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Is justice obtained if not consistently applied?

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The death penalty is one of the few issues with which I have difficulty reconciling my rather liberal criminal defense tendencies.

While the concept of the state executing another human being is repugnant to me, I find that on rare occasions the sordid facts of a highly disturbing case cause a little voice inside my head to whisper convincingly, "if ever a case merited such a severe penalty, it's this one."

The recently decided U.S. Supreme Court opinion, *Kennedy v. Louisiana*, No. 07-343, is just such a case.

As a mother of two children, I am particularly repulsed by allegations of a rape committed against a defenseless and helpless child. The underlying facts of this case are heart wrenching. The victim was just eight years old when she was brutally raped by her stepfather, resulting in injuries so severe that she required emergency reparative surgery.

Of all the non-fatal cases that might warrant the death penalty, this reprehensible crime most certainly fits the bill. This poor child's life will never be the same.

Not surprisingly, my feelings were mixed when I learned the court held that imposing the death penalty in child rape cases violated the Constitution. Specifically, the majority of the court concluded that the Eighth Amendment prevented Louisiana from imposing the death penalty for the rape of a child in cases where the crime did not result, nor was intended to result, in the death of the victim.

However, I began to experience an overwhelming sense of relief as I read the majority opinion. The decision was well grounded, both in policy and legal precedent. Despite the horrendous facts of the

case, the court made the correct determination and spared us, as a society, of the burden of attempting to navigate an untraversable slippery slope.

The crux of the issue was not of retribution, but rather, one of practical application. The court focused on the severity and finality of the death penalty and the likelihood that its application would prove to be anything but consistent in child rape cases: "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... In this context, which involves a crime that in many cases will overwhelm a decent person's judgment, we have no confidence that the imposition of the death penalty would not be so arbitrary as to be 'freakis[h].' ... We cannot sanction this result when the harm to the victim, though grave, cannot be quantified in the same way as death of the victim. ... 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."

The potential for the arbitrary application of the death penalty in child rape cases is extraordinary. The lack of uniform implementation of such an irrevocable and final sentence would be anything but just. And justice simply cannot be assured in the absence of consistency.

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