2002); ORE. REV. STAT. § 426.005 (1998); 42 PA. STAT. ANN. §§ 9791-99 (West 2007); S.C. CODE ANN. §§ 44-48-10 to 44-48-170 (2002 and Supp. 2007); TEX. HEALTH & SAFETY CODE ANN. §§ 841.001 to 841.147 (Vernon 2003); VA. CODE ANN. §§ 37.2-900 to 920 (2006 and Supp. 2007); WASH. REV. CODE § 71.09.010 (1992 and Supp. 2002); WIS. STAT. § 980.01-13 (2005). There are at least 11 states that have enacted residency restrictions for sex offenders. *See* ALA. CODE § 15-20-26 (Supp. 2000); ARK. CODE ANN. § 5-14-128 (Supp. 2007); CAL. PENAL CODE § 3003 (West Supp. 2008); FLA. STAT. § 947.1405 (7)(a)(2)(2001); GA. CODE ANN. § 42-1-13 (Supp. 2007); 720 ILL. COMP. STAT. § 5/11 – 9.3(b-5) (Supp. 2008); KY. REV. STAT. ANN. § 17.495 (West 2000); LA. REV. STAT. ANN § 14:91.1 (Supp. 2004); OHIO REV. CODE ANN. § 2950.031 (LexisNexis 2003); OKLA. STAT. ANN. tit. 57, § 590 (West 2003); ORE. REV. STAT. §§ 144.642-643 (1999)).

108. Melissa Meister, *Murdering Innocence: The Constitutionality of Capital Child Rape Statutes*, 45 ARIZ. L. REV. 197, 208-09 (2003).

109. *Id.* at 209.

110. *Id.*

Yet due to the language and reasoning of *Coker*, there is a high level of likelihood that state legislatures were unnaturally influenced in their actions in considering capital child rape enactments. Despite this possibility of a constrained legislature, the majority found there to be sufficient evidence that there was a national consensus against the imposition of the death penalty in instances of child rape that did not result in death of the child. This conclusion was supported by the Court's own independent judgment, leading it to conclude that capital child rape statutes were unconstitutional as cruel and unusual under the Eighth and Fourteenth Amendments.

#### IV. Impact of *Kennedy v. Louisiana*

The immediate effect of the Supreme Court's decision in *Kennedy v. Louisiana* was readily apparent in the invalidation of the capital child rape statutes, not only in Louisiana, but also in Texas, South Carolina, Georgia, Montana, and Oklahoma.<sup>111</sup> The holding that the death penalty was unconstitutional as a penalty for child rape also had the effect of removing that particular sanction from the consideration of other state legislatures. Before the decision had been reached, there was evidence that the states of Alabama, Colorado, Mississippi, Missouri and Tennessee had been contemplating legislation authorizing the death penalty for child rape.<sup>112</sup>

In fact, after the Supreme Court announced its decision in *Kennedy*, eighty-five members of Congress sent a letter to the Court asking that its ruling be reconsidered.<sup>113</sup> That letter reflected a concern with the Court's failure to recognize a 2006 amendment that had been passed by Congress that allowed for the death penalty for the crime of child rape under the Uniformed Code of Military Justice. The Court was urged to consider the fact that the provision allowing for the death penalty in child rape cases passed the House of Representatives by a vote of three hundred and seventy four to forty-one, and passed in the Senate by a vote of ninety-five to zero.<sup>114</sup> The eighty-five members of Congress urged that this

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111. Linda Greenhouse, *Supreme Court Rejects Death Penalty for Child Rape*, N.Y. TIMES, June 26, 2008, available at [http://www.nytimes.com/2008/06/26/washington/26scotuscnd.html?pagewanted=1&\\_r=](http://www.nytimes.com/2008/06/26/washington/26scotuscnd.html?pagewanted=1&_r=).

112. Brief for Texas, et al., as Amici Curiae Supporting Respondents, No. 07-343, 2008 WL 782550, at \*10, (U.S. Mar. 19, 2008), for *Kennedy v. Louisiana*, 128 S. Ct. 2641 (2008).

113. *Rep. Cubin Signs Letter Asking Court to Reconsider Child Rape Decision*, US FED. NEWS, July 23, 2008, available at 2008 WLNR 13782270.

114. *Id.*

voting record showed evidence of a national consensus. The Court denied the request to rehear the case, maintaining its original holding: the death penalty as a penalty for child rape is unconstitutional as a violation of the Eighth and Fourteenth Amendments.<sup>115</sup>

The decision in *Kennedy*, however, reached far beyond the instances of child rape.<sup>116</sup> While the Court's holding did not address offenses against the State, such as "treason, espionage, terrorism, and drug kingpin activity," the holding is not limited to child rape but is also applicable to other criminal offenses against an individual where the victim is not killed.<sup>117</sup> The Court held that "[a]s it relates to crimes against individuals . . . the death penalty should not be expanded to instances where the victim's life was not taken."<sup>118</sup> The holding therefore limits state legislators not just in terms of using the death penalty for instances of child rape, but also in the use of the death penalty as a punishment for almost all non-murder crimes. In being so constrained, state legislators cannot freely advocate for the consensus and will of their constituents.

State legislators and members of Congress, as elected officials, are supposed to serve as the voice of their constituents. A holding restricting state legislators and members of Congress has the ultimate effect of limiting the voice of the people.

[I]n a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people. The deference we owe to the decisions of the state legislatures under our federal system, is enhanced where the specification of punishment is concerned, for these peculiarly questions of legislative policy. Caution is necessary lest this Court become, under the aegis of the Cruel and Unusual Punishment Clause, the ultimate arbiter of the standards of criminal responsibility . . . throughout the country. A decision that a given punishment is impermissible under the Eighth Amendment cannot be reversed short of a constitutional amendment. The ability of the people to express their preference through the normal democratic

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115. *Kennedy v. Louisiana*, 129 S. Ct. 1 (2008) (Mem.).

116. *Kennedy*, 128 S. Ct. at 2659.

117. *Id.*

118. *Id.*

processes, as well as through ballot referenda, is shut off.<sup>119</sup>

Beyond the effect on the ability of state legislatures as the voice of their constituents to enact statutes allowing for the death penalty in non-murder crimes, there is also a non-obvious effect on state practices with respect to capital punishment. As capital punishment is now circumscribed to instances of murder and potentially crimes against the state, the number of offenders exposed to the possible sanction of the death penalty will be necessarily limited. As the Court in *Kennedy* noted, there were “[a]pproximately 5,702 incidents of vaginal, anal, or oral rape of a child under the age of 12 were reported nationwide in 2005.”<sup>120</sup> The associated number of offenders connected with those reported incidents of child rape are now permanently excluded, as a result of the Court’s decision in *Kennedy*, from the pool of individuals who could have been exposed to the death penalty. And while it cannot be proven to an absolute certainty, a limited pool of offenders who are potentially vulnerable to the death penalty will almost certainly result in a decreased number of offenders who will be sentenced to death in comparison to the number of individuals that would have been sentenced with capital punishment had the pool of potential offenders been more encompassing. As the Court has, in previous cases, looked towards the actual numbers of individuals sentenced to death as evidence of the existence or non-existence of a national consensus, this potentially decreased number, therefore, has the potential of impacting the Supreme Court’s determination in future death penalty cases.<sup>121</sup> By manipulating the possible pool of offenders exposed to the death penalty, the Supreme Court has unnaturally influenced one of the very “objective factors” of state practice that it has typically relied on in determining whether or not there is a natural consensus concerning death penalty regulations.

The impact of the Supreme Court’s decision in *Kennedy v. Louisiana* affects not only the actual statutes that it has invalidated; it also has an impact on future state enactments and future state practice in regards to execution. These two areas of impact coincide with two of the main areas that influence the Court in its determination of the existence

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119. *Gregg v. Georgia*, 428 U.S. 153, 175-76 (1976) (internal quotations and citations omitted).

120. *Kennedy*, 128 S. Ct. at 2660. It is noted in *Kennedy* that this number is twice that of the total number of incidents of intentional murder for the same time period. *Id.*

121. See *Roper v. Simmons*, 543 U.S. 551, 564-65 (2005); *Atkins v. Virginia*, 536 U.S. 304, 316 (2002); *Coker v. Georgia*, 433 U.S. 584, 597 (1977).

of a national consensus. As a result, under the current scheme of Eighth Amendment capital jurisprudence, the *Kennedy* decision will ultimately have an influence on the objective evidence that is utilized in the determination of whether there is a national consensus in future death penalty cases. So while the decision in *Kennedy* has only been a partial victory for those that oppose the death penalty,<sup>122</sup> it is possible that this current victory eventually could lead to the ultimate triumph for those morally opposed to capital punishment: the declaration that the death penalty itself is cruel and unusual punishment.

Yet, perhaps that outcome is implicit in the very concept of “evolving standards of decency that mark the progress of a maturing society.”<sup>123</sup> The words “evolving,” “progress,” and “maturing” denote the idea that society with its evolving standards of decency is moving towards some ultimate ideal of society. For as the majority in *Kennedy* stated in response to the concern that it was, by its own actions, interfering with the natural development of consensus:

these concerns overlook the full meaning and substance of the established proposition that the Eighth Amendment is defined by the evolving standards of decency that mark the progress of a maturing society. Confirmed by repeated, consistent rulings of this Court, this principle requires that use of the death penalty be restrained. The rule of evolving standards of decency with specific marks on the way to full progress and mature judgment means that resort to the penalty must be reserved for the worst of crimes and limited in its instances of application.<sup>124</sup>

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122. However, even those that morally oppose the death penalty have criticized the *Kennedy* decision for its reasoning.

123. *Kennedy*, 128 S. Ct. at 2664 (quotation omitted).

124. *Id.* at 2664-65 (internal punctuation and citation omitted).