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Death Is Different, Even on the Bayou: The Disproportionality of Crime and Punishment in Louisiana's Capital Child Rape Statute

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You shall give life for life, eye for eye, tooth for tooth . . .

I. Introduction

A guiding principle of this nation’s criminal justice system, deriving its roots from age old notions of fairness, is that the punishment should fit the crime. The United States Supreme Court has adopted this principle through its conclusion that the Eighth Amendment contains a proportionality guarantee. The Court has used this guarantee to bar punishments that it finds "grossly disproportionate" to the object crimes. Twenty years ago, the Supreme Court used this proportionality doctrine to support its finding that the death penalty was an unconstitutionally excessive punishment for the rape of an adult woman. Recently, Louisiana challenged the limits of this decision by enacting a law authorizing the death penalty for the rape of a child under 1335

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1. Exodus 21:23-25. Readers often interpret this comment as vengeful; however, its actual intent was to set limits to ensure that the payment did not exceed the debt actually incurred. See Jesse Jackson & Jesse Jackson, Jr., Legal Lynching 181 (1996) (advocating abolition of death penalty).

2. See Gregg v. Georgia, 428 U.S. 153, 173 (1976) (upholding Georgia’s death penalty in face of Eighth Amendment challenge). The Court found that a punishment is excessive if it is grossly out of proportion to the severity of the crime. Id.


the age of twelve. The Louisiana Supreme Court recently upheld this law in the face of a constitutional challenge based on the proportionality doctrine. This Note examines whether, in light of Supreme Court precedent, Louisiana’s capital child rape statute does, in fact, pass constitutional muster.

Part II of this Note outlines the development of the proportionality doctrine in the United States. This historical survey includes a brief discussion of the rationale of early cases employing proportionality review. Part II also identifies some general factors from these early cases that guide the Supreme Court’s decisions in this area. Part III of this Note specifically addresses the role of proportionality review in capital sentencing. In addition, Part III discusses two important Supreme Court decisions based on the proportionality doctrine. This discussion focuses on basic constitutional requirements for proportionality review of capital punishment. Part IV analyzes the Supreme Court’s decision finding the death penalty unconstitutionally excessive for the rape of an adult woman. This discussion addresses the reasoning underlying the Court’s decision and includes selected state reactions to the Court’s decision. Part V of this Note details Louisiana’s capital child rape statute and discusses the reasoning the Louisiana Supreme Court employed when it upheld the statute in the face of a proportionality attack. Finally, Part VI of this Note critiques the Louisiana court’s analysis.

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5. See LA. REV. STAT. ANN. § 14:42 (West 1996) (imposing death penalty for aggravated rape when victim is under 12 years old).

6. See State v. Wilson, 685 So. 2d 1063, 1073 (La. 1996) (holding that death penalty for rape of child under 12 is not excessive punishment), cert. denied sub nom. Bethley v. Louisiana, 117 S. Ct. 2425 (1997). The United States Supreme Court denied certiorari; however, three Justices attached a statement that indicated the Court’s denial was not a decision on the merits of the claim. Bethley, 117 S. Ct. at 2425-26. Instead, the Justices noted a jurisdictional bar to the Court’s review in that the cases had not proceeded to final conviction and thus were not ripe for the Court’s review. Id.

7. See infra Part II.A-B (outlining development of proportionality doctrine).

8. See infra notes 44-47 and accompanying text (identifying three guiding factors for proportionality review).


10. See infra notes 71-90 and accompanying text (discussing Supreme Court’s decisions in Enmund v. Florida and Coker v. Georgia).

11. See infra notes 67-70 and accompanying text (discussing factors Supreme Court has used in proportionality review for capital cases).

12. See infra Part IV.A-C (discussing Supreme Court’s decision in Coker v. Georgia); see also Coker v. Georgia, 433 U.S. 584, 592 (1977) (finding death penalty excessive punishment in cases of rape of adult female).

13. See infra notes 150-66 and accompanying text (discussing Florida’s and Mississippi’s reactions to Coker).

and concludes that the death penalty for child rape is an unconstitutionally excessive punishment based on United States Supreme Court precedent or a properly conducted proportionality review.\textsuperscript{15}

\textbf{II. The History of Proportionality Review in American Jurisprudence}

Philosophy professor Burton Leiser once wrote that "there must be some principles that can be applied to determine which penalties are appropriate and which are not, which penalties are too light and which are excessive."\textsuperscript{16} The proportionality doctrine, embodied within the Eighth Amendment's prohibition against "cruel and unusual punishments,"\textsuperscript{17} establishes these principles in American jurisprudence.\textsuperscript{18} The United States Supreme Court has long debated the exact meaning of the Eighth Amendment’s requirement of proportionality between crime and punishment.\textsuperscript{19} However, the definitions and requirements that the Court has provided often have done more to confuse the issue than to provide any meaningful standards.\textsuperscript{20}

Chief Justice Burger described the Court’s Eighth Amendment decisions as "less than lucid."\textsuperscript{21} This sentiment exists due to the Supreme Court’s attempts to expand or contract the breadth of the proportionality doctrine in order to adapt to the constantly changing attitudes of our nation’s society.\textsuperscript{22}

\begin{itemize}
  \item \textsuperscript{15} See infra Part VI.A-C (critiquing Louisiana Supreme Court’s ruling that found death penalty constitutional for child rape).
  \item \textsuperscript{16} BURTON M. LEISER, LIBERTY, JUSTICE, AND MORALS: CONTEMPORARY VALUE CONFLICTS 219 (3d ed. 1986).
  \item \textsuperscript{17} U.S. CONST. amend. VIII. The Eighth Amendment provides that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Id.
  \item \textsuperscript{18} See Trop v. Dulles, 356 U.S. 86, 99-100 (1958) (finding that Eighth Amendment contains proportionality guarantee that bans punishments that are excessive to crimes for which they are imposed).
  \item \textsuperscript{19} See id. at 99-102 (finding that Eighth Amendment bans not only types of punishment but degrees of punishment that are offensive to constitutional principles); Weems v. United States, 217 U.S. 349, 380-81 (1910) (finding proportionality guarantee within Eighth Amendment in striking down 15 year prison sentence at hard labor for crime of falsifying documents).
  \item \textsuperscript{20} Compare Solem v. Helm, 463 U.S. 277, 303 (1983) (holding life imprisonment disproportionate to crime of utterance), and Enmund v. Florida, 458 U.S. 782, 801 (1982) (holding that death penalty was disproportionate penalty when defendant in felony murder did not kill and did not intend to kill), with Tison v. Arizona, 481 U.S. 137, 151 (1987) (finding that death sentence was proportionate to felony murder when defendants did not kill but exhibited "reckless indifference to human life"), and Rummel v. Estelle, 445 U.S. 263, 285 (1980) (holding that mandatory life sentence was not disproportionate to crime of forging checks).
  \item \textsuperscript{21} See Coker v. Georgia, 433 U.S. 584, 614 (1977) (Burger, C.J., dissenting) (warning that state reaction to recent inconsistent Supreme Court holdings on Eighth Amendment issues could provide false indications of societal opinions as to what constitutes "cruel and unusual" punishment).
  \item \textsuperscript{22} See Trop, 356 U.S. at 100-01 (stating that Eighth Amendment is not static but must
Until the beginning of the twentieth century, the Supreme Court applied the Cruel and Unusual Punishments Clause only to cases of torture and barbaric cruelty.\textsuperscript{23} Throughout this century, the Court has gradually broadened its interpretation of the Eighth Amendment to include a prohibition against punishments that are greatly disproportionate to the crimes for which they are imposed.\textsuperscript{24} Although the Court has conceded that the legislature has broad discretion to set punishments, the Court has also indicated that it is "a precept of justice that punishment for crime should be graduated and proportioned to [the] offense."\textsuperscript{25} By the 1950s, the Court no longer applied the proportionality doctrine to only its inquiry into barbaric types of punishment. Instead, the Court began to review punishments to decide whether the length and severity of the punishment conformed to the nation’s evolving standards of decency.\textsuperscript{26} In other words, a punishment must not stray too far from what "draw its meaning from the evolving standards of decency that mark the progress of a maturing society").


\textsuperscript{24} See id. at 1715 (discussing Supreme Court’s interpretation of Eighth Amendment that included bans on disproportionate sentences as well as barbaric sentences).

\textsuperscript{25} See Weems v. United States, 217 U.S. 349, 367 (1910) (finding that judicial branch holds power to review legislative penal statutes to ensure compliance with constitutional mandates). In \textit{Weems}, the Supreme Court considered whether a sentence of 15 years at hard labor for the crime of falsifying checks was excessive. \textit{Id.} at 366. In addition, the defendant would spend his sentence shackled with chains around his wrists and ankles. \textit{Id.} While recognizing the deference due to legislative autonomy, the Court nevertheless found a judicial duty to ensure proportionality between crime and punishment. \textit{Id.} The Court demonstrated the disproportionate relationship between Weems’s crime and his punishment by comparing other, more serious crimes in the same jurisdiction that called for more lenient penalties. \textit{Id.} at 380-81. Likewise, the Court considered comparable United States statutes for similar offenses. \textit{Id.} The Court concluded that the Philippines, the jurisdiction imposing the punishment in this case, punished various degrees of homicide, inciting rebellion, and robbery more leniently than Weems’s offense. \textit{Id.} The Court determined these crimes were much more serious than Weems’s offense. \textit{Id.} Further, the Court noted that federal law only imposed a maximum penalty of two years imprisonment for such an offense. \textit{Id.} Based on these factors, the Court declared the sentence unconstitutional. \textit{Id.} Thus, the Court, for the first time, recognized a proportionality guarantee within the Eighth Amendment’s Cruel and Unusual Punishments Clause. \textit{Id.}

\textsuperscript{26} See Trop v. Dulles, 356 U.S. 86, 100 (1958) (discussing precise meaning of Eighth Amendment’s proportionality guarantee). In \textit{Trop}, the Court considered whether the deprivation of the defendant’s citizenship for his desertion from the army in World War II constituted an excessive penalty. \textit{Id.} at 88. The Court found that the Eighth Amendment bans not only types of punishment but also degrees of punishment that are "offensive to cardinal principles for which the Constitution stands." \textit{Id.} at 102. Further, the Court compared the laws of the
society feels is just and proper for the given crime. This "evolving standards" doctrine is the principal concept to emerge from early Supreme Court proportionality discussions and is still a guiding force in today's proportionality jurisprudence.27

B. Recent Changes in the Proportionality Doctrine

Although the "evolving standards" doctrine continues to survive in Supreme Court jurisprudence, recent Court decisions involving proportionality review have produced varied results because of two competing notions.28 First, the United States's system of federalism envisions that each state legislature is the proper forum for discussion of matters relating to crime and punishment.29 The logical result of such a federal system is that different legislatures in different regions naturally will differ on what types of crimes deserve more severe punishments.30 The second factor influencing Supreme Court jurisprudence involving proportionality review is the Eighth Amend-


29. See Harmelin, 501 U.S. at 998 (Kennedy, J., concurring) (discussing role of Court in determinations of punishments). Justice Kennedy stated that "the fixing of prison terms for specific crimes involves a substantive penological judgment that, as a general matter, is 'properly within the province of legislatures, not courts.'" Id. (Kennedy, J., concurring) (quoting Rummel, 445 U.S. at 275-76).

30. See Harmelin, 501 U.S. at 990. Justice Scalia's majority opinion acknowledges that some states will always treat particular offenders more harshly than other states. Id. Such diversity is the "very raison d'être of our federal system." Id.
ment's guarantee against "cruel and unusual punishments." This guarantee competes with a federalist system by setting limits on any one state's authority to impose certain punishments that offend constitutional standards. Due to these equally intense yet competing notions, the Court has recently vacillated on its position as to which cases it will review for proportionality and to what extent such an inquiry should proceed.

Until recently, it appeared settled in Supreme Court jurisprudence that the Eighth Amendment requires proportionality between the crime and punishment. However, the exact application of such a requirement to specific cases has produced varied and often contradictory results. In Harmelin v. Michigan, the Supreme Court markedly altered the judicial landscape of proportionality review. The Harmelin Court found that a mandatory life

31. U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").
32. See Coker v. Georgia, 433 U.S. 584, 597 (1977) (stating that although legislative attitudes are important factor in Eighth Amendment cases, constitutional concerns mandate Supreme Court's review of punishments to ensure punishments comport with Eighth Amendment requirements).
33. See Solem, 463 U.S. at 290-92 (deciding that objective factors should guide proportionality review). These factors include (1) the gravity of the offense and the harshness of the penalty; (2) the sentences imposed on similar or more serious crimes in the same jurisdiction; and (3) the sentences imposed for commission of the same crime in other jurisdictions. Id. But cf Harmelin, 501 U.S. at 986-90 (criticizing Solem's three factors as troublesome if not impossible to compare objectively).
34. See Solem v. Helm, 463 U.S. 277, 303 (1983) (setting aside sentence of life without possibility of parole for conviction under South Dakota recidivist statute as disproportionate penalty in relation to crime); Trop v. Dulles, 356 U.S. 86, 103 (1958) (finding that deprivation of U.S. citizenship as punishment for absence without leave from military for one day is disproportionate sentence); Weems v. United States, 217 U.S. 349, 380-81 (1910) (stating that courts must ensure proportionality between crime and punishment).
35. Compare Rummel v. Estelle, 445 U.S. 263, 284 (1980) (deciding Texas recidivist statute allowing mandatory life sentences for third time offenders does not impose disproportionate punishment even if three predicate offenses were relatively minor) with Solem, 463 U.S. at 303 (finding that South Dakota recidivist statute's imposition of mandatory life sentence on third time felons violates proportionality guarantee of Eighth Amendment).
37. See Harmelin v. Michigan, 501 U.S. 957, 996 (1991) (affirming life sentence imposed on defendant for first time drug possession conviction). In Harmelin, the Court considered whether a life sentence imposed on a first time drug offender constituted an excessive punishment. Id. at 961. The defendant in Harmelin appealed a mandatory life sentence without the possibility of parole following his conviction for possession of 672 grams of cocaine. Id. Harmelin contended that such a harsh penalty was "significantly disproportionate" to the crime. Id. Justice Scalia authored the Court's opinion and began by concluding that the Eighth Amendment contained no proportionality guarantee. Id. at 965. However, only Chief Justice Rehnquist joined Justice Scalia in this portion of the opinion. Id. at 962-65. Although only
sentence imposed on a first time offender convicted of cocaine possession did
not constitute a disproportionate penalty in light of the offense.\textsuperscript{38} The Court
indicated that it would not supplant most legislative determinations regarding
punishment with its own views as long as the punishment involved incarcera-
tion rather than the death penalty.\textsuperscript{39}

In fact, Justice Scalia concluded that the Eighth Amendment contains no
proportionality guarantee.\textsuperscript{40} This position has garnered some scholarly criti-
cism because it ignores a long line of Supreme Court precedent recognizing
a narrow proportionality requirement.\textsuperscript{41} Furthermore, seven other Justices of
the \textit{Harmelin} Court did not share Justice Scalia’s opposition to the existence
of a proportionality guarantee.\textsuperscript{42} Although Justice Scalia’s opposition to a
proportionality guarantee in the Eighth Amendment might not be widely held,
it illustrates the wide variation in Eighth Amendment interpretation.

Notwithstanding Justice Scalia’s view, the Court has consistently ac-
nowledged a proportionality requirement within the Eighth Amendment

Justice Scalia and Chief Justice Rehnquist did not find a proportionality guarantee, a majority
of the Court agreed that it should not interpret \textit{Solem} and \textit{Coker} too broadly. \textit{Id.} at 1001
(Kennedy, J., concurring). Thus, sentences need not be strictly proportional to their respective
crimes, but may not be "grossly disproportionate" to those crimes. \textit{Id.} (Kennedy, J., concur-
ing). The Court indicated that in the noncapital context, it would be increasingly hesitant to
draw lines between sentences of varying lengths and refused to draw such a line in Harmelin’s
case. \textit{Id.} at 996. Thus, the Court upheld Harmelin’s conviction and found the life imprisonment
of a first time drug offender was not an unconstitutionally excessive punishment. \textit{Id.}

38. \textit{Id.} at 994-96.

39. \textit{Id.} at 994. The Court discussed its precedents in which it struck down the death
penalty as disproportionate to the crimes at issue in the cases. \textit{Id.} Although the Court reaf-
irmed decisions such as \textit{Coker} and \textit{Enmund}, it did so on the theory that "death is different" and
requires protections that other forms of punishment do not. \textit{Id.} The Court acknowledged the
appropriateness of a stricter adherence to meaningful proportionality review in capital sentence
review but did not extend the exacting standards of \textit{Coker} outside of capital issues. \textit{Id.}

40. \textit{Id.} at 965. Only Chief Justice Rehnquist joined Justice Scalia in this portion of the
majority opinion. \textit{Id.}

41. \textit{See} Margaret R. Gibbs, Note, Eighth Amendment—Narrow Proportionality Requi-
rement Preserves Deference to Legislative Judgment, 82 J. CRIM. L. & CRIMINOLOGY 955, 968-72
(1992) (criticizing Justice Scalia’s assertion that Eighth Amendment contains no proportionality
guarantee as inconsistent with Supreme Court precedent).

42. \textit{See} \textit{Harmelin}, 501 U.S. at 997 (Kennedy, J., concurring). Justice Kennedy, in an
opinion joined by Justice O’Connor and Justice Souter, acknowledged that the Court’s decisions
"recognize that the Cruel and Unusual Punishments Clause encompasses a narrow proportionality
principle." \textit{Id.} (Kennedy, J., concurring); \textit{see id.} at 1012 (White, J., dissenting). Justice
White, joined by Justice Blackmun and Justice Stevens, concluded that "there can be no doubt
that prior decisions of this Court have construed [the Eighth Amendment] to include a propor-
tionality principle." \textit{Id.} (White, J., dissenting). Justice Marshall filed a separate dissent in which
he agreed with Justice White’s assertion that the Eighth Amendment contains a proportionality
through its continued practice of invalidating punishments when it finds the punishment lacks proportionality to the crime. When conducting a proportionality review, the Supreme Court has warned that the subjective views of individual judges must not supplant the determinations of duly elected legislatures, absent some objective criteria. Consequently, the Court has developed the following three general factors for courts to use in proportionality review: (1) the gravity of the offense and the harshness of the penalty; (2) the sentences imposed on similarly grave offenses within the same jurisdiction; and (3) the sentences imposed on the same crime in other jurisdictions. Despite the general reliance on these factors, they have been criticized because they are difficult to apply objectively. As Justice Scalia points out in Harmelin, our federal system allows one state to criminalize an act that other states may not punish at all. According to Justice Scalia, it is simply an extension of federalism that one state may punish an act more harshly than a neighboring state. Thus, adherence to a federal system leads courts to give great defer-


44. See Coker, 433 U.S. at 592 (stating that Court should use objective criteria rather than subjective views when conducting proportionality review).


46. See Enmund, 458 U.S. at 788 (embracing use of objective factors in proportionality analysis); Coker, 433 U.S. at 592 (stating that objective factors must guide Court's proportionality review to maximum extent possible).

47. See Harmelin, 501 U.S. at 986-90 (criticizing use of alleged objective factors because factors are incapable of objective application). Justice Scalia's opinion finds it impossible to weigh objectively the "gravity" of an offense as the first factor requires. Id. at 987-88. Justice Scalia believes the gravity of an offense is entirely subjective and necessarily depends on the criminal issues that are most troubling in a particular region. Id. Thus, only the Michigan legislature should determine what penalties are necessary for the specific crimes that plague the streets of Detroit. Id. at 988.

48. See id. at 989 (hypothesizing that some states may punish killing same endangered wild animals for which other states offer bounties).

49. Id. A short hypothetical will help to illustrate this point. For instance, it is perfectly conceivable that the state of Texas would choose to outlaw cattle thievery and provide severe penalties for this crime. However, a state such as New Jersey may apply an extremely lenient sentence for this same crime because New Jersey's cattle industry is not as important to New Jersey as Texas's cattle industry is to Texas. Thus, in Texas, a cattle thief's sentence would likely be vastly disproportionate to a cattle thief's sentence in New Jersey. However, the
ence to state legislatures. Although this deference is due in part to notions of federalism, it also stems from the inherent difficulty in the process of deciding which prison terms exceed allowable limits.

Despite this difficulty, the judiciary has always possessed an intrinsic duty to guarantee that the legislature acts within the bounds of the Constitution. Naturally, this duty of the judiciary to ensure the constitutionality of legislative actions intensifies when those legislative acts subject a United States citizen to the possibility of execution. The next Part of this Note reviews the Court's application of the proportionality guarantee to capital punishment.

III. Role of Proportionality in Capital Sentencing

A. General Use of Proportionality Review of Death Penalties

Despite the uncertain future of proportionality review in the realm of noncapital cases, courts have applied the proportionality doctrine more consistently in death penalty cases. In fact, numerous states require, by statute, cherished notion of federalism, which is deeply rooted in our nation's history, demands that state legislatures should address peculiarly local concerns in appropriately local manners. The result of these varying local attitudes toward crime is that a court would have a difficult time comparing the sentences of these two hypothetical cattle thieves.

50. See Rummel v. Estelle, 445 U.S. 263, 284 (1980) (refusing to draw line between prison terms of varying years because "Texas is entitled to make its own judgment as to where such lines lie"); State v. Wilson, 685 So. 2d 1063, 1067 (La. 1996) (concluding that courts should exercise caution in asserting their views over views of legislature).

51. See Rummel, 445 U.S. at 275 (addressing difficulties involved in second-guessing legislative decisions). The Court stated that an "extensive intrusion into the basic line-drawing process that is pre-eminently the province of the legislature when it makes an act criminal would be difficult." Id.

52. See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (finding that "[i]t is emphatically the province and duty of the judicial department to say what the law is"); see also Enmund v. Florida, 458 U.S. 782, 797 (1982) (concluding that it is ultimately Supreme Court's duty to determine whether Eighth Amendment precludes death penalty for certain crimes).


54. See infra notes 55-71 and accompanying text (discussing role of proportionality review in capital punishment).


56. See Enmund, 458 U.S. at 783-84 (employing proportionality review to hold death penalty excessive for crime of robbery when defendant neither killed nor intended to kill); Coker v. Georgia, 433 U.S. 584, 592 (1977) (holding that death penalty is "grossly dispropor-
their state supreme courts to review every death sentence imposed to ensure proportionality between the crime and the death sentence. Although many factors guide the Supreme Court's review of a death sentence, two principal reasons have led to the Court's increased acceptance of proportionality review in capital cases. First, the Court recognizes that the death penalty is unlike any other form of punishment and that its implementation demands unique constitutional protections. The finality and unique nature of the death penalty causes even those normally opposed to proportionality review to admit its importance in the capital context. For example, in *Harmelin*, Justice

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57. See, e.g., *ALA. CODE* § 13A-5-53(b)(3) (1997) (requiring that Alabama Supreme Court and appellate courts conduct proportionality review on all death sentences); *MASS. GEN. LAWS ANN.* ch. 279, § 71 (West 1997) (requiring that Massachusetts Supreme Court review all death sentences for proportionality); *S.C. CODE ANN.* § 16-3-25(C)(3) (Law Co-op. 1997) (requiring that South Carolina Supreme Court conduct proportionality review on all death sentences).

58. See infra notes 59-70 and accompanying text (discussing reasons for increased judicial acceptance of proportionality review in capital cases).

59. *Furman*, 408 U.S. at 239-40 (per curiam) (invalidating Georgia's death penalty scheme in part because it lacked proportionality review provisions).

60. See *Harmelin*, 501 U.S. at 994 (finding need for proportionality review in death penalty cases after opinion previously found that no general proportionality guarantee exists in Eighth Amendment). Increased proportionality protections are vital in any attempt to impose the death penalty for child rape because of the Supreme Court's recently relaxed evidentiary protections in cases of child molestation. Cf. Allison C. Goodman, Note, *Two Critical Evidentiary Issues in Child Sexual Abuse Cases: Closed-Circuit Testimony by Child Victims and Exceptions to the Hearsay Rule*, 32 AM. CRIM. L. REv. 855, 875-82 (1995) (evaluating impact of recent Supreme Court decisions regarding admissibility of evidence in cases of sexual assault on children). Goodman expresses concern over the recent Supreme Court decision in *White v. Illinois*, which greatly relaxed evidentiary standards to the detriment of defendants in cases of child sexual abuse. *Id.*; see *White v. Illinois*, 502 U.S. 346, 354 (1992) (finding no need to demonstrate child witness's unavailability in order to invoke hearsay exceptions to allow testimony of child victim's doctor and babysitter). The Court admitted into evidence a statement that the victim made to her babysitter immediately following the alleged assault and the testimony of the doctor who attended to the child under the "excited utterance" and "medical
Scalia stated that the Eighth Amendment contains no proportionality guarantee. However, later in that same opinion, Justice Scalia agreed with prior Court decisions invalidating death sentences under the Eighth Amendment as excessive in relation to the underlying crimes. Justice Scalia found that proportionality review in capital cases is proper because the unique and final nature of the death penalty requires increased constitutional protections.

The second reason leading to greater judicial acceptance of proportionality review in capital cases relates to the unique nature of the death penalty as a punishment. A proportionality review involving a death sentence is easier for courts because such a review can be conducted more objectively than the difficult and highly subjective task of comparing prison terms of varying lengths. Therefore, because the death penalty is qualitatively different than imprisonment for any length of time, it is easier for reviewing courts to find the death penalty excessive for certain types of crimes. The existence of such an objective guidepost because of the qualitative difference of the death penalty is important because, as with proportionality review in the noncapital cases, the Supreme Court has endorsed the use of objective factors to guide care exceptions to the hearsay rule. *Id.* at 356. The Court found both exceptions to the hearsay rule to be "firmly rooted" in jurisprudence, so that the trustworthiness of the testimony was not an issue. *Id.* at 357. Perhaps most importantly, despite previous beliefs to the contrary, the Court found no need for the State to demonstrate that the child was unavailable or unable to testify in order to invoke such "firmly rooted" exceptions to the hearsay rule. *Id.* at 354. While it might be sound policy to relax a defendant's right to confront his accusers in order to protect the innocent child victims of sexual assault from having to relive the trauma through live trial testimony, such a policy necessitates that the judiciary steadfastly guard other rights of the defendant.

61. *Harmelin*, 501 U.S. at 965 (asserting that there is no proportionality requirement within Eighth Amendment). Only Chief Justice Rehnquist joined Justice Scalia in this conclusion. *Id.*

62. *See id.* at 994 (finding that Court properly decided *Coker* and *Enmund* because death penalty cases call for heightened judicial scrutiny).

63. *See id.* (stating that "death is different"). Justice Scalia made this statement after already finding that the Eighth Amendment does not generally contain a proportionality guarantee. *Id.* However, when dealing with the precedents of *Coker* and *Enmund*, two cases standing for the requirement of proportionality, Scalia admitted that the Court decided those cases correctly. *Id.* However, he limited such proportionality exclusively to the field of capital cases and refused to extend the doctrine out of the context of the death penalty. *Id.*


65. *See supra* notes 47-51 and accompanying text (noting difficulty of applying proportionality review in noncapital context).

its proportionality analysis in capital cases. Those objective factors mirror the factors used in the noncapital context and include the following: (1) the gravity of the penalty in relation to the crime; (2) the sentences imposed within the same jurisdiction on similar or more serious crimes; and (3) the sentences imposed in other jurisdictions for the same crime. Although some courts have criticized the use of these factors in the noncapital context, the contrasts between the death penalty and other sentences have led to greater acceptance of these factors in capital proportionality review. Thus, in the last twenty years, the Supreme Court has applied these factors in finding the death penalty disproportionate to two separate classes of crimes in two landmark decisions.

B. Enmund v. Florida

In Enmund v. Florida, the Court considered whether the death penalty was a disproportionate sentence for a defendant involved in a felony-murder who did not actually shoot the victims of a robbery or possess any intent to kill. A jury convicted the defendant and sentenced him to death as a result


68. See Enmund, 458 U.S. at 789-97 (conducting proportionality review using objective factors).


70. See Rummel v. Estelle, 445 U.S. 263, 275 (1980) (endorsing Court's use of proportionality review to invalidate death penalty for rape of adult woman in Coker). The Court found Coker's proportionality analysis acceptable because the Court could "draw a 'bright line' between the punishment of death and the various other permutations and commutations of punishments short of that ultimate sanction." Id.; see Steven Grossman, Proportionality in Non-Capital Sentencing: The Supreme Court's Tortured Approach to Cruel and Unusual Punishment, 84 Ky. L.J. 107, 152 (1996) (finding that irrevocability and severity of death penalty affords courts better opportunity to objectively apply proportionality analysis than in comparison of differing lengths of prison terms).

71. See Enmund, 458 U.S. at 783-84 (finding death penalty disproportionate for felony-murder defendant who neither killed nor intended to kill); Coker, 433 U.S. at 592 (finding death penalty grossly disproportionate to crime of rape of adult woman).


73. See Enmund v. Florida, 458 U.S. 782, 783-84 (1982) (finding death penalty disproportionate for felony-murder defendant who neither killed nor intended to kill). In Enmund, the Court considered whether the death penalty constituted excessive punishment for a getaway driver involved in a robbery felony-murder who did not actually kill the victims and had no intent to kill. Id. at 784. During the course of the robbery, one of Enmund's accomplices shot and killed an elderly couple. Id. The jury convicted Enmund under the felony-murder doctrine as a principal in the first degree murder and sentenced him to death. Id. On appeal,
of his role as the driver in the armed robbery of an elderly couple.\textsuperscript{74} The facts showed not only that the petitioner did not kill the victims, but also that he did not contemplate that one of his accomplices would kill the couple.\textsuperscript{75} Thus, the Court determined that the petitioner lacked any intent to kill.\textsuperscript{76} The Court next observed that only eight jurisdictions in the United States imposed the death penalty on defendants involved in felony-murders who did not kill or possess any intent to kill.\textsuperscript{77} Furthermore, the Court followed precedent in reviewing the attitudes of the international community on this issue.\textsuperscript{78} The Court noted that England abolished its own felony-murder doctrine and that the rest of Europe had never adopted the doctrine.\textsuperscript{79} This lack of societal support for the death penalty in cases such as Enmund's prompted the Court to conclude popular sentiment weighed heavily against the imposition of the death penalty for the crime at issue.\textsuperscript{80} Thus, the Court found "death [to be] an unconstitutional penalty absent an intent to kill."\textsuperscript{81}

Enmund argued that the death penalty constituted a disproportionate punishment in light of the fact that he served only as a driver and had no intent to kill. \textit{Id.} The Court employed the traditional proportionality analysis, focusing on the type of punishment, legislative attitudes, international opinion, and sentencing decisions of juries. \textit{Id.} at 788-89. The Court found that only eight jurisdictions in the country allowed for the imposition of the death penalty for felony-murder. \textit{Id.} at 792-93. The Court also looked to international opinion, noting that several nations had abolished or severely restricted the felony-murder doctrine. \textit{Id.} at 796 n.22. These factors led the Court to find the death penalty a disproportionate punishment for defendants such as Enmund, who lack the requisite culpable mental state for murder. \textit{Id.} at 796, 799. \textit{But see} Tison v. Arizona, 481 U.S. 137, 158 (1987) (limiting \textit{Enmund} by holding that death penalty is not disproportionate for felony-murder convictions of defendants who did not kill but who exhibited "reckless indifference to human life").

\textsuperscript{74} \textit{Enmund}, 458 U.S. at 784.
\textsuperscript{75} \textit{Id.}
\textsuperscript{76} \textit{Id.} at 796.
\textsuperscript{77} \textit{Id.} at 792-93.
\textsuperscript{78} \textit{See id.} at 796 n.22 (citing \textit{Coker} as authority to examine international opinion).
\textit{Enmund} based its international review on \textit{Coker}'s statement that "the climate of international opinion concerning the acceptability of a particular punishment" is relevant to a complete proportionality review. \textit{Coker} v. Georgia, 433 U.S. 584, 596 n.10 (1977). \textit{But cf.} Stanford v. Kentucky, 492 U.S. 361, 369 (1989) (determining that Eighth Amendment does not preclude imposition of death penalty on defendants who commit crimes at 16 or 17 years of age). When the \textit{Stanford} Court addressed the issue of societal standards of decency, it emphasized that it would review "American conceptions of decency" and not international standards. \textit{Id.} at 369 n.1.
\textsuperscript{79} \textit{Enmund} v. Florida, 458 U.S. 782, 796 n.22 (1982).
\textsuperscript{80} \textit{See id.} (acknowledging more societal support for death penalty in present case than in \textit{Coker} but concluding that societal sentiment still rejected death penalty in this case). \textit{But see} Tison v. Arizona, 481 U.S. 137, 158 (1987) (applying felony-murder doctrine to affirm death penalty for defendant who did not actually kill in commission of felony but demonstrated reckless disregard for human life).
\textsuperscript{81} \textit{Enmund}, 458 U.S. at 796.
C. Coker v. Georgia

In *Coker v. Georgia*, the Supreme Court also addressed the applicability of the death penalty to an entire class of crimes. *Coker* involved a proportionality challenge to a Georgia statute imposing the death penalty in cases of aggravated rape. The Court used a proportionality analysis focusing on the type and severity of the punishment in relation to the crime. The Court also assessed the trends of state legislatures in setting punishments for rape. This analysis of legislative trends centered on the punishments for rape not only in this country, but also throughout the developed nations of the world. Georgia was the only American jurisdiction imposing the death penalty for the rape of an adult woman, and only three out of sixty surveyed nations imposed such a penalty. The results of this analysis led the Court to find that the evidence


83. See *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (finding death penalty for rape of adult woman grossly disproportionate). In *Coker*, the Supreme Court decided whether the death penalty constituted a disproportionate punishment for a defendant convicted of raping an adult woman. *Id.* The petitioner in *Coker* broke into a couple's home, tied up the husband, and raped the wife at knife point. *Id.* at 587. Earlier in the evening, the petitioner had escaped from a Georgia prison where he had been serving various sentences for murder, rape, and aggravated assault. *Id.* Georgia's capital sentencing system, which the Supreme Court had recently declared unconstitutional in *Furman*, was restructured prior to *Coker*, and the Court had validated the new procedure. See *Gregg v. Georgia*, 428 U.S. 153, 206-07 (1976) (upholding death sentence because Georgia's procedural requirements for imposition of capital sentence ensured against arbitrary and random death sentences). Thus, in *Coker*, there were no procedural challenges to the death sentence. Instead, the defendant simply claimed that rape was not in the category of crimes deserving of the death penalty. *Coker*, 433 U.S. at 592. The Court evaluated the claim using the following objective factors: (1) the gravity of penalty in relation to the crime; (2) the sentences imposed by the legislature for similar or more serious crimes in the same jurisdiction; and (3) the sentences imposed in other jurisdictions for similar crimes. *Id.* at 593-600. This analysis found that only three states allowed for the death penalty for rape, and within those states, juries rarely imposed the death sentence. *Id.* at 595-96. Further, Georgia law required that certain aggravating circumstances exist before defendants convicted of deliberate killings could receive the death penalty. *Id.* at 600. Thus, rapists who did not kill their victims could receive sentences that were more severe than those of the deliberate killer. *Id.* The Court could not accept this anomaly and held that the death penalty is "an excessive penalty for the rapist who, as such, does not take human life." *Id.* at 598.

84. *Id.* at 592.

85. See *id.* at 597-98 (utilizing objective factors in analysis).

86. See *id.* at 593-96 (utilizing objective factors in analysis).

87. See *id.* at 596 n.10 (finding international opinion helpful in analysis). The Court found support for its decision to conduct a survey of international opinion from its opinion in *Trop v. Dulles*. *Id.*; see *Trop v. Dulles*, 356 U.S. 86, 102 (1958) (suggesting that international opinion should enter into proportionality analysis to determine global society's feeling towards particular punishments).

"weigh[ed] very heavily on the side of rejecting capital punishment as a suitable penalty for raping an adult woman." The next Part of this Note further examines the facts and reasoning of the Coker decision.

IV. Analysis of Coker v. Georgia

A. The Decision and Its Rationale

In Coker v. Georgia, the United States Supreme Court found the death penalty an unconstitutional punishment for the rape of an adult woman when death does not result for the victim. Louisiana's capital rape statute imposes the death penalty on a defendant convicted of the rape of a child under the age of twelve when death does not result for the victim. Thus, the only difference between the present Louisiana law and the invalidated Georgia law at issue in Coker is the age of the victim. Given the similarity of the Georgia law at issue in Coker and the current Louisiana law at issue in this Note, a more comprehensive understanding of the facts and rationale of Coker will aid in the analysis of the constitutionality of the present Louisiana capital child rape statute.

On September 2, 1974, Ehrlich Anthony Coker escaped from a Georgia state prison where he was serving various sentences for murder, rape, kidnapping, and aggravated assault. Upon his escape, Coker broke into the home of Allen and Elnita Carver at approximately 11:00 p.m. Coker tied up Mr. Carver in the bathroom and proceeded to rape Mrs. Carver as he threatened her with a knife. Coker stole the Carvers' car, kidnapped Mrs. Carver, and then raped her before authorities captured him. Georgia charged Coker under a law imposing the death penalty for rape under certain circumstances.

89. Id. at 596.
90. See infra Part IV.A (discussing facts and rationale of Coker).
92. See LA. REV. STAT. ANN. § 14:42(C) (West 1996) (stating that if victim of aggravated rape was under age of 12 years, then offender "shall be punished by death or life imprisonment").
94. Id.
95. Id.
96. Id.
97. See GA. CODE ANN. § 26-3102 (Supp. 1976) (allowing imposition of death penalty only after jury finding of statutory aggravating circumstance); id. § 27-2534.1 (listing statutory aggravating circumstances). The relevant part of § 27-2534.1 allowed for the imposition of the death penalty in cases of rape under the following three circumstances: (1) the rapist has a prior conviction for a capital felony; (2) the rape was committed while the offender was engaged in
Coker’s rape of Mrs. Carver was committed with two of these circumstances present: (1) Coker had a prior capital conviction; and (2) Coker raped Mrs. Carver while engaged in an armed robbery. The jury convicted Coker and imposed the death penalty. Coker appealed, arguing that capital punishment in the case of rape was excessive and violated the Eighth Amendment’s guarantee against cruel and unusual punishments.

Five years prior to Coker, the United States Supreme Court in Furman v. Georgia invalidated Georgia’s death penalty because of flaws in Georgia’s death sentencing procedures that invited arbitrary and discriminatory application of the death penalty. The year before the Supreme Court heard Coker, the Court approved the new system that Georgia designed in reaction to Furman, which alleviated the procedural infirmities. The defendant in Coker, however, did not make a procedural challenge to Georgia’s capital system, but instead attacked the proportionality of the death penalty for a crime from which no death resulted. Therefore, Coker presented the Supreme Court with its first chance in the post-Furman era to consider the constitutionality of the death penalty for a crime other than murder.

committing another capital felony or aggravated battery; or (3) the rape was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery on the victim. Id.

98. See id. § 27-2534.1(b)(1)-(2) (listing prior capital felony conviction and commission of rape while engaged in armed robbery as two circumstances in which death penalty is available for rape).


100. Id. at 592.


102. See Furman v. Georgia, 408 U.S. 238, 239-40 (1972) (per curiam) (invalidating Georgia’s death penalty statute due to arbitrary and discriminatory application). In Furman, the Court addressed whether the death penalty constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. Id. The case consolidated appeals by three defendants sentenced to death under Georgia and Texas law. Id. at 240 (Douglas, J., concurring). The Court analyzed whether the sentencing procedures utilized in Georgia and Texas made the imposition of the death penalty susceptible to arbitrary and discriminatory application. Id. at 309 (Stewart, J., concurring). A majority of the Court concluded that the rarity of the death penalty’s imposition in this country suggests that it has not been regularly or fairly applied. Id. at 293 (Brennan, J., concurring). As Justice Stewart stated, the death penalty was "unusual" in that it was so "wantonly and so freakishly imposed." Id. at 310 (Stewart, J., concurring).

103. See Gregg v. Georgia, 428 U.S. 153, 207 (1976) (finding that Georgia’s new bifurcated capital sentencing structure provided sufficient safeguards against arbitrary or discriminatory application).

104. See Karp, supra note 23, at 1716 (analyzing Coker and examining its possible future implications).

105. See id. at 1715 (discussing prior Supreme Court decisions on death penalty prior to Coker).
The Coker Court attempted to discern a workable framework for proportionality review from the often unclear previous opinions of the Court on the subject.\textsuperscript{106}

The Court began its opinion by confirming its finding in Gregg v. Georgia\textsuperscript{107} that the "death penalty is not invariably cruel and unusual punishment within the meaning of the Eighth Amendment."\textsuperscript{108} However, the Coker Court also found that the Eighth Amendment not only applies to barbaric punishments but also bans those punishments that are excessive in relation to the object crime.\textsuperscript{109} Coker adopted Gregg's definition of "excessive" in that a punishment is excessive if it (1) makes no measurable contribution to the accepted goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime.\textsuperscript{110} Finally, the Court acknowledged the importance of conducting a proportionality review based on objective factors, rather than on the subjective views of individual Justices.\textsuperscript{111} Coker listed such objective factors as public attitudes concerning a particular sentence, legislative attitudes toward a particular sentence, and the attitudes of juries as reflected by their sentencing decisions that courts may consider.\textsuperscript{112}

The analysis in Coker began with an examination of the historical and present judgment of society concerning the imposition of the death penalty in

\textsuperscript{106} See Trop v. Dulles, 356 U.S. 86, 103 (1958) (holding that deprivation of United States citizenship for soldier's military desertion violated Eighth Amendment's proportionality guarantee); Weems v. United States, 217 U.S. 349, 381 (1910) (holding that 15 year prison term at hard labor with wrist and ankle shackles was unconstitutionally disproportionate to crime of falsifying bank records).

\textsuperscript{107} 428 U.S. 153 (1976).

\textsuperscript{108} See Coker v. Georgia, 433 U.S. 584, 591 (1977) (affirming Gregg's finding that death penalty is not inherently cruel and unusual); see also Gregg, 428 U.S. at 207 (affirming Georgia's death sentence procedures and finding that death penalty is not always cruel and unusual). In Gregg, the Court addressed whether the imposition of the death penalty for murder violated the Eighth and Fourteenth Amendments. Id. at 158. The case involved a defendant sentenced to death after conviction on counts of armed robbery and murder. Id. Georgia's sentencing procedures, which the Court had previously declared constitutionally deficient in Furman., were no longer in existence. Id. at 162-63. Instead, Georgia provided a bifurcated system in which the first stage established the defendant's guilt or innocence and the second stage established the punishment. Id. In the punishment stage, a list of aggravating and mitigating factors guided the jury in order to ensure against arbitrary imposition of the death penalty. Id. at 196-97. These protections compelled the Court to affirm the imposition of the defendant's death penalty because the additional protections instituted in Georgia assured that juries would no longer "wantonly and freakishly impose the death sentence." Id. at 207.

\textsuperscript{109} Coker, 433 U.S. at 592.

\textsuperscript{110} See id. (stating that punishments could fail on either of two grounds).

\textsuperscript{111} See id. at 593 (finding need for objective review).

\textsuperscript{112} Id. at 593-97.
cases of rape. The Supreme Court emphasized that after Furman, states choosing to impose the death penalty modified their capital sentencing procedures in order to satisfy the requirements of Furman. Thirty-five states immediately reinstated the death penalty for murder, leading to Gregg's conclusion that a large section of our society endorsed the death penalty. However, the Coker Court found that the post-Furman capital legislation did not indicate such a clear showing of popular support for the death penalty in cases of rape. Sixteen states included rape as a capital offense prior to Furman. However, only three of those states, including Georgia, imposed the death penalty for rape in their revised, post-Furman statutes. Furthermore, the Court invalidated the other two state statutes on other grounds prior to Coker. Thus, in 1977, only Georgia punished the rape of an adult woman as a capital offense. Coker considered only the constitutionality of the rape of an adult woman, while acknowledging that two states, Florida and Mississippi, authorized the death penalty for the rape of a child. Parts IV.B and IV.C of this Note discuss the reactions of Florida and Mississippi to Coker in greater detail.

113. Id. at 593. The Court began by finding that at no time in the 50 years prior to Coker had a majority of the states authorized death as a punishment for rape. Id. The Court found that by 1971, just prior to the Court's decision in Furman that invalidated the death penalty provisions in most states, 16 states and the federal government authorized capital punishment for the rape of an adult female. Id.

114. See id. (discussing reaction to Furman).

115. Id. at 593-94.

116. Id. at 594.

117. Id.


120. Id.

121. Id. at 595.

122. See infra notes 149-64 and accompanying text (discussing treatment of Coker by Supreme Court of Florida and Supreme Court of Mississippi).
Because Georgia was the only state in the country to allow the death penalty for the rape of an adult woman, the Supreme Court found that legislative attitude regarding the death penalty for rape "obviously weighs very heavily on the side of rejecting capital punishment as a suitable penalty for raping an adult woman."{123} This conclusion did not end the Supreme Court's inquiry, however. The Court reviewed jury sentences in Georgia in cases prosecuted under the law at issue in Coker.{124} According to submissions presented to the Court, the Georgia Supreme Court reviewed sixty-three rape convictions between 1973 and the time of the Coker decision.{125} Of these sixty-three convictions, only six defendants received the death penalty for their crimes.{126} The Court recognized that the sparing imposition of the death penalty could simply reflect juries' reservation of the death penalty for particularly heinous rapes.{127} However, the Court took notice of the fact that nine out of every ten juries that had the opportunity to impose the death penalty on convicted rapists failed to do so.{128} These numbers convinced the Court that jury attitudes, like the legislative attitudes the Court had previously addressed, indicated strong societal disapproval of the death penalty for rape.{129}

Next, the Supreme Court cited other more serious crimes for which the death penalty was not available in Georgia.{130} For example, a defendant convicted of a deliberate killing did not receive the death penalty absent proof of aggravating circumstances.{131} Thus, a strange anomaly could occur whereby Georgia might punish a murderer less severely for ending another's life than it punishes the rapist who allows the victim to live.{132} The Supreme Court

123. Coker, 433 U.S. at 596. The Court noted that under Trop, it may also consider international opinions regarding a particular punishment. Id. at 596 n.10. Because only 3 out of 60 surveyed major nations in the world authorized the death penalty for rape, this further weighed against Georgia's statute. Id. (citing DEPT OF ECONOMIC AND SOCIAL AFFAIRS, UNITED NATIONS, CAPITAL PUNISHMENT 86 (1968)).

124. See Coker, 433 U.S. at 596-97 (discussing sentencing attitudes of juries). But cf. State v. Gardner, 947 P.2d 630, 650 (Utah 1997) (finding that imposition of death penalty for prisoner who committed aggravated assault was excessive and in violation of Utah Constitution and Eighth Amendment). The Gardner court noted that such an inquiry into jury behaviors regarding punishments for certain crimes may not be feasible. Id. In Gardner, no prosecutor had sought a capital conviction under the provision of the law at issue prior to petitioner's case. Id.


126. Id.

127. See id. at 597 (acknowledging that low number of death sentences could result from reluctance of juries to impose death penalty except in extreme cases).

128. Id.

129. Id.

130. See id. at 600 (discussing punishments in Georgia for deliberate killings).

131. Id.

132. Id.
could not accept this notion and used it as a further indicator that Georgia’s
death penalty for cases of rape was disproportionately excessive in view of the
crime. 133

The Court openly acknowledged rape as a horrible and violent crime,
stating that "short of homicide, it is the ultimate violation of self." 134 Rape
involves physical and psychological harm to the victim and causes societal
harm by undermining a community’s sense of security and well-being. 135 The
Court further noted that rape is "without doubt deserving of serious punish-
ment, but in terms of moral deprivity and injury to the public, it does not
compare with murder." 136 Coker recognized a fundamental difference in the
murderer’s victim, for whom life is over, and the rapist’s victim, who would
certainly be greatly damaged but "normally not beyond repair." 137

Coker was a plurality decision, with Justices Stewart, Blackmun, and
Stevens joining in Justice White’s plurality opinion. 138 Justices Marshall and
Brennan concurred in the result, reiterating their position that the death
penalty itself is a cruel and unusual punishment. 139 Justice Powell, concurring
in the judgment, disagreed with the plurality’s broad assertion of the death
penalty’s excessiveness for all cases of rape. 140 Instead, Justice Powell felt
that the Eighth Amendment may not foreclose the imposition of the death
penalty in the case of a particularly brutal and savage rape. 141 Justice Powell
believed it unnecessary to make the majority’s sweeping assertion that the
death penalty is always a disproportionate punishment for the crime of rape. 142
Justice Powell wanted the Court to wait until a particularly savage rape
resulted in a death sentence before adjudicating the matter entirely. 143 Such
patience would give the Court the time to evaluate whether the objective
indicators of society’s "evolving standards of decency" called for the death
penalty in extremely brutal cases of rape. 144

133. See id. (finding it difficult to accept notion that "rapist, with or without aggravating
circumstances, should be punished more heavily than the deliberate killer").
134. Id. at 597.
135. See id. (acknowledging damage to victim and to society from rape).
136. Id. at 598.
137. Id.
138. Id. at 584.
139. Id. at 600-01.
140. See id. at 601 (Powell, J., concurring) (stating that death penalty may prove appropri-
ate punishment in brutal cases of rape).
141. Id. at 603 (Powell, J., concurring).
142. Id. at 601 (Powell, J., concurring).
143. See id. (Powell, J., concurring) (stating that proper facts could show that society does
sanction death penalty for outrageous cases of rape).
144. Id. at 603 (Powell, J., concurring).
Chief Justice Burger wrote the Coker dissent, which Justice Rehnquist joined. The dissent sharply disagreed with the plurality's conclusion that the death penalty is excessive in cases of rape. The dissent found the decision to be unnecessarily broad, foreclosing the death penalty even for repeated rapists who pose a constant danger to society. The Chief Justice believed that the decision to protect society from the danger posed by such a repeated sexual offender was predominantly legislative and that the majority decision seriously impinged Georgia's legislative judgment.

B. Florida's Reaction to Coker v. Georgia

When Coker came before the Court, two states, Mississippi and Florida, provided for the death penalty in cases of the aggravated rape of a child. Buford v. State provided the Florida Supreme Court its first opportunity to examine its child rape statute in light of Coker. Buford involved, among other things, a challenge to a Florida law imposing capital punishment in cases involving the sexual battery of a child. The Florida court noted that Coker involved the rape of an adult woman, leaving unsettled the issue of whether the death penalty for the rape of a child is a disproportionate punishment.

145. Id. at 604-22 (Burger, C.J., dissenting).
146. See id. at 605 (Burger, C.J., dissenting) (finding that Court's decision prevents Georgia from imposing most effective form of punishment in case of habitual offender).
147. Id. at 610 (Burger, C.J., dissenting).
148. Id. (Burger, C.J., dissenting).
149. Id. at 595.
150. 403 So. 2d 943 (Fla. 1981).
151. See Buford v. State, 403 So. 2d 943, 950-51 (Fla. 1981) (finding Coker applicable to case imposing death penalty for child rapist). In Buford, the Supreme Court of Florida decided whether the death penalty constituted an excessive punishment for the crime of child rape. Id. at 950. The defendant in Buford appealed convictions of rape and murder, for each of which he was sentenced to death. Id. at 944. In his appeal, petitioner attacked the constitutionality of imposing a death sentence for the crime of sexual battery upon a child. Id. at 950. The Florida Supreme Court first addressed the Coker opinion by acknowledging that the opinion itself did not decide the issue of whether the death penalty is grossly disproportionate for the rape of a child. Id. However, the court then looked to the rationale of the Coker decision, specifically quoting sections in which the United States Supreme Court distinguished rape from murder and placed great emphasis on the fact that a rapist, if no more than that, does not take human life. Id. at 951. The Florida Supreme Court thus concluded that "[t]he reasoning of the justices in Coker v. Georgia compels [the court] 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." Id.
153. Buford, 403 So. 2d at 950.
Despite the difference in the victims' ages in Coker and Buford, the Florida Supreme Court applied the Coker rationale to the issue of capital punishment for child rape. The court found that Coker's result hinged on the finding that rape, unaccompanied by any other circumstances, does not involve the taking of another human life. The Florida Supreme Court cited language in Coker seemingly foreclosing the possibility of a death sentence, "unique in its severity and irrevocability," for any rapist who does not take a human life. Applying Coker, the court invalidated Florida's capital child rape statute, finding the death penalty "grossly disproportionate and excessive punishment for the crime of sexual assault."

C. Mississippi's Reaction to Coker v. Georgia

Like Florida, in 1977 Mississippi also punished the rape of a child under the age of twelve with the death penalty. Immediately following Coker, the Mississippi Supreme Court evaluated the constitutionality of its child rape law in Upshaw v. State. The defendant in Upshaw received the death penalty as a result of his conviction for the rape of his young niece. Upshaw

154. Id. at 950-51.
155. Id. at 951 (quoting Coker v. Georgia, 433 U.S. 584, 598-99 (1977)).
156. Id. (quoting Coker, 433 U.S. at 598).
157. Id.
159. See Upshaw v. State, 350 So. 2d 1358, 1360 (Miss. 1977) (finding that Mississippi's capital child rape statute did not impose disproportionate punishment in light of crime). In Upshaw, the Mississippi Supreme Court addressed the issue of whether imposing the death penalty on child rapists constituted excessive punishment. Id. The defendant in Upshaw appealed his conviction and death sentence for the rape of his young niece. Id. The defendant premised his argument on the basis that the imposition of the death penalty for the rape of a child constituted cruel and unusual punishment in violation of his Eighth Amendment rights. Id. Although the Mississippi Supreme Court heard arguments on the case prior to Coker, the court deferred consideration until the United States Supreme Court decided Coker. Id. After Coker, the Mississippi court requested additional briefs on the applicability of Coker to the Upshaw case. Id. The Mississippi Supreme Court decided that Coker only applied to the rape of an adult woman. Id. The court focused on the fact that the Coker opinion carefully refrained from deciding the issue of capital punishment in relation to the crime of child rape and that the opinion specifically stated that the case involved the rape of an adult woman at least seven times. Id. The court then premised its holding on its view of the United States Supreme Court's position relating to the Eighth Amendment as a barrier to the imposition of the death penalty for minor crimes. Id. The court then concluded that the rape of a child was not a minor crime, and absent a constitutional infirmity, the court should defer to the legislature's judgment in defining crime and punishment. Id. at 1361. Thus, the court found the statute constitutional. Id.
160. Id. at 1359.
reached the Mississippi Supreme Court prior to Coker; however, the court postponed its decision on the constitutionality of the death penalty for child rape pending Coker's outcome. The court found that Coker's numerous references to an "adult woman" made Coker inapplicable to cases of child rape. Thus, the court distinguished Coker because, according to the Mississippi Supreme Court, Coker "took great pains to limit its decision to the applicability of the death penalty for the rape of an adult woman." Because, in the Upshaw court's view, the rape of a child involved a much more serious offense than the rape of an adult, the Mississippi state legislature remained free to determine that the death penalty was proper for the rape of a child.

Many post-Coker cases interpreting the breadth of Coker's holding suggest that the Mississippi Supreme Court's narrow reading of Coker in Upshaw is a minority position. In fact, the Mississippi Supreme Court conformed to the majority understanding of Coker's reasoning in 1989, when the court found that life imprisonment was the maximum penalty for the rape of a child under Mississippi law. Most courts and commentators believe that Coker stands for the proposition that the death penalty is an inappropriate and excessive penalty for crimes not involving the taking of human life.

161. Id. at 1360.
162. Id.
163. Id.
164. Id.
165. See United States v. Cheely, 36 F.3d 1439, 1457 n.3 (9th Cir. 1994) (Alarcon, J., concurring and dissenting) (acknowledging that Supreme Court espoused principle in Coker that death penalty may not apply absent homicide); State v. Coleman, 605 P.2d 1000, 1017 (Mont. 1979) (finding Coker relevant to all crimes for which death penalty is imposed that did not result in loss of life).
166. See Leatherwood v. State, 548 So. 2d 389, 402-03 (Miss. 1989) (finding that life imprisonment was maximum punishment for rape of child under Mississippi law). At the time of Leatherwood, in order to impose the death penalty, Mississippi law required a finding that the defendant actually killed, attempted to kill, intended that a killing take place, or contemplated lethal force be employed. Id. Because none of these factors exist in the case of rape, the death penalty cannot be imposed on a rapist. Id.
167. See Cheely, 36 F.3d at 1457 (Alarcon, J., concurring and dissenting) (finding Coker to proscribe use of death penalty for defendant who does not take human life); Leigh Dingerson, Reclaiming the Gavel: Making Sense Out of the Death Penalty Debate in State Legislatures, 18 N.Y.U. REV. L. & SOC. CHANGE 873, 878 (1991) (arguing that Coker finds that the imposition of death penalty for crimes from which no death occurs is unconstitutional and that no subsequent Supreme Court decision has challenged this precedent); Stephen P. Garvey, "As the Gentle Rain From Heaven": Mercy in Capital Sentencing, 81 CORNELL L. REV. 989, 1009 n.74 (1996) (stating that courts generally understand Coker to prohibit death sentences for crimes other than murder); Ved P. Nanda, Recent Developments in the United States and Internationally Regarding Capital Punishment—An Appraisal, 67 ST. JOHN'S L. REV. 523, 532 (1993) (finding that Coker stands for proposition that death sentence is excessive when victim is not
Recently, however, the Louisiana Supreme Court reached the same conclusion as Upshaw regarding Coker's applicability to statutes imposing the death penalty for crimes other than the rape of an adult woman. 168

V Louisiana's Capital Child Rape Statute

A. The Statute's First Challenge

In 1995, the legislature of Louisiana revised the state's aggravated rape statute to provide the death penalty as punishment for those convicted of raping a child under twelve years of age. 169 In so doing, Louisiana became the first state to enact a statute imposing the death penalty on child rapists since the Supreme Court's decision in Coker 170 Furthermore, Louisiana is currently

...
the only state in the union to provide the death penalty in cases of child rape.\textsuperscript{171} Such obvious departure from the national consensus eventually required the Louisiana Supreme Court to decide the constitutionality of imposing the death penalty on child rapists.\textsuperscript{172}

Shortly after the Louisiana legislature revised the aggravated rape statute, the district attorney in New Orleans charged Anthony Wilson with the aggravated rape of a five-year-old girl and began prosecution under the newly enacted death penalty provision of the aggravated rape statute.\textsuperscript{173} Wilson moved to quash the indictment, arguing that the death penalty was disproportionate to the crime of rape, and the trial court granted the motion.\textsuperscript{174} In a separate case, the district attorney in Monroe charged Patrick Dewayne Bethley with the aggravated rape of three girls under the same aggravated rape statute and sought the death penalty.\textsuperscript{175} Bethley also moved to quash the indictment on the grounds that the death penalty was unconstitutionally disproportionate to the crime of rape.\textsuperscript{176} The court granted the motion; however, the court found the proportionality argument unpersuasive and instead dismissed the case because the statute failed to sufficiently limit the class of defendants eligible for the death penalty.\textsuperscript{177} The state appealed both decisions, and the Louisiana Supreme Court consolidated the cases and issues upon accepting the appeal.\textsuperscript{178} Thus, the case of \textit{State v. Wilson}\textsuperscript{179} afforded Louisiana's highest court the opportunity to determine the constitutionality of one

\textsuperscript{171} See \textit{Leatherwood}, 548 So. 2d at 402-03 (finding that life imprisonment was maximum punishment for rape of child under Mississippi law); see also \textit{Buford v. State}, 403 So. 2d 943, 951 (Fla. 1981) (holding that Florida's capital child rape statute was unconstitutional under Eighth Amendment in light of Supreme Court's reasoning in \textit{Coker}). \textit{But cf.} S. 258, 144th Leg., Reg. Sess. (Ga. 1997) (proposing amendment to Georgia's rape statute to include death penalty when victim is under 12 years old). The proposed bill failed to pass. \textit{Id.}

\textsuperscript{172} See \textit{Wilson}, 685 So. 2d at 1064 (reviewing constitutionality of Louisiana legislature's decision to include death penalty as punishment for child rape).

\textsuperscript{173} \textit{Id.} at 1064-65.

\textsuperscript{174} \textit{Id.}

\textsuperscript{175} \textit{Id.} at 1065. Bethley's case was particularly heinous because he knew he was HIV positive at the time of the rapes, and one of the rape victims was Bethley's own daughter. \textit{Id.} One commentator has advocated the death penalty in cases of rape involving an HIV positive rapist. See Stefanie S. Wepner, \textit{The Death Penalty: A Solution to the Problem of Intentional AIDS Transmission Through Rape}, 26 J. MARSHALL L. REV. 941, 965 (1993) (advocating capital punishment in cases of rape by HIV positive assailants because prison will not be adequate punishment to deter potential rapists or vindicate rights of victims).


\textsuperscript{177} \textit{Id.}

\textsuperscript{178} \textit{Id.} at 1063.

\textsuperscript{179} 685 So. 2d. 1063 (La. 1996).
of the state's most controversial laws.¹⁸⁰

B. State v. Wilson

After a brief discussion of the history of the Eighth Amendment, the Wilson court concluded that the Eighth Amendment proscribed punishments which (a) made no measurable contribution toward acceptable goals of punishment and thus imposed needless pain and suffering or (b) were grossly out of proportion to the severity of the crime.¹⁸¹ The Louisiana court then addressed the applicability of Coker to the case before it. The court acknowledged that Coker forbade the imposition of the death penalty in the case of the rape of an adult woman.¹⁸² However, despite language in Coker seemingly foreclosing the use of the death penalty regardless of the type or brutality of the rape, the Wilson court found Coker applicable only if the rape involved an adult woman.¹⁸³

¹⁸⁰ See State v. Wilson, 685 So. 2d 1063, 1073 (La. 1996) (finding that death penalty is not excessive punishment for child rape), cert. denied sub nom. Bethley v. Louisiana, 117 S. Ct. 2425 (1997). The Louisiana Supreme Court directly addressed whether the death penalty for child rapists who did not kill violated the Eighth Amendment in light of Coker. Id. at 1064. The case was a facial challenge to Louisiana Revised Statute § 14:42, which allowed imposition of the death penalty for the rape of a child under 12. Id. The court chose to interpret Coker in a very narrow fashion, focusing on the "great pains" that the Coker plurality took to refer only to the rape of an adult woman in its opinion. Id. at 1066. This narrow reading afforded the Louisiana court the opportunity to distinguish Coker because the issue in Wilson was the rape of a child, a crime the Wilson court found even more heinous than the rape of an adult. Id. The court then analyzed the statute using the "evolving standards of decency" test that the Supreme Court employed in Trop v. Dulles, 356 U.S. 86 (1958), and endorsed in many subsequent cases, including Coker. Id. at 1067-69. The court concluded that it should afford great deference to the legislature's decisions when the court attempts to ascertain the proper standards of society. Id. at 1067. While acknowledging that Louisiana was the only state to impose such harsh punishment for this crime, the court determined that the uncertainty of state legislatures in the post-Furman era regarding what crimes are sufficient to invoke the death penalty may explain this apparent opposition. Id. at 1068-69. Thus, simply because a state is presently in the minority does not make its judgment less worthy of deference. Id. at 1069. Given all of these considerations, the court concluded that "[w]hile the Eighth Amendment bars the death penalty for minor crimes..., the crime of rape when the victim is under the age of twelve is certainly not a minor crime." Id. at 1070. Thus, the court upheld the statute. Id. at 1073. The United States Supreme Court denied certiorari because the case had not proceeded to a conviction. See Bethley v. Louisiana, 117 S. Ct. 2425, 2425-26 (1997) (statement of Justice Stevens) (noting jurisdictional bar to Court's review).

¹⁸¹ Wilson, 685 So. 2d. at 1065 (citing Gregg v. Georgia, 428 U.S. 153, 173 (1976)). This is also the test that the Supreme Court utilized in Coker. See Coker v. Georgia, 433 U.S. 584, 592 (1977).

¹⁸² Wilson, 685 So. 2d. at 1066.

¹⁸³ Id.
The Wilson court based its narrow interpretation of Coker on the fact that the plurality in Coker took "great pains" to refer only to the rape of an adult woman in its opinion. In support of this contention, the court noted fourteen occasions in either the plurality opinion, concurring opinion, or dissenting opinion where the phrase "adult woman" appears. Thus, the Louisiana Supreme Court quickly found Coker inapplicable to the question of imposing the death penalty on child rapists. The next Part of the Note questions such a conclusion.

After distinguishing Coker, the court next conducted its own proportionality analysis of the constitutionality of the death penalty for child rapists. The court first observed that children are a "particularly vulnerable" segment of society in need of the state's special protection. In the court's opinion, the duly elected legislature had set the standards of a "maturing society" by recognizing the devastation involved in child rape and the subsequent harm resulting to the child and the community. In the court's opinion, the Louisiana legislature addressed this harm by amending the state's aggravated rape statute to permit the death penalty in cases of aggravated rape when the victim is under twelve years of age. Presumably, the Louisiana legislature felt that imposing the death penalty for child rapists would help the state fulfill its responsibility to protect its children.

184. Id. Interestingly, this is the same language that the Mississippi Supreme Court used in Upshaw v. State. However, the Wilson opinion never cites Upshaw. See Upshaw v. State, 350 So. 2d 1358, 1360 (Miss. 1977) (upholding state's capital child rape law despite Coker decision).

185. Wilson, 685 So. 2d at 1066.

186. See id. (finding rape of child more detestable than rape of adult woman).

187. See id. at 1067-73 (addressing issues of proportionality).

188. Id. at 1067. The court stated that children are neither mature enough to, nor capable of, defending themselves. Id. It is thus the state's responsibility to protect them. Id.

189. Id. "Maturing society" refers to the test that the Supreme Court adopted for Eighth Amendment challenges in Trop v. Dulles. See Trop v. Dulles, 356 U.S. 86, 101 (1958) (stating "evolving standards" test for first time). The Court found that the Amendment must draw its meaning from "the evolving standards of decency that mark the progress of a maturing society." Id. The Court accepted the "evolving standards" test in many subsequent cases involving capital proportionality review. See Campbell v. Wood, 511 U.S. 1119, 1120 (1994) (accepting that Eighth Amendment's proportionality guarantee "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society" (quoting Trop, 356 U.S. at 101)); Hudson v. McMillian, 503 U.S. 1, 8 (1992) (applying "evolving standards" test to Eighth Amendment challenge).


The Wilson court elected to give great deference to the decisions of its legislature, particularly because it acted in near unanimity on this issue. The court cited Supreme Court authority indicating that the legislature need not select the least severe penalty for the crime as long as the penalty comports with the Eighth Amendment. Also, the court presumed that legislative enactments are constitutional under both the federal and Louisiana constitutions. The court completed its analysis of the propriety of the legislation with the statement, "courts must exercise caution in asserting their views over those of the people as announced through their elected representatives."

The Wilson court next compared the Louisiana punishment for child rape with the punishments allowed other states. The court recognized Louisiana as the only state in the country to allow the death penalty for the rape of a child under the age of twelve. The court did not find this fact determinative, however, and noted that at the time of Coker, three states provided for the death penalty in cases of child rape. The court viewed these statutes, all enacted prior to Coker, as suggesting a trend in public opinion favoring the death penalty for the heinous crime of child rape. The court further sug-

The author questions whether allowing the death penalty for child rape cases will actually protect the children. Id. The enormity of death penalty litigation is an ordeal that could traumatize child victims. Id. Further, the author argues that perpetrators who are friends or relatives of the victim may use the possibility of death to dissuade the children from reporting sexual abuse. Id. The author advocates a careful consideration of all of these issues before state legislatures rush to protect children with less than effective measures. Id.

192. See Wilson, 685 So. 2d at 1067 (discussing popularity of death penalty for child rapists in Louisiana's legislature). The court noted that the Louisiana House of Representatives passed the amendment with a vote of 79 to 22. Id. at 1067 n.5. The measure then went to the Senate where it passed by the even greater margin of 34 to 1. Id. Subsequently, the governor signed the amendment into law. Id.

193. Id. at 1067 (citing Gregg v. Georgia, 428 U.S. 153, 175 (1976)).

194. Id.

195. Id.

196. See id. at 1067-69 (surveying other states' punishments for child rape).

197. Id. at 1068.

198. Id. Those states were Florida, Mississippi, and Tennessee. Id. The Supreme Court invalidated the Tennessee statute in Woodson v. North Carolina because the statute mandated the death penalty upon conviction. Id.; see generally Woodson v. North Carolina, 428 U.S. 280 (1976) (invalidating mandatory death penalties). The Florida Supreme Court found the Coker analysis controlling in its invalidation of Florida's statute in State v. Buford. See supra notes 150-57 (discussing Buford). The court makes no mention of the Mississippi Supreme Court's decision in Upshaw v. State. See supra notes 158-64 (discussing Upshaw). The Wilson court's failure to cite Upshaw is certainly perplexing because Upshaw's holding is similar to Wilson, especially in regards to its narrow reading of Coker as applicable only in cases of rape involving adult women.

199. See State v. Wilson, 685 So. 2d 1063, 1068 (La. 1996), cert. denied sub nom. Bethley
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Suggested that other states may want to adopt similar statutes, but refuse to do so because of the uncertainty created by the Supreme Court's holdings in this area. The court ended its jurisdictional survey, concluding that a constitutional infirmity does not exist in a statute simply because a state chose to be the first to enact it.

Next, the Wilson court addressed the propriety of imposing the death penalty when no death occurs as a result of the object crime. The Louisiana Supreme Court centered its discussion of this proposition on the United States Supreme Court's analysis in Enmund v. Florida. Although Enmund invalidated the death sentence involved in that case, the Wilson court relied instead on the language in Enmund that used the defendant's conduct as a standard to determine excessiveness. The Louisiana court determined that the death sentence was not excessive punishment for child rape because the deplorable nature of the rapist's conduct makes the death penalty appropriate. The court further noted that the Supreme Court has recently allowed the death penalty for a felony-murder defendant who did not actually kill the victim but only acted with reckless indifference to human life. The Wilson court used these examples to conclude that the Eighth Amendment bars the death penalty only for "minor" crimes and that child rape is certainly not a "minor" crime.

v. Louisiana, 117 S. Ct. 2425 (1997) (pointing to this trend as possibly marking "an evolution of a standard"). The "evolution of a standard" refers to the test for proportionality announced in Trop. See Trop v. Dulles, 356 U.S. 86, 100-01 (1958) (stating that Eighth Amendment must "draw its meaning from the evolving standards of decency that mark the progress of a maturing society").

200. Wilson, 685 So. 2d at 1069. The Wilson court quoted Chief Justice Burger's dissent in Coker as support for this reasoning. Id. Chief Justice Burger suggested that it is difficult to judge proportionality by looking solely at what legislatures had refrained from doing because the Court's inconsistent holdings in the area might stifle state action. See Coker v. Georgia, 433 U.S. 584, 614 (1977) (Burger, C.J., dissenting) (describing Court's holdings on Eighth Amendment as "less than lucid"). The Wilson opinion actually credited Justice Powell, rather than Chief Justice Burger, with this point. Wilson, 685 So. 2d at 1068-69.

201. Wilson, 685 So. 2d at 1069. The court noted the possibility that other states are awaiting the outcome of the challenges to the Louisiana statute before enacting their own, similar statutes. Id.

202. Id. at 1069-70.
203. See id. (discussing Enmund v. Florida).
204. Id. at 1069.
205. Id.
206. See id. at 1070 (referring to Tison v. Arizona); see also Tison v. Arizona, 481 U.S. 137, 158 (1987) (affirming death sentence when defendants exhibited "reckless indifference" to human life).
Thus, the Louisiana court ended its proportionality review of the state's capital child rape statute, finding that the death penalty for child rapists was not excessive punishment.

VI. Analysis of State v. Wilson

An analysis of Wilson should begin with a reiteration of the requirements of proportionality review mandated by Coker and other Supreme Court decisions. Coker requires a reviewing court to use the following three objective factors to guide its decision: legislative attitudes, jury attitudes, and other crimes and their respective punishments within the jurisdiction in question.

In addition to these objective factors, Coker further found the Constitution to require a court to apply its own judgment to the question of the acceptability of the death penalty for a type of crime. Given these requirements, the analysis of the correctness of Wilson necessitates three separate inquiries. First, did Wilson correctly interpret Coker as inapplicable to the constitutionality of the death penalty in cases of child rape? Second, did the Wilson court ignore required elements of proportionality review that might have led the court to a different conclusion? Finally, did Wilson reach the correct conclusions based on the factors used by the Louisiana Supreme Court in its proportionality review?

A. Wilson's Approach to the Applicability of Coker

The Wilson court mistakenly emphasized the use of the phrase "adult woman" in Coker and, thus, wrongly found Coker inapplicable to the facts of Wilson. As stated in Part IV, most courts and scholars have not placed such a restrictive inference on Coker's language. The Supreme Court used the phrase "adult woman" in Coker because the facts in Coker presented only the rape of an adult woman. The proper function of appellate courts is not to determine facts and circumstances, but to establish rules of law based on the facts and circumstances presented. Thus, appellate courts, including the

208. Id. at 1073. The court also addressed the issue of whether the statute allowed for arbitrary imposition of the death penalty. See id. at 1070-73 (finding that statute survives challenge of arbitrary application).

209. See Coker v. Georgia, 433 U.S. 584, 592 (1977) (listing these objective factors as crucial to Eighth Amendment judgments).

210. See id. at 597-98 (concluding that Court had its own "abiding conviction" that death penalty was excessive for rape).

211. See supra note 165 (providing examples of broader interpretations of Coker).

212. See Antonin Scalia, The Rule of Law as a Law of Rules, 56 U. CHI. L. REV. 1175, 1179-80 (1989) (highlighting Justice Scalia's belief that appellate courts should pronounce rules to govern subsequent similar cases instead of deciding cases based on subjective tests such as
Supreme Court, generally refrain from issuing advisory opinions on issues that are not before the Court. This doctrine, often called judicial restraint, can easily explain the Supreme Court's care in Coker to limit its ruling to the facts immediately before the Court. However, the rationale and rules of law set forth in the analysis leading to the specific holding should apply with equal force to facts and circumstances that are extremely similar to those in Coker, such as the facts of Wilson.

The analysis used by the Supreme Court in Coker indicates that Coker's holding applies to all rapes, regardless of the brutality involved. The Louisiana Supreme Court briefly quoted some of this language from Coker but decided that because the United States Supreme Court's analysis referred to the rape of an adult woman, it was inapplicable in the case of the rape of a child. Such a sweeping dismissal of the motivation behind the Supreme Court's decision to declare rape an improper crime upon which to impose a death sentence is misplaced. By focusing only on the phrase "adult woman" in Coker, the Louisiana court never addressed what appears to be the central motivation of the Coker decision: the absence of death in the crime.

The Louisiana court quoted the statement in Coker that "in terms of moral depravity and of the injury to the person and to the public, [rape] does not compare with murder, which does involve the unjustified taking of human life . . . . The murderer kills; the rapist, if no more than that, does not." The Wilson court further quoted Coker's contention that the death penalty "is an excessive penalty for the rapist who, as such, does not take human life." Facts or circumstances. Justice Scalia states that his opinions attempt to set forth a rule of law rather than resting on facts and circumstances because such a practice constrains lower courts as well as the Supreme Court and Justice Scalia himself. Id. at 1179. Such constraint is necessary to ensure predictability of precedent, which increases the law's power and stability. Id.

213. See id. (referring to practice of limiting holdings to immediate facts as "the course of judicial restraint").

214. See Coker, 433 U.S. at 601 (Powell, J., dissenting) (dissenting to majority's assertion that death penalty is excessive punishment in all cases of rape). In fact, Justice Powell believed that the Coker opinion went too far by holding that capital punishment is always a disproportionate penalty for the crime of rape, regardless of the circumstances surrounding the rape. Id. (Powell, J., dissenting). Justice Powell agreed that the death penalty was ordinarily a disproportionate penalty for the common rape. Id. (Powell, J., dissenting). He disagreed, however, with what he saw as the Court's complete ban on capital punishment for rape even in particularly vile and heinous cases. Id. (Powell, J., dissenting).


216. See Coker v. Georgia, 433 U.S. 584, 598 (1977) (finding absence of victim's death strongly persuasive evidence that death penalty was disproportionate to crime of rape).

217. Wilson, 685 So. 2d at 1066 (quoting Coker, 433 U.S. at 598).

218. Id. (quoting Coker, 433 U.S. at 598).
Despite acknowledging the reasoning in *Coker*, which appears to find the death penalty excessive punishment for crimes in which no death results, the Louisiana Supreme Court failed to reconcile *Coker*’s holding with its decision that child rape is deserving of the death penalty. Instead, the *Wilson* court wrongly decided that the analysis of *Coker* could not apply, despite the obvious similarity of the facts, because the victims’ ages differed.219 Because *Coker* should apply to the Louisiana child rape statute, the statute’s death penalty provision is unconstitutional based on the *Coker* precedent.

**B. Wilson’s Failure to Address Required Factors of Proportionality Review**

Even if *Coker* is inapplicable to the facts in *Wilson*, the Louisiana Supreme Court failed to conduct a proper proportionality review. The court addressed only one of the three required objective factors in its review of Louisiana’s capital child rape statute.220 Thus, the court failed to compare other crimes and their respective punishments within Louisiana to the crime and punishment at issue in *Wilson*.221

The *Wilson* court, in failing to compare other death eligible crimes in Louisiana with child rape, ignored one of the concerns expressed in the *Coker* opinion. Had the *Wilson* court compared other death eligible crimes in Louisiana to child rape, the court should have reached the same result as the Supreme Court in *Coker*.222 Louisiana’s current capital sentencing regime is similar to the capital structure in Georgia at the time of *Coker*.223 The Louisiana Code of Criminal Procedure requires a jury finding of at least one statutory aggravating circumstance before the imposition of any death sentence.224 For example, today in Louisiana, a deliberate killer can only receive the death

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219. *See id.* (finding *Coker* inapplicable when victim is under age of 12).
220. *See id.* at 1067-69 (looking only to attitudes of other legislatures while ignoring jury attitudes and comparisons of other crimes and punishments in Louisiana).
221. *See Coker*, 433 U.S. at 600 (addressing other, more serious, crimes in Georgia for which defendants do not receive death penalty).
222. *See id.* (comparing other crimes and punishments in Georgia to death sentence for rape). The *Coker* Court found that certain deliberate killings in Georgia were not punishable by death absent certain aggravating circumstances. *Id.* The Court could not accept the notion that society could punish a rapist more severely than a deliberate killer. *Id.*
223. *Compare* LA. CODE CRIM. PROC. ANN. art. 905.3 (West 1997) (requiring jury finding of one statutory aggravating circumstance before state imposes death sentence even in cases of deliberate, first-degree homicide) with GA. CODE ANN. § 26-3102 (Supp. 1976) (allowing imposition of death penalty only after jury finding of statutory aggravating circumstance).
224. LA. CODE CRIM. PROC. ANN. art. 905.3 (imposing death penalty only after specific jury finding of at least one statutory aggravating circumstance).
penalty upon a jury finding of certain aggravating circumstances.225 This requirement of a jury finding of aggravating circumstances before the imposition of the death penalty also existed in Georgia at the time of Coker.226 Consequently, Louisiana could punish a child rapist whose rape exhibits one of the statutory aggravating circumstances more severely than it could punish a deliberate killer whose crime lacks one of the aggravating circumstances. This is exactly the anomaly the Supreme Court refused to accept in Coker.227 However, although such an anomaly in the law of Georgia was a factor prompting the Coker Court to overturn Georgia’s capital rape statute, the Wilson court never made a similar inquiry.

The Wilson opinion also omitted any reference to another factor considered in Coker’s proportionality review: jury attitudes.228 Coker found that nine out of ten juries that were given the opportunity to utilize the death penalty in cases of the rape of an adult declined to do so.229 The Supreme Court viewed this as another factor indicating a general unwillingness by society to impose the death penalty in cases of rape.230 The Wilson court could not complete such an inquiry, however, because it did not have any reliable figures regarding juries’ attitudes towards imposing a death sentence on child rapists, or any rapist, due mostly to the Supreme Court’s decision in Coker. In fact, no executions have occurred for a nonhomicide crime in the United States since 1975, and no judge or jury has imposed the death penalty on a defendant in a nonhomicide case since 1977.231 These facts should have provided a glaring example to the Wilson court that society’s evolving standards do not include the imposition of the death penalty for crimes not resulting in death.232

225. See id. (requiring statutory aggravating circumstances before imposition of death sentence).

226. See Coker v. Georgia, 433 U.S. 584, 600 (1977) (concluding that such disparity in sentencing between killers and rapists is unacceptable); see also GA. CODE ANN. § 26-3102 (allowing imposition of death penalty only after jury finding of statutory aggravating circumstance).

227. See Coker, 433 U.S. at 600 (finding possibility of deliberate killer receiving lighter punishment than rapist unacceptable).

228. See State v. Wilson, 685 So. 2d 1063, 1067 n.6 (La. 1996) (addressing Court’s use of jury attitudes in Coker opinion), cert. denied sub nom. Bethley v. Louisiana, 117 S. Ct. 2425 (1997). Although the court recognized the importance that the United States Supreme Court placed on jury attitudes in Coker, the Louisiana Supreme Court never addressed jury attitudes regarding the death penalty for child rape.


230. Id.


232. See id. (finding lack of death sentences for crimes not resulting in death "noteworthy" in evaluation of contemporary standards of decency).
C. Analysis of Wilson's Use of Factors Addressed by the Court

Although the failure of Wilson to address two of the three factors used by the Supreme Court in proportionality analysis already renders the opinion suspect, those infirmities are not the only flaws in the opinion. Wilson's complete deference to legislative judgment without testing the legislative decision against proper constitutional standards creates a further problem within the opinion. Although the court acknowledged that legislative punishments must not be disproportionate to the offense, the court never engaged in an independent inquiry into whether the statute in question is disproportionate. Despite Louisiana being the only state to impose the death penalty in cases of child rape, the court upheld the statute by giving "great deference to [the] legislature's determination of the appropriateness of the penalty." Without a proper, independent judicial proportionality analysis, such legislative deference appears to suggest that the legislature may provide any punishment not unconstitutionally excessive, and a punishment is not excessive if the legislature provides for it. Such circular logic completely abandons the spirit behind meaningful proportionality review guaranteed by the Eighth Amendment.

Another flaw in the Wilson court's analysis relates to its conclusion based on the survey of punishments imposed for child rape in other jurisdictions. The court correctly concluded that Louisiana is the only state in the nation to impose the death penalty for child rape. In Coker, the Supreme Court found that evidence of only one jurisdiction allowing for the death penalty in cases of rape weighed heavily against the death penalty for the rape of an adult woman. However, instead of following the Supreme Court's reasoning in Coker, the Louisiana Supreme Court asserted that a state being the only one to provide for the death penalty for a class of criminals does not make that decision constitutionally infirm. Such an assertion seems to directly contra-

233. See Wilson, 685 So. 2d at 1067 (affording Louisiana legislature nearly complete control over crime and punishment).

234. See id. (giving legislature great control over selection of punishments as long as penalties are not disproportionate to crimes).

235. Id. at 1073.

236. See id. at 1067-69 (comparing other states' punishments for child rape to Louisiana's).

237. Id. at 1068.

238. See Coker v. Georgia, 433 U.S. 584, 596 (1977) (finding that capital punishment was unsuitable for rape of adult woman).

dict the primary reasoning of Coker, as well as other Supreme Court cases addressing this aspect of proportionality review. For example, Coker places great emphasis on the fact that prior to Furman, sixteen states allowed for the death penalty for the crime of rape. Furman prompted all states authorizing the death penalty to redraft their death penalty legislation to comply with Furman's requirements. In so doing, only three of the sixteen states previously imposing the death penalty for rape chose to continue this practice. Furthermore, two of those three had their capital sentencing structure invalidated because they required the mandatory imposition of the death penalty. In their redrafted statutes, each of those states omitted rape from its revised list of capital crimes.

Thus, at the time of Coker, Georgia was the only jurisdiction in the nation allowing its juries to impose a death sentence in cases of rape involving a female, adult victim. As stated, the fact that a defendant could die for the commission of rape in Georgia, yet nowhere else in the United States, factored heavily into the decision that capital punishment was an excessive penalty for rape. Thus, it is apparent that the Supreme Court not only required an inquiry into the punishments imposed on similar crimes in other jurisdictions, but the Court found this analysis exceedingly helpful and important. The Wilson court, however, ignored this Supreme Court precedent. Instead of

240. See Enmund v. Florida, 458 U.S. 782, 793 (1982) (finding that because only eight states allow for death penalty in felony-murder cases with no finding of actual intent to kill, death penalty is disproportionate punishment when defendant lacks intent to kill); Coker, 433 U.S. at 596 (stating that current attitudes with respect to death penalty for rape is not wholly unanimous among all states, but weighs heavily toward rejecting such punishment); cf. State v. Gardner, 947 P.2d 630, 650 (Utah 1997) (holding that Utah's statute imposing death penalty for prisoner convicted of aggravated assault was unconstitutional because only two jurisdictions in United States allow such punishment).


242. See id. (analyzing various state punishments for rape). The three states were Georgia, Louisiana, and North Carolina. Id.

243. Id. Louisiana and North Carolina were the two states that had to revise their capital punishment statutes. Id.

244. Id.

245. Id. at 595-96.

246. See id. at 596 (finding sentencing discrepancy unacceptable).

247. See Enmund v. Florida, 458 U.S. 782, 792-93 (1982) (finding that only eight jurisdictions allow death penalty solely based on participation in felony-murder). The Enmund Court found this relatively small number of jurisdictions informative in its decision that society had rejected capital punishment based solely on participation in a felony murder. Id.; Coker v. Georgia, 433 U.S. 584, 596 (1977) (finding that only one jurisdiction imposed death penalty for rape of adult woman). The Court considered this low number evidence that society had rejected capital punishment as a "suitable penalty for raping an adult woman." Id.
finding a lack of broad support for a particular punishment important, the *Wilson* court virtually ignored the import of Louisiana's status as the lone state in the country to impose the death penalty for child rape. 248

The final and most glaring deficiency in *Wilson* occurs during the court's discussion of the propriety of imposing the death penalty when no death resulted from the crime. 249 This discussion is undoubtedly an attempt by the court to undertake the requirement of *Coker* for a court to apply its own judgment to questions regarding the appropriateness of the death penalty. 250 *Wilson* used two Supreme Court cases to support its conclusion that the death penalty is an appropriate punishment for child rape, even when no death results, because of the appalling nature of the crime. 251 In the two Supreme Court cases cited in *Wilson*, the defendants received death sentences for their participation in felony murders and appealed their convictions under the Eighth Amendment. 252 The two cases, when taken together, suggested to the Louisiana Supreme Court that the death penalty is permissible in situations when the defendant has neither actually killed nor intended to kill, but simply acted with reckless indifference to human life. 253

Although this fact lends support to the *Wilson* conclusion, the Supreme Court precedents upon which the *Wilson* court based this conclusion are simply inapplicable to the facts of the case. The court relied on the two felony-murder cases for the proposition that the death penalty is appropriate when no death results from the crime. 254 However, those two cases arose from two felony-murders, necessarily requiring that the cases involved crimes in

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249. See id. at 1069-70 (discussing death penalty option when no death occurs from object crime).

250. See *Coker*, 433 U.S. at 597 (finding that Constitution contemplates that Court's "own judgment will be brought to bear" on acceptability of death penalty under Eighth Amendment).

251. See *Wilson*, 685 So. 2d at 1070 (concluding that appalling nature of crime, severity of harm to victim, and harm imposed on community suggest that death penalty is not excessive for crime of child rape). The two cases upon which the court relied were *Enmund* v. *Florida* and *Tison* v. *Arizona*. Id.; see *Tison* v. *Arizona*, 481 U.S. 137, 158 (1987) (finding death penalty acceptable for defendant who plays major role in felony-murder and acts with "reckless indifference to human life"); *Enmund*, 458 U.S. at 796 (finding death penalty excessive for defendant only tangentially involved in felony-murder who neither killed nor possessed intent to kill).

252. See *Tison*, 481 U.S. at 146-58 (determining propriety of death sentence of defendants convicted of felony-murder); *Enmund*, 458 U.S. at 788-801 (reviewing death sentence for defendant involved in felony-murder).


254. Id. at 1069 (discussing *Enmund* and *Tison* under heading of "Crime Without Death").
which the victims' death did occur.\textsuperscript{255} In both cases, the Supreme Court's inquiry only revolved around whether the respective defendants sufficiently participated in the felonies that led to the victims' deaths.\textsuperscript{256} The Supreme Court did not discuss the constitutionality of imposing the death penalty when no death resulted from the crime in either case because the victims actually died in both cases. Thus, the \textit{Wilson} court erroneously based its conclusion that the death penalty is appropriate punishment for crimes in which the victim is not killed on two Supreme Court cases in which the victims were, in fact, killed.

\textbf{VII. Conclusion}

As the foregoing analysis indicates, the \textit{Wilson} court incorrectly failed to apply the Supreme Court's holding in \textit{Coker} to a fact pattern identical in every way except for the age of the victim.\textsuperscript{257} Further, the court failed to address two of the three factors that the Supreme Court has found necessary to review the proportionality of a punishment in relation to its crime.\textsuperscript{258} Also, the analysis employed by the Louisiana Supreme Court is seriously flawed in many respects.\textsuperscript{259} All of these facts lead to the conclusion that \textit{Wilson} is a poorly reasoned decision and that its conclusion is incorrect in light of \textit{Coker}. Therefore, when the Supreme Court inevitably decides the issue,\textsuperscript{260} Louisiana's capital child rape statute should not survive scrutiny under \textit{Coker}'s reasoning. The Court should find that the statute allowing the death penalty

\textsuperscript{255} See Tison, 481 U.S. at 140-41 (noting that defendants shot and \textit{killed} four victims after defendants stole victims' car); Enmund v. Florida, 458 U.S. 782, 784 (1982) (stating that defendants shot and \textit{killed} victims during armed robbery).

\textsuperscript{256} See Tison, 481 U.S. at 156 (determining defendant's individualized culpability to determine propriety of death penalty); \textit{Enmund}, 458 U.S. at 798 (focusing on defendant's \textit{culpability} in underlying crime to determine propriety of death penalty).

\textsuperscript{257} See supra notes 211-19 and accompanying text (discussing \textit{Wilson}'s failure to apply \textit{Coker}'s holding to child rape).

\textsuperscript{258} See supra notes 220-32 and accompanying text (discussing \textit{Wilson}'s failure to apply two key factors of proper proportionality review).

\textsuperscript{259} See supra notes 233-56 and accompanying text (discussing flaws in \textit{Wilson}'s analysis).

\textsuperscript{260} See Bethley v. Louisiana, 117 S. Ct. 2425, 2425-26 (1997) (denying certiorari to defendants involved in \textit{Wilson} decision). Justice Stevens, joined by Justice Ginsburg and Justice Breyer, attached a statement to the denial of certiorari indicating that the denial did not, in any sense, constitute a ruling on the merits of the case. \textit{Id.} at 2425. The Justices noted that a jurisdictional bar arguably exists to the Court's review of the issues in \textit{Wilson} until the Louisiana state court reaches a final judgment. \textit{Id.} at 2425-26. In criminal cases, the imposition of the sentence defines finality. \textit{Id.} at 2426. This statement indicates a strong likelihood that at least these three Justices would agree to review the \textit{Wilson} decision if and when a defendant is sentenced to die under the Louisiana statute.
for the rape of a child under twelve years old is an unconstitutionally excessive punishment in violation of the Cruel and Unusual Punishments Clause of the Eighth Amendment.

Although most courts and commentators have interpreted Coker to preclude the death penalty in nonhomicide crimes, the Louisiana Supreme Court's failure to recognize such a preclusion indicates that the United States Supreme Court needs to further clarify the impetus behind Coker. When the Court has provided greater constitutional protections in capital cases than non-capital cases, it has explained the need for these heightened protections by stating that "death is different." The Court has generally used this phrase to describe the unique difference between death as a form of punishment and all other punishments imposed by the law. However, the Court could easily use this same benchmark when it evaluates the types of crimes for which the death penalty is an appropriate punishment. Thus, a state should only impose the death penalty as punishment for crimes resulting in death. Such a clear and definitive standard would provide the judiciary with a clear rule of law that affords the objectivity the Supreme Court requires in proportionality review. Therefore, the Court should explicitly adopt a standard for capital proportionality review that implicitly runs throughout Coker: without death in the crime, there will be no death in the punishment.

261. See supra note 167 (listing courts and scholars concluding that Coker prohibits death penalty for nonhomicide crimes).
263. See Rummel v. Estelle, 445 U.S. 263, 274-75 (1980) (finding that death is different because Court can draw "bright line" between death sentence and all other forms of punishment).
264. But cf. supra note 167 (listing statutes that impose death penalty for crimes that do not inherently involve loss of life). A standard that restricts the death penalty to only those crimes from which a death resulted would not preclude death sentences under many of these statutes, such as the "drug kingpin" statute. It would simply require proof that the so-called "kingpin's" continuing criminal activities resulted in a death before the death penalty becomes a permissible penal option.
265. See supra notes 65-70 and accompanying text (discussing Court's desire for objective factors to guide proportionality analysis); see also supra note 212 (stating Justice Scalia's belief that appellate courts' adoption of definitive rules of law provides guidance and constraint for judiciary).