Moreover, the clearest guidance on how to avoid future litigation, which both Justice Stevens[99] and Justice Thomas[100] argue is inevitable under the plurality's standard, came from Justice Stevens's concurrence and Justice Ginsburg's dissent. A state wishing to avoid potential future fights could follow Justice Stevens's suggestion to stop using pancuronium bromide and implement Justice Ginsburg's suggested "safeguards." While perhaps undercutting the import of the plurality opinion, Justice Stevens and Justice Ginsburg effectively fill in the law.

It may be true that the Chief Justice will yet find a way to promote more consensus opinions on the Court, but *Baze* suggests that his goal may not be desirable. Perhaps for the better, the Roberts Court remains a place where individual Justices express a diversity of opinions that can just as easily lead to a wide 7–2 split or a more narrow 5–4 divide.

2. Eighth Amendment — Death Penalty — Punishment for Child Rape. — The Eighth Amendment, "applicable to the States through the Fourteenth Amendment,"[1] provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[2] Excess, cruelty, and unusualness, however, do not have fixed definitions — they all are measured relative to expectations. To circumscribe the bounds of constitutionality, therefore, in the past century the Supreme Court has had to gauge such expectations by looking to "public opinion" and "evolving standards of decency," as well as its own independent judgment, to define what punishments are excessive, cruel, or unusual.[3] Last Term, in *Kennedy v. Louisiana*,[4] the Court applied these Eighth Amendment analyses and held unconstitutional a state statute that permitted the death penalty for the rape of a child that did not result in the child's death.[5] The opinion serves as a case study in the weaknesses of the Court's current "cruel and unusual" test, revealing the test's anachronisms and impracticalities. The Court should recognize these problems and exercise restraint in striking down laws under the Eighth Amendment by applying a presumption of constitutionality.

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99 *Baze*, 128 S. Ct. at 1542 (Stevens, J., concurring in the judgment).

100 *Id.*. at 1562 (Thomas, J., concurring in the judgment).

1 Kennedy v. Louisiana, 128 S. Ct. 2641, 2649 (2008), *modified on denial of reh'g*, No. 07-343, 2008 WL 4414670 (U.S. Oct. 1, 2008) (mem.)

2 U.S. CONST. amend. VIII. The Supreme Court has held that the amendment bans all excessive punishments, regardless of whether they are cruel or unusual. *See* Atkins v. Virginia, 536 U.S. 304, 311 n.7 (2002).

3 State v. Kennedy, 957 So. 2d 757, 779–80 (La. 2007) (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958); Weems v. United States, 217 U.S. 349, 378 (1910)).

4 128 S. Ct. 2641.

5 *Id.* at 2646.

On the morning of March 2, 1998, Patrick Kennedy called 911 to report the rape of his eight-year-old stepdaughter (referred to as L.H. in court documents), saying that "[t]wo neighborhood boys . . . had dragged L.H. from the garage to the yard, pushed her down, and raped her."[6] When the police arrived, they found L.H. in the house, on her bed, "wrapped in a bloody blanket" and "bleeding profusely from the vaginal area."[7] She was taken to a hospital, where a pediatric surgeon was able to treat her injuries.[8]

State investigators found that the yard where L.H. claimed the rape had occurred did not show evidence of her being dragged and pushed down as her stepfather had originally claimed. The "police found blood on the underside of L.H.'s mattress," suggesting the rape had occurred in her bedroom, not outside.[9] In addition, Kennedy had called his employer twice early in the morning to say he was unavailable to work and "to ask a colleague how to get blood out of a white carpet," and made another call to a carpet cleaner requesting "urgent assistance in removing bloodstains."[10] The 911 call occurred an hour and a half later.[11]

The State arrested the stepfather and charged him with L.H.'s rape. At trial, the jury was convinced by the prosecution's case, convicted the defendant of aggravated rape, and recommended a death sentence.[12] Kennedy appealed to the state supreme court under a constitutional provision making appealable any case in which the defendant is sentenced to death, claiming, among other errors, that the statute under which he was convicted and sentenced, which allows capital punishment for nonhomicide aggravated rape, violated the Eighth Amendment.[13]

The Supreme Court of Louisiana affirmed the conviction and death sentence,[14] ruling that the Louisiana statute was not cruel and unusual under any of the tests laid out by the U.S. Supreme Court.[15] The statute defined rape of a victim under thirteen years old as aggravated

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[6] *Id.*

[7] *Id.*

[8] *Kennedy*, 957 So. 2d at 761.

[9] *Kennedy*, 128 S. Ct. at 2647.

[10] *Id.*

[11] *Id.*

[12] *Kennedy*, 957 So. 2d at 760.

[13] *Id.*

[14] In addition to the Eighth Amendment analysis described here, the court rejected the defendant's claim that a state statute that allowed a videotape of the victim's testimony violated the Confrontation Clause of the Sixth Amendment, as well as the defendant's claims of violations of the hearsay rule and an Eighth Amendment violation based on failing to ensure the death sentence is not imposed arbitrarily or capriciously. *Id.* at 772–79, 790–91.

[15] *Id.* at 789.

rape, and made it a capital offense.[16] To determine whether this statute violated the Eighth Amendment, the Louisiana court applied the two-part analysis set forth by the U.S. Supreme Court in *Roper v. Simmons*:[17]

> The beginning point is a review of objective indicia of consensus, as expressed in particular by the enactments of legislatures that have addressed the question. . . . We then must determine, in the exercise of our own independent judgment, whether the death penalty is a disproportionate punishment . . . .[18]

On the first part of the test, the court noted that six states including Louisiana have laws authorizing the death penalty for nonhomicide child rape.[19] Turning to the second part of the test, the court emphasized that since child rape seems the most heinous of nonhomicide crimes, the death penalty was not a disproportionate punishment.[20]

Chief Justice Calogero dissented, basing his view on *Coker v. Georgia*,[21] in which the Supreme Court ruled that capital punishment for rape of an adult is constitutionally excessive. The Chief Justice stated that, "[w]ith the possible exception of . . . espionage or treason, the Eighth Amendment precludes capital punishment for any offense that does not involve the death of the victim," and disagreed that other states' laws indicated a consensus that the death penalty was appropriate in such cases.[22]

The Supreme Court reversed. Writing for the Court, Justice Kennedy[23] held "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" Amendment's proscription of cruel and unusual punishment, basing the ruling "both on consensus and [the Court's] own independent judgment."[24]

Mirroring the analysis of the Louisiana Supreme Court, the Court first addressed whether there exists a national consensus that the death penalty for child rape is so disproportionate and excessive as to be unconstitutional.[25] After all eighteen then-existing child rape statutes

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16 LA. REV. STAT. § 14:42(A)(4), (D)(2) (2008).

17 125 S. Ct. 1183 (2005).

18 *Id.* at 1192.

19 *Kennedy*, 957 So. 2d at 784–85. However, Florida's capital rape provision has not been enforced since the Florida Supreme Court struck down the law in 1981. *Id.* at 785 (citing Buford v. State, 403 So. 2d 943 (Fla. 1981)); *see also Kennedy*, 128 S. Ct. at 2652 (refusing to include Florida's law in the Court's count of capital rape statutes).

20 *Kennedy*, 957 So. 2d at 785–89.

21 433 U.S. 584 (1977).

22 *Kennedy*, 957 So. 2d at 794 (Calogero, C.J., dissenting).

23 Justice Kennedy was joined by Justices Stevens, Souter, Ginsburg, and Breyer.

24 *Kennedy*, 128 S. Ct. at 2650–51.

25 *Id.* at 2651–58.

were invalidated in 1972 by *Furman v. Georgia*,[26] six states reinstituted capital rape provisions, the most recent in 2007.[27] But forty-four states and the federal government (or at least, so the Court thought[28]) do not have provisions allowing capital punishment for child rape.[29] Comparing these numbers to other cases, the Court pointed out that it has held capital punishment unconstitutional when similar or greater numbers of statutes allowing the practice in certain circumstances existed.[30]

Louisiana argued that the small number of statutes was misleading because some state legislatures may not have passed such laws because they interpreted *Coker v. Georgia*, which prohibited capital adult rape statutes, to mean that all capital rape statutes were unconstitutional. The *Kennedy* Court rejected this argument and noted that Louisiana and amici were merely hypothesizing that some state legislatures were unsure as to the constitutionality of child rape cases, while state courts generally recognized that the question was unanswered by that case.[31] The Court also rejected Louisiana's broader argument that the few states that had capital rape statutes better represented the current standards of society because they represented "a consistent direction of change in support of the death penalty for child rape," saying that consistent change had not been proven and might not make a difference anyway.[32]

Concluding that "there is a national consensus against capital punishment for the crime of child rape,"[33] the Court then turned to the second part of its analysis: its own independent judgment. The Court stated that "[e]volving standards of decency . . . of a maturing society" restrict "the extension of the death penalty."[34] The *Kennedy* Court held that capital punishment is disproportionate for the crime of child rape, even though the victim "[must endure] years of long anguish"[35] — no matter how terrible a rape, it is not murder.[36] However, the Court also noted that however terrible a rape, it is not "treason, espio-

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[26] 408 U.S. 238 (1972).

[27] *Kennedy*, 128 S. Ct. at 2651.

[28] *See infra* p. 301.

[29] *Kennedy*, 128 S. Ct. at 2652.

[30] *Id.* at 2653 (citing Roper v. Simmons, 125 S. Ct. 1183, 1192 (2005) (prohibiting the death penalty for juveniles at a time when twenty states allowed it); Atkins v. Virginia, 536 U.S. 304, 313–15 (2002) (prohibiting the death penalty for the mentally retarded at a time when twenty states allowed it); Enmund v. Florida, 458 U.S. 782 (1982) (prohibiting the death penalty for robbery in which an accomplice committed murder at a time when eight states allowed it)).

[31] *Id.* at 2654–56.

[32] *Id.* at 2656.

[33] *Id.* at 2657–58.

[34] *Id.* at 2658.

[35] *Id.*

[36] *See id.* at 2659–60.

nage, terrorism, [or] drug kingpin activity," for which the Court explicitly left the death penalty as a viable punishment option, because those crimes are "offenses against the State."[37]

Justice Alito dissented.[38] He emphasized that six state laws do not represent a consensus *for* the use of the death penalty for child rape,[39] but could not agree that the other forty-four states' laws represent a consensus the other way, either. He agreed with Louisiana's hypothesis that though the holding in *Coker* applied only to adult women, the broad language of the *Coker* plurality's dicta was also taken into account by both state legislatures and state courts.[40] "[T]hese interpretations," said Justice Alito, "have posed a very high hurdle for state legislatures considering the passage of new laws permitting the death penalty for the rape of a child."[41] Capital child rape laws enacted by some states in the past decade, therefore, combined with more robust child abuse laws in all states, might be evidence of standards of decency shifting towards such punishment, not away.[42]

As for "the Court's 'own judgment,'"[43] Justice Alito remarked that the majority opinion labored under the assumption that a ruling upholding the statute would "expand" the death penalty, whereas affirmance would instead have merely been a confirmation of the "status of presumptive constitutionality."[44] The majority's contention that murder is always worse than rape was also less than clear to Justice Alito,[45] and he pointed to the apparent incongruity of measuring the degree of evil in the criminal act when the Court took such pains to limit the holding to crimes against individuals, leaving the death pen-

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[37] *Id.* at 2659. At the end of the opinion, the Court listed other reasons why the death penalty for child rape is unwise and therefore unjustified: Child rape is more frequent than first-degree murder, meaning that many more convicted defendants would risk capital punishment, a possibility the Court found "could not be reconciled with our evolving standards of decency." *Id.* at 2660. Furthermore, imposing the death penalty in child rape cases prolongs the child victim's interaction with "the brutality of her experience . . . [and] forces a moral choice [of helping acquire a death sentence] on the child, who is not of mature age to make that choice." *Id.* at 2662. Child victims may be extremely unreliable witnesses, and families might fail to report child rapists for fear that such a report would lead to that family member's death. *Id.* at 2663–64. Finally, "making the punishment for child rape and murder equivalent" means that a rational offender would be more likely to kill his victim, "who is often the sole witness." *Id.* at 2664 (citing Corey Rayburn, *Better Dead Than R(ap)ed?: The Patriarchal Rhetoric Driving Capital Rape Statutes*, 78 ST. JOHN'S L. REV. 1119, 1159 (2004)).

[38] His dissent was joined by Chief Justice Roberts and Justices Scalia and Thomas.

[39] *Kennedy*, 128 S. Ct. at 2672–73 (Alito, J., dissenting).

[40] *Id.* at 2666–69.

[41] *Id.* at 2667.

[42] *Id.* at 2669–71.

[43] *Id.* at 2673 (citing *id.* at 2658 (majority opinion)).

[44] *Id.* at 2675.

[45] *Id.* at 2675–76.

alty intact for "offenses against the State" that are on federal and state law books, such as drug kingpin activity.[46]

Louisiana petitioned for a rehearing on the basis of information that came to light shortly after the Court released its opinion.[47] One week after the decision, a military law blogger noted that "both the majority and the dissent overlooked a congressional statute right on point."[48] Buried in the 422 pages of the National Defense Authorization Act of 2006 was a provision that amended the Uniform Code of Military Justice to provide that "death or such other punishment as a court-martial may direct" is appropriate for one guilty of rape or rape of a child.[49] While bloggers and journalists commented on the error and how it reflected on the statute-counting portion of the Court's opinion,[50] Louisiana filed its petition and the Acting Solicitor General of the United States later filed a brief as amicus curiae in support of that petition.[51] The Court denied the rehearing, and instead added a footnote to the opinion saying that the military law did "not affect [its] reasoning or conclusions."[52]

The Court's reliance on "national consensus" and "independent judgment" has a shaky foundation. Because modern theory and empirical methods discount the objectivity of the Court's current two-part analysis, the Court should recognize that the test for Eighth Amendment constitutionality can no longer be applied with the necessary judicial objectivity (if, indeed, it ever could) and mitigate the test's problems by applying a presumption of Eighth Amendment constitutionality as urged by Justice Alito in his dissent.

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[46] *Id.* at 2676 (internal quotation marks omitted) (citing *id.* at 2659 (majority opinion)). Justice Alito also pointed out that the plethora of justifications discussed by the Court — harm to the victim, procedural issues, sentencing difficulties — were policy considerations, not markers of constitutionality. *Id.* at 2673–75.

[47] Petition for Rehearing, *Kennedy*, 128 S. Ct. 2641 (No. 07-343), *available at* http://www.scotusblog.com/wp/wp-content/uploads/2008/07/rehear-kennedy-v-la-7-21-08.pdf.

[48] Posting of CAAFlog to CAAFlog, http://caaflog.blogspot.com/2008/06/supremes-dis-military-justice-system.html (June 28, 2008, 18:25).

[49] National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 552(b), 119 Stat. 3136, 3263 (codified at 10 U.S.C. § 920 note).

[50] *See, e.g.*, Linda Greenhouse, *In Court Ruling on Executions, a Factual Flaw*, N.Y. TIMES, July 2, 2008, at A1; Laurence H. Tribe, *The Supreme Court is Wrong on the Death Penalty*, WALL ST. J., July 31, 2008, at A13; Posting of Orin Kerr to The Volokh Conspiracy, http://volokh.com/posts/1217520854.shtml (July 31, 2008, 12:14); Posting of Marty Lederman to Convictions, http://www.slate.com/blogs/blogs/convictions/archive/2008/07/03/if-a-federal-statute-falls-in-the-forest-and-no-one-s-around-does-it-make-a-sound-or-undermine-what-would-otherwise-be-a-national-consensus.aspx (July 3, 2008, 10:07).

[51] Brief for the United States as Amicus Curiae, *Kennedy*, 128 S. Ct. 2641 (2008) (No. 07-343), *available at* http://www.scotusblog.com/wp/wp-content/uploads/2008/09/sg-brief-kennedy-9-16-08.pdf.

[52] *Kennedy v. Louisiana*, No. 07-343, 2008 WL 4414670, at *1 (U.S. Oct. 1, 2008) (mem.). Justices Thomas and Alito would have granted the petition for rehearing. *Id.*

The history of Eighth Amendment jurisprudence stems from now-discredited Progressive Era ideals that envision laws and government as climbing and converging towards one pinnacle of good government. Progressivism's influence began in a 1910 decision, *Weems v. United States*,[53] in which the majority guided its opinion with an idea of "fundamental law" and a mental image of "those who have formed their conception of the relation of a state to even its offending citizens from the practice of the American commonwealths."[54] In so doing, the Court made one of its first pronouncements on the definition of "cruel and unusual," finding that a colonial law in the Philippines that instituted a minimum sentence of twelve years of imprisonment and hard labor for falsifying any public document was so disproportionate as to be unconstitutional.[55] The Eighth Amendment, the Court declared, is "progressive, and . . . may acquire meaning as public opinion becomes enlightened by a humane justice."[56] The idea that public opinion would reflect a society's progression toward more enlightened patterns of criminal punishment has carried through the Court's Eighth Amendment jurisprudence to the present day. The *Kennedy* opinion is just the most recent example, concluding that the Court's task is to reflect "evolving standards of decency," which "must embrace and express respect for the dignity of the person."[57]

However, modern U.S. legal theory no longer couches its authority in ideals of a natural law; instead, legal theory and empirical analyses recognize that society's mores can be shaped by legal frameworks and do not necessarily reflect some objective good. Since the rise of realism in the 1930s, most legal scholars have abandoned the view of a fundamental or natural law progressing towards a single ideal that judges can reliably discern.[58] Courts have been slower to embrace the effects of legal realism, but over time they have begun to accept the idea that judges and society do not scientifically discover and progress toward an ideal natural law.[59] But in the context of the Eighth

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[53] 217 U.S. 349 (1910).

[54] *Id.* at 366–67.

[55] *Id.* at 382.

[56] *Id.* at 378.

[57] *Kennedy*, 128 S. Ct. at 2649 (citing Trop v. Dulles, 356 U.S. 86, 100–01 (1958)).

[58] Posting of Eric Posner to Convictions, http://www.slate.com/blogs/blogs/convictions/archive/2008/06/25/the-eighth-amendment-ratchet-puzzle-in-kennedy-v-louisiana.aspx (June 25, 2008, 11:06); *see also* JOHN HENRY SCHLEGEL, AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE 1 (1995) ("[I]t was not until the 1920s that more than an isolated soul would claim that legal science was unscientific.").

[59] Even in areas of law that do still rely on a source of law or legal rights beyond the text of a statute or constitutional provision, judges tend to minimize rhetoric about natural law and try to rely on a source of authority more acceptable to a post-realist legal world. *Compare, e.g.*, Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798) (opinion of Chase, J.) (basing his opinion on natural justice), *and* Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 143 (1810) (Johnson, J., concurring) (relying on "the

Amendment, the Supreme Court refuses to accept such a possibility, maintaining its natural law rhetoric and using an "objective indicia" test that falsely presumes that society and state laws will always progress towards some "higher" goal.[60]

Even accepting the natural law rhetoric of *Kennedy* and other Eighth Amendment cases, modern evaluations of jurists' decisions call into question courts' social objectivity and whether courts can therefore be trusted to divine any objective, natural law.[61] Yet in conducting his independent analysis, Justice Kennedy suggested he relied on truths universally acknowledged, a claim that sounds to the modern ear tenuous at best.[62] It is troubling that this second part of the Court's Eighth Amendment test rests on even less rigorous methods to define evolving standards of decency than the statute-counting rubric used to determine the national consensus. Instead of sampling fifty state legislatures, the Court now samples just nine individual Justices and their personal opinions about what punishments are sufficiently immoral to be banned under the Eighth Amendment.

But the Eighth Amendment test's weaknesses do not merely stem from theories of natural law or judicial objectivity that have fallen out of favor in most areas of academia and legal practice; the prevalence and sophistication of modern empirical studies highlight that the test is simply difficult to apply. There is no principled way to measure a national consensus or an evolving standard of decency.[63]

In the past, in order to determine the definition of "cruel and unusual," the Supreme Court has surveyed "civilized nations of the

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reason and nature of things"), *with* Griswold v. Connecticut, 381 U.S. 479 (1965) (describing "penumbras" of the Bill of Rights' guarantees, rather than natural law), *and* Troxel v. Granville, 530 U.S. 57 (2000) (using the terminology of "fundamental right" based in the Fourteenth Amendment). See also KATHLEEN SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 452–55 (14th ed. 2001) for a description of the antecedents of substantive due process in the tradition of natural law and an outline of the development of due process terminology.

[60] *Cf.* NORMAN J. FINKEL, COMMONSENSE JUSTICE: JURORS' NOTIONS OF THE LAW 152 (1995) ("If punishment is hinged to evolving standards of decency, what happens if a progressive maturing society enters a period of regress? The justices must decide.").

[61] *See, e.g.*, Dan M. Kahan, David A. Hoffman, and Donald Braman, *Whose Eyes Are You Going To Believe?* Scott v. Harris *and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. (forthcoming Jan. 2009).

[62] *See Kennedy*, 128 S. Ct. at 2660 (citing to "the fundamental, moral distinction" between robbery and murder the Court found in *Enmund v. Florida*,. 458 U.S. 782 (1982), and finding the "same distinction" between murder and child rape).

[63] Finding "objective" measures that will define the Eighth Amendment has always proved a difficult trick — in his dissent in *Weems*, Justice Edward White claimed, "My inability to [apply the majority's interpretation of the Eighth Amendment] must, however, be confessed, because I find it impossible to fix with precision the meaning which the court gives to that provision." Weems v. United States, 217 U.S. 349, 385 (1910) (White, J., dissenting). His complaint, it appears, was prescient.

world";[64] "public attitudes concerning a particular sentence — history and precedent, legislative attitudes, and the response of juries reflected in their sentencing decisions";[65] "historical development of the punishment at issue, legislative judgments, international opinion, and the sentencing decisions juries have made";[66] and, as noted above, state legislative enactments as indicia of popular opinion.[67] The *Kennedy* Court, therefore, could not blindly apply precedent; the Court has never been able to agree on which objective factors to use from one case to the next. Yet the *Kennedy* Court gave no explanation or justification of its preferred methodology of looking only to state statutes.[68]

But more troubling than just the existence of a wide range of possible factors is that modern empirical tests regularly demonstrate that public opinion changes depending on whom one asks and how the question is framed. In *Kennedy*, the Court focused on the fact that only a few states had capital rape provisions at the time of decision. However, public opinion polls suggest that most Americans support the death penalty for child rapists in some circumstances (though whether it would constitute a "consensus" one way or the other is debatable). When asked after the *Kennedy* decision was released whether they "favor[ed] or oppos[ed] the death penalty for persons convicted of child rape," 55% of voters polled favored and 38% opposed it.[69] The Court would probably be unwise to look to public opinion polls, as variable and easily manipulated as they are and as untrained in polling statistics as the Court is.[70] However, the wide range of measures used by the Court in the past, and the potential variability of their results, demonstrates how inadequate the Court's objective measures really are in discerning social norms or mores. The Court in *Weems* may have been able truthfully to believe that its "objective" but rudimentary measurements truly reflected a widespread

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64 Trop v. Dulles, 356 U.S. 86, 102 (1958).

65 Coker v. Georgia, 433 U.S. 584, 592 (1977).

66 Enmund v. Florida, 458 U.S. 782, 788 (1982).

67 *See* Roper v. Simmons, 543 U.S. 551, 562–63 (2005) (citing Atkins v. Virginia, 536 U.S. 304, 314–15 (2002); Penry v. Lynaugh, 492 U.S. 302, 334 (1989)).

68 It did explain why proposed laws should not be counted as the same as enacted laws, but did not explain why only enacted laws are acceptable measures of opinion. *Kennedy*, 128 S. Ct. at 2656. The parties' and the Court's failure to find the federal statute on point and the quick revelation of that mistake point out how fraught with inaccuracies even that most simple measurement may be, further undermining the Court's seemingly arbitrary choice of objective indicia.

69 Press Release, Quinnipiac University Polling Institute, July 17, 2008 — American Voters Oppose Same-Sex Marriage Quinnipiac University National Poll Finds, but They Don't Want Government To Ban It (July 17, 2008), *available at* http://www.quinnipiac.edu/x1295.xml?ReleaseID=1194. See also Posting of Jonathan Adler to The Volokh Conspiracy, http://volokh.com/posts/1216572130.shtml (July 20, 2008, 12:42) and comments interpreting the poll results.

70 *See* FINKEL, *supra* note 60, at 152.

consensus; the modern Court, in an era that complacently accepts that there are no lies like statistics,[71] can no longer do so honestly.

Apart from the troublesome rhetoric of the Court's Eighth Amendment test, the result in *Kennedy* can also serve as an object lesson in how faulty the test can be in mapping societal expectations or norms. The *Kennedy* ruling, which is supposed to reflect a national consensus, seems disconnected from public opinion, either because the rule is too narrow (Why prohibit the death penalty for child rape but allow it for drug kingpins?) or because it is too broad (Why prohibit the death penalty for child rape in all cases when public opinion polls suggest there may not actually be a consensus against such a punishment?). It is perhaps revealing that, just hours after the Court issued its opinion purporting to reflect a national consensus, both major-party presidential candidates issued statements denouncing the decision.[72]

How then should the Court police the boundaries of the Eighth Amendment? Admittedly, that amendment saddles the Supreme Court with an almost impossible task: to define "cruel and unusual" is a vague procedure steeped in relativism. Indeed, at least one member of the Congress that wrote the amendment "objected to the words 'nor cruel and unusual punishment,' the import of them being too indefinite."[73] The interpretation of those words perhaps *requires* the Court to look to the outside world to determine what society deems cruel or unusual. However, both realism and empiricism dictate that the Court recognize that its current test for defining those terms is not objective. Rather, the two-part test is fraught with difficulties in determining a national consensus and applying a natural law that is either nonexistent or impossible to discern reliably.

If the Court continues to maintain that it must evaluate the Eighth Amendment under a rubric of national consensus and independent judgment, it should at least recognize that in many cases a truly objective measurement will not exist. When faced with the prospect of an uncertain ruling on what the national consensus *is*, much less what it means, the Court would do well to recognize a presumption of constitutionality as Justice Alito urged in his dissent. This presumption would necessarily raise the hurdle for those seeking to have a statute declared unconstitutional. However, to do otherwise puts the burden on state legislatures to figure out what the Court will decide consti-

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[71] *See, e.g.*, DARRELL HUFF, HOW TO LIE WITH STATISTICS 8 (W.W. Norton & Co. 1993) (1954) ("The secret language of statistics . . . is employed to sensationalize, inflate, confuse, and oversimplify.").

[72] *See McCain, Obama Disagree with Child Rape Ruling*, MSNBC, June 26, 2008, http://www.msnbc.msn.com/id/25379987/.

[73] Weems v. United States, 217 U.S. 349, 368–69 (1910) (quoting Rep. Smith's remarks as recorded by the Congressional Register) (internal quotation marks omitted).

tutes a national consensus, which might result in the chilling effect that Justice Alito and Louisiana suggested occurred in the case of capital rape provisions. If it is impracticable for the Court objectively to discern a national consensus or to discover natural law through its independent judgment, how much more impossible is the state legislatures' task of predicting the conclusions the Court will reach? That chilling effect can result in the Court being able to claim a standard of decency has evolved even if the phenomenon is really a result of prior Court decisions changing the standard. A presumption of constitutionality would allow states to continue to change their statutes during periods of apparent disagreement as to a national consensus, and require the Court to wait to see if a consensus truly emerges before declaring a standard of decency to exist by forcing it into existence.

3. Sixth Amendment — Attachment of Right to Counsel. — Ever since the Supreme Court's decision in *Kirby v. Illinois*,[1] the "attachment" of the Sixth Amendment right to counsel has turned on the commencement of adversary judicial proceedings. In various opinions over the years, courts have parsed the pretrial stages of criminal investigation and adjudication to identify the precise moment at which such proceedings actually commence.[2] Last Term, in *Rothgery v. Gillespie County*,[3] the Supreme Court continued this project, holding that a criminal defendant's Sixth Amendment right to counsel attaches after the defendant's initial appearance before a judicial officer where he learns of the charge against him and his liberty is subject to restraint. The Court's holding was, by its own account, narrow, redundant, and of little consequence to the defendant in question. Despite these features, the decision was an important one. *Rothgery* provides a great deal of doctrinal clarity and has very real practical effects. It is particularly notable for its formalist methodology, and, going forward, will be remembered for the fundamental purposive question that it raises.

On July 15, 2002, Texas police executed a warrantless arrest of suspected felon Walter Rothgery for illegal possession of a firearm.[4] While he was being booked at Gillespie County jail, Rothgery requested that the State appoint him counsel.[5] No counsel was appointed. The following morning, pursuant to the Texas Code of Criminal Procedure, the police brought Rothgery before a magistrate judge.[6] Rothgery once again insisted upon a right to appointed coun-

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[1] 406 U.S. 682 (1972).

[2] *See, e.g.*, Coleman v. Alabama, 399 U.S. 1, 9–10 (1970) (plurality opinion) (right to counsel attached at pre-indictment preliminary hearing); United States v. Wade, 388 U.S. 218, 236–37 (1967) (right to counsel attached at post-indictment, pretrial line-up).

[3] 128 S. Ct. 2578 (2008).

[4] *See* Rothgery v. Gillespie County, 413 F. Supp. 2d 806, 807 (W.D. Tex. 2006).

[5] *Id.*

[6] *See id.* at 807 n.2.