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## STUDENT NOTE

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### IS THE MURDER OF INNOCENCE A CAPITAL CRIME?

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INTRODUCTION .....	158
I. <i>KENNEDY v. LOUISIANA: A CASE STUDY</i> .....	158
A. <i>Facts of Kennedy v. Louisiana</i> .....	158
B. <i>Case History of Kennedy v. Louisiana</i> .....	161
II. THE CONSTITUTIONALITY OF CAPITAL PUNISHMENT FOR CHILD RAPE .....	162
A. <i>The Supreme Court's Stance on Capital Punishment</i> .....	162
B. <i>Are Society's Ideas of Capital Punishment for Child             Rapists Shifting?</i> .....	165
1. Repeat Offenders: The Problem of Recidivism ..	165
2. Federal Rules of Evidence .....	166
C. <i>The Roper Test</i> .....	167
1. Consensus .....	167
a. <i>States</i> .....	167
b. <i>Military</i> .....	168
2. Disproportionate? .....	169
D. <i>Distinguishing Adult and Child Rape Victims</i> .....	171
III. PRACTICAL ARGUMENTS SUPPORTING AND DISCLAIMING THE <i>KENNEDY</i> DECISION .....	172
A. <i>Numbers and Underreporting</i> .....	172
B. <i>Encouraging Murder?</i> .....	172
C. <i>Witness Reliability: Problems with Child Witnesses</i> .....	173
D. <i>Hardships of Trial</i> .....	173
E. <i>Defense Concerns: Minimal Funds and "Crushing             Caseloads"</i> .....	174
F. <i>Child Rape Is Costly to Society</i> .....	175

CONCLUSION ..... 175

INTRODUCTION

“One who takes another’s life is a murderer; one who rapes a child under the age of twelve murders innocence.”<sup>1</sup>

Few will dispute that child molesters are some of the most despised individuals on earth, guilty of once-unspeakable crimes. As society learns more about sex offenders, some see indications that these criminals cannot be rehabilitated, meaning they will likely continue to assault individuals until either their freedom or their lives are taken. The question emerges: do we lock them up forever or provide capital punishment for these heinous offenders? And, if the answer is capital punishment, is this acceptable under the Constitution, particularly the Eighth Amendment’s “cruel and unusual punishment” language?

I. LOUISIANA V. KENNEDY: A CASE STUDY

A. Facts of Louisiana v. Kennedy

Eight-year old L.H. was brutally raped on the morning of March 2, 1998.<sup>2</sup> Although the minor victim insisted that two boys attacked her while she sold Girl Scout cookies from her garage, police soon turned the investigation toward the victim’s stepfather, Patrick Kennedy.<sup>3</sup>

Kennedy’s employer, Alvin Arguello, testified that he received a message from Kennedy early on the morning of March 2, 1998, stating he would be unable to work that day.<sup>4</sup> Kennedy called back and spoke with Arguello between 6:30 am and 7:30 am to ask how to remove blood stains from carpet, adding that his stepdaughter had “just become a young lady.”<sup>5</sup> Arguello testified that Kennedy sounded nervous during this conversation.<sup>6</sup> At 7:37 am, Kennedy called B & B Carpet Cleaning to schedule an urgent carpet cleaning to remove blood stains.<sup>7</sup>

<sup>1</sup> Melissa Meister, *Murdering Innocence: The Constitutionality of Capital Child Rape Statutes*, 45 ARIZ. L. REV. 197, 224 (2003).

<sup>2</sup> State v. Kennedy, 957 So. 2d 757, 761 (La. 2007), *rev’d*, \_\_\_ U.S. \_\_\_, 128 S. Ct. 2641 (2008), *modified and reh’g denied*, \_\_\_ U.S. \_\_\_, 129 S. Ct. 1 (2008).

<sup>3</sup> *Id.* at 762, 764-65.

<sup>4</sup> *Id.* at 761.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

At 9:18 am, Kennedy called 911 to report the rape of his stepdaughter.<sup>8</sup> He told the operator that he found his stepdaughter lying in the yard and she had told him that “two boys grabbed her, pushed her down, pulled her over there, and raped her.”<sup>9</sup> He went on to describe a teenager he often saw walking through the neighborhood along with a ten-speed bicycle the boy rode.<sup>10</sup>

While Kennedy was still on the telephone with the 911 dispatcher, Sheriff’s Deputy Michael Burgess was only one block away when he received the call about the rape and arrived at the victim’s home within minutes.<sup>11</sup> Burgess was confused upon his arrival because the alleged crime scene seemed inconsistent with the reported facts of the rape.<sup>12</sup> For instance, a dog slept nearby and coagulated blood was found in an undisturbed patch of tall grass.<sup>13</sup> Burgess found the victim lying on her bed, wearing only a t-shirt and wrapped in a bloody cargo blanket.<sup>14</sup> Meanwhile, Kennedy was wiping his hands with a bloody towel that he said he got from the bathroom after taking the victim to the bathtub to clean her.<sup>15</sup> Although Kennedy claimed he carried the victim upstairs to the bathroom from the yard, he did not have blood on his clothes, nor was there a bloody trail leading from the yard.<sup>16</sup> When Burgess questioned the victim, Kennedy answered for her and seemed upset that the girl was being questioned.<sup>17</sup> The victim told Burgess that two boys dragged her from the garage where she was selling Girl Scout cookies and that one of them raped her.<sup>18</sup>

When the ambulance arrived, EMS field supervisor Stephen Brown found Kennedy using water in a basin to wipe the victim’s genital area.<sup>19</sup> Kennedy told Brown he was wiping blood from the area to see from where the bleeding was coming, in order to stop it.<sup>20</sup> Brown asked Kennedy to stop.<sup>21</sup> Brown then examined the victim, “found

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<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 761-62.

<sup>12</sup> *Id.* at 762.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

blood oozing from her vaginal area,” and covered it with a pad.<sup>22</sup> Brown also testified, outside the jury’s presence, that the blood appeared to be more coagulated than it should have been if the reported time of the rape was accurate.<sup>23</sup> While Brown attempted to interview the victim, Kennedy again interrupted and tried to answer for the girl.<sup>24</sup>

Subsequent luminol testing at the victim’s home indicated the presence of blood in a large area on the carpet at the foot of the victim’s bed, including the carpet pad and the subfloor.<sup>25</sup> Stains were also found on the underside of the mattress and mattress pad.<sup>26</sup> Dr. Michael Adamowicz from the Connecticut State Police Forensic Science Lab tested the mattress pad in 1998 but did not find DNA.<sup>27</sup> Defense expert Dr. Carolyn Van Winkle tested the pad in 2001; and using a newer and more sensitive test, found DNA, but ruled out the victim as the source of the DNA.<sup>28</sup> Thus, there was no conclusive proof that the large amounts of blood came from the victim.

Similarly, there was scant physical evidence to connect Kennedy to the crime. Dr. Henry Lee from the Connecticut State Police Forensic Science Lab did not find semen in the victim’s shorts, nor did he find seminal fluid or spermatozoa in the vaginal swabs taken from the victim at the hospital.<sup>29</sup> However, Dr. Lee testified that there were no grass or soil stains on the victim’s clothes that would be expected if she actually had been dragged across the yard.<sup>30</sup> Based on crime scene photographs, Dr. Lee also testified that there was no sign of a struggle in the yard, and the small amount of blood on the grass appeared to have been planted based on the indication of low-velocity dripping.<sup>31</sup>

The victim finally told her mother that Kennedy had raped her and that she could not keep it to herself any longer.<sup>32</sup> After confessing to her mother, the victim maintained that Kennedy was her rapist and

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<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 762 n.8.

<sup>24</sup> *Id.* at 762.

<sup>25</sup> *Id.* at 766.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 767.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

that he forced her to lie previously.<sup>33</sup> In her compelling testimony, the victim, then fourteen years old, said, “I woke up one morning and Patrick was on top of me.”<sup>34</sup> The state played a videotaped interview of the victim while she remained on the witness stand.<sup>35</sup> In the video, the victim stated that Kennedy “raped her, saw that she was bleeding, and called the police after informing her that she had better tell them the story he made up.”<sup>36</sup> She said the rape occurred in her bed while the defendant covered her eyes with his hand and while her shorts were off and he was naked.<sup>37</sup> After the rape, the victim said she fainted and did not remember any further details.<sup>38</sup> The eight-year-old girl’s injuries were very serious. “Her entire perineum was torn and her rectum protruded into her vagina.”<sup>39</sup> Surgery corrected these injuries;<sup>40</sup> however, the girl remained in great pain, requiring “gallons of stool softener” to allow her to defecate after surgery.<sup>41</sup> A doctor at Children’s Hospital said her injuries were the worst he had seen as the result of a sexual assault.<sup>42</sup>

#### B. *Case History of Kennedy v. Louisiana*

A jury returned a guilty verdict for aggravated rape against Patrick Kennedy on August 25, 2003.<sup>43</sup> The penalty phase was held the next day.<sup>44</sup> At the capital sentencing phase, another young female victim whose cousin was married to Kennedy, testified that Kennedy had sexually abused her on three occasions, the first two involved touching and the last actual intercourse.<sup>45</sup> The jury unanimously determined that Kennedy should be put to death.<sup>46</sup>

Since this case involved the death penalty, it was appealed directly to the Louisiana Supreme Court. On May 22, 2007, the court decided the death penalty was constitutional for child rape.<sup>47</sup> Patrick Kennedy

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<sup>33</sup> *Id.* at 767-68.

<sup>34</sup> *Id.* at 767.

<sup>35</sup> *Id.* at 768.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 761.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 761 n.4.

<sup>42</sup> *Id.* at 761.

<sup>43</sup> *Id.* at 760.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 772.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 760, 793.

then appealed to the United States Supreme Court, which reversed the Louisiana Supreme Court's opinion, holding that capital punishment for child rape is unconstitutional under *Roper*.<sup>48</sup> However, the Supreme Court affirmed that the constitutionality of the death penalty in child rape cases is subject to the idea of "evolving standards of decency," meaning it could become constitutional if society reaches such a consensus.<sup>49</sup>

Three days after the Supreme Court issued their opinion, Colonel Dwight Sullivan wrote a short entry on the CAAFlog, a military blog, about *Kennedy*.<sup>50</sup> Colonel Sullivan noted that the Court failed to discuss military law in its decision and the fact that the military allows for the death penalty in child rape cases.<sup>51</sup> As Corey Rayburn Yung stated, "Colonel Sullivan's post about the omission in the Court's opinion might have been relegated to the dustbin of Internet history had the leading Supreme Court reporter not taken notice."<sup>52</sup> Linda Greenhouse wrote a *New York Times* article that expanded upon Colonel Sullivan's post.<sup>53</sup> Soon thereafter, Louisiana filed a petition for rehearing based on the Court's omission of military law in its prior opinion.<sup>54</sup> The Court then requested briefs to determine if it should grant rehearing or amend its previous decision.<sup>55</sup> On October 1, 2008, the Court denied rehearing, affirming its previous decision.<sup>56</sup>

## II. THE CONSTITUTIONALITY OF CAPITAL PUNISHMENT FOR CHILD RAPE

### A. *The Supreme Court's Stance on Capital Punishment*

The Eighth Amendment of the United States Constitution states, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."<sup>57</sup> For years the Supreme Court has grappled with the limits of "cruel and unusual" punish-

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<sup>48</sup> *Kennedy v. Louisiana*, \_\_\_ U.S. \_\_\_, 128 S. Ct. 2641 (2008), *modified and reh'g denied*, \_\_\_ U.S. \_\_\_, 129 S. Ct. 1 (2008) [hereinafter *Kennedy I*]; see *Roper v. Simmons*, 543 U.S. 551 (2005).

<sup>49</sup> *Trop v. Dulles*, 356 U.S. 86, 101 (1958); see *Kennedy I*.

<sup>50</sup> Corey Rayburn Yung, *Is Military Law Relevant to the "Evolving Standards of Decency" Embodied in the Eighth Amendment?*, 103 NW. U. L. REV. COLLOQUY 140 (2008).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 140.

<sup>53</sup> *Id.* at 140-41.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Kennedy I*.

<sup>57</sup> U.S. CONST. amend. VIII.

ment.<sup>58</sup> Although the Court has yet to set the parameters of cruel and unusual punishment, it has noted in several opinions that the notion is dynamic and changes with the times.<sup>59</sup>

In *Weems*, the Court stated that the Eighth Amendment is “progressive, and is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice.”<sup>60</sup> Forty-eight years later, the Supreme Court reaffirmed its notion that Eighth Amendment interpretation changes over time.<sup>61</sup> In *Trop*, the Court determined that the Eighth Amendment “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”<sup>62</sup> In essence, the Court long ago established that interpretation of the Eighth Amendment may change as society’s morals and standards change.

The Court has not yet determined the full extent of the evolution of the Eighth Amendment. It has, however, limited the use of the death penalty based on society’s notions of cruel and unusual punishment. In *Atkins v. Virginia*, 536 U.S. 304 (2002), the Supreme Court exempted mentally retarded individuals from the death penalty. Three years later the Court invalidated the death penalty for all defendants under the age of eighteen at the time of the commission of the crime.<sup>63</sup> The Supreme Court of Louisiana asserted that *Atkins* and *Roper* “reaffirm the Court’s view that at its core the Eighth Amendment requires the Court to refer to ‘the evolving standards of decency that mark the progress of a maturing society to determine which punishments are so disproportionate as to be cruel and unusual.’”<sup>64</sup>

The United States Supreme Court has said juries cannot “wantonly and freakishly impose the death sentence.”<sup>65</sup> The Court previ-

<sup>58</sup> See, e.g., *Furman v. Georgia*, 408 U.S. 238 (1972) (Death penalty for the specific cases at hand constitutes “cruel and unusual punishment” under the Eighth Amendment); *Gregg v. Georgia*, 428 U.S. 153 (1976) (The death penalty “comports with the basic concept of human dignity at the core of the [Eighth] Amendment”); *Coker v. Georgia*, 433 U.S. 584 (1977) (Death penalty for rape constitutes “cruel and unusual” punishment under the Eighth Amendment).

<sup>59</sup> See *Weems v. United States*, 217 U.S. 349, 373 (1910) (“Time works changes, brings into existence new conditions and purposes.”); see also *Trop*, 356 U.S. at 101 (1958).

<sup>60</sup> *Weems*, 271 U.S. at 378.

<sup>61</sup> See *Trop*, 356 U.S. 86.

<sup>62</sup> *Id.* at 101.

<sup>63</sup> *Roper v. Simmons*, 543 U.S. 551 (2005).

<sup>64</sup> *Kennedy*, 957 So. 2d at 782 (quoting *Roper*, 543 U.S. at 561).

<sup>65</sup> *Gregg*, 428 U.S. at 206-07.

ously held that the death penalty is unconstitutional under the Eighth Amendment if its purpose is to inflict pain and suffering or if it is grossly disproportionate to the severity of the crime committed.<sup>66</sup> Additionally, “[t]o pass constitutional muster, a capital sentencing scheme must ‘genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of [the same crime].’”<sup>67</sup>

In the case of Patrick Kennedy, the class has been narrowed to that of child rapists. In the view of the Louisiana Supreme Court, “and evidently the view of the United States Supreme Court, child rape is the most heinous of all non-homicide crimes, and while the majority of other states may not provide capital punishment for child rape, many do provide capital punishment for other non-homicide crimes which are far less heinous.”<sup>68</sup>

Another constitutional issue is federalism. The state of Missouri, in particular, expressed federalism concerns regarding capital punishment.<sup>69</sup> In its *Amici Curiae* brief, the state noted “[t]his case is controlled by the fundamental principle that, except to the limited extent prescribed by the Federal Constitution, States are generally free to define crimes and their punishments.”<sup>70</sup> Missouri sought to have a state-wide debate “about whether the crime of child rape, at least in certain circumstances, warrants the death penalty.”<sup>71</sup>

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<sup>66</sup> *Id.* at 170-74.

<sup>67</sup> *Lowenfield v. Phelps*, 484 U.S. 231, 244 (1988) (quoting *Zant v. Stephens*, 462 U.S. 862, 877 (1983)).

<sup>68</sup> *Kennedy*, 957 So. 2d at 785; see also *Coker*, 433 U.S. at 597-98. See, e.g., ARK. CODE ANN. § 55-51-201(c) (West 2008) (Treason may be punishable by death); CAL. [PENAL] CODE § 37(a) (Treason may be punishable by death) (West 2009); GA. CODE ANN. § 17-10-30(a) (West 2008) (Aircraft hijacking may be punishable by death); MISS. CODE ANN. § 97-25-55(1) (West 2008) (Aircraft piracy may be punishable by death); WASH. REV. CODE ANN. § 9.82.010(2) (West 2009) (Treason may be punishable by death).

<sup>69</sup> See Brief for Missouri Governor Matt Blunt and Members of the Missouri General Assembly as *Amici Curiae* Supporting Respondents, *Kennedy I*, 128 S. Ct. 2641 (No. 07-343), 2008 WL 742922 [hereinafter *Missouri Amici Brief*].

<sup>70</sup> *Id.* at 5 (citing *Payne v. Tennessee*, 501 U.S. 808, 824 (1991); *McCleskey v. Zant*, 499 U.S. 467, 491 (1991); *Gore v. United States*, 357 U.S. 386, 393 (1958)).

<sup>71</sup> *Missouri Amici Brief*, *supra* note 69, at 5.



## B. *Are Society's Ideas of Capital Punishment for Child Rapists Shifting?*

### 1. Repeat Offenders: The Problem of Recidivism

Society has a low tolerance of sex offenders, specifically pedophiles, in light of reports of high recidivism rates among offenders. “[O]ne study found that 10 [%] of child molesters offend again within 4 to 5 years, and other studies have found that recidivism rates grow higher when the time span is extended.”<sup>72</sup> Some studies place child molester recidivism rates between twenty-two and forty percent, while others suggest rates closer to fifty percent.<sup>73</sup> Still, other studies place recidivism rates between sixty-five and ninety-five percent.<sup>74</sup>

Regardless of the exact numbers, recidivism rates of child molesters are “impermissibly high.”<sup>75</sup> Even those that argue recidivism rates for child molesters are lower than reported admit the lower rates in their studies are likely inaccurate.<sup>76</sup> Such inaccuracies can be attributed to the underreporting of sex crimes.<sup>77</sup>

Purported high recidivism rates and strong skepticism regarding rehabilitation causes many to doubt that freedom of sex offenders is proper because no “100-percent-effective methods” exist outside prison or death.<sup>78</sup> Lawmakers find recidivism of sex offenders quite disturbing. All fifty states and Congress have now “enacted statutes requiring authorities to notify the public of the location of registered sex

<sup>72</sup> Brief for Nat'l Ass'n of Social Workers et al. as Amici Curiae Supporting Petitioner, *Kennedy I*, 128 S. Ct. 2641 (No. 07-343), 2008 WL 494945 at 14 (citing AMERICAN PSYCHOLOGICAL SOCIETY, PROTECTING SOCIETY FROM SEXUALLY DANGEROUS OFFENDERS: LAW, JUSTICE AND THERAPY 64-65 (Bruce J. Winick and John Q. La Fond eds., 2003)).

<sup>73</sup> Catherine Rylyk, *Lest We Regress to the Dark Ages: Holding Voluntary Surgical Castration Cruel and Unusual, Even for Child Molesters*, 16 WM. & MARY BILL RTS. J. 1305 (April, 2008) (citing The Center for American Cultural Renewal, *Abuser Goes Free Without Restrictions*, <http://www.cfacr.org/pages/article.php?aid=679> (last visited Dec. 30, 2008)).

<sup>74</sup> Alisa Graham, Note, *Simply Sexual: The Discrepancy in Treatment Between Male and Female Sex Offenders*, 7 WHITTIER J. CHILD & FAM. ADVOC. 145, 157 (Fall 2007) (citing Jennifer B. Siverts, Note, *Punishing Thoughts Too Close to Reality: A New Solution to Protect Children From Pedophiles*, 27 THOMAS JEFFERSON L. REV. 393, 395 (2005)).

<sup>75</sup> RYLYK, *supra* note 73, at 1330 (citing Adam Shajnfeld & Richard B. Krueger, *Reforming (Purportedly) Non-Punitive Responses to Sexual Offending*, 25 DEV. MENTAL HEALTH L. 81, 99 (2006)).

<sup>76</sup> Richard Wright, *Sex Offender Post-Incarceration Sanctions: Are There Any Limits?*, 34 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 17 (Winter 2008) (citing R. Karl Hanson, *What Do We Know About Sex Offender Risk Assessment?*, 4 PSYCHOL. PUB. POL'Y & L. 50, 67 (1998)).

<sup>77</sup> *Id.*

<sup>78</sup> Rylyk, *supra* note 73, at 1330 (quoting Paul Martin Andrews, Letter to the Editor, *What It Takes to Stop Sexual Predators*, WASH. POST, July 12, 2006, at A14).

offenders.”<sup>79</sup> The state of New York, for example, addresses the concerns of recidivism in its Sexual Offender Registration Act, stating:

The legislature finds that the danger of recidivism posed by sex offenders . . . and that the protection of the public from these offenders is of paramount concern or interest to government. The legislature further finds that law enforcement agencies’ efforts to protect their communities, conduct investigations and quickly apprehend sex offenders are impaired by the lack of information about sex offenders who live within their jurisdiction and that the lack of information shared with the public may result in the failure of the criminal justice system to identify, investigate, apprehend and prosecute sex offenders.<sup>80</sup>

A 1993 Congressional House Report found that “evidence suggests that child sex offenders are generally serial offenders. Indeed, one recent study concluded the ‘behavior is highly repetitive, to the point of compulsion,’ and found that 74% of imprisoned child sex offenders had one or more prior convictions for a sexual offense against a child.”<sup>81</sup>

There is obviously great concern about recidivism amongst child molesters. Although various studies conclude a wide range of recidivism rates, “[w]hat is known is that there is a high probability that pedophiles will commit acts of sexual abuse again and they will go to great lengths to gain access to children.”<sup>82</sup> “The death penalty is a reasoned expression of society’s moral outrage at this crime, and will serve the purpose of preventing self-help and vigilantism.”<sup>83</sup>

## 2. Federal Rules of Evidence

Sex offender recidivism has been specifically addressed in the Federal Rules of Evidence. Rules 413, 414, and 415 were added by Congress in 1994 and made effective in 1995.<sup>84</sup> These rules allow for

<sup>79</sup> Melissa Meister, *Murdering Innocence: The Constitutionality of Capital Child Rape Statutes*, 45 ARIZ. L. REV. 197, 214 (2003) (citing Christina E. Wells & Erin Elliott Motley, *Reinforcing the Myth of the Crazy Rapist: A Feminist Critique of Recent Rape Legislation*, 81 B.U. L. REV. 127, 131 (2001)).

<sup>80</sup> Richard Klein, *An Analysis of Thirty-Five Years of Rape Reform: A Frustrating Search for Fundamental Fairness*, 41 AKRON L. REV. 981, 1038 (2008) (quoting N.Y. CORRECT. LAW § 168 (Consol. 2008)).

<sup>81</sup> H.R. REP. NO. 103-392 (1993) (citing A. Nicholas Groth, Ann W. Burgess, H. Jean Birnbaum, and Thomas S. Gary, *A Study of the Child Molester: Myths and Realities*, 41 LAE J. AM. CRIM. JUST. A. 17, 22 (1978)); see also Michele L. Earl-Hubbard, Comment, *The Child Sex Offender Registration Laws: The Punishment, Liberty Deprivation, and Unintended Results Associated with the Scarlet Letter Laws of the 1990s*, 90 NW. U. L. REV. 788, 790 (1996).

<sup>82</sup> Graham, *supra* note 74, at 157.

<sup>83</sup> Brief for Respondent at 55, *Kennedy I*, 128 S. Ct. 2641 (No. 07-343).

<sup>84</sup> FED. R. EVID. 413-415 accompanying notes.

evidence of prior similar crimes in both criminal and civil sexual assault and child molestation cases.<sup>85</sup> In all other criminal and civil cases, evidence of similar crimes is rarely allowed under the Federal Rules of Evidence. Thus, the addition of these rules in 1994 indicated Congress' recognition of the problem of recidivism and their desire to protect sexual assault victims. The purpose of the rules is "to protect the public from crimes of sexual violence."<sup>86</sup> Congress's decision to protect sexual assault victims, through enactment of Rules 413, 414, and 415, suggests that it perceived sex offenders as a particularly heinous group, requiring less governmental protection under the Federal Rules of Evidence.

### C. *The Roper Test*

The *Roper* Court set out a two-part test to determine the constitutionality of the death penalty under the Eighth Amendment.<sup>87</sup> The test begins with "a review of objective indicia of consensus," followed by a determination "whether the death penalty is a disproportionate punishment" to the crime committed.<sup>88</sup>

#### 1. Consensus

##### a. *States*

Five states allow the death penalty for sui generis extraordinary crimes against the government, such as treason, espionage, and aircraft piracy.<sup>89</sup> Four states allow for the death penalty for aggravated kidnapping.<sup>90</sup> Florida even allows for the death penalty in extreme drug cases in which no one dies.<sup>91</sup> "Thus, 14 of the 38 states permitted capital punishment provide the death penalty for non-homicide crimes: Louisiana, Oklahoma, South Carolina, Georgia, Arkansas, California, Mississippi, New Mexico, Washington, Colorado, Idaho, Montana, South Dakota, and Florida."<sup>92</sup> At the federal level, the death penalty is available "for the kingpin of an extraordinarily large continu-

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<sup>85</sup> See FED. R. EVID. 413-415.

<sup>86</sup> See 140 CONG. REC. S12, 990 (daily ed. Sept. 20, 1994) (statement of Sen. Dole).

<sup>87</sup> *Roper*, 543 U.S. 551, 564 (2005).

<sup>88</sup> *Id.*

<sup>89</sup> *Kennedy*, 957 So. 2d at 786.

<sup>90</sup> *Id.*

<sup>91</sup> See, e.g., FLA. STAT. ANN. § 893.135(1) (West 2008); FLA. STAT. ANN. § 921.142 (West 2008).

<sup>92</sup> *Kennedy*, 957 So. 2d at 787.

ing criminal drug enterprise.”<sup>93</sup> Thus, several states and the federal government allow for capital punishment for non-homicide crimes.

But what about capital punishment for rapes? In *Coker v. Georgia*,<sup>94</sup> the Court held the death penalty for the rape of an adult woman violated the Eighth Amendment. Noting that *Coker* was a plurality decision, Justice Ginsburg stated during oral argument for *Kennedy* that “you don’t have an opinion of five Justices saying that, in any and all circumstances, rape that leaves the victim alive cannot be punished by the death penalty.”<sup>95</sup> After *Coker*, the Louisiana legislature instated the death penalty for aggravated rape of a child under the age of twelve.<sup>96</sup> Four other states, Oklahoma, South Carolina, Montana, and Georgia, have capitalized child rape since the *Coker* decision as well.<sup>97</sup> According to the *Roper* Court, five was the number “sufficient to indicate a new consensus regarding society’s standards of decency towards the juvenile death penalty.”<sup>98</sup> In *Roper*, the Court explained that it had in the past changed its “standard of decency” for juvenile death penalty after five states abolished child death penalty laws.<sup>99</sup> Since five states now allow for the death penalty in child rape cases, there appears to be “objective indicia of consensus” under *Roper*.<sup>100</sup>

Additionally, nine states joined together to submit an amicus brief supporting the State of Louisiana, the respondent in *Kennedy*.<sup>101</sup> Although most of these states do not allow the death penalty for child rape, their brief supporting Louisiana demonstrates their support of such laws in other states.<sup>102</sup> This may indicate a growing consensus among the states in favor of capital punishment for child rape.

#### b. *Military*

Not only have five states approved the death penalty for child rapists, but the military also allows for such under the Uniform Code of

<sup>93</sup> *Id.* at 788. See 18 U.S.C. § 3591(b)(1) (2008). See also 21 U.S.C. § 848(e) (2008).

<sup>94</sup> *Coker*, 433 U.S. 584 (1977).

<sup>95</sup> Transcript of Oral Argument at 7, *Kennedy I*, 128 S. Ct. 2641 (No. 07-343).

<sup>96</sup> See 1995 La. Acts 397; 1997 La. Acts 757; 1997 La. Acts 898; LA. REV. STA. ANN. § 14:42(D)(2) (2007).

<sup>97</sup> *Kennedy*, 957 So. 2d at 784.

<sup>98</sup> *Id.* at 788. See also *Roper*, 543 U.S. 551 (2005).

<sup>99</sup> *Id.* at 562, 565.

<sup>100</sup> See *Roper*, 543 U.S. at 564.

<sup>101</sup> See Brief of Texas, et al. as Amici Curiae Supporting Respondent, *Kennedy*, 128 S. Ct. 2641 (No. 07-343).

<sup>102</sup> See *id.*

Military Justice (“UCMJ”).<sup>103</sup> Although military law has allowed for the death penalty for child rape since at least 1863,<sup>104</sup> the death penalty has not been carried out under the law in the last fifty years.<sup>105</sup> In 2006, Congress re-classified rape under the UCMJ into two separate crimes, adult rape and child rape.<sup>106</sup> However, Congress also removed “death” from the statute, stating only that rape shall be punished “as a court-martial may direct.”<sup>107</sup> For his part, President George W. Bush later left in place, in the Manual for Courts-Martial, the availability of the death penalty for rape of an adult or child victim.<sup>108</sup>

## 2. Disproportionate?

To determine the proportionality of capital punishment to the crime of child rape, it is important to understand the effects of rape on children. A wide range of physical problems result from child rape, including “abdominal pain, vomiting, urinary tract infections, perineal bruises and tears, pharyngeal infections, and venereal diseases.”<sup>109</sup>

Sadly, the physical scars from rape are nearly paled in comparison to the wide-ranging psychological ramifications, including “depression, insomnia, sleep disturbances, nightmares, compulsive masturbation, loss of toilet training, sudden school failure, and unprovoked crying.”<sup>110</sup> These effects are merely the beginning, however. Child victims of rape also experience “feelings of guilt, poor self-esteem, feelings of inferiority, self-destructive behavior, a greater likelihood of becoming a drug or alcohol addict, and increased suicide attempts.”<sup>111</sup> “The psychological trauma of child rape is even greater when a family member rapes the child—such victimization at the hands of someone the child trusts can lead to lifelong familial and trust issues.”<sup>112</sup>

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<sup>103</sup> See 10 U.S.C. § 920 (a) (2008).

<sup>104</sup> *Kennedy v. Louisiana*, 129 S. Ct. 1 (2008) [hereinafter *Kennedy II*] (citing Act of Mar. 3, 1863, § 30, 12 Stat. 736).

<sup>105</sup> *Id.* at 1.

<sup>106</sup> *Id.* at 2 (citing National Defense Authorization Act, § 552(a)(1), 119 Stat. 3257).

<sup>107</sup> 10 U.S.C. § 920(a) (2008).

<sup>108</sup> Exec. Order No. 13447, 3 C.F.R. § 243 (2008).

<sup>109</sup> Meister, *supra* note 1, at 208-09 (2003) (quoting Yale Glazer, *Child Rapists Beware! The Death Penalty and Louisiana’s Aggravated Rape Statute*, 25 AM. J. CRIM. L. 79, 87-88 (1997)).

<sup>110</sup> Meister, *supra* note 1, at 209 (citing Handbook on Sexual Abuse of Children: Assessment and Issues 4 (Lenore E. Auerbach Walker ed., 1988)).

<sup>111</sup> Meister, *supra* note 1, at 209 (citing Glazer, *supra* note 109, at 87-88).

<sup>112</sup> Meister, *supra* note 1, at 209 (citing Bridgette M. Palmer, *Death as a Proportionate Penalty for the Rape of a Child: Considering One State’s Current Law*, 15 GA. ST. U.L. REV. 843, 864-65 (1999)).

Courts agree that rape, in general, is a heinous crime unlike any other. The *Coker* Court expressed its disdain for rape and the need for strong punishment of rape, stating,

It is highly reprehensible, both in a moral sense and in its almost total contempt for the personal integrity and autonomy of the female victim and for the latter's privilege of choosing those with whom intimate relationships are to be established. Short of homicide, it is the 'ultimate violation of self.' It is also a violent crime because it normally involves force, or the threat of force or intimidation, to overcome the will and the capacity of the victim to resist. Rape is very often accompanied by physical injury to the female and can also inflict mental and psychological damage. Because it undermines the community's sense of security, there is public injury as well. Rape is without doubt deserving of serious punishment.<sup>113</sup>

The Louisiana Supreme Court agrees with the United States Supreme Court's view of rape, stating that child rape is "like no other crime."<sup>114</sup> In his *Coker* dissent, Justice Burger called rape "one of the most egregiously brutal acts one human being can inflict upon another."<sup>115</sup> In his concurrence in *Coker*, Justice Powell said that "the deliberate viciousness of the rapist may be greater than that of the murderer. . . . Some victims are so grievously injured physically or psychologically that life *is* beyond repair."<sup>116</sup>

Studies of child sex abuse victims have revealed that sexual abuse of children is "grossly intrusive in the lives of children and is harmful to their normal psychological, emotional, and sexual development in ways which no just or humane society can tolerate."<sup>117</sup> In fact, the "rape of a child 'not only immediately traumatizes the child, but it also alters the child's life forever.'"<sup>118</sup> Indeed, for many victims rape may produce a "fate worse than death."<sup>119</sup>

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<sup>113</sup> *Coker*, 433 U.S. at 597-98 (1977) (internal citations omitted).

<sup>114</sup> *Kennedy*, 957 So. 2d at 789.

<sup>115</sup> *Coker*, 433 U.S. at 607-08 (1977).

<sup>116</sup> *Id.* at 603.

<sup>117</sup> Meister, *supra* note 1, at 208 (quoting CHRISTOPHER BAGLEY & KATHLEEN KING, CHILD SEXUAL ABUSE: THE SEARCH FOR HEALING 2 (1990)).

<sup>118</sup> *Id.* at 209 (quoting Bridgette M. Palmer, *Death as a Proportionate Penalty for the Rape of a Child: Considering One State's Current Law*, 15 GA. ST. U.L. REV. 843, 843 (1999)).

<sup>119</sup> Corey Rayburn, *Better Dead Than R(ap)ed?: The Patriarchal Rhetoric Driving Capital Rape Statutes*, 78 ST. JOHN'S L. REV. 1119, 1119 (2004) (quoting Susan Jacoby, *Thank Feminists for Rape Reforms*, BALTIMORE SUN, Aug. 13, 2002, at 11A).

#### D. *Distinguishing Adult and Child Rape Victims*

Children are a special class of people, and the State has been given the responsibility to protect them.<sup>120</sup> In fact, children are “particularly vulnerable since they are not mature enough nor capable of defending themselves.”<sup>121</sup> Rape devastates not only abused children but also the community.<sup>122</sup> “A ‘maturing society,’ through its legislature has recognized the degradation and devastation of child rape, and the permeation of harm resulting to victims of [child] rape.”<sup>123</sup> The vulnerability of children is even greater when a family member is the abuser. Melissa Meister explains the state’s duty to such victims, stating, “[t]he state’s duty to a victim of child rape is even more pressing because many children are raped by a family member, who normally should be providing protection, and thus these children are forced to rely solely on the state for protection.”<sup>124</sup>

“Common experience tells us that there is a vast difference in mental and physical maturity of an adolescent teenager. . . and a pre-adolescent child. . . . [I]t is well known that child sexual abuse leaves lasting scars that often carry from generation to the next. . . such injury seems inherent in the offense.”<sup>125</sup> The *Coker* plurality “took great pains” to limit its decision to the rape of adult women and referred to an “adult woman” fourteen times.<sup>126</sup> The *Wilson* court said that “given the appalling nature of the crime, the severity of the harm inflicted upon the victim, and the harm imposed on society, the death penalty is not an excessive penalty for the crime of rape when the victim is a child under the age of twelve years old.”<sup>127</sup>

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<sup>120</sup> See *Kennedy*, 957 So. 2d at 789.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> Meister, *supra* note 1, at 209-10 (2003).

<sup>125</sup> *State v. Brown*, 660 So. 2d 123, 126 (La. App. 1995).

<sup>126</sup> *State v. Wilson*, 685 So. 2d 1063, 1066 (La. 1997), *cert. denied*, *Bethley v. Louisiana*, 520 U.S. 1259 (1997). See also, *Coker v. Georgia*, 433 U.S. 584 (1977).

<sup>127</sup> *Wilson*, 685 So. 2d at 1070.

### III. PRACTICAL ARGUMENTS SUPPORTING AND DISCLAIMING THE KENNEDY DECISION

#### A. *Numbers and Underreporting*

The estimated number of yearly victims of child sexual abuse in the United States ranges from 83,000 to 217,000 children.<sup>128</sup> Based on evidence of child sexual abuse as reported by adults, at least twenty percent of women were sexually abused as children and five to ten percent of men.<sup>129</sup> This indicates the numbers are likely closer to 500,000 children each year being sexually abused in this country.<sup>130</sup>

As amici in *Kennedy*, the National Association of Social Workers and several other similarly situated groups argue that underreporting of rape could result if the death penalty is a potential consequence.<sup>131</sup> The problem of underreporting may be worse when the perpetrator is a relative.<sup>132</sup> Underreporting also means that fewer victims will be identified and treated.<sup>133</sup> Considering the psychological damage that rape inflicts on child victims, the lack of treatment could be devastating to young victims.

#### B. *Encouraging Murder?*

“[T]he 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 merely raping them.”<sup>134</sup> “If the death penalty is reserved for murder, then sex offenders have an incentive to stop short of killing their victims.”<sup>135</sup> This argument is particularly compelling because no one wants children’s lives to be put in mortal danger. However, there is little evidence to support amici’s argument. Amici overlook that children are raped and murdered in states where the death penalty applies only to the murder and in states that do not make capital punishment available for murder.

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<sup>128</sup> Brief for the Nat’l Ass’n of Social Workers, *supra* note 72, at 7 (citing U.S. DEP’T OF HEALTH AND HUMAN SERVICES, CHILD MALTREATMENT 2005 41 tbl.3-6 (2007)).

<sup>129</sup> *Id.* See, e.g., David Finkelhor, *Current Information on the Scope and Nature of Sexual Abuse*, 4 THE FUTURE OF CHILDREN 31, 42 (Summer/Fall 1994); Tina B. Goodman-Brown, et al., *Why Children Tell: A Model of Children’s Disclosure of Sexual Abuse*, 27 CHILD ABUSE & NEGLECT 525, 527 (2003).

<sup>130</sup> See Finkelhor, *supra* note 129, at 34. See also Goodman-Brown, *supra* note 129.

<sup>131</sup> Brief for the Nat’l Ass’n of Social Workers, *supra* note 72, at 3-4.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 5.

<sup>135</sup> *Id.* at 15.



### C. *Witness Reliability: Problems with Child Witnesses*

The Supreme Court “has consistently held that the Eighth Amendment demands heightened reliability in capital cases in part to guard against the risk that an innocent defendant might be put to death.”<sup>136</sup> Children, however, are often unreliable as witnesses. “[Y]oung children are particularly susceptible to suggestion in circumstances that are common to cases involving allegations of child sexual abuse, such as repeated questioning or other forms of pressure by parents or other authority figures.”<sup>137</sup> In fact, “[c]hild sexual abuse convictions are often ‘based primarily, if not solely, on the word of the victims involved.’”<sup>138</sup> A jury would be hard-pressed to discount the words of a child victim, so false accusations or inconsistencies could prove fatal to a defendant’s claim of innocence.

### D. *Hardships of Trial*

Rape trials can be very traumatic for victims who not only have to face their rapists but also testify in detail about the crime committed against them. This is often uncomfortable and embarrassing. In Louisiana, non-capital rape cases average 283 days in length from arrest to disposition.<sup>139</sup> Capital rape cases, however, last an average of 633 days.<sup>140</sup>

As if the extended length of a capital trial is not bad enough for child rape victims, the notoriety that attaches to these cases further exacerbates the trauma. “[T]he added publicity from a death-penalty prosecution may alone be sufficient to increase the trauma experienced by a victim.”<sup>141</sup> The greater the public attention that is focused on the victim, the more traumatic the experience of testifying is likely

<sup>136</sup> Brief of the Nat’l Ass’n of Criminal Defense Lawyers as Amicus Curiae in Support of Petition for Writ of Certiorari at 3, *Kennedy I*, 128 S. Ct. 2641 (No. 07-343), 2007 WL 4104371. See also *Johnson v. Mississippi*, 486 U.S. 578, 584 (1988).

<sup>137</sup> Brief for the Nat’l Ass’n of Criminal Defense Lawyers, *supra* note 136, at 5. See, e.g., Ceci, Bruck, & Rosenthal, *Children’s Allegations of Sexual Abuse: Forensic and Scientific Issues*, 1 PSYCHOL., PUB. POL’Y & L. 494, 506 (1995).

<sup>138</sup> Brief for the Nat’l Ass’n of Criminal Defense Lawyers, *supra* note 136, at 5 (quoting Dana D. Anderson, *Assessing the Reliability of Child Testimony in Sexual Abuse Cases*, 69 S. CAL. L. REV. 2117, 2118 (1996)).

<sup>139</sup> Brief of the Nat’l Ass’n of Social Workers, *supra* note 72, at 19 (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, 183 (2002)).

<sup>140</sup> *Id.* at 19 (citing West, at 183).

<sup>141</sup> *Id.* at 21 (citing *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 618 (1982) (Burger, C.J., dissenting)).

to be.<sup>142</sup> When an instance of child sexual abuse gains notoriety, “negative consequences for the child are more likely to result.”<sup>143</sup> Although this is certainly an unintended consequence of allowing capital punishment for child rape, courts should not underestimate the detrimental effects a lengthy trial can have on child rape victims and should take great care to minimize these effects.

*E. Defense Concerns: Minimal Funds and “Crushing Caseloads”*

Public defender offices are concerned about the cost of capital rape trials.<sup>144</sup> They are already struggling with minimal funds and argue there is not enough money to competently defend even more capital cases.<sup>145</sup> Because public defenders are ethically required to provide competent representation, a lack of funds could force them to unwillingly break their ethical obligations to their indigent clients.<sup>146</sup>

Louisiana criminal defense lawyers are also concerned that already-excessive caseloads could be drastically overloaded if more capital cases are added.<sup>147</sup> They argue that “[t]he primary causes of the state’s failing indigent defense system are inadequate funding and crushing caseloads of public defenders.”<sup>148</sup> In fact, “[t]he indigent defense system in Louisiana is beyond the point of crisis and is so weakened in relation to the other criminal justice system components that it calls into question the ability of the entire criminal court system to dispense justice accurately and fairly.”<sup>149</sup> The stress placed upon public defenders from the addition of capital crimes should not be taken lightly. These public servants receive little pay for many hours of thankless work. The added pressures when caseloads are even more burdened and budgets tightened could cause some to give up their jobs

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<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 22 (quoting Gene G. Abel et al., *Complications, Consent, and Cognitions in Sex Between Children and Adults*, 7 INT’L J. L. & PSYCHIATRY 89, 93 (1984)).

<sup>144</sup> Motion and Brief of Louisiana Public Defender Offices in Parishes Impacted By Hurricanes Katrina and Rita as Amicus Curiae Supporting Petition for Writ of Certiorari, *Kennedy I*, 128 S. Ct. 2641 (No. 07-343), 2007 WL 4132892.

<sup>145</sup> *Id.*

<sup>146</sup> See MODEL RULES OF PROF’L CONDUCT R. 1.1 (2007).

<sup>147</sup> See Brief for Louisiana Association of Criminal Defense Lawyers et al. as Amici Curiae Supporting Petitioner, at 2, *Kennedy I*, 128 S. Ct. 2641 (No. 07-343), 2008 WL 467890.

<sup>148</sup> *Id.* at 6.

<sup>149</sup> *Id.* at 6 (quoting NAT’L LEGAL AID & DEFENSE ASS’N, IN DEFENSE OF PUBLIC ACCESS TO JUSTICE, (2004), available at, [http://www.nlada.org/Defender/Defender\\_Evaluation/la\\_eval\\_summary.pdf](http://www.nlada.org/Defender/Defender_Evaluation/la_eval_summary.pdf)).

and enter the private sector. This would further cripple the indigent defense system, causing a debilitating trend toward more overburdened, cash-strapped public defenders. In other instances, public defenders may resign themselves to providing less-than-competent representation, constituting not only serious ethics violations, but also a failure of the justice system as we know it.

#### F. *Child Rape Is Costly to Society*

Child abuse and child rape is costly to society, not just in terms of the physical and mental costs to the child, but also in actual dollar amounts for medical care and social services.<sup>150</sup> For example, in 1987, taxpayers “spent between \$138,000 and \$152,000 for each sexually abused child.”<sup>151</sup> Imagine the current costs, more than twenty years later. Certainly the cost of child sexual abuse is incredible.

#### CONCLUSION

Despite what a few may say, child rape is one of the most heinous crimes.<sup>152</sup> In his argument to the Supreme Court in *Kennedy*, R. Ted. Cruz said,

In this instance, [he] is a 300-pound man who violently raped an eight-year-old girl. On any measure, he is exquisitely culpable. And the question, as this Court put it in *Roper*, as to — to the Eighth Amendment inquiry as to the death penalty is whether the offender can be reliably, quote, “be classified among the worst offenders.”

Under almost any analysis, someone who commits the sort of unspeakable crime that Patrick Kennedy commits is reliably classified among the worst offenders.<sup>153</sup>

No one can deny that child rapists deserve very serious punishment. Currently, based on the Supreme Court’s *Kennedy* decision, capital punishment is unavailable for child rapists. However, this could change as society’s views on this issue change.

<sup>150</sup> Meister, *supra* note 1, at 198 (citing Bridgette M. Palmer, *Death as a Proportionate Penalty for the Rape of a Child: Considering One State’s Current Law*, 15 GA. ST. U. L. REV. 843, 866-67 (1999)).

<sup>151</sup> *Id.*

<sup>152</sup> See Transcript of Oral Argument at 21, *Kennedy I*, 128 U.S. 2641 (No. 07-343), 2008 WL 1741235 (Justice Scalia asked Mr. Fisher, “Do you think treason is worse than child rape?” Mr. Fisher responded, “Well, Blackstone thought treason was more serious than murder. It has traditionally been the most serious crime that a person can commit, and I think historically, as well a[s] nationally, that is still the sentiment that is shared.”).

<sup>153</sup> *Id.* at 51-52 (quoting *Roper v. Simmons*, 543 U.S. 551 (2005)).

Regardless of one's view of capital punishment, society cannot ignore the horrific nature of child rape and its effect on young, innocent victims. Perpetrators of child rape are the worst of all criminals because they murder the innocence of our children. Even though strong opinions exist on each side of the capital punishment issue, there seems to be a consensus that society is unwilling to show mercy to criminals who harm children.