Kennedy v. Louisiana and the Committee of Philosopher Kings

Eric G. Roscoe, American University

Available at: https://works.bepress.com/eric_roscoe/3/
Kennedy v. Louisiana and the Committee of Philosopher Kings.

The Supreme Court, in their last term, officially abandoned all Constitutional moorings to come to a conclusion that they thought was right. Writing the opinion in Kennedy v. Louisiana, 128 S.Ct. 2641 (2008), Justice Kennedy finally admitted that the Court does not care what the Constitution says, or what the nation as a whole has concluded, but would rather look to the majority of justices and their opinions. We should not be concerned with the court’s ultimate conclusion in Kennedy, but rather the way in which they derived that conclusion. There are two particularly disturbing issues with the Kennedy opinion: one, is that the evaluation of national consensus was flawed because it disregarded a particularly recent military law authorizing the execution of child rapists; and two, the ultimate conclusion of the court used national consensus as window dressing for their actual desire to impose their own opinion.

Before analyzing the two issues in this case it should be noted that the particular facts could have allowed the court to reach the conclusion that either execution for child rape does not violate the Eighth Amendment, or that it does. Patrick Kennedy is the man convicted of raping his eight-year old stepdaughter so severely that she required emergency surgery to repair lacerations on the wall of her vagina and to reattach her cervix. He first told the police that two local boys on bicycles had attacked his daughter in the garage while selling girl-scout cookies. The evidence however, showed that she had been raped in the house hours before Kennedy called the police. It is hard to imagine a more heinous crime and, while the daughter did not die, she will now live the rest of her life with this horrific event shaping the way she approaches human interaction.
That being said, the Louisiana statute does not specify the severity of the child rape nor the recidivist nature of the accused. It permits that in all instances of anal or vaginal rape of a child under the age of twelve a death sentence may be assessed. It is one of only six states in the country that authorize the death penalty for child rape. Given that this is the case, a challenge using the Eighth Amendment must determine whether a national consensus exists that says whether we approve of the death penalty in these instances. A national consensus is determined through a tally of the states authorizing a practice, as well as the federal laws, and a determination of the directional movement of state laws.

The Court made its first error in their initial assessment of whether or not a national consensus exists when they concluded that of the states and federal government with the death penalty, only six permitted it for child rape. They missed the fact that The Uniform Code of Military Justice permits execution for child rape (10 U.S.C. §856; Manual for Courts-Martial, United States, Part II, Ch. X, Rule 1004(c)(9) (2008); id., Part IV, ¶45.f(1)). When discussing the notion of a national consensus the court should be looking at what state legislatures have done and what they desire to do, as well as what Congress, a representative of the general national consensus, has authorized.

In this instance the reliance on state legislatures was questionable for one main reason. The Court’s decision in Coker v. Georgia, 433 U.S. 584 (1977), outlawed the death penalty for rape of an adult, and many jurisdictions including the Florida Supreme Court, Buford v. State, 403 So. 2d 943 (1981), interpreted the dicta in this opinion to mean that there could never be a statute authorizing the death penalty for rape. The nature of the Coker opinion has stymied the
The very fact that the U.S. Congress decided to authorize the death penalty for Child Rape in the Military provides a view of national consensus which points in the opposite direction of the Court’s conclusion in *Kennedy*. A criticism of using the UCMJ to determine national consensus is that military laws are written to operate and regulate with the goal of projecting military force efficiently throughout the world. However, viewing the UCMJ in the context of the death penalty for rape demonstrates less of a dividing line between the military and civilian world. The military, just like Louisiana, is seeking deterrence and mainly retribution for the heinous nature of child rape. This is not a stricter punishment because of the martial nature of one’s duties, like being criminally charged for abandoning a post, but rather a punishment that speaks to the nature of the crime itself.

Given the potential effect of the UCMJ on the *Kennedy* opinion the Court still rejected the petition for rehearing, and for good reason. The real holding had nothing to do with Eighth Amendment Jurisprudence. The *Kennedy* Court uses the notion of national consensus as a front for the real reason they find the Louisiana statute unconstitutional, the majority’s personal opinion. After providing a discussion of national consensus Justice Kennedy turns to a piece of dicta in the *Coker* case which states, “in the end our own judgment (that of the Court) will be brought to bear on the acceptability of the death penalty under the Eighth Amendment.” (*Coker*, 433 U.S. 597) From this point forward the opinion rests on the justice’s own personal judgment.
As Justice Scalia points out, in rejecting the petition for rehearing, it is not just an abandonment of legal principles, but a rejection of all rational Constitutional analysis to say that “no criminal penalty shall be imposed which the Supreme Court deems unacceptable.” (Patrick Kennedy, Petitioner v. Louisiana, on petition for rehearing, 544 U.S. ___(2008)*2). On that basis the Court has now made it impossible to determine the Constitutionality of any punishment because the analysis is locked in the minds of the majority of Court justices. Reasoned rule based analysis gives freedom to the states to craft legislation in line with the rules, when the standard is personal opinion the states have no firm ground upon which to draw conclusions.

The analysis of the *Kennedy* Court is the problem. Justice is served by determining what the law is, not what one wistfully dreams it should be. So today the Court has finally overstepped its bounds into the world where “judges of the law (are replaced) with a committee of Philosopher Kings.” (Stanford v. Ky., 492 U.S. 361, 379 (1989)).