The Death Penalty is Cruel and Unusual Punishment for the Crime of Rape - Even the Rape of a Child

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THE DEATH PENALTY IS CRUEL AND UNUSUAL PUNISHMENT FOR THE CRIME OF RAPE—EVEN THE RAPE OF A CHILD

I. INTRODUCTION

In 1995, Louisiana amended its criminal code to allow for the sentence of death to be imposed when a person is convicted of raping a child under the age of twelve. In 1996, Georgia followed suit and amended its penal code to become the second and only other state to impose such a severe penalty for the crime of rape.

Soon after Louisiana revised its penal code, the Louisiana grand jury indicted the first two defendants charged under this new law. Anthony Wilson was charged with the rape of a five-year-old girl. Patrick Bethley was charged with raping three girls, ages five, seven, and nine. One of the victims was Bethley's daughter. Furthermore, at the time of his alleged crimes, Bethley knew he was HIV positive. Both defendants appealed to the United States Supreme Court challenging the constitutionality of the new Louisiana statute. They relied primarily on a 1977 United States Supreme Court case, which held that capital punishment was cruel and unusual punishment for the rape of an adult woman. In June 1997, the United States Supreme Court denied certiorari to Wilson's and Bethley's cases as neither defendant had been convicted, but reserved its right to review

1. LA. REV. STAT. ANN. § 14:42 (West 1997).
2. GA. CODE. ANN. § 16-6-1 (1997).
4. Id.
5. Id.
6. Id.
7. Id. at 1065.
8. Id.
a decision if a conviction should issue.\textsuperscript{10}

At a time when politicians are basing their political campaigns on law and order platforms, including proposals that the death penalty be instituted for rape and child molestation,\textsuperscript{11} we as a society, and in particular the courts, are being faced with the question of whether death should be imposed on a citizen convicted of raping a child.

This comment outlines the United States Supreme Court's historic treatment of the imposition of the death penalty in rape cases\textsuperscript{12} and concludes that such a severe punishment is cruel and unusual for the rape of anyone.\textsuperscript{13} First, it will detail the United States Supreme Court's rulings in \textit{Furman v. Georgia},\textsuperscript{14} where most of the states' death penalty legislation was invalidated,\textsuperscript{15} and \textit{Gregg v. Georgia},\textsuperscript{16} where the Court held that the death penalty was not invariably cruel and unusual.\textsuperscript{17} Next, this comment examines \textit{Coker v. Georgia},\textsuperscript{18} in which the Court held that the death penalty was a "grossly" disproportionate punishment for the crime of raping an adult woman.\textsuperscript{19} Then this comment discusses how lawmakers throughout the nation reacted to the \textit{Coker} decision, including the repeal of all legislation allowing the death penalty to be imposed as punishment for the crime of rape.\textsuperscript{20} Lastly, this comment analyzes Louisiana's 1995 statute instituting the death penalty for the rape of a child.\textsuperscript{21} After comparing the rationale behind the \textit{Coker} decision and Louisiana's new law,\textsuperscript{22} this comment concludes that the age of the victim does not change the crime

\textsuperscript{10} Id. "The U.S. Supreme Court declined to review that decision, at least for now. Three Justices—John Paul Stevens, Ruth Bader Ginsburg and Stephen Breyer—wrote to point out that the Court could hear the case later if one of the men is in fact sentenced to death." Michael Higgins, \textit{Is Capital Punishment for Killers Only?}, 83 A.B.A. J. 30 (1997).


\textsuperscript{12} See discussion infra Part II.A-E.

\textsuperscript{13} See discussion infra Part IV.C.

\textsuperscript{14} 408 U.S. 238 (1972).

\textsuperscript{15} See discussion infra Part II.B-C.

\textsuperscript{16} 428 U.S. 153 (1976).

\textsuperscript{17} See discussion infra Part II.D.

\textsuperscript{18} 433 U.S. 584 (1977).

\textsuperscript{19} See discussion infra Part II.E.

\textsuperscript{20} See discussion infra Part II.F.

\textsuperscript{21} See discussion infra Part II.G.

\textsuperscript{22} See discussion infra Part IV.B.
and that the sentence of death is too severe a punishment for the crime of rape or any crime that does not include intent to kill.\textsuperscript{23}

II. BACKGROUND

A. The Historical Perspective

The Eighth Amendment of the United States Constitution reads, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."\textsuperscript{24} Despite the extreme nature of the death penalty, even the framers accepted it as appropriate in some circumstances.\textsuperscript{25} During the debates of the first Congress on the Bill of Rights, it was noted that though no cruel and unusual punishment was to be inflicted, "it was sometimes necessary to hang a man, villains often deserve whipping and perhaps having their ears cut off."\textsuperscript{26} In the early days, states punished many felonies with death; but over time the definition of cruel and unusual punishment broadened\textsuperscript{27} and crimes where the death penalty was an acceptable form of punishment decreased.\textsuperscript{28}

In the twentieth century, many American states continue to have the death penalty on their books,\textsuperscript{29} but the class of murders to be punished by death has narrowed\textsuperscript{30} and subsequently there has been widespread adoption of laws expressly granting juries the discretion to recommend mercy.\textsuperscript{31} There has been a steady decline in the infliction of the death penalty in every decade since 1930, the earliest period for which statistics are available.\textsuperscript{32}

Currently, there is no one on death row for a crime that

\begin{itemize}
\item 23. See discussion infra Part IV.C.
\item 24. U.S. CONST. amend. VIII.
\item 26. Furman v. Georgia, 408 U.S. 238, 244 (1972). The concern, even at the time of the drafting of the Eighth Amendment, was that punishments be administered fairly and not selectively to "minorities...out casts of society...who are unpopular." Id. at 243.
\item 27. See Higgins, supra note 10.
\item 28. Id.
\item 29. See Gregg, 428 U.S. at 177 (citing Woodson v. North Carolina, 428 U.S. 280, 289 (1976)).
\item 30. Id.
\end{itemize}
did not involve a killing, and no one has been executed for rape in the United States since 1964. Before the United States Supreme Court decided *Furman v. Georgia* in 1972, sixteen states allowed for the death penalty to be imposed as a punishment for the crime of rape. The ruling in *Furman* invalidated the majority of the states’ death penalty laws. After *Furman*, only three states reenacted the death penalty for the crime of rape.

In 1977, the United States Supreme Court declared that it was unconstitutional to sentence a man to die for raping an adult woman. Since that time, two states have attempted to get around the Supreme Court’s ruling by amending their laws to allow for the death penalty to be imposed on someone convicted of raping a child.

**B. Furman v. Georgia: Death Penalty Reform**

In 1972, the United States Supreme Court reviewed *Furman v. Georgia*, in which the Supreme Court of Georgia and the Court of Appeals in Texas had confirmed the convictions and sentences of death for one murderer and two rapists. All three defendants were black. Both men convicted of rape had raped white women; one used a pair of scissors as his weapon and the other had no weapon.

33. See Higgins, supra note 10, at 31.
34. See id. at 30.
35. 403 U.S. 238 (1972).
37. See id. at 594.
38. See id. North Carolina, Georgia and Louisiana reenacted the death penalty for the crime of rape. Id.
39. See id. at 584.
40. See discussion supra Part I. Georgia and Louisiana revised their laws to provide for the death penalty as punishment for the crime of raping a child under twelve. See also GA. CODE. ANN. § 16-6-1 (1997); LA. REV. STAT. ANN. § 14:42 (West 1997).
41. GA. CODE. ANN. § 16-6-1 (1997); LA. REV. STAT. ANN. § 14:42 (West 1997).
42. 408 U.S. 238 (1972).
44. Id. at 253.
45. Id.
46. Id. at 253 (1972). This comment will not analyze the great disparity in the treatment of minorities and the poor when it comes to the death penalty. For further analysis, see *Furman*. See also Carol Steiker, *Remembering Race, Rape and Capital Punishment*, 83 VA. L. REV. 693 (1997).
Neither of the rape victims were killed.\textsuperscript{47} In its opinion, the United States Supreme Court expressed great concern for the manner in which the death penalty was handed out.\textsuperscript{48} Juries had broad discretion when deciding if a defendant should die or be imprisoned and there were no standards governing the selection of the penalty.\textsuperscript{49} A statistical analysis conducted by the NAACP revealed that in the forty years surveyed, every single one of the forty-five men executed for rape was black.\textsuperscript{50} Although white men had also been convicted of the same crime, they were not sentenced to die.\textsuperscript{51}

Upon review, the United States Supreme Court held that death penalty laws could no longer allow for arbitrary sentences.\textsuperscript{52} The Court was explicit, noting that the Eighth Amendment requires legislatures to write penal laws that are "even handed, non-selective, and non-arbitrary."\textsuperscript{53} In order to be constitutional, the death penalty laws had to provide procedural safeguards to assure that people were treated equally.\textsuperscript{54} One way to ensure that a punishment was not cruel and unusual was to make sure not only that it fit the crime, but that everyone found guilty for committing that crime was punished the same way.\textsuperscript{55} The concerns expressed in \textit{Furman}, that the penalty of death not be imposed in an arbitrary or capricious manner,\textsuperscript{56} could only be met through carefully drafted statutes, which ensured that the sentencing authority was given adequate information and guidance.\textsuperscript{57}

\begin{thebibliography}{99}
\bibitem{47} \textit{Furman}, 408 U.S. at 252-53.
\bibitem{48} \textit{Id}. Minority groups were often sentenced to die at a greater rate than other segments of the population. \textit{Id}. at 249-51.
\bibitem{49} \textit{Furman v. Georgia}, 408 U.S. 238, 255 (1972).
\bibitem{50} See Steiker, supra note 46, at 699. In fact, research shows that the proportion of blacks executed in the United States after 1930 for rape, 89\%, was greater than that for murder, 55\%. DAVID LESTER, THE DEATH PENALTY—ISSUES AND ANSWERS, 32 (1987).
\bibitem{51} See Steiker, supra note 50, at 699.
\bibitem{52} \textit{Furman}, 408 U.S. at 256.
\bibitem{53} \textit{Id}.
\bibitem{54} \textit{Id}.
\bibitem{56} \textit{Id}.
\bibitem{57} \textit{Id}. at 195. Specifically, the sentencing authority should be required to specify the factors it relied upon in making its decision. This will provide "the further safeguard of meaningful appellate review" to ensure that death sentences are imposed fairly. \textit{Id}.
\end{thebibliography}
C. Reaction to Furman by the States

The Court's ruling in Furman invalidated most of the states' capital punishment statutes because of the manner in which the death penalty was imposed under those laws. Before Furman was decided, only sixteen states and the federal government authorized the death penalty for rape. After Furman was decided, of the thirty-five states that reinstated the death penalty, only Georgia, North Carolina, and Louisiana included the rape of an adult woman as a capital offense in their revised legislation.

Though North Carolina and Louisiana revised their laws relating to the death penalty, both of these laws were invalidated in 1976. In Woodson v. North Carolina, the United States Supreme Court held that North Carolina's law, which provided for mandatory death sentences, "failed to curb arbitrary and wanton jury discretion" and was unconstitutional under the Eighth and Fourteenth Amendments. That same year in Roberts v. Louisiana, the Court reiterated its position, holding that Louisiana's mandatory death sentence "also fail[ed] to comply with Furman's requirement that standardless jury discretion be replaced by... safeguard[s] against the arbitrary and capricious imposition of the death penalty." When North Carolina and Louisiana again revised their laws they reenacted the death penalty for the crime of murder but did not include rape as a capital offense.

When Georgia amended its death penalty legislation after Furman, it retained the death penalty for murder, kidnapping for ransom where the victim is harmed, armed

59. See id. at 594.
61. Id. North Carolina and Louisiana's laws were invalidated because they imposed mandatory death sentences. Coker, 433 U.S. at 594. Coker later invalidated Georgia's law. Id. at 584.
63. Id. at 595.
64. 428 U.S. 280 (1976).
66. Id.
robbery, treason, aircraft hijacking, and rape. The constitutionality of Georgia's law was tested in 1976, but only with regard to the crime of murder.

D. Gregg v. Georgia: Death Penalty Is Not Always Cruel and Unusual

In 1976, a Georgia court convicted Troy Gregg of armed robbery and murder and sentenced him to die for both crimes. Upon review of Gregg's case, the United States Supreme Court held that "the punishment of death does not invariably violate the constitution." It is not an inherently barbaric or unacceptable mode of punishment for a crime, but before a convicted defendant can be sentenced to die the judge or jury must find, beyond a reasonable doubt, one of ten aggravating circumstances specified in the Georgia statute.

71. See id.; see also discussion infra Part IV.C.1.
73. Id. at 169.
74. Coker, 433 U.S. at 591.
75. Gregg, 428 U.S. 153, 164-65 (1976). The following is the list of the aggravating circumstances to be considered which may allow the judge or jury to impose the death penalty:

1. The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.
2. The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.
3. The offender by his act of murder, armed robbery or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.
4. The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.
5. The murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duty.
6. The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.
7. The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhumane in that it involved torture, depravity of mind, or an aggravated batter to the victim.
8. The offense of murder was committed against any peace officer,
The evidence in this case established that Gregg murdered his two victims so that he could rob them and take their car. The trial judge instructed the jury that it would not be authorized to consider imposing the death penalty unless it first found beyond a reasonable doubt one of the aggravating circumstances. The jury found that: "the offense of murder was committed while the offender was engaged in the commission of two other capital felonies, ... [and t]hat the offender committed the offense of murder for the purpose of receiving money and the automobile described in the indictment." These qualified as two of the aggravating circumstances in Georgia’s statute and Gregg’s death sentence for the crime of murder was upheld. The aggravating circumstances assured the Supreme Court that the death penalty would be handed down fairly and Georgia’s death penalty law remained temporarily in tact.

But in the same opinion, the Court devoted much time to its concern that the punishment must fit the crime. As early as the Magna Carta there was concern that “[a] free man shall not be amerced for a trivial offence, except in accordance with the degree of the offense.” In 1910, the United States Supreme Court addressed the constitutionality of the Philippine punishment “Cadra temporal,” which was imposed for falsifying a document. That punishment included “at least twelve years and one day, in chains, at hard and painful labor ... and subjection to lifetime surveillance.” The Court rejected “the proposition that the Eighth Amendment reaches corrections employee or fireman while engaged in the performance of his official duties.
9. The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.
10. The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

Gregg, 428 U.S. at 165 n.9.
76. Id. at 159.
77. Id. at 161.
79. Id.
80. Id.
81. Id. at 171.
83. Gregg, 428 U.S. at 171.
only punishments that are 'inhumane' and focused rather on the proportion between the crime and the punishment. In Weems v. United States, the Court concluded that "such penalties for such offenses amaze those who . . . believe that it is a precept of justice that punishment for a crime should be graduated and proportionate to the offense.

In 1958, while reviewing the constitutionality of denationalization used to punish a soldier who had been a deserter for a day, the United States Supreme Court "observed in dicta that 'fines, imprisonment and even execution may be imposed depending on the enormity of the crime.'\(^{88}\) Further, in 1976, the Gregg Court noted that in order for a punishment to meet the "basic concept underlying the Eighth Amendment" it must not be "excessive."\(^{89}\) That is, "the punishment must not be grossly out of proportion to the severity of the crime."\(^{90}\) So while holding that the death penalty was not always unconstitutional, the United States Supreme Court found that it must be appropriate for the crime.\(^{91}\)

E. Coker v. Georgia: Death Penalty Is Cruel and Unusual Punishment for the Crime of Rape

Just one year later, the United States Supreme Court heard another Georgia case imposing the death penalty, but this time it was being applied for the crime of rape.\(^{92}\) Erhlich Coker, the defendant, escaped from Ware Correctional Institution, broke into the Carvers' home, robbed them, and raped Mrs. Carver.\(^{93}\) The Georgia law Coker was sentenced under provided that a person convicted of rape shall be punished by death or by imprisonment for not less than one and not more than twenty years.\(^{94}\) When determining the appropriate sentence, the jury was instructed that it could

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85. Id.
86. 217 U.S. 349 (1910).
87. Gregg, 428 U.S. at 171.
88. Id. at 172 (citing Trop v. Dulles, 356 U.S. 86, 100 (1958)).
89. Id. at 173.
91. Id.
93. Id. at 587.
94. Id. at 586
consider “aggravating circumstances,” such as whether the rape was committed by someone with a prior conviction of a felony or whether it was committed while committing another capital felony. The jury found both of these aggravating circumstances present and sentenced Coker to death by electrocution. Though Coker had previously committed other felonies, this conviction was only for the crime of rape.

At the time the United States Supreme Court heard this case, Georgia was the only state that allowed the death penalty to be imposed for the rape of an “adult woman.” Upon review of Coker, the Supreme Court held that the Eighth Amendment’s ban on cruel and unusual punishment prevents states from executing defendants convicted of raping adult women. The court recognized after reviewing a long series of cases, “it was now settled that the death penalty is not invariably cruel and unusual punishment within the meaning of the Eighth Amendment,” but the Court went on to reason that a punishment is unconstitutional if it is too severe for the crime committed. After reviewing the decline in the number of states permitting a death sentence for the crime of rape, from sixteen down to only three, the court concluded that the sentence of death was a “grossly disproportionate and excessive punishment for the crime of rape” and was, therefore, forbidden by the Eighth Amendment as cruel and unusual. The Justices claimed that the legislative rejection of capital punishment for rape in other states strongly confirmed their own judgment that it was a disproportionate penalty for the rape of an adult

95. Id. at 588.
96. Id.
97. Id. at 591.
98. Coker v. Georgia, 433 U.S. 584, 599 (1977). “Coker had prior convictions for capital felonies rape, murder and kidnapping but these prior convictions do not change the fact that the instant crime being punished is a rape not involving the taking of life.” Id. Coker was tried separately for the armed robbery that occurred at the same time as the rape and received a separate life sentence for that crime. Id.
99. Id. at 596. Florida and Mississippi had laws allowing for the death penalty for the rape of a child. Buford v. Florida, 403 So. 2d 943, 950 (Fla. 1981); Leatherwood v. Mississippi, 548 So. 2d 389 (Miss. 1989).
100. See Higgins, supra note 10.
102. Id. at 592.
103. Id. at 594.
woman. The Court repeatedly asserted that it was addressing the issue of rape involving an “adult woman” and left open the question of how it would rule if the case involved the rape of a child.

F. Reaction to Coker v. Georgia

After Coker, Tennessee, Florida, and Mississippi maintained laws allowing for the death penalty to be imposed on a defendant convicted of raping a child. The laws of all three states would eventually be repealed. In 1977, the same year as Coker, the Supreme Court of Tennessee found that Tennessee’s mandatory death penalty was unconstitutional, leaving only two states with such a severe penalty for the crime of raping a child.

In 1981, the Supreme Court of Florida held in Buford v. Florida that the reasoning in Coker compelled them to find that a sentence of death was grossly disproportionate and excessive punishment for the crime of sexual assault and, therefore, forbidden by the Eighth Amendment as cruel and unusual even when the victim was a child. Robert Buford was convicted of first degree murder and sexual battery of an eleven-year-old girl. He received two death sentences for those crimes. Though the death sentence was upheld for the murder conviction, the death penalty imposed for the sexual assault was vacated. The Florida Supreme Court held that under Coker the death penalty was too severe a punishment even for the rape of a child.

In 1989, the Mississippi Supreme Court held that “under
present statutory authority the maximum punishment upon conviction of [the rape of a child under twelve] is life imprisonment" and did not reach the constitutional question. Dale Leatherwood was convicted of raping an eleven-year-old girl and sentenced to die. Though the Mississippi law allowed for the death penalty to be imposed for the conviction of raping a child under twelve, in order for the sentence to be handed down, it had to be shown that the defendant actually killed, attempted to kill, intended to kill or contemplated lethal force. At the time this case was pending, Mississippi was the only state authorizing death as a penalty for rape of any kind.

Invalidating the Mississippi law, the Mississippi Court reasoned that however heinous or offensive child rape may be, the victim's life is not taken.

Though the victim may hardly forget her nightmarish experience, sensitive response by family, friends and competent professionals may often assure recovery so that in time the victim comes to lead a... quite livable life. In this sense the harshness of the death penalty is qualitatively greater than the gravity of the offense.

The Mississippi court evaded the constitutionality of the issue, but in his concurrence, Justice Robertson argued that because the Mississippi law authorized a death sentence for the crime of rape, it should be held unconstitutional pursuant to the Eighth Amendment's ban on cruel and unusual punishment.

G. Louisiana Revised Its Law to Allow the Death Penalty to Be Imposed for the Rape of a Child

In 1995, Louisiana amended its law to allow the death penalty for the rape of a child...
penalty to be imposed when the victim of rape was under the age of twelve.\(^{125}\) Louisiana statute Title 14, § 42 reads in part:

A. Aggravated rape is committed upon a person . . . where the anal or vaginal sexual intercourse is deemed to be without lawful consent of the victim because it is committed under any one of the following . . . 4) the victim is under the age of [twelve].

C. [I]f the victim was under [twelve] . . . [the] offender shall be punished by death or life imprisonment.\(^{126}\)

In order to convict a defendant under this law it must be shown that 1) there was anal or vaginal penetration, 2) without consent, and 3) that the lack of consent was due to the age of the victim.\(^{127}\) Additionally, the Louisiana Code of Criminal Procedure provides guidelines, which must be followed, including that the trial be bifurcated, indigent defendants be given counsel, and the conviction be based on proof beyond a reasonable doubt.\(^{128}\)

The Louisiana Supreme Court found that Louisiana's law fell within the guidelines of the state's constitution, which provided that "punishment is excessive and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than purposeful and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of crime."\(^{129}\) Technically, Louisiana's law may also satisfy the requirements of \textit{Furman};\(^{130}\) but after \textit{Coker};\(^{131}\) it must be determined whether the death penalty is really appropriate for the crime of rape in any situation.

In 1995, two defendants were indicted under Louisiana's


\(^{127}\) \textit{Id.} A child under the age of twelve can not legally consent to sexual intercourse. \textit{Id.}


\(^{129}\) \textit{Id.} at 1065 (citing \textsc{La. Const} art. I § 20; \textit{Gregg v. Georgia}, 428 U.S. 153 (1976)).

\(^{130}\) \textit{Furman v. Georgia}, 408 U.S. 238 (1972); \textit{see also} discussion \textit{supra} Part II.B.

\(^{131}\) \textit{Coker v. Georgia}, 433 U.S. 584 (1977); \textit{see also} discussion \textit{supra} Part II.E.
In affirming the constitutionality of the Louisiana law, the Louisiana Supreme Court reasoned that because children cannot protect themselves the state must provide protection. They went on to say that a "maturing society" through its legislature has recognized the degradation and devastation of child rape, and the permeation of harm resulting to victims of rape in this age category. The court relied on the fact that the Louisiana "[L]egislature has determined that this crime is deserving of the death penalty because of its deplorable nature, being a 'grievous affront to humanity.' The contemporary standards as defined by the Louisiana legislature indicate that the harm inflicted upon a child when raped is tremendous, causing the child to suffer physically, emotionally, and mentally.

Quoting Gregg v. Georgia, the Louisiana court reasoned that "capital punishment is an expression of society's moral outrage at particularly offensive conduct...[and though] unappealing to many...it is essential in an ordered society." The Louisiana Supreme Court concluded that "given the appalling nature of the crime, the severity of the harm inflicted upon the victim, and the harm imposed on society, the death penalty is not an excessive penalty for the crime of rape when the victim is a child under the age of twelve years old."

The Louisiana Supreme Court also found that the imposition of the death penalty for the rape of a child would serve as a deterrent. Based on the United States Supreme

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132. See Wilson, 685 So. 2d 1063. See also discussion supra Part I.
133. Wilson, 685 So. 2d at 1067.
134. Louisiana v. Wilson, 685 So. 2d 1063, 1067 (La. 1996), cert. denied, 117 S. Ct. 2425 (1997). "While the rape of an adult female in itself reprehensible, the legislature has concluded that rape becomes much more detestable when the victim is a child." Id.
135. Id. at 1069.
136. Id. This harm is especially devastating since the majority of offenders are family members. "The Louisiana courts have held that sex offenses against children cause untold psychological harm not only to the victim but also to generations to come." Id. at 1070.
138. Wilson, 685 So. 2d at 1070 (citing Gregg, 428 U.S. at 183).
139. Id.
Court’s reasoning in *Gregg v. Georgia*, the Louisiana court reasoned that “[t]wo legitimate goals of punishment are retribution and deterrence.” The Louisiana Supreme Court found that the “death penalty for the rape of a child less than twelve years old would be a deterrence to the commission of that crime.”

Louisiana is no longer the only state authorizing the death penalty for the rape of a child. In 1996, Georgia revised its penal code to be consistent with Louisiana’s. Though the legislature is said to reflect the views of society, only two states out of fifty have such a severe penalty for rape.

H. The Country’s Current Attitude About Cruel and Unusual Punishment

Most states require that a life be taken before they will accept the death penalty as punishment for a crime. In 1982, the United States Supreme Court held that the death penalty is impermissible except where the defendant himself kills, attempts to kill, or intends to kill. In *Enmund v. Florida*, the defendant had been sentenced to die for his part as the get away driver in an armed robbery. Defendant’s co-conspirator had killed someone during the commission of the crime, but defendant only sat in the car. In holding the death penalty too severe a punishment for this defendant, the Supreme Court reasoned, “[w]e have no doubt that robbery is a serious crime deserving of serious punishment. It is not, however, a crime ‘so grievous an affront

141. *Id.*
142. *Id.* *See also* discussion *infra* Part IV.C.2.
143. *See infra* notes 144-145 and accompanying text.
144. GA. CODE ANN. § 16-6-1 (1997).
146. Only thirteen states have laws on the books that call for the death penalty in non-homicide cases, mostly for treason, aggravated kidnapping or aircraft hijacking. *See Higgins, supra* note 10, at 31. In addition to first degree murder, California allows for the death penalty to be imposed for the crime of treason and for willful perjury, which leads to the execution of an innocent person. CAL. PENAL CODE §§ 37, 128 (West 1998).
149. Enmund, 458 U.S. at 782.
150. *Id.* at 784.
to humanity that the only adequate response may be the penalty of death." In fact, the Supreme Court declined to draw a clear line between crimes that warrant the death penalty and those that do not, but it strongly implied that the victim should die before death is ordered.

The Coker Court reasoned that even before it declared the death penalty unconstitutional for the rape of an adult woman, "in the vast majority of cases, at least nine out of ten, juries have not imposed the death sentence [in rape cases]." Even in Louisiana, juries have sentenced defendants convicted of raping a child to life imprisonment but not to death. These life sentences were upheld as constitutional.

In 1988, the Louisiana Supreme Court found that the mandatory life sentence for aggravated rape of a five-year-old girl was not disproportionate or unconstitutional. In 1994, the Third Circuit Court of Appeal in Louisiana held that a twenty year sentence for the conviction of "attempted aggravated rape" of a child under twelve was not unnecessarily cruel. In 1996, even after Louisiana revised its law to allow for the death penalty, a Louisiana jury sentenced a defendant to life imprisonment after he was convicted of raping his nine and eleven-year-old daughters. The Louisiana Supreme Court found that the mandatory life sentence of the defendant in this case was not a violation of the constitution. In other words, it matched the severity of the crime.

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152. See Wilson, 685 So. 2d at 1070 (citing Tison v. Arizona, 481 U.S. 137, 157 (1987)). The Court discussed the appropriate punishment for intentional killings and reckless indifference to life, but did not make any clear finding as to specific crimes where the death penalty would be appropriate and others where it would not. Id.
156. See Louisiana v. Viree, 670 So. 2d 733 (La. 1996); Louisiana v. Jamison, 640 So. 2d 438 (La. 1994) (sentencing the defendant to 20 years imprisonment); Louisiana v. Pokey, 529 So. 2d 474 (La. 1988).
157. See cases cited supra note 156.
158. See Pokey, 529 So.2d at 478.
159. See Louisiana v. Jamison, 640 So. 2d 438, 448 (La. 1994).
161. See id.
At the time of publication of this comment, Wilson and Bethley had not been sentenced—they were merely indicted by the grand jury and attempted to appeal to the United States Supreme Court on the constitutionality of Louisiana’s law at that time. The Supreme Court denied certiorari and said that if someone was actually sentenced to die under Louisiana’s new law it may entertain the case.

III. UNRESOLVED ISSUE: IS RAPE OF A CHILD DIFFERENT THAN RAPE OF AN ADULT?

Twenty years ago the United States Supreme Court held it was cruel and unusual to punish a convicted rapist by sentencing him to die. In its holding the Court did not directly address the crime of raping a child. The Louisiana Legislature feels that the rape of a child is a much more heinous crime than the rape of an adult and, therefore, such a rapist should be punished by death. But as the United States Supreme Court held in Enmund v. Florida, absent a killing or at least the intention to kill, the death penalty is cruel and unusual and therefore a violation of the Constitution.

Louisiana’s new law does not require that the perpetrator kill his victim or even that he intend to kill them in order for the sentence of death to be imposed. The Louisiana Supreme Court found that sex offenses against children cause “untold psychological harm not only to the victim but to generations to come,” and attempted to distinguish it as more grievous than the rape of an adult. Though the

162. See supra Part II.G.
164. See Higgins, supra note 10.
165. See Coker v. Georgia, 433 U.S. 584 (1977). The Court was specific in its reference to the rape of an “adult” woman. Id. at 584.
166. Id. at 592.
169. Id.
170. LA. REV. STAT. ANN. § 14:42 (West 1997). All that is required is that there be a rape and that the rape victim be under the age of twelve. Id.
172. Id. at 1069.
United States Supreme Court clearly held in *Coker v. Georgia* that the death penalty was a "grossly disproportionate" punishment for the crime of rape, it remains to be seen how the Court will rule on the constitutionality of Louisiana's new statute focusing on children.

**IV. ANALYSIS**

**A. The Death Penalty Is Not an Appropriate Punishment for the Crime of Rape**

In 1977, the United States Supreme Court invalidated Georgia's law, the only state law at the time that allowed the death penalty to be imposed for the crime of rape. In its ruling, the Court reiterated its holding in *Gregg v. Georgia* that the death penalty as punishment for deliberate murder was neither too severe nor disproportionate. It then went on to reason that the death penalty was grossly disproportionate and excessive punishment for the crime of rape and "therefore forbidden by the Eighth Amendment." In coming to this conclusion, the Court looked at history and the "country's current judgment" with regard to rape and the death penalty. At the time *Coker* was decided, acceptance of the death penalty was declining in the United States and at no time in the preceding fifty years had a majority of the states authorized death as a punishment for rape.

The Court also returned to its reasoning in *Furman*, that in order for a punishment to be constitutional, it must first be determined that it did not involve unnecessary and wanton infliction of pain. Second, the punishment must not

174. See discussion supra Part I. The United States Supreme Court denied certiorari to Wilson and Bethley at this time because neither defendant had been convicted. Bethley v. Louisiana, 117 S. Ct. 2425 (1997).
175. See supra Part II.D. See also *Coker v. Georgia*, 433 U.S. 584 (1977). They concluded 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." *Id.* at 592.
178. *Id.* at 593.
179. *Id.* at 592-93.
be grossly out of proportion to the severity of the crime.\textsuperscript{182} The Court did not deny that rape was a horrible crime deserving serious punishment, but in terms of moral depravity and the injury to the person and the public, the Justices reasoned that rape did not compare with murder which involved the taking of human life.\textsuperscript{183} Though the victim suffered, the crime in \textit{Coker} was rape as opposed to murder, so the death penalty was inappropriate.\textsuperscript{184} The Supreme Court found that there is a qualitative difference between murder and rape, and a lesser degree of harm is produced by rape.\textsuperscript{185}

The Court concluded, "We have the abiding conviction that the death penalty, which 'is unique in its severity and irrevocability'... is an excessive penalty for the rapist who, as such, does not take human life."\textsuperscript{186} Thus although the Court found that for the crime of murder the death penalty was acceptable, the Court drew a distinct line in cases where there was no loss of life, including cases in which the defendant was convicted of rape.\textsuperscript{187}

The Eighth Amendment is not precise and its "scope is not static."\textsuperscript{188} It draws its meaning from the "evolving standards of decency that mark our maturing society,"\textsuperscript{189} and as it has evolved it has come to bar not only those punishments that are "barbaric but also those that are excessive."\textsuperscript{190} The clause forbidding "cruel and unusual punishment"\textsuperscript{191} is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice.\textsuperscript{192} The crimes for which society will condone the death penalty change with time and after \textit{Coker} it was

\begin{footnotesize}
\begin{itemize}
\item[182.] See Gregg, 428 U.S. at 173. Although rape is a reprehensible crime, the concurrence in \textit{Coker} found no indication that petitioner's offense was committed with excessive brutality or that the victim sustained serious or lasting injury. \textit{Id.}
\item[184.] \textit{Id.} at 598.
\item[185.] See Higgins, \textit{supra} note 10, at 31.
\item[186.] Coker, 433 U.S. at 598.
\item[187.] See id.
\item[188.] See Furman v. Georgia, 408 U.S. 238, 242 (1972).
\item[190.] \textit{Id.}
\item[191.] U.S. CONST. amend. VIII.
\end{itemize}
\end{footnotesize}
considered cruel and unusual to sentence someone to die for committing rape.\textsuperscript{193}

B. \textit{Louisiana Now Wants to Impose the Death Penalty for the Rape of Child}

In 1995, Louisiana revised its legislation to allow for the sentence of death when a defendant is convicted of raping a child under twelve.\textsuperscript{194} Wilson and Bethley were indicted under Louisiana’s revised penal code.\textsuperscript{195} Wilson was charged with the rape of a five-year-old girl; Bethley was charged with raping three young girls, ages five, seven, and nine.\textsuperscript{196} These defendants argued that the United States Supreme Court’s reasoning about the qualitative difference between murder and rape of an adult woman applies equally to the crime of raping a child.\textsuperscript{197} Neither defendant intended to kill their victims and all that separated them from \textit{Coker} was the age of the victim.\textsuperscript{198}

The Louisiana Supreme Court rejected Wilson’s and Bethley’s argument and found the holding in \textit{Coker v. Georgia}\textsuperscript{199} was limited to the rape of an adult woman.\textsuperscript{200} The United States Supreme Court denied certiorari to Wilson’s and Bethley’s appeal, leaving the holding in \textit{Coker} as the precedent of how to treat the death penalty in rape cases.\textsuperscript{201} The Louisiana court pointed out that the \textit{Coker} Court took great pains in referring only to the rape of adult women throughout the opinion,\textsuperscript{202} using the term “adult woman”

\textsuperscript{193} See supra Part II.E. One of the most important functions of the jury when deciding between life imprisonment and death for a defendant is to maintain a link between contemporary community values and the penal system. See Gregg v. Georgia, 428 U.S. 153, 171 (1976) (quoting Witherspoon v. Illinois, 391 U.S. 510, 519 n.15 (1968)).

\textsuperscript{194} LA. REV. STAT. ANN. § 14:42 (West 1997).


\textsuperscript{196} Wilson, 685 So. 2d at 1063.

\textsuperscript{197} Id.

\textsuperscript{198} Id.

\textsuperscript{199} 433 U.S. 584 (1977).

\textsuperscript{200} Wilson, 685 So. 2d at 1065.

\textsuperscript{201} See supra note 191. As previously stated, the United States Supreme Court found the death penalty to be cruel and unusual punishment for the crime of rape. Coker v. Georgia, 433 U.S. 584 (1977).

fourteen times. Based on this reasoning, the Louisiana Supreme Court upheld Louisiana Code section 14:42, which authorizes the death penalty when a defendant is convicted of raping a child under twelve.

Proponents of Louisiana's law, including Jerry Jones, who is prosecuting the Bethley case, believe that Coker was wrongly decided, "probably because appellate judges—like academics—don't see the crushed lives left behind after rape and sexual abuse. Who's to say that it's more traumatic to die than to live with being brutalized?" The Justices in Louisiana agreed and reasoned that the rape of a child is an intentional crime and deserving of death. But those supporting Louisiana's law miss the reasoning in Coker and Enmund, in which the Court held that punishing a crime, which involved no intent to kill, by executing the defendant is cruel and unusual.

As devastated as a rape victim may be, "sensitive response" by family, friends and professionals will assist the victim back to a "livable life." A murder takes away human life and, therefore, imposition of the death penalty may be justified. But the rapist does not kill and though the crime is despicable, it is not deserving of the punishment of death.

C. The Supreme Court Should Find Rape—Even of a Child—Is Still Not Deserving of the Death Penalty

1. The Rape of a Child Does Not Involve Murder

The Supreme Court held in Enmund v. Florida that when there is no intent to kill in a crime, the imposition of the death penalty constitutes cruel and unusual

203. Id. at 1065 n.2.
204. LA. REV. STAT. ANN. § 14:42 (West 1997).
205. Id.
207. Wilson, 685 So. 2d at 1072-73. But even the Justices in Coker acknowledged that rape is never an act committed accidentally and rarely can it be said to be unpremeditated. Coker, 433 U.S. at 603.
211. Id.
punishment. Though Wilson and Bethley may have raped their victims, they had no intent to kill their victims. As previously discussed, the level of culpability is not as great for the crime of rape as it is for the crime of murder. Though the rape of a child is more heinous than the rape of an adult, it is still only rape and absent the intention to kill the victim the defendant should not be sentenced to die.

The United States Supreme Court identified three factors to guide courts in determining whether a sentence meets the Eighth Amendment’s burden: 1) the gravity of the offense and harshness of the penalty, 2) the sentences imposed on other criminals for the same offense in the same jurisdiction, and 3) the sentences imposed on criminals for the same offense in other jurisdictions. Looking at the statutes of other states is a good way to determine if a penalty is excessive, and looking at the other states’ statutes in this situation reveals that Georgia is the only state to agree with Louisiana that the death penalty is an appropriate punishment for raping a child. Twenty years after the United States Supreme Court held the death penalty was cruel and unusual punishment for the rape of an adult woman, only two states have revised

213. Enmund v. Florida, 458 U.S. 782 (1982). As the dissenting Justices in Furman noted, the 19th Century movement away from mandatory death sentences was rooted in the recognition that “individual culpability is not always measured by the category of the crime committed.” Roberts v. Louisiana, 428 U.S. 325, 333 (1989) (citing Furman v. Georgia, 408 U.S. 238, 402 (1972)).

214. Louisiana v. Wilson, 685 So. 2d 1063 (La. 1996), cert. denied, 117 S. Ct. 2425 (1997). Wilson and Bethley have not been convicted, only indicted. Id.

215. See Coker, 433 U.S. at 598. If there is an accompanying capital crime of murder, it is mostly likely that the defendant would be tried for murder and receive the death penalty that way so it is not necessary to analyze a case like that. But when there is no accompanying murder, the death penalty is too severe a penalty for rape. Id. at 599 n.16.


217. Leatherwood, 548 So. 2d at 406 (citing Solem v. Helm, 463 U.S. 277, 292 (1983)).


219. See Higgins, supra note 10. Though Louisiana was the first state to pass a law allowing a convicted child rapist to be put to death does not mean the law does not reflect the views of other states. One year after Louisiana amended its law Georgia followed passing a statute similar to Louisiana’s making two states in which the rape of a child is a capital crime. See Higgins, supra note 10.

their laws in an attempt to get around the Supreme Court’s ruling. The other forty-eight states follow Coker and do not allow imposition of the death penalty solely for the crime of rape.

In fact in 1981, the Florida Supreme Court found that the holding in Coker was controlling for the rape of a child. When a defendant convicted of raping an eleven-year-old girl was sentenced to die, he appealed to Florida’s Supreme Court. The court relied first on the reasoning in Gregg, where the United States Supreme Court found that “[r]ape is without doubt deserving of serious punishment; but in terms of moral depravity . . . it does not compare with murder . . . . [R]ape by definition does not include the death of or even the serious injury to another person. The murderer kills; the rapist, if no more than that, does not.” The Florida court concluded that the reasoning of the Justices in Coker compelled them to find that “a sentence of death is grossly disproportionate and excessive” for the crime of rape and, therefore, forbidden by the Eighth Amendment as cruel and unusual. Even though the Florida case involved the rape of an eleven-year-old girl, Coker was found to control.

The only difference in Louisiana’s law and the death penalty statute that the United States Supreme Court found unconstitutional in Coker is the specification of the age of the victim. No life must be lost before the death penalty can be imposed under Louisiana’s law. As the Supreme Court specified in Coker and in Enmund, the crime of rape alone is not enough to allow the perpetrator to be sentenced to die. The Louisiana Court found the class of offenders is sufficiently limited to those who rape a child under the age of

221. See Higgins, supra note 10. Georgia and Louisiana are the only states with laws allowing the death penalty to be imposed as punishment for the crime of rape. Id.

222. Buford v. Florida, 403 So. 2d at 951.

223. Id. at 943.

224. Id. at 951 (citing Gregg v. Georgia, 428 U.S. 153, 187 (1976)).

225. Id.

226. Buford, 403 So. 2d at 951.

227. Louisiana’s law specifies that the death penalty may only be imposed if the rape victim was under the age of twelve. LA. REV. STAT. ANN. § 14:42 (West 1997).

228. See supra note 220.

twelve and not every rapist will be subject to the death penalty. But as previously discussed, the death penalty is too severe a punishment for the crime of rape regardless of the victim's age.

The Louisiana Supreme Court commented that while Louisiana was the sole jurisdiction with such a statute in effect at the time of Wilson's and Bethley's indictments, it had the suggestion from several other states that their citizens desire the death penalty for such a heinous crime as well. The Louisiana court's belief that other states will follow suit if this law is upheld maybe misplaced. In fact, in the area of child rape, there appears to be "no groundswell of support outside of a few of the southern states."

Perhaps the dissent in Wilson said it best, "No other state in the union imposes the death penalty for the aggravated rape of a child under twelve. . . . [because] . . . the statute fails constitutional scrutiny under the decisions of the United States Supreme Court in Coker v. Georgia . . . Furman v. Georgia . . . and Gregg v. Georgia . . . ." The previous rulings by the Supreme Court have held not only that the death penalty is cruel and unusual for the crime of rape, but that it is cruel and unusual for any crime when a life is not taken. But "[f]ar more convincing than Gregg, or Coker or Enmund, or any of the others, the American public has spoken—through its legislatures and juries. That public has told us that, however heinous it may regard the rape of a child, death is not an acceptable punishment." It must be remembered that the question is not "whether we condone

232. Wilson, 685 So. 2d at 1069.
233. See discussion supra Part I. The only other state to amend its law to allow for the death penalty to be imposed for the rape of a child under twelve is Georgia. See Higgins, supra note 10.
235. Wilson, 685 So. 2d at 1074 (Calogero, J., dissenting).
237. See Leatherwood v. Mississippi, 548 So. 2d 389, 406 (Miss. 1989). Only two of the fifty states have laws allowing for the imposition of the death penalty for the crime of rape and no one has been executed for committing a rape since 1964. Even since Louisiana revised its law in 1995, no jury has sentenced someone to die for the crime of rape alone. See Higgins supra note 10, at 30.
rape or murder, for surely we do not; it is whether capital punishment [for rape] is a punishment no longer consistent with our own self-respect.  

The United States Supreme Court was in no hurry to rule on this issue as it denied certiorari to Wilson and Bethley on the basis that neither had been convicted. But when looking at how the Louisiana juries sentence child rapists, the Court may doubt that a jury will sentence someone to die for the rape of a child. Even after Louisiana revised its law to allow for the death penalty, in 1996, a Louisiana jury sentenced a man convicted of raping his nine and eleven-year-old daughters to life imprisonment—not to death.

The Supreme Court has already declared that the imposition of the death penalty for rape is unconstitutional. In fact, it went as far as to say that absent the taking of a life, the death penalty is too severe a punishment for any crime. The raping of a child is no doubt heinous, but it does not involve a taking of a life and, therefore, imposition of the death penalty would be too severe.

2. The Death Penalty Is Not an Effective Deterrent

The Louisiana Supreme Court also found that the death penalty serves as a deterrent to raping children. It held that deterrence and retribution are legitimate goals of punishment and that the sentence of death for the rape of a child will be a deterrent. Even the United States Supreme Court said that the death penalty serves two social purposes: retribution and deterrence of capital crimes by prospective

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239. See Higgins, supra note 10. Ira Robins, criminal law professor at American University's Washington College of Law, comments that it is hard to predict what the Supreme Court would do with the Louisiana law but hopes that they strike it down. She fears a slippery slope leading to the death penalty for less serious crimes like the kidnapping of children. Id.
240. See supra Part II.H. See also Louisiana v. Viree 670 So. 2d 733 (La. 1996); Louisiana v. Jamison, 640 So. 2d 438 (La. 1994); Louisiana v. Pokey, 529 So. 2d 474 (La. 1988).
244. See Leatherwood v. Mississippi, 548 So. 2d 389, 406 (Miss. 1989).
246. See id.
offenders.247

But statistical attempts to evaluate the deterrence value of the death penalty have been inconclusive.248 There is no evidence that the threat of death as punishment for a crime will deter those who seek to rape children.249 Furthermore, because of the manner in which the penalty is implemented in the United States, a rational person contemplating raping a child is confronted not with a certain death, but with a slight possibility that he may be executed at some point in the distant future.250 This is really no deterrent at all.

V. PROPOSAL

Louisiana Penal Code section 14:42, and Georgia Penal Code section 16:61 should be repealed as they are unconstitutional under the United States Supreme Court's current rulings.251 Neither law requires that a life be taken before the death penalty may be imposed.252 In Coker v. Georgia,253 the Supreme Court of the United States declared that the imposition of the death penalty for the crime of rape is unconstitutional.254 The Court conceded that rape was a despicable crime and deserved serious punishment,255 but found a qualitative difference between the rape and murder.256 The Court concluded that the death penalty, "which is unique in its severity and irrevocability . . . is an excessive penalty for the rapist, who as such, does not take a human life."257

In 1982, the United States Supreme Court went as far as to say that absent the killing of another person, or at least the intent to kill another person, the death penalty is too

248. See id. at 184-85.
249. See id.
252. LA. REV. STAT. ANN. § 14:42 (West 1997); GA. CODE. ANN. § 16-6-1 (1997).
255. Id. at 598.
256. Id.
257. Id.
severe a punishment for any crime. The raping of a child is no doubt a heinous crime, but it is not murder and, therefore, the imposition of the death penalty is cruel and unusual.

When someone is sentenced to die for raping a child under either Georgia’s or Louisiana’s laws, the United States Supreme Court should grant certiorari in order to declare once and for all that the death penalty is cruel and unusual punishment for the crime of rape no matter what the age of the victim. Relying on precedent, the Justices should find that despite the despicable nature of the crime of rape, even of a child, it does not qualify as a crime deserving of the punishment of death.

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259. See Leatherwood v. Mississippi, 548 So. 2d 389, 405 (Miss. 1989).
260. The United States Supreme Court has already held that the death penalty is too severe a punishment for the crime of rape. Coker v. Georgia, 433 U.S. 584 (1977).
262. The Supreme Court held in Enmund v. Florida that absent a killing or at least the intention to kill, the death penalty is a cruel and unusual punishment. 458 U.S. 782 (1982).