

## **Chapter 4**

### **The Death Penalty for Non-Homicide Drug Trafficking?<sup>1</sup>** **Kennedy v. Louisiana and the Federal Death Penalty Act**

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#### **I. Topic and Case Background**

##### **Introduction**

There are currently two statutory schemes in the U.S. that provide for the death penalty as a possible sentence for the distribution of large quantities of illegal narcotics (“drug trafficking”). These are: a Florida state law,<sup>2</sup> and a Federal law<sup>3</sup> (which applies only to prosecutions in federal court – by far the minority of criminal prosecutions in the U.S.). Neither of these drug trafficking death penalty statutes has ever been subject to a constitutional challenge in the U.S. federal or state courts, perhaps because neither of them has ever been used by a prosecutor to seek the death penalty in a drug trafficking case that did not also involve the death of a victim. As a result, there is no jurisprudence in the United States that directly analyzes and decides the constitutionality of statutes that allow the death penalty for drug trafficking alone. This is true at both the state and federal levels.

As a result, it is somewhat challenging, in the present volume, to address the courts’ analysis of this issue. However, because the death penalty for drug trafficking is a major issue in ongoing debates in China, and because it is likely that the U.S. Supreme Court may have to decide the constitutionality of such laws at some point in the future, we address the constitutionality of capital drug trafficking statutes in this chapter.

Making this discussion somewhat easier is the fact that in a recent case totally unrelated to drug trafficking (the case itself addressed the constitutionality of imposing the death penalty for rape of a child where no death occurs), *Kennedy v. Louisiana*, the U.S. Supreme Court conducted a detailed analysis of the distinction between crimes that do and do not take a human life and the relationship of each type of crime to the death penalty. Within this analysis, in a non-binding portion of the Court’s opinion (*dictum*), the Court drew an analytical line separating “offenses against the individual” from

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<sup>1</sup> “Drug trafficking” is a general term that is defined differently in the statutes of the various U.S. jurisdictions. Some states define “drug trafficking” as a more serious offense than common possession, distribution, or possession with intent to distribute controlled substances, by designating “trafficking” offenses as only those involving a large minimum quantity of drugs. Federal statutes, however, define “drug trafficking” offenses quite inclusively, as the possession, manufacture, distribution, dispensing, transport, import, export, or possession with intent to manufacture, distribute or dispense controlled substances, without a minimum quantity requirement. *See, e.g.*, 18 U.S.C. § 924(c)(2), 18 U.S.C. § 801 et seq., 21 U.S.C. § 951 et seq., and 46 U.S.C. § 70501 et seq. Even under federal law, however, the penalty for such an offense does depend on the quantity involved. In death penalty jurisdictions, both state and federal statutes require a special aggravating factor in order to make drug trafficking a capital offense, and federal law requires that drug trafficking offenses be especially serious in order to be capital offenses if no death occurs in the course of the crime. *See* 21 U.S.C. § 848(e) (providing for capital punishment where a death results from organized trafficking) and 18 U.S.C. § 3591(b) (requiring large quantities and a managerial position in a continuing criminal enterprise for capital punishment where no death occurs from trafficking and related attempted killing).

<sup>2</sup> Fla.Stat. § 921.142 (death penalty for drug trafficking alone if at least one aggravating factor also found).

<sup>3</sup> 18 U.S.C. § 3591(b) (1994 death penalty for “drug kingpins”).

“offenses against the State.” In its holding, the *Kennedy* Court stated that, at least within the category of “offenses against the individual,” the death penalty is unconstitutional for crimes that do not take a human life, because the punishment of death is “excessive” and “disproportionate” to the crime, pursuant to the Eighth Amendment’s prohibition on “cruel and unusual punishment.” With respect to the other category, however – “offenses against the State” – *including crimes such as drug trafficking* (and treason and espionage), even when they do not result in a death, the Court left open the possibility that the death penalty might not be unconstitutionally “excessive” punishment.

Because (1) the *Kennedy* case contains the fullest and most recent statement by the Supreme Court of the principle that crimes not involving a death must not be subject to the death penalty, as well as the Court’s potentially conflicting statement that drug trafficking, though it may not cause a death, might not fall within the class of offenses to which the aforementioned principle applies, and (2) there are no Supreme Court or other state or federal appellate court cases that address the question of the constitutionality of the death penalty in drug trafficking cases where there is no loss of life, we therefore address *Kennedy* as the central case in this chapter, despite the fact that it involves the crime of rape of child, rather than that of drug trafficking.

#### A. *The History of Modern U.S. Drug Legislation and Policy: the “War on Drugs”*

Any discussion of drugs and the death penalty in the United States needs to begin with the so-called “War on Drugs,” a state and federal effort to combat the supply-side of the illegal drug market that began in the 1970s and has continued to this day.<sup>4</sup> While many Americans see the “War on Drugs” as a particularly American phenomenon, this view is myopic: the past thirty years have seen a global war on drugs, at least if the following statistic on the expansion of the death penalty for drug trafficking is any indicator: “In 1979, a survey of penalties for drug trafficking in 125 countries revealed that the death penalty could be imposed in ten of them. By 1995, the number of countries with capital punishment for such offenses had risen to at least twenty-six: fifteen in Asia, ten in the Middle East, North Africa, and the United States.”<sup>5</sup>

It is in this context that federal and state legislatures passed considerable legislation ratcheting up drug-related sentences, galvanizing them with mandatory minimum prison terms, and resulting in overflowing court dockets and soaring prison populations. After the 1972 *Furman* decision (discussed in Chapter 1) effectively invalidated then-extant death penalty statutes for all crimes, the federal government did not reinstate the federal death penalty until the 1988 Anti-Drug Abuse Act which was passed in the fervor of the War on Drugs.<sup>6</sup> The Anti-Drug Abuse Act contained an act called the “Drug

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<sup>4</sup> While the actual origin of the term is difficult to trace, its political origin is a bit more certain. See Claire Suddath, *The War on Drugs*, Time Magazine, Mar. 25, 2009, available at <http://www.time.com/time/world/article/0,8599,1887488,00.html>. “Although the U.S. government has battled drugs for decades — President Eisenhower assembled a 5-member Cabinet committee to ‘stamp out narcotic addiction’ in 1954 — the term ‘War on Drugs’ was not widely used until President Nixon created the Drug Enforcement Administration (DEA) in 1973 to announce ‘an all-out global war on the drug menace.’”

<sup>5</sup> Roger Hood, *The Death Penalty: The USA in World Perspective*, 6 J. Transnat'l L. & Pol'y 517, 530-31 (1997).

<sup>6</sup> Eileen Connor, *Criminal Law: The Undermining Influence Of The Federal Death Penalty On Capital Policymaking And Criminal Justice Administration In The States*, 100 J. Crim. L. & Criminology 149, 155-56 (2010). See also, Christopher Cutler, *Comment: Death Resurrected: The Reimplementation of the Federal Death Penalty*, 23 Seattle U. L. Rev. 1189, 1200-01 (2000): “By 1988, the phrase ‘the War on Drugs’ had become an often repeated phrase in American vernacular. Seeking to alleviate the social ills accompanying the torrent of illegal narcotics entering this country, Congress made great

Kingpin Act,” which authorized the death penalty sanction for any defendant, who, while working as part of a criminal enterprise, intentionally kills, counsels, commands, procures, induces or causes the intentional killing of any person.<sup>7</sup> The act, however, still required a related killing in order to impose capital punishment. It also made two other drug-related crimes involving a killing eligible for capital punishment.<sup>8</sup> In 1994, Congress passed the Violent Crime Control and Law Enforcement Act, which included the Federal Death Penalty Act. The FDPA greatly expanded the number of federal death penalty-eligible crimes to around sixty, and also expanded the number of death-eligible offenses and aggravating factors<sup>9</sup> for drug-related behavior *that results in death* (and that includes a corresponding mental state of either intent or reckless disregard for human life), but it also took the unusual step of carving out a capital crime for “drug kingpins” that did not include a related death as a prerequisite.<sup>10</sup> Essentially, the result of this rash of legislation from 1988 to 1996 was that many crimes that touched upon drug activity and also involved a death were now federal capital offenses; moreover, the death penalty was also extended to the crime of drug trafficking in extremely large quantities and to the crime of attempted or ordered murder of public officers, jurors, witnesses or their families by the leader of a criminal enterprise who commits a drug trafficking offense (also called the 1994 death penalty for drug kingpins) without the need to prove a death in order to seek the death penalty.

Traditionally, the prosecution of drug trafficking-related and other drug-related murders was left to local prosecutors in each state (and under the varying laws of each state), but as the War on Drugs began to take center stage in the national dialogue, many crimes that touched upon the drug trade were given high priority by federal prosecutors.<sup>11</sup> During this period, the U.S. Attorney General’s office (the office of the head Prosecutor in the U.S. federal-level courts) increased its prosecution of drug trafficking-related and other drug-related murders (over which the federal courts also had jurisdiction which they had chosen not to exercise in the past), although the number of federal prosecutions for

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efforts to curtail drug importations. One of the most visible results of this effort is the ‘Drug Kingpin Act,’ codified as 21 U.S.C. 848, creating a federal death penalty for certain crimes associated with the drug trade. While the legislative history for the Drug Kingpin Act is minimal, the use of the Drug Kingpin Act to curtail drug dealers was a natural progression of the war on drugs and a predictable response to the nation’s overwhelming support for the death penalty. The Drug Kingpin Act was created in a whirlwind of political fury. One commentator noted that Congress’s haste was evidenced most obviously in the fact that it neglected to include ... anything at all about the actual time, place, method, and manner for carrying out federal death sentences. That election-year Congress’s interest in the death penalty was purely and transparently symbolic, almost aesthetically so, and not remotely practical.”

<sup>7</sup> 21 U.S.C. § 848(e).

<sup>8</sup> 21 U.S.C. § 841(a), (b)(1)(A)(1994); 21 U.S.C. § 848(e)(1)(A).

<sup>9</sup> 18 U.S.C. § 3592; while the FDPA was largely responsible for the expansion of federal capital offenses, the 1996 Anti-Terrorism and Effective Death Penalty Act did add four offenses to the list of capital federal crimes.

<sup>10</sup> 18 U.S.C. § 3591(b); *see also* Connor, at 156; for general background on the expansion of the federal death penalty since that time, *see* John Cunningham, *Comment: Death In The Federal Courts: Expectations And Realities Of The Federal Death Penalty Act Of 1994*, 32 U. Rich. L. Rev. 939, 939-40 (1998): “[The federal death penalty] was vastly expanded with the codification of the Federal Death Penalty Act of 1994 ... as part of the Violent Crime Control and Law Enforcement Act of 1994. Largely in response to the American public’s desire to expand and expedite the use of the death penalty for violent crimes, as evidenced by recent public outrage over drug-related killings and terrorist acts, the 1994 Congress, by a vote of three to one, increased the number of federal crimes potentially invoking a death sentence to sixty.”

<sup>11</sup> Connor, at 156. Two of the three most prosecuted death-eligible federal crimes are drug-related homicides. “For example, among the most frequently charged federal capital crimes are the use of a gun to commit homicide during and in relation to a crime of violence or drug trafficking in violation of 18 U.S.C. § 924(j), murder in aid of racketeering activity in violation of 18 U.S.C. § 1959(a), and murder in furtherance of a continuing criminal narcotics enterprise in violation of 21 U.S.C. § 848(e)(1)(A) - all targeting conduct proscribed by every state.”

these types of offenses remains small in real terms today.<sup>12</sup> This change in prosecutorial policy has meant that murder defendants in states that have abolished the death penalty under state law (either *de facto* or *de jure*) are nevertheless at risk of being tried for a capital offense in federal court, particularly if the crime resulting in death of which they are accused involved drugs or drug trafficking.<sup>13</sup>

The protracted attack on the supply-side of the drug trade has come under considerable criticism of late. This critique, by an Arizona appellate court judge, is representative of those who would like to see a change in the way the War on Drugs is conducted:

Ironically, most mandatory penalty provisions enacted during the 1980s and 1990s concerned drug crimes, behaviors...[and were] uniquely insensitive to...deterrent effects....Despite risks of arrest, imprisonment, injury and death, drug trafficking offers economic and other rewards to disadvantaged people that far outweigh any available in the legitimate economy. Market niches created by the arrest of dealers are...often refilled within hours... In the 1980s, conservative parent groups vigorously demanded that something be done about hard drugs such as cocaine and heroin. Politicians, typically, responded by demanding increased punishment. That approach is strikingly effective, not in solving the problem, but in alleviating political pressure. A naive public passively accepts that approach to almost all crime issues without questioning whether more punishment really solves the crime problem. This political posturing generates a succession of escalating cycles. Public demand leads to intensified efforts to attack the drug trade.<sup>14</sup>

The above critique cites “conservative parent groups” (and politicians who desire to please them) as a major driver of the increased punishment for drug crimes, but not all conservatives are in that camp. Like the Arizona judge quoted above, in recent years, some conservative leaders have mitigated their stances on the War on Drugs.<sup>15</sup> One example is conservative criminologist James Q. Wilson, who has observed of drug crimes that “[s]ignificant reductions in drug abuse will come only from reducing

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<sup>12</sup> Connor, at n. 135. The Justice Department has even explained away a racial disparity in death penalty indictments with reference to the War on Drugs: “Between 1995 and 2000, United States Attorneys [federal prosecutors] recommended the death penalty with respect to 494 defendants, 85 of whom were white and 242 of whom were black... The Department of Justice disputes that a racial disparity exists in the operation of the federal death penalty. ... acknowledging that ‘the proportion of minority defendants in federal capital cases exceeds the proportion of minority individuals in the general population,’ but asserting that ‘this is not the result of any form of bias,’ but rather a product of the fact that ‘organized drug trafficking is largely carried out by gangs whose membership is drawn from minority groups.’”

<sup>13</sup> Connor, at 160-61. An excellent example of this phenomenon happens to be the *Quinones* case, discussed at the end of Chapter 1. “Quinones was accused of murdering an undercover New York City Police Department (NYPD) officer in the Bronx. Although Quinones’ criminal behavior fit within the federal charge of murder in furtherance of a continuing criminal enterprise, the crime was arguably local: he was a relatively small-time drug dealer; the victim was part of an NYPD investigative team; the murder was in retaliation for an arrest by the NYPD; the murder took place in the Bronx and was investigated by the NYPD. Capital punishment was (at the time) available in New York, but the Bronx District Attorney, Robert Johnson, has a policy of not seeking the death penalty.... Although the United States Attorney recommended against seeking the death penalty in the case, the United States Attorney General overrode this recommendation. The Justice Department pursued the capital charge, it said, in order to ensure consistency of capital punishment across the country. The federal jury convicted Quinones, but he was given only a life sentence.”

<sup>14</sup> Judge Rudolph Gerber, *On Dispensing Injustice*, 43 Ariz. L. Rev. 135, 154.

<sup>15</sup> See, e.g., Jesse McKinley, *Pat Robertson Says Marijuana Should be Legal*, *The New York Times*, March 7, 2012. Available at <http://www.nytimes.com/2012/03/08/us/pat-robertson-backs-legalizing-marijuana.html>.

demand for those drugs... The marginal product of further investment in supply reduction [law enforcement] is likely to be small ... I know of no serious law enforcement official who disagrees with this conclusion. Typically, police officials tell interviewers that they are fighting a losing war or, at best, a holding action.”<sup>16</sup>

And while views on the War on Drugs writ large may be softening, the legal fact is that the War on Drugs lowered the federal statutory death penalty threshold for drug crimes from its previous “life for a life” position, and has given U.S. prosecutors the power to pursue the death penalty for non-homicide large-scale drug trafficking, otherwise known as the 1994 death penalty for drug kingpins,<sup>17</sup> even if, in the nearly twenty years since this law was passed, it has yet to be used, and therefore has yet to be squarely tested for its constitutionality.

B. *The Death Penalty for “Drug Kingpins” under Federal Law*

Large-scale drug trafficking is one of the very few non-homicide crimes in the United States that may carry the sentence of death. It is even atypical within the select group of non-homicide capital offenses, as most others involve direct threats to the state, such as the crime of treason or espionage. And yet, it is not a vestige of a bygone era languishing in some dusty rulebook, but rather, part of a relatively new federal statute passed by Congress within the last twenty years. But for all of its uniqueness, it is rarely discussed – few Americans are even aware that it is possible to execute someone for drug trafficking. This may be true, in large part, because no one has been executed (or even sentenced) under this provision. Far more attention is directed, for example, to the controversial role the federal prosecution plays in promoting the use of the death penalty in drug-related *homicides* than to the existence of the death penalty for large-scale drug trafficking.<sup>18</sup>

Since the Supreme Court has yet to rule directly on the constitutionality of the death penalty under the Super-Kingpin statute, in this section we will engage in a time-honored common law academic tradition: prediction. The question is: “What evidence can we find that the Supreme Court would either uphold or prohibit the death penalty for non-homicide drug trafficking if the issue were to be raised in court?” In this examination, we will assess the limits of Supreme Court jurisprudence regarding death sentences for non-homicide crimes. In general, Supreme Court doctrine holds that capital crimes *against the person* are limited to a very small group of offenses that involve the death of the victim, and that even violent child rape does not rise to the level of a capital offense. However, this does not mean that the federal statute that made large-scale drug trafficking death-eligible is necessarily unconstitutional. The reasons why are fascinating, offer an excellent case study in U.S. death penalty and constitutional law, and should provide the reader with interesting insights into the arguments for and against the use of the death penalty for drug crimes.

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<sup>16</sup> Gerber, at 143.

<sup>17</sup> 18 U.S.C. § 3591(b)(1) & (2).

<sup>18</sup> See e.g., Connor.

## II. Case and Analysis

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

### Note:

Although *Kennedy v. Louisiana* is a case involving the constitutionality of executing someone for the crime of child rape, and not a case about drug crimes, we will examine it here for a couple of reasons. First, as mentioned above, there simply have been no capital prosecutions for non-homicide drug trafficking in the United States. Secondly, *Kennedy* is a seminal death penalty case, and grasping its logic is critical if one is to understand modern American capital jurisprudence. If the Court had ruled that Louisiana's statute making child rape a capital offense was constitutional, it could have greatly expanded the number of non-homicide crimes against the individual that would be eligible for the death penalty.

#### A. Issues

Is the imposition of the death penalty for the rape of a child that does not cause, and was not intended to cause, the victim's death, unconstitutional under the Eighth Amendment's prohibition of cruel and unusual punishment? And, what impact does this decision have on the right of legislatures to make drug trafficking a death-eligible offense?

#### B. Case Facts

Patrick O. Kennedy, a resident of New Orleans, Louisiana, was accused of raping his eight-year-old stepdaughter. The rape was extremely violent and severely injured the young girl's sexual organs to such an extent that emergency surgery was required to repair her injuries. Kennedy claimed that he was not guilty. In his defense, he averred that the rape had been committed by two local boys, and refused to plead guilty when a deal was offered to spare him from a possible death sentence.<sup>19</sup> Louisiana charged the defendant with the aggravated rape of his then-eight-year-old stepdaughter. He was convicted and sentenced to death by a unanimous jury under a state statute authorizing capital punishment for the rape of a child under twelve. He was the first person to be sentenced to death under this statute, which had been passed in 1995. The defendant appealed his conviction and sentence in the state courts, claiming that the death penalty for a non-lethal crime against an individual was unconstitutional according to the *Coker v. Georgia*<sup>20</sup> case, which had declared the death penalty unconstitutional for the offense of adult rape. The State Supreme Court affirmed the conviction and sentence, despite the *Coker* decision, reasoning that children are a class in need of special protection, emphasizing that four other States had capitalized child rape since 1995 and at least eight additional states had authorized the death penalty for other non-homicide crimes. The passage of new state laws allowing the death penalty for non-homicide crimes was important to the Louisiana High Court's reasoning, for a number of seminal Federal Supreme Court death penalty cases had determined that when a court is deciding whether a punishment is "cruel and unusual" under the Eighth Amendment of

<sup>19</sup> Petition for Writ of Certiorari at 7, *Kennedy v. Louisiana*, 2007 U.S. Briefs 343 (No. 07-343), available at <http://www.deathpenaltyinfo.org/Kennedypetition.pdf>.

<sup>20</sup> *Coker v. Georgia*, 433 U.S. 584 (1977).

the federal Constitution, they are to look at the legislative history of the state legislatures, among other indicators. They do this to gauge the degree to which a punishment has received popular validation. But under those cases, (notably *Roper v. Simmons*, 543 U. S. 551 (2005), and *Atkins v. Virginia*, 536 U. S. 304 (2002)), it is *the direction of change* observed in those legislative decisions rather than the numerical count of states that is significant. The Louisiana Supreme Court therefore determined that, although the number of states which allowed the death penalty for child rape was small, it was growing, and this trend evidenced that a significant population of the country deemed the crime of child rape one deserving of execution.

Below, the U.S. Supreme Court recounts the analysis of the Louisiana Supreme Court:

The state court next asked whether “child rapists rank among the worst offenders.” It noted the severity of the crime; that the execution of child rapists would serve the goals of deterrence and retribution; and that, unlike in *Atkins* and *Roper*, there were no characteristics of petitioner that tended to mitigate his moral culpability. It concluded: “[S]hort of first-degree murder, we can think of no other non-homicide crime more deserving [of capital punishment].” On this reasoning the Supreme Court of Louisiana rejected petitioner’s argument that the death penalty for the rape of a child under 12 years is disproportionate and upheld the constitutionality of the statute. Chief Justice Calogero dissented. *Coker*, in his view, “set out a bright-line and easily administered rule” that the Eighth Amendment precludes capital punishment for any offense that does not involve the death of the victim.<sup>21</sup>

### C. Holding

Kennedy subsequently appealed his sentence to the U.S. Supreme Court. The U.S. Supreme Court reversed the Louisiana Supreme Court’s decision regarding his sentence, holding, specifically, that the Eighth Amendment bars Louisiana from imposing 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, and generally, that “[a]s it relates to crimes against individuals ... the death penalty should not be expanded to instances where the victim’s life was not taken.” The Court found the following bases for its holding:

1. **Proportionality and the Justifications for Punishment.** Under the precept of justice that punishment is to be graduated and proportionate to the crime, informed by evolving standards, 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.’” Even child rape does not meet that standard because no human life is taken.
2. **History and Objective Evidence of Contemporary Norms.** A review of the authorities informed by contemporary norms, including the history of the death penalty for this and other non-homicide crimes, current state statutes and new enactments, and the number of executions since 1964, demonstrated a national consensus against capital punishment for the crime of child rape.

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<sup>21</sup> *Kennedy v. Louisiana*, at 418.

3. **Evolving Standards of Decency.** Informed by its own precedents and its understanding of the Constitution and the rights it secures, the Court concluded, in its independent judgment, that the death penalty is not a proportional punishment for the crime of child rape and that evolving standards of decency counsel the Court to be most hesitant before allowing extension of the death penalty, especially where no life was taken in the commission of the crime.

D. *Analysis*

1. Objective severity of the crime and Subjective *Mens Rea*,<sup>22</sup> 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.’”<sup>23</sup>

The Court in *Kennedy* began its analysis with a review of the constitutionally-recognized reasons for punishment. It recognized three: rehabilitation, deterrence, and retribution. Retribution, often equated with the notion of “eye for an eye” jurisprudence, is occasionally seen by scholars and jurists as a rather antediluvian notion of justice, and was even decried by a minority of the judges in *Furman* as an illegitimate reason for punishment.<sup>24</sup> However, retribution was reaffirmed as a traditional basis for exacting punishment in the 1976 Death Penalty Cases and rehabilitated (in a manner of speaking) to serve as an analog or cap for gauging the extent to which a punishment is proportional to the offense committed, and limiting the extent to which punishment can be used, regardless of its capacity to rehabilitate or deter (i.e., few may dispute that the government may deter jaywalking or many other crimes by making it a death-eligible offense, but the Supreme Court has in effect, made “life for a life” a prerequisite to any utilitarian designs of the legislative and executive branches). Here, the Court points out that, regardless of the deterrent effect of a certain type of punishment, the Eighth Amendment limits the use of punishments that exceed the severity of the individual’s crime.

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. As we shall discuss, punishment 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.’” Though the death penalty is not invariably unconstitutional, see *Gregg v. Georgia*, the Court insists upon confining the instances in which the punishment can be imposed.<sup>25</sup>

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<sup>22</sup> *Mens rea* is a Latin word referring to the “state of mind” of the defendant at the time of the offense, which is the way in which we determine the extent of a defendant’s culpability for an offense and therefore the severity of his punishment.

<sup>23</sup> *Kennedy v. Louisiana*, at 420, citing *Roper v. Simmons*, at 568, and *Atkins v. Virginia*, at 319.

<sup>24</sup> The term “an eye for an eye” originated in several passages of the Torah, the Hebrew Bible or “Old Testament,” and is often cited as coming from the Book of Exodus. It both delimited and justified the boundaries of punishment.

<sup>25</sup> *Kennedy v. Louisiana*, at 420.

The Court then looked to its own precedent to examine the previous limits it had set on the use of the death penalty. What becomes clear is that this “retribution analysis” considers both the severity of the crime and also the maliciousness of the defendant’s *mens rea*. The crime of adult rape was deemed not to meet the very high burden that would allow for life to be taken as punishment.

“Rape is without doubt deserving of serious punishment; but in terms of moral depravity and of the injury to the person and to the public, it does not compare with murder, which does involve the unjustified taking of human life. Although it may be accompanied by another crime, rape by definition does not include the death of ... another person. The murderer kills; the rapist, if no more than that, does not....”<sup>26</sup>

The Supreme Court’s emphasis on the defendant’s subjective *mens rea*, however, has been equal to and linked with its emphasis on the objective severity of the crime itself in its analysis of the retributive proportionality of the death penalty. Supreme Court cases preceding *Kennedy* held that juveniles and mentally retarded persons lacked the personal responsibility necessary to be subject to the death penalty for crimes they committed, even if they had murdered someone.<sup>27</sup> Additionally, an adult who aided and abetted a robbery that resulted in death, but who had not killed, attempted to kill, or intended that a killing take place was determined to be ineligible for execution. This case, *Enmund v. Florida*,<sup>28</sup> was for a time the outer boundary line of cases that, although resulting in the death of a victim, cannot constitutionally allow a death sentence for the defendant. The Court repeated in *Enmund* the fundamental, moral distinction between a “murderer” and a “robber,” noting that while “robbery is a serious crime deserving serious punishment,” it is not like death in its “severity and irrevocability.”<sup>29</sup> The most recent Supreme Court case to address the constitutionality of a death sentence where there was no *intent* to cause death on the part of accomplice-defendants was *Tison v. Arizona*,<sup>30</sup> which extended the death penalty one notch further on the scale of non-intentionality in the causing of death to a victim. In *Tison*, a jail-break case where the accomplices did not kill the victims but were active, substantial participants in a dangerous enterprise and whose conduct showed a “reckless disregard for human life,” the accomplices were still deemed constitutionally death-eligible.<sup>31</sup>

<sup>26</sup> *Kennedy v. Louisiana*, at 427-28, citing *Coker v. Georgia*, at 598.

<sup>27</sup> *Roper v. Simmons* (juveniles), *Atkins v. Virginia* (mentally retarded persons).

<sup>28</sup> *Enmund v. Florida*, 458 U. S. 782 (1982).

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

<sup>30</sup> *Tison v. Arizona*, 481 U. S. 137 (1987).

<sup>31</sup> *Id.* The *Tison* decision is very significant, because unlike the Chinese criminal law, which includes a type of reckless intent in the most severely punishable category of intentional murder, U.S. criminal law would generally *not* allow the most severe punishment for murder where the defendant did not have the actual intent to cause a death. Felony-murder is a special exception to this rule of U.S. law, in which intent to kill is sometimes presumed, in the case of a single defendant, and often transferred, in a co-defendant scenario, through the creation of a legal fiction of intent to cause a death based on policy considerations about the importance of deterring and punishing felonies that are likely to end in a death. In *Enmund v. Florida*, the Supreme Court had held that, with no evidence as to an offender’s intention to end a life, participation in an armed robbery, on its own, did not sufficiently establish culpability in the homicide of a victim committed by a fellow robber so as to justify a death sentence. The *Enmund* Court left open the possibility that active participation in a crime more certain to result in death might indicate a sufficient level of culpability to sustain a death sentence. The Supreme Court then addressed a similar situation in the *Tison* case, this time finding that even without a specific “intent to kill,” “reckless disregard for human life” can also represent a highly culpable mental state that can support a capital sentence when combined with major participation in a felony that results in a victim’s death at the hands of co-felon. To allow the death penalty, however, in a situation where the evidence does not show that the defendant actually intended to cause a death, is an extreme result, and to date this is the furthest the Supreme Court has gone in its willingness to allow capital punishment for a homicide where the defendant’s mental state is anything less than actual intent to cause death.

The *Kennedy* Court recounts that, for crimes against individual persons, the legal threshold prior to *Kennedy* was a resultant death *and* a concomitant *mens rea*.

2. “A national consensus against capital punishment for the crime of child rape”

a. *Trends in jury decisions and state legislation used as objective evidence of contemporary norms*

One of the most complicated aspects of the Court’s Eighth Amendment analysis is related to exactly how it should determine a national consensus on what is “cruel and unusual punishment.” What objective standards can the court use for making such an abstract and subjective judgment? In a large, pluralistic society with many different values and conceptions of “just deserts,” it is no easy task to interpret what crimes and defendants meet the threshold that allows for the taking of the defendant’s life. Some conservative jurists on the Court believe that the only fair way to determine national consensus on what constitutes cruel and unusual punishment is to try to discover what the clause “cruel and unusual punishment” meant at the time of the drafting of the Bill of Rights, and that if the right of states to use the death penalty for retribution is to be limited any further than the original intent of the phrase, it must be changed via Constitutional amendment. Some reform-minded jurists on the Court believe that any constitutional Supreme Court judgment must take into account the changes that have occurred in life and law over the past two hundred years. Moreover, there is debate about the degree to which any interpretation of the “values and traditions of the American people” can be considered objective.

What has developed over time as these different perspectives have engaged in debate is a framework that represents a compromise among these views – one that requires the judges to consider certain historical and legal factors over others. Specifically, the Justices must look at the laws state legislatures have enacted concerning certain punishments, and the degree to which courts and juries have administered those laws. These are called “objective indicia of society’s standards” in Court precedent, but perhaps they are more aptly named “the closest-to-objective” indicia the Court could come up with. The idea is that in a democratic society rife with different views on the death penalty, the best indicators of “what society thinks and has thought” are the political and judicial decisions that result from intense debate.

The reader may find of some interest the specific method by which the Court determines the legislative and judicial history and tradition of the use of the death penalty in child rape cases.

The existence of objective indicia of consensus against making a crime punishable by death was a relevant concern in *Roper*, *Atkins*, *Coker*, and *Enmund*, and we follow the approach of those cases here. The history of the death penalty for the crime of rape is an instructive beginning point.

In 1925, 18 States, the District of Columbia, and the Federal Government had statutes that authorized the death penalty for the rape of a child or an adult... Between 1930 and 1964, 455 people were executed for those crimes... To our knowledge the last

individual executed for the rape of a child was Ronald Wolfe in 1964...

In 1972, *Furman* invalidated most of the state statutes authorizing the death penalty for the crime of rape; and in *Furman*'s aftermath only six States reenacted their capital rape provisions. Three States—Georgia, North Carolina, and Louisiana—did so with respect to all rape offenses. Three States—Florida, Mississippi, and Tennessee—did so with respect only to child rape... All six statutes were later invalidated under state or federal law...

Louisiana reintroduced the death penalty for rape of a child in 1995... Under the current statute, any anal, vaginal, or oral intercourse with a child under the age of 13<sup>32</sup> constitutes aggravated rape and is punishable by death.... Mistake of age is not a defense, so the statute imposes strict liability in this regard. Five States have since followed Louisiana's lead... Four of these States' statutes are more narrow than Louisiana's in that only offenders with a previous rape conviction are death eligible... Georgia's statute makes child rape a capital offense only when aggravating circumstances are present, including but not limited to a prior conviction...

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 non-homicide offenses [including the death penalty for large-scale drug trafficking]; but it did not do the same for child rape or abuse... Under 18 U. S. C. §2245, an offender is death eligible only when the sexual abuse or exploitation results in the victim's death.

...The evidence of a national consensus with respect to the death penalty for child rapists, as with respect to juveniles, mentally retarded offenders, and vicarious felony murderers, shows divided opinion but, on balance, an opinion against it. Thirty-seven jurisdictions—36 States plus the Federal Government—have the death penalty. As mentioned above, only six of those jurisdictions authorize the death penalty for rape of a child. 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* and *Roper* and the 42 States in *Enmund* that prohibited the death penalty under the circumstances those cases considered.<sup>33</sup>

According to its precedent, the Court must also consider the "direction" of the change, if any, in the objective indicia. The situation here was different than in cases determining that juveniles and the mentally retarded could not be executed. In those cases, the objective evidence and the direction of the change were in concert. A large proportion of states did not allow execution of a child or mentally retarded defendant, and the decisions of most states in the past thirty years had been in that direction. With the death penalty for child rape, however, while only six states allowed for defendants convicted

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<sup>32</sup> When *Kennedy* was charged with the crime of rape of a child, the Louisiana statute referred to a child victim as one under the age of twelve; while the *Kennedy* case was on appeal and in other post-conviction proceedings, the Louisiana statute was amended to refer to a child victim as one under the age of thirteen. La. Stat. Ann. § 14:42.

<sup>33</sup> *Kennedy v. Louisiana*, at 422-23; 426.

of child rape to be executed, the trend was actually an *increasing* number of states passing legislation that would make child rape a death-eligible offense. The Court concluded that, nevertheless, because the overall number was so low, this trend was not significant enough to establish the kind of “direction” of change that case precedent required.

*b. The Supreme Court’s Own Analysis is Also Required – contemporary norms alone are insufficient*

The analysis of “objective indicia of society’s standards” alone, however, is not dispositive. Even after the history of legislatures and court practice has been considered, the Eighth Amendment interpretive method also allows, and requires, the Court to accompany these considerations with its own analysis based on legal precedent. The standard used in *Kennedy* is described thusly:

In these [earlier] cases the Court has been guided by “objective indicia of society’s standards, as expressed in legislative enactments and state practice with respect to executions.” *Roper*; see also *Coker* (plurality opinion) (finding that both legislatures and juries had firmly rejected the penalty of death for the rape of an adult woman); *Enmund* (looking to “historical development of the punishment at issue, legislative judgments, international opinion, and the sentencing decisions juries have made”). 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. See *id.*; *Gregg* (joint opinion of Stewart, Powell, and Stevens, JJ.); *Coker* (plurality opinion).

... As we have said in other Eighth Amendment cases, objective evidence of contemporary values as it relates to punishment for child rape is entitled to great weight, but it does not end our inquiry. “[T]he Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.” *Coker* (plurality opinion); see also *Roper*; *Enmund* (“[I]t is for us ultimately to judge whether the Eighth Amendment permits imposition of the death penalty”).<sup>34</sup>

*c. The Court’s final determination after reviewing both the objective and subjective factors: The death penalty is not a proportional punishment for the crime of child rape, and evolving standards of decency counsel the Court to be most hesitant before allowing an extension of the death penalty, especially where no life was taken in the commission of the crime.*

The Court begins by acknowledging that child rape is an incredibly serious offense, “an attack not just upon a child but upon her childhood,” with lasting implications for the rest of the victim’s life. The Justices also acknowledge that there are certainly valid moral arguments that this is an offense that should be death-eligible. In the end, however, the Court comes to an interesting, pragmatic conclusion that contradicts the weight of these acknowledgments. It points out that there is considerable, divided

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<sup>34</sup> *Kennedy v. Louisiana*, at 421; 434.

opinion, even on the Court, about the success or failure of its death penalty reform since the 1970s, and that this division has caused it to adopt a conservative posture toward any expansion of the death penalty's reach.

This has led some Members of the Court to say we should cease efforts to resolve the tension and simply allow legislatures, prosecutors, courts, and juries greater latitude. For others the failure to limit these same imprecisions by stricter enforcement of narrowing rules has raised doubts concerning the constitutionality of capital punishment itself.

Our response to this case law, which is still in search of a unifying principle, has been to insist upon confining the instances in which capital punishment may be imposed. See *Gregg* (joint opinion of Stewart, Powell, and Stevens, JJ.) (because “death as a punishment is unique in its severity and irrevocability,” capital punishment must be reserved for those crimes that are “so grievous an affront to humanity that the only adequate response may be the penalty of death.”)<sup>35</sup>

The pragmatic cautiousness of the Court's decision is even more evident as it concludes its argument. The Court claims first, that there is a definitive difference between murder and other crimes that do not result in death, but then immediately afterwards “finds significant” that if child rape were to be a capital offense, it would nearly double the number of death-eligible offenses. Moreover, the Court acknowledges that it would be at a loss to construct a procedural scheme that could ensure that only the worst of the worst of child rapists could be executed.

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.”

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...

... We find it difficult to identify standards that would guide the decision-maker 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

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<sup>35</sup> *Kennedy v. Louisiana*, at 436-37.

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]," *Furman* (Stewart, J., concurring). 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.<sup>36</sup>

The Court then continues to make a large number of other arguments, giving a host of reasons why it may not be a good idea to make child rape a death-eligible offense (it does not serve retributive purposes to put child witnesses through the ordeal of preparing and testifying in death penalty cases, which can drag on for years and do psychological damage to the child in the process, it is a type of prosecution that is unusually reliant on child witnesses whose testimony may be unreliable and susceptible to suggestion; it may not have the intended deterrent effect, as child abuse is notoriously under-reported, and the fact that it may be death-eligible might cause even fewer people to come forward to report it). In its conclusion, what we have is a general, common-law posture announced by the Court that favors a decreased, careful use of the death penalty.

Each of these propositions, standing alone, might not establish the unconstitutionality of the death penalty for the crime of child rape. Taken in sum, however, they demonstrate the serious negative consequences of making child rape a capital offense. These considerations lead us to conclude, in our independent judgment, that the death penalty is not a proportional punishment for the rape of a child...

... Confirmed by repeated, consistent rulings of this Court, th[e] principle [of evolving standards of decency] 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 [*emphasis added*].<sup>37</sup>

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<sup>36</sup> *Kennedy v. Louisiana*, at 438-39.

<sup>37</sup> *Id.* at 446-47.

**III. Discussion: The relationship between the *Kennedy* decision and the Constitutionality of the federal statute making large-scale drug trafficking a capital offense.**

- A. *Non-homicide crimes against individuals now appear to be non-death eligible. Does this mean that capital punishment for non-homicide large-scale drug trafficking is also unconstitutional?*

Although the majority in the *Kennedy* case carefully qualifies its general holding (that a death must occur in order to impose the death penalty on a defendant) to limit it to the category of “crimes against individuals,” much of the Court’s reasoning would appear to go beyond this category. For example, the Court states in its analysis that “[e]volving 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.”<sup>38</sup> The court states that it “cannot sanction” the use of the death penalty “when the harm to the victim, though grave, cannot be quantified in the same way as death of the victim.”<sup>39</sup> And again, leading up to the majority’s conclusion in *Kennedy*, the Court opines that:

The rule of evolving standards of decency with specific marks on the way to full progress and mature judgment means that resort to the [death] 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.<sup>40</sup>

Finally, but for the limitation to crimes against individuals, the final sentence of the majority opinion would appear equally applicable and reasonable when applied to all crimes -- “Difficulties in administering the [death] 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.” The foregoing language strongly implies that under U.S. Supreme Court jurisprudence, the death penalty might be unconstitutional for *all* non-homicide crimes, and provides a potential basis for challenging the constitutionality of federal and state laws authorizing the death penalty for drug trafficking and other non-homicide crimes against the state.

However, the Court does limit its holding to the category of “crimes against individuals” and goes on to differentiate this category, without stating its reasons, from that of “offenses against the State,” in a critical passage that may or may not be considered *dictum* (a non-binding portion of an appellate court’s decision):

Our concern here is limited to crimes against individual persons. We do not address, for example, crimes defining and punishing treason, espionage, terrorism, *and drug kingpin activity*, which are offenses against the State [emphasis added].<sup>41</sup>

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<sup>38</sup> *Kennedy v. Louisiana*, at 435.

<sup>39</sup> *Id.* at 439.

<sup>40</sup> *Id.* at 446-47.

<sup>41</sup> *Id.* at 437.

The idea of considering “drug kingpin activity” an “offense against the State” rather than a crime against individuals has support in the record of debates and hearings in Congress regarding the constitutionality of proposed legislation making drug kingpin activity a capital offense, even when no death occurs. In 1989, Senator Alfonse D’Amato advocated for the imposition of the death penalty for leaders of major drug organizations, whether or not a death resulted. He did this by citing to the oral and written testimony of Edward S.G. Dennis, Jr., then-Assistant Attorney General for the Criminal Division of the United States Department of Justice. Although Dennis’s testimony predated the FDPA (passed in 1994) and the *Kennedy* case (decided in 2008), it was geared toward dealing with the possibility that the *Coker* opinion (of 1977) could be construed to prohibit capital punishment in *all* non-homicide offenses. Dennis analyzed non-homicide drug kingpin activity from the perspectives of both the state of mind of the leaders of major drug organizations (which he described as showing a depraved, reckless disregard for human life, using the principles and language highlighted in the Supreme Court’s decision in *Tison* and other death penalty cases) and of the scope and severity of public harm caused by large-scale drug trafficking. He analogized the harm caused by large-scale drug trafficking to the enormous magnitude of public harm caused by other offenses against the state that more directly undermine state security, such as treason, espionage and airliner hijacking, for which the death penalty was available regardless of whether a death occurred, as historical examples.<sup>42</sup>

But the fact that a Senator and Assistant Attorney General opine that drug kingpin crimes are crimes against the state does not necessarily make it so. In a strange twist, the minority dissenting Justices in *Kennedy* questioned the majority’s categorization of drug crimes as crimes against the state, asserting that this is a baseless distinction. These dissenting justices were against the constitutional limitation of the death penalty in *Kennedy* and are generally prone to favor fewer restrictions on the death penalty; however, the *Kennedy* dissent’s reasoning on this particular issue, if adopted by the majority, would seem to support *even greater* restriction on the application of the death penalty than the majority holding explicitly calls for, by also making non-homicide drug trafficking an impermissible target for the death penalty.

Justice Alito argued for the minority that no national consensus in fact existed prohibiting the death penalty in this case, and vehemently opposed the majority’s application of a “blanket rule” barring the death penalty in child rape cases regardless of the facts of the case, such as the age of the child, the sadistic nature of the crime, and the number of times the child had been raped. The dissent went on to argue that, in terms of moral depravity and harm to the victim and society, the distinction between child rape and homicide is unjustified; further, he argued that for the same reasons, the majority had not adequately justified its conclusion that non-homicide “offenses against the State” are more harmful than the rape of a child -- and that the inclusion of drug kingpin offenses within this category was wholly unexplained.

With respect to the question of the harm caused by the rape of a 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. And the Court does not take the position that no harm other than the loss

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<sup>42</sup> Death Penalty for Drug Kingpins-A Constitutional Idea Whose Time Has Come, 135 Cong. Rec. S13684-02 (daily ed. Oct. 18, 1989) (statements of Sen. D’Amato & Edward S.G. Dennis, Jr., Assistant Attorney General, Criminal Division). The current federal aircraft piracy statute limits the application of capital punishment to cases in which a death occurs. *See* 49 U.S.C. § 46502(a)(2)(B) & (b)(1)(B).

of life is sufficient. The Court takes pains to limit its holding to “crimes against individual persons” and to exclude “offenses against the State,” a category that the Court stretches--without explanation--to include “drug kingpin activity.” But the Court makes no effort to explain why the harm caused by such crimes is necessarily greater than the harm caused by the rape of young children. This is puzzling in light of the Court’s acknowledgment that “[r]ape has a permanent psychological, emotional, and sometimes physical impact on the child.” As the Court aptly recognizes, “[w]e cannot dismiss the years of long anguish that must be endured by the victim of child rape.”<sup>43</sup>

Justice Alito was likely making this argument to point out a perceived weakness in the majority’s logic, and seems to be implying that there were other unstated bases for its decision (it is possible, for example, that the majority wanted to avoid having to directly overrule the 1994 legislation authorizing capital punishment in non-homicide drug kingpin cases so recently passed by the federal congress if there were grounds to do so). And yet, if the statutory provisions permitting the death penalty in non-homicide drug kingpin cases were ever addressed directly by the Supreme Court, it is likely that the outcome would depend, not solely on the *Kennedy* proportionality test, but on the question of whether this statute contains crimes that the Court determines are offenses *against a person* or *against the State*. Of course, one cannot predict the future with any great certainty, but it is conceivable that supporters of limited use of the death penalty might attempt to use the *minority’s* reasoning here – that there is no apparent reason to find that non-homicide drug crimes do more harm to victims or society than child rape – to argue that this crime cannot, therefore, be categorized as an “offense against the State” or that despite such a categorization, large-scale drug trafficking alone cannot constitutionally merit a sentence of death. This could conceivably lead to the ironic result that although Justice Alito’s reasoning might eventually win the day, following this reasoning may lead to a result that is opposite the minority justices’ intent in their argument against the *Kennedy* decision.

#### B. *The Resurgence of the Court’s Proportionality and Excessiveness Determination*

What the reader is witnessing in the *Kennedy* decision is the latest iteration of the Court’s “proportionality determination” in death penalty cases. In other words, how is the Court supposed to determine whether something is “disproportionate” or “excessive” under the Eighth Amendment? In *Kennedy*, and in the *Atkins* case described in Chapter 5 (Defendants with Mental Disorders and the U.S. Death Penalty), we see the Court setting up a proportionality test that involves both “objective determinations” (a survey of legislative and jury history on the issue) of the evolution of society’s standards of decency as it relates to the question of proportionality, and a “subjective determination” by the Court itself, based on its own analysis of the proportionality of the punishment to the crime as well as with respect to whether the traditional justifications of punishment (retribution and deterrence) are furthered by a particular punishment. This test has come out of a prolonged debate on the Court about just what is to be considered in this determination, and to what extent.

In fact, when we compare the way in which the Court interprets the Eighth Amendment across all forms of punishment, we note that the particular balance the Court takes seems to depend heavily on

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<sup>43</sup> *Kennedy v. Louisiana*, at 467 (Alito, J., joined by Scalia, C.J., and Thomas, J., dissenting).

whether the death penalty is involved. In non-death penalty cases, the Court gives legislatures quite a lot of leeway in setting the boundaries of permissible punishment. In the death penalty context, however, the Court has applied a heightened level of scrutiny over legislative determinations of the offense and offenders eligible for the death penalty. And yet, while the Court's own "subjective" analysis has become increasingly important of late, the Court has not clearly defined its precise balancing test for "excessiveness," resorting instead to the laundry list of reasons seen above in the *Kennedy* decision. There may not be any clarity on the horizon, as it may be impossible to get five judges to agree on the precise balancing of the "baselines" involved in the excessiveness or proportionality decision. For now, what these cases connote is a general agreement that the fact that "death is different" from other types of punishment means that the Supreme Court will be far more critical of legislative desires to make classes of offense or offenders death-eligible.

These cases also seem to imply, as mentioned above, that one of the theories of punishment critical to death penalty jurisprudence is retributive justice. Strangely though, "eye for an eye...life for a life" theory – oftentimes seen as hearkening back to society's draconian past—is now being used by the Court to *limit* the application of the death penalty to crimes that meet that standard (again, in the case of crimes against the individual, not against the state), by requiring the loss of a life before imposition of capital punishment. From another perspective, that of international law and the United Nations International Covenant on Civil and Political Rights' Article Six, which seeks to restrict the use of the death penalty in countries that have not abolished it to "the most serious crimes in accordance with the law," what the U.S. Supreme Court may be saying in *Kennedy* is that only those crimes [against an individual] that result in the loss of life, may be considered "the most serious crimes" and all other crimes are therefore categorically excluded from capital punishment consideration. Only time, and the next death penalty case, will tell.

#### IV. Questions

1. *President Obama's Response*: As an example of just how many people disagreed with the Court's decision, it is interesting to note that when this case was decided, both presidential-candidate John McCain and Barack Obama condemned the result.<sup>44</sup>

Do you agree that the threshold question, in deciding whether a particular crime ought to be a capital offense, should be whether or not the crime directly (or proximately) involves the loss of a life? In *Kennedy*, the majority and minority seem to disagree on this, with Justice Alito claiming that loss of life justifies the death penalty, but there may be other crimes that do as well. Justice Kennedy, however, seems to be saying that there is a preliminary threshold that legislatures and executives must adhere to, that they are prohibited from using the death penalty as a sanction unless a crime against an individual involves a death. This type of reasoning is vastly different from Supreme Court jurisprudence regarding other forms of punishment, for example, life in prison. In the context of decisions about the proportionality of prison sentences, the Court has subjected the philosophical underpinnings of lawmakers to far less explicit scrutiny. What do you think? Should a retributive threshold have to be reached before

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<sup>44</sup> *McCain, Obama disagree with child rape ruling*, MSNBC June 6, 2008, available at [http://www.msnbc.msn.com/id/25379987/ns/politics-decision\\_08/t/mccain-obama-disagree-child-rape-ruling/#.T2Fa8BEgf5A](http://www.msnbc.msn.com/id/25379987/ns/politics-decision_08/t/mccain-obama-disagree-child-rape-ruling/#.T2Fa8BEgf5A).

arguments based upon the rationales of deterrence or utility are made? Should this be limited simply to death penalty cases because “death is different?” Why or why not?

2. Does the fact that the law includes a possible death penalty for drug trafficking – although the provision is never actually used – strengthen or weaken the rule of law? What arguments can be made in support of both answers to this question?
3. Do you believe that large-scale drug trafficking is best defined as a crime against the person or a crime against the state? What information would you need to make this determination? Is there any such distinction in Chinese law or practice? Where is the cut-off between a crime against a person and a crime against a state, and what standards could help protect this division? Could any type of crime become a crime against the state, if done on a sufficiently large scale?

The laws allowing the death penalty for large scale drug trafficking that does not result in a death require that the criminal activity be part of a “continuing criminal enterprise,” which means that the defendant’s conduct was part of an ongoing series of violations undertaken by six or more people working in concert in which the defendant was in a leadership role.<sup>45</sup> Does the existence of a “continuing criminal enterprise” have any bearing on the question of whether the drug trafficking was a crime against individuals or the state?

4. Public opinion regarding the death penalty and crime control is an issue in nearly every country. If the comments made by the Arizona judge<sup>46</sup> in the introduction to this chapter are true, the “War on Drugs” and the concomitant expansion of harsh sentences for drug-related offenses have had few positive effects aside from political benefits to politicians seeking to satisfy the public and stay in power. What efforts need to be made to align the interests of all involved to a more rational policy of drug control and prevention?

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<sup>45</sup> 18 U.S.C. § 3591(b), 21 U.S.C. § 848(c).

<sup>46</sup> Gerber, *On Dispensing Injustice*, at 154.