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Kennedy v. Louisiana: A Chapter of Subtle Changes in the Supreme Court's Book on the Death Penalty

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For over thirty years, an ambiguity lingered in American death penalty jurisprudence. After the United States Supreme Court found unconstitutional a Georgia statute that authorized capital punishment for the crime of rape, a remaining question loomed large. Was this 1977 decision, *Coker v. Georgia*,[1] limited to statutes that allowed the penalty of death for all forms of rape, or did it prohibit the penalty of death only for raping an adult, thus allowing a state to authorize death for the crime of rape of a child? This question was answered by the Court in the 2007–2008 term in *Kennedy v. Louisiana*,[2] which barred capital punishment for "one who raped but did not kill a child, and who did not intend to assist another in killing the child," finding such a punishment unconstitutional under both the Eighth and the Fourteenth Amendments.[3]

An unstudied reading of *Kennedy* might suggest that it is simply a clarification and continuation of *Coker*. However, a thorough review of *Kennedy* demonstrates not only a much broader holding than was necessary but also a subtle shift in emphasis by the Court with potentially significant implications. These subtle changes can be discerned in several aspects of the opinion. First, the Court has added nuances to the original two-step test for proportionality in capital punishment cases to move away from an emphasis on the objective component of the national consensus and toward an emphasis on the Court's own subjective judgment. Additionally, the Court relied on new categories of information for consideration in its proportionality analysis. Finally, these subtle shifts contributed to the breadth of the Court's holding. The actual holding in *Kennedy* is significantly broader than was necessary to resolve the issue presented, especially considering the Court's previous jurisprudence in *Enmund v. Florida*,[4] finding the death penalty unconstitutional in the case of one who aids and abets a felon in the course of which a murder occurs when the defendant did not attempt, intend, or effectuate the killing or use of lethal force; *Atkins v. Virginia*,[5] finding that the Eighth Amendment bars capital punishment for the mentally impaired; and *Roper v. Simmons*,[6] holding that capital punishment is barred by the Eighth Amendment for a minor who is seventeen years old at the time of the murder.

This Article will examine the *Kennedy* case and holding, focusing on the above-mentioned nuances of the opinion, and suggest that *Kennedy* subtly altered death penalty jurisprudence, not only to favor the Court's subjective judgment but also effectively to limit capital punishment. While the stated desire to limit the death penalty is not new, some of the methods suggested by the Court are worthy of discussion and analysis. This Article will examine some of those subtle changes and reflect on what effect, if any, *Kennedy* will have on future death penalty jurisprudence.

I. Summary of the *Kennedy* Case

At issue in *Kennedy* was the constitutionality of the Louisiana statute that allowed the death penalty for aggravated rape of a child under the age of twelve.[7] The factual background to the case is one so severe that the Court stated near the very beginning of the opinion: "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."[8]

In March 1998, petitioner Kennedy telephoned police stating that his eight-year-old stepdaughter ("L.H.") had been raped. He claimed neighborhood boys dragged her from the garage, raped her on the side yard, and fled. He further asserted that he witnessed one of the assailants flee. L.H. had been severely injured in the rape. Police found her at the scene bleeding profusely from the vaginal area (after Kennedy had cleaned her, thereby removing any biological evidence which may have existed). One medical expert testified these injuries were "the most severe he had seen."[9] Although both Kennedy and L.H. initially maintained that others raped L.H., evidence quickly pointed to Kennedy. Such evidence included Kennedy's phone calls prior to calling 911 to carpet cleaners and others about the removal of blood stains from a carpet; blood located under the victim's mattress as opposed to the location outdoors where Kennedy claimed the rape occurred (which was primarily undisturbed); inconsistent and incredible statements by Kennedy about the crime and what he claimed to have seen; and crime scene evidence.[10] Eight days after the crime, police arrested Kennedy for the rape of L.H.[11] After

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she was removed from her mother's custody and then returned in June, L.H. disclosed that Kennedy had raped her.[12] The defendant was tried and convicted by a jury of aggravated rape under § 14:42 of the Louisiana Statutes, which allowed the prosecutor to pursue the death penalty because L.H. was less than twelve years old at the time of the crime.[13]

The jury heard additional evidence during the penalty phase of the trial, including testimony from the goddaughter of Kennedy's former wife, who reported being molested and raped by Kennedy when she was eight years old.[14] The jury unanimously sentenced Kennedy to death, and that sentence was affirmed by the Louisiana Supreme Court.[15] Kennedy then appealed to the United States Supreme Court, which described the question presented as "whether the Constitution bars respondent from imposing the death penalty for the rape of a child where the crime did not result, and was not intended to result, in death of the victim."[16]

The Supreme Court held, in an opinion authored by Justice Kennedy and joined by Justices Stevens, Souter, Ginsberg, and Breyer, "based both on consensus and our own independent judgment, . . . 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."[17] More specifically, the majority concluded that there was a national consensus that the death penalty is never acceptable for the rape of a child and that, in its own judgment, this penalty is inconsistent with evolving standards of decency.[18]

As will be discussed below, the Court appeared to employ the accepted two-part proportionality test it had articulated in *Coker*, and substantially continued to employ in *Enmund*, *Atkins*, and *Roper*.[19] As an overview, this test is comprised of a two-pronged analysis. First, the Court engages in an objective analysis of society's standards to determine if a national consensus exists either in support of or against the death penalty under the circumstances at issue in the given case. Second, the Court looks to its own subjective judgment on the propriety of the death penalty.[20] However, in applying this test in *Kennedy*, the Court shifted it ever so slightly to emphasize, among other aspects, its own subjective judgment and new sources of information.

Writing in dissent, Justice Alito challenged what he saw as the unsound, dually erroneous analysis of the majority, with respect to both national consensus and the Court's own judgment.[21] As to the national consensus, the majority and the dissent challenged each other's statistics regarding which states authorize the death penalty for child rape and which states tried to but were prevented from doing so. The dissent rejected the assertion that this case should be compared to the national trends of *Atkins* and *Roper*, in which the number of jurisdictions allowing the death penalty for the mentally impaired or juveniles, respectively, was decreasing. More fundamentally, Justice Alito agreed with the state of Louisiana in noting that some jurisdictions understood *Coker*'s rejection of the death penalty to apply to all rapes and, therefore, were reluctant to enact legislation authorizing such a penalty for the rape of a child. "[D]icta in this Court's decision in *Coker v. Georgia* has stunted legislative consideration of the question whether the death penalty for the targeted offense of raping a young child is consistent with prevailing standards of decency."[22] While Justice Alito allowed for the possibility that states such as Louisiana that authorized the death penalty for rape of a child were at the forefront of a trend,[23] the majority did not. The dissent further challenged the majority's comparison of the forty-four states without the death penalty for child rape to the thirty without the death penalty in *Atkins* and *Roper*.[24]

> I do not suggest that six new state laws necessarily establish a "national consensus" or even that they are sure evidence of an ineluctable trend. In terms of the Court's metaphor of moral evolution, these enactments might have turned out to be an evolutionary dead end. But they might also have been the beginning of a strong new evolutionary line. We will never know, because the Court today snuffs out the line in its incipient stage.[25]

Justice Alito argued that to the majority "what matters is the Court's 'own judgment.'"[26] He then asserted that the grounds on which the majority rested its judgment were possibly compelling policy statements, but were not pertinent to the constitutional question of whether the Eighth Amendment bars such a punishment.[27]

II. The Majority Opinion Varied the *Coker* Test in Some Subtle but Important Ways

A. The Court Explicitly Moved the Test from Two Equal Component Parts to One in Which the Court's Own Subjective Judgment Is Paramount

In *Kennedy*, the Court did indeed continue to apply the two-pronged test to assess the proportionality of capital punishment within the Louisiana statute.[28] However, in so doing, there was a marked shift in emphasis from the objective prong to the subjective prong of the Court's own judgment.[29] This is clear when one examines the test as articulated in 1977 in *Coker* as compared to that articulated in *Kennedy*.

Coker, decided just one year after *Gregg*'s reinstatement of the death penalty, clearly notes (as does *Kennedy*) that, as a threshold matter, the death penalty in and of itself is not unconstitutional.[30] Both acknowledge that the Eighth Amendment bars not only barbaric punishment, but also that which is excessive.[31] Regarding the description of the actual prongs, the *Coker* plurality stated:

> [T]hese Eighth Amendment judgments should not be, *or appear to be* merely subjective views by individual Justices; judgment should be informed by objective factors *to the maximum possible extent*. To this end, attention must be given to the public attitudes

> concerning a particular sentence history and precedent, legislative attitudes, and the response of juries reflected in their sentenceing [*sic*] decisions are to be consulted.[32]

Contrast this with the most recent pronouncement of the test. Rather than being focused on the objective factors "to the maximum possible extent," the Court stated it would be *guided* by

> objective indicia of society's standards, as expressed in legislative enactments and state practice with respect to executions. *The inquiry does not end there, however. Consensus is not dispositive.* Whether the death penalty is disproportionate to the crime committed depends as well upon the standards elaborated by controlling precedents and by the Court's *own understanding* and interpretation of the Eighth Amendment's text, history, meaning, and purpose.[33]

The Court went on to state that its ruling was "[b]ased both on consensus and our own independent judgment."[34]

Although the *Kennedy* Court parroted the *Coker* language regarding the objective criteria, it explicitly stated that a national consensus, no matter how strong, is not dispositive. This is a far cry from the *Coker* language, which stated quite the opposite: that objective factors should be the basis of the analysis and only after they are considered should the Court look to its own judgment. While *Coker* made clear that the Court's own judgment should be considered ("for the Constitution contemplates that in the end our own judgment will be brought to bear on the question of acceptability of the death penalty"), at best it placed the Court's subjective judgment on par with the objective criteria, or more likely, secondary to it.[35] Indeed, the Court not only warned against subjective judgment being the basis of a decision, but against it even *appearing* to be the basis.[36] This is also reflected in *Atkins*, which noted that the subjective prong's function was limited to the confirmation of a national consensus. "Thus, in cases involving a consensus, our own judgment is 'brought to bear,' by asking whether there is reason to disagree with the judgment reached by the citizenry and its legislators."[37]

The preference for the subjective factors in *Kennedy* was suggested by a somewhat conclusory declaration of a national consensus. Rather than deferring to the objective criteria, the *Kennedy* Court indicated it would be "guided" by objective factors.[38] It then found a national consensus against capital punishment for the rape of a child,[39] although six states had allowed the death penalty for that crime within the previous fifteen years. The preference for subjective factors was also apparent in the Court's discussion of whether a national trend was emerging, and, more specifically, in its dismissal of the government's argument that one reason so few states had adopted the death penalty for rape of a child is the confusion surrounding *Coker*.[40] The government argued that, although fewer than ten states had such a penalty, that was a significant number given the ambiguity of *Coker*.[41] The Court acknowledged that portions of *Coker* could be read to apply to all forms of rape, but then disregarded that argument because of the other statements in the opinion, and the repeated use of the phrases "adult female" and "adult woman" in the opinion.[42] It characterized the question in *Coker* as one regarding the rape of adult women. Yet, the *Coker* plurality had stated "*Coker* was granted a writ of certiorari, limited to a single claim, rejected by the Georgia court, that the punishment of death for rape violates the Eighth Amendment."[43]

The brevity of the analysis of objective factors is apparent in *Kennedy*'s dismissal of the effect of *Coker* on legislators. Although the Court recognized that some states had refrained from seriously considering legislation authorizing the death penalty for the crime of rape of a child because of the *Coker* ambiguity, it noted that "there is no clear indication that state legislatures have misinterpreted *Coker* to hold that the death penalty for child rape is unconstitutional."[44] As noted by Justice Alito, the labeling of this view as a "misinterpretation" of *Coker* is interesting given that it was the view of partially concurring Justice Powell. In his partial concurrence and partial dissent in *Coker*, Justice Powell stated his concern that the holding was clearly too broad in excluding the death penalty for all forms of rape regardless of the circumstances.[45] "Rather, in an opinion that ranges well beyond what is necessary, [the plurality] holds that capital punishment always regardless of the circumstances is a disproportionate penalty for the crime of rape."[46]

Having labeled the opinion of Justice Powell a "misinterpretation," and then disputing the number of states that had adopted the death penalty for child rape, the Court rejected the claim that this movement toward the death penalty was indeed indicative of a movement across the nation or, at a minimum, evidence *against* a national consensus forbidding the death penalty. It rejected the notion that pending legislation had relevance and finally stated that the six jurisdictions that enacted the death penalty for rape of a child in thirteen years cannot compare to *Atkins*, in which eighteen states had forbidden the death penalty for the mentally impaired in a period of fifteen years.[47] Again, however, the Court ignored the climate of these changes. In both *Atkins* and *Roper*, the avenue of change was effectively open to legislatures to take without concern that their actions would be unconstitutional. After *Coker*, which was clear enough to an Associate Justice as well as numerous state legislatures, the avenue was effectively *closed* as a result of the perception that the death penalty for rape of a child would violate *Coker*.

An unusual procedural event highlighted this preference for the subjective view of the Court. In the original opinion, the Court concluded that because only six states had such legislation, and no one had been executed for rape in over thirty years, "there is a national consensus against capital punishment for the crime of child rape."[48] However, the Court, and apparently all parties and amici,

ignored the Uniform Code of Military Justice, which includes death as a penalty for rape of a child.[49] When this fact was brought to light after the issuance of the original opinion, Louisiana sought a rehearing, arguing that this significantly undercut the Court's conclusion that a national consensus against the death penalty for rape of a child existed. Louisiana found it particularly important that this statute, as part the larger National Defense Authorization Act, was enacted by Congress in 2006 and implemented by an executive order in 2007.[50]

Not surprisingly, seven Justices of the Court voted not to rehear the case. The majority Justices from the original opinion joined Justice Kennedy's statement. The Court noted that death for rape of a child has been the law in the military since the nineteenth century, and yet the death penalty has not been carried out in fifty years.[51] The Court acknowledged that Congress revised the military's sexual assault statutes, but minimized the separation of the crimes of rape and rape of a child.[52] Congress approved an interim maximum penalty of death, pending the final setting of the maximum penalty by the President. President Bush left the availability of the death penalty in place.[53]

The Court also noted that the death penalty was similarly in effect for *Coker*. Just as then, this fact would not affect the Court's opinion here because the civilian and military justice systems are different regimes. Finally, the Court concluded that the federal criminal law, which did not provide for imposition of the death penalty for child rape, was more relevant.[54] Although Justices Thomas and Alito dissented, they wrote no statement. Justice Scalia, joined by Chief Justice Roberts, took this opportunity to attack the majority's emphasis on the subjective aspect of the test:

> I am voting against the petition for rehearing because the views of the American people on the death penalty for child rape were, to tell the truth, irrelevant to the majority's decision in this case. The majority opinion, after an unpersuasive attempt to show that a consensus against the penalty existed, in the end came down to this: "[T]he Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment." Of course, the Constitution contemplates no such thing; the proposed Eighth Amendment would have been laughed to scorn if it had read "no criminal penalty shall be imposed which the Supreme Court deems unacceptable."[55]

Although the Court applied the well-known two-pronged test in both its original and modified opinions, the Court's actual application placed an emphasis on its own subjective judgment.

B. The Court Emphasized the Goal of Decreasing the Use of the Death Penalty Regardless of the National Consensus

Throughout the opinion, the Court made several references to narrowing the applicability of the death penalty. Although the objective prong of the test was to consider the question of national consensus, the Court minimized this language and instead implied that the standard of decency could only mean a contraction of the applicability of the death penalty.[56] In other words, no matter what the consensus of the nation, the Court essentially believes that decency can *only* be served by an anti–death penalty position. The Supreme Court is essentially suggesting that, regardless of the direction in which the states move, our standards of decency *by definition* could not allow any broadening of the death penalty. "It is an established principle that decency, in its essence, presumes respect for the individual and thus moderation or restraint in the application of capital punishment."[57]

Although opposition to expanding the death penalty was not entirely new for the Court,[58] it had often been stated in very different contexts. Indeed, in *Atkins* and *Roper*, the Court noted it previously recognized that capital punishment should be limited to the "most serious crimes . . . whose extreme culpability makes them the most deserving of execution."[59] Both cases took that language and applied it to classes of defendants who may indeed be less culpable because of either their mental status or age. *Kennedy*, however, expanded this language far beyond the contexts present in *Atkins* and *Roper*.

Such a culpability issue was not present in *Kennedy*. There can be no question as to the egregiousness of Kennedy's crime, and his case has none of the class-of-defendant implications of *Atkins* or *Roper*. Indeed, the Court nearly opened its opinion by stating, "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 [of] society."[60] Although Kennedy was not representative of any less-culpable group, the Court applied the language narrowing the death penalty in such situations to him. The Court took the "most serious crimes" language and narrowed the definition. Unlike in *Enmund*, the "most serious" crimes are not, apparently, defined by any of the vast array of facts surrounding a case that courts traditionally use to determine a crime's severity, such as the presence of torture, extreme violence, or extreme vulnerability of the victim. Rather narrowly, the "most serious" of crimes can only be those that result in (or in the narrowest of circumstances are intended to result in) a death, or crimes against the state, or (rather inexplicably) crimes in which the defendant was a drug kingpin.

The second manifestation of the Court's interpretation of "evolving standards" as only against the death penalty was in its characterization of such a penalty in this case. The Court framed the act of applying the death penalty to this crime as "expand[ing] the death penalty."[61] The statement was clear that no matter the direction of a national consensus, the "standards of decency that mark the progress of a maturing society counsel us to be most hesitant before interpreting the Eighth Amendment to allow the extension of the death penalty."[62]

Indeed, the Court explicitly stated, "Evolving standards of decency are difficult to reconcile with a regime that seeks to expand the death penalty to [rape of a child]."[63] By implication, then, regardless of national consensus, it is a principle of the Eighth Amendment to narrow the death penalty. In making this argument, the Court referred to *Gregg* and the recognized tension between general rules and case-specific circumstances, which has produced unsatisfying results.[64] "Our response to this case law, which is still in search of a unifying principle, has been to insist upon confining the instances in which capital punishment may be imposed."[65]

This backdrop is combined with the Supreme Court stretching precedent further by taking the unrelated principle of confining the death penalty to the most violent and culpable offenders and applying it to egregious crimes and culpable defendants, such as in *Kennedy*. The Court then asserted that doing otherwise would expand the death penalty.

The final point made by the Court was that the frequency of child rape was so great that extending the death penalty to such cases would increase the number of defendants sentenced to death. This time, without precedent, the Court stated that such an increase in numbers would violate "the necessity to constrain the use of the death penalty."[66] Therefore, the Court has ruled out the death penalty, no matter how severe the crime, if the crime occurs frequently enough. Many jurisdictions enact severe penalties to deter an explosion of certain types of crime. The Court's concern that death may not be a valid penalty for frequently committed crimes suggests that deterrence is no longer an acceptable penological justification.[67]

C. The Court Relied on Considerations in Its Own Subjective Judgment Not Previously Considered in Eighth Amendment Proportionality Analysis

It was not only the emphasis on the subjective test that was a subtle shift from *Coker*, but also what the Court considered while engaging in the subjective and objective analyses.[68] These considerations include what the Court regarded as the interests of the victim and possible procedural concerns. Most striking is the Court's somewhat paternalistic assessment of the interests of the victim. With regard to the victim, we continue to see a lack of real understanding of the crime of rape and the victimization of a minor. Although we do see a refreshing modernization of the Court's understanding of rape since *Coker*, the ultimate conclusion that rape is a less morally grave crime than murder is unchanged. Initially, *Kennedy* explicitly recognized the shortcomings of the *Coker* plurality's conceptualization of rape.[69] Thankfully absent from *Kennedy* are statements such as those in *Coker* that the rape victim was "unharmed," notwithstanding the fact that she was forcefully raped in front of her bound husband, had her life threatened, and was abducted.[70] Indeed, *Coker* was filled with misinformation about rape in general, such as the claim that rape "normally involves force" and "often physical injury."[71] Finally, there was the oft-quoted language reflecting the then-all-male Court's view that "rape by definition does not include . . . serious injury to another person. . . . 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."[72] While *Kennedy* explicitly distanced itself from this by stating, "We cannot dismiss the years of long anguish that must be endured by the victim of child rape,"[73] the analysis did not fully come into a twenty-first century understanding of the dynamics of the crime of rape of a child.

Some of the views that underlie *Coker*'s misapprehensions about rape remain in *Kennedy*. First, the Court embraced the conceptual conclusion of *Coker*:

> Consistent with evolving standards of decency and the teachings of our precedents we conclude that, in determining whether the death penalty is excessive, there is a distinction between intentional first-degree murder on the one hand and non-homicide crimes against individual persons, even including child rape, on the other. The latter crimes may be devastating in their harm, as here, but "in terms of moral depravity and of the injury to the person and to the public," they cannot be compared to murder in their "severity and irrevocability."[74]

While the misinformation concerning rape of a child may be present in *Kennedy*, some of the information relied upon by the Court to reach this conclusion is novel to its death penalty jurisprudence. First, within the Court's discussion of retributive theory as being an inadequate justification for the death penalty in a rape case, the Court stated that it "must include the question whether the death penalty balances the wrong to the victim."[75] This was markedly different than *Enmund*, which examined deterrence and retribution as they related to the *defendant*, not the victim.[76] Furthermore, *Enmund* ultimately embraced retribution, but determined this theory was not served because the defendant class lacked culpability. *Atkins* similarly discussed the effect of retribution only in terms of how the severity of the punishment must depend on the *defendant's* culpability.[77]

This focus on what was perceived by the Court as "best" for the victim was a new consideration in the subjective prong. To justify it, the Court referred to the fact that capital cases require a long-term commitment by the victim and that the victim will be put through this lengthy process in his or her formative years.[78] The Court questioned the validity of "[s]ociety's desire to inflict the death penalty for child rape by enlisting the child victim to assist it" and labeled such action as "forc[ing] a moral choice on the child."[79] One curious aspect of this discussion is that each of these criticisms is an accurate cost of any litigation involving child victims. Yet, the jurisprudence has not proposed declining to litigate such cases. The Court added another descriptive reason for consideration of the victim in its analysis. First,

the Court noted that most sexual victimizers of children are related to their victims or are close to their victims' families, and the availability of the death penalty will add to the recognized underreporting of child sexual assault, which will, in turn, decrease any deterrent effect of such a penalty.[80] These reasons for opposing the death penalty in cases of child rape are new considerations.

The Court also suggested some procedural policy arguments. The Court declared, with little discussion, that there was a "problem of unreliable, induced, and even imagined child testimony."[81] This last overly generalized statement makes no distinction among the different types of cases involving children, is a hotly contested claim that is far from clear, and was stated by the Court with little review. The authority for this assertion was the amicus brief of the National Association of Criminal Defense Lawyers, as well as some of the articles cited therein. As a general matter, however, the Court did not reference the limits of those studies, nor did it mention other articles and studies that qualified or challenged the claim.[82] As a matter specific to the case, Justice Alito noted there was little issue of victim unreliability in Kennedy's prosecution. Although it is true that eight-year-old L.H. initially cooperated with the defendant's story, she (as is often typical) eventually disclosed that the defendant was her assailant and had threatened her if she did not confirm his claims.[83] Not only is it a questionable proposition that reliability is an issue in every child rape case, but, as Justice Alito noted, it was not at issue in this case, where the medical evidence fully corroborated the victim's testimony. Yet, the Court, without reflection, based some of its opinion on such an over-generalization.

The Court made a second procedural argument. The Court stated that because of the high number of child rapes, the resulting increase in the number of executions would be significant. In rejecting the possible solution of utilizing more aggravating factors to limit any unnecessary increase in frequency of the death penalty, the Court stated that such was not a sufficient option in child rape cases. The reason offered by the Court was because such crimes

> in many cases will overwhelm a decent person's judgment, we have no confidence that the imposition of the death penalty would not be so arbitrary as to be "freakis[h]." We cannot sanction this result when the harm to the victim, though grave, cannot be quantified in the same way as death of the victim.[84]

However, this argument applies equally to homicide cases. Indeed, no matter the charge, juries are often asked to hear tragic, horrible facts. Even in murder cases with egregious facts, we do not systematically question the ability of jurors to follow the trial court's instructions and decide cases and penalties based upon the evidence before them and the law as given to them by the trial court.[85] This policy argument is remarkable because of the inconsistent manner in which the Court has characterized rape of a child. On the one hand, the Court stated that rape of a child was not as morally depraved a crime as murder. On the other, however, the Court also stated that the crime *categorically* was such that a decent person could be overwhelmed by its egregiousness and be unable to sentence the defendant in accordance with the law. This is both internally inconsistent and, as compared to *Coker*, novel.

Two aspects of these considerations of the Court are notable. First, it is a clear expansion of the types of information the Court has considered in exercising "its own judgment." Indeed, this was a point not lost on Justice Alito, who noted,

> These policy arguments, whatever their merits, are simply not pertinent to the question whether the death penalty is "cruel and unusual" punishment. The Eighth Amendment protects the right of an accused. It does not authorize this Court to strike down federal or state criminal laws on the ground that they are not in the best interests of crime victims or the broader society. The Court's policy arguments concern matters that legislators should—and presumably do—take into account in deciding whether to enact a capital child-rape statute, but these arguments are irrelevant to the question that is before us in this case. Our cases have cautioned against using "'the aegis of the Cruel and Unusual Punishment Clause' to cut off the normal democratic processes," but the Court forgets that warning here.[86]

Second, while some of these arguments are intriguing, they are inaccurate, at worst, and not well developed, at best. In any event, the Court's reliance on them marks a change in both the type and quality of the considerations on which it will rely.

III. The Court's Decision to Issue a Holding Significantly Broader Than Necessary Indicates That *Kennedy* Was Not Simply a Reassertion of *Coker*

The official question presented on which the Court granted certiorari was (1) Whether the Eighth Amendment's Cruel and Unusual Punishment Clause permits a state to punish the crime of rape of a child with the death penalty; and (2) If so, whether Louisiana's capital rape statute violates the Eighth Amendment insofar as it fails to genuinely narrow the class of such offenders' eligibility for the death penalty.[87] The Court described the issue in the opinion as "whether the Constitution bars respondent from imposing the death penalty for the rape of a child where the crime did not result, and was not intended to result, in death of the victim."[88]

As discussed above, this description arose from a perceived ambiguity in *Coker* as to whether its holding applied to any rape, or whether it applied exclusively to rapes of adult women. However, the Supreme Court's

holding far exceeded what was necessary to answer these questions. The Court in no way limited its holding to rape of children: "As it relates to crimes against individuals, . . . the death penalty should not be expanded to instances where the victim's life was not taken."[89]

Kennedy held that the death penalty is inappropriate for all crimes against the person that are not murder. In so doing, however, the Court specifically excluded drug kingpin activity from the list of personal crimes that are not murder.[90] *Coker* ignored the fact that people murder for many reasons, some depraved and some not. *Kennedy* expanded this ignorance with its inclusion of non-homicidal drug kingpins and others as more morally depraved than one who rapes a child. The Court was silent as to why drug kingpin activity is different from espionage or other crimes. If the reason for the Court's judgment was the broad effect drug trafficking has across our society (hence its suggestion that this is akin to a crime against the state), then one must ask about the effect of sexual assaults on children in our society.[91] The long-term effects of child rape are indeed devastating and include, but are not limited to, an increased risk of substance abuse, suicide, difficulty in relationships, post-traumatic stress disorder, prostitution, and sexual problems.[92] Such effects involve not only the victim, but her family and future family.

Why the Court expanded the ban on the death penalty in this way is unclear. This is particularly perplexing when the Court could have simply decided *Kennedy* by clarifying that *Coker* meant what it said when it stated, "We have concluded that a sentence of death is grossly disproportionate and excessive punishment for the crime of rape and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment."[93]

However, the Court chose a much more expansive holding, eliminating the death penalty as a punishment in any personal crime other than murder. There is arguably some room within the holding for imposing the death penalty for the rape of a child in which the defendant intended to kill or attempted to kill the victim. However, it is unlikely this will be permitted, given the Court's clear preference for an evolving standard of decency that by definition narrows the death penalty, its stated policy of never enlarging crimes to which the death penalty can apply, and its willingness to continue to decrease the number of such applicable crimes by emphasizing the Court's own judgment.

IV. Conclusion

Kennedy v. Louisiana is the latest chapter in the Supreme Court's death penalty jurisprudence. The decision was not necessarily surprising; however, it contains some surprises in its analysis. In examining the types of information on which the Court relied for its conclusion, subtle shifts away from *Coker* are apparent. The discussion of these shifts was not meant to suggest an impending radical change in the Court's view of the death penalty.[94] Nor do they indicate a previously undetected radical agenda of the Court. Rather, for the advocate, they represent views to be aware of as one attempts both to litigate these issues and to process the current status of the death penalty in the United States.

Notes

1. 433 U.S. 584 (1977).
2. 128 S. Ct. 2641 (2008).
3. *Id.* at 2650-51.
4. 458 U.S. 782 (1982).
5. 536 U.S. 304 (2002).
6. 543 U.S. 551 (2005).
7. La. Stat. Ann. § 14:42. It has since been amended to apply when the child is less than thirteen.
8. *Kennedy*, 128 S. Ct. at 2646.
9. *Id.* at 2646.
10. *Id.* at 2647.
11. *Id.* at 2640.
12. *Id.* at 2647.
13. Aggravating circumstances are set forth in La. Code Crim. Proc. Ann. art. 905.4 (1997 Supp.) and include the following:
    (1) The offender was engaged in the perpetration or attempted perpetration of aggravated rape, forcible rape, aggravated kidnapping, second degree kidnapping, aggravated burglary, aggravated arson, aggravated escape, assault by drive-by shooting, armed robbery, first degree robbery, or simple robbery. . . . (10) The victim was under the age of twelve years or sixty-five years of age or older.
14. *Kennedy*, 128 S. Ct. at 2648.
15. *Kennedy v. State*, 957 So.2d 757 (2004). The Louisiana Supreme Court found children in a special class of persons to be protected, but it also found that the direction of change in favor of the death penalty for child rape was significant and in favor of the statute. Finally, the court found that child rapists were among the *worst* offenders. 128 S. Ct. at 2648-49; 957 So.2d at 788-89.
16. *Kennedy*, 128 S. Ct. at 2646.
17. *Id.* at 2650-51.
18. *Id.* at 2649, 2653, 2651; *see also id.* at 2665 (Alito, J., dissenting).
19. *Infra* Part II.A. The test basically appears unchanged in these cases, although the Court began to look to international opinion as well. *See Enmund*, 458 U.S. at 787, 796. However, in *Atkins*, the Court discussed its previous language in *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958 plurality), noting the Eighth Amendment draws its meaning from "evolving standards of decency which mark the progression of a civil society." 536 U.S. at 311-12.
20. *Atkins*, 536 U.S. at 311-12.
21. *Kennedy*, 128 S. Ct. at 2665 (Alito, J., dissenting).
22. *Id.* (internal citation omitted).
23. *Id.* at 2672 (Alito, J., dissenting) ("State legislatures, for more than 30 years, have operated under the ominous shadow of the *Coker* dicta and thus have not been free to express their own understanding of our society's standards of decency. And in the months following our grant of certiorari in this case, state legislatures have had an additional reason to pause. Yet despite the inhibiting legal atmosphere that has prevailed since 1977, six States have recently enacted new, targeted child-rape laws.").
24. *Id.* at 2669 (Alito, J., dissenting).
25. *Id.* at 2672-73. (Alito, J., dissenting).
26. *Id.* at 2673 (Alito, J., dissenting).
27. *Id.*
28. *Id.* at 2650.

[29] This observation is similar to that of Justice Alito, who wrote in his dissent, "What matters is the Court's own judgment." *Id.* at 2673 (Alito, J., dissenting). Similarly, Justice Scalia wrote in his concurring statement denying the respondent's petition for a rehearing, "I am voting against the petition for rehearing because the views of the American people on the death penalty for child rape were, to tell the truth, irrelevant to the majority's decision in this case." 129 S. Ct. 1 (2008) (Scalia, J., respecting denial of rehearing).

[30] *Coker*, 433 U.S. at 591; *Kennedy*, 128 S. Ct. at 2650.

[31] *Coker*, 433 U.S. at 592; *Kennedy*, 128 S. Ct. at 2649.

[32] *Coker*, 433 U.S. at 593 (emphases added).

[33] *Kennedy*, 128 S. Ct. at 2650 (emphasis added) (citations omitted).

[34] *Id.*

[35] *See Coker*, 433 U.S. at 592, 597.

[36] *Id.* at 592.

[37] 536 U.S. at 313 (citation omitted).

[38] *Kennedy*, 128 S. Ct. at 2650.

[39] *Id.* at 2643, 2657. The Court noted that "past cases" objective evidence of contemporary constitutional values is entitled to great weight, but it went on to say such does not end the inquiry. *Id.* at 2658.

[40] *Id.* at 2653-54. The Court also recognized that for an unstated reason, the victim in *Coker* was treated as an adult, notwithstanding her age of sixteen years. However, at the time of the crime she was married and living with her husband and three-week-old child. *Id.* at 2654.

[41] *Id.* at 2653-55.

[42] *Id.* at 2653.

[43] *Coker*, 433 U.S. at 586.

[44] *Kennedy*, 128 S. Ct. at 2656.

[45] *Coker*, 433 U.S. at 601-03 (Powell, J., concurring); *Kennedy*, 128 S. Ct. at 2666 (Alito, J., dissenting).

[46] *Coker*, 433 U.S. at 601 (Powell, J., concurring).

[47] *Kennedy*, 128 S. Ct. at 2656.

[48] *Id.* at 2657-58.

[49] U.C.M.J., art. 120.

[50] *Kennedy v. Louisiana*, 129 S.Ct. 1 (2008) (respecting denial of rehearing).

[51] *Id.*

[52] *Id.*

[53] *Id.*; Exec. Order No. 13447, 72 Fed. Reg. 56214 (Sept. 28, 2007).

[54] *Kennedy*, 129 S. Ct. at 1.

[55] *Id.* at 3 (Scalia, J., respecting denial of rehearing) (internal citation omitted).

[56] With regard to the objective prong, the Court invoked the now-familiar phrase regarding the "evolving standards of decency that mark the progress of a maturing society." *Kennedy*, 128 S. Ct at 2649 (quoting *Trop v. Dulles*, 356 U.S. 86 (1958)). However, it described this standard as "not merely descriptive, but [one which] necessarily embodies a *moral* judgment." *Id.* (quoting *Furman v. Georgia*, 408 U.S. 238, 382 (1972) (Burger, C.J., dissenting)) (emphasis added).

[57] *Id.* at 2658 (citing *Trop*, 356 U.S. at 100). The majority did not respond to Justice Alito's argument that an increase in the death penalty could be consistent with evolving standards of decency because, since *Coker*, "reported instances of child abuse have increased dramatically; and there are many indications of growing alarm about the sexual abuse of children." *Id.* at 2669-70 (Alito, J., dissenting).

[58] *Id.* at 2659 (citing *Gregg*, 428 U.S. at 187 ("Our response to this case law, which is still in search of a unifying principle, has been to insist upon confining the instances in which capital punishment may be imposed.")).

[59] *Roper*, 543 U.S. at 568 (quoting *Atkins*, 536 U.S. at 319).

[60] *Kennedy*, 128 S. Ct. at 2646.

[61] *Id.* at 2661. *See also id.* at 2662 ("The incongruity between the crime of child rape and the harshness of the death penalty poses risks of overpunishment and counsels against a constitutional ruling that the death penalty can be *expanded* to include this offense." (emphasis added)).

[62] *Id.* at 2658.

[63] *Id.* at 2661. The Court describes rape of a child as "an area where standards to confine [the death penalty's] use are indefinite and obscure." For a discussion of that statement, Part III D.

[64] *Kennedy*, 128 S. Ct. at 2659.

[65] *Id.*

[66] *Id.* at 2660.

[67] In its proportionality doctrine, whether concerning the death penalty or not, the Court had always recognized all three penological theories on which punishment can legitimately be based: rehabilitation, deterrence, and retribution. *See, e.g., Harmelin v. Michigan*, 501 U.S. 957, 999 (1991) (Kennedy, J., concurring in part and concurring in judgment). Not only did *Kennedy* challenge deterrence, it also condemned retribution, the theory often relied upon to justify the death penalty. *See Kennedy*, 128 S. Ct. at 2650 ("It is the last of these, retribution, that most often can contradict the law's own ends. This is of particular concern when the Court interprets the meaning of the Eighth Amendment in capital cases. When the law punishes by death, it risks its own sudden *descent into brutality*, transgressing the constitutional commitment to *decency* and restraint." (emphases added)).

[68] The Court also framed the subjective test in a somewhat moral framework. In so doing, the Court took that morality one step further by suggesting morality demanded that death not be the punishment. "It must be acknowledged that there are *moral grounds* to question a rule barring capital punishment for a crime against an individual that did not result in death." *Kennedy*, 128 S. Ct. at 2658 (emphasis added).

[69] *Id.* at 2658 ("The attack was not just on her but on her childhood. For this reason, we should be most reluctant to rely upon the language of the plurality in *Coker*.").

[70] *Coker*, 433 U.S. at 587.

[71] *Id.* at 597-98.

[72] *Id.* at 598.

[73] *Kennedy*, 128 S. Ct. at 2658.

[74] *Id.* at 2660 (quoting *Coker*, 433 U.S. at 598).

[75] *Id.* at 2662 (citing *Roper*, 543 U.S. at 571).

[76] *Enmund*, 458 U.S. at 798.

[77] *Atkins*, 536 U.S. at 319.

[78] *Kennedy*, 129 S. Ct. at 2662.

[79] *Id.* at 2662-63.

[80] *Id.* at 2663. The Court also acknowledged that, while perhaps a deterrent for rape, the death penalty provides no deterrence for an offender considering murdering his rape victim. *Id.* at 2664.

[81] *Id.* at 2663.

[82] *Compare, e.g.*, Lindsay C. Malloy et al, *Filial Dependency and Recantation of Child Sexual Abuse Allegations*, 46 J. Am. Acad. Adolescent Psychiatry 2 (2007); Thomas D. Lyon, *The New Wave in Child Suggestibility Research: A Critique*, 84 Cornell L. Rev. 1004 (1999); Thomas Lyon, *Applying Suggestibility Research to the Real World: The Case of Repeated Questions*, 65 Law & Contemp. Probs. 98 (2002); *with* Stephen Ceci & Richard Friedman, *The Suggestibility of Children: Scientific Research and Legal Implications*, 86 Cornell L. Rev. 33 (2000).

[83] *See, e.g.*, Malloy et al., *supra* note 82.

[84] *Kennedy*, 128 S. Ct. at 2661 (quoting *Furman*, 408 U.S. at 310 (Stewart, J., concurring)).

[85] Indeed, the Supreme Court generally presumes that jurors follow the trial court's instructions. *See, e.g., Richardson v. Marsh*, 481 U.S. 200, 211 (1987).

[86] *Kennedy*, 128 S. Ct. at 2673 (Alito, J., dissenting) (quoting *Atkins v. Virginia*, 536 U.S. 304, 323 (2002) (Rehnquist, C. J., dissenting) (quoting *Gregg v. Georgia*, 428 U.S. 153, 176 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.))).

[87] Pet. for Cert., *Kennedy v. Louisiana*, 128 S. Ct. 2641 (2008) (No. 07-343).

[88] *Kennedy*, 128 S. Ct. at 2646.

[89] *Id.* at 2659. *See also id.* at 2650-51 ("[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.").

[90] *Id.* at 2659.

[91] *Id.*

[92] *See, e.g.*, American Psychological Association, Understanding Child Sexual Abuse (2001), *at* http://www.apa.org/releases/sexabuse/effects.html; D. Finkelhor & A. Browne, *Impact of Child Sexual Abuse: A Review of the Research*, 99 Psychol. Bull. 66 (1986); Christopher Bagley & Kathleen King, Child Sexual Abuse: The Search for Healing (1990).

[93] *Coker*, 433 U.S. at 592.

[94] Nor is it meant to suggest the author's view that the death penalty is either the correct or incorrect penalty for such a crime.