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Shirley Huang, Esq.*¹

Introduction

The human capacity for good and compassion makes the death penalty tragic; the human capacity for evil and depraved behavior also makes the death penalty necessary.²

Rape is “one of the most egregiously brutal acts one human being can inflict upon another,”³ and has been described as a “fate worse than death.”⁴ Child rape is perhaps the worst crime one can commit, arguably second only to murder.⁵ It was not until the mid-1980s that the media brought child sexual abuse to the nation’s attention as a serious issue.⁶

In 1976, the Supreme Court decided that sentencing a defendant to death for the crime of rape violates the Eighth Amendment because it constitutes punishment that is grossly disproportionate to the crime committed.⁷ For more than thirty years, the constitutionality of classifying child rape as a capital crime has been questioned.⁸ The Court recently ended the ambiguity in *Kennedy v. Louisiana* by determining that the death penalty is an inappropriate sanction for child rapists, where the victim is left alive.⁹

This article explores the constitutionality of the death penalty for the crime of child rape, focusing specifically on Louisiana’s capital child rape statute.¹⁰ Part II briefly outlines the Supreme Court’s child rape decisions. Part III examines the practical and theoretical problems associated with using capital punishment in the context of child rape. Part IV suggests ways to amend child rape statutes to provide for the death penalty in a way that does not violate the Eighth Amendment.

Prepping the United States Supreme Court for Judicial Review of Capital Punishment for Child Rapists

The Supreme Court Holds that Capital Punishment in Cases Where the Victim is an Adult is Unconstitutional

Pre-*Coker v. Georgia*

Eighteen states, the District of Columbia, and the federal government allowed the use of the death penalty for the rape of an adult woman in 1925.¹¹ Almost fifty years later, that number had barely decreased.¹² In *Furman v. Georgia*,¹³ the Court held that the death penalty as imposed in the cases before the Court constituted cruel and unusual punishment. As a result of the decision, states with capital rape statutes were forced to reconsider and revise their statutes so as not to be arbitrary and capricious.¹⁴ Although states began to reinstate the death penalty after *Gregg v. Georgia*,¹⁵ only Georgia, North Carolina, and Louisiana maintained rape as a capital crime.¹⁶

Coker v. Georgia

In 1974 Ehrlich Coker was sentenced to death after being convicted of the rape of a sixteen-year-old woman. Section 26-2001 of the Georgia Criminal Code provided that “(a) person convicted of rape shall be punished by death or by imprisonment for life, or by imprisonment for not less than one nor more than 20 years.”¹⁷ Defendant Coker argued that the state statute violated the cruel and unusual punishment clause of the Eighth Amendment, and the Court agreed.¹⁸ Following the *Coker* decision, states followed suit and revised their rape and death penalty statutes to reflect the holding.¹⁹

Between 1989 and 1995 no jurisdiction in the United States authorized the death penalty as punishment for the crime of rape.²⁰ However, this changed in 1996 when Louisiana passed its capital rape statute and sentenced Anthony Wilson and Patrick Bethley to death for raping a child under the age of twelve.²¹ The Louisiana capital rape statute made the death penalty a potential punishment for aggravated rape of a child under the age of thirteen.²²

Capital Child Rape in Louisiana Courts

*State v. Wilson*²³ was the first case after *Coker* to challenge a child rape statute. In 1995, Anthony Wilson was indicted by a grand jury for aggravated rape of a five year old girl.²⁴ His case was consolidated with that of Patrick Dewayne Bethley, who was charged with raping three girls under the age of ten, including his daughter.²⁵ Defense counsel moved to quash the indictments arguing that imposing the death penalty for the crime of rape would constitute cruel and unusual punishment under the Eighth Amendment to the Constitution.²⁶ The trial courts in Wilson and Bethley's cases agreed with the defense on the grounds that the punishment was excessive and the class of eligible defendants had not been sufficiently limited.²⁷ The State appealed both cases to the Louisiana Supreme Court which held that "in the case of the rape of a child under the age of twelve, the death penalty is not an excessive punishment nor is it susceptible of being applied arbitrarily and capriciously."²⁸ The United States Supreme Court denied certiorari based on lack of jurisdiction because Bethley had not been convicted or sentenced to death when the challenges were made.²⁹

Recently the Supreme Court reconsidered the issue of capital punishment for child rapists in its decision in *Kennedy*. In 1998, Patrick Kennedy was charged with aggravated rape of a victim under the age of twelve: his eight-year-old stepdaughter.³⁰ The State of Louisiana sought the death penalty and the jury subsequently found the defendant guilty.³¹ In the penalty sentencing phase, the jury unanimously recommended a death sentence.³²

Was the Decision in Kennedy the Right One?

Could it merely have been a coincidence that the more liberal justices made up the majority of the *Coker* Court that found the Louisiana statute unconstitutional?³³ *Coker* noted the importance of the Justices looking beyond their own opinions to more objective factors.³⁴ Louisiana Governor Bobby Jindal proclaimed that the five liberal justices who voted the statute unconstitutional did "not share the same 'standards of decency' as the people of Louisiana."³⁵ Naturally, Justices' personal opinions will affect their judicial decisions.³⁶ In *Coker*, dicta of the majority suggest a trend toward abolishing the death penalty.³⁷ The Court's decision in *Kennedy* both embraces *Coker*'s instruction to look toward objective factors and appears to continue the trend toward the outright abolition of the death penalty in the

United States.

Is The Death Penalty Proportionate to The Crime of Child Rape?

The *Coker* Court seemed to approach the death penalty with the theory of "an eye for an eye," finding that the death penalty is appropriate for murder, but not rape.³⁸ Past decisions where the death penalty has been sought in non-homicide cases have subsequently been determined to be unconstitutional.³⁹

Is the United States Evolving Towards Putting Child Rapists To Death?

The concept of "[cruel and unusual]" must draw its meaning from evolving standards of decency that mark the progress of a maturing society."⁴⁰ *Coker* explored the issue of whether the "evolving standards of decency" doctrine leads states which allow capital punishment to extend it to child rape cases that do not involve homicide. The Court stressed that the Louisiana statute should be judged by "the evolving standards of decency that mark the progress of a maturing society," and not the standards that existed when the Eighth Amendment was adopted.⁴¹ The Court concluded that "there is a national consensus against capital punishment for the crime of child rape."⁴² In reaching that conclusion, the Supreme Court looked to objective factors such as "public attitudes concerning a particular sentence history and precedent, legislative attitudes, and the response of juries reflected in their sentencing decisions."⁴³

Legislative Enactments

Since 1995, several states have attempted to pass legislation providing the death penalty as a potential sentence in child rape cases;⁴⁴ few have been successful.⁴⁵ In calculating the number of states with capital rape statutes, the Court in *Kennedy* ignored states with pending capital child rape legislation.⁴⁶

Recent Supreme Court death penalty decisions have looked to foreign countries in determining evolving standards of decency.⁴⁷ Rape is punishable by death in China, Egypt, Iran, Iraq, Kuwait, Morocco, Pakistan, Saudi Arabia, Somalia, South Korea, Syria, Taiwan, Uganda, United Arab Emirates, and the former USSR.⁴⁸ China, Iran, Jordan, Mongolia, the Philippines, Uganda,

and Uzbekistan are the only foreign countries that utilize the death penalty to punish child rapists.⁴⁹ The more developed countries of the world are largely absent from that list. Thus, although the *Kennedy* Court omitted any discussion of international opinion,⁵⁰ the result of the case would likely have been the same; the death penalty is excessive for the crime of child rape in developed countries.

The Court thought it had rid its hands of the issue of capital child rape in June 2008 with the *Kennedy* decision, until an article in the New York Times⁵¹ noted that on the weekend after the ruling, Marine Corps Reserve Colonel Dwight Sullivan wrote in a blog about the Court's failure to discuss the military penalty for rape in the Uniform Code of Military Justice.⁵² Once notified of the omission, Louisiana petitioned the Court for a rehearing to consider the military capital child rape statute enacted by Congress.⁵³ On October 1, 2008, the Court denied the state of Louisiana a rehearing on the matter.⁵⁴

Acting Solicitor General Gregory Garre argued that the actions by Congress and the President were "the emerging 'national consensus' supporting - not opposing - capital punishment in child rape cases."⁵⁵ In his opinion, Justice Kennedy seems to suggest that military law has no place in the Court's discussion of sentencing civilians to death as the military world and civilian world are two discrete spheres.⁵⁶ However, in his dissent, Justice Antonin Scalia questions how a soldier could be sentenced to death for raping a child, yet a civilian could not.⁵⁷

In addition to questioning the distinction between military and civilian treatment of the death penalty for child rape, Scalia also asserts that states that categorically prohibit the death penalty should not be counted when determining whether there is a national consensus in favor of imposing the death penalty for a certain crime.⁵⁸ Fourteen states punish twenty-one different crimes with the death penalty.⁵⁹ If the Court had considered the non-homicide death penalty jurisdictions along with the child rape death penalty jurisdictions, Louisiana's statute would have had a better chance of surviving constitutional muster, as simply an additional non-homicide death penalty law. On the other hand even though those jurisdictions have such statutes they have not been enforced,⁶⁰ and thus the result may have been the same.

History and Precedent

Since 1964, the United States has not executed

anyone for a crime that did not result in the death of the victim.⁶¹ *Kennedy* notes that since 1964, only two individuals have been sentenced to death for child rape.⁶² In light of the Supreme Court holdings discussed above, some prosecutors have chosen not to seek the death penalty in child rape cases.⁶³ For instance, in the case of Rodolfo Lopez Velazquez, a convicted child rapist, the prosecutor did not seek the death penalty because he was under the impression that *Coker* controlled and that the death penalty was unavailable as a sanction.⁶⁴ However, when *Coker* struck down the death penalty as a punishment for rape, the main rationale behind the ruling was that the survival of the victim does not justify killing the rapist.⁶⁵ Similarly, the Court stated in *Kennedy* that "the death penalty can be disproportionate to the crime itself where the crime did not result, or was not intended to result, in the death of the victim."⁶⁶

That said, the *Kennedy* Court repeatedly noted the following distinction: although *Coker* found that the death penalty for raping an adult woman is unconstitutional, it did not necessarily exclude the death penalty for child rape.⁶⁷ Indeed, in his dissent Justice Samuel Alito speculated as to why states do not pass laws making child rape a capital crime,⁶⁸ whereas the majority found it unnecessary to do so.⁶⁹ The Court found that in recent years some states have moved toward using such a punishment; however, the change has been insignificant.⁷⁰ The Court compared the forty-five jurisdictions that prohibit the death penalty for child rape to "the 30 States in *Atkins* and *Roper* and the 42 States in *Enmund* that prohibited the death penalty under the circumstances those cases considered."⁷¹ In citing *Atkins*, the Court recognizes that "[c]onsistent change [in support of the death penalty for rape] might counterbalance an otherwise weak demonstration of consensus,"⁷² however, the Court found no such consistent change.⁷³

Public Attitudes

Public attitudes toward imposition of the death penalty are "an expression of society's outrage at particularly offensive conduct."⁷⁴ Although states may be increasingly tough on those who rape children,⁷⁵ that does not necessarily mean that the constituents of those states approve of the death penalty for child rape. What society thinks is acceptable can also be judged by the response of juries.⁷⁶ However, the mere fact that a jury does not recommend a death sentence for a defendant does not mean that the jury believes that the crime the defendant committed should not be punishable by

death.⁷⁷ Instead, juries reserve the death penalty for those individuals they feel deserve it the most.⁷⁸ In doing so, jurors must evaluate the facts presented about the defendant to determine “whether in this instance society is justified in killing him.”⁷⁹

Considering the Severity of the Death Penalty as a Punishment for Child Rape

A punishment is excessive and therefore unconstitutional under the Eighth Amendment if it “(1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime.”⁸⁰ A punishment is also excessive when it “serves no penal purpose more effectively than a less severe punishment.”⁸¹ If a juror believes that a death sentence is too severe and the court is likely to impose such a sentence if the defendant is found guilty, the juror may decide to vote to acquit in order to avoid the defendant’s execution.⁸²

Would the Death Penalty Deter Would-Be Child Rapists?

A sentence may be cruel and unusual punishment, even if it “may measurably serve the legitimate ends of punishment.”⁸³ However, a sentence is not invalid simply because it does not serve the legitimate ends of punishment.⁸⁴ The majority in *Kennedy* points out that there is no significant proof that the death penalty will deter individuals from committing child rape.⁸⁵ There is no method to measure the number of individuals who would be deterred from committing child rape by the potential imposition of the death penalty.⁸⁶ The death penalty could serve deterrent purposes or it could have no effect at all.⁸⁷ Some individuals are more prone to commit violent crimes than others, “given the same objective motives and equal prospects of punishment.”⁸⁸

The existence of the death penalty for child rape gives rapists no incentive to leave their victims alive since they could easily dispose of the best, and often the sole, witness to the crime.⁸⁹ The Louisiana Supreme Court rejected Patrick Kennedy’s policy argument that upholding the statute will “encourage a rapist to murder

his victim.”⁹⁰ Child rapists will therefore have to make the conscious effort to kill their victim.⁹¹ By imposing the death penalty on a child rapist, the courts will essentially be punishing the rapist for making the decision not to kill the child.⁹² It sends a mixed message: “We will kill you if you rape a child” and “Kill the child if you wish because you will receive the death penalty either way.” Therefore, without the death penalty, child rapists may be more inclined to kill the victim.

The National Association of Social Workers (NASW), having filed an amicus curiae brief in support of Petitioner Patrick Kennedy, believes that Louisiana’s aggravated rape law undermines “the scourge of sexual violence against children and aiding its victims”⁹³ because “rather than protecting children, this statute will increase the number of victimized children, encourage offenders to kill their victims, and interfere with victims’ healing process.”⁹⁴

The death penalty is not necessary to achieve the deterrent objective if a punishment less severe than death will serve the same purpose.⁹⁵ For example, the possibility of receiving a sentence of life without parole could be an effective deterrent.⁹⁶ Advocated for criminal defendants fear that guilty defendants will plead to the charges simply to avoid the death penalty, while innocent defendants will go to trial, “[risking] death to defend themselves at trial.”⁹⁷ However with life without parole as the alternative, this would not pose a serious problem because although the public may wish to have the defendant executed, he is removed from society, and therefore he or she will no longer pose a threat to children.

Are Child Rapists Part of the “Most Deserving”

Capital punishment is reserved for “those offenders who commit ‘a narrow category of the most serious crimes’ and whose extreme culpability makes them ‘the most deserving of execution.’”⁹⁸ The Supreme Court in *Coker v. Georgia*, compared the impact of rape on a victim with the impact of murder on a victim. In doing so the Court concluded that the death penalty would violate the Constitution in child rape cases.⁹⁹ The Court emphasized that the life of a rape victim is not beyond repair.¹⁰⁰ Nevertheless, some commentators argue otherwise. They note that while any existing physical

wounds may heal, the psychological effects of childhood sexual abuse will last a lifetime.¹⁰¹ Though rape is not as final as murder, it is certainly an atrocious crime that outrages society. In *Kennedy v. Louisiana*, Justice Kennedy opines that questions of morality come into play when considering banning the death penalty in child rape cases.¹⁰² Namely, he states that “there are moral grounds to question a rule barring capital punishment for a crime against an individual that did not result in death.”¹⁰³ In determining whether child rapists are the “most deserving,” Justice Alito implies that the majority in *Kennedy* misplaced its focus by considering the Eighth Amendment.¹⁰⁴ He states that the amendment is meant to protect an accused’s rights, not to determine whether the punishment in question is “in the best interests of crime victims or the broader society.”¹⁰⁵

Louisiana’s Capital Child Rape Statute As Written Was Arbitrary and Capricious

A capital statute must distinguish between those who deserve the death penalty and those who do not.¹⁰⁶ A bright-line rule for the death penalty would not be rational in child rape cases.¹⁰⁷ In *Coker*, Justice Powell referenced *Snider v. Peyton*,¹⁰⁸ which discusses the “degree of culpability of rapists.”¹⁰⁹ He highlights that in some cases, a rapist may be more vicious than a murderer,¹¹⁰ emphasizing the severe and aggravated nature of rape.¹¹¹

A death penalty statute may “not be imposed under sentencing procedures that [create] a substantial risk that it would be inflicted in an arbitrary and capricious manner.”¹¹² There are certain standards that must be met. First, the sentencing judge must have adequate aggravating and mitigating circumstances to use as guidelines.¹¹³ Second, the statute must sufficiently narrow the class of defendants eligible for the death penalty.¹¹⁴ These standards can be met in two ways: (1) the statute may narrow the definition of capital offenses or, (2) the statute may broaden the definition of capital offenses and narrow jury findings of aggravating circumstances at the penalty phase.¹¹⁵ The death penalty may not be enforced infrequently such that the punishment becomes arbitrary.¹¹⁶

The two aggravating circumstances for the capital crime of child rape in Louisiana are the victim’s age and the fact that the offense was rape or attempted rape.¹¹⁷ The Court in *Kennedy* denied additional narrowing aggravators as a possible option to bring child rape statutes within death penalty jurisprudence.¹¹⁸ Pres-

ident Barack Obama disagrees with the Court’s unwillingness to make an exception based on the brutality of the attack.¹¹⁹ Obama believes that “if a state makes a decision that under narrow, limited, well-defined circumstances, the death penalty is at least potentially applicable, that does not violate our Constitution.”¹²⁰ Justice Roberts believes that the law was narrow enough in limiting the availability of the death penalty to those who rape victims under the age of twelve.¹²¹ In a separate opinion in *Coker*, Justice Powell suggests that the death penalty would be proportionate for rape if the offense was “committed with excessive brutality or [if]... the victim sustained serious or lasting injury.”¹²²

On the Horizon: The Aftermath of *Kennedy*

The Court’s ruling in *Kennedy v. Louisiana* implied that no crime but murder should be punishable by death. Although most would agree that the *Coker* and *Kennedy* decisions outlaw the use of the death penalty in child rape cases, others do not see the *Kennedy* decision as an end to the crusade.¹²³ If proponents of the death penalty for child rape do wish to continue the battle, they will have to help create statutes that will withstand the scrutiny of the Supreme Court. Proponents can do so by adding aggravating and mitigating circumstances and developing techniques to help reduce or even eliminate innocent executions.

South Carolina recently passed a statute providing that first-time child rapist is not eligible for the death penalty.¹²⁴ If the United States Supreme Court were to review South Carolina’s statute prior to the *Kennedy* case, the Court could very well have held that the statute is constitutional because it is tailored to avoid the substantial risk of imposing the death penalty arbitrarily and capriciously.¹²⁵

Aggravating Circumstances State Legislatures Should Consider

The extremely broad Louisiana child rape statute had no provisions for requirements such as corroboration or prior convictions of sexual assault.

Rapist is Carrying a Life Threatening Disease

Faced with HIV-positive defendants and defendants with AIDS, would opponents of the death penalty for the crime of child rape view death as disproportionate to the crime if the child contracts the fatal disease

from the rapist? Although the death may not be immediate, the rapist will undoubtedly be the proximate cause of the eventual death of the child.¹²⁶ Louisiana does not allow the death penalty under a felony-murder theory,¹²⁷ but it would be interesting to see if it would accept the HIV-positive status of a defendant as an aggravating circumstance rising to the level of felony-murder.¹²⁸

Prior Record of Conviction of Sexual Offense

Capital punishment could potentially deter others from committing rapes after being convicted the first time.¹²⁹ Chief Justice Burger in his dissenting opinion in *Coker* called attention to the fact that the defendant was already serving a lengthy prison sentence.¹³⁰ Additional prison time would have “no incremental punitive effect” because *Coker* has a life pattern such that he “presents a particular danger to the safety, welfare, and chastity of women . . . [such that] the likelihood is therefore great that he will repeat his crime at the first opportunity.”¹³¹ Thus, in theory, capital punishment would have a deterrent force on the habitual offender because once convicted, he would have no other opportunity to commit rape.

Mitigating Circumstances Legislatures Should Consider

A Mental Disease/Illness

Should we punish a person by death if he or she is committing child rape because of a mental illness? Several states provide for involuntary civil commitment of sexually violent predators whereby the State confines individuals who are determined to be a threat to society if they are released after imprisonment.¹³² If the condition is treatable or curable, should we treat those defendants like the mentally incompetent and stay the execution until they regain competency?

Prior Victimization

Many sexual assault offenders were sexual assault victims prior to offending.¹³³ Offenders who have a history of being sexually abused as a child have a lower degree of culpability as they do not always realize the impropriety of sexual misconduct.¹³⁴ Being a past victim of sexual abuse, though mitigating, would not constitute absolute protection from prosecution. The victim-turned-offender is still responsible for his or her

actions and his or her victim nevertheless deserves justice.

The Rapist is a Family Member

When it comes to juvenile victims, over thirty-four percent of individuals who rape children are family members of those children, and approximately fifty-nine percent are acquaintances.¹³⁵ Allowing the death penalty for child rape may make already reluctant children less likely to report sexual assaults.¹³⁶ Even if a child does report the assault, the child may be easily persuaded to recant the allegation by family members.¹³⁷ Opponents argue that imposing a rape sentence on a child rapist that is related to the victim by blood or marriage, would be “undeniably counterproductive and will not serve any legitimate penal purpose for the State of Louisiana.”¹³⁸

Protecting the Innocent

One reason that juries generally may decide not to impose the death penalty is a lack of irrefutable guilt.¹³⁹ There is a need for heightened reliability in capital cases “to guard against the risk that an innocent defendant might be put to death.”¹⁴⁰ The testimony of children may be unreliable because they are susceptible to suggestion,¹⁴¹ may confuse fantasy with reality,¹⁴² and often recant their allegations.¹⁴³

The National Association of Criminal Defense Lawyers (NACDL), as amici curiae in *Kennedy v. Louisiana*, stresses the lack of reliability of children as witnesses because of factors such as their vulnerability to suggestion and the withdrawal of their allegations.¹⁴⁴ Although this is a valid point to consider, it should not be given much weight because juries also undoubtedly weigh the credibility of the testifying child victim against the accused.¹⁴⁵ Children may be unable to distinguish between imagination and reality,¹⁴⁶ and this weakness leaves these young witnesses vulnerable to attacks on their credibility. As much as juries would like to believe children, they tend not to lend credence to children over adults,¹⁴⁷ despite the fact that the alleged sex offender has the most to gain by falsifying his or her testimony. In *Kennedy*, Justice Alito addressed the reliability concerns regarding child witnesses and suggests a corroboration requirement supported by precedent.¹⁴⁸

Innocence Review Commission

As with any person charged with a crime, there

is always a possibility that the person is innocent.¹⁴⁹ Society relies on juries to find guilt correctly in capital cases so as not to execute an innocent person.¹⁵⁰ In order to decrease the likelihood of executing an innocent person, states may adopt an innocence review commission similar to North Carolina's review commission.¹⁵¹ However, the existence of an innocence review commission may cause jurors to use a standard lower than beyond a reasonable doubt because they believe the commission will catch their mistakes.¹⁵²

Conclusion

The death penalty has the potential to be proportionate for child rape in the manner for which Louisiana provides. If a state chooses to rebel against the *Kennedy* ruling and pass a capital child rape statute, then the statute must be narrowed such that only those who truly deserve it will receive the death penalty.¹⁵³

The Court's decision in *Kennedy* begs the question: if the death penalty is not acceptable for any type of rape—which is a crime against a person—then is there any justification for sentencing someone to death for a crime against the State? Because child rape is often viewed as second to murder as the most heinous crime,¹⁵⁴ The *Kennedy* decision could be used by defense counsels to argue that their clients should not be executed for a non-homicide crime. Unless states start passing legislation capitalizing non-homicide crimes and sentencing to death defendants who did not kill anyone, such statutes will suffer the same fate as the one that originally sentenced Patrick Kennedy to the death penalty. The Supreme Court would then be forced to announce clearly that only murderers will be executed and create another landmark case in death penalty jurisprudence.

¹ The author would like to thank her parents, John and Jane Huang, who have always and continue to make sacrifices for their children. Additionally, the author thanks Associate Dean Leonard Birdsong for encouraging her to publish this article and for providing guidance to the author during her time in law school. Lastly, the author wishes to thank the staff of the Criminal Law Brief for all of the hours they invested into preparing the article for publication.

² FRANK G. CARRINGTON, NEITHER CRUEL NOR UNUSUAL: THE CASE FOR CAPITAL PUNISHMENT 11 (Arlington House 1978) (quoting Robert L. Shevin, Attorney General of the State of Florida).

³ *Id.* (quoting *Coker v. Georgia*, 433 U.S. 584, 607-08 (1977) (Burger, C.J., dissenting)).

⁴ Melissa Meister, *Murdering Innocence: The Constitutionality of Capital Child Rape Statutes*, 45 ARIZ. L. REV. 197 (2003) (quoting MARCIA J. WALKER & STANLEY L. BRODSKY, SEXUAL ASSAULT: THE VICTIM AND THE RAPIST 135 (1976)).

⁵ See *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2646 (2008) (“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 . . . sought to express.”).

⁶ Bridgette M. Palmer, Note, *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) (citing DOUGLAS W. PRYOR, UNSPEAKABLE ACTS: WHY MEN SEXUALLY ABUSE CHILDREN ix (1996)); see also Childhelp.org, National Child Abuse Statistics, <http://www.childhelp.org/resources/learning-center/statistics> (last visited Nov. 5, 2008) (compiling data from the National Institute on Drug Abuse 2000 Report and a Child Abuse & Neglect Study conducted by Arthur Becker-Weidman PhD and finding that “children who have been sexually abused are 2.5 times more likely to abuse alcohol and 3.8 times more likely to become addicted to drugs”).

See *Coker*, 433 U.S. 584; see also U.S. CONST. amend. VIII.

⁸ See discussion *infra* Part II (discussing the history of the Supreme Court’s treatment of capital punishment for rape).

⁹ *Kennedy*, 128 S. Ct. at 2650-51 (2008) (holding that “a death sentence for one who raped but did not kill a child, and who did not intend to assist another in killing the child, is unconstitutional under the Eighth and Fourteenth Amendments”).

¹⁰ See LA. REV. STAT. ANN. tit. 14 § 42(D) (West 2007), *invalidated by* *Kennedy v. Louisiana*, 128 S. Ct. 2641 (2008).

¹¹ *Coker*, 433 U.S. at 593.

¹² *Id.* (remarking that sixteen states and the federal government still authorized capital punishment for the rape of adult women).

¹³ 408 U.S. 238 (1972).

¹⁴ *Coker*, 433 U.S. at 594.

¹⁵ 428 U.S. 153, 169 (1976) (holding that the punishment of death for the crime of murder does not “invariably violate the Constitution”); see also Corinna Barrett Lain, *Deciding Death*, 57 DUKE L.J. 1, 8-9 (2007) (“Gregg is the 1976 landmark that reinstated the death penalty a mere four years later, approving newly drafted ‘guided discretion’ statutes and inaugurating what has come to be known as the modern death penalty era.”) (citing *Gregg*, 428 U.S. at 195).

¹⁶ *Coker*, 433 U.S. at 594 (finding Louisiana and North Carolina’s statutes made the death penalty mandatory in rape cases and were therefore subsequently invalidated by *Roberts v. Louisiana*, 428 U.S. 325 (1976) and *Woodson v. North Carolina*, 428 U.S. 280 (1976)). Aggravated rape was punishable by death in Louisiana until 1976 when it was determined by the United States Supreme Court to “constitute[] cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.” *Selman v. Louisiana*, 428 U.S. 906 (1976), *remanded to* 340 So. 2d 260 (La. 1976) (“[T]he appropriate sentence to be imposed upon a valid conviction for aggravated rape is the most severe constitutional penalty established by the legislature for a lesser included offense at the time the crime was committed . . . [which is] twenty years at hard labor.”).

¹⁷ GA. CRIM. CODE § 26-2001 (1971 rev.).

¹⁸ *Coker*, 433 U.S. at 592 (concluding that a death sentence is a “grossly disproportionate” punishment for the crime of rape).

¹⁹ David W. Schaaf, Note, *What If The Victim Is A Child? Examining The Constitutionality Of Louisiana’s Challenge To Coker v. Georgia*, 2000 U. ILL. L. REV. 347, 354-55 (noting that Tennessee and Florida each struck down their respective capital child rape statute after applying the *Coker* rationale); see also *Collins v. State*, 550 S.W.2d 643, 646 (Tenn. 1977) (striking down Tennessee’s capital child rape statute); *Buford v. State*, 403 So. 2d 943, 951 (Fla. 1981) (striking down Florida’s capital child rape statute).

²⁰ Pamela J. Lormand, *Proportionate Sentencing for Rape of a Minor: The Death Penalty Dilemma*, 73 TUL. L. REV. 981, 1014 (1999).

²¹ See *State v. Wilson*, 685 So. 2d 1063 (La. 1996).

²² See LA. REV. STAT. ANN. tit. 14 § 42(D) (West 2007) (“Whoever commits the crime of aggravated rape shall be punished by life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. (2) However, if the victim was under the age of thirteen years . . . : (a) And if the district attorney seeks a capital verdict, the offender shall be punished by death or life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence, in accordance with the determination of the jury”), *invalidated by Kennedy v. Louisiana*, 128 S. Ct. 2641 (2008).

²³ 685 So. 2d 1063 (consolidating *Bethley*’s case with *Wilson*’s).

²⁴ *Id.* at 1064.

²⁵ *Id.* at 1065. *Bethley* also knew that he was HIV positive at the time of the rapes. *Id.*

²⁶ *Id.* at 1064-65 (“The thrust of both defendants’ arguments is that the imposition of the death penalty for a crime not resulting in a death is ‘cruel and unusual punishment’ and therefore unconstitutional under the Eight [sic] Amendment to the United States Constitution”); see also U.S. CONST. amend. VIII.

²⁷ *Wilson*, 685 So. 2d at 1065.

²⁸ *Id.* at 1063, 1073.

²⁹ See *Betheley v. Louisiana*, 520 U.S. 1259 (1997) (finding that in cases involving a criminal defendant “finality is normally defined by the imposition of the sentence” (quoting *Flynt v. Ohio*, 451 U.S. 619, 620 (1981)). For more on the *Bethley* case see generally Rhonda Bell, *Rape Suspect Ot [sic] Ready For Trial Mentally Retarded Man Faces Death If Convicted Of Rape Of 6-Year-Old*, NEW ORLEANS TIMES-PICAYUNE, Dec. 16, 1999, at B1. As of 1999, *Wilson* was determined mentally retarded and incompetent to stand trial. *Id.* *Bethley* pled guilty and received a life sentence for a single count of aggravated rape to avoid prosecutors seeking the death penalty. *Id.* Prosecutors predicted *Bethley* would not live through the automatic appeals process if he was given the death sentence because he was HIV positive. *Id.*

³⁰ *Kennedy*, 128 S. Ct. at 2645-46 (describing the victim’s injuries as extremely severe).

³¹ *Id.* at 2646.

³² *State v. Kennedy*, 957 So. 2d 757, 761 (La. 2007).

³³ See Paula Berg, *Toward A First Amendment Theory Of Doctor-Patient Discourse And The Right To Receive Unbiased Medical Advice*, 74 B.U. L. REV. 201 (1994) (characterizing the Burger Court, which decided *Coker*, as quite “liberal”).

³⁴ *Coker*, 433 U.S. at 592 (noting that the Court should specifi-

cally consider “public attitudes concerning a particular sentence history and precedent, legislative attitudes, and the response of juries reflected in their sentencing decisions.”); see also discussion *infra* Part III.A.

³⁵ Mark Sherman, *Court Bans Death Penalty for Child Rape*, ASSOCIATED PRESS STATE & LOCAL WIRE, June 26, 2008.

³⁶ Brian Z. Tamanaha, *A Socio-Legal Methodology For The Internal/External Distinction: Jurisprudential Implications*, 75 FORDHAM L. REV. 1255, 1256 (2006) (“Justices in some instances consciously decide cases on political grounds, regardless of what they say, and all Justices subconsciously see the law through the lens of their ideological beliefs, which shape their legal interpretations.”).

³⁷ See *Kennedy*, 128 S. Ct. at 2650 (observing that, by providing for capital punishment, the law risks running counter to the constraints of the Constitution).

³⁸ See *Coker*, 433 U.S. at 598 (“[T]he death penalty . . . is an excessive penalty for the rapist who, as such, does not take human life.”).

³⁹ See, e.g., *Enmund v. Florida*, 458 U.S. 782 (1982) (holding that sentencing to death a defendant who aids and abets a felony in which murder is committed by others violates the Eighth Amendment); *Eberheart v. Georgia*, 433 U.S. 917 (1977) (concluding that imposing the death penalty for aggravated kidnapping is cruel and unusual); *United States v. Jackson*, 390 U.S. 570 (1968) (finding the Federal Kidnapping Act to be unconstitutional because of a capital punishment clause).

⁴⁰ *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

⁴¹ *Kennedy*, 128 S. Ct. at 2649 (quoting *Trop*, 356 U.S. at 101).

⁴² *Id.* at 2657-58. The Louisiana Supreme Court, on the other hand, disagreed by considering the number of jurisdictions which have capital non-homicide crimes and therefore, concluded that there is no national consensus as the use of capital punishment for crimes that do not result in the death of the victim. 957 So. 2d 757, 788 (La. 2007), *overruled by Kennedy*, 128 S. Ct. 2641.

⁴³ See e.g., *Coker*, 433 U.S. at 592 (singling out legislative enactments and jury responses as the only relevant factors); *Stanford v. Kentucky*, 492 U.S. 361, 379 (1989) (citing plurality opinion as an important factor), *overruled by Roper v. Simmons*, 543 U.S. 551 (2005).

⁴⁴ See Colin Garrett, *Death Watch*, CHAMPION, June 2006, at 46 (finding Massachusetts, California, Pennsylvania, Virginia and Alabama have all considered bills).

⁴⁵ See TEX. PEN. CODE § 12.42 (2007 Supp.); FLA. STAT. ANN. § 794.011(2)(a) (West 2000); 10 OKL. ST. ANN. § 7115(I) (2006 Supp.); S.C. CODE ANN. § 16-3-655(C)(I) (2006 Supp.).

⁴⁶ *Kennedy*, 128 S. Ct. at 2656 (“It is not our practice, nor is it sound, to find contemporary norms based upon state legislation that has been proposed but not yet enacted.”).

⁴⁷ See *Roper*, 543 U.S. at 578 (noting that international opinion is largely opposed to the use of the death penalty for juvenile defendants). However, *Roper* also makes it clear that international opinion is not determinative. *Id.*

⁴⁸ ROGER HOOD, THE DEATH PENALTY: A WORLD-WIDE PERSPECTIVE 77 (3d ed. 2002).

⁴⁹ Joanna H. D’Avella, Note, *Death Row for Child Rape? Cruel and Unusual Punishment Under the Roper-Atkins “Evolving Standards of Decency” Framework*, 92 CORNELL L. REV. 129, 154 (2006) (citing HOOD, *supra* note 48, at 84-85).

⁵⁰ *Kennedy*, 128 S. Ct. 2641 (failing to discuss international standards); see also Landon Webber, *Victims Ignored and Justice Denied, Because of Supreme Court's 'Evolving Standards,'* WRITE IDEA, June 27, 2008, <http://www.writeidea.org/2008/06/victims-ignored-and-justice-denied.html> (“In Wednesday’s decision, *Kennedy v. Louisiana*, Justice Kennedy at least decided to stick with determining national consensus based on the laws of U.S. states.”).

⁵¹ Col. Dwight Sullivan, *The Supremes Dis the Military Justice System*, CAAFLOG, June 28, 2008, <http://caaflog.blogspot.com/2008/06/supremes-dis-military-justice-system.html>.

⁵² 10 U.S.C. §§ 856, 920; Manual for Courts-Martial, United States, Part IV, ¶ 45.f(1) (2008).

⁵³ Section 552(b) of the National Defense Authorization Act for Fiscal Year 2006, 119 Stat. 3136, 3264 (2006).

⁵⁴ See *Kennedy v. Louisiana*, 128 S. Ct. 2641 (2008).

⁵⁵ Warren Richey, *Despite Gaffe, Supreme Court Won't Revisit Landmark Child-Rape Ruling*, CHRISTIAN SCIENCE MONITOR, Oct. 2, 2008, at 25.

⁵⁶ See *Kennedy*, 128 S. Ct. 1, at *2 (2008) (statement denying petition for rehearing) (“In any event, authorization of the death penalty in the military sphere does not indicate that the penalty is constitutional in the civilian context.”).

⁵⁷ *Id.* at *3 (Scalia, J., dissenting).

⁵⁸ LINDA E. CARTER & ELLEN KREITZBERG, UNDERSTANDING CAPITAL PUNISHMENT LAW 79 (2004).

⁵⁹ Matthew Silversten, Comment, *Sentencing Coker v. Georgia to Death: Capital Child Rape Statutes Provide the Supreme Court an Opportunity to Return Meaning to the Eighth Amendment*, 37 GONZ. L. REV. 121, 162 n.339 (2002).

⁶⁰ See *infra* Part III.A.1.b.

⁶¹ Petition for Writ of Certiorari, *Kennedy v. Louisiana*, 128 S. Ct. 2641 (2008) (No. 07-34), 2007 WL 2688267, at *11 n.2 (noting that James Coburn was executed for robbery (citing EXECUTIONS IN THE U.S. 1608-2002: THE EPSY FILE EXECUTIONS BY DATE 381 (2007))). In 2003, Brin Regan, a former U.S. Air Force sergeant was convicted of two counts of attempted espionage, but the jury did not find him eligible for the death penalty under the Federal Death Penalty Act. CARTER & KREITZBERG, *supra* note 58, at 90-91.

⁶² Patrick Kennedy and Richard Davis also happen to be the only individuals on death row in the United States for a non-homicide crime. *Kennedy*, 128 S. Ct. at 2657.

⁶³ *Divided Court Says Rape Convict Can't Receive Life Without Parole*, ASSOCIATED PRESS STATE & LOCAL WIRE, Feb. 25, 2008.

⁶⁴ *Id.* The Georgia Supreme Court refused to accept the State’s argument and upheld the Court of Appeals decision that the trial judge did not have the authority to sentence the defendant to life without parole without first seeking the death penalty. *Id.*

⁶⁵ See *Coker*, 433 U.S. at 598 (“We have the abiding conviction that the death penalty, which ‘is unique in its severity and irrevocability,’ is an excessive penalty for the rapist who, as such, does not take human life.” (quoting *Gregg*, 428 U.S. at 187)).

⁶⁶ *Kennedy*, 128 S. Ct. at 2650; see also *Coker*, 433 U.S. at 599; Emily Marie Moeller, Comment, *Devolving Standards of Decency: Using the Death Penalty to Punish Child Rapists*, 102

DICK. L. REV. 621, 648 998) (“Because the death penalty is the ultimate sanction our criminal justice system provides, it should be reserved for those whose crime involves the unjustified taking of a human life, not child rape.”). The Court chose not to address the death penalty for crimes against the State such as treason or terrorism. See *Kennedy*, 128 S. Ct. at 2659.

⁶⁷ See *id.* at 2654-56.

⁶⁸ See *id.* at 2668 (Alito, J., dissenting) (mentioning reasons such as respecting the *Coker* decision and fear of wasting state resources if their statute is found unconstitutional). In the *Coker* dissent, Chief Justice Burger suggested that other states may be inclined to adopt the death penalty if they see a strong decrease in Georgia’s incidence of rape. *Coker*, 433 U.S. at 618 (Burger, C.J., dissenting).

⁶⁹ *Kennedy*, 128 S. Ct. at 2655 (“In the absence of evidence from those States where legislation has been proposed but not enacted we refuse to speculate about the motivations and concerns of particular state legislators.”).

⁷⁰ See *id.* at 2656.

⁷¹ *Id.* at 2653.

⁷² *Id.* at 2656.

⁷³ *Id.*

⁷⁴ *Gregg*, 428 U.S. at 183. One public poll revealed that sixty-five percent of those surveyed were in favor of executing child molesters. Corey Rayburn, *Better Dead Than Raped?: The Patriarchal Rhetoric Driving Capital Rape Statutes*, 78 ST. JOHN’S L. REV. 1119, 1138 (2004) (citing John Q. Barrett, *Death for Child Rapists May Not Save Children*, NAT’L L.J., Aug. 18, 1997, at A21).

⁷⁵ Mark Sherman, *US Supreme Court Reviewing Death Penalty For Child Rapists*, ASSOCIATED PRESS WORLDSTREAM, Apr. 16, 2008.

⁷⁶ Darrel K. Harris was convicted of “brutally murdering the three people in a Brooklyn social club in the first capital trial since the death penalty returned to New York.” ROBERT JAY LIFTON & GREG MITCHELL, WHO OWNS DEATH? CAPITAL PUNISHMENT, THE AMERICAN CONSCIENCE, AND THE END OF THE DEATH PENALTY 143 (2000). Most of the panel was disgusted by these murders, but two jurors “held out for a life sentence, believing the man could be spiritually redeemed in prison.” *Id.* at 144.

⁷⁷ See *Gregg*, 428 U.S. at 182 (“The relative infrequency of jury verdicts imposing the death sentence does not indicate rejection of capital punishment per se.”).

⁷⁸ See *id.* (“Rather, the reluctance of juries in many cases to impose the sentence may well reflect the humane feeling that this most irrevocable of sanctions should be reserved for a small number of extreme cases.”).

⁷⁹ LIFTON & MITCHELL, *supra* note 76, at 139 (referring to murderers).

⁸⁰ *Coker*, 433 U.S. at 592 (citing *Gregg*, 428 U.S. 153 (1976)).

⁸¹ *Furman*, 408 U.S. at 279-80 (Brennan, J., concurring).

⁸² See Brief Amici Curiae of the ACLU et al., *Coker v. Georgia*, 433 U.S. 584 (1977) (No. 75-5444), 1976 WL 181482, at *28 n.* (noting that “the threatened penalty may come to dominate the deliberation of a jury” (quoting HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 311 n.8 (1966))).

⁸³ *Coker*, 433 U.S. at 593 n.4.

⁸⁴ *Id.*

⁸⁵ See *Kennedy*, 128 S. Ct. at 2655 (“Respondent cites no reliable

data to indicate that state legislatures have read Coker to bar capital punishment for child rape and, for this reason, have been deterred from passing applicable death penalty legislation.”).

⁸⁶ Ken Vernon, *Reflecting Society*, GOLD COAST BULL., Nov. 21, 2005, at 37 (quoting poet Hyman Barshay)

The death penalty is a warning, just like a lighthouse throwing its beams out to sea. We hear about shipwrecks, but we do not hear about the ships the lighthouse guides safely on their way. We do not have proof of the number of ships it saves, but we do not tear the lighthouse down.

Id.

⁸⁷ *Coker*, 433 U.S. at 617 (Burger, C.J., dissenting).

⁸⁸ HOOD, *supra* note 48, at 205 (quoting Isaac Ehrlich, *Capital Punishment and Deterrence: Some Further Thoughts and Additional Evidence*, 85 J. POL. ECON. 714, 742-43 (1977)).

⁸⁹ Yale Glazer, *Child Rapists Beware! The Death Penalty and Louisiana's Amended Aggravated Rape Statute*, 25 AM. J. CRIM. L. 79, 105 (1997) (citing Original Brief of Appellee Patrick De-wayne Bethley at 20, *State v. Bethley*, 685 So. 2d 1063 (La. 1996) (No. 96-F0-460)); *see also* Brief of the National Association of Criminal Defense Lawyers (NACDL) as Amici Curiae in Support of Petitioner, *Patrick Kennedy v. Louisiana*, 2007 WL 4104371 at *3 (Nov. 14, 2007) (No. 07-343) (“Child sexual abuse convictions are often ‘based primarily, if not solely, on the word of the victims involved.’” (quoting Dana A. Anderson, *Assessing the Reliability of Child Testimony in Sexual Abuse Cases*, 69 S. CAL. L. REV. 2117, 2118 (1996))).

⁹⁰ *State v. Kennedy*, 957 So. 2d at 789 n.38.

⁹¹ Glazer, *supra* note 89, at 106.

⁹² *Id.* at 107 (“Those who oppose the imposition of the death penalty for the rape of a child under twelve argue that if the defendant did not intend to kill the victim, the defendant should not be punished as if such an intent existed.”).

⁹³ Brief of the National Association of Social Workers (NASW) et al. as Amici Curiae in Support of Petitioner, *Kennedy v. Louisiana*, 129 S. Ct. 1 (2008) (No. 07-343), 2007 WL 3444963 (Nov. 14, 2007).

⁹⁴ *Id.* at *3 (showing an estimated number of 83,000 to 217,000 children a year are sexual abuse victims); *id.* at *6 (citing U.S. Department of Health and Human Services, *Child Maltreatment 2005* 41 tbl. 3-6 (2007)); Andrea J. Sedlak & Diane D. Broadhurst, *Third National Incidence Study of Child Abuse and Neglect* 2-1 to -3, 3-3 tbl.3-1 (1996).

⁹⁵ CARTER & KREITZBERG, *supra* note 58, at 8 (comparing the use and non-use of the death penalty among states).

⁹⁶ *Furman*, 408 U.S. at 356 (Marshall, J. concurring) (“Life imprisonment remains a severe sanction which can be used as leverage for bargaining for pleas or confessions in exchange either for charges of lesser offenses or recommendations of leniency.”).

⁹⁷ Brief of the NACDL, *supra* note 89, at *10 (citing Joseph L. Hoffmann et al., *Plea Bargaining in the Shadow of Death*, 69 FORDHAM L. REV. 2313, 2359 (2001)); Petition for a Writ of Certiorari, *supra* note 61, at *22 (“[D]efendants charged with child rape are more likely to plead guilty than before [Louisiana’s capital rape law] was enacted.” (citing Angela D. West, *Death as Deterrent or Prosecutorial Tool? Examining the Impact of Louisiana’s Child Rape Law*, 13 CRIM. JUST. POL’Y REV. 156 (2002))).

⁹⁸ *See Roper*, 543 U.S. at 568 (quoting *Atkins*, 536 U.S. 304, 319

(2002) (presenting recent case law discussing evolving standards of decency in response to national concerns about the use of capital punishment)).

⁹⁹ *Coker*, 433 U.S. at 598 (“Life is over for the victim of the murderer; for the rape victim, life may not be nearly so happy as it was, but it is not over and normally is not beyond repair.”).

¹⁰⁰ *Id.*

¹⁰¹ Glazer, *supra* note 89, at 86 (explaining that rape victims suffer behavioral problems long after their physical injuries have healed); *see also* Brief of NASW, *supra* note 93, at *11 (showing that “[sexual] abuse increases the likelihood that the victim will subsequently engage in crime, become pregnant while a minor, drop out of school, abuse alcohol or drugs, and suffer from psychological disorders, such as depression, anxiety disorders, and posttraumatic stress disorder.” (citing BARBARA TATEM KELLY, U.S. DEPARTMENT OF JUSTICE, IN THE WAKE OF CHILDHOOD MALTREATMENT 2 (Aug. 1997))).

¹⁰² *Kennedy*, 128 S. Ct. at 2658.

¹⁰³ *Id.* *See also id.* at 2649 (pointing out that “[t]he standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment”) (quoting *Furman*, 408 U.S. at 382 (Burger, C.J., dissenting)).

¹⁰⁴ *Kennedy*, 128 S. Ct. at 2673 (Alito, J., dissenting).

¹⁰⁵ *Id.*

¹⁰⁶ The Louisiana Supreme Court noted that the United States Supreme Court in *Lowenfield v. Phelps*, 484 U.S. 231 (1988) held “a death sentence does not violate the Eighth Amendment merely because the single statutory ‘aggravating circumstance’ found by the jury duplicates an element of the underlying offense.” *Kennedy*, 957 So. 2d at 791.

¹⁰⁷ Justice Powell does not believe that it is so simple to have a bright-line-rule. *Coker*, 433 U.S. at 603 (Powell, J., concurring in part, dissenting in part).

¹⁰⁸ 356 F.2d 626, 627 (4th Cir. 1966).

¹⁰⁹ *Coker*, 433 U.S. at 603 (Powell, J., concurring in part, dissenting in part) (citing *Snider*, 356 F.2d at 627 (“There is extreme variation in the degree of culpability of rapists. If one were sentenced to death upon conviction of rape of an adult under circumstances lacking great aggravation, the Supreme Court might well find it an appropriate case to consider the constitutional question tendered to us.”)).

¹¹⁰ *Id.*

¹¹¹ *Id.* (“Some victims are so grievously injured physically or psychologically that life is beyond repair.”).

¹¹² *Gregg*, 428 U.S. at 188 (referring to the holding of *Furman*).

¹¹³ Lormand, *supra* note 20, at 987 (citing *Gregg*, 428 U.S. at 188); *see also Woodson*, 428 U.S. 280 (requiring statutes to have some mitigating circumstances in order to avoid being determined an arbitrary and capricious punishment).

¹¹⁴ Lormand, *supra* note 20, at 988 (citing *Zant v. Stephens*, 462 U.S. 862, 877 (1983)).

¹¹⁵ *Id.* at 987 (citing *Lowenfield*, 484 U.S. at 246). Louisiana has decided to narrowly define its capital offenses, thereby allowing the jury to narrow its findings at the guilt phase. *See* Brief in Opposition to Petition for Certiorari, *Kennedy v. Louisiana*, 29 S. Ct. 1, (2008) (No. 07-343), 2007 WL 4104370, at *23.

¹¹⁶ *Furman*, 408 U.S. at 255 (Douglas, J., con

cretion of judges and juries in imposing the death penalty enables the penalty to be selectively applied, feeding prejudices against the accused if he is poor and despised, and lacking political clout, or if he is a member of a suspect or unpopular minority, and saving those who by social position may be in a more protected position.”).

¹¹⁷ Louisiana requires that a jury find “beyond a reasonable doubt that at least one statutory aggravating circumstance exists” before sentencing a defendant to death. LA. CODE CRIM. PROC. ANN. art. 905.3, 905.4 (West 1997).

¹¹⁸ *Kennedy*, 128 S. Ct. at 2660 (denying the utility of more aggravating circumstances such as to authorize capitalizing child rape because it would still result in arbitrary imposition of the death penalty).

¹¹⁹ See Linda Greenhouse, *Justices Bar Death Penalty for the Rape of a Child*, N.Y. TIMES, A1, June 21, 2008 (noting that President Obama disagrees with the Court’s unwillingness to make an exception based on the brutality of the attack).

¹²⁰ See Robert Barnes, *High Court Rejects Death for Child Rape*, WASH. POST, A1, June 26, 2008.

¹²¹ Bill Walsh, *Justices Consider Death Penalty for Child Rapists*, NEWHOUSE NEWS SERVICE, Apr. 16, 2008.

¹²² See *Coker*, 433 U.S. at 601 (Powell, J., concurring in part, dissenting in part).

¹²³ Texas Representative Lamar Smith proposed an amendment to the U.S. Constitution to overrule the *Kennedy* decision. *Rep. Smith Introduces Constitutional Amendment to Protect Child Victims of Forcible Rape*, US FED NEWS, June 26, 2008. The resolution does not mandate the death penalty, but it certainly makes the option available for the justice system. *Id.*

¹²⁴ S.C. CODE ANN. § 16-3-655(C)(I) (2006 Supp); Garrett, *supra* note 44.

¹²⁵ For an in-depth discussion of South Carolina’s capital child rape statute, see Carli J. Wilcox, *Is South Carolina’s New Capital Child Rape Statute Unconstitutional as Cruel and Unusual Under the Eighth Amendment?*, 1 CHARLESTON L. REV. 315 (2007).

¹²⁶ See *People v. Dekens*, 695 N.E.2d 474, 475 (Ill. 1998) (“Under [the proximate cause] theory, liability attaches ‘for any death proximately resulting from the unlawful activity-notwithstanding the fact that the killing was by one resisting the crime.’” (quoting *People v. Lowery*, 687 N.E.2d 973, 975-76 (1997))); see also *People v. Boand*, 838 N.E.2d 367 (Ill. App. Ct. 2005) (applying the proximate cause theory of liability to a rape case).

¹²⁷ See LA. CODE CRIM. PROC. ANN. art. 905.

¹²⁸ Angelyn L. Miller, Comment, *Constitutional Law: Can a Convicted Rapist Be Sentenced to Death for Raping a Child Under Twelve Years of Age?*, 37 WASHBURN L.J. 187, 202 (1997)) (suggesting that the death penalty should be offered only when the rapist not only has AIDS, but is also aware of having AIDS).

¹²⁹ See *Coker*, 433 U.S. at 665-66 (Burger, C.J., dissenting) (“[O]thers in his position will henceforth feel no compunction whatsoever about committing further rapes as frequently as he may be able to escape from confinement and indeed even within the walls of the prison itself.”).

¹³⁰ On September 2, 1974, Coker escaped from the Ware Correctional Institution after which he entered the house of Allen and Elnita Carver and raped Mrs. Carver. *Id.* at 587.

¹³¹ *Id.* at 606-07 (Burger, C.J., dissenting).

¹³² See, e.g., FLA. STAT. ANN. §§ 394.910-.930 (West 2008).

¹³³ NATIONAL CENTER FOR JUVENILE JUSTICE, *SEXUAL ASSAULT OF YOUNG CHILDREN AS REPORTED TO LAW ENFORCEMENT: VICTIM, INCIDENT, AND OFFENDER, CHARACTERISTICS* (2000), <http://www.ojp.usdoj.gov/bjs/pub/pdf/saycrle.pdf> (citing Vanderbilt, 1992) (last visited Nov. 5, 2008).

¹³⁴ See Suzanne Meiners-Levy, *Challenging the Prosecution of Young “Sex Offenders”: How Developmental Psychology and the Lessons of Roper Should Inform Daily Practice*, 79 TEMP. L. REV. 499, 507 (2006) (“[A]s prior victims of abuse, they are less likely to realize the inappropriateness or illegality of their sexual behavior.”) (citing Larry K. Brown et al., *Impact of Sexual Abuse on the HIV-Risk-Related Behavior of Adolescents in Intensive Psychiatric Treatment*, 157 AM. J. PSYCHIATRY 1413, 1414-15 (2000))).

¹³⁵ National Center for Juvenile Justice, *Sexual Assault of Young Children as Reported to Law Enforcement: Victim, Incident, and Offender, Characteristics*, 2000, <http://www.ojp.usdoj.gov/bjs/pub/pdf/saycrle.pdf> (last visited Nov. 5, 2008).

¹³⁶ William G. Austin, *Assessing Credibility in Allegations of Marital Violence in the High-Conflict Child Custody Case*, 38 FAM. & CONCILIATION COURTS REV. 462, 468 (2000) (“Sometimes the children will report on incidents, but they may be reluctant to report because of a loyalty conflict in their attachment to the parents or being aligned with a parent who is a perpetrator of abuse.”); Thomas D. Lyon, *The New Wave in Children’s Suggestibility Research: A Critique*, 84 CORNELL L. REV. 1004, 1048 (1999) (remarking that some children do report abuse out of fear of what may to them, their families or their perpetrators). In some cases, the child is even more unlikely to report abuse because the abuser is a family member otherwise close to the child, and additionally, children sometimes are afraid of being blamed for what has happened to them. *Id.*; see also Brief of the NASW, *supra* note 93, at *8 (finding that there is a high rate of reluctance of children to report sexual abuse by family members) (citing Tina B. Goodman-Brown et al., *Why Children Tell: A Model of Children’s Disclosure of Sexual Abuse*, 27 CHILD ABUSE & NEGLECT 525, 537 (2003)).

¹³⁷ See Brief of NACDL, *supra* note 89, at *6 (citing Lindsay Malloy et al., *Filial Dependency & Recantation of Child Sexual Abuse Allegations*, 46 J. AM. ACAD. CHILD & ADOLESC. PSYCHIATRY 162, 167 (Feb. 2007)); see also *infra* Part IV.E (expressing concerns about the use of child testimony).

¹³⁸ Glazer, *supra* note 89, at 112 (quoting Brief in Support of Appellees of Amicus Curiae Louisiana Foundation Against Sexual Assault, Inc., et al. at 4, *State v. Bethley*, 685 So. 2d 1063 (La. 1996) (No. 96-F0-460)).

¹³⁹ Bill Rankin et al., *Death Still Arbitrary*, ATLANTA JOURNAL-CONSTITUTION, <http://www.ajc.com/metro/content/metro/stories/deathpenalty/dayone/dpdayone3.html> (last visited Nov. 5, 2008); see also Margery Malkin Koosed, *Averting Mistaken Executions By Adopting The Model Penal Code’s Exclusion Of Death In The Presence Of Lingering Doubt*, 21 N. ILL. U. L. REV. 41, 67 (2001) (“Pro-death jurors may fear that a subsequent jury may not convict, and pro-life jurors may fear that a subsequent jury will acquit on all charges or sentence the possibly innocent defendant to death.” (citing William J. Bowers et al., *Foreclosed Impartiality in Capital Sentencing: Jurors’ Predispositions, Guilt-Trial Experience, and Pre-*

mature Decision Making, 83 CORNELL L. REV. 1476, 1527 (1998))).

¹⁴⁰ Brief of the NACDL, *supra* note 89, at *2 (citing *Johnson v. Mississippi*, 486 U.S. 578, 584 (1988)).

¹⁴¹ *Id.* at *4.

¹⁴² *Id.*

¹⁴³ *Id.* at *6 (stating that a number of studies “have found more than 20% of children recant their allegations of sexual abuse”) (citing Malloy et al., *supra* note 137, at 165).

¹⁴⁴ *Id.* at *2. A number of studies have shown that more than twenty percent of children recant their allegations of sexual abuse. *Id.* (citing Malloy et al., *supra* note 137, at 165; Kamala London et al., *Children Tell?*, 11 PSYCH., PUB. POL’Y. & L. 194, 216 (2005)).

¹⁴⁵ Brief of the NACDL, *supra* note 89, at *3 (citing *Ex parte Thompson*, 153 S. W. 3d 416, 422 (Tex. Crim. App. 2005) (Cochran, J., concurring)).

¹⁴⁶ Daniel E. Monnat & Paige A. Nicholas, *The Kid Gloves Are Off: Child Hearsay After Crawford V. Washington*, 30 FEB CHAMPION 18, 20 (2006) (citing *Maryland v. Craig*, 497 U.S. 836, 868 (1990) (Scalia, J., dissenting)).

¹⁴⁷ David McCord, *Expert Psychological Testimony About Child Complainants in Sexual Abuse Prosecutions: A Foray into the Admissibility of Novel Psychological Evidence*, 77 J. CRIM. L. & CRIMINOLOGY 1, 47 (1986) (“With respect to the moral ability to tell the truth, jurors may believe that children are more likely to lie than are adults.”).

¹⁴⁸ *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2675 (2008) (Alito, J., dissenting).

¹⁴⁹ Professor Hugo Adam Bedau conceded that some innocent persons have undoubtedly been executed, “even if it cannot be proved.” HOOD, *supra* note 48, at 104 (citing MICHAEL L. RADELET, HUGO ADAM BEDAU & CONSTANCE E. PUTNAM, *IN SPITE OF INNOCENCE* (1992)).

¹⁵⁰ Brief of the NACDL, *supra* note 89, at *3 (citing *Herrera v. Collins*, 506 U.S. 390, 407 n.5 (1993)).

¹⁵¹ See generally Erik Lillquist, *Improving Accuracy in Criminal Cases*, 41 U. RICH. L. REV. 897, 906-11 (2007); Jerome M. Maiatico, *All Eyes on Us: A Comparative Critique of the North Carolina Innocence Inquiry Commission*, 56 DUKE L.J. 1345 (2007) (demonstrating the use of safeguards to protect against wrongful execution).

¹⁵² Lillquist, *supra* note 151, at 908. There is also the possibility of exonerating a guilty person. *Id.*

¹⁵³ See David W. Schaaf, Note: *What if the Victim is a Child?: Examining the Constitutionality of Louisiana’s Challenge to Coker v. Georgia*, 2000 U. ILL. L. REV. 347, 375 (2000) (“[I]f Louisiana’s death-penalty law for child rape is struck down, the future proliferation of the death penalty could be severely limited. For the current nonhomicide, nonrape death-penalty laws to survive, states will have to prove that the crime they are punishing with death is worse than rape.”).

¹⁵⁴ *State v. Kennedy*, 957 So. 2d at 785 (asserting that child rape is “the most heinous of all non-homicide crimes,” and remarking that the United States Supreme Court seems to agree).

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