Supplementary Material

Chapter 11: The Contemporary Era—Criminal Justice/Punishments/Capital Punishment

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Kennedy v. Louisiana, 554 U.S. 407 (2008)

Patrick Kennedy was charged with raping his eight-year-old stepdaughter. Louisiana state law permitted juries to sentence to death persons found guilty of raping a child under twelve. At trial, Kennedy was found guilty of an aggravated rape. The jury then voted to impose the death penalty. Kennedy appealed that decision. He claimed that the Eighth and Fourteenth Amendments did not permit states to execute persons who had not committed murder. The Supreme Court of Louisiana rejected this claim. Kennedy appealed to the Supreme Court of United States.

Missouri public officials and nine states submitted amicus briefs urging the court to permit child rapists to be executed. The brief for nine states declared,

> *Enacting a categorical ban, irrespective of the will of the people as expressed through their States' legislative enactments, would be "antithetical to considerations of federalism," and would "cut off . . . normal democratic processes." The amici States seek to preserve the ability of their democratically elected legislatures to enact penal laws that are reflective of the contemporary moral judgment of society concerning the unique and horrific crime of aggravated child rape.*

Liberal public interest groups, legal aid associations, prominent English jurists, and the National Association of Social Workers filed briefs urging the justices to limit the death penalty to convicted murderers. The brief for the National Association of Social Workers, signed by many anti–sexual violence associations, asserted,

> *Executing child rapists will likely worsen the problem of underreporting that already frustrates efforts to combat sexual offenses against children. . . . Because Louisiana's penalty scheme does away with the marginal deterrence that is a central feature of punishment theory, the scheme will also encourage abusers to kill their victims. Under Louisiana law, abusers face no greater penalty for raping and killing their victims than for solely raping them; thus, it is more likely that an abuser will choose to eliminate the victim, who is in many instances the sole witness to the crime.*

The Supreme Court reversed the Louisiana Supreme Court by a 5–4 vote. Justice Kennedy's majority opinion ruled that the Constitution limited the death penalty to convicted murderers. Why did Kennedy think murder is different from any other crime? Why did the dissent disagree? Who had the better of the argument? Consider Justice Kennedy's assertion that the Eighth Amendment requires that "the use of the death penalty be restrained." Does this mean that the Court should be more willing to find a social consensus in favor of narrowing the instances of capital punishment than a social consensus in favor of expanding the instances of capital punishment? Is that sound? How do you explain the increasing anti–death penalty drift of Justice Kennedy's opinions?

JUSTICE KENNEDY delivered the opinion of the Court

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. . . [T]he Eighth Amendment's protection against excessive or cruel and unusual punishments flows from the basic "precept of justice that punishment for [a] crime should be graduated and

proportioned to [the] offense." Whether this requirement has been fulfilled is determined not by the standards that prevailed when the Eighth Amendment was adopted in 1791 but by the norms that "currently prevail." The Amendment "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." This is because "[t]he standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change."

Evolving standards of decency must embrace and express respect for the dignity of the person, and the punishment of criminals must conform to that rule. [P]unishment is justified under one or more of three principal rationales: rehabilitation, deterrence, and retribution. 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.

For these reasons we have explained that capital punishment must "be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'" . . .

. . .

[T]he Court has been 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.

Based both on consensus and our own independent judgment, our holding is 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.

Louisiana reintroduced the death penalty for rape of a child in 1995. . . . Five States have since followed Louisiana's lead. . . .

By contrast, 44 States have not made child rape a capital offense. As for federal law, Congress in the Federal Death Penalty Act of 1994 expanded the number of federal crimes for which the death penalty is a permissible sentence, including certain nonhomicide offenses; but it did not do the same for child rape or abuse.

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. . . Though our review of national consensus is not confined to tallying the number of States with applicable death penalty legislation, it is of significance that, in 45 jurisdictions, petitioner could not be executed for child rape of any kind. That number surpasses the 30 States in *Atkins v. Virginia* (2002) and *Roper v. Simmons* (2005) and the 42 States in *Enmund v. Florida* (1982) that prohibited the death penalty under the circumstances those cases considered.

. . . Respondent and its *amici* suggest that some States have an "erroneous understanding of this Court's Eighth Amendment jurisprudence." They submit that the general propositions set out in [*Coker v. Georgia (1977)*], contrasting murder and rape, have been interpreted in too expansive a way, leading some state legislatures to conclude that *Coker* applies to child rape when in fact its reasoning does not, or ought not, apply to that specific crime.

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. . . 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. 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.

The position of the state courts, furthermore, to which state legislators look for guidance on these matters, indicates that *Coker* has not blocked the emergence of legislative consensus. The state courts that have confronted the precise question before us have been uniform in concluding that *Coker* did not address the constitutionality of the death penalty for the crime of child rape. . . .

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Respondent and its *amici* identify five States where, in their view, legislation authorizing capital punishment for child rape is pending. 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. There are compelling reasons not to do so here. Since the briefs were submitted by the parties, legislation in two of the five States has failed.

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Nine States—Florida, Georgia, Louisiana, Mississippi, Montana, Oklahoma, South Carolina, Tennessee, and Texas—have permitted capital punishment for adult or child rape for some length of time between the Court's 1972 decision in [*Furman v. Georgia* (1972)] and today. Yet no individual has been executed for the rape of an adult or child since 1964, and no execution for any other nonhomicide offense has been conducted since 1963. . . .

Louisiana is the only State since 1964 that has sentenced an individual to death for the crime of child rape; and petitioner and Richard Davis, who was convicted and sentenced to death for the aggravated rape of a 5-year-old child by a Louisiana jury in December 2007. . . .

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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. These facts illustrate the point. Here the victim's fright, the sense of betrayal, and the nature of her injuries caused more prolonged physical and mental suffering than, say, a sudden killing by an unseen assassin. The attack was not just on her but on her childhood. . . .

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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 nonhomicide 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."

In reaching our conclusion we find significant the number of executions that would be allowed under respondent's approach. The crime of child rape, considering its reported incidents, occurs more often than first-degree murder. Approximately 5,702 incidents of vaginal, anal, or oral rape of a child under the age of 12 were reported nationwide in 2005; this is almost twice the total incidents of intentional murder for victims of all ages (3,405) reported during the same period. . . . [T]he 36 States that permit the death penalty could sentence to death all persons convicted of raping a child less than 12 years of age. This could not be reconciled with our evolving standards of decency and the necessity to constrain the use of the death penalty.

It might be said that narrowing aggravators could be used in this context, as with murder offenses, to ensure the death penalty's restrained application. We find it difficult to identify standards that would guide the decisionmaker so the penalty is reserved for the most severe cases of child rape and yet not imposed in an arbitrary way. Even were we to forbid, say, the execution of first-time child rapists, or require as an aggravating factor a finding that the perpetrator's instant rape offense involved multiple victims, the jury still must balance, in its discretion, those aggravating factors against mitigating circumstances. In this context, which involves a crime that 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.

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The goal of retribution, which reflects society's and the victim's interests in seeing that the offender is repaid for the hurt he caused does not justify the harshness of the death penalty here. In measuring retribution, as well as other objectives of criminal law, it is appropriate to distinguish between a particularly depraved murder that merits death as a form of retribution and the crime of child rape.

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It is not at all evident that the child rape victim's hurt is lessened when the law permits the death of the perpetrator. Capital cases require a long-term commitment by those who testify for the

prosecution, especially when guilt and sentencing determinations are in multiple proceedings. In cases like this the key testimony is not just from the family but from the victim herself. During formative years of her adolescence, made all the more daunting for having to come to terms with the brutality of her experience, L.H. was required to discuss the case at length with law enforcement personnel. In a public trial she was required to recount once more all the details of the crime to a jury as the State pursued the death of her stepfather. . . .

Society's desire to inflict the death penalty for child rape by enlisting the child victim to assist it over the course of years in asking for capital punishment forces a moral choice on the child, who is not of mature age to make that choice. The way the death penalty here involves the child victim in its enforcement can compromise a decent legal system; and this is but a subset of fundamental difficulties capital punishment can cause in the administration and enforcement of laws proscribing child rape.

There are, moreover, serious systemic concerns in prosecuting the crime of child rape that are relevant to the constitutionality of making it a capital offense. The problem of unreliable, induced, and even imagined child testimony means there is a "special risk of wrongful execution" in some child rape cases. . . .

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The experience of the *amici* who work with child victims indicates that, when the punishment is death, both the victim and the victim's family members may be more likely to shield the perpetrator from discovery, thus increasing underreporting. As a result, punishment by death may not result in more deterrence or more effective enforcement.

In addition, by in effect making the punishment for child rape and murder equivalent, a State that punishes child rape by death may remove a strong incentive for the rapist not to kill the victim. Assuming the offender behaves in a rational way, as one must to justify the penalty on grounds of deterrence, the penalty in some respects gives less protection, not more, to the victim, who is often the sole witness to the crime. . . .

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[T]the Eighth Amendment is defined by "the evolving standards of decency that mark the progress of a maturing society." [T]his principle requires that use of the death penalty be restrained. The rule of evolving standards of decency with specific marks on the way to full progress and mature judgment means that resort to the penalty must be reserved for the worst of crimes and limited in its instances of application. In most cases justice is not better served by terminating the life of the perpetrator rather than confining him and preserving the possibility that he and the system will find ways to allow him to understand the enormity of his offense. Difficulties in administering the penalty to ensure against its arbitrary and capricious application require adherence to a rule reserving its use, at this stage of evolving standards and in cases of crimes against individuals, for crimes that take the life of the victim.

JUSTICE ALITO, with whom THE CHIEF JUSTICE, JUSTICE SCALIA, and JUSTICE THOMAS join, dissenting.

The Court today holds that the Eighth Amendment categorically prohibits the imposition of the death penalty for the crime of raping a child. This is so, according to the Court, no matter how young the child, no matter how many times the child is raped, no matter how many children the perpetrator rapes, no matter how sadistic the crime, no matter how much physical or psychological trauma is inflicted, and no matter how heinous the perpetrator's prior criminal record may be.

I turn first to the Court's claim that there is "a national consensus" that it is never acceptable to impose the death penalty for the rape of a child. . . . [D]icta in this Court's decision in *Coker v. Georgia* (1977), 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. The *Coker* dicta gave state legislators and others good reason to fear that any law permitting the imposition of the death penalty for this crime would meet precisely the fate that has now befallen the Louisiana statute that is

currently before us, and this threat strongly discouraged state legislators—regardless of their own values and those of their constituents—from supporting the enactment of such legislation.

As the Court correctly concludes, the *holding* in *Coker* was that the Eighth Amendment prohibits the death penalty for the rape of an "'adult woman,'" and thus *Coker* does not control our decision here. But the reasoning of the Justices in the majority had broader implications.

. . . The plurality summarized its position as follows: "We have the abiding conviction that the death penalty . . . is an excessive penalty for the rapist who, as such, does not take human life."

. . .

Understandably, state courts have frequently read *Coker* in precisely this way. The Court is correct that state courts have generally understood the limited scope of the *holding* in *Coker*, but lower courts and legislators also take into account—and I presume that this Court wishes them to continue to take into account—the Court's dicta. And that is just what happened in the wake of *Coker*. Four years after *Coker,* when Florida's capital child rape statute was challenged, the Florida Supreme Court, while correctly noting that this Court had not *held* that the Eighth Amendment bars the death penalty for child rape, concluded that "[t]he reasoning of the justices in *Coker v. Georgia* compels us to hold that a sentence of death is grossly disproportionate and excessive punishment for the crime of sexual assault and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment."

For the past three decades, these interpretations have posed a very high hurdle for state legislatures considering the passage of new laws permitting the death penalty for the rape of a child. The enactment and implementation of any new state death penalty statute—and particularly a new type of statute such as one that specifically targets the rape of young children—imposes many costs. . . . Moreover, conscientious state lawmakers, whatever their personal views about the morality of imposing the death penalty for child rape, may defer to this Court's dicta, either because they respect our authority and expertise in interpreting the Constitution or merely because they do not relish the prospect of being held to have violated the Constitution and contravened prevailing "standards of decency." Accordingly, the *Coker* dicta gave state legislators a strong incentive not to push for the enactment of new capital child-rape laws even though these legislators and their constituents may have believed that the laws would be appropriate and desirable.

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In Oklahoma, the opposition to the State's capital child-rape statute argued that *Coker* had already ruled the death penalty unconstitutional as applied to cases of rape. Representative Fletcher Smith of the South Carolina House of Representatives forecast that the bill would not meet constitutional standards because "death isn't involved."

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If anything can be inferred from state legislative developments, the message is very different from the one that the Court perceives. In just the past few years, despite the shadow cast by the *Coker* dicta, five States have enacted targeted capital child-rape laws.

Such a development would not be out of step with changes in our society's thinking since *Coker* was decided. During that time, reported instances of child abuse have increased dramatically; and there are many indications of growing alarm about the sexual abuse of children.

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[T]the Court argues that statistics about the number of executions in rape cases support its perception of a "national consensus," but here too the statistics do not support the Court's position. The Court notes that the last execution for the rape of a child occurred in 1964, but the Court fails to mention that litigation regarding the constitutionality of the death penalty brought executions to a halt across the board in the late 1960's. . . . The Court also fails to mention that in Louisiana, since the state law was amended in 1995 to make child rape a capital offense, prosecutors have asked juries to return death verdicts in four cases. This 50% record is hardly evidence that juries share the Court's view that the death penalty for the rape of a young child is unacceptable under even the most aggravated circumstances.

In light of the points discussed above, I believe that the "objective indicia" of our society's "evolving standards of decency" can be fairly summarized as follows. Neither Congress nor juries have done anything that can plausibly be interpreted as evidencing the "national consensus" that the Court

perceives. 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.

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A major theme of the Court's opinion is that permitting the death penalty in child-rape cases is not in the best interests of the victims of these crimes and society at large. In this vein, the Court suggests that it is more painful for child-rape victims to testify when the prosecution is seeking the death penalty. The Court also argues that "a State that punishes child rape by death may remove a strong incentive for the rapist not to kill the victim," and may discourage the reporting of child rape.

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. . . .

The Court's argument regarding the structuring of sentencing discretion is hard to comprehend. The Court finds it "difficult to identify standards that would guide the decisionmaker so the penalty is reserved for the most severe cases of child rape and yet not imposed in an arbitrary way." Even assuming that the age of a child is not alone a sufficient factor for limiting sentencing discretion, the Court need only examine the child-rape laws recently enacted in Texas, Oklahoma, Montana, and South Carolina, all of which use a concrete factor to limit quite drastically the number of cases in which the death penalty may be imposed. In those States, a defendant convicted of the rape of a child may be sentenced to death only if the defendant has a prior conviction for a specified felony sex offense.

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That sweeping holding is also not justified by the Court's concerns about the reliability of the testimony of child victims. First, the Eighth Amendment provides a poor vehicle for addressing problems regarding the admissibility or reliability of evidence, and problems presented by the testimony of child victims are not unique to capital cases. Second, concerns about the reliability of the testimony of child witnesses are not present in every child-rape case. In the case before us, for example, there was undisputed medical evidence that the victim was brutally raped, as well as strong independent evidence that petitioner was the perpetrator. Third, if the Court's evidentiary concerns have Eighth Amendment relevance, they could be addressed by allowing the death penalty in only those child-rape cases in which the independent evidence is sufficient to prove all the elements needed for conviction and imposition of a death sentence. . . .

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With respect to the question of moral depravity, is it really true that every person who is convicted of capital murder and sentenced to death is more morally depraved than every child rapist? Consider the following two cases. In the first, a defendant robs a convenience store and watches as his accomplice shoots the store owner. The defendant acts recklessly, but was not the triggerman and did not intend the killing. In the second case, a previously convicted child rapist kidnaps, repeatedly rapes, and tortures multiple child victims. Is it clear that the first defendant is more morally depraved than the second?

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With respect to the question of the harm caused by the rape of child in relation to the harm caused by murder, it is certainly true that the loss of human life represents a unique harm, but that does not explain why other grievous harms are insufficient to permit a death sentence. . . .

The rape of any victim inflicts great injury, and "[s]ome victims are so grievously injured physically or psychologically that life *is* beyond repair." . . . .

. . . Psychological problems include sudden school failure, unprovoked crying, dissociation, depression, insomnia, sleep disturbances, nightmares, feelings of guilt and inferiority, and self-destructive behavior, including an increased incidence of suicide.

The deep problems that afflict child-rape victims often become society's problems as well. Commentators have noted correlations between childhood sexual abuse and later problems such as substance abuse, dangerous sexual behaviors or dysfunction, inability to relate to others on an interpersonal level, and psychiatric illness. . . .

The harm that is caused to the victims and to society at large by the worst child rapists is grave. It is the judgment of the Louisiana lawmakers and those in an increasing number of other States that these harms justify the death penalty. The Court provides no cogent explanation why this legislative judgment should be overridden. Conclusory references to "decency," "moderation," "restraint," "full progress," and "moral judgment" are not enough.

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