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USA: Another step up the evolutionary ladder

Supreme Court prohibits death penalty for child rape

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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.
Kennedy v. Louisiana, US Supreme Court, 25 June 2008

On 25 June 2008, by five votes to four, the US Supreme Court struck down a Louisiana law allowing the death penalty for the non-homicidal rape of a child. The five Justices in the majority opinion held that execution was an excessive punishment in such cases, and that the USA's constitutional ban on "cruel and unusual" punishments bars imposition of the death penalty for the rape of a child "where the crime did not result, and was not intended to result, in the victim's death."

Amnesty International welcomes the judgment, while acknowledging the serious nature of the crimes targeted by such legislation in a number of states in the USA. In addition to its absolute opposition to the death penalty in all cases, the organization has been concerned that such laws run counter to international standards seeking to narrow the scope of the death penalty, and that they contradict the global trend towards eradication of capital punishment. While children must be protected from violence, the death penalty is not the way to do it. And while the victims of childhood sexual assault deserve all possible therapeutic assistance, executing the offender does nothing to heal the trauma caused by the crime. Indeed, a law that increases the punishment for child rape from imprisonment to death may put the life of the child at increased risk. If such an offender rapes or otherwise sexually abuses a child, and is aware of the detail and scope of the law, he might decide that he has nothing to lose by killing the child, the only witness to the offence. The death penalty would thus have become a counter-deterrent. Such laws may also bring with them particular risks to the accused. A child who becomes a witness is vulnerable to making unreliable statements, a matter of extreme concern when such evidence may be what secures a death sentence.[1]

The case here concerned Patrick Kennedy, who was sentenced to death in Louisiana in 2003 for the rape of his eight-year-old stepdaughter. Only one other man is on death row for the rape of a child in the USA. A Louisiana jury sent Richard Davis to death row in 2007 for the rape of a five-

[1] See USA: More about politics than child protection: The death penalty for sex crimes against children, June 2006, http://www.amnesty.org/en/library/info/AMR51/094/2006/en.

year-old child. Of the approximately 3,300 individuals on death row in the USA, these two men are the only condemned inmates who were convicted of crimes not involving murder.

As in its rulings in 2002 and 2005 outlawing the execution of people with mental retardation (*Atkins v. Virginia*) and of people for crimes committed when they were under 18 years old (*Roper v. Simmons*), the Supreme Court applied its "evolving standards of decency" analysis. In *Trop v. Dulles* in 1958, the Supreme Court had held that the meaning of the US Constitution's Eighth Amendment ban on cruel and unusual punishments was not static, but "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." In a brief filed with the Supreme Court half a century later in the *Kennedy* case, urging the Justices to uphold the Louisiana child rape law, the state prosecuting authorities in Texas, Alabama, Colorado, Idaho, Mississippi, Missouri, Oklahoma, South Carolina and Washington argued that "such evolution need not be in only one direction".

Nevertheless, authoring the majority opinion in the *Kennedy v. Louisiana* ruling, Justice Anthony Kennedy wrote that:

> "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… When the law punishes by death, it risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint."

Justice Kennedy explained that this is why capital punishment in the USA is "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." Thus, children and the mentally impaired had been excluded from the death penalty by the *Roper* and *Atkins* decisions because such defendants were categorically less culpable. In earlier decisions, the Court had held that death was an impermissible punishment where the crime did not result, and was not intended to result, in the death of the victim.[2]

In Amnesty International's view, the death penalty *per se* is incompatible with human dignity. As the United Nations General Assembly said in its landmark resolution against the death penalty adopted in late 2007, "the use of the death penalty undermines human dignity", and "a moratorium on the use of the death penalty contributes to the enhancement and progressive development of human rights".

In *Kennedy v. Louisiana*, the Court examined the USA's history of the death penalty for the crime of rape. It found that in 1925, 18 states, the District of Columbia and the federal government had laws that allowed the death penalty for the rape of a child or an adult. Between 1930 and 1964, 455 people were executed for such crimes. After the Supreme Court struck down the country's existing death penalty laws in 1972 in *Furman v. Georgia*, six states re-enacted laws allowing the death penalty for rape, but these laws were subsequently also invalidated. In 1995, Louisiana reintroduced the death penalty for the rape of a child, and Georgia, Montana, Oklahoma, South

[2] *Coker v. Georgia*, 1977 (death penalty disproportionate for the crime of non-homicidal rape of an adult woman); *Enmund v. Florida*, 1982, (death penalty excessive for a defendant who aids and abets in a crime where murder committed, but who himself did not kill, attempt to kill, or intend to kill the victim).

Carolina and Texas subsequently followed with their own legislation, leaving 44 states and the federal government without such laws in force. The *Kennedy* decision noted that "it is of significance that, in 45 jurisdictions, [Patrick Kennedy] could not be executed for child rape of any kind."

The Supreme Court majority compared such figures to those before it in *Atkins* and *Roper*. In 2002, 30 states prohibited the death penalty for people with mental retardation, while 20 permitted it. In 2005, 30 states prohibited the death penalty for offenders under the age of 18 at the time of the crime, and 20 allowed it. Executions of such prisoners were relatively rare and confined to a handful of states. The Court noted that no one had been executed in the USA for the rape of a child or an adult since 1964, and no one had been executed for any other non-homicide crime since 1963.

The Court rejected the State of Louisiana's contention that under the "evolving standards of decency" analysis, the six states where child rape is a capital offence, coupled with proposals in a number of other states to enact such laws, reflected an emerging consensus in favour of such use of the death penalty. The *Kennedy* majority responded that "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." The Court added that in any event, efforts to pass such legislation had recently failed in a number of states.

The five Justices in the majority concluded that the history of the death penalty for rape and other non-homicide crimes, current laws and legislative activity, and the low number of death sentences and absence of executions for such crimes pointed to "a national consensus against capital punishment for the crime of child rape". Having drawn this conclusion, the Court then went on to apply its "own judgment" to the issue.

The majority thoroughly acknowledged the seriousness of the crime for which Patrick Kennedy had been convicted, saying it was not possible to recount the crime "in these pages in a way sufficient to capture in full the hurt and horror inflicted on his victim". The "attack was not just on her but on her childhood… Rape has a permanent psychological, emotional, and sometimes physical impact on the child." However, while "the years of long anguish that must be endured by the victim of child rape" must not be dismissed, the majority said, it did not follow that the death penalty is a proportionate punishment for the crime:

> "Evolving 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, a hesitation that has special force where no life was taken in the commission of the crime. 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… [T]he death penalty should not be expanded to instances where the victim's life was not taken…
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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 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." [3]

The majority attached significant weight to the fact that the frequency of child rape, if punishable by death, could result in a substantial upsurge in the use of the death penalty: "The crime of child rape, considering its reported incidents, occurs more often than first-degree murder." Such an increase in the use of capital punishment, the Court said, "could not be reconciled with our evolving standards of decency and the necessity to constrain the use of the death penalty." Moreover, any attempt to narrow the use of the death penalty within the category of child rapists would likely result in inconsistencies. The Court said that "the resulting imprecision and the tension between evaluating the individual circumstances and consistency of treatment have been tolerated where the victim dies. It should not be introduced into our justice system, though, where death has not occurred." It continued:

> We have spent more than 32 years articulating limiting factors that channel the jury's discretion to avoid the death penalty's arbitrary imposition in the case of capital murder. Though that practice remains sound, beginning the same process for crimes for which no one has been executed in more than 40 years would require experimentation in an area where a failed experiment would result in the execution of individuals undeserving of the death penalty. Evolving standards of decency are difficult to reconcile with a regime that seeks to expand the death penalty to an area where standards to confine its use are indefinite and obscure."

Amnesty International reiterates its view that the death penalty in the USA remains a punishment marked by discrimination, arbitrariness and error, despite the efforts of the Supreme Court to regulate it.[4]

In *Kennedy v. Louisiana*, on the question of one of the would-be justifications for the death penalty, retribution, the Court stated that:

> "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, [the victim in this case] 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. And in the end the State made [her] a

[3] The Court stressed that its analysis was limited to crimes against the individual, and that it was not addressing, "for example, crimes defining and punishing treason, espionage, terrorism, and drug kingpin activity, which are offenses against the State."
[4] See USA: The experiment that failed. A reflection on 30 years of executions, January 2007, http://www.amnesty.org/en/library/info/AMR51/011/2007/en.

> central figure in its decision to seek the death penalty, telling the jury in closing statements: '[She] is asking you, asking you to set up a time and place when he dies.'
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> 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."

In addition, the Court concluded that there were "serious systematic concerns" in prosecuting the crime of child rape as a capital offence, including the problem of "unreliable, induced, and even imagined child testimony". Such testimony could lead to the execution of wrongfully convicted defendants in some child rape cases, particularly given the likely centrality of the victim as a witness in any such case. The question in a capital case, the Court continued, "is not just the fact of the crime, including, say, proof of rape as distinct from abuse short of rape, but details bearing upon brutality in its commission. These matters are subject to fabrication or exaggeration, or both."

In examining the question of deterrence, the Court noted that under-reporting is a common problem with respect to child sexual abuse. A commonly cited reason for not reporting abuse is the fear of negative consequences for the perpetrator, "a concern that has special force where the abuser is a family member." In such circumstances, under-reporting would be increased, and "punishment by death may not result in more deterrence or more effective enforcement." Moreover, the existence of the death penalty could make it more likely that the abuser will 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."

After considering such issues, the majority concluded that the death penalty "is not a proportional punishment for the rape of a child." Thus, "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."

Four of the Justices dissented, rejecting the claim that a national consensus had been shown. Justice Samuel Alito, writing for the four dissenting Justices, argued that "Neither Congress nor juries have done anything that can plausibly be interpreted as evidencing the 'national consensus' that the Court perceives". He continued: "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".

It is a snuffing out, if that is what it is, that Amnesty International welcomes. Better that a death penalty law be snuffed out, than a human being who becomes the target of such a law.

The dissent paid particular attention to the harm done to the child victims of rape. Justice Alito wrote, for example:

> "It has been estimated that as many as 40% of 7- to 13-year-old sexual assault victims are considered 'seriously disturbed.' 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.
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> 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. Victims of child rape are nearly 5 times more likely than non-victims to be arrested for sex crimes and nearly 30 times more likely to be arrested for prostitution.
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> 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."

As Amnesty International pointed out in its short 2006 report on this issue, a large number of those on death row in the USA, and scores of those who have already been executed, were themselves subjected to sexual and physical abuse when they were children. In numerous cases, the jury were left without a full picture of the abuse or its ramifications. An example is the case of Gary Etheridge, executed in Texas in 2002. He had been physically abused by his father, and was repeatedly raped and physically abused by an older brother starting from when he was six years old. Gary Etheridge began using drugs and getting into trouble with the law from the age of 12. He attempted suicide on at least two occasions, once after being raped while serving a prison term for a prior, non-violent offence. His severe depression, when left untreated outside prison, contributed to his self-medicating with illegal drugs and to serious drug addiction. He was intoxicated on a combination of heroin and cocaine when he sexually assaulted and murdered a 15-year-old girl. At his trial for that murder, his lawyers were aware of the mitigating evidence of his horrific upbringing, but chose not to present it. They feared that this evidence could be used by the prosecutor to argue that Gary Etheridge would be a future danger if allowed to live. Indeed at the 1990 trial, the judge had referred to the defendant as a "piece of trash" and "a blight on society".[5]

Such language is reminiscent of that used by at least one Oklahoma legislator who referred to child molesters as "monsters" and "less than human" during the debates on the Oklahoma sex offender bill that was passed in June 2006. As a Supreme Court Justice noted in 1972 in *Furman*

[5] See *USA: The execution of mentally ill offenders*, January 2006, http://www.amnesty.org/en/library/info/AMR51/003/2006/en.

v. Georgia: “It is the poor, the sick, the ignorant, the powerless and the hated who are executed.” There are few more publicly vilified figures in society today than those labelled as paedophiles. Justice Alito suggested as much when he wrote that “I have little doubt that, in the eyes of ordinary Americans, the very worst child rapists – predators who seek out and inflict serious and emotional injury on defenceless young children – are the epitome of moral depravity”. The brief filed by the state prosecuting authorities in nine states calling on the Supreme Court to uphold the Louisiana law under which Patrick Kennedy was condemned to death, referred to the “peculiar depravity manifested by those who rape small children”, and “a degree of manifest evil, that is qualitatively distinct” in such cases.

Undoubtedly, child rape is a very serious crime with very serious consequences. Undoubtedly, too, however, the links between trauma suffered by individuals during childhood or later in life and their own propensity to violence are complex and varied. So too are the causes of adult sexual violence against children. Amnesty International does not seek to excuse criminal violence, or to downplay the trauma suffered by child victims of adult sexual violence. It merely seeks to end a punishment that is blind to such complexity and diverts resources from efforts seeking to explain violence and prevent its recurrence.

The death penalty not only runs the risk of irrevocable error, it is also costly – to the public purse, as well as in social and psychological terms. It has not been proven to have a special deterrent effect. It tends to be applied discriminatorily on grounds of race and class. It denies the possibility of reconciliation and rehabilitation. It promotes simplistic responses to complex human problems, rather than pursuing explanations that could inform positive strategies. It prolongs the suffering of the murder victim’s family, and extends that suffering to the loved ones of the condemned prisoner. It consumes resources that could be better used to work against violent crime and assist those affected by it. It is a symptom of a culture of violence, not a solution to it. It is an affront to human dignity.

Amnesty International urges the USA to recognize that there is an evolving global standard against the death penalty – for any crimes, however serious – as evidenced by the UN General Assembly resolution in 2007 calling for a worldwide moratorium on executions with a view to abolition and appealing to states that still retain the death penalty “to progressively restrict the use of the death penalty and reduce the number of offences for which it may be imposed”.

Amnesty International reiterates its call for a total moratorium on executions in the USA, at state, federal and military level. Legislatures and executive offices around the country should work for abolition of the death penalty, as a necessary measure for the protection of fundamental human rights. To use Justice Alito’s words, the death penalty is an evolutionary dead end.

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