Journal of Criminal Law and Criminology

Volume 89
Issue 2 *Winter*

Article 6

Winter 1999

# Louisiana's Newest Capital Crime: The Death Penalty for Child Rape

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0091-4169/99/8902-0717
THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY
Vol. 89, No. 2
Printed in U.S.A.


# COMMENT

# LOUISIANA'S NEWEST CAPITAL CRIME: THE DEATH PENALTY FOR CHILD RAPE

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> Those whom we would banish from society or from the human community itself often speak in too faint a voice to be heard above society's demand for punishment. It is the particular role of the courts to hear these voices, for the Constitution declares that the majoritarian chorus may not alone dictate the conditions of social life. The Court thus fulfills, rather than disrupts, the scheme of separation of powers by closely scrutinizing the imposition of the death penalty, for no decision in a society is more deserving of "sober second thought."[1]

## I. INTRODUCTION

In Louisiana, prosecutors are currently seeking the death penalty against two men accused of raping children in the case of *State v. Wilson*.[2] In 1995, Louisiana passed a state law making it a capital offense to rape a child under twelve. Louisiana Revised Statute 14:42 (C) reads in pertinent part:

> Whoever commits the crime of aggravated rape shall be punished by life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. However, if the victim was under the age of twelve years . . . the offender shall be punished by death or life impris-

[1] McCleskey v. Kemp, 481 U.S. 279, 343 (1987) (Brennan, J., dissenting) (quoting Harlan F. Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 25 (1936)).

[2] 685 So. 2d 1063 (La. 1996). By a recent count, there are approximately thirty other pending rape cases in Louisiana in which the defendants may qualify for the death penalty. John Q. Barrett, *Death for Child Rapists May Not Save Children*, NAT'L L. J., Aug. 18, 1997, at A21.

onment at hard labor without benefit of parole, probation, or suspension of sentence, in accordance with the determination of the jury.[3]

Prosecutors indicted two defendants, Anthony Wilson and Patrick Dewayne Bethley, under the new law. Prior to conviction, both moved to quash the indictments, challenging the statute's constitutionality on its face.[4] The respective trial courts granted both motions to quash, and the State then appealed to the Louisiana Supreme Court, which consolidated the cases for review.[5] On appeal, both defendants argued that the law is unconstitutional because imposing the death penalty for raping a child is cruel and unusual punishment.[6] Although the Louisiana Supreme Court found the law constitutional, the question bears further examination: is the law constitutional? Or is the imposition of the death penalty for a non-homicide crime cruel and unusual punishment?

This Comment proposes that imposing the death penalty for child rape is unconstitutional because the Eighth Amendment prohibits punishments that are disproportionate to the crimes for which they are imposed. Part II reviews the background law involving the Eighth Amendment and relevant Supreme Court case law. Part III analyzes the issues presented by the decision in *State v. Wilson* and discusses four hurdles for the Louisiana statute: (1) a procedural hurdle which insures against arbitrary and capricious imposition of the death penalty;[7] (2) that the punishment must not be excessive in relation to the crime;[8] (3) that the punishment must serve a legitimate goal beyond the needless imposition of pain and suffering;[9] and (4) that a punishment must not be so severe as to be unacceptable to contemporary society.[10] Part IV concludes that the Louisiana

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[3] LA. REV. STAT. ANN. § 14:42 (C) (West 1995), revised and codified in LA. REV. STAT. ANN. § 14:42(D)(1), (2) (West Supp. 1999) with no relevant changes.

[4] *Wilson*, 685 So. 2d at 1063.

[5] *Id.*

[6] *Id.*

[7] *See infra* Part III.B.

[8] *See infra* Part III.C.

[9] *See infra* Part III.C.2.

[10] *See infra* Part III.D.

statute will likely be struck down when it reaches the Supreme Court of the United States because it is excessive punishment for the crime of rape.

## II. BACKGROUND LAW

### A. THE ADOPTION OF THE EIGHTH AMENDMENT

The Eighth Amendment to the Federal Constitution, ratified on December 15, 1791, prohibits the infliction of cruel and unusual punishments.[11] The Framers took the language of this amendment from the English Bill of Rights, adopted by Parliament in 1688, after the English Civil War.[12] The English Bill of Rights contained the same language: "excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[13] The prohibition against cruel and unusual punishment was absent from the original body of the United States Constitution, an exclusion that was hotly debated at the time of enactment. At the Massachusetts Convention, this exclusion was protested: "Congress shall have to ascertain . . . and determine what kind of punishments shall be inflicted on persons convicted of crimes. They are nowhere restrained from inventing the most cruel and unheard of punishments."[14] At the Virginia Convention, Patrick Henry echoed this fear: "Congress . . . may define crimes and prescribe punishments. . . . [W]hen we come to punishments, no latitude ought to be left, nor dependence put on the virtue of representatives. [Without a prohibition on cruel and unusual punishment], [y]ou let them loose; you do more—you depart from the genius of your country."[15] Clearly, participants at the Conventions were voicing a desire to enact a ban on cruel and unusual punishment to act as a restraint on the laws enacted by the legislatures. Eventually, this view carried the day, and the Eighth Amend-

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[11] "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

[12] O'Neil v. Vermont, 144 U.S. 323, 339 (1892) (Field, J., dissenting).

[13] *Id.*

[14] Furman v. Georgia, 408 U.S. 238, 258-59 (1972) (Brennan, J., concurring) (citing 2 J. ELLIOT'S DEBATES 111 (2d ed. 1876)).

[15] *Id.* at 259 (citing 3 J. ELLIOT'S DEBATES 447 (2d ed. 1876)).

ment was enacted as part of the Bill of Rights. After the Eighth Amendment became effective, it served as a restraint on the courts and a warning not to abuse the discretion with which the courts had been entrusted.[16] At this time, the debate surrounding cruel and unusual punishment shifted from whether to have a prohibition to what the prohibition actually meant.

### B. THE MEANING OF CRUEL AND UNUSUAL PUNISHMENT

#### *1. The Historical Debate*

The debate surrounding the meaning of cruel and unusual punishment began after the adoption of the Cruel and Unusual Punishment Clause and continues today. Scholars and jurists disagree over the original meaning of the Clause, as well as its present meaning. The Framers included the Eighth Amendment in the Bill of Rights to limit legislative power to prescribe punishments for crimes, but we have little evidence of how they defined "cruel and unusual punishment." Certainly the ban reached torture and other barbaric punishments, as early cases demonstrate.[17] In *Pervear v. Massachusetts*,[18] the United States Supreme Court referred to the Clause for the first time, nearly eighty years after the Eighth Amendment's ratification. Ordinarily, the terms of the Clause applied to something inhuman and barbarous, such as torture.[19] Examples of cruel and unusual punishments included being disemboweled alive, burned alive, beheaded, or drawn and quartered.[20] However, none of the early cases called for an exhaustive definition. In *Wilkerson v. Utah*, the Court held that the Eighth Amendment prohibits torture and like punishments of "unnecessary cruelty."[21] Several years later, the Court declared:

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[16] Weems v. United States, 217 U.S. 349, 376 (1910).

[17] *See, e.g.*, McDonald v. Commonwealth, 53 N.E. 874 (Mass. 1899); *In re* Kemmler, 136 U.S. 436 (1890); Wilkerson v. Utah, 99 U.S. 130 (1878).

[18] 5 Wall. 475 (1867).

[19] *See* McDonald v. Commonwealth, 53 N.E. 874 (Mass. 1899).

[20] *See Wilkerson*, 99 U.S. at 135-36 (1878).

[21] *Id.* at 136.

> [D]ifficulty would attend the effort to define with exactness the extent of the constitutional provision, which provides that cruel and unusual punishments shall not be inflicted; but it is safe to affirm that "punishments of torture . . . and all others in the same line of unnecessary cruelty, are forbidden" by that amendment to the Constitution. . . . Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies . . . something more than the mere extinguishment of life.[22]

The first hint that the Clause prohibited more than torture and other barbaric punishments occurred in 1892. In *O'Neil v. Vermont,* the punishment at issue was imprisonment at hard labor for violating the Vermont liquor laws.[23] Justice Field, dissenting, interpreted the Clause to prohibit not only punishments which inflict torture, but also "all punishments which, by their excessive length or severity, are greatly disproportioned to the offenses charged."[24] This was the first appearance of any discussion of proportionality.

In 1910, in *Weems v. United States,* the Court firmly rejected the notion that the Cruel and Unusual Punishment Clause prohibited only torturous and barbaric punishments.[25] At issue was punishment of imprisonment at "hard and painful labor" for up to twenty years, loss of all political rights, and surveillance by authorities for life, all for falsifying an official public document.[26] Examining the works of various legal scholars, as well as the debates surrounding the enactment of the Cruel and Unusual Punishment Clause, the Court concluded that the Framers must have intended that the ban on cruel and unusual punishment include penalties disproportionate to the offenses for which they are imposed.[27] Describing Patrick Henry and others who championed the enactment of the Clause, the opinion noted:

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[22] *Kemmler,* 136 U.S. at 447 (1890)(quoting Wilkerson v. Utah, 99 U.S. 130, 135 (1878)).

[23] O'Neil v. Vermont, 144 U.S. 323 (1892).

[24] *Id.* at 339-40 (Field, J., dissenting).

[25] 217 U.S. 349 (1910).

[26] *Id.*

[27] *Id.* at 372-73.

> They were men of action, practical and sagacious, not beset with vain imaging, and it must have come to them that there could be exercises of cruelty by laws other than those which inflicted bodily pain or mutilation. . . . [W]e cannot think that the possibility of a coercive cruelty being exercised through other forms of punishment was overlooked.[28]

The Court in *Weems* expanded the definition of cruel and unusual punishment, recognizing that its vitality depended on its ability to expand in application.[29]

Examining the English definition of cruel and unusual punishment, the *Weems* Court observed:

> [T]he earliest application of the provision in England was in 1689 . . . to avoid an excessive pecuniary fine imposed upon Lord Devonshire by the court of the King's Bench. . . . [T]he House of Lords . . . decided that the fine 'was excessive and exorbitant, against the Magna Carta, the common right of the subject, and the law of the land.'[30]

Therefore, the English definition explicitly embraced the concept that punishments (in this case fines) can be excessive with respect to the offenses for which they are imposed. Undoubtedly the Framers knew of this English definition when they chose to copy the language of the English Bill of Rights, which suggests their intent that the Eighth Amendment include a ban on excessive punishments.

*Weems* was also the first case to note the flexibility of the Clause prohibiting cruel and unusual punishment.[31] After examining several state cases and works by commentators, the Court concluded that "[t]he clause of the Constitution . . . may therefore be progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice."[32]

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[28] *Id.*

[29] *Weems*, 217 U.S. at 373.

[30] *Id.* at 376 (quoting 11 State Trials 1354).

[31] *Id.* at 378.

[32] *Id. See also* Mackin v. United States, 117 U.S. 348 (1886); *Ex Parte* Wilson, 114 U.S. 417, 427 (1885).

*2. The Death Penalty in Recent Years: The Road to* Coker v. Georgia

The Supreme Court, per Chief Justice Warren, reiterated the flexibility of the Clause in 1958:

> The exact scope of the Constitutional phrase 'cruel and unusual' has not been detailed by this Court. But the basic policy reflected in these words is firmly established in the Anglo-American tradition of criminal justice . . . . The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards . . . [T]he words of the Amendment are not precise, and their scope is not static. *The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.*[33]

A look at the Supreme Court's modern death penalty jurisprudence must begin with *McGautha v. California.*[34] Prior to *McGautha,* the Court had been under pressure for decades to rule on whether the death penalty was constitutional as punishment for any crime.[35] At issue in *McGautha* was whether the Due Process Clause of the Fourteenth Amendment mandates standards limiting the sentencer's discretion in choosing a penalty.[36] The Court held that it did not, in part because such general standards would be impossible to develop, given the variety of cases.[37]

Later the same year, in *Furman v. Georgia,* the Court held unconstitutional death penalty schemes which leave the decision of whether or not to impose the death penalty to undirected juror discretion.[38] The decision made unconstitutional every state's death penalty scheme and resulted in vacated death sentences for all 629 persons on death row at the time.[39] In *Furman,* five justices wrote separate concurring opinions, but all

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[33] Trop v. Dulles, 356 U.S. 86, 99-101 (1958) (emphasis added).

[34] 402 U.S. 183 (1971).

[35] Michael Mello, *Executing Rapists: A Reluctant Essay on the Ethics of Legal Scholarship,* 4 WM. & MARY J. WOMEN & L. 129, 141 (1997).

[36] *McGautha,* 402 U.S. at 183.

[37] *Id.* at 196-208.

[38] 408 U. S. 238 (1972).

[39] Mello, *supra* note 35, at 141.

held that the death penalty may not be imposed in an "arbitrary and capricious" manner.[40] From Chief Justice Warren's oft quoted comments in *Trop v. Dulles*,[41] Justice Brennan, concurring in the judgment, concluded that "[a] punishment is 'cruel and unusual,' therefore, if it does not comport with human dignity."[42] He pointed to four principles inherent in the Clause: (1) that even criminals have human dignity; (2) that the State must not arbitrarily inflict a severe punishment; (3) that a severe punishment must not be unacceptable to contemporary society; and (4) that severe punishment must not be excessive.[43]

The next great leap in death penalty jurisprudence occurred in 1976, with *Gregg v. Georgia* and its companion cases. In *Gregg*, the Court upheld the imposition of the death penalty when applied under sentencing procedures that narrow the class of death-eligible defendants and provide adequate information and guidance to the sentencing authority as to who should be sentenced to death.[44] As a general proposition, a system which provides for bifurcated proceedings at which the sentencing authority receives information relevant to the

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[40] Godfrey v. Georgia, 446 U.S. 420, 447 (1980) (summarizing the Court's holding in *Furman*).

[41] *See supra* text accompanying note 33.

[42] *Furman*, 408 U.S. at 270 (Brennan, J., concurring).

[43] *Id.* at 270-79.

[44] *See* Gregg v. Georgia, 428 U.S. 153, 206-07 (1976) (plurality opinion). *See also* Jurek v. Texas, 428 U.S. 262 (1976) (Texas capital sentencing procedure which required jury to consider five categories of aggravating circumstances, which permitted, as interpreted by Texas courts, consideration of mitigating circumstances, and which focused on the particularized circumstances of the individual offense and individual offender was not unconstitutional on theory that it would lead to arbitrary and capricious imposition); Proffitt v. Florida, 428 U.S. 242 (1976) (holding that Florida sentencing procedures requiring judge to consider specific aggravating and mitigating factors, requiring judge to set forth written findings when the death penalty was imposed, and calling for review by the Florida Supreme Court were not unconstitutional). *Cf.* Roberts v. Louisiana, 428 U.S. 325 (1976) (holding unconstitutional a Louisiana death penalty scheme which narrowly defined five categories of first-degree murder for which the death penalty was mandatory and which required juries in all first-degree murder cases to also be instructed on manslaughter and second-degree murder even if there was not a scintilla of evidence to support such a verdict); Woodson v. North Carolina, 428 U.S. 280 (1976) (holding that imposition of a mandatory death sentence without consideration of the character and record of the individual offender or the circumstances of the particular offense was inconsistent with the Eighth Amendment and therefore unconstitutional).

imposition of the sentence, and standards to guide its use of that information, best meets the concern of arbitrary and capricious application.[45] However, merely providing these procedures does not guarantee that the Supreme Court will find a sentencing scheme constitutional, and each system will be examined individually.[46]

In *Gregg v. Georgia*, Georgia's statutory sentencing scheme met *Furman*'s procedural requirements by: (1) providing for separate sentencing procedures where evidence of aggravating and mitigating factors can be presented to the jury; (2) requiring that a jury find at least one statutory aggravating circumstance before imposing the death penalty; and (3) providing for an automatic appeal to, and review by, the state supreme court as a check against the random or arbitrary imposition of the death penalty.[47]

### C. THE SUPREME COURT'S PROPORTIONALITY ANALYSIS: *COKER V. GEORGIA*

When one of the pending cases results in a death sentence, and the United States Supreme Court finally reviews Louisiana Revised Statute § 14:42(c), the State of Louisiana will face a major hurdle because it will have to prove that executing child rapists does not violate the Supreme Court's decision in *Coker v. Georgia*.[48] In *Coker*, a divided Supreme Court held that imposing the death penalty for raping an adult woman was cruel and unusual punishment under the Eighth Amendment.[49]

Coker escaped from the correctional facility where he was serving various sentences for murder, rape, kidnapping, and aggravated assault. He entered the house of the Carvers, threatened them with a knife, and raped sixteen-year-old Mrs. Carver. He then fled in the Carvers' car, taking Mrs. Carver with him. Apprehended a short time later, he was charged with escape,

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[45] *Gregg*, 428 U.S. at 195.

[46] *Id.*

[47] *Id.* at 206-07.

[48] 433 U.S. 584 (1977) (plurality opinion).

[49] *Id.*

armed robbery, motor vehicle theft, kidnapping, and rape. He was convicted and sentenced to death for the rape count.[50]

The four Justice plurality held the death penalty unconstitutional in cases of rape, explaining that "a sentence of death is grossly disproportionate and excessive punishment for the crime of rape and is therefore forbidden by the Eighth Amendment."[51] In support of its holding, the Supreme Court cited objective evidence of contemporary society's attitude towards the imposition of the death penalty for the crime of rape.[52] At the time of *Coker*, "[t]he current judgment with respect to the death penalty for rape [was] not wholly unanimous among state legislatures, but it obviously weigh[ed] very heavily on the side of rejecting capital punishment for raping an adult woman."[53] Only three states allowed the imposition of the death penalty for any rape (adult or child), which the Justices interpreted as a legislative rejection of the death penalty for rape.[54]

The Court acknowledged the seriousness of rape.[55] The plurality opinion defined it as a violent crime, which "[s]hort of homicide, . . . is the 'ultimate violation of self.'"[56] Accompanied by psychological and often physical damage to the victim, as well as injury to the public, rape undermines a community's sense of security.[57] Despite the gravity of the offense, the Court concluded that rape was not as grave a crime as murder in terms of blameworthiness of the defendant and resulting public injury.[58]

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[50] *Id.* at 587-91.

[51] *Id.* at 592.

[52] *Id.* at 593.

[53] *Id.* at 596 (concluding that society generally rejects the death penalty for rape of an adult woman when Georgia was the only jurisdiction with a statute making the rape of an adult woman a capital offense, and only two others made the rape of a child a capital offense).

[54] *Id.* at 595-97.

[55] *Id.*

[56] *Id.* (quoting U.S. DEPARTMENT OF JUSTICE, LAW ENFORCEMENT AND ASSISTANCE ADMINISTRATION REPORT, RAPE AND ITS VICTIMS: A REPORT FOR CITIZENS, HEALTH FACILITIES AND CRIMINAL JUSTICE AGENCIES 1 (1975)).

[57] *Id.* at 598.

[58] *Id.*

The *Coker* Court drew a bright line between those who kill and those who do not.[59]

There are problems with some of the Court's language in this passage. One can certainly dispute the conclusion that rape does not include the serious injury to another person, or that life for the rape victim is normally not beyond repair. Indeed, for many rape victims, living with victimization is more difficult than death. Additionally, many rapes involve serious physical injury. However, courts must take from this language the mandate that they must draw a line between crimes that result in death and those that do not.

The Court concluded that since rapists, as such, do not take the lives of their victims, they therefore do not deserve the death penalty.[60] In *Coker*, the Court specifically rejected a sentencing scheme in which some murderers would not receive the death penalty, while some rapists would.[61] The Justices distinguished between crimes which result in loss of life, and crimes which do not.

Justices Brennan and Marshall concurred in the result, but wrote separately to express their views that the death penalty always constitutes cruel and unusual punishment.[62] Justice Powell concurred with the result based on the facts of *Coker*, but dissented because he felt the opinion was overbroad, and the death penalty might be appropriate in rape cases which were particularly brutal or heinous.[63] Chief Justice Burger and Justice Rehnquist dissented on the grounds that Georgia did not lack

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[59] *Id.* ("Although it may be accompanied by another crime, rape by definition does not include the death of or even the serious injury to another person. The murderer kills; the rapist, if nothing more than that, does not.").

[60] *Id.* at 598. Commentators have taken this statement as a signal that death would be disproportionate for any rape. *See, e.g.*, JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 6.05(B) (2d ed. 1995) (concluding that "[d]eath, therefore, is a constitutionally inappropriate penalty for rape (or, one would assume from the Court's reasoning, for any other offense), if no life is taken"); ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 25 (3d ed. 1982) (noting that "the Court will hold that capital punishment is always, regardless of circumstances, a disproportionate crime for the penalty of rape").

[61] *See Coker*, 433 U.S. at 600.

[62] *Id.*

[63] *Id.* at 601 (Powell, J., concurring in part and dissenting in part).

the constitutional power to impose the death penalty for rape, and in striking down the death penalty imposed on Coker, the Court was overstepping "the bounds of proper constitutional adjudication by substituting its policy judgment for that of the state legislature."[64] It is in the shadow of this Supreme Court precedent that Louisiana passed its statute allowing the death penalty for child rape.

## III. ANALYSIS

### A. THE CURRENT CONFLICT: *STATE V. WILSON*

The defendant in the first case, Anthony Wilson, was indicted by a grand jury on December 21, 1995, for the aggravated rape of a five year old girl.[65] Moving to quash the indictment based on a facial challenge to the constitutionality of the statute, Wilson argued that the crime of rape is not punishable by death.[66] The trial court granted Wilson's motion to quash, and the state appealed to the Louisiana Supreme Court.[67]

The defendant in the second case, Patrick Dewayne Bethley, was charged with raping three girls, ages five, seven, and nine, between December 1, 1995 and January 10, 1996.[68] One of the girls is his daughter.[69] The state alleged that Bethley knew he was HIV positive at the time of the crimes.[70] Bethley filed a motion to quash, arguing that La. R.S. § 14:42 (C) was unconstitutional on its face because imposing the death penalty for rape violates the Eighth Amendment.[71] The trial court found § 14:42 (C) constitutional under the Eighth Amendment, the Fourteenth Amendment (Equal Protection Clause) and under the

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[64] *Id.* at 604 (Burger, C.J., dissenting).

[65] State v. Wilson, 685 So. 2d 1063, 1064 (La. 1996).

[66] *Id.* at 1064-65.

[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] *Id.* at 1065. *See supra* notes 3 & 11 and accompanying text for texts of statute and Eighth Amendment.

Louisiana Constitution.[72] However, the trial court struck down the statute on the ground that it did not sufficiently limit the class of death-eligible defendants, and therefore was subject to arbitrary and capricious application.[73]

On appeal the cases were consolidated and the Louisiana Supreme Court found § 14:42 (C) constitutional because the death penalty was not an excessive punishment for child rape, nor was the statute susceptible to arbitrary or capricious application.[74] Two Justices concurred in the result, and wrote separately to assign reasons,[75] and two Justices dissented, one of whom thought the statute was unconstitutional under *Coker*.[76]

Defendant Bethley petitioned the United States Supreme Court for certiorari, which was denied on June 2, 1997.[77] Justices Stevens, Ginsburg, and Breyer issued a statement, respecting the denial of certiorari, but stating that "[i]t is worth noting the existence of an arguable jurisdictional bar to our review. Our consideration of state court decisions is confined to '[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had.' . . . Petitioner has been neither convicted of nor sentenced for any crime."[78] They went on to say that in the context of a criminal prosecution, the imposition of a sentence normally constitutes finality.[79] This case will likely be reviewed by the Supreme Court once the trial court issues a final judgment.

The background law of the Eighth Amendment, Supreme Court case law, and *State v. Wilson* combine to present three issues: (1) is the Louisiana statute subject to arbitrary and capricious application?; (2) is the death penalty excessive

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[72] *Id.* "No law shall subject any person to . . . cruel, excessive, or unusual punishment." LA. CONST. art. I, §20. "[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV.

[73] *Wilson*, 685 So. 2d at 1065.

[74] *Id.* at 1073.

[75] *Id.*

[76] *Id.* at 1074 (Calogero, C.J., dissenting).

[77] Bethley v. Louisiana, 117 S. Ct. 2425 (1997).

[78] *Id.* at 2425–26.

[79] *Id.* at 2426 (quoting Flynt v. Ohio, 451 U.S. 619, 620 (1981)).

punishment for child rape?; and (3) does society consider the death penalty acceptable punishment for raping a child?

B. THE LOUISIANA STATUTE PASSES *FURMAN*'S PROCEDURAL TEST

To comply with *Furman*, the discretion of the fact finder in the guilt phase of the trial must also "be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."[80] Consistent with this, "an aggravating circumstance [considered by the sentencing authority] must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of [the same crime]."[81]

To pass constitutional muster on procedural grounds, the Louisiana statute must provide a bifurcated trial structure, with separate guilt and sentencing phases. At the sentencing phase, the jury must consider aggravating and mitigating circumstances, and the sentencing procedure must provide proper guidance to limit jury discretion. The sentencing scheme must sufficiently narrow the class of defendants eligible to receive the death penalty. Finally, the sentencing structure must provide for mandatory review by the Louisiana Supreme Court of any death sentences imposed.

*1. Bifurcated Trials: Individualized Considerations*

In Louisiana, "[t]he jury charged with the task of deciding between death or some other penalty is not given unbridled discretion in the decision making process."[82] The Louisiana Code of Criminal Procedure provides guidelines for ensuring against arbitrary and capricious imposition of the death penalty. Article 905 provides for a bifurcated trial structure and requires a separate sentencing hearing held after conviction.[83] At the sentenc-

[80] Gregg v. Georgia, 428 U.S. 153, 189 (1976) (plurality opinion).

[81] Zant v. Stephens, 462 U.S. 862, 877 (1983).

[82] State v. Wilson, 685 So. 2d 1063, 1071 (La. 1996).

[83] LA. CODE CRIM. PROC. ANN. art. 905 (West 1995). The statute reads: "Following a verdict or plea of guilty in a capital case, a sentence of death may be imposed only after a sentencing hearing as provided herein."

ing hearing, the jury weighs individual considerations. "[T]he jury considers evidence of aggravating and mitigating circumstances to determine whether a particular defendant should receive a death sentence for the particular crime committed."[84] Article 905.2 of the Louisiana Code of Criminal Procedure requires that "[t]he sentencing hearing shall focus on the circumstances of the offense, the character and propensities of the offender."[85] Therefore, Louisiana's sentencing scheme complies with the constitutional requirements outlined by the Supreme Court.[86]

*2. Narrowing the Class of Death Eligible Defendants*

The Supreme Court requires that "when a sentencing body is given such discretion as to determine whether a life should be taken, that discretion must be suitably directed and limited so as to minimize the risk of arbitrary and capricious application."[87] The sentencing scheme must sufficiently narrow the class of death-eligible defendants. The scheme can narrow the class in one of two ways: (1) the legislature may itself narrow the definition of capital offenses; or (2) the legislature may broadly define capital offenses and provide for narrowing by requiring jury findings of aggravating circumstances at the sentencing phase.[88]

Louisiana's sentencing scheme is constitutional because the legislature narrowed the definition of capital offenses.[89] The Louisiana statute narrows the class of convicted rapists eligible for the death penalty by requiring a conviction on a count of aggravated rape for death penalty eligibility. Further, the victim of the rape must be under twelve years of age in order for the

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[84] State v. Watson, 449 So. 2d 1321, 1325 (La. 1984).

[85] LA. CODE CRIM. PROC. ANN. art. 905.2 (West 1995).

[86] Lockett v. Ohio, 438 U.S. 586 (1978) (interpreting the Eighth and Fourteenth Amendments to require individualized consideration of mitigating factors in capital cases).

[87] Gregg v. Georgia, 428 U.S. 153, 189 (1976).

[88] Lowenfield v. Phelps, 484 U.S. 231, 246 (1988).

[89] State v. Wilson, 685 So. 2d 1063, 1071 (La. 1996).

defendant to be death-eligible.[90] If a crime lacks that aggravating circumstance, the defendant is not death-eligible. The Louisiana scheme narrows the class of death-eligible defendants sufficiently to pass constitutional muster. The Supreme Court has held this type of sentencing scheme constitutional.[91]

*3. Mandatory Review for Proportionality*

A capital sentencing scheme must provide for mandatory review of all death sentences for proportionality.[92] The Louisiana statute requires the Louisiana Supreme Court to review every death sentence imposed for constitutionality.[93] The court must look at "(1) whether the sentence was imposed under influence of passion, prejudice, or arbitrary factors; (2) whether the evidence supported a finding of a statutory aggravating circumstance; and (3) whether the sentence, in view of both the offense and the offender, is disproportionate to the penalty imposed in other cases."[94]

Louisiana's sentencing scheme complies with the procedural requirements of *Furman.* It provides for a bifurcated trial structure, including a separate sentencing hearing for consideration of aggravating and mitigating circumstances. It provides guidance to the sentencing authority as to who may receive a sentence of death, thereby curbing the sentencing authority's discretion. It narrows the class of death-eligible defendants at the guilt phase of the trial, and also provides for mandatory review for proportionality of all death sentences by the Louisiana Supreme Court.

C. PUNISHMENT MUST NOT BE EXCESSIVE

Although Louisiana's sentencing scheme passes constitutional muster on *Furman*'s procedural grounds, it fails the Eighth Amendment's test on proportionality grounds. A pun-

[90] LA. REV. STAT. ANN. §14:42 (1995). The Court has held that even when the aggravating circumstance is identical to an element of the crime, the death sentence is not invalid. *Lowenfield*, 484 U.S. at 246.

[91] *Wilson*, 685 So. 2d at 1071 (citing *Lowenfield*, 484 U.S. at 246).

[92] Gregg v. Georgia, 428 U.S. 153, 206-07 (1976).

[93] LA. CODE CRIM. PROC. ANN. art. 905.9 (West 1995).

[94] State v. Martin, 645 So. 2d 190, 199 (La. 1994).

ishment is unconstitutional if it is excessive in comparison to the severity of the offense.[95] A punishment is excessive and unconstitutional if it (1) is grossly out of proportion to the severity of the crime,[96] or (2) makes no measurable contribution to the acceptable goals of punishment, and hence is nothing more than the needless imposition of pain and suffering.[97] This two-pronged test determines if a punishment is excessive; if either prong is met, the punishment is excessive and therefore unconstitutional.

*1. The Punishment Must be Proportionate to the Crime*

Although questions may remain about whether the Framers intended the Cruel and Unusual Punishment Clause to ban all disproportionate punishments, the Supreme Court has read a ban on disproportionate punishments into the Clause, at least with regard to the death penalty.[98] In determining whether a punishment is disproportionate to a given crime, a court must weigh three factors: (1) the severity of the penalty;[99] (2) the gravity of the offense;[100] and (3) at times the blameworthiness of the defendant.[101]

a) Severity of the Penalty

There is no question that death as a punishment is unique in its severity and irrevocability.[102] Death is the most severe punishment that could possibly be imposed, and it is completely irrevocable.

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[95] *Gregg*, 428 U.S. at 173.

[96] *Id.*

[97] *Id.*

[98] *See supra* Part II.B and Part II.C. It is unclear if under current law, there is a general proportionality guarantee inherent in the Eighth Amendment when the death penalty is not the punishment being examined. For a treatment of this topic, see Les A. Martin, Harmelin v. Michigan: *The Demise of the Eighth Amendment's Proportionality Guarantee*, 38 LOY. L. REV. 255 (1992). *See also* Harmelin v. Michigan, 501 U.S. 957 (1991); Solem v. Helm, 463 U.S. 277 (1983); Rummel v. Estelle, 445 U.S. 263 (1980).

[99] Woodson v. North Carolina, 428 U.S. 280, 304 (1976).

[100] Coker v. Georgia, 433 U.S. 584, 597-98 (1977).

[101] Enmund v. Florida, 458 U.S. 782, 798 (1982).

[102] Furman v. Georgia, 408 U.S. 238, 286-91 (1972) (Brennan, J., concurring).

b) Gravity of the Offense

The second factor weighed in determining the proportionality of the death penalty in relation to a given crime is the gravity of the offense. This includes the amount of harm caused to the victim of the crime, as well as any resulting public injury, such as "undermin[ing] a community's sense of security."[103]

The Court has refused to draw a clear line distinguishing those crimes grave enough to warrant the death penalty and those that do not.[104] Purporting to acknowledge this, the Louisiana Supreme Court claimed to know the Supreme Court's mind:

> The *Coker* Court recognized the possibility that the degree of harm caused by an offense could be measured not only by the injury to a particular victim but also by the resulting public injury. This implies that some offenses, in particular the rape of a child, might be so injurious to the public that death would not be disproportionate in relation to the crime for which it is imposed.[105]

The crime of raping a child, by itself, does not take a life. The Louisiana Court acknowledged the argument that the death penalty should not be imposed for non-homicides.[106] Despite precedent, the court concluded that the death penalty is not disproportionate to the crime of raping a child because:

> [c]ontemporary standards as defined by the legislature indicate that the harm inflicted upon a child when raped is tremendous. That child suffers physically, as well as emotionally and mentally, especially since the overwhelming majority of offenders are family members. Louisiana courts have held that sex offenses against children cause untold psychological harm not only to the victim but also to generations to come.[107]

The court proposed that because the Supreme Court has declined to draw a clear line, it ought to defer to legislative

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[103] *Coker*, 433 U.S. at 596-98.
[104] Tison v. Arizona, 481 U.S. 137, 157 (1987).
[105] State v. Wilson, 685 So. 2d 1063, 1070 (La. 1996).
[106] *Id.* at 1069.
[107] *Id.* at 1070.

judgment on the matter.[108] Concluding that the Eighth Amendment only bars the death penalty for minor crimes, the Louisiana court asserted that the crime of raping a child under twelve is not a minor crime, and therefore the death penalty is not excessive.[109] The court also quoted *Gregg v. Georgia* as justification for its conclusion: "In part, capital punishment is an expression of society's moral outrage at particularly offensive conduct. This function may be unappealing to many, but it is essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs."[110]

In *Wilson*, the defendants argued that death is a disproportionate penalty for the crime of rape because rape is not as grave a crime as murder.[111] The defendants contended that the following quote from *Coker* applies equally to raping a child as it does to the rape of an adult woman:

> Rape is without doubt deserving of serious punishment; but in terms of moral depravity and of the injury to the person and to the public, it does not compare with murder, which does involve the unjustified taking of human life. Although it may be accompanied by another crime, rape by definition does not include the death of or even the serious injury to another person. The murderer kills; the rapist, if no more than that, does not. Life 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. We have the abiding conviction that the death penalty, which 'is unique in its severity and irrevocability,' . . . is an excessive penalty for the rapist who, as such, does not take human life.[112]

The Louisiana Supreme Court rejected the assumption that a rapist causes less harm than a murderer because in some cases women have preferred death to being raped, or have taken their own lives after being raped.[113] It also rejected the argu-

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[108] *Id.* (citing Tison v. Arizona, 481 U.S. 137, 157 (1987)).

[109] *Id.*

[110] *Id.* (quoting Gregg v. Georgia, 428 U.S. 153, 183 (1976)).

[111] *Id.* at 1065.

[112] Coker v. Georgia, 433 U.S. 584, 598 (1977).

[113] *Wilson*, 685 So. 2d at 1066 n.3 (citing David J. Karp, Coker v. Georgia: *Disproportionate Punishment and the Death Penalty for Rape*, 78 COLUM. L. REV. 1714, 1720 (1978)).

ment that *Coker* controlled their analysis, noting that the plurality in *Coker* took "great pains in referring only to the rape of adult women throughout their opinion,[114] leaving open the question of [whether imposing the death penalty for] the rape of a child [is constitutional]."[115] Reasoning that since the *Coker* Court described the rape of an adult woman as a serious crime which violated the self (only murder could violate the self more), the court concluded that the Louisiana Legislature correctly found the rape of a child even more detestable.[116] The court explained that children are a special class, in need of special protection and particularly vulnerable since they are not mature enough to defend themselves.[117] Child rape causes terrible emotional and often physical harm to the victim, and also causes a devastating blow to the sense of safety in a community.[118]

The Louisiana Court correctly concluded that the crime of raping a child is not a minor one. It is a heinous crime, which should be punished severely. The court also concluded correctly that the child victim of rape suffers tremendous harm. A child is vulnerable, unable to protect herself, particularly if a family member perpetrates the crime. However, the court erroneously concluded that the death penalty is not a disproportionate punishment for the crime of child rape.

The Louisiana Court asserted that the Supreme Court's analysis in *Coker* does not apply to the cases before it because the *Coker* holding is limited to cases in which the death penalty is imposed for the rape of an adult woman.[119] Rape of a child differs from the rape of an adult woman "[s]ince children cannot protect themselves . . . [and] are a class of people that need special protection; they are particularly vulnerable since they are not mature enough nor capable of defending themselves."[120]

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[114] *Id.* at 1066.

[115] *Id.*

[116] *Id.* at 1066-67.

[117] *Id.* at 1067.

[118] *Id.*

[119] *Id.* at 1066. The court pointed to fourteen times that the Justices in *Coker* referred to the victim as an "adult woman." *Id.*

[120] *Id.* at 1067.

The Louisiana Court makes a strong argument here; rape, especially child rape, causes emotional and physical trauma to its victim.

However, the Court in *Coker* drew the line: if the perpetrator of the crime does not take human life, the death penalty is disproportionate. Raping a child, if unaccompanied by any other crime, does not result in death. It is a heinous and serious crime deserving of severe punishment; however, because it does not result in loss of life, it does not deserve the death penalty. To impose capital punishment on a defendant convicted of raping a child would be excessive punishment, which violates the Eighth Amendment.

c) Blameworthiness of Defendant

The culpability or blameworthiness of the defendant at times also weighs in determining the proportionality of the punishment in relation to a given crime. "The focus [has to] be on *his* culpability, . . . for we insist on 'individualized consideration as a constitutional requirement in imposing the death sentence'. . ."[121]

The defendants in *Wilson* challenged the statute as unconstitutional because it permits the death penalty without a finding of intent.[122] The defendants argued that this makes the rape of a child a more severe crime than murder since murder requires intent to kill, whereas the Louisiana statute does not require a specific intent to rape a child under twelve.[123] The court dealt with this challenge by pointing out that "[t]he statute does not make the death penalty automatic for the rapist as opposed to the murderer. Once the rapist is found guilty, he proceeds to the sentencing hearing in which he is permitted to introduce any mitigating evidence."[124] Therefore, if the rapist was mistaken as to age of the victim, he may introduce that fact at the sentencing hearing as a mitigating factor through evidence that

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[121] Enmund v. Florida, 458 U.S. 782, 798 (1982) (quoting Lockett v. Ohio, 438 U.S. 586, 605 (1978)). *See also* Tison v. Arizona, 481 U.S. 137 (1987).

[122] *Wilson*, 685 So. 2d at 1072.

[123] *Id. See also* LA. REV. STAT. ANN. § 144:42 (C) (West 1995).

[124] *Id.*

he truly thought the victim was of age, based on appearances or representation. The court also pointed out, however, that "[r]ape of a child is an intentional crime in and of itself . . . [because] one does not 'accidentally' rape a child."[125]

The Louisiana Court proposed that the death penalty is permissible in some situations when the defendant has neither killed nor intended to kill anyone.[126] The court cited *Tison v. Arizona*, which held that the death penalty is not disproportionate punishment for a defendant whose participation in a felony that results in murder was major, and whose mental state was one of reckless indifference.[127] In *Tison*, the Petitioner and his brothers had helped plan and effect the escape of their father from prison, where he was serving a life sentence for killing a prison guard during a previous escape attempt.[128] After they carried out their escape plan, they helped abduct, detain, and rob a family of four.[129] They watched while their father and another accomplice murdered the members of that family with shotguns the defendants had procured and provided to use in the escape.[130] The trial court convicted them of capital murder under Arizona's felony murder and accomplice liability statutes and sentenced them to death.[131] The Supreme Court upheld the death sentences, asserting that the Petitioners' mental states had been those of reckless indifference, which constituted a culpable mental state.[132]

The Louisiana court was wrong to rely on *Tison*. *Tison* is very different from *Wilson*. *Tison* does hold that the death penalty can be imposed on defendants who neither directly kill, nor specifically intend to kill anyone, but the crimes committed in *Tison* resulted in the deaths of four innocent people. The crime of raping a child, on the other hand, does not result in death. The Supreme Court upheld the death penalty if imposed under

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[125] *Id.* at 1072-73.
[126] *Id.* at 1069.
[127] 481 U.S. 137 (1987).
[128] *Id.* at 139.
[129] *Id.* at 140-41.
[130] *Id.* at 139-41.
[131] *Id.* at 141-42.
[132] *Id.* at 151.

the felony murder doctrine on defendants who played a major role in the felony which resulted in murder and had a mental state of reckless indifference (the defendants in *Tison* procured the guns for the prison escape of their father and must have known someone could be killed in the escape, but participated in it anyway). However, the Court has not held that the death penalty may be imposed on defendants who neither kill nor intend to kill anyone when they commit crimes that do not result in the victim's death.

In *Enmund v. Florida*, the Supreme Court held that the death penalty is an excessive penalty for a robber who does not take a life.[133] In *Enmund*, the defendant was driving the getaway car, and was nowhere near the crime scene when two people were shot during the commission of a robbery.[134] There was no proof that any killing had been contemplated prior to the commission of the crime by the defendant, or by the two accomplices who committed the robbery and the murders.[135] Attempting to distinguish the crime in *Enmund* from the crime of child rape, the court in *Wilson* asserted that "[i]n *Enmund*, the defendant simply aided and abetted a robbery," while the Louisiana statute "contemplates a defendant who rapes a child."[136] Certainly society finds the rape of a child more morally repugnant than a robbery. However, the legislature could address that by making child rape punishable by life imprisonment, or by some other term of incarceration more severe than that imposed on the robber. The conclusion that child rape should receive the death penalty does not follow from the premise that society finds it more morally repugnant than robbery.

The Supreme Court has weighed the culpability or blameworthiness of the defendant only in the context of felony murder. The Court did not reach this analysis in *Coker*; instead it drew a line between rape, which does not result in the loss of human life, and homicides, which do. The Court has drawn a bright line which the Louisiana Court failed to follow. If a

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[133] 458 U.S. 782 (1982).

[134] *Id.*

[135] *Id.* at 798.

[136] State v. Wilson, 685 So. 2d 1063, 1069 (La. 1996).

crime results in the loss of human life, courts may impose the death penalty if the defendant had a culpable mental state and played a major role in the crime. If no loss of life results, it becomes unnecessary to determine whether the defendant had a culpable mental state or whether he played a major role in the crime. The death penalty is disproportionate punishment for crimes which do not result in loss of human life.

*2. No Needless Imposition of Pain and Suffering*

Legitimate goals of punishment include retribution and deterrence.[137] Punishment is excessive, and does not serve these goals if it involves the needless imposition of pain and suffering.[138] First, "the punishment must not involve the unnecessary and wanton infliction of pain."[139] Second, the type of punishment imposed for a given crime must serve an acceptable goal of punishment.

In a society that requires its citizens not to retaliate, but rather to look to the law to vindicate wrongs done to them, the goal of retribution is critically important. The Supreme Court explained that:

> [t]he instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose on criminal offenders the punishment they 'deserve,' then there are sown the seeds of anarchy of self-help, vigilante justice, and lynch law.[140]

Behind the principle of retribution is the idea that people must take responsibility for their actions; that is, when they do a wrong to society by committing a crime, they must pay in some way to make it right. "The theory of retributive justice is a the-

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[137] *Id.* Retribution is defined as "deserved punishment for evil done." WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 1548 (2d ed. 1983). Deterrence derives from 'deter', meaning "to discourage or keep from doing something." *Id.* at 496.

[138] Gregg v. Georgia, 428 U.S. 153, 173 (1976).

[139] Furman v. Georgia, 408 U.S. 238, 392-93 (1972) (Burger, C.J., dissenting).

[140] *Id.* at 308 (Stewart, J., concurring).

ory of just desserts, and some notion that the punishment should fit the crime is inherent in that theory."[141]

In *Wilson*, the Louisiana Court confronted the argument that the Louisiana statute does not serve the principle of retribution because the imposition of the death penalty will have a chilling effect on the already inadequate reporting of this crime.[142] The argument continues:

> [s]ince arguably most child abusers are family members, the victims and other family members are concerned about the legal, financial, and emotional consequences of coming forward. Permitting the death penalty for the crime will further decrease the reporting since no child wants to be responsible for the death of a family member.[143]

With decreased reporting, more offenders would escape the punishment their evil deserves.

In response, the Louisiana Court pointed out that the child is an innocent victim and the offender is responsible for his actions.[144] The answer, however, is not responsive to the challenge that the statute fails to serve the principle of retribution. It points out a truism of child rape but does not at all respond to the challenge that the death penalty will prevent reporting of an already underreported crime. Thus, the Louisiana court failed to explain how the statute promotes the principle of retribution.

The principle of deterrence refers to discouraging people from committing a crime. Whether a deterrent is successful is not always easily determined: "statistical attempts to evaluate the worth of the death penalty as a deterrent to crimes by potential offenders have occasioned a great deal of debate."[145] Some studies suggest that the death penalty may not have more of a deterrent effect than lesser penalties.[146] The death penalty probably functions as a significant deterrent for some, and not for others. The value of capital punishment as a deterrent to crime is a

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[141] State v. Gardner, 947 P.2d 630, 651 (Utah 1997).
[142] State v. Wilson, 685 So. 2d 1063, 1073 (La. 1996).
[143] *Id.*
[144] *Id.*
[145] Gregg v. Georgia, 428 U.S. 153, 184 (1976).
[146] *Id.* at 185.

complex factual issue, the resolution of which properly rests with the legislatures which can evaluate the results of statistical studies in light of local conditions and with a flexibility not available to the courts.[147] However, the judgment and decisions of a legislature should only be accorded deference to a certain point; courts must act as a constitutional check on the legislatures.[148]

The *Wilson* court argued that making child rape a capital crime would be a deterrent.[149] This is not necessarily true.

> While people generally assume that stiffer penalties have a greater deterrent effect, in fact one may argue that a disproportionately harsh punishment will undermine the goals of deterrence. Disproportionate penalties may make prosecutors and sentencers reluctant to seek or impose penalties they see as unjust. . . . [I]f unnecessarily harsh penalties are imposed, they may still undermine the State's effort to deter more serious crimes because criminals may recognize that once they have exposed themselves to a capital punishment, the State has no further power to punish them.[150]

If prosecutors and sentencers are reluctant to impose the death penalty, and the criminal knows this, then the punishment loses its deterrent function. Further, if Louisiana imposes the death penalty for raping a child under twelve, what deters the rapist from also killing the child? He could receive no harsher penalty for the murder of the child than for the rape. Thus, the murder becomes no worse (in terms of punishment and deterrence) than the rape. Indeed, by killing the child, the rapist eliminates perhaps the only witness to the crime who could testify with first hand knowledge. Therefore, the death penalty fails to serve the principle of deterrence more significantly than another punishment, such as life imprisonment,

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[147] *See* Furman v. Georgia, 408 U.S. 238, 403-05 (1972) (Burger, C.J., dissenting).

[148] Criminal law has always been the domain of the states. United States v. Lopez, 115 S. Ct. 1624, 1642 (1995) (Thomas, J., concurring). Often, the states react with hostility when their power to make criminal laws and fashion criminal penalties is threatened. However, ours is a federal system, and the Supreme Court's power to strike down unconstitutional laws is firmly established. *See* Marbury v. Madison, 5 U.S. 137 (1803).

[149] State v. Wilson, 685 So. 2d 1063, 1073 (La. 1996).

[150] State v. Gardner, 947 P.2d 630, 651 (Utah 1997).

would. The death penalty's severity makes prosecutors less likely to seek it, and it fails to further deter child rapists from taking the lives of their victims.

### D. ACCEPTABILITY OF PUNISHMENT TO CONTEMPORARY SOCIETY

Public attitude toward punishment is very important; a punishment's validity depends upon its acceptability to contemporary society. Chief Justice Warren's words in *Trop v. Dulles* are worth repeating: "[t]he [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[151] Thus, courts must assess contemporary values regarding the infliction of the challenged sanction, the death penalty.[152] This requirement saves the Cruel and Unusual Punishment Clause from being nothing more than the subjective views of individual judges.[153] It means that objective factors will inform the judgment.[154] Examining the laws of other jurisdictions and evidence of the frequency or infrequency with which juries impose a given punishment sheds light on public attitudes toward that punishment.

#### *1. Other Jurisdictions*

In determining the acceptability of a punishment to contemporary society, courts should look at the entire country's opinion of that punishment.[155] This entails examining the laws of other states to determine how many other jurisdictions allow the imposition of that punishment, for which crimes, and why.[156] The frequency or infrequency of similar or identical laws indicates the public judgment with respect to that crime.[157] If all or most of the other states impose the same punishment for the same crime, that suggests a general endorsement of that punishment. If few or none have similar laws on the books, it indi-

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[151] 356 U.S. 86, 101 (1958).
[152] Gregg v. Georgia, 428 U.S. 153, 173 (1976).
[153] *See* Coker v. Georgia, 433 U.S. 584, 592 (1977).
[154] *Id.* at 592.
[155] *See id.* at 593.
[156] *See id.*
[157] *See id.* at 593-94.

cates that society does not generally endorse the imposition of that particular punishment for that particular crime.[158]

Laws indicate legislative attitudes; if a legislature chooses to impose the death penalty for a certain crime, it considers it an appropriate punishment for that crime. If it chooses to impose a lesser punishment, it considers that punishment more appropriate than the death penalty. When assessing punishments enacted by democratically elected legislatures, courts make a presumption of validity.[159]

In *Wilson*, the Louisiana Supreme Court argued for judicial restraint and deference to the legislature, reasoning that the legislature, as the voice and pulse of the people, was in the best position to know and articulate the will of the people.[160] The Louisiana court stated that "courts must exercise caution in asserting their views over those of the people as announced through their elected representatives."[161] The argument for judicial restraint is persuasive only to a point. Justice Brennan has explained:

> [W]e must not, in the guise of 'judicial restraint,' abdicate our fundamental responsibility to enforce the Bill of Rights. Were we to do so, the "constitution would indeed be as easy of application as it would be deficient in efficiency and power. Its general principles would have little value and be controverted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality."[162]

Deference to the legislature, therefore, cannot weigh more heavily than a court's responsibility to enforce the Constitution, and courts must determine for themselves whether a penalty is acceptable.

According to the Supreme Court, "one of the most conservative and acceptable methods of determining the excessiveness of a penalty is to examine the statutes of the other states."[163]

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[158] *See id.*

[159] Gregg v. Georgia, 428 U.S. 153, 175 (1976).

[160] State v. Wilson, 685 So. 2d 1063, 1067 (La. 1996).

[161] *Id.*

[162] Furman v. Georgia, 408 U.S. 238, 269 (1972) (Brennan, J., concurring) (quoting Weems v. United States, 217 U.S. 343, 373 (1910)).

[163] *Gregg*, 428 U.S. at 179.

Louisiana is the only state that imposes the death penalty for the rape of a child.

In the years since *Coker*, the Mississippi, Florida, and Tennessee Supreme Courts have invalidated state statutes which made rape of a child a capital offense.[164] Mississippi did so in *Leatherwood v. Mississippi*.[165] In *Leatherwood*, the defendant was convicted of raping an eleven year-old child and sentenced to death.[166] The Supreme Court of Mississippi held that the maximum punishment for raping a child is life imprisonment.[167]

The Tennessee Supreme Court, in *Collins v. State*, invalidated a statute which mandated the death penalty for raping a child.[168] Significantly, in the intervening twenty years, Tennessee has not re-enacted a statute allowing, rather than requiring, the death penalty for the rape of a child. If the legislature in Tennessee found it acceptable and desirable to execute criminals who rape children, it would have enacted a statute allowing the death penalty to be imposed on such criminals. Tennessee's current lack of such a statute suggests that public opinion in Tennessee weighs against imposing the death penalty for the rape of a child.

The Florida Supreme Court invalidated a child rape death penalty statute[169] in *Buford v. State*.[170] In *Buford* the defendant was convicted of first degree murder, sexual battery of a child under eleven years of age, and burglary with intent to commit sexual battery.[171] He was sentenced to death for both the murder

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[164] Buford v. State, 403 So. 2d 943 (Fla. 1981); Leatherwood v. Mississippi, 548 So. 2d 389 (Miss. 1989); Collins v. State, 550 S.W.2d 643 (Tenn. 1977).

[165] 548 So. 2d 389 (Miss. 1989). The statute at issue was MISS. CODE ANN. § 97-3-65 (1974), which stated "(e)very person eighteen (18) years of age or older who shall be convicted of rape by carnally and unlawfully knowing a child under the age of fourteen (14) years, upon conviction, shall be sentenced to death or imprisonment for life . . ."

[166] *Leatherwood*, 548 So. 2d 389.

[167] *Id.* at 403.

[168] 550 S.W.2d 643 (Tenn. 1977).

[169] The statute read in relevant part "[A] person 18 years of age or older who commits sexual battery upon, or injures the sexual organs of, a person less than 12 years of age in an attempt to commit sexual battery upon such person commits a capital felony. . ." FLA. STAT. ANN. § 794.011(2) (West 1976).

[170] 403 So. 2d 943 (Fla. 1981).

[171] *Id.* at 944.

charge and the sexual battery charge.[172] The defendant appealed, in part challenging the constitutionality of the death sentence imposed for sexual battery as cruel and unusual punishment in violation of the Eighth Amendment. The Florida Supreme Court found *Coker v. Georgia* controlling.[173] The Florida Court applied the *Coker* analysis to the imposition of the death penalty for the rape of a child, following the bright line drawn by the *Coker* court between crimes which cause the death of the victim and crimes that do not.[174] The court explained: "The reasoning of the justices in *Coker v. Georgia* compels us to hold that a sentence of death is grossly disproportionate and excessive punishment for the crime of sexual assault and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment."[175]

In *Wilson,* the Louisiana Supreme Court acknowledged that Louisiana is the only state to impose the death penalty for raping a child.[176] Insisting that this fact did not determine excessiveness, the court pointed out that at the time of *Coker,* three other states, Florida, Mississippi, and Tennessee, had statutes authorizing the death penalty in rape cases where the victim was a child and the offender an adult.[177] The court suggested that despite subsequent invalidation of those statutes, the fact that they existed at all might be the beginning of a public trend toward allowing the death penalty in child rape cases, and that the failure of more states to enact such statutes may mean that those states are waiting to see what happens to those states which do enact such statutes.[178] To the contrary, it is more likely that the lack of similar statutes reflects the popular and legislative views that it is an excessive penalty because after invalidation no attempts were made to re-enact those statutes in compliance with the Constitution. It is therefore unlikely that popular attitude

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[172] *Id.*
[173] *Id.* at 950.
[174] *Id.*
[175] *Id.* at 951.
[176] State v. Wilson, 685 So. 2d 1063, 1068 (La. 1996).
[177] *Id.*
[178] *Id.*

in those states called for imposing the death penalty on rapists or that legislatures thought it constitutional to do so.

The court in *Wilson* pointed out that Mississippi's and Tennessee's statutes were invalidated for infirmities in the statutes themselves or in the sentencing schemes of the states, and not because they were unconstitutional violations of the Eighth Amendment's prohibition on cruel and unusual punishment.[179] Concluding this point, the court argued "We cannot look solely at what legislatures have refrained from doing under conditions of great uncertainty arising from the Supreme Court's 'less than lucid holdings on the Eighth Amendment.'"[180]

The argument made by the Louisiana Court is not persuasive. That three states previously had statutes allowing the imposition of the death penalty for the rape of a child does not suggest a trend, particularly when each of those statutes was invalidated, and not subsequently re-enacted. In fact, the Florida court found *Coker* controlling in the context of imposing the death penalty for child rape. The distinct trend is away from making child rape a capital offense; Louisiana is the only state in the country that makes the rape of a child a capital offense. In a similar context, when eight other states had laws similar to the one in question at the time, the Supreme Court characterized that as a trend away from imposing the death penalty for a given crime.[181] Since no other states have laws similar to Louisiana's, Louisiana's law falls under what the Court has defined as society's rejection of the death penalty for the rape of a child.

### 2. *Infrequency of Imposition by Juries*

The jury is also a "significant and reliable index of contemporary values" because it is drawn from, and directly involved in, society at large, and therefore represents those values.[182] The

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[179] *Id.* at 1068-69.

[180] *Id.* at 1069 (citing *Coker*, 433 U.S. at 614).

[181] In *Enmund v. Florida*, there were eight other jurisdictions allowing the "imposition of the death penalty solely for participation in a robbery in which another robber takes [a] life." 458 U.S. 782, 789 (1982). The Court called this "a small minority of jurisdictions," *id.* at 792, and concluded that this amounted to "[s]ociety's rejection of the death penalty for accomplice liability in felony murder." *Id.* at 794.

[182] Gregg v. Georgia, 428 U.S. 153, 181 (1976).

Supreme Court has stated that "one of the most important functions any jury can perform in making . . . a selection [between life imprisonment and death] is to maintain the link between contemporary values and the penal system."[183] If juries show a reluctance to impose the death penalty on defendants convicted of certain crimes, it suggests that contemporary society thinks so severe a punishment should be reserved for extreme cases. If juries tend to impose the death penalty in certain cases, it reflects approval of imposing that punishment for that crime.[184] Examining the frequency with which juries impose the death penalty for a given crime guides courts in determining whether contemporary society finds the death penalty unacceptable for certain crimes.

Since 1977, no sentencer has imposed the death penalty on a defendant in a non-homicide case, even where they would have been allowed to do so.[185] Across the country, juries do not impose the death penalty for crimes that do not result in the victim's death. This extreme reluctance of juries to impose the death penalty for non-homicides indicates that contemporary society finds that punishment unacceptable for those crimes.

## IV. CONCLUSION

Louisiana's statute allowing the imposition of the death penalty for the rape of a child is unconstitutional because it violates the Eighth Amendment's prohibition of cruel and unusual punishment. The Louisiana Supreme Court wrongly upheld the statute in *Wilson.* The United States Supreme Court denied certiorari for lack of jurisdiction because there was no final judgment in the case. Should the trial court convict and sentence either Wilson or Bethley to death, the Court will probably grant certiorari since it would mark the first time in thirty years

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[183] Witherspoon v. Illinois, 391 U.S. 510, 519 n.15 (1968).

[184] *See* Furman v. Georgia, 408 U.S. 238, 388 (1972) (Burger, C.J., dissenting).

[185] State v. Gardner, 947 P.2d 630, 650 & n.11 (Utah 1997) (noting also that there have been no convictions or death sentences imposed in the Louisiana cases involving the statute at issue because those cases involve only a pretrial facial challenge to the constitutionality of the Louisiana statute).

that a jury sentenced a defendant to death for a non-homicide crime.

Upon review, the Court will likely strike the law down as a violation of the Eighth Amendment. The imposition of the death penalty for the rape of a child falls under the Court's analysis in *Coker v. Georgia.* It rises to the level of excessive punishment, as it is disproportionate in relation to the crime of child rape. The crime of raping a child is clearly heinous and deserving of severe punishment; however, because the crime does not result in the loss of human life, the Court will likely follow the line drawn in *Coker* and prohibit imposing the death penalty for this crime.

Additionally, the Court should strike down the Louisiana statute. Imposing the death penalty for rape does not serve the principle goals of punishment. The death penalty does not serve the goal of retribution because inherent in the concept of retribution is the notion of proportionality, which the statute violates. The punishment does not serve the principle of deterrence either. It will likely decrease the reporting of an already underreported crime because most child rapists are family members. Imposing the death penalty for this crime will make children and other family members who know about the rape less likely to come forward, which gives the rapist more security in knowing he will remain unprosecuted for his crime. To provide more security to the rapist entails less deterrence.

Contemporary society, represented by state legislators, rejects the death penalty for non-homicide crimes, including the rape of a child, because the Supreme Court indicated in *Coker* that it is unconstitutional to do otherwise. It was a message understood by all but Louisiana, which is the only jurisdiction that allows the death penalty for the rape of a child. Other jurisdictions have struck down similar laws as unconstitutional within the last three decades. Most significantly, Florida struck down its identical law, finding that the *Coker* analysis controlled. Finally, no jury has imposed the death penalty in a non-homicide case in thirty years. Significantly, juries nationwide refuse to impose the death penalty on criminals who do not kill. This signifies that contemporary society considers the death penalty

disproportionate in relation to crimes that do not result in the loss of human life.

The United States Supreme Court will likely, as it should, strike down the Louisiana statute.