Death As A Proportionate Penalty For The Rape Of A Child: Considering One State's Current Law

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DEATH AS A PROPORTIONATE PENALTY FOR THE RAPE OF A CHILD: CONSIDERING ONE STATE’S CURRENT LAW

INTRODUCTION

"Rape is many things. It is a goal in and of itself. It is an instrument of torture. It is a means of proving masculinity. It is a means of getting sex."\(^1\) Rape is "almost a total contempt for the personal integrity and autonomy of the female victim . . . . Short of homicide, it is the ‘ultimate violation of self.'"\(^2\) The crime of ‘rape is unique among acts of violence [because] it shatters not only a victim’s physical well-being but also [destroys] her emotional world.'"\(^3\) The effects of rape are often irreparable because the violation damages the surviving victim’s self-esteem as well as her ability to trust and feel secure.\(^4\) Consequences of rape are permanent; they remain with a victim for a lifetime—any relief from the stressful effects is temporary.\(^5\)

The crime of rape is even more reprehensible and consequential when the victim is a child.\(^6\) The very act of raping a child "challenges the most deeply held morals of contemporary society."\(^7\) Child rape statistics are often included in the broad category of sexual abuse.\(^8\) The term “sexual abuse” includes all "illegal sex acts performed against a minor."\(^9\) Sexual abuse in childhood not only immediately traumatizes the child, but it also alters the child’s life forever, and the rape experience,

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4. See id.
the ultimate form of sexual abuse, causes emotional, social, economic, behavioral, and sexual problems. The impact of rape is even more profound than other forms of sexual abuse because rape "involves force and genital contact." In 1992, female victims reported 109,000 rapes to law enforcement agencies. Seventeen thousand of these female victims were under the age of twelve. Experts allege that these statistics are merely estimates because less than one-third of all sexual abuse is identified and substantiated by child protective authorities.

Since the mid 1980s, child sexual abuse has been brought to the forefront of the national agenda due in part to the attention of the mass media. State legislatures have enacted tougher laws with stiffer sanctions in response to the increase of sexual abuse crimes in the United States. Specific examples include Sex Offender Registration; Public Notification of Sex Offender Release (also known as Megan's Laws); and, more generally, "Three Strikes You're Out" laws.

10. See Wilson, 685 So. 2d at 1097-1071; Lurigio et al., supra note 8, at 70.
11. See Lurigio et al., supra note 8, at 70.
12. See Patrick A. Langan, Ph.D. & Caroline Wolf Harlow, Ph.D., Bureau of Justice Statistics Crime Data Brief (June 1994) (visited Sept. 27, 1997) <http://www.ojp.usdoj.gov/pbcj.asciit/childraper.txt.html>. These estimates are conservative because only reported rapes were included in the statistic. See id. For the entire report, see LAWRENCE A. GREENFIELD, U.S. DEPT. OF JUSTICE, CHILD VICTIMIZERS: VIOLENT OFFENDERS AND THEIR VICTIMS (Mar. 1999).
15. See Pryor, supra note 7, at 2.
17. See id. at 312-13. The Federal Crime Bill of September 1994 (H.R. 3355) mandated that all states require law enforcement, corrections departments, probation agencies, and patrol agencies to track the location of convicted sexual offenders. See id. at 312. As enacted, it required states to adopt a sex offender registry by October 1997 or risk the loss of federal funding. See id.
18. See id. at 313. Megan's Laws require the public to be notified when a sex offender is released into the community. See id.
19. See id. at 311-12. "Three Strikes You're Out" laws require third-time felons to be sentenced to life in prison with no opportunity for probation or parole. See id. The "Three Strikes You're Out" law was first passed in California in March 1994 and continues to grow in popularity. See id. at 311. Such laws directly impact repeat sex offenders because rape is included as one of the enumerated felonies. See id. The Georgia General Assembly went one step further when it enacted a "Two Strikes You're Out" law. See O.C.G.A. § 17-10-7 (1997). Under this law, felons convicted a second time.
Between 1983 and 1992, arrests for rape increased nearly 16%, according to the Uniform Crime Act. By 1993, 97,000 inmates, 12.6% of the overall prison population, were convicted sex offenders. Corollary data suggests that many of these convicted sex offenders' victims were children. Nevertheless, it remains unclear from this data whether the increase in arrests was a result of tougher laws or more rapes.

Louisiana took the most radical step in the legislative battle against sex offenders who target children. In 1995, the Louisiana State legislature enacted a law permitting capital punishment for the rape of a child under the age of twelve. This law is controversial, especially in light of the United States Supreme Court's holding in Coker v. Georgia. In that case, the Court declared that, although "rape is without doubt deserving of serious punishment," the death penalty prescribed to an individual convicted of raping an adult woman was cruel and excessive punishment and, thus, violated the Eighth Amendment of the United States Constitution.

This Note considers whether the death penalty as a punishment for the rape of a child under the age of twelve is cruel and unusual punishment prohibited by the Eighth Amendment. The Note, however, presumes that the death penalty itself is not "cruel and unusual punishment" and, therefore, not prohibited by the Eighth Amendment.
Precedent indicates that the United States Supreme Court does not consider the death penalty per se unconstitutional. In order to limit the scope of the Note to a strictly proportional argument that considers only whether the death penalty when applied to the crime of child rape is excessive, the Note assumes that the fact-finder applies death penalty statutes fairly and equally to all persons convicted of a capital crime. Thus, race, gender, or socio-economic bias arguments exceed the scope of the Note.

Part I of the Note consists of a brief constitutional analysis of the Eighth Amendment, considering its parameters as determined by recent United States Supreme Court decisions. Part II examines the Supreme Court’s analysis of the death penalty as it applies to the rape of an adult woman in Coker v. Georgia. Part III considers the Louisiana child rape statute and the decision of the Louisiana Supreme Court in State v. Wilson that held the statute constitutional. Part IV considers whether the holding in Coker is controlling and whether children are to be treated differently in legal jurisprudence. Part V applies the United States Supreme Court’s proportionality analysis set forth in Gregg v. Georgia and its progeny to the death penalty for the rape of a child. Part VI addresses whether the United States Supreme Court would hold death penalty statutes for child rape arbitrary and capricious. Finally, the Note concludes that if courts implement the death penalty at all, it is proportionate to

Brennan concurred in the judgment stating that the “death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments.” Id. Similarly, Justice Marshall stated that the “death penalty . . . is a cruel and unusual punishment.” Id.

31. See id. at 591 (“It is now settled that the death penalty is not invariably cruel and unusual punishment within the meaning of the Eighth Amendment; it is not inherently barbaric or an unacceptable mode of punishment for crime; neither is it always disproportionate . . . .”).

32. Although the United States Supreme Court must consider in every death penalty case whether race was a factor in sentencing, such an analysis exceeds the scope of the Note, which is limited to the question of proportionality. See Stephen B. Bright, Challenging Racial Discrimination in Capital Cases, 21 CHAMPION 19 (1987) (considering whether capital punishment is racially applied); see also Michael Mello, Executing Rapes: A Reluctant Essay on the Ethics of Legal Scholarship, 4 WM. & MARY J. WOMEN & L. 129, 166 (1993) (addressing the issue of rape and racism and stating that “[h]istory points to the inescapable truth that the death penalty for rape was imposed disproportionately against black men,” especially when the victim was a white woman).

33. 653 So. 2d 1063 (La. 1996).

the crime of child rape even though the United States Supreme Court will likely follow Coker's precedent.

I. ANALYSIS OF THE EIGHTH AMENDMENT AND THE SUPREME COURT'S INTERPRETATION OF WHETHER A DEATH PENALTY LAW IS CONSTITUTIONAL

A full and complete analysis of the death penalty exceeds the scope of this Note. Nonetheless, it is necessary to offer at least an overview of this country's evolving death penalty standards. Any detailed discussion of the Eighth Amendment will be limited to circumstances in which the death penalty is prescribed as a punishment for rape.

The Eighth Amendment to the United States Constitution states that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” The thrust of the Supreme Court’s focus in capital punishment decisions incorporates the proper interpretation of the “cruel and unusual punishment” clause, which the Court derives from “evolving standards of decency that mark the progress of a maturing society.”

A. Historical Review of the Eighth Amendment

From 1791 until the end of the nineteenth century, the United States Supreme Court used a historical interpretation of the Cruel and Unusual Punishment Clause as generally accepted by the colonies and under English common law. “The States uniformly followed the common-law practice of making death the exclusive and mandatory sentence for certain specified offenses.” These offenses included murder, treason, piracy,

35. U.S. CONST. amend. VIII (emphasis added).
37. See id. at 521. Pervear v. Massachusetts, 72 U.S. 475 (1866), was the first major case decided by the United States Supreme Court to mention the Cruel and Unusual Punishment Clause. See id. at 522. There, the Court held that the Eighth Amendment did not apply to state action. See id. It was not until 1962 that the Eighth Amendment applied to the states via the Fourteenth Amendment. See id. at 528 (referring to Robinson v. California, 370 U.S. 660 (1962)).
arson, and rape.\textsuperscript{39} Hence, the Framers of the Constitution considered capital punishment to be an integral part of the United States criminal justice system.\textsuperscript{40} Their primary concern was preventing the prescription of torturous or barbaric methods of punishment.\textsuperscript{41} In practice, the Eighth Amendment was practically ignored because "barbaric practices . . . had become obsolete."\textsuperscript{42}

Contemporary interpretations of the Cruel and Unusual Punishment Clause began in 1910 when the United States Supreme Court, in \textit{Weems v. United States},\textsuperscript{43} changed its focus from considering past definitions of cruel and unusual punishments to "a more contemporary standard [concentrating on] what society would and would not tolerate."\textsuperscript{44} In \textit{Weems}, the Court first recognized that "disproportionately excessive punishments violated the Cruel and Unusual Punishment Clause."\textsuperscript{45} The Court evaluated punishments by society's current definition of "excessive."\textsuperscript{46}

Historically, courts rarely adjudicated Eighth Amendment claims.\textsuperscript{47} During the Supreme Court's first 175 years, it only discussed the Cruel and Unusual Punishment Clause nine times.\textsuperscript{48} The Eighth Amendment, however, did not apply to the

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39. \textit{See id.}


41. \textit{See State v. Wilson, 885 So. 2d 1063, 1065 (La. 1996).}

42. \textit{Id.}

43. 217 U.S. 349 (1910).

44. Jacobowitz, \textit{supra} note 36, at 524.

45. Andrew H. Mun, \textit{Mandatory Life Sentence Without Parole Found Constitutionally Permissible for Cocaine Possession—Harmelin v. Michigan, 111 S. Ct. 2880 (1991), 67 WASH. L. REV. 713, 715 (1992).} The defendant in \textit{Weems} was convicted of falsifying an official document and was sentenced to a Philippine punishment, \textit{Cadena temporal. See id.} at 716. Such punishment included imprisonment from 12 years to 20 years in which the prisoner was to be bound in chains and subjected to hard and painful labor. \textit{See id.} at 716 n.32; Jacobowitz, \textit{supra} note 36, at 524 n.27.

46. \textit{See Jacobowitz, \textit{supra} note 36, at 523.}


48. \textit{See id.} The nine Supreme Court cases that refer to the Eighth Amendment are: \textit{Trop v. Dulles, 356 U.S. 86 (1958); Louisiana ex rel. Francis v. Resweber, 329 U.S. 459 (1947); Badders v. United States, 240 U.S. 391 (1916); Weems v. United States, 217 U.S. 349 (1910); Howard v. Fleming, 191 U.S. 126 (1903); O’Neil v. Vermont, 144 U.S. 323 (1892); In re Kemmler, 138 U.S. 436 (1890); Wilkerson v. Utah, 99 U.S. 130 (1878); and Pervear v. Commonwealth, 72 U.S. (5 Wall.) 475 (1867). See id. at 897 n.28.}
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individual states until the early 1960s. In *Robinson v. California*, the Supreme Court held that each state must follow the Cruel and Unusual Punishment Clause of the Eighth Amendment.

**B. Arbitrary and Capricious Parameters**

In the 1970s, the United States Supreme Court established two general requirements in the capital sentencing process: consistency and individualization. The Court derived these principles from two landmark death penalty cases: *Furman v. Georgia* and *Woodson v. North Carolina*. In *Furman*, the Court established the principle of consistency, which requires a state to narrow the class of persons eligible for the death penalty and to justify why the severe penalty is reasonable for the particular defendant on trial. The *Furman* Court "effectively declared all state death penalty statutes unconstitutional," because they did not set forth specific sentencing guidelines and gave juries "'untrammled discretion' to impose the death penalty." Ultimately, the *Furman* Court held that "vesting a jury with standardless sentencing power violated the Eighth and Fourteenth Amendments."

The *Woodson* Court further limited the application of the death penalty by requiring sentencing bodies to consider relevant mitigating circumstances. As a result, the *Woodson* decision invalidated all mandatory death sentence statutes


51. *See id.* The Court held in *Robinson* that the Eighth Amendment must be observed by the states and the federal government. *See* Coker v. Georgia, 433 U.S. 584, 586 (1977).


53. 408 U.S. 238 (1972) (per curiam).

54. 428 U.S. 280 (1976) (plurality opinion).


because these laws did not allow for individualization. The Court held that a mandatory sentence of death disallows "particularized consideration of relevant aspects of the character and record of each convicted defendant." By incorporating these two general requirements, the Court established new criteria for death penalty cases in an attempt "[t]o minimize the risk of arbitrary action and [to] provide individualized sentencing.

C. Bifurcated Trials and Proportionality

In the 1976 case of Gregg v. Georgia, the Court upheld the death penalty when applied to the crime of murder, "provided the sentence was statutorily imposed" and based on specific guidelines. If the defendant was found guilty, an additional hearing was required (bifurcated trial) to determine the appropriate punishment and to consider the circumstances surrounding the crime (proportionality). The Court also set forth a two-prong test to determine whether a punishment was "excessive" or "barbaric" and, thus, a violation of the Eighth Amendment. A punishment is excessive or barbaric if it: (1) makes no measurable contribution to acceptable goals of punishment and hence is . . . [a] needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime. In determining what society deems as excessive

59. *See* Garvey, *supra* note 52, at 999-1000. The North Carolina statute read in pertinent part:

> A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death. . . .

*Woodson*, 428 U.S. at 285 n.4.


63. Wepner, *supra* note 3, at 966. Although the holding in *Gregg* is limited to its facts, the Georgia statute allowed the death penalty for not only murder but also five other categories of crime: (1) kidnapping for ransom or when the victim is harmed; (2) armed robbery; (3) rape; (4) treason; and (5) aircraft hijacking. *See Gregg*, 428 U.S. at 162-63.

64. *See Gregg*, 428 U.S. at 192.


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punishment, the Supreme Court considers "society's views of the challenged punishment as expressed by objective evidence of community values, including legislative judgments, sentences imposed by juries, public opinion and international practices." The Court also engages in an independent review to determine whether the imposed sentence "amounts to the unnecessary and wanton infliction of pain or is grossly disproportionate to the severity of the offense."

The Supreme Court in Coker v. Georgia specifically extended the Eighth Amendment proportionality review to death penalty cases because the punishment of death is "unique in its severity and irrevocability." According to Coker, the Eighth Amendment's ban on cruel and unusual punishment does not prohibit capital punishment; however, it does limit death sentences to crimes that are proportionate.

II. DEATH PENALTY FOR THE RAPE OF AN ADULT WOMAN VIOLATES THE EIGHTH AMENDMENT: PROPORTIONALITY AS APPLIED TO RAPE

In Coker, the United States Supreme Court held that the death penalty was excessive punishment for the crime of rape of an adult woman. The defendant in Coker escaped from prison while serving sentences for murder, rape, kidnapping, and aggravated assault. On the same night as his escape, the defendant committed—and was subsequently convicted of—escape, motor vehicle theft, armed robbery, kidnapping, and rape. In accordance with Georgia's statutory procedures,

67. See & Shanks, supra note 55, at 1430-31 (citations omitted).
68. Id. at 1432 (quoting Coker v. Georgia, 433 U.S. 584, 592 (1977)).
69. 433 U.S. 584 (1977) (plurality opinion). Justice White delivered the opinion of the Court, joined by Justices Stewart, Blackmun, and Stevens. See id. at 586. Justices Brennan and Marshall concurred separately in the judgment, both stating that the death penalty was cruel and unusual in all circumstances. See id. at 600. Justice Powell concurred in the judgment, but dissented from the Court's proposition that the death penalty is a disproportionate punishment for the rape of an adult in all cases. See id. at 601. Chief Justice Burger, joined by Justice Rehnquist, dissented from the opinion. See id. at 604.
70. Mun, supra note 45, at 717 (quoting Coker, 433 U.S. at 598).
71. See id.
72. See Coker, 433 U.S. at 584.
73. See id. at 587.
74. See id.
considered constitutional by the United States Supreme Court in *Gregg*, the jury found two statutorily defined aggravating circumstances present and delivered a sentence of death by electrocution for the rape count. The Georgia Supreme Court affirmed the conviction. In a plurality opinion, the United States Supreme Court overturned the sentence, holding that "a sentence of death is grossly disproportionate and excessive punishment for the crime of rape and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment."

In finding the death penalty for rape to be disproportionate, the Court determined what society deemed as acceptable punishment by considering current legislative enactments and jury behavior. The Court, however, did not consider public opinion, community values, or international laws, as the *Gregg* decision suggested, except as reflected by then-current legislative enactments and jury verdicts. At the time of the *Coker* decision, only Georgia imposed a sentence of death when the rape victim was an adult woman. However, the *Coker* majority did not consider that prior to the *Furman* decision, which preceded *Coker* by five years, sixteen states and the federal government had authorized the death penalty as a

75. *See id.* at 586. The Georgia statute that allowed the death penalty for rape was found at *GA. CODE ANN.* § 28-2001 (1972) (unconstitutional after *Coker*). *See id.* The statute provided that "[a] person convicted of rape shall be punished by death or by imprisonment for life, or by imprisonment for not less than one nor more than 20 years." *Id.* at 586. The relevant aggravating circumstances of the Georgia statute were found at *GA. CODE ANN.* § 27-2534.1 (1977) (upheld by the Supreme Court in *Gregg*). *See id.* at 587-88 n.3. The jury must find at least one of the following aggravating circumstances before the death penalty can be imposed: (1) the offense was committed by a person with a prior conviction for a capital offense; (2) the offense was committed while the offender was engaged in the commission of another capital felony; or (3) the offense was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim. *See id.; see also The Supreme Court, 1976 Term, 91 Harv. L. Rev. 70, 123 n.9 (1977) [hereinafter *Supreme Court*]. The jury in *Coker* was instructed to consider (1) and (2). *See Coker*, 433 U.S. at 587-89.


77. *Coker*, 433 U.S. at 592. The Court considered the death penalty grossly disproportionate as applied to the crime of rape because a homicide did not occur. *See id.* at 592, 598.

78. *See id.* at 593-99.

79. *See id.*

80. *See id.* at 595-98 (noting that both Florida, *Fla. STAT. ANN.* § 784.011(2) (West 1976), and Mississippi, *Miss. CODE ANN.* § 97-3-65 (Supp. 1976), authorized the death penalty in rape cases in which the child was the victim).
proper punishment for the crime of rape. The Court, instead, determined that the majority of states at that time did not authorize the death penalty as a punishment for rape.

The Court further noted that since the 1973 Furman decision, Georgia juries had sentenced rapists to death only six times. Since the jury is a "significant and reliable objective index of contemporary values," the Court concluded that society did not support the death penalty in rape cases; therefore, the requirements of Furman and its progeny were not satisfied. However, the Court failed to consider whether the limited number of jury-imposed death sentences was an indication that post-Furman and Woodson safeguards were in fact working.

As for the Court's independent proportionality review of the death penalty as applied to the crime of rape, the Court stated that the crime deserved serious punishment. "[I]n terms of moral depravity and of the injury to the person and to the public, [however,] it does not compare with murder, which does involve the unjustified taking of human life." Ultimately, the Court reasoned that because rape does not involve homicide, the death penalty "is an excessive penalty for the rapist who . . . does not take human life."

81. See id. at 594-95. Furman v. Georgia invalidated most of the capital punishment statutes, including rape statutes authorizing the death penalty, mainly because of the manner in which the death penalty was imposed. See id. at 595. As a result, states were faced with the task of enacting modified capital punishment laws to satisfy Furman requirements. See id. Of the 16 states that allowed the death penalty for the crime of rape, only three states—Georgia, North Carolina, and Louisiana—reinstated the death penalty for rape in their revised statutes. See id. at 594. North Carolina's and Louisiana's statutes were invalidated under Woodson because they provided that the death penalty was mandatory for persons found guilty of rape. See id.

82. See id. at 593-95.

83. See id. at 596.

84. Id.

85. See id. at 594-95.

86. See id. at 598.

87. Id.

88. Id. The Supreme Court did not elaborate on the statute's arbitrary and capricious application in Coker because the statutory scheme was deemed constitutional in Gregg. See id. Also, the Court already determined that the death penalty was excessive for the crime of rape. See id.
III. THE LOUISIANA STATUTE AND ITS CONSTITUTIONALITY
ACCORDING TO STATE v. WILSON

Louisiana law provides that "if the victim [of aggravated rape] was under the age of twelve years . . . the offender shall be punished by death or life imprisonment . . . in accordance with the determination of the jury." 89 The Louisiana Supreme Court held in State v. Wilson 90 that the death penalty was not constitutionally excessive for the capital rape of a child, nor was the punishment susceptible of being applied arbitrarily or capriciously. 91 In Wilson, two separate Louisiana grand juries indicted the defendants for unrelated crimes. One of the defendants, an HIV positive male, allegedly raped three girls ages five, seven, and nine, including his own daughter. 92 The other defendant was charged with the rape of a five-year-old girl. 93 After lower courts quashed the indictments, holding that the Louisiana statute was unconstitutional, the Louisiana Supreme Court consolidated the State's appeals. 94

The Louisiana Supreme Court concluded that the Coker decision was limited to the facts of that case because "[t]he plurality took great pains in referring only to the rape of adult women throughout their opinion, leaving open the question of

89. LA. REV. STAT. ANN. § 14:42 (West Supp. 1997). The state must prove three elements for the aggravated rape of a child under the age of 12: "(1) anal or vaginal penetration; (2) deemed to be without consent of the victim (3) because of the victim's age at [the] time of [the] rape." Id. at note 2.5.
91. See id. at 1070, 1073. Defendant Wilson moved to quash the grand jury indictment alleging that rape could never be punished by death. See id. at 1064-65. The Criminal District Court, Parish of Orleans, quashed the indictment holding that the death penalty was constitutionally excessive for the crime of rape. See id. at 1064-65. The state appealed. See id.
92. Defendant Bethley also filed a motion to quash his grand jury indictment urging that the Louisiana statute was unconstitutional. See id. at 1065. The Fourth Judicial District Court, Parish of Ouachita, quashed the indictment ruling that the statute was unconstitutional because the class of death-eligible defendants was not sufficiently limited. See id. The state appealed. See id.
93. See id. at 1065. An argument exists independent of this Note that a person who rapes a victim when he is aware that he is infected with the AIDS virus should be eligible for the death penalty if he transfers the virus to his victim. See generally Wepner, supra note 3. In effect, the rapist would be imposing a death sentence on the victim. See id.
94. See Wilson, 685 So. 2d at 1064.
the rape of a child." Additionally, because "rape becomes much more detestable when the victim is a child," the decision in Coker should not extend to rape when the victim is a child. The Louisiana Supreme Court agreed with the United States Supreme Court that rape was reprehensible. The Louisiana Supreme Court, however, held that the rape of a child was so reprehensible that the crime was justified as a capital offense and upheld the statute as constitutional.

The Louisiana Supreme Court began its constitutional analysis in Wilson with a determination of whether the death penalty for child rape constituted excessive punishment. The court deferred to the state legislature's determination that the death penalty for the crime of child rape served two legitimate goals—retribution and deterrence—and, thus, the punishment was appropriate for the crime. According to the court, the death penalty is not excessive for the crime of child rape because the nature of such a crime is appalling, the harm inflicted on the victim is severe, and the harm imposed on society is injurious.

As to whether the death penalty as applied to the aggravated rape of a child was applied arbitrarily or capriciously, the court determined that the legislature sufficiently narrowed the definition of capital offenses as required by Furman and its progeny. Moreover, the court provided the defendants a bifurcated trial in which it gave the jury uniform guidelines

95. Id. at 1066 (citation omitted). The Louisiana Supreme Court, after examining the Coker decision, stated that the various Supreme court justices, in both the plurality opinion and dissenting opinion, refer to "adult woman" 14 times. See id. at 1066 n.2 (providing a complete list of each time "adult woman" is used in the Coker decision). Thus, according to Wilson, Coker is limited to the facts of that case—the rape of an adult. See id. at 1066.

96. Id.

97. See id.

98. See id. at 1064, 1087.

99. See id. at 1085.

100. See id. at 1073. The United States Supreme Court in Gregg v. Georgia wrote that the death penalty serves two social purposes: retribution and deterrence. See Gregg v. Georgia, 428 U.S. 153, 183 (1976). In particular, capital punishment is an "expression of society's moral outrage at particularly offensive conduct." Id. The death penalty as a deterrent of capital crimes by potential offenders is controversial and the results are inconclusive. See id.

101. See Wilson, 685 So. 2d at 1070.

102. See id. at 1070-71.
under the Louisiana Code of Criminal Procedure that included a consideration of aggravating and mitigating circumstances.

The defendants in *State v. Wilson* appealed the Louisiana Supreme Court decision to the United States Supreme Court. However, the United States Supreme Court denied certiorari in *Bethley v. Louisiana*. Justice Stevens, joined by Justices Ginsburg and Breyer, issued a statement regarding the denial of certiorari. The Justices stated that the consideration of state court decisions is confined to "[f]inal judgments ... rendered by the highest court of a State in which a decision could be had." Thus, the Court will be in a position to hear the case if a convicted child rapist is actually sentenced to death.

IV. IS THE RAPE OF A CHILD DIFFERENT FROM THE RAPE OF AN ADULT WOMAN?

This Part addresses two foundational questions that must be answered before considering the constitutionality of the death penalty as punishment for child rape. First, does the United States Supreme Court's holding in *Coker* apply when the victim is a child? If the Court determines that *Coker* applies to all rapes, then *stare decisis* presumes that the death penalty, as it applies to child rape, is per se unconstitutional.

103. *See id.* at 1071 (referring to *LA. CODE CRIM. PROC.* arts. 905-905.9 (1997), specifically art. 905.4).
104. *See id.* The defendants argued that the Louisiana Code of Criminal Procedure was applicable only to the crime of first degree murder. *See id.* The court determined that the aggravating circumstances were originally intended to apply to first degree murder; however, many aggravators apply to the crime of raping a child under age 12. *See id.* The court further stated that the application would be more clear if the legislature had enacted additional circumstances relating to the aggravated rape of a child under age 12. *See id.* However, the court limited its opinion to the constitutionality of Louisiana's capital child rape statute. *See id.; see also LA. REV. STAT. ANN.* § 14:42(C) (West Supp. 1997).
106. *See id.*
107. *See id.*
108. *Id.* (quoting 28 U.S.C. § 1257(a) (1994)).
109. *See id.*
110. *See Wepner, supra note 3, at 987.
111. *See, e.g., Coker v. Georgia*, 433 U.S. 584 (1977); *Buford v. State*, 403 So. 2d 943, 951, 954 (Fla. 1981) (holding that *Coker* was binding in the case of child rape).
the law treat children differently, permitting the rape of a child to elicit harsher penalties than the rape of an adult woman?\footnote{See State v. Wilson, 685 So. 2d 1063, 1065-69 (La. 1995); see also infra notes 128-88.}

\textbf{A. Is Coker Controlling?}

\textit{Coker v. Georgia} is the "biggest obstacle" to allowing the death penalty for convicted child rapists.\footnote{Wepner, supra note 3, at 987.} Nonetheless, "\textit{Coker} is not insurmountable."\footnote{Id. (referring to the proposition that courts may impose death sentences upon rapists with AIDS). The analysis used in the Wepner Note to distinguish \textit{Coker} is similar to this Note's analysis as it applies to the death penalty for the rape of a child. See \textit{id.} at 965-73. The Court would ultimately have to distinguish or overrule \textit{Coker} for \textit{stare decisis} not to bar capital punishment for rape. See generally Wilson, 685 So. 2d at 1065-69 (distinguishing rape of child from holding in \textit{Coker}).} According to the \textit{Wilson} court, the holding in \textit{Coker} did not apply to all rape cases, but only extended to the rape of an adult woman.\footnote{See Wilson, 685 So. 2d at 1065-66.} One author wrote that "[i]t is abundantly clear . . . that the \textit{Coker} Court confined its holding to . . . the rape of an adult woman and did not render a decision on the constitutionality of the death penalty for the rape of a child."\footnote{Yale Glazer, \textit{Child Rapists Beware! The Death Penalty and Louisiana's Amended Aggravated Rape Statute}, 25 AM. J. CRIM. L. 79, 83-84 (1997).} In fact, three Justices in \textit{Coker} (Chief Justice Burger, and Justices Powell and Rehnquist) expressly stated that the holding should be limited to that case.\footnote{See \textit{id.} at 950-51. The Florida Supreme Court in \textit{Buford} invalidated \textit{FLA. STAT. ANN.} § 794.011(2) (1976). See \textit{infra} note 234 and accompanying text.} Similarly, in a pre-\textit{Coker} decision, the Fourth Circuit held that the death penalty as applied to the rape of a child was not unconstitutional when a nine-year-old girl was raped and suffered severe injuries.\footnote{See \textit{id.} at 950-51. The Florida Supreme Court in \textit{Buford} invalidated \textit{FLA. STAT. ANN.} § 794.011(2) (1976). See \textit{infra} note 234 and accompanying text.}

In 1981, the Florida Supreme Court in \textit{Buford v. State}\footnote{See \textit{id.} at 950-51. The Florida Supreme Court in \textit{Buford} invalidated \textit{FLA. STAT. ANN.} § 794.011(2) (1976). See \textit{infra} note 234 and accompanying text.} held that the United States Supreme Court's reasoning in \textit{Coker} extended to the capital rape of a child under eleven years of age;\footnote{See Snider v. Peyton, 356 F.2d 626 (4th Cir. 1966).} the rape victim in \textit{Coker} was sixteen.\footnote{403 So. 2d 943 (Fla. 1981).} Hence, at least
one state's highest court has concluded that *Coker* was binding in the case of child rape.\textsuperscript{122}

If *Coker* controls, the capital rape of a child would be deemed excessive punishment and therefore unconstitutional.\textsuperscript{123} On the other hand, considering that death penalty decisions are based on evolving standards,\textsuperscript{124} even if the same analysis used in *Coker* was applied to the Louisiana statute, the *Coker* holding may be distinguishable.\textsuperscript{125} Nonetheless, the *Coker* decision dictates that in order to uphold the Louisiana law, the Court must determine: that the rape of a child is "morally deprav[ed]"\textsuperscript{126} like the crime of homicide; that society deems such punishment tolerable; and that the statute contains enough safeguards so that it cannot be applied arbitrarily and capriciously.\textsuperscript{127}

**B. Children are Different**

American jurisprudence often distinguishes adults from children.\textsuperscript{128} For example, states have determined that children need a separate division of the court to meet their special circumstances.\textsuperscript{129} Thus, legislatures have statutorily concluded that certain safeguards are necessary to protect juvenile offenders as well as child victims.\textsuperscript{130} States justify treating children different legislatively and judicially on the premise

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*Coker* is controlling, according to *State v. Wilson*, there are certainly differences between a 12-year-old and a 16-year-old. *See Wilson*, 685 So. 2d at 1065-69. As a practical matter, biological and anatomical differences exist due to puberty.\textsuperscript{122} *See Buford*, 403 So. 2d 943.


\textsuperscript{124} *See Jacobowitz, supra* note 36, at 525.


\textsuperscript{126} *Coker*, 433 U.S. at 598.

\textsuperscript{127} These questions involve death penalty parameters previously discussed in this Note and discussed in *Coker*. *See supra* notes 35-71 and accompanying text.

\textsuperscript{128} At common law, "children" were persons who had not attained the age of 14. *See Black's Law Dictionary* 239 (8th ed. 1980). Today, the age of majority varies in different states. *See id.* However, in most states a person reaches the of age majority at 18. *See id.* at 997.

\textsuperscript{129} *See Julie A. Anderson, The Sixth Amendment: Protecting Defendants' Rights at the Expense of Child Victims*, 30 J. MARSHALL L. REV. 767, 774-75 (1997). The Juvenile Court Act of 1899 was a codification by the Illinois legislature separating court procedures dealing with dependent, delinquent, and neglected children from the adult system. *See id.* This codification was a catalyst—by 1925 every state except two (Maine and Wyoming) had instituted juvenile courts. *See id.* at 775 n.46.

\textsuperscript{130} *See id.* at 776.
"that children constitute a class of people who need special protection because they are incapable of defending themselves." Children are vulnerable because they are not as mature as adults, intellectually or physically, nor are they capable of defending themselves. Juvenile jurisprudence presumes that children cannot protect themselves, and thus the State assumes the responsibility of protecting them. The State takes on the role of a surrogate parent through the doctrine of pares patriae and thereby holds a duty to protect the child's best interest.

One of the most obvious ways lawmakers treat children differently is in the area of labor regulations. The federal government has regulated child labor practices since the early twentieth century, when Congress passed the Child Labor Act of 1916. Today the Fair Labor Standards Act (FLSA), first enacted in 1938, regulates practices of the entire work force and specifically prohibits the exploitation of children in the workplace. Lawmakers intended child labor statutes to protect children against carelessness and even recklessness incidental to their immaturity. Even though the FLSA applies to the entire workforce, it treats children differently than adults.

State laws also treat child victims of sexual offenses differently than adult victims. Similar to Louisiana, other

133. See Anderson, supra note 129, at 775.
134. See id. Pares patriae refers to the principle that the State must take care of those who cannot take care of themselves, such as minors. See id. at 775 n.53.; see also BLACK'S LAW DICTIONARY 1114 (6th ed. 1990) (defining pares patriae).
136. See Pignatella, supra note 135, at 174.
137. See id. at 177. The FLSA seeks to protect children against oppressive child labor in three major ways: (1) the regulation of hours; (2) the establishment of age limitations; and (3) the regulation of hazardous occupations. See id. The FLSA has expanded in scope and protection since it was initially enacted. See id. at 181.
139. See Pignatella, supra note 135, at 183 (describing the FLSA).
140. For example, states enact statutory rape laws that rest solely on the age of the victim. See infra notes 142-47 and accompanying text. Additionally, some states classify rape felony degrees depending on the age of the victim. See infra notes 148-55 and
states have enacted tougher laws against sex offenders in an attempt to protect children. For example, many states have statutory rape provisions. Statutory rape statutes do not require a prosecutor to prove that intercourse occurred without the consent of the female victim. As a matter of law, the intercourse is considered “nonconsensual” if the child is under the age set by the state legislature. For example, in Georgia, females under the age of sixteen are not legally capable of giving consent to intercourse. Conversely, if the victim is not under the age set by the legislature, the crime of rape is not proved unless the evidence shows that intercourse was nonconsensual. Thus, a definitional disparity exists for the crime of rape just because the female is, for example, twenty-one instead of fourteen.

Similarly, in some states the age of a rape victim determines the degree or class of felony. Often, states separate felonies accompanying text.

141. See Freeman-Longo, supra note 16, at 311-17.
144. See O.C.G.A. § 16-6-1 (1996) (referring to the holding in Hill v. State, 249 Ga. 402, 271 S.E.2d 802 (1980), cert. denied, Hill v. Georgia, 451 U.S. 923 (1981), in the judicial comments); Kitrosser, supra note 142, at 314. The typical statutory rape law no longer punishes every male who has sex with any female below a prescribed age. See id. Instead, the states enact age-span provisions that allow a person above a certain age to be subject to punishment for having sex with a person below a certain age. See id. However, this does not change the analysis in this Note because age-span provisions are normally limited to adolescents. See id.
146. See id. § 16-6-1 (explaining in the judicial decision comments that Jackson v. State, 225 Ga. 553, 107 S.E.2d 291 (1959), held that rape is not proved if evidence shows that the female consented at any time).
147. Compare id. § 16-6-3, with id. § 16-6-1.
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into degrees or classes according to the severity of the crime, and the degree of felony determines the type of punishment. For example, in Kentucky, the rape of a child under the age of twelve is automatically considered a Class A felony. By contrast, the rape of a person over the age of twelve is considered a Class B felony unless the rape is aggravated, which is when the victim suffers serious physical injuries. Similarly, in Tennessee, the rape of a child under thirteen is a Class A felony, whereas the unaggravated rape of a woman is only a Class B felony. In Tennessee, the classification of child rape is the same as that for attempted first degree murder and conspiracy to commit a first degree murder. Only first degree murder is in a class above Class A.

These states' laws are based on a public policy of protecting children from the heinous crimes of rape and aggravated sodomy, and tougher sex offense sanctions prevent children from being "exploited for sexual purposes regardless of their 'consent.'" Perhaps the most common way state legislatures have tried to protect children from exploitation is through registration and notification requirements, commonly known as Megan's Laws. Adopted in some form in all fifty states and by

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149. A degree of a crime is used to refer to "similar conduct that is punished to a greater or a lesser extent depending on the existence of one or more factors." BLACK'S LAW DICTIONARY 424 (6th ed. 1990). Examples of classifications include differing degrees of a crime such as first or second degree murder. See id. Similarly, some jurisdictions separate felonies into classes (A) or (B) corresponding to punishment or sentencing categories. See id.

150. See id. Class A felonies signify a crime deserving harsher penalties according to state legislatures than do Class B felonies. See id.


152. See id.


154. See id. § 39-11-117(a)(2).

155. See id. § 39-11-117(a)(1).

156. See, e.g., SB 258, 1997 Ga. Gen. Assem., § 1. SB 258 was sent to the Senate Judiciary Committee and eventually became HB 801, which was never enacted into law. See infra note 238. A similar version was reintroduced in 1999. See HB 116, 1999 Ga. Gen. Assem.


158. See Steven L. Friedland, On Treatment, Punishment, and the Civil Commitment of Sex Offenders, 70 U. COLO. L. REV. 73, 84 (1999). Megan's Laws are named for Megan Kanka, a child "who was kidnapped, raped, and murdered by a recidivist sex offender." Id. The death of Megan Kanka became the catalyst event for the passage of such laws. See id. Offenders may violate Megan's Laws in various ways; however, such laws
the federal government, registration laws require a released sex offender to register with law enforcement authorities in their place of domicile. Specifically, public notification laws, often passed in conjunction with registration laws, require local officials to release certain information about a sex offender to residents when the offender relocates to a community. In Delaware, for example, persons convicted of a sex offense against a child are required to have their driver's licenses coded with a "Y" to symbolize that they have been convicted of such a sex crime. Noncompliance with state registration or notification laws is often punishable under criminal statutes.

The United States Supreme Court acknowledges the protection of children as witnesses as well. Specifically, the Court upheld a Maryland statute that makes an exception to the face-to-face Confrontation Clause of the Sixth Amendment. Under the Maryland statute, child victims may testify via videotape or one-way or two-way closed-circuit television. Thus, a child testifying in her abuser's trial may avoid face-to-face confrontation. This exception only applies to children who were victims of sexual abuse and who are testifying at the offender's trial. Adult victims do not receive the same exception.

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specifically target pedophilia. See id.
159. See id.
160. See id.
161. See Kelly McMurry, Delaware Labels Drivers' Licenses of Sex Offenders, TRIAL, July 1998, at 116.
163. See Anderson, supra note 129, at 762 (referring to Maryland v. Craig, 497 U.S. 836 (1990), which "carved out an exception to the right of confrontation").
164. Consider MD. CODE ANN., CTS. & JUD. PROC. § 9-102(a)(1)(ii) (1989), which "allowed the child victim to be cross-examined outside of the defendant's presence via one-way closed-circuit television." Anderson, supra note 129, at 763. This protection of the child victim-witness was upheld by the United States Supreme Court in Maryland v. Craig, 497 U.S. 836 (1990).
165. See Anderson, supra note 129, at 779.
166. See id.
167. See id. at 782-83.
168. See id.
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V. THE EXCESSIVENESS ARGUMENT AS IT APPLIES TO THE DEATH PENALTY FOR CHILD RAPE: RECONSIDERING COKER AND WILSON

To determine whether the death penalty would be excessive for the crime of child rape, this Part analyzes the impact of the crime on the victim, how society views the crime, and whether the death penalty is proportionate as applied to child rape. Additionally, this Part discusses current statutes and jury behavior as they reflect societal views surrounding the proper penalty for child rape.169

A. Impact of the Crime

In Coker, the United States Supreme Court limited its discussion primarily to the impact the rapist inflicts on the victim.170 This Part and the Louisiana Supreme Court in Wilson consider both the impact on the victim and on society.171

1. Impact on the Victim

According to Coker, a qualitative difference exists between rape and homicide.172 Theoretically, because rape does not involve death, a lesser amount of harm is caused by the rape.173 However, “[w]ho’s to say that it’s more traumatic to die than it is to live with being brutalized?”174 The rape victim not only must recover physically, but also must resume a normal existence.175 The dissenting judges in Coker vehemently argued that rape “is not a crime ‘light years’ removed from murder in the degree of its heinousness.”176 Furthermore, while life ends abruptly for the murder victim, the rape victim must cope with far more than the initial physical pain of rape.177 The victim

170. See id. at 592-600.
173. See id.
175. See Wepner, supra note 3, at 988.
177. See Wepner, supra note 3, at 941 (citing Francis T. Murphy, Violence Against
must also deal with the psychological pain of being raped.\textsuperscript{178} For many child victims, these problems last for a lifetime, not only taking away their innocence, but also limiting their promise for the "pursuit of happiness."\textsuperscript{179}

A pedophile’s victim is generally a child between the ages of seven and thirteen.\textsuperscript{180} Children in this age range are generally incapable of resisting the offender and are exceptionally vulnerable to the effects of rape.\textsuperscript{181} According to standardized measures of psychopathology, forty percent of pre-adolescent victims are seriously disturbed.\textsuperscript{182} Further, psychopathology and mental disorders often follow the child to adulthood.\textsuperscript{183} In addition to psychological consequences, the act of rape poses a potentially serious danger to the life and safety of the victim.\textsuperscript{184}

The impact of the rape extends beyond the act itself.\textsuperscript{185} In addition to psychiatric problems, research also shows that child rape leads to delinquency and running away.\textsuperscript{186} Research indicates that the effects of child sexual abuse become even more profound when children are victimized by people they trust, such as their fathers or other relatives, and when "the victimization involves force and genital contact."\textsuperscript{187} Feelings of betrayal toward abusers and animosity toward family members who failed to protect the child continue into adulthood and ultimately may interfere with a victim’s ability to trust others.\textsuperscript{188}

For some rape victims, the imposition of the death penalty satisfies their need for retribution, justice, and closure.\textsuperscript{189}

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178. \textit{See id.}
179. JAMES BAYNARD, A BRIEF EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES app. at 187 (1992); \textit{see} Lurigio et al., \textit{supra} note 8, at 70.
180. \textit{See} Treanor, \textit{supra} note 14, at 278. Symptoms of pedophilia, according to the fourth edition of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM-IV), include "recurrent, intense sexually arousing fantasies, sexual urges, or behaviors involving sexual activity with a prepubescent child" generally 13 or younger. Friedland, \textit{supra} note 158, at 82 (quoting DSM-IV).
182. \textit{See} Lurigio et al., \textit{supra} note 8, at 70.
183. \textit{See id.}
184. \textit{See id.}
185. \textit{See id.}
186. \textit{See id.}
187. \textit{Id.}
188. \textit{See id.}
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However, there is an additional dilemma if the rapist is a family member.\textsuperscript{190} According to 1994 crime data, the majority of child rape victims, about ninety-six percent, had a prior relationship with their attacker.\textsuperscript{191} Twenty percent were victimized by their fathers.\textsuperscript{192} Thus, the imposition of the death penalty on a family member may lead to a "revictimization."\textsuperscript{193} It is not uncommon for victims to blame themselves for what has happened.\textsuperscript{194} If the death penalty is imposed, the child may feel responsible for the defendant's death.\textsuperscript{195} This scenario will, in effect, contribute to additional psychological problems for the child.\textsuperscript{196}

Additionally, the imposition of the death penalty when the offender is a relative may have some unintended consequences, such as limiting the reporting of child rape.\textsuperscript{197} The result of decreased reporting ultimately will interfere with the capital child rape statute's major goals—deterrence and retribution—and is unacceptable as a policy matter.\textsuperscript{198} Jurors, in compliance with the United States Supreme Court's ruling in \textit{Furman} and its progeny, must consider such factors when weighing aggravating and mitigating circumstances.\textsuperscript{199}

Regardless of the relationship an offender has with the victim, rape causes untold psychological harm not only to the victim, but also to future generations.\textsuperscript{200} Even more troubling is the result that some adult survivors turn to dangerous sexual behavior themselves, creating a continuous cycle of abuse.\textsuperscript{201} Though the negative effects of rape may interfere with the victim's ability to function in society, the bottom line, according to \textit{Coker}, is that rape does not include death.\textsuperscript{202} However, the United States Supreme Court may change its view of the death

\textsuperscript{190} See id. at 1070.
\textsuperscript{191} See Langan & Harlow, supra note 12, at 1.
\textsuperscript{192} See id.
\textsuperscript{193} See Wilson, 685 So. 2d at 1070.
\textsuperscript{194} See Lurigio et al., supra note 8, at 71.
\textsuperscript{195} See Wilson, 685 So. 2d at 1073.
\textsuperscript{196} See id. at 1072.
\textsuperscript{197} See id. at 1073.
\textsuperscript{198} See id.
\textsuperscript{200} See Wilson, 685 So. 2d at 1070.
\textsuperscript{201} See Lurigio et al., supra note 8, at 70.
penalty as it applies to rape if a particular rape is "deplorable [enough in] nature" and such a "grievous affront to humanity" as to render the punishment proportionate to the crime.

2. Impact on Society

"Rape is one of the fastest growing violent crimes reported in the United States; it is estimated that a rape is reported every two to six minutes . . . ." Rape of a child undermines society's sense of security, particularly considering the high rate of recidivism. According to one author, the rate of recidivism for rape is between seven and thirty-five percent, while the rate of recidivism for child molesters reaches as high as forty percent. Sex offenders, especially those who target children, are unlikely to stop after one incident. According to a United States Justice Department survey, a sexual predator who victimizes children is more than twice as likely to have multiple victims than a sex offender who targets adults. In fact, the average pedophile "commits 282 illegal acts with 150 different victims." The psychological impact on victims discussed previously certainly affects society as a whole. In addition, there is a financial impact. Although it seems unthinkable to consider the effects of rape in purely economic terms, rape has a high cost in terms of tax dollars spent on social services and medical

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203. Wilson, 685 So. 2d at 1099.
204. This Note contends, like the Louisiana Supreme Court in Wilson, that the rape of a child is deplorable enough to render the death penalty a proportionate punishment. See id.
205. Glazer, supra note 118, at 85.
206. See Wilson, 685 So. 2d at 1070.
208. See id.
210. See id. at 407.
212. See generally Freeman-Longo, supra note 16, at 317-18 (referring to the amount of money that rape costs taxpayers).
213. See id.
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expenses for victims. In 1987, for example, taxpayers spent between $138,000 and $152,000 for each sexually abused child.

B. Society’s Shifting Opinion on the Death Penalty

In Coker, the Supreme Court used two sources to determine public opinion concerning capital punishment for rape. Initially, the Court considered whether most American jurisdictions then made the crime of rape a capital offense. In addition, the Court considered the number of defendants who had been sentenced to death by a jury for the crime of rape.

1. Current Statutes

At the time of Coker, Georgia was the only state that authorized the death penalty for the rape of an adult woman. Two other states, Florida and Mississippi, provided for the death penalty when a child was raped.

The Supreme Court’s reliance on only these three states as allowing the death penalty in rape cases may have been somewhat flawed considering that the Coker decision was only five years after the Furman decision, which ushered a “[c]onsiderable uncertainty . . . into this area of law.” The

214. See id.
215. See id. Considering this estimate is 10 years old, it is inaccurate because of inflation.
217. See id. at 593-96. The Court concluded that other state statutory schemes and current jury determinations weighed in favor of its holding that the death penalty as applied to rapists was excessive. See id. at 597. Chief Justice Burger, joined by Justice Rehnquist, in dissent stated that these statistics “cannot be deemed determinative, or even particularly relevant.” Id. at 613. This pattern of analysis was continued in Enmund v. Florida, 458 U.S. 782 (1982) and supported by Mississippi Supreme Court Justice Robertson in concurrence in Leatherwood v. State, 548 So. 2d 389, 403 (1989). But see State v. Wilson, 485 So. 2d 1063, 1068 (1986) (finding indeterminant the fact that Louisiana is the only state providing the death penalty for the rape of a child); State v. Gardner, 947 P.2d 630, 654-55 (Utah 1997) (Russon, J., dissenting) (arguing that constitutionality cannot depend on “how many states [have] similar statutes”).
219. See id. at 595-96. In the North Carolina and Louisiana capital rape statutes, the death penalty was mandatory and, thus, the statutes were invalidated by Woodson. See id. at 594.
220. See id. at 595. Tennessee provided for a mandatory death sentence for the rape of a child and, thus, its statute was invalidated in a subsequent court decision. See id.
221. Id. at 814 (Burger, C.J., dissenting).
Furman decision invalidated all states’ death penalty statutes, and state legislatures were uncertain whether the Court would sustain any statute imposing the death penalty. In fact, many states were still in the process of reworking their death penalty statutes. Both Louisiana and North Carolina had statutes that authorized the death penalty for the crime of adult rape. Woodson, however, invalidated those statutes because they made imposition of the death penalty mandatory.

In Coker, the majority of the Court inferred that the imposition of the death penalty for rape was declining, whereas the dissenting justices opined that, since the turn of the century, “one-third of American jurisdictions [had] consistently provided the death penalty for rape.” In 1967, before Furman and Woodson, a survey of fifty-five jurisdictions revealed that nineteen jurisdictions had allowed the death penalty for rape. In light of the Furman and Woodson decisions, it was not clear whether the decline in states imposing the death penalty for rape resulted from judicial decisions or the changed minds of legislators.

The Louisiana Supreme Court in State v. Wilson stated that the analysis of present statutes and current jury determinations is one of the most “conservative” methods in determining excessiveness. At the time of Wilson, Louisiana was the only state that had a law providing for the death penalty as punishment for the rape of a child less than twelve years of age, much the same position as Georgia in Coker. Prior to Louisiana enacting its legislation authorizing the death penalty

222. See id.
223. See id.
224. See id. at 613.
225. See id. at 614.
226. Id. at 614.
227. See Mello, supra note 32, at 159. The 55 jurisdictions surveyed were the fifty states plus the District of Columbia, Puerto Rico, Virgin Islands, and federal civil and military authority. See id.
228. See id.
229. 685 So. 2d 1063 (La. 1996).
230. See id. at 1067.
231. See id. at 1068.
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for convicted child rapists, Tennessee, Mississippi, and Florida had similar laws, which ultimately were invalidated.

Other state legislatures have enacted or are considering laws similar to the Louisiana statute. For example, the Mississippi legislature enacted a statute in 1996 allowing the death penalty for persons convicted of raping a child under the age of fourteen. In 1997 and 1999, Georgia lawmakers considered allowing the death penalty as punishment for persons convicted of raping a child under the age of twelve. California lawmakers introduced a similar bill in 1999 to authorize the death penalty when a defendant commits a “lewd and lascivious act on a child under the age of [fourteen] years.” However, the California bill would only apply to second offenders. Some Pennsylvania lawmakers are proposing legislation that seeks to
impose the death penalty for repeated sexual assaults on children.\textsuperscript{241}

The current and proposed legislation may indicate a trend toward making child rape a capital offense.\textsuperscript{242} In \textit{Enmund v. Florida},\textsuperscript{243} the United States Supreme Court found that eight jurisdictions allowed the death penalty to be imposed in common law felony murder cases even when the defendant did not actually kill the victim.\textsuperscript{244} However, eight jurisdictions were not enough for the Supreme Court to uphold the law.\textsuperscript{245} Ultimately, this factor “weigh[ed] on the side of rejecting capital punishment for the crime at issue.”\textsuperscript{246}

According to \textit{Wilson}, the fact that Louisiana was the only state at the time to allow the death penalty for the rape of a child was “not conclusive” evidence to deem a law unconstitutional because (1) there is no “constitutional infirmity” in a state’s statute just because that jurisdiction was first in enacting such a statute; and similarly, (2) “statutes applied in one state can be carefully watched by other states” to see the outcome of constitutional challenges.\textsuperscript{247} Furthermore, the United States Supreme Court has acknowledged that the needs and standards of our society continually change.\textsuperscript{248} In reality, legislatures may offer new laws as an indication of society’s changing preference.\textsuperscript{249} However, if a law’s constitutionality rests on whether other states pass similar laws, legislators could never pass new laws.\textsuperscript{250} Limiting legislation to what sister states enact

\textsuperscript{242} See, e.g., supra notes 223-26 and accompanying text.
\textsuperscript{243} 458 U.S. 782 (1982).
\textsuperscript{244} See id. at 789. Five years later the United States Supreme Court limited this holding. See\textit{Tison v. Arizona}, 481 U.S. 137 (1987); infra notes 284-85 and accompanying text.
\textsuperscript{245} See \textit{Enmund}, 458 U.S. at 792.
\textsuperscript{246} Leatherwood v. State, 548 So.2d 389, 405 (Miss. 1989) (quoting \textit{Enmund}, 458 U.S. at 793).
\textsuperscript{247} State v. Wilson, 685 So. 2d 1063, 1069 (La. 1996).
\textsuperscript{248} See Jacobowitz, supra note 36, at 526 (referring to Trop v. Dulles, 356 U.S. 86 (1958)).
\textsuperscript{249} See id. at 526 n.37 (explaining that it is within “society’s prerogative” to outlaw punishments that its forefathers permitted). If society can outlaw past punishments, it can reaffirm old punishments or implement new ones. See id. at 525 (quoting \textit{Weems v. United States}, 217 U.S. 349, 373 (1910)).
would prevent states from ever "enact[ing] a novel or distinctive law without being thwarted by a constitutional challenge." subpoena

Legislation constitutes "the clearest and most objective evidence of how contemporary society views a particular punishment." Legislative enactments in thirty-eight states reflect a decision by those states' constituents to support the death penalty. The increasing number of prisoners on death row might also indicate that societal attitudes seem to support the imposition of the death penalty. Polls suggest that seventy to seventy-five percent of the public now supports the death penalty. Ten percent of those polled indicated that they previously opposed capital punishment. One poll indicates that sixty-five percent of the public would support the death penalty for child molesters. Like legislation, however, polls are neither determinative nor completely representative of society.

Considering current state and federal laws, qualified support exists for imposing the death penalty for crimes that do not involve death. The federal government and thirteen states have laws that impose the death penalty in non-homicide cases, such as treason or aircraft hijacking. In 1994, Congress passed

251. See id.
254. See Gardner, 947 P.2d at 654.
255. See Barrett, supra note 241.
256. See id.
257. See id.
258. See Higgins, supra note 174, at 31. Many commentators believe that Coker stands for the proposition that the death penalty is unconstitutional whenever death is not a result of the crime. See generally Paul D. Kamenar, Death Penalty Legislation for Espionage and Other Federal Crimes is Unnecessary: It Just Needs a Little Re-enforcement, 24 WAKE FOREST L. REV. 881, 888-89 (1989). Other authors argue that such a reading of Coker is erroneous and too broad. See Wepner, supra note 3, at 969.
259. See Higgins, supra note 174, at 31. Arkansas, California, Colorado, Georgia, Illinois, Louisiana, Mississippi, Missouri, Washington, and the federal government impose the death penalty for the crime of treason. See id. at 30. Colorado, Idaho, Illinois, Missouri, and Montana impose the death penalty for aggravated kidnapping, aggravated kidnapping for ransom, kidnapping when victim is harmed, or kidnapping while incarcerated. See id. The death penalty is also allowed for crimes involving drug distribution. See id. For example, Florida allows the death penalty for drug trafficking. Missouri offers the death penalty for drug dealing near schools, and the federal government imposes the death penalty for drug dealing by a drug kingpin. See id. Other
a statute allowing the execution of large scale drug kingpins.260 Yet, the United States Supreme Court hinted in Coker that the death penalty would not be proportionate to the crime unless murder was involved.261 If Coker is read to support such a proposition, then the aforementioned laws directly challenge that decision.262

The current state of federal and local laws, as well as a shift in public opinion, may invalidate the arguments in Coker that limited the death penalty to crimes involving murder.263 The Court’s own view may also have shifted because, in 1987, the Court narrowed its Enmund decision in Tison v. Arizona.264 In Tison, the Court held that, under the Eighth Amendment, the death penalty is not disproportionate when applied to felony murder when the defendant acts with reckless indifference—even if the defendant did not actually pull the trigger.265

2. How Juries Impose the Death Penalty

Juries are considered “significant and reliable objective ind[ices] of contemporary values.”266 According to the United States Supreme Court in Gregg, however, “the relative infrequency of jury verdicts imposing the death sentence does not indicate rejection of capital punishment per se.”267 Before the Supreme Court held in Coker that the death penalty for the rape of an adult woman was unconstitutional, Georgia juries had only sentenced rapists to death six times in four years.268 In Wilson, the Louisiana Supreme Court did not even discuss how many, if any, child rapists were sentenced to death by a jury

capital crimes include aircraft hijacking (Georgia), child rape under 12 (Louisiana), aircraft piracy (Mississippi), placing bombs near bus terminals (Missouri), and espionage (New Mexico). See id.
260. See id.
262. See id.
263. See supra notes 258-59 and accompanying text.
265. See id. at 138.
267. Gregg, 428 U.S. at 182.
268. See Coker, 433 U.S. at 597.
under the state’s statute.269 Currently, however, no one in the United States is on death row for a non-homicide crime.270

In 1989, the Mississippi Supreme Court noted in Leatherwood v. State271 that the defendant was the only person on death row for the rape of a child.272 In fact, the defendant in Leatherwood was the only person Mississippi had ever sentenced to die for capital rape of any kind.273 Ultimately, the Mississippi Supreme Court reversed the capital punishment sentence,274 but did not invalidate the death penalty as it applied to child rape.275 Instead, the statute allowing the death penalty in that case was invalidated by a separate Mississippi statute.276

Although jurors represent the community’s judgment, this representation is arguably limited, considering that the jury selection process “eliminate[s] significant segments of the public from the jury.”277 Similarly, because a sentence of death requires jury unanimity, a single juror can prevent a jury from returning a sentence of death.278 Justice Rehnquist, dissenting in Woodson, wrote that “the fact that . . . such jurors could prevent conviction in a given case, even though the majority of

270. See Higgins, supra note 174, at 31.
271. 548 So. 2d 389 (Miss. 1989).
272. See id. at 405.
273. See id.
274. See id. at 403.
275. See id.
276. See id. at 402-03. The court held that Miss. Code Ann. § 99-19-101(7) (Supp. 1988) precluded the imposition of the death penalty. See id. at 403. That statute provided that: In order to return and impose a sentence of death the jury must make a written finding of one or more of the following: (a) The defendant actually killed; (b) The defendant attempted to kill; (c) The defendant intended that a killing take place; (d) The defendant contemplated that lethal force would be employed.

Id. The court stated that because the defendant did not meet any conditions of the statute, the maximum punishment for rape of a child under 12 was life imprisonment. See id.
society, speaking through legislatures, had decreed that it should be imposed, certainly does not indicate that society as a whole rejected . . . [the] punishment.\textsuperscript{279}

In \textit{Coker}, the United States Supreme Court emphasized the fact that only one of every ten jurors sentenced convicted rapists to death.\textsuperscript{280} Thus, the Court concluded that society must not support the death penalty for rape.\textsuperscript{281} However, as discussed earlier, jury decisions are not a dispositive indication of society's approval or disapproval of the death penalty as applied to rape.\textsuperscript{282} The jury's death penalty sentence may "reflect only the facts of the crime."\textsuperscript{283} Furthermore, since jurors struggle with their responsibility for executing someone,\textsuperscript{284} limited death penalty sentences may suggest that juries consider mitigating circumstances and apply the death penalty only in the most severe cases.\textsuperscript{285}

\section*{VI. THE ARBITRARY AND CAPRICIOUS APPLICATION ARGUMENT AS IT APPLIES TO THE CAPITAL RAPE OF A CHILD: REVISITING \textit{COKER} AND \textit{WILSON}}

Even if the United States Supreme Court considered the death penalty for the rape of a child a proportionate punishment, the Court may still deem the statute unconstitutional if it is applied arbitrarily and capriciously.\textsuperscript{286} The Court in \textit{Furman} opined that a state statute authorizing the death penalty must institute sentencing systems of guided

\begin{enumerate}
\item \textit{Woodson}, 428 U.S. at 312.
\item \textit{See id.} at 596-97.
\item \textit{See Gregg v. Georgia, 428 U.S. 153, 182 (1976); Caren Myers, Encouraging Allocation at Capital Sentencing: A Proposal For Use Immunity, 97 COLUM. L.REV. 787, 814, (1997) (concluding that the jury's sentence only reflects the facts of the crime); Hans, supra note 277, at 1236 (stating that jurors struggle with their decision to execute another). If one accepts this type of jury behavior, then a jury sentence does not reflect society's approval or disapproval of the death penalty, but only reflects the unwillingness of a jury to be personally responsible for a defendant's execution or that the sentence might be limited to what the defendant on trial deserves. \textit{See Woodson}, 428 U.S. at 312 (Rehnquist, J., dissenting).
\item Myers, supra note 282, at 814.
\item \textit{See} Hans, supra note 277, at 1236-37.
\item \textit{See Gregg}, 428 U.S. at 182.
\item \textit{See Woodson}, 428 U.S. 280; \textit{Furman v. Georgia}, 408 U.S. 238 (1972) (per curiam); Garvey, supra note 62, at 985-1001; Searcy & Shanks, supra note 55, at 1455-38.
\end{enumerate}
discretion.\textsuperscript{287} Post-\textit{Furman} requirements include bifurcation, which allows the jury to consider guilt and punishment separately.\textsuperscript{288} Statutes must also require the fact-finder to consider both aggravating and mitigating circumstances.\textsuperscript{289} In \textit{Coker}, the Court did not reach whether the Georgia statute allowing the death penalty for the rape of an adult woman was applied arbitrarily or capriciously\textsuperscript{290} because: (1) the Court had already invalidated the Georgia statute on the grounds that the death penalty was excessive for the crime of rape; and (2) the Court had sustained Georgia's "aggravating circumstances" statutory scheme a year earlier in \textit{Gregg}.\textsuperscript{291}

Georgia's statutory scheme at the time provided for a bifurcated trial, required a jury to find at least one aggravating circumstance to proceed to the sentencing phase, and allowed for an automatic appeal if a death sentence was imposed.\textsuperscript{292} Similarly, the Louisiana trial process is bifurcated, and the death sentence can only be imposed if certain aggravating circumstances are found by the jury.\textsuperscript{293} The Louisiana legislature further confines the application of the death penalty by narrowing the definition of offenses punishable by death.\textsuperscript{294} In 1988, the United States Supreme Court held in \textit{Lowenfield v. Phelps}\textsuperscript{295} that the Louisiana scheme effectively narrowed the class of death eligible persons to those who commit murder.\textsuperscript{296} The Court in \textit{Lowenfield} considered the Louisiana law as it applied to first degree murder.\textsuperscript{297}

Regardless, the Louisiana law may face an arbitrary and capricious challenge because the Louisiana legislature did not designate any specific aggravating circumstances to narrow the class of capital rape defendants.\textsuperscript{298} Instead, the capital child rape

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\bibitem{} See Garvey, \textit{supra} note 52, at 995-96.
\bibitem{} See Searcy & Shanks, \textit{supra} note 55, at 1435-36.
\bibitem{} See \textit{Coker}, 433 U.S. 584.
\bibitem{} See \textit{Supreme Court, \textit{supra} note 75}, at 123.
\bibitem{} See \textit{id}.
\bibitem{} See \textit{id}.
\bibitem{} 484 U.S. 231 (1988).
\bibitem{} See \textit{id} at 244-45.
\bibitem{} See \textit{id}.
\bibitem{} See \textit{supra} notes 103-04 and accompanying text; see also Lisa White Shirley, State
statute refers to the same aggravating and mitigating circumstances that apply to capital murder. However, the Wilson court found that many of the aggravating factors for murder would apply to a capital rape defendant. The class of offenders is further narrowed because it is not open to all rapists; only those who rape a child under twelve years of age may be sentenced to death.

Other than the legislative drafting problems described above, opponents of the Louisiana capital rape law offer two main reasons why such a penalty may be applied arbitrarily or capriciously. First, offenders who “fortuitously” rape a twelve-year-old child instead of an eleven-year-old child are not eligible for the death penalty. The court in Wilson dismissed this argument claiming that the legislature has “the power to make the laws[,] and they determined where the line should be drawn.” Legislatures frequently determine age limits; examples include statutory rape laws, child labor laws, driving laws, and underage drinking laws. Of course the capital child rape statute is different because a sentence of death is irrevocable.

Second, opponents claim that the statute permits the death penalty without a finding of intent. The Wilson court


299. See Shirley, supra note 298, at 1920.
300. See State v. Wilson, 685 So. 2d 1063, 1071-72 (La. 1996); Shirley, supra note 298, at 1920. However, Justice Victory, in his concurring opinion, explicitly stated that the legislature should amend the state's sentencing procedure to alleviate any question of the statute's application. See Wilson, 685 So. 2d at 1074 (Victory, J., concurring).
301. See Wilson, 685 So. 2d at 1071.
302. Id.
303. See id. at 1072.
304. See supra notes 142-47 and accompanying text.
305. See supra notes 135-39 and accompanying text.
307. See, e.g., id. § 3-3-23 (1990).
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responded to this argument in two ways: (1) the death penalty is not automatic—the jury must consider both aggravating and mitigating circumstances; and (2) rape is an intentional crime that cannot accidentally happen.  

If the Court interprets Furman and Woodson broadly—as mandating specific means of consistency and individualization—these arguments might effectively influence the Court to consider the Louisiana statute arbitrary and capricious in its application. At the same time, if the Court narrowly interprets Furman and Woodson—as granting the legislature discretion to establish reasonable limits and to fulfill goals of punishment in death penalty statutes—then the Court may determine that the statute effectively narrows the defendants who are eligible for the death penalty.

CONCLUSION

"In a period in our country's history when the frequency of [rape] is increasing alarmingly, it is indeed a grave event for the Court to take from the states whatever deterrent and retributive weight the death penalty retains." While penalties or punishments imposed by states for the rape of a child may differ, all may be constitutional. Legislatures alone determine crimes and proscribe penalties. They are not required to select any particular penalty, provided that the punishment selected does not violate the Eighth Amendment. Furthermore, state legislatures should not be regarded as insensitive to human values merely because they act to protect the lives and related values of the innocent.

It is difficult to believe that Louisiana will remain alone in punishing the rape of a child by death if the next decade demonstrates a reduction in rapes against children in Louisiana.

311. See id.
313. See Wilson, 685 So. 2d at 1071; see also supra notes 280-301 and accompanying text.
316. See Wilson, 685 So. 2d at 1072.
317. See id. at 1067, 1069.
318. See id. at 1069 (referring to Chief Justice Burger's dissent in Coker).
and, thus, engenders a greater confidence in the rule of law.\textsuperscript{319} Although the legislature creates the law, the judiciary alone determines the constitutionality of a penalty.\textsuperscript{320} Therefore, the Court may find it difficult to move away from the precedent of \textit{Coker}. Nonetheless, the Court has the discretion to rule that the \textit{Coker} Court was wrong; albeit such action is highly unlikely. Further, the Court can determine that capital rape statutes are not unconstitutional when the victim is a child because: (1) children require more protection than adults; (2) the legislative pendulum is moving in the direction of harsher penalties for sexual offenses; and (3) society supports the application of the death penalty when children are the victims.

There is no doubt that child rape is a serious crime that deserves serious punishment. Society has an obligation to enforce stiffer sanctions—if not the ultimate penalty—for the rape of a child.\textsuperscript{321} The pivotal question is whether rape causes similar damage to families, society, and the victim as does murder. The victim has to live with the memory of rape everyday. Every time the victim looks in the mirror, he or she is constantly reminded of the crime. If someone breaks into a house, the damage can be repaired. If someone steals valuable goods, those goods can be replaced. But if someone takes the life of another, that life can never be replaced. Similarly, if someone takes away the innocence of a child, that innocence can never be replaced. In this respect, the death penalty is not excessive for the crime of raping a child.

\textit{Bridgette M. Palmer}

\textsuperscript{319} \textit{See id.}
\textsuperscript{320} \textit{See Marbury v. Madison, 1 Cranch (5 U.S.) 137 (1803).}
\textsuperscript{321} \textit{See SB 258, 1997 Ga. Gen. Assem., § 1.}