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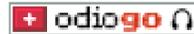
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The Death Penalty for Child Rape: Why Texas May Help Louisiana

JURIST Guest Columnist [Adam Gershowitz](#) of South Texas College of Law says the principal beneficiary of a new Texas child rape death penalty law will likely be the State of Louisiana, which may see its child rape statute transformed from an unconstitutional outlier to a constitutional model for the rest of the country...

 **Texas is on the cusp of becoming the sixth state to authorize the death penalty for child rape. Both the House and Senate have passed similar bills, and once the legislation is reconciled the Governor will surely sign it. Despite the enormous publicity, one question that remains unanswered is who will benefit from the new Texas statute.**

Defense attorneys are certainly not the beneficiaries, as they now have to contend not just with reviled clients but with the added pressure that comes with the possibility of a death sentence. And prosecutors, many of whom opposed the legislation, do not fare much better because it is possible (though disputed) that the availability of the death penalty will decrease reporting in family rape cases and will lead some perpetrators to kill their victims. Nor are the citizens of Texas the winners, because the new law makes death a possibility only for second-time offenders, with first offenders getting minimum sentences of 25 years in prison. Thus, it will likely be decades before the public sees someone sentenced to death (no less executed) for child rape in Texas.

So who really wins from Texas's largely symbolic law (other, of course, than the politicians who enacted it)? The answer may well be the State of Louisiana. Although Texas will become the sixth state to authorize the death penalty for child rape, Louisiana (which, in 1995, became the first state to enact such a statute in modern times) is the only jurisdiction in the country that actually has sent a child rapist to death row.

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Patrick Kennedy was sentenced to death in 2003 in Louisiana for the despicable rape of his eight-year old stepdaughter. If his death sentence survives review by the Louisiana courts -- a substantial likelihood, given that the Louisiana Supreme Court indicated over a decade ago that it believes capital punishment for child rape is constitutional -- the United States Supreme Court will be forced to confront the question of whether a child rape statute is constitutional. (In 1977, the Court outlawed the death penalty for the "conventional" crime of rape, but stated fourteen separate times that its decision was limited to rape of an "adult" woman.)

How will the Court decide whether it is constitutional for Louisiana to execute a child rapist? In determining whether capital punishment is permissible, the Court has looked to a number of factors (including international opinion and the gravity of the offense), but it has put the greatest emphasis on whether there is a "national consensus" in favor of the punishment. And it has determined the existence of a national consensus by nose-counting state legislatures and paying particular attention to whether there is a one-directional trend in legislative enactments.

Thus, in 2002, the Court forbid the execution of the mentally retarded in large part because sixteen states that previously authorized such executions had abolished the practice over the past dozen years. In 2005, the Court forbid the execution of juveniles, in large part because of a one-directional change in which five states that had authorized juvenile executions had banned them in recent years. To be sure, the Court also relied on other factors in its mental retardation and juvenile execution cases, but its emphasis on national legislative trends was unmistakable.

Which brings us back to the new Texas law and Louisiana's effort to execute Patrick Kennedy. The Texas law, though largely symbolic, is another notch in the national legislative trend authorizing capital punishment for child rapists. Once the Texas law is enacted, Texas will be the sixth state since 1995 to authorize capital punishment for child rape. This makes for a small, but certainly a one-directional, national trend. And indeed, the enactment of six child-rape statutes is a more pronounced change than the five-state trend that convinced the Supreme Court to ban the execution of juveniles only two years ago.

Moreover, the trend is not likely to end with Texas. Given Texas's status as the nation's leader in capital punishment, the high-profile enactment of a child rape death-penalty statute may spur other states to change their own laws. At present, Alabama and Utah are considering similar legislation.

At the end of the day, the new Texas law probably will not make Texas citizens any safer. It will bring no satisfaction to the vast majority of prosecutors across the state. And it may even raise the risk of homicide for child victims while decreasing the reporting of

serious intra-family sex offenses. The benefit of the Texas statute, if there is one, will likely be for the State of Louisiana. Through no action of its own, Louisiana may sees its child rape statute transformed from an unconstitutional outlier to a constitutional model for the rest of the country. And while that may raise serious concerns about the soundness of the Supreme Court's jurisprudence, it should certainly require Louisiana to say thank you to Texas.

Adam Gershowitz teaches Criminal Procedure and a seminar on the death penalty at South Texas College of Law.

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