An Unanswered Question in Kennedy v. Louisiana: How Should the Supreme Court Determine the Constitutionality of the Death Penalty for Espionage?

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I. INTRODUCTION

The terrorist attacks of September 11, 2001, forever changed both the international and domestic landscapes of United States security efforts. With the erosion of the national sense of security, the American military adapted to meet the new challenges of insurgent warfare in Afghanistan and Iraq. Likewise, the creation of the Department of Homeland Security and the enactment of the U.S.A. Patriot Act signaled a turning point in American domestic security strategies—strategies that required not only closer surveillance within the national borders, but also further scrutiny of the actions of U.S. citizens.

These internal security efforts often exposed acts of espionage and betrayal by U.S. citizens. In 2001, Brian Patrick Regan worked for the National Reconnaissance Office (NRO), an agency that maintained reconnaissance satellites. He used his security clearance to search the NRO’s classified computer network for information about the military efforts of Iran, Iraq, China, and Libya. Regan planned to sell data to these foreign governments, but he was arrested at Dulles International Airport near Washington, D.C., on his way to Europe. The FBI found coded information and the addresses of Chinese and Iraqi foreign embassies in Regan’s pockets and shoes. His computer contained letters to the governments of Iraq and Libya, in which Regan offered to sell national secrets about these States’ missile systems for $13 million. Regan was charged with three counts of.

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5. *Id.* ¶¶ 24, 28.
attempted espionage, and the United States Attorney’s Office sought the death penalty. The damaging effect of Regan’s attempt to transfer the secret information was disputed at trial, and the jury sentenced him to life imprisonment instead of capital punishment. If he had been given the death penalty, Regan would have been the first person executed for espionage in the United States since Julius and Ethel Rosenberg were put to death for conspiring to transmit secrets to the former Soviet Union in 1953.

Espionage, attempted espionage, and conspiracy to commit espionage are punishable by death under 18 U.S.C. § 794 and the sentencing guidelines of 18 U.S.C. §§ 3591–3598, also known as the Federal Death Penalty Act (FDPA). The constitutionality of this penalty under the Eighth Amendment, however, has never been directly addressed.

Despite the lack of jurisprudence on the death penalty for espionage, prosecutions for the crime are common. The Department of Justice reports espionage convictions and plea agreements, and national intelligence agencies research and record espionage trends and developments. Although national security concerns can discourage prosecutors from pursuing the death penalty, the “political determination to execute spies remains

9. Espionage Case of Former Sergeant, supra note 3.
strong." In the aftermath of September 11, the prosecution of spies will likely continue to be a national priority.

The jurisprudence interpreting the constitutionality of capital punishment for non-homicide crimes against individuals may determine the constitutionality of future espionage executions. In June 2008, the United States Supreme Court considered the constitutionality of the death penalty for the rape of a child in *Kennedy v. Louisiana*. The Court noted that the Eighth Amendment protection against “cruel and unusual punishment” is based on the principle of “proportionality” and should be interpreted according to the “evolving standards of decency that mark the progress of a maturing society.” The Court then applied a two-pronged test to make this determination. Under the first prong, the Court reviewed objective evidence of a national consensus on the acceptability of capital punishment for child rape. Through the second prong, the Court applied its independent judgment of the Eighth Amendment’s “text, history, meaning, and purpose,” including the purposes of punishment and the degree of culpability of the crime.

Following this two-pronged analysis, the *Kennedy* Court held that “the death penalty is not a proportional punishment for the rape of a child.” Moreover, the Court explicitly limited this holding to crimes against individuals, stating, “We do not address, for example, crimes defining and punishing treason, espionage, [and] terrorism . . . which are offenses against the State.” This raises the question of which constitutional test should be applied to the death penalty analysis for espionage and other crimes against the State. If Regan had been given the death penalty, instead of life imprisonment, for attempted espionage and appealed his sentence,

17. 128 S. Ct. 2641, 2646 (2008).
18. U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”).
21. *Id.* at 2650-51.
22. *Id.* at 2649-50.
23. *Id.* at 2664.
24. *Id.* at 2659.
how would the Supreme Court have analyzed the constitutional claim?

This Note explores this unanswered question in *Kennedy* to determine whether the Court’s two-pronged test can be applied to the death penalty analysis for espionage. Although the Court in *Kennedy* noted that treason and terrorism are also offenses against the State, this Note considers only espionage prosecutions because they are becoming more prevalent “in lieu of the procedurally more demanding charge of treason.” Part II discusses the history of espionage, the lack of jurisprudence on the constitutionality of espionage executions, and the jurisprudence that developed the two-pronged test applied in *Kennedy*. Part III examines the *Kennedy* opinion and the Supreme Court’s determination of the unconstitutionality of the death penalty for child rape. Part IV describes the conceptual differences between crimes against the State, such as espionage, and crimes against individuals, such as child rape, that may restrict the application of the *Kennedy* test to capital punishment jurisprudence for espionage. Part V analyzes why—despite these seemingly conceptual differences between crimes against the State and crimes against individuals—the *Kennedy* test can, and should, be applied to the death penalty analysis for espionage. Part VI concludes and stresses the necessity for jurisprudential overlap between *Kennedy* and espionage executions.

II. BACKGROUND: ESTABLISHING A FOUNDATION

A. Espionage: Ancient Roots, Current Trends, and Unclear Future

Espionage is “the practice of using spies to collect information about what another government or company is doing or plans to do.” The ancient Egyptian, Greek, and Roman civilizations used
espionage to maintain political control of their empires.\textsuperscript{28} After the collapse of the Roman Empire, treason and espionage laws of the Middle Ages promoted allegiance to feudal lords.\textsuperscript{29} When European nations formally developed during the Renaissance, espionage was employed to combat internal and external threats to the government or monarchy.\textsuperscript{30} Espionage was later used to end anti-colonial rebellions as these European nations expanded their colonial empires.\textsuperscript{31} In the Industrial Revolution, the use of espionage shifted, and governments began to spy on internal political and labor organizations.\textsuperscript{32} Finally, improvements in photography, transportation, and communication in the 1800s ushered in the modern espionage era and its emphasis on research and analysis of intelligence information.\textsuperscript{33}

Current espionage statutes in the United States focus on the need for internal national security and punish those who threaten it. As 18 U.S.C. § 794 states, capital punishment or imprisonment shall be imposed on one who:

With intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation, communicates, delivers, or transmits, . . . to any foreign government, or to any faction or party or military or naval force within a foreign country, whether recognized or unrecognized by the United States, or to any representative, officer, agent, employee, subject, or citizen thereof, either directly or indirectly, any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, note, instrument, appliance, or information relating to the national defense . . . .

Attempts to transmit such information\textsuperscript{35} and conspiracies to violate the statute\textsuperscript{36} also are punishable by death or imprisonment. Various

\textsuperscript{29} Id.
\textsuperscript{30} Id.
\textsuperscript{31} Id.
\textsuperscript{32} Id.
\textsuperscript{33} Id.
\textsuperscript{34} 18 U.S.C. § 794(a) (2006).
\textsuperscript{35} Id.
\textsuperscript{36} 18 U.S.C. § 794(c) (2006).
other federal statutes further define the facets of espionage in the United States.\textsuperscript{37}

While prosecutors can also pursue the death penalty through a conviction under the Treason Clause of the United States Constitution, the scope of this crime is more limited.\textsuperscript{38} Treason is the only crime defined in the Constitution, and its roots date back to English law.\textsuperscript{39} After the Revolution, the Framers of the Constitution deliberately narrowed the scope of the Treason Clause\textsuperscript{40} in order to limit the legislature’s ability to oppress the citizens.\textsuperscript{41} Treason is defined exclusively as levying war against the United States or adhering to the enemy by giving aid and comfort.\textsuperscript{42} Evidentiary protections included in the Treason Clause further limit its application.\textsuperscript{43} Treason convictions require proof of an overt act and the sworn testimony of two witnesses to that act, or the convictions can be established upon confession in open court.\textsuperscript{44} Finally, 18 U.S.C. § 2381 adds the statutory requirement of allegiance to the United States to be convicted of treason.\textsuperscript{45}

Although treason and espionage are punishable by death, espionage is easier for the government to prove. Espionage focuses on the act of transferring information, and the list of prohibited conduct in 18 U.S.C. § 794 is much broader than that for treason.\textsuperscript{46} Unlike treason, espionage does not require that information be given to an enemy of the United States or proof of actual harm to national security.\textsuperscript{47} Moreover, espionage convictions do not require proof of an overt act by two witnesses, a confession in open court, or allegiance to the United States.\textsuperscript{48}


\textsuperscript{38} U.S. CONST. art. 3, § 3, cl. 1.

\textsuperscript{39} James G. Wilson, Chaining the Leviathan: The Unconstitutionality of Executing Those Convicted of Treason, 45 U. PITP. L. REV. 99, 104–05 (1983).

\textsuperscript{40} Bab, supra note 26, at 1725.


\textsuperscript{42} Bab, supra note 26, at 1727.

\textsuperscript{43} Id. at 1726.

\textsuperscript{44} Id.


\textsuperscript{47} Norwood, supra note 16, at 846–47.

The executions of Julius and Ethel Rosenberg in 1953 illustrate the government’s preference to prosecute under the espionage statute rather than the Treason Clause. In *Rosenberg v. United States*, the Rosenbergs were charged with conspiracy to commit espionage for delivering secrets to the former Soviet Union with the intent to benefit that State. The defendants argued that they were entitled to the evidentiary protections of the Treason Clause because their alleged crime was in the “nature of treason.” However, because the prosecutor charged the Rosenbergs with espionage, rather than treason, their sentences were upheld on the testimony of only one witness instead of the two required by the Treason Clause. Thus, a careful use of prosecutorial discretion greatly lessened the government’s evidentiary burden.

The Rosenberg case provides perspective on the current inclination to prosecute under 18 U.S.C. § 794. Nevertheless, while that case is the only time the Supreme Court has reviewed the death penalty for espionage, the Court only considered the use of authority to grant a stay of execution, not the constitutionality of the actual punishment. Consequently, there is no direct Supreme Court jurisprudence on the constitutionality of capital punishment for espionage.

Lower court cases, though, have indirectly analyzed the death penalty for espionage. In the 1980s, the Ninth Circuit Court of Appeals focused on the sentencing guidelines for the punishment in *United States v. Harper*, and the Middle District of Florida reviewed the statute of limitations for espionage prosecutions in *United States v. Helmich*. Then, in 2002, Brian Patrick Regan filed several motions to strike the government’s Notice of Intent to Seek the Death Penalty for his attempted espionage conviction.

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49. Fletcher, *supra* note 26, at 1623.
50. 195 F.2d 583, 588 (2d Cir. 1952).
51. Fletcher, *supra* note 26, at 1623.
52. *Id.*
54. 729 F.2d 1216, 1225 (9th Cir. 1984).
but he did not directly attack the constitutionality of the proposed punishment. Instead, his motions focused on the issues of vagueness, prosecutorial discretion, and the aggravating factors listed in the FDPA.

A survey of the jurisprudence directly addressing capital punishment for espionage reveals an immense void. This lack of jurisprudence raises the question of whether the Court should look to the case law on the death penalty for crimes against individuals for guidance.

B. Crimes Against Individuals: Origins and Extensions of the Death Penalty Analysis

Unlike with espionage, there is ample jurisprudence regarding the death penalty when the victim of the crime is an individual. The Supreme Court has developed a two-pronged test to determine whether the death penalty for non-homicide crimes against individuals meets the Eighth Amendment’s proportionality requirement. The Court has expanded the test to restrict capital punishment for certain types of defendants, such as “mentally retarded defendants” and juveniles. A better understanding of this two-pronged test is necessary in order to consider its applicability to the non-homicide crime of espionage.

In 1977, the Supreme Court first introduced the two-pronged test for capital punishment analysis in the context of rape. In *Coker v. Georgia*, the Court held the death penalty unconstitutional for the rape of an adult woman. Coker was serving a sentence for several felonies when he escaped from jail, robbed the home of Mr. and Mrs. Carver, raped Mrs. Carver, and kidnapped her. Under Georgia’s rape statute, the jury sentenced Coker to death by electrocution. The question on appeal was whether the death penalty was a proportional punishment for the rape of an “adult woman.” The Supreme Court reversed the death sentence,

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58. Regan, 221 F. Supp. 2d at 674; Regan, 221 F. Supp. 2d at 668–70; Regan, 221 F. Supp. 2d at 661.
62. Id. at 587.
63. Id. at 591.
64. Id. at 592.
holding that "a sentence of death is grossly disproportionate and excessive punishment for the crime of rape and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment." The Court reached this conclusion by developing and applying a two-pronged test.

Under the first prong, the Court looked for objective evidence of a national consensus on the "acceptability of death as a penalty for rape of an adult woman." The Court considered relevant state laws and statistics on jury decisions about the death penalty for rape. Through the second prong, the Court applied its independent judgment to determine the constitutionality of capital punishment for rape under the Eighth Amendment. The Court concluded that rape is not comparable to murder "in terms of moral depravity and of the injury to the person and to the public .... The murderer kills; the rapist, if no more than that, does not."

In 1982, the Supreme Court applied the Coker test in the felony murder context. In Enmund v. Florida, the Court concluded that imposing a capital sentence on an accomplice to robbery and murder was unconstitutional under the Eighth Amendment. Although the defendant participated in the robbery by waiting in the getaway car, he did not commit the murders during the course of the felony, nor did he intend for the murders to occur. The Court used the two-pronged Coker analysis and stated that the accomplice could be held criminally liable only for his "personal responsibility and moral guilt."

Since 2001, the Supreme Court has extended the Coker test beyond certain non-homicide crimes against individuals to prohibit capital punishment for specific categories of defendants. In Atkins v. Virginia, the Court held that subjecting "mentally retarded criminals" to the death penalty is excessive punishment under the Eighth Amendment. The Court noted that defendants with mental

65. Id.
66. Id. at 593.
67. Id. at 593–97.
68. Id. at 597.
69. Id. at 598.
71. Id. at 801.
72. Id. at 786.
73. Id. at 801.
74. Id. See generally Tison v. Arizona, 481 U.S. 137 (1987) (upholding the death penalty for a defendant who actively and recklessly participated in the events of a felony murder). "[M]ajor participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the Enmund culpability requirements." Id. at 158.
disabilities are less capable of premeditating and planning criminal activities; therefore, executing them does not effectively serve the punishment goals of retribution and deterrence. In *Roper v. Simmons*, the Court stated that the death penalty is unconstitutional for offenders younger than eighteen at the time of the offense. Because juveniles have “diminished culpability,” the Court found that “the penological justifications for the death penalty apply to them with lesser force than to adults.” In both *Atkins* and *Roper*, the Court applied the two-pronged test introduced in *Coker* and subsequently followed in *Kennedy* in 2008.

III. *Kennedy v. Louisiana*: A Return to, and an Expansion of, the *Coker* Holding

In *Kennedy*, the Supreme Court both returned to, and expanded upon, its decision in *Coker*. The Court applied the two-pronged *Coker* test to determine the constitutionality of the death penalty for the rape of a child. As the most recent extension of the death penalty analysis for non-homicide crimes against individuals, the *Kennedy* decision shines considerable light on the state of capital punishment jurisprudence for non-homicide crimes and may help predict the future of death penalty jurisprudence for espionage.

A. Facts and Procedural History

On March 2, 1998, Patrick Kennedy called 911 and reported that two neighborhood boys had raped his step-daughter. He claimed that his daughter was in the garage when the two boys dragged her into the yard, raped her in the grass, and then rode off on a blue ten-speed bicycle. The police found the girl in her bed, wrapped in a bloody blanket. Kennedy explained that he had carried his daughter into the house, cleaned her in the bathroom, and then placed her in the bed while he called the police. A pediatrics expert described the victim’s injuries as:

76. *Id.* at 319–20.
77. 543 U.S. 551, 578 (2005).
78. *Id.* at 571.
80. *Id.* at 2646.
81. *Id.*
82. *Id.*
83. *Id.*
The most severe he had seen from a sexual assault in his four years of practice. A laceration to the left wall of the vagina had separated her cervix from the back of her vagina, causing her rectum to protrude into the vaginal structure. Her entire perineum was torn from the posterior fourchette to the anus.  

The victim required emergency surgery to repair the damage.  

A police investigation revealed evidence that contradicted Kennedy’s version of the events. This, coupled with the victim’s statement that Kennedy had raped her, led to Kennedy’s arrest. He was charged with the aggravated rape of his step-daughter, and, upon conviction, the jury unanimously sentenced him to death. The Louisiana Supreme Court affirmed the sentence and Kennedy appealed to the United States Supreme Court. The question before the Court was whether the Constitution barred the imposition of the death penalty for the rape of a child.  

B. The Majority Opinion: Applying the Two-Pronged Coker Test

Justice Kennedy wrote for the majority, and Justices Stevens, Souter, Ginsburg, and Breyer joined the opinion. The majority decision reversed the Louisiana Supreme Court, holding 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.” Relying on Coker, the majority noted that the two-pronged test for determining the constitutionality of capital punishment under the Eighth Amendment involves (1) objective evidence of a national consensus regarding the death penalty for the crime at issue and (2) the Court’s independent judgment of the meaning and purpose of the Eighth Amendment’s principle of proportionality.

84. Id.  
85. Id.  
86. Id. at 2647.  
87. Id.  
88. Id. at 2645–46 (the statute specified that aggravated rape included rape of a child under the age of twelve; Kennedy’s step-daughter was eight years old at the time of the offense).  
89. Id. at 2648.  
90. Id.  
91. Id. at 2649.  
92. Id. at 2646.  
93. Id. at 2645.  
94. Id. at 2650–51.  
95. Id. at 2650.
1. The First Prong: Objective Evidence of a National Consensus

Under the first prong, the majority considered the history of death penalty statutes for child rape and did not find a national consensus supporting capital punishment for the crime. Justice Kennedy noted that many state statutes imposing the death penalty for rape were invalidated by a 1972 Supreme Court decision; six states reenacted death penalty statutes for rape after the decision, but all were subsequently overruled. The Court further found that Louisiana had reintroduced the death penalty for child rape in 1995, and although five states followed suit, forty-four other states chose not to make child rape a capital offense. Justice Kennedy then stated that the FDPA expanded the realm of non-homicide crimes subject to capital punishment in 1994, but it failed to include child rape. In sum, the majority observed that thirty-seven jurisdictions (thirty-six states and the federal government) allowed the death penalty for at least one crime—only six of them, however, defined child rape as a capital offense.

During the original hearing, the Court failed to consider a capital child rape statute under the Uniform Code of Military Justice (UCMJ) when researching evidence of a national consensus. A petition for rehearing was filed, and the Court reviewed this oversight. The majority determined, though, that the UCMJ does not bear on the evidence of a national consensus in the civilian context. Justice Kennedy stated that objective evidence of a national consensus on the death penalty for a civilian crime is not affected by the status of similar military offenses.

After exploring the existence of state statutes imposing capital punishment for child rape, Justice Kennedy compared this objective evidence to that of Atkins and Roper. In Atkins, the Court found that thirty states (including twelve non-capital states) prohibited the death penalty for defendants with mental disabilities, and twenty states permitted it. In Roper, the majority

96. Id. at 2656–57.
97. Id. at 2651; see Furman v. Georgia, 408 U.S. 238 (1972).
98. Kennedy, 128 S. Ct. at 2651–52.
99. Id. at 2652.
100. Id. at 2653.
102. Id.
103. Id. at 2.
104. Id.
105. Kennedy, 128 S. Ct. at 2653.
106. Id. (citing Atkins v. Virginia, 536 U.S. 304, 313–15 (2002)).
noted that thirty states did not subject juveniles to capital punishment, and eighteen of those states allowed the death penalty for other crimes; twenty states permitted juvenile executions.\footnote{Id. (citing Roper v. Simmons, 543 U.S. 551, 564 (2005)).} Finally, Justice Kennedy found that, in both cases, the states that allowed the death penalty rarely imposed the punishment.\footnote{Id. (“Only five [s]tates had executed an offender known to have an IQ below 70 between 1989 and 2002 . . . ; and only three [s]tates had executed a juvenile offender between 1995 and 2005 . . . .”).}

The majority rejected the dissent’s argument that \textit{Coker} was misinterpreted by the states as banning capital punishment for child rape, thus preventing a subsequent national consensus from emerging in favor of the death penalty for the crime.\footnote{Id. at 2654.} Justice Kennedy did not find reliable evidence to support the assertion that \textit{Coker} acted as a deterrent to the development of a national consensus on capital punishment for child rape.\footnote{Id. at 2655–56.} The majority observed that state courts limited the holding in \textit{Coker} to the rape of an adult woman and did not hinder capital child rape legislation.\footnote{Id. at 2655.} While noting that changes in state legislation were persuasive, the Court did not find a “direction of change” in favor of child rape statutes.\footnote{Id. at 2656.} Justice Kennedy argued that the six states that had added capital punishment statutes for child rape since 1995 showed less of a “direction of change” than the enacted statutes in \textit{Atkins} and \textit{Roper}.\footnote{Id. at 2656–57. In \textit{Atkins}, eighteen states had enacted legislation prohibiting capital punishment for defendants with mental disabilities from 1989–2001. \textit{Id.} (citing Atkins v. Virginia, 536 U.S. 304, 313–15 (2002)). In \textit{Roper}, only five states had outlawed executions of juvenile defendants from 1989–2001, but this was accompanied by a previous recognition of the “impropriety” of executing juveniles before \textit{Stanford v. Kentucky}, 492 U.S. 361 (1989), was decided. \textit{Id.} at 2657 (citing Roper v. Simmons, 543 U.S. 551, 565–67 (2005)). \textit{Stanford} was a case allowing capital punishment for juveniles, and \textit{Roper} overruled it. \textit{Roper}, 543 U.S. at 565–66, 578–79. At the time of \textit{Stanford} in 1989, twelve states prohibited executions of juveniles under eighteen, and fifteen states prohibited executions of juveniles under seventeen. \textit{Kennedy}, 128 S. Ct. at 2657 (citing \textit{Roper}, 543 U.S. at 566–67).} Concluding the
first prong, the majority found that a national consensus existed against the death penalty for child rape.\textsuperscript{116}

2. The Second Prong: The Court's Independent Judgment

Under the second prong, the majority applied its independent judgment to interpret the meaning and purpose of the Eighth Amendment.\textsuperscript{117} While recognizing the extent of injury suffered by victims of child rape, Justice Kennedy stated that this injury alone did not mean that the execution of the defendant was a proportional penalty.\textsuperscript{118} The Court found that the "evolving standards of decency" in American society require both consistency in assigning punishment and flexibility to tailor the penalty to the specific defendant and crime at issue.\textsuperscript{119} Because of this tension in defining appropriate punishments, Justice Kennedy noted that the instances in which capital punishment may be imposed should be limited and should not be allowed when the victim's life is not taken.\textsuperscript{120} The Court observed that the large number of reported child rapes is consistent with this need to restrain the use of the death penalty; furthermore, simply narrowing the list of aggravating factors required to impose the punishment will not enable the average juror to apply the death penalty proportionally to the crime.\textsuperscript{121} Justice Kennedy stated that allowing executions for child rape in this context could lead to unconstitutional experimentation and over-punishment.\textsuperscript{122}

Justice Kennedy also noted that capital punishment for child rape does not satisfy the penological goal of retribution.\textsuperscript{123} According to the majority, retribution is achieved when the death penalty allows the "community as a whole . . . to affirm its own judgment that the culpability of the prisoner is so serious that the ultimate penalty must be sought and imposed."\textsuperscript{124} The Court stated that, in non-homicide cases, the death sentence must balance the harm done to the victim.\textsuperscript{125} In child rape cases, however, the majority did not find evidence that the death penalty lessens the

\begin{thebibliography}{99}
\item 116. \textit{Id.} at 2658.
\item 117. \textit{Id.}
\item 118. \textit{Id.}
\item 119. \textit{Id.} at 2658–59.
\item 120. \textit{Id.} at 2660.
\item 121. \textit{Id.} at 2660–61.
\item 122. \textit{Id.} at 2661–62.
\item 123. \textit{Id.} at 2662.
\item 124. \textit{Id.} (citing Panetti v. Quarterman, 551 U.S. 930 (2007)).
\item 125. \textit{Id.}
\end{thebibliography}
victim's pain because the child will be required to testify in prolonged court proceedings.\textsuperscript{126}

Finally, the majority observed systemic concerns in prosecuting defendants for child rape.\textsuperscript{127} Justice Kennedy noted that the testimony of the child-victim is often “unreliable, induced, and even imagined . . . .”\textsuperscript{128} This creates a risk of wrongful conviction because the child is usually the only witness to the crime.\textsuperscript{129} The majority also found that death penalty proceedings require detailed testimony about the brutality of the rape and the resulting injuries, information that is hard for children to provide.\textsuperscript{130} In addition, the Court stated that imposing the death penalty for child rape could lead to increased non-reporting of the crime; families may seek to protect their relatives, and defendants could be encouraged to kill their victims to avoid discovery and prosecution.\textsuperscript{131} After applying \textit{Coker}'s two-pronged test to capital punishment for child rape, the majority concluded that execution is not a proportional punishment to the crime.\textsuperscript{132}

\textbf{C. The Dissenting Opinion: A Different Outcome Under the Coker Analysis}

Justice Alito wrote the dissenting opinion in \textit{Kennedy}, with Chief Justice Roberts and Justices Scalia and Thomas joining the opinion.\textsuperscript{133} The dissenters opposed the majority’s categorical rule prohibiting the death penalty for child rape.\textsuperscript{134} Unlike the majority, they believed that a child rapist could inflict an injury, like that of Kennedy’s victim, worthy of execution.\textsuperscript{135}

First, Justice Alito attacked the majority’s evidence of a national consensus against the death penalty for child rape.\textsuperscript{136} He argued that the evidence was unreliable because \textit{Coker} discouraged state legislators from supporting subsequent death penalty legislation and prevented any potential for an affirmative national consensus on the issue.\textsuperscript{137} Moreover, Justice Alito stated that the

\begin{footnotesize}
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\item \textsuperscript{126} Id. at 2662–63.
\item \textsuperscript{127} Id. at 2663.
\item \textsuperscript{128} Id.
\item \textsuperscript{129} Id.
\item \textsuperscript{130} Id.
\item \textsuperscript{131} Id. at 2663–64.
\item \textsuperscript{132} Id. at 2664.
\item \textsuperscript{133} Id. at 2665.
\item \textsuperscript{134} Id.
\item \textsuperscript{135} Id. at 2676–77.
\item \textsuperscript{136} Id. at 2665–66.
\item \textsuperscript{137} Id.
\end{itemize}
\end{footnotesize}
majority’s reliance on Atkins and Roper was misplaced because neither of those cases was preceded by a Supreme Court decision limiting legislative consensus efforts.\(^{138}\)

Instead, the dissenters found a national consensus supporting capital punishment for child rape.\(^{139}\) Justice Alito noted that five states had enacted death penalty statutes for child rape since Coker, and changes in societal attitudes accompanied this legislation.\(^{140}\) The dissenters concluded that state statutes establishing the Sex Offender Registration Program, the involuntary commitment of sex offenders, and residency restrictions for sex offenders all indicated a national consensus favoring executions for child rape.\(^{141}\)

Justice Alito also criticized the majority’s emphasis on policy and procedural arguments that he characterized as irrelevant to the Eighth Amendment analysis.\(^{142}\) He argued that the Eighth Amendment is not the appropriate mechanism for solving child testimony problems or for protecting victims’ interests.\(^{143}\) The majority’s remaining arguments, stated the dissenters, did not justify its holding.\(^{144}\) Justice Alito disagreed with the idea that murder is “unique in its moral depravity;”\(^{145}\) that murder involves a distinct harm does not mean that the harm of child rape is insufficient to warrant the death penalty.\(^{146}\) Rather, Justice Alito found that the injuries caused by child rape are irreparable for the victim and negatively affect society.\(^{147}\) In conclusion, the dissent rejected the majority’s arguments and supported the constitutionality of the death penalty for child rape.\(^{148}\)

\textit{D. The Two-Pronged Test After Kennedy: Extent of Influence Remains Unanswered}

\textit{Kennedy} further developed the two-pronged jurisprudential test of \textit{Coker} by expanding the application of the test to child rape,\(^{149}\) excluding military laws from the national consensus determination

\begin{itemize}
  \item \(^{138}\) \textit{Id.} at 2669.
  \item \(^{139}\) \textit{Id.}
  \item \(^{140}\) \textit{Id.} at 2669–70.
  \item \(^{141}\) \textit{Id.} at 2670–71.
  \item \(^{142}\) \textit{Id.} at 2673.
  \item \(^{143}\) \textit{Id.} at 2673–75.
  \item \(^{144}\) \textit{Id.} at 2675.
  \item \(^{145}\) \textit{Id.} at 2676.
  \item \(^{146}\) \textit{Id.} at 2676–77.
  \item \(^{147}\) \textit{Id.}
  \item \(^{148}\) \textit{Id.} at 2677–78.
  \item \(^{149}\) \textit{Id.} at 2646.
\end{itemize}
under the first prong, and addressing systemic concerns as part of the Court’s independent judgment under the second prong. Currently, the two-pronged test is used to analyze the death penalty for several non-homicide crimes against individuals and for specific categories of less culpable defendants. As Kennedy states, however, the Court has yet to address the application of this two-pronged test to determine the constitutionality of capital punishment for espionage and other crimes against the State.

IV. CONCEPTUAL DIFFERENCES BETWEEN CRIMES AGAINST INDIVIDUALS AND CRIMES AGAINST THE STATE: OVERCOMING THE HURDLE

Statutes that define crimes against the State and crimes against individuals reveal seemingly conceptual distinctions that could require different tests to determine the constitutionality of capital punishment for each. These differences would prevent the two-pronged Kennedy test from applying to espionage executions. Although these distinctions exist, they should not prevent overlap of the Eighth Amendment analysis.

First, the statutory origins of each category of crime are unique. Crimes against individuals largely developed through state law because the Constitution reserves to the states those powers not expressly delegated to the federal government. Crimes against the State are mainly based on federal law due to the express power of Congress to declare war and provide for the common defense and general welfare. However, although the Treason Clause in Article III of the Constitution allows Congress to set the appropriate penalty, the crime of treason actually originated in state law prior to the Revolution and the drafting of the Constitution.

Second, a crime against an individual has a tangible victim, as indicated by the statutes defining these crimes. The relevant statute in Kennedy refers to the aggravated rape of a child (under thirteen years of age) and uses the term “victim” throughout the statute. On the other hand, a crime against the State, such as treason or

151. Kennedy, 128 S. Ct. at 2663.
152. Id. at 2659.
153. U.S. CONST. art. 1, § 8; U.S. CONST. amend. X.
154. U.S. CONST. art. 1, § 8, cl. 11.
155. U.S. CONST. art. 3, § 3, cl. 3–42.
156. Wilson, supra note 39, at 107.
Espionage, has an intangible victim. Title 18, Section 794 of the United States Code indicates that the person transmitting confidential information must intend or have reason to believe that it will be used "to the injury of the United States . . . ." Despite this difference, crimes against individuals have communal effects, and crimes against the State can directly harm individuals even though the security of the State is the main target.

Finally, the causal connection between each category of crime and its primary victim can be dissimilar. Crimes against individuals usually have a direct link between the criminal act and the injury to the victim. The direct consequence of murder is the death of the victim, and the immediate result of rape is physical and emotional injury to the victim. This causation between act and injury is less direct for espionage and other crimes against the State. Espionage focuses on the act of transmitting information with the intent to injure the United States or help a foreign government, and the statute does not specify that this injury must actually occur. If there is a delayed injury to the United States, it can be difficult to causally connect that injury to the perpetrator's act of espionage. Such a bright line between direct and indirect effects, though, is misleading. If an act of espionage involves transmitting the names of spies, then that crime can have an immediate impact on those individuals. Likewise, crimes against individuals have lasting consequences; a rape victim can

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164. The execution of ten FBI and CIA agents was a direct effect of Aldrich Ames' actions despite the later compromise of U.S. security. FBI History, supra note 160; Victims of Aldrich Ames, supra note 160.
experience the delayed effects of pregnancy or sexually transmitted diseases.\textsuperscript{165}

These conceptual differences between crimes against individuals and crimes against the State are not absolute and should not prevent overlap of the Eighth Amendment analysis. Crimes against the State are largely federal, but they share their origins in state law with crimes against individuals. Moreover, the distinction between tangible and intangible victims is not complete; crimes against individuals affect the community, and crimes against the State can impact individuals. Lastly, the direct and indirect effects of the crimes are fluid. Both crimes against individuals and crimes against the State have immediate and delayed consequences. This overlap of conceptual characteristics supports the incorporation of the two-pronged 	extit{Kennedy} test to the death penalty analysis for espionage.

V. APPLYING THE \textit{KENNEDY} TEST TO CAPITAL PUNISHMENT FOR ESPIONAGE

\textbf{A. Why the Kennedy Test Should Apply to Espionage Executions}

The two-pronged analysis applied in \textit{Kennedy} to declare the death penalty a disproportional punishment for child rape can, and should, be used to determine the constitutionality of capital punishment for espionage. The death penalty jurisprudence for espionage is virtually nonexistent. Meanwhile, the current \textit{Kennedy} test has a rich jurisprudential history with a broad application to non-homicide crimes against individuals and specific categories of less culpable defendants.\textsuperscript{166} Also, the conceptual differences between crimes against the State and crimes against individuals are not absolute and do not prevent overlap of the Eighth Amendment analysis for child rape and espionage.

In fact, two lower court decisions analyzing the death penalty for espionage have referenced contemporaneous capital punishment cases for crimes against individuals. In the Rosenbergs' initial appeal of their capital sentences in 1952, the Second Circuit Court of Appeals upheld their death sentences by referencing Supreme Court decisions on the death penalty for


\textsuperscript{166} See supra Part II.B.
crimes against individuals. Although it limited its holding to the specific factual situation, the Second Circuit considered "cruel and unusual punishment" to exist when the punishment "shocks the conscience and sense of justice of the people of the United States"—a standard developed in the context of crimes against individuals. In the 1984 Harper decision, the Ninth Circuit found 18 U.S.C. § 794 to be unconstitutional because it lacked legislative guidelines for imposing the death penalty. The parties in that case supported reliance on a contemporary capital punishment standard for crimes against individuals to determine the constitutionality of the espionage statute's death penalty provision.

Even though neither of these cases is a Supreme Court decision, and neither directly addresses the constitutionality of capital punishment for espionage, both rely on contemporaneous Supreme Court decisions interpreting aspects of the death penalty for crimes against individuals. Like these prior cases, capital punishment sentences for espionage should reference the current jurisprudence for crimes against individuals. The Kennedy decision is the contemporary, relevant test of death penalty constitutionality for non-homicide crimes against individuals, and it should be used to analyze the constitutionality of capital sentences for the non-homicide crime of espionage.

Opponents of expanding the two-pronged Kennedy analysis to espionage executions could contend that the absence of a formal test for espionage does not mean that the Kennedy test must be adopted. This may be because the nature of the harm caused by espionage to national security is unique; it can lead to a change in foreign policy or the deaths of innocent people. While this harm is distinct, it would only change the analysis under the two-pronged test, not whether the test should apply. This concern also ignores the already broad application of the Kennedy test, the conceptual similarities between crimes against the State and crimes against individuals, and the previous overlap between the death penalty analyses of the two categories of crimes.

167. United States v. Rosenberg, 195 F.2d 583, 608 n.34 (2d Cir. 1952) (citing Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 473 (1947) and O'Neil v. Vermont, 144 U.S. 323, 340 (1892)).
168. Id. at 608.
169. Id.
170. United States v. Harper, 729 F.2d 1216, 1226 (9th Cir. 1984); see supra Part II.A.
171. Id. at 1218 (referring to the Court's reasoning in Furman v. Georgia, 408 U.S. 238 (1972)).
Critics of incorporation from one category of crime to another might also argue that statutes are presumed constitutional until they are challenged. Because Supreme Court cases on the constitutionality of the death penalty provision for espionage are scarce, 18 U.S.C. § 794 should be presumed constitutional, so no test is needed. This argument overlooks the fact that many would-be challenges to the death penalty provision for espionage might be preempted by plea agreements. Both prosecutors and defendants may eagerly avoid trial in espionage cases: defendants want to escape the death penalty, and prosecutors feel pressure to maintain the confidentiality of government documents. Thus, the lack of jurisprudence on the death penalty provision of 18 U.S.C. § 794 is not a valid indication of its presumed constitutionality.

B. How the Kennedy Test Would Be Applied to Espionage Executions

Deciding that the two-pronged Kennedy test should be applied to the death penalty for espionage does not end the analysis. The specific aspects of each prong must be considered to determine how they would be evaluated in the context of espionage. With slight modifications, the Kennedy test can be applied practically to the Eighth Amendment constitutionality review for espionage executions.

1. Applying the First Prong: Objective Evidence of a National Consensus

The Kennedy majority found a national consensus against the imposition of the death penalty for child rape by comparing state statutes defining the crime and its capital penalty. Since espionage is largely a federal crime, the Court's comparison of state statutes does not directly correspond to the national consensus analysis for espionage. Congress' enactment of 18 U.S.C. § 794 and the FDPA could be evidence of a national consensus because state-elected officials in the House of Representatives and the Senate participated in the process. By extension, then, a new national consensus would exist every time Congress enacts new legislation; such a volatile view of national consensus is contrary to the Kennedy Court's evaluation of the history of child rape

legislation and its emphasis on the steady development of a clear consensus.\textsuperscript{174}

Another complication occurs when searching for a consensus among state espionage statutes. New Mexico is the only state to enact such a statute,\textsuperscript{175} but the statute is part of the state’s military code and should not be considered in the national consensus analysis. The amended opinion in \textit{Kennedy} disregarded the UCMJ capital punishment statute for child rape when determining the existence of a national consensus.\textsuperscript{176} Likewise, military statutes on espionage (both federal and state) would not be applicable to a consensus determination for the civilian crime of espionage under 18 U.S.C. § 794.

The federal nature of espionage statutes and the lack of corresponding state espionage statutes require that the objective prong of the \textit{Kennedy} test be modified slightly for espionage. To find a national consensus for espionage, the Supreme Court could look beyond espionage statutes to state statutes defining other crimes against the State, such as treason and terrorism. This would balance the extreme of finding a national consensus in every federal statute against finding no consensus because of the lack of useful state espionage statutes.

Currently, nine states have treason statutes: Arkansas, California, Colorado, Georgia, Illinois, Louisiana, Mississippi, Missouri, and Washington.\textsuperscript{177} In the past decade, state legislators have expanded the scope of their death penalty statutes,\textsuperscript{178} but capital statutes for espionage have been excluded from this trend. The events of September 11, however, influenced ten states to pass death penalty statutes for terrorism.\textsuperscript{179} As noted by the \textit{Kennedy} majority, terrorism is a crime against the State,\textsuperscript{180} and the states’ enactment of capital punishment for terrorism could indicate their support for related espionage prosecutions.\textsuperscript{181} On the other hand,

\begin{itemize}
\item \textsuperscript{174} \textit{See supra} Part III.B.1.
\item \textsuperscript{175} N.M. \textit{STAT. ANN.} § 20-12-42 (West 2003).
\item \textsuperscript{176} \textit{Kennedy} v. Louisiana, 129 S. Ct. 1 (2008), \textit{modifying Kennedy}, 128 S. Ct. 2641 (2008); \textit{see supra} Part III.B.1.
\item \textsuperscript{177} Death Penalty Information Center, \texttt{http://www.deathpenaltyinfo.org/death-penalty-offenses-other-murder} (last visited Feb. 16, 2010).
\item \textsuperscript{179} \textit{Id.} at 27–28 (Arizona, Nevada, New Jersey, New York, Ohio, Oklahoma, Tennessee, Utah, Texas, and Virginia).
\item \textsuperscript{180} \textit{Kennedy}, 128 S. Ct. at 2659.
\item \textsuperscript{181} This Note recognizes, but does not address, the debate over the proper definition of terrorism. \textit{See} Nicholas J. Perry, \textit{The Numerous Federal Legal Definitions of Terrorism: The Problem of Too Many Grails}, 30 \textit{J. LEGIS.} 249
\end{itemize}
the states had an opportunity to include death penalty legislation for espionage after September 11, and they chose not to. This may be because terrorism often results in homicide, which is governed by state law, while espionage remains largely a federal crime beyond state jurisdiction. If this is the case, then state terrorism statutes could indicate a growing trend toward promoting national security within state law to accompany similar federal efforts.

National politics and objectives are often influenced by international trends. Because espionage is a federal crime, the search for a national consensus could include observations of espionage statutes in other nations. The Court in Atkins and Roper indirectly referenced international opinions when prohibiting the death penalty for less culpable defendants. Moreover, in Trop v. Dulles the Supreme Court directly applied a comparative law approach by reviewing the nationality laws of eighty-four countries to determine the constitutionality of the federal Nationality Act of the United States. Such a comparative analysis would be appropriate for espionage because of its federal law origins and the crime’s effects on international relations. Regardless of the ultimate interpretation of the state and federal statutes, the search for a national consensus from Kennedy is applicable and useful to determine the constitutionality of the death penalty for espionage.

The Kennedy majority also considered the extent of the practice of executing defendants for the crime of child rape. In Kennedy, no defendant had been executed for child rape since 1964; the last execution for espionage was the Rosenbergs in

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183. Roper v. Simmons, 543 U.S. 551, 578 (2005); Atkins v. Virginia, 536 U.S. 304, 316 n.21 (2002); see also Fields, supra note 182, at 980–81 (discussing the Supreme Court’s references to “foreign law and international opinion” in Roper and Atkins).


185. Kennedy, 128 S. Ct. at 2657.

186. Id.
Furthermore, no one has been put to death for treason since John Brown in 1859. This rare use of the death penalty to punish crimes against the State "could be interpreted as society’s evolving distaste for the penalty, at least against political criminals." Unlike the dissent’s argument in Kennedy that the misinterpretation of Coker prevented a national consensus from developing in favor of the death penalty for child rape, the Rosenberg executions have supported any subsequent efforts to seek capital punishment for espionage by indicating that the punishment is constitutional. Despite this affirmation, the jury refused to apply the death penalty after convicting Brian Patrick Regan in 2002. This analysis of the frequency of the practice of executing convicted defendants is appropriate for both child rape and espionage.

2. Applying the Second Prong: The Court’s Independent Judgment

Under the second prong of the Kennedy analysis, the Court used its independent judgment to interpret the Eighth Amendment’s meaning and purpose. This prong is more easily applicable to the death penalty analysis for espionage because it considers the general purposes of punishment and the intent of the Eighth Amendment instead of searching for objective evidence that is harder to compare from one crime to another.

As described in Kennedy, the death penalty should be enforced in limited circumstances because of the tension between promoting consistency in applying the penalty versus flexibility to tailor the punishment to the specific defendant and crime at issue. Just as Kennedy considered the number of reported child rapes and the effect of existing aggravating factors on jury discretion, these same factors are applicable to the death penalty analysis for espionage.

188. Wilson, supra note 39, at 156.
189. Id.
190. Life Sentence for Bid to Sell Secrets, supra note 6; Jury Rules Out Death Penalty for Failed Spy, supra note 10.
191. Kennedy, 128 S. Ct. at 2658.
192. Id. at 2658-59.
193. Id. at 2660-61.
The number of reported instances of espionage would influence the risk of inconsistency in applying the death penalty to the crime. Also, as with child rape statutes, the aggravating factors required to impose capital punishment for espionage can be studied to determine their effect on jury discretion. The aggravating factors for espionage are defined in 18 U.S.C. § 3592, part of the FDPA, and are limited to the following circumstances: whether the defendant (1) has been convicted of a prior espionage or treason offense; (2) knowingly created a “grave risk” to national security; or (3) knowingly jeopardized the life of another person. 194

By prohibiting the death penalty for child rape, Kennedy sought to lower the rate of experimentation in the imposition of death sentences without the necessary limiting guidelines. 195 This concern is directly applicable to the constitutionality review of capital punishment for espionage because of the lack of jurisprudence on the issue. Despite the jurisprudence on the death penalty for non-homicide crimes against individuals, the Kennedy Court stated that extending the death penalty to child rape would lead to dangerous experimentation when compared with the characteristics and effects of murder. 196 Likewise, the elements and effects of espionage can be compared to treason and terrorism to determine whether capital punishment would be disproportionally experimental.

When considering the goal of retribution, Kennedy reviewed the proportionality of the death penalty according to the extent of harm to the victim. 197 The bright line drawn by the majority between the injuries of murder and rape requires more nuances in the context of espionage. With espionage, the extent of harm to the victim is complicated by the intangible nature of the victim and the indirect causation between act and effect. Nevertheless, the extent of injury from espionage can be compared with injuries from treason and terrorism to determine the retributive value of espionage executions.

Finally, the systemic concerns in Kennedy, including evidentiary issues, the potential for increased non-reporting, and the incentive to kill witnesses in order to avoid detection, should be considered for espionage. 198 The testimonial evidence in an espionage case is more likely to be competent; however, the main evidentiary issue to be considered with espionage is the classified

195. Kennedy, 128 S. Ct. at 2661.
196. Id.
197. Id. at 2662.
198. Id. at 2663–64.
nature of the transmitted information. There is a national security interest in protecting this information, but in a death penalty case this evidence would be disclosed. The balancing of these interests is unique to espionage cases.

Applying the death penalty to espionage convictions could lead to increased non-reporting of the crime. Co-workers of spies might want to protect defendants from possible execution. The relationship between co-workers is less intimate than that of family members, though, so the risk of non-reporting may not be as much of an issue for espionage as it is for child rape. Moreover, the incentive to kill the victim to avoid detection is less relevant to espionage than to child rape because the likely victim of espionage is the national community and not an individual person. A spy may kill a possible informant to avoid detection, but this connection is less direct than that of rapist and rape victim. When killing a rape victim, a rapist is likely killing the only witness, and certainly the key witness, to the crime. If a spy kills a potential informant, many other witnesses may remain, and he has only slightly diminished his risk of avoiding eventual detection.

The Eighth Amendment analysis in *Kennedy* is easily applied to capital punishment statutes for espionage. The considerations remain the same, but the analytic factors change with the criminal context. In *Kennedy*, the crime of child rape was compared to murder, and espionage can be compared to treason and terrorism to determine the proportional Eighth Amendment punishment.

**VI. CONCLUSION**

Although no one has been executed for espionage since 1953, the government's pursuit of the death penalty against Brian Patrick Regan illustrates the issue's continuing relevance. Since the terrorist attacks of September 11 and the increased efforts to ensure national security through diplomatic and covert efforts, espionage statutes may become more relevant in the future. There is, however, no direct jurisprudence on the constitutionality of the death penalty for espionage. This uncertainty could lead to unconstitutional experimentation and over-punishment the next time a defendant is sentenced to die for spying. Whether the death penalty for espionage is ultimately deemed constitutional or not, this conclusion should be made after a careful analysis of society's attitude toward the crime and the purpose and intent of the Eighth Amendment.

199. *Id.* at 2658–60.
Kennedy's two-pronged test for the death penalty for child rape can be successfully applied to the constitutional analysis of espionage executions. The conceptual characteristics of crimes against individuals and crimes against the State share similarities, and previous espionage cases have already referenced contemporaneous Eighth Amendment standards for crimes against individuals. With the lack of jurisprudence on the death penalty for espionage, the jurisprudence for crimes against individuals should be used to determine the constitutionality of the punishment.

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