

LOUISIANA v. KENNEDY

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I. INTRODUCTION

In 2003, Patrick Kennedy was convicted for the aggravated rape of his eight-year-old stepdaughter.¹ The prosecutor sought the death penalty, and a unanimous jury sentenced Kennedy to death pursuant to a Louisiana law authorizing capital punishment for rape of a child under twelve.² In response, Kennedy moved for a new trial, arguing that the Constitution prohibits the death penalty for crimes when the victim survives.³ Following the denial of that motion, he appealed to the Louisiana Supreme Court.⁴ When that court declined to overturn his death sentence,⁵ Kennedy petitioned the U.S. Supreme Court for review, which the Court granted in January 2008.⁶ The *Kennedy* decision contains a lengthy examination of the Court's "cruel and unusual punishment" jurisprudence, which raises questions about how the Court can remain persuasive when deciding issues with profound moral implications.

II. FACTS AND PROCEDURAL HISTORY

On the morning of March 2, 1998, Kennedy called 9-1-1 and explained that, while getting his son ready for school, he heard screaming and, upon investigating, found his stepdaughter on the ground outside.⁷ Kennedy claimed she told him that two young, black males dragged her from the garage to the side yard and that one

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1. *State v. Kennedy* (*State v. Kennedy*), 957 So. 2d 757, 760 (La. 2007).

2. *Id.* (citing LA. REV. STAT. ANN. § 14:42 (2008)) The Louisiana Supreme Court noted that the threshold age was later changed to thirteen, but Kennedy's trial occurred under the old version of the law. *Id.*, 957 So. 2d. at 780.

3. *Id.* at 760.

4. *Id.*

5. *Id.* at 793.

6. *Kennedy v. Louisiana*, 128 S. Ct. 829 (2008) (mem).

7. *State v. Kennedy*, 957 So. 2d. at 761.

raped her there.⁸ His stepdaughter's injuries, which were described by an expert in pediatrics as "the most severe he had seen from a sexual assault," required emergency surgery.⁹

Although both the stepdaughter and Kennedy initially reported the same series of events, other facts emerged that cast doubt on their accounts.¹⁰ For example, Kennedy had called his employer hours before he called 9-1-1 and explained that he would not be at work that day because "his little girl had become a young lady."¹¹ Furthermore, he had called a carpet cleaning service earlier that morning to remove bloodstains.¹² Kennedy also wiped down the victim, making it impossible to retrieve a DNA sample,¹³ and gave inconsistent statements regarding the bike on which the attackers allegedly rode.¹⁴ Investigators noted that, despite her claims that she had been dragged across concrete, Kennedy's stepdaughter had no scrapes on her legs and there were no signs of struggle in the yard.¹⁵

Six years later, Kennedy was tried for his stepdaughter's rape. After identifying Kennedy as the rapist, the stepdaughter was unable to continue her testimony, so the prosecutors introduced a videotaped interview in which she had identified Kennedy as the rapist.¹⁶ After the video ended, the stepdaughter testified that her previous story about the two boys was untrue and that Kennedy was the only person who had raped her.¹⁷ The jury ultimately convicted Kennedy of aggravated rape and voted unanimously for the death penalty.¹⁸

On appeal, Kennedy raised a variety of arguments, including Confrontation Clause challenges to the introduction of the videotape,¹⁹ but his primary argument focused on Louisiana allowing capital punishment in cases not resulting in homicide because, according to Kennedy, the U.S. Supreme Court had established "that

8. *Id.*

9. *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2646 (2008).

10. *Id.* at 2646–47.

11. *State v. Kennedy*, 957 So. 2d. at 765.

12. *Id.* at 766.

13. *Kennedy*, 128 S. Ct. at 2646.

14. *State v. Kennedy*, 957 So. 2d. at 763.

15. *Id.* at 765, 767.

16. *Id.* at 768.

17. *Id.* at 769–71.

18. *Id.* at 771–72.

19. *Id.* at 772–79. This issue was not presented to the Supreme Court, but the Supreme Court of Louisiana found that the introduction of this videotape did not violate the Confrontation Clause.

the loss of life is the essential component which renders capital punishment a proportionate penalty under the Eighth Amendment.”²⁰ Kennedy’s case was subsequently heard by the Louisiana Supreme Court.

III. THE DECISION OF THE LOWER COURT AND LEGAL BACKGROUND

The Eighth Amendment states: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”²¹ The meaning of these terms is far from certain, but “[o]rdinarily, the terms ‘cruel and unusual’ imply something inhuman and barbarous in the nature of the punishment.”²² The Louisiana Supreme Court in *Kennedy* observed that the meaning of the Eighth Amendment may change over time²³ because it “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”²⁴

To flush out the requirements of the U.S. Supreme Court’s Eighth Amendment jurisprudence, the Louisiana Supreme Court examined *Gregg v. Georgia*.²⁵ In *Gregg*, the Court sanctioned the use of the death penalty after *Furman v. Georgia*, in which the Court found that the imposition of the death penalty in the three cases before it would constitute cruel and unusual punishment.²⁶ The Louisiana court in *Kennedy* focused specifically on the *Gregg* Court’s determination that the assessment of a punishment’s “excessiveness” requires determining whether the punishment goes only as far as necessary to further the legitimate goals of punishment and whether the particular sentence is disproportionate to the crime.²⁷

The Louisiana court concluded its overview of Eighth Amendment jurisprudence by discussing *Roper v. Simmons* in which, when assessing the constitutionality of executing juvenile offenders,

20. *Id.* at 779.

21. U.S. CONST. amend. VIII.

22. *McDonald v. Commonwealth*, 53 N.E. 874, 875 (Mass. 1899) (internal citation omitted).

23. *State v. Kennedy*, 957 So. 2d. at 779; *Trop v. Dulles*, 356 U.S. 86 (1958); *Weems v. United States*, 217 U.S. 349 (1910).

24. *State v. Kennedy*, 957 So. 2d. at 779 (quoting *Trop*, 356 U.S. at 101).

25. *Gregg v. Georgia*, 428 U.S. 153 (1976).

26. *Furman v. Georgia*, 408 U.S. 238 (1972).

27. *State v. Kennedy*, 957 So. 2d. at 779–80 (citing *Gregg*, 428 U.S. at 173).

the Supreme Court examined both “objective indicia of society’s standards” and “the Court’s independent judgment.”²⁸

Turning its focus specifically to the Louisiana law challenged by Kennedy,²⁹ the court noted that it had previously addressed the constitutionality of the death penalty for child molestation in *State v. Wilson*.³⁰ There, the court spent considerable time distinguishing *Wilson* from the Supreme Court’s decision in *Coker v. Georgia*.³¹ *Coker* arose under a Georgia law authorizing the use of the death penalty for rape.³² Noting that *Gregg* had left open the constitutionality of capital punishment for crimes other than homicide, the Supreme Court in *Coker* determined that the death penalty was not a constitutional punishment for the rape of an adult victim.³³ In reaching this conclusion, the Court emphasized that, following *Furman*, no state that had not already permitted capital punishment added it and that only three of the sixteen states that permitted capital punishment authorized it for child rape.³⁴ Moving from the objective indicia to its independent judgment, the *Coker* plurality acknowledged the trauma of rape, but differentiated between rape and murder because “[l]ife is over for the victim of the murderer; for the rape victim, life may not be nearly so happy as it was, but it is not over and normally is not beyond repair.”³⁵ Based on this distinction, the Court held that capital punishment was disproportionate to the crime of rape when no life is taken.³⁶

The *Wilson* Court found that the plurality in *Coker* “took great pains in referring only to the rape of adult women throughout their opinion, leaving open the question of the rape of a child.”³⁷ Though rape of an adult woman is certainly a heinous crime, the *Wilson* court interpreted the Louisiana legislature’s passage of the law authorizing capital punishment for child rapists as signifying that child rape is

28. *Id.* at 782 (citing *Roper v. Simmons*, 543 U.S. 551, 564 (2005)) (internal citation omitted).

29. LA. REV. STAT. ANN. § 14:42.

30. *State v. Wilson*, 685 So. 2d 1063 (La. 1996).

31. *Id.* at 1065–66 (La. 1996); *Coker v. Georgia*, 433 U.S. 584 (1977).

32. *Coker*, 433 U.S. at 586.

33. *Id.* at 592 (citing *Gregg v. Georgia*, 428 U.S. 153, 187 n. 35 (1976)).

34. *Id.* at 594–95 (internal citation omitted).

35. *Id.* at 598.

36. *Id.*

37. *State v. Wilson*, 685 So. 2d 1063, 1066 (La. 1996).

significantly worse.³⁸ Moreover, children require “special protection” by the state due to their vulnerability.³⁹

Having concluded that the Louisiana legislature “determined a ‘standard of decency’” to which deference was due, the *Wilson* Court then examined other states’ legislation in this area.⁴⁰ After acknowledging that Louisiana was now alone in sentencing child rapists to death, the court, citing the history from *Coker*, noted various state laws permitting capital punishment when the rape victim is a child⁴¹ and found that the more authoritative indicator of the “evolution” of standards of decency was that these statutes had been enacted after *Furman*.⁴² Moreover, the *Wilson* Court suggested that Louisiana’s approach had not been followed by other states because other jurisdictions were likely postponing their legislation until constitutional challenges were resolved.⁴³

The Louisiana Supreme Court faced such a challenge in *Kennedy*. To determine whether capital punishment was permissible for child rapists, the court looked to recent U.S. Supreme Court cases regarding the excessiveness of capital punishment. The Supreme Court had prohibited capital punishment for a variety of non-homicide crimes⁴⁴ and *Kennedy* argued that Louisiana’s statute would also get struck down.⁴⁵ The court noted that the Supreme Court continued to look to “evolving standards of decency . . . to determine which punishments are so disproportionate as to be cruel and unusual.”⁴⁶ Furthermore, the Supreme Court had examined the actions of other legislatures and juries in addition to applying its independent judgment.⁴⁷ The

38. *Id.*

39. *Id.* at 1067.

40. *Id.* at 1067–68.

41. *See supra* note 34 and accompanying text.

42. *Wilson*, 685 So. 2d at 1068.

43. *Id.* at 1069.

44. *See, e.g.*, *Enmund v. Florida*, 458 U.S. 782, 801 (1982) (holding that the imposition of the death penalty is unconstitutional for the driver of a getaway car who did not commit murder and who had no intention to do so); *Eberheart v. Georgia*, 433 U.S. 917 (1977) (citing *Coker v. Georgia*, 433 U.S. 584 (1977) and holding that death for kidnapping and rape was excessive); *United States v. Jackson*, 390 U.S. 570, 591 (1968) (holding “the death penalty clause of the Federal Kidnaping [sic] Act unenforceable” because the death penalty was only available when the defendant requested a jury trial, thereby creating an unconstitutional disincentive to request a jury).

45. *State v. Kennedy (State v. Kennedy)*, 957 So. 2d 757, 782 (La. 2007).

46. *Id.* (quoting *Roper v. Simmons*, 543 U.S. 511, 5661 (2005)).

47. *Id.* (citing *Roper*, 453 U.S. at 564 (quoting *Atkins v. Virginia*, 536 U.S. 304, 312 (2002) (holding that the Constitution prohibits the execution of the mentally retarded)).

Louisiana court noted that, under the first prong of Eighth Amendment analysis, it should not only assess the current status of child rape in each of the jurisdictions with capital punishment, but also “take into account the direction of change.”⁴⁸ Under the second prong—the independent judgment prong—the Louisiana court determined that recent cases indicated that it needed to analyze “whether capital punishment for a particular class of offenders serves the twin social purposes of deterrence and retribution.”⁴⁹

After tracing the development and interpretation of the Eighth Amendment’s judicially-created, two-part analysis, the Louisiana Supreme Court applied the test to Kennedy’s case. The court observed that four states had passed legislation making rape of a child a capital offense since its decision in *Wilson*, even though some of the legislation was “more narrowly drawn” or unused.⁵⁰ The court also considered the number of states that have made other non-fatal crimes eligible for the death penalty.⁵¹ Noting the rather surprising amount of disagreement regarding how various states should be counted, the court’s complicated count indicated that “approximately 38% of capital jurisdictions (15 of 39, including federal) authorize some form of non-homicide capital punishment.”⁵²

Though the number of such jurisdictions may not constitute a clear consensus, the court found that these numbers did signify a movement towards allowing capital punishment for non-homicide offenses.⁵³ The court focused primarily on the four other states that made child rape a crime eligible for the death penalty, but also echoed the *Wilson* suggestion that states may simply be unsure of what the Supreme Court will allow.⁵⁴

Under the second prong of the Eighth Amendment analysis, the court contrasted the offenders targeted by the law at issue with the mentally retarded and juvenile offenders exempted from receiving capital punishment by *Atkins v. Virginia*⁵⁵ and *Roper v. Simmons* and held that the “execution of child rapists will serve the goals of

48. *Id.* at 783.

49. *Id.*

50. *Id.* at 784.

51. *Id.*

52. *Id.* at 788.

53. *Id.*

54. *Id.* at 788; *see supra* note 45 and accompanying text.

55. *Atkins v. Virginia*, 536 U.S. 304 (2002).

deterrence and retribution just as well as execution of first-degree murderers would.”⁵⁶ The Louisiana court, therefore, upheld Kennedy’s conviction and death sentence.⁵⁷ Kennedy then petitioned the U.S. Supreme Court for certiorari, which the Court granted.

IV. KEY FINDINGS OF THE U.S. SUPREME COURT

To determine if executing a child rapist is constitutional, the U.S. Supreme Court first examined its case law regarding the death penalty when the crime does not lead to homicide. Although the Court found capital punishment disproportional to the non-homicide crimes in *Coker v. Georgia*,⁵⁸ *Enmund v. Florida*,⁵⁹ and *Eberheart v. Georgia*,⁶⁰ the Court reached the contrary result in *Tison v. Arizona*, in which the defendants did not personally kill the victims but were integrally involved in the events leading up to the death.⁶¹ Accordingly, the Court concluded that there is no rule barring the use of capital punishment for crimes that do not result in death and reaffirmed the two-part test of the “objective indicia of society’s standards” and its “own independent judgment.”⁶²

The Court’s search for “objective indicia of society’s standards” began by examining the state of capital punishment law in 1925, when a total of twenty jurisdictions, including the federal government, allowed capital punishment for rape.⁶³ Following *Furman v. Georgia*,⁶⁴ which led to an informal moratorium on capital punishment, six states reintroduced the death penalty for rape, but all six sentencing schemes were later struck down for various reasons.⁶⁵ Although Louisiana was the first state to again provide for capital punishment for the rape of a child, five other states followed.⁶⁶ The Court observed that the two parties disagreed as to the status of various state laws, but it concluded that forty-four states and the federal government have

56. *State v. Kennedy*, 957 So. 2d. at 788–89.

57. *Id.* at 793.

58. *Coker v. Georgia*, 433 U.S. 584 (1977).

59. *Enmund v. Florida*, 458 U.S. 782, 801 (1982).

60. *Eberheart v. Georgia*, 433 U.S. 917 (1977).

61. *Tison v. Arizona*, 481 U.S. 137, 137 (1977); *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2646 (2008).

62. *Kennedy*, 128 S. Ct. at 2650.

63. *Id.* at 2651.

64. *Furman v. Georgia*, 408 U.S. 238 (1972).

65. *Kennedy*, 128 S. Ct. at 2651 (internal citation omitted).

66. *Id.*

not made the rape of a child a capital crime.⁶⁷ Ultimately, the Court held that this overwhelming majority was significant.⁶⁸

The Court then addressed the argument that states have not enacted statutes similar to Louisiana's because they misunderstood *Coker*.⁶⁹ Noting that the victim in *Coker* was only sixteen, the Court in *Kennedy* nevertheless held that *Coker* "does not speak to the constitutionality of the death penalty for child rape."⁷⁰ Moreover, the Court found no evidence to support the proposition that jurisdictions' misinterpretation of *Coker* led to trepidation in making child rape a capital crime, although the Court did note the existence of contrary statements in some state court opinions.⁷¹

Next, the Court addressed Louisiana's argument that, although only a few states have authorized the death penalty for child rape, these states "reflect a consistent direction of change in support of the death penalty for child rape."⁷² To offset the low number of states with similar child-rape capital punishment laws, Louisiana attempted to harness the Supreme Court's language that "[i]t is not so much the number of these States that is significant, but the consistency of the direction of change."⁷³ Though the Court did acknowledge "that in the last 13 years there has been change towards making child rape a capital offense," it determined the trend was not comparable to that in *Atkins v. Virginia*, in which the Court held the execution of the mentally retarded to be unconstitutional after finding a national trend against it, or *Roper v. Simmons*, in which the Court prohibited capital punishment for crimes committed prior to the age of eighteen after finding a national trend disfavoring it too.⁷⁴ The *Kennedy* Court, instead, found the situation more comparable to that in *Enmund* where only eight states had enacted the challenged legislation, which indicated a consensus against it.⁷⁵ Moreover, no one had been executed for child rape since 1964, eight years prior to the *Furman*

67. *Id.*

68. *Id.* at 2653 (emphasis added).

69. *Id.* In addition to being raised by the Respondent and various amici, this argument appeared in *State v. Wilson*, 685 So. 2d 1063, 1069 (La. 1996), as well as during oral argument. See Transcript of Oral Argument at 15–17, 46–47, *Kennedy*, 128 S. Ct. 2641 (No. 07-343).

70. *Kennedy*, 128 S. Ct. at 2654.

71. *Id.* at 2655.

72. *Id.* at 2656.

73. *Id.* (quoting *Atkins v. Virginia*, 536 U.S. 304, 315 (2002)).

74. *Id.* at 2657.

75. *Id.* (citing *Enmund v. Florida*, 458 U.S. 782, 789, 792 (1982)).

decision.⁷⁶ Summing up its study of the objective indicia of society's standards, the Court concluded "there is a national consensus against capital punishment for the crime of child rape."⁷⁷

The Court then clarified the "independent judgment" prong of the Eighth Amendment analysis. In attempting to apply the "evolving standards of decency" to capital punishment, the Court noted it has generally moved toward restricting the number of death-eligible offenses⁷⁸ and emphasized the distinction, featured prominently in *Coker*, between murder and all other non-homicide crimes. It also expressed concern about the frequent incidence of child rape, which could result in a significant number of executions under statutes like Louisiana's.⁷⁹

Finally, the Court analyzed the death penalty for child rape in relation to the retributive and deterrent purposes of punishment.⁸⁰ Although the Court did not decide whether capital punishment would deter future child rapes, it did determine that "the incongruity between the crime of child rape and the harshness of the death penalty poses risks of overpunishment and counsels against a constitutional ruling that the death penalty can be expanded to include this offense."⁸¹ Furthermore, the Court held that the potential retributive function of capital punishment was less compelling for child rape than for murder.⁸²

Additionally, because the capital sentencing process can last years and require multiple appearances, the Court was concerned about the impact it might have on child victims.⁸³ The child's lack of autonomy was a concern as well: "Society's desire to inflict the death penalty for child rape by enlisting the child victim to assist it over the course of years in asking for capital punishment forces a moral choice on the child, who is not of mature age to make that choice."⁸⁴ The victim's youth also raised concerns about the accuracy of the testimony.⁸⁵ Lastly, the Court also took seriously the research of some of the amici

76. *Id.* at 2657 (internal citation omitted).

77. *Id.* at 2657–58.

78. *Id.* at 2659 (citing *Gregg v. Georgia*, 428 U.S. 153 at 187 (1976)).

79. *Id.* at 2660 (citing *Coker v. Georgia*, 433 U.S. 584 at 598 (1977)).

80. *Id.*

81. *Id.* at 2662.

82. *Id.*

83. *Id.*

84. *Id.* at 2662–63.

85. *Id.* at 2663.

indicating that the availability of the death penalty might both lead to underreporting and increase the likelihood that the rapist would kill the victim.⁸⁶ Taken together, these factors led the Court “to conclude, in [its] independent judgment, that the death penalty is not a proportional punishment for the rape of a child.”⁸⁷

Justice Alito, joined by Justices Scalia and Thomas and Chief Justice Roberts, dissented. He observed that the majority’s holding forbids imposing the death penalty

no matter how young the child, no matter how many times the child is raped, no matter how many children the perpetrator rapes, no matter how sadistic the crime, no matter how much physical or psychological trauma is inflicted, and no matter how heinous the perpetrator’s prior criminal record may be.⁸⁸

Justice Alito, addressing the majority’s finding of a consensus against the use of the death penalty to punish child rape, began by challenging the Court’s assessment of the impact of *Coker* on state legislatures.⁸⁹ While agreeing with the majority that the *Coker* holding was limited to the rape of an adult woman, Justice Alito noted that Justice Powell interpreted *Coker*’s plurality opinion to cover all rape.⁹⁰ Justice Alito suggested that states may have declined to authorize the death penalty for child rape in light of this ambiguity and the costs of implementing such a sentencing procedure, leading to the low numbers cited by the majority.⁹¹

The dissent in *Kennedy* focused on the increased legislative attention for child rape to argue that the Court had fundamentally misunderstood the direction of society’s evolution.⁹² Moreover, while the majority pointed to the failure of similar legislation in states other than Louisiana, the suspension of those legislative efforts corresponded to the Court’s granting of certiorari in *Kennedy*.⁹³ The

86. *Id.* at 2664 (citing Brief for National Association of Social Workers et al. as Amici Curiae Supporting Petitioner at 11–13, *Kennedy v. Louisiana*, 128 S. Ct. 2641(2008) (No. 07-343)).

87. *Id.*

88. *Id.* at 2665 (Alito, J., dissenting).

89. *Id.* at 2666.

90. *Id.* (citing *Coker v. Georgia*, 433 U.S. 584, 603 (1977) (Powell, J., concurring in part and dissenting in part)).

91. *Id.* at 2667–68.

92. *Id.* at 2669 (focusing on sex offender requirements, and the five states that made child rape a capital crime in spite of *Coker*).

93. *Id.* at 2671.

dissent described the majority's jurisdiction count as "misleading."⁹⁴ As a result, the dissent concluded the "objective indicia" portion of its analysis by focusing on the six states that had chosen to allow the death penalty for child rape, arguing that these states might have served as the beginning of an evolution towards consensus had the Court not ruled the way it did.⁹⁵

Turning its attention to the independent judgment portion of the analysis, the dissent criticized the majority's concern for the impact on the victim if forced to participate in the capital sentencing process and the potential effect the new legislation might have on offenders.⁹⁶ According to the dissent, such "policy arguments . . . are simply not pertinent to the question of whether the death penalty is 'cruel and unusual' punishment . . . [because t]he Eighth Amendment protects the right of *an accused*."⁹⁷ The dissent also noted possible limiting factors that state legislatures have already used to limit the number of cases where the death penalty was available.⁹⁸ Moreover, the *Kennedy* majority, as Justice Alito observed, did not hold that death may be imposed only for crimes where the victim dies because it preserved the use of capital punishment for crimes such as treason.⁹⁹

Additionally, the dissent focused on the majority's concerns about expanding the realm of crimes punishable by death.¹⁰⁰ Because *Coker* did not address the question of child rape and because state laws are presumed to be valid, the dissent argued that affirming Louisiana's sentencing scheme would not constitute an expansion of capital punishment.¹⁰¹ The dissent also rejected the majority's judgment that murder's impact on the victim and society is unique.¹⁰² The dissent devoted considerable attention to the serious impact of child rape on both individual victims and society and concluded that the Court failed to justify its decision to strike down Louisiana's attempt to respond to these injuries.¹⁰³

94. *Id.*

95. *Id.* at 2671–72.

96. *Id.*

97. *Id.* (emphasis added).

98. *Id.* Many of the states with these laws require, for example, that the defendant have a prior conviction of a sexual offense before the defendant may receive capital punishment. *Id.*

99. *Id.*

100. *Id.* at 2675 (quoting *id.* at 2658).

101. *Id.* (internal citation omitted).

102. *Id.* at 2676.

103. *Id.* at 2676–77.

V. ANALYSIS AND CONCLUSIONS

Although *Kennedy v. Louisiana* contains a wide range of possible arguments to analyze, this Commentary focuses on the mechanics and implications of the Court's reliance upon jurisdiction counting to establish "objective indicia." The opinions in *Kennedy* demonstrate the most basic problem with relying on this tallying method—the inability to agree upon the categorization of a particular jurisdiction's law. Moreover, substantial disagreement existed as to the meaning behind these numbers. Both the majority and the dissent discussed in detail the impact of *Coker v. Georgia* on state legislatures.¹⁰⁴ The *Kennedy* Court also miscounted a jurisdiction: the federal government amended the Uniform Code of Military Justice in 2006 to permit capital punishment for child rape, but this development went unnoticed by both the majority and the dissent in *Kennedy*.¹⁰⁵

Taken together, these arguments and omissions highlight three practical pitfalls present in the jurisdiction counting that the Court has used in Eighth Amendment cases. First, parties often disagree as to how to count a jurisdiction. Second, parties may suggest that various concerns, such as related litigation, impact the numbers and, therefore, make the reliance upon raw data questionable. Third, the Court sometimes simply miscounts.

These three pitfalls have potentially wide-ranging implication. As the author of a Washington Post editorial wrote, "The Supreme Court's legitimacy depends not only on the substance of its rulings but also on the quality of its deliberations," suggesting that deliberations based upon faulty facts threaten the persuasiveness of the Court.¹⁰⁶ Despite supporting the Court's original ruling, the author argued that the Court should agree to rehear the case because "this is an opportunity for the court to show judicial humility. Before the court

104. See *supra* notes 69–71, 89–95 and accompanying text.

105. Linda Greenhouse, *In Court Ruling on Executions, A Factual Flaw*, N.Y. TIMES, July 2, 2008, at A1; National Defense Authorization Act for Fiscal Year 2006, § 552, 119 Stat. 3136, 3264 (2006). Although parties do have the option to petition the Court for a re-examination of its decision, even one of the attorneys who argued the case for Louisiana stated that the Court would likely not elect to hear the case again despite the error. Greenhouse, *supra*, at A1. The Justice Department has since stated that "government lawyers should have known that Congress had recently made the rape of a child a capital offense in the military and should have informed the Supreme Court of that fact while the justices were considering whether death was a constitutional punishment for the crime." *Id.* at A15.

106. Editorial, *Supreme Slip-up; A Recent High Court Ruling is Factually Flawed. The Justices Should Correct It*, WASH. POST, July 6, 2008, at B6.

declares its final view on national opinion about the death penalty, it should accurately assess the view of the national legislature.”¹⁰⁷

The author’s depiction of the Supreme Court is hardly flattering, and not simply because the piece focused on the Court’s factual misstep. The suggestion that the Court could benefit from an exercise in “judicial humility” implies that the Court merely makes pronouncements upon a captive citizenry. But, of course, that is precisely the function of the Supreme Court, which has been “vested” with the “judicial power of the United States.”¹⁰⁸ To suggest that the Court’s image would be bolstered by “humility” is to suggest that some people resent or question the Court’s authority and that its public image as final arbiter of law could somehow be improved by acknowledging that it too makes mistakes.

In addition to flagging the possible impact of such an error on the Court’s ability to persuade, the editorial’s use of the phrase “*its* final view of national opinion” raises a more troubling issue.¹⁰⁹ The Court in *Kennedy* looked for “objective indicia of consensus” under the first prong of the Eighth Amendment analysis, but this editorial suggests that this search for something “objective” may actually be a highly subjective inquiry.¹¹⁰ The disagreement between the majority and the dissent about how to characterize certain jurisdictions’ approaches to the death penalty for child rape may bolster such a conclusion, as does the lengthy discussion about the potential impact *Coker* had on these numbers.¹¹¹

The inclusion of the second prong of the cruel and unusual punishment analysis—the independent judgment of the Court—strongly implies that this inquiry should remain separate from the “objective” assessment present in the first prong. One might then wonder if the creation of the second prong stemmed from a desire to acknowledge publicly what had long been considered privately: the Justices’ personal feelings regarding the use of capital punishment.

On a practical level, the way the Justices read the results of the jurisdiction counting and *Coker*’s potential influence is necessarily intertwined with their understanding of the constitutionality of the

107. *Id.*

108. U.S. CONST. art. III, § 1.

109. Editorial, *supra* note 106 (emphasis added).

110. *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2651 (2008).

111. *Id.* at 2652; *see supra* notes 69–71, 89–95 and accompanying text.

death penalty for child rape. If, for example, a Justice believes that *Coker* confused state legislatures as to the legality of capital punishment for any kind of rape, including the rape of a child, then a Justice could argue that a state's attempt to permit capital punishment for child rape should indicate the state's strong belief in its necessity and propriety.¹¹² But the end result would be indistinguishable if a Justice used the argument that *Coker* confused state legislatures to support his pre-existing belief that the death penalty is appropriate for child rape. As a result, the numbers could inform the conclusion, or the conclusion could lead to the interpretation of the numbers, but a Justice could easily conceal the latter in writing an opinion under the cloak of the "objective indicia."

The questions then become whether a court can be objective in its search for evidence of a consensus regarding "the evolving standards of decency that mark the progress of a maturing society" and whether it is desirable for the Court to be objective at all.¹¹³ The Court decided years ago that the meaning of the Eighth Amendment would not be tied to the time of its drafting, but instead that its meaning would adjust in response to changing conditions.¹¹⁴ While this flexibility allows the Eighth Amendment to remain relevant, it poses unique interpretive issues. In assessing what constitutes "decency," one must question if a judge can remove a discussion of morality from the value-laden term in order to provide the objectivity required by Eighth Amendment jurisprudence. By relying upon an assessment of the decisions of various legislatures in determining society's view of the use of the death penalty in a particular context, the judge can theoretically add a barrier between personal views and society's view.

There are serious rhetorical or persuasive advantages in erecting such a barrier. Professor Austin Sarat made an analogous argument in suggesting that the movement to abolish the death penalty would be better served by a focus on the procedural flaws in the implementation of the death penalty, rather than continuing to

112. See *Kennedy*, 128 S. Ct. at 2666 (Alito, J., dissenting) (supporting the proposition that states enacted capital punishment laws for child rape in spite of the dicta in *Coker*).

113. *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

114. See *id.* (stating that the meaning of "cruel and unusual" should change over time); *Weems v. U.S.*, 217 U.S. 349, 374 (1910) ("Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. . . . Therefore a principle, to be vital, must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions.").

challenge the morality of capital punishment.¹¹⁵ According to Professor Sarat, the argument against the morality of the death penalty has failed, but a new focus on the constitutional problems with the mechanics of capital punishment could prove more convincing.¹¹⁶

In a similar vein, the appeal to these “objective indicia” of how *society* views the death penalty may prove more convincing than “a frontal assault on the morality of state killing” in a particular context.¹¹⁷ Individual citizens may respond to their jurisdictions’ legislative action on capital punishment with a variety of arguments, but, in the end, the court would only “count” this objection in the first part of its Eighth Amendment analysis. But this shift in rhetoric is only effective if genuine. If the Court loses the ability to call its assessment of the current state of the law “objective,” the Justices lose a critical element of persuasion.

The taint of subjectivity may not stem from any subterfuge on the part of the Court. But because the “objective indicia” element of the Eighth Amendment analysis could so easily be influenced by personal judgments, the Court must scrupulously assess each jurisdiction’s statutes. At the same time, a descent to mere nose-counting would posit the Justices as pollsters, not judges. The problem with *Kennedy*, therefore, may be that a well-reasoned opinion may simply fail to persuade if the conclusion appears to have come before the reasoning.

115. AUSTIN SARAT, *WHEN THE STATE KILLS* 246–60 (Princeton University Press 2002) (2001).

116. *Id.* at 249–51.

117. *Id.* at 251.