

When Will It Stop? The Use of the Death Penalty for Non-Homicide Crimes

I. INTRODUCTION

The punishment a defendant receives for committing a crime is generally proportional to the crime committed. A defendant who robs a store will receive a less severe sentence than someone who commits murder. In fact, a basic element of American criminal law is: the more severe the crime, the more severe the punishment.¹ The ultimate form of punishment, as well as the most controversial, is the death penalty. The death penalty has traditionally been reserved for only the most serious types of crimes which involve the unlawful and intentional taking of another human life. Recently, however, some states have decided to depart from this standard, and now authorize the use of the death penalty for crimes in which no one was killed.²

The initial challenge of a death sentence for a non-homicide crime occurred in 1969, when a defendant argued that a death sentence for robbery was cruel and unusual under the Eighth Amendment of the United States Constitution.³ The Supreme Court, however, decided the case on other grounds and never actually addressed the question of using the death penalty for a non-homicide crime such as robbery. Eight years later in *Coker v. Georgia*,⁴ the Court again confronted the use of the death penalty for a non-homicide crime and ruled that sentencing a defendant to death for the rape of an adult woman was unconstitutional. This decision set a precedent suggesting that the Court would closely examine, and possibly invalidate, any sentence of death for a crime not involving a homicide.

Now, twenty years later, state legislatures have begun to move away from *Coker* and have enacted statutes which allow prosecutors to seek the death penalty for crimes in which no one was killed. In fact, thirteen states and the federal government presently have statutes which permit the death penalty for crimes other than homicide.⁵ For instance, in Arkansas, California, and Washington, a defendant can get the death penalty for committing treason.⁶ In New Mexico, the state can use the death penalty against a defendant who commits espionage.⁷ Additionally, Missouri has taken the greatest liberty with its statutes by permitting the death penalty in cases in which the defendant sold drugs near a school or placed a bomb near a bus terminal.⁸

1. U.S. CONST. amend. VIII.

2. Michael Higgins, *Is Capital Punishment for Killers Only?*, 83 A.B.A. J., Aug. 1997, at 30. States included are Arkansas, California, Colorado, Florida, Georgia, Idaho, Illinois, Louisiana, Mississippi, Missouri, Montana, New Mexico, and Washington). *Id.*

3. See *Boykin v. Alabama*, 395 U.S. 238 (1969).

4. *Coker v. Georgia*, 433 U.S. 584 (1977).

5. Higgins, *supra* note 2, at 31.

6. See ARK. CODE ANN. § 5-51-201 (Michie 1978); CAL. PENAL CODE § 37 (West 1988); WASH. REV. CODE ANN. § 9.82.010 (West 1988).

7. See N.M. STAT. ANN. § 20-12-42 (Michie 1978).

8. See MO. ANN. STAT. § 578.310 (West 1996).

Despite these state statutes and the expanded use of the death penalty, no one is presently on death row for a crime that did not involve a death.⁹ The key question, then, seems to be what the Supreme Court will do when a defendant is finally sentenced to death under one of these new statutes. Will the Court find the non-homicide death penalty statutes constitutional, or will it find them impermissible under the Eighth Amendment? A valid concern is that if the Court upholds the statutes there will be a slippery-slope leading to the use of the death penalty for even less severe crimes, such as kidnapping a child.¹⁰ Because the Court has yet to rule on the non-homicide death penalty statutes, no one can say for sure what the outcome will be. Nevertheless, this Note will examine past Supreme Court cases and related scholarly work in an attempt to predict how the Court might rule and, more important, how it should rule given society's contemporary standards and the prevailing views concerning the death penalty.

This Note is divided into several sections. Section II provides a brief history of the development of the death penalty in the United States. Section III lays a more detailed factual foundation from which this issue has grown. This section is important because a discussion regarding the current non-homicide death penalty statutes would be incomplete without first understanding their origins. Section IV analyzes the important constitutional issues which the Supreme Court should take into consideration when eventually faced with this issue, as well as a discussion of what role the state legislatures, public opinion, and juries should play. Section IV also includes a prediction of how the Supreme Court and legislatures might deal with the non-homicide death penalty statutes given these factors. Section V proposes actions that state legislatures and Congress should take to adequately deal with these statutes. Finally, Section VI concludes this Note and offers some insights into the key issues that society will face in the future concerning the death penalty and its increased use for non-homicide crimes.

II. DEVELOPMENT OF CAPITAL PUNISHMENT IN THE UNITED STATES

The American legal system has used capital punishment as a valid sentence against a defendant throughout its history. During the mid-1600's, the death penalty was administered for crimes such as "idolatry, witchcraft, blasphemy, murder, assault in sudden anger, sodomy, buggery, adultery, statutory rape, rape, manstealing, perjury in a capital trial, and rebellion."¹¹ The use of the death penalty continued into the 1700's, during which people were put to death for cutting down a tree, stripping a child, robbery, and forgery.¹² The frequent use of the death penalty led many people to believe that the Framers of the United States Constitution viewed the use of death as an acceptable and widely used form of punishment for serious offenses.¹³ Public sentiments eventually changed, though, and by 1917, ten states had abolished capital punishment all together.¹⁴ The beginning of World War I quickly halted the move-

9. Higgins, *supra* note 2, at 31.

10. *Id.* (quoting Ira Robbins, professor of criminal law at American University's Washington College of Law).

11. *Furman v. Georgia*, 408 U.S. 238, 335 (1972) (Marshall, J., concurring).

12. William J. Brennan, *Constitutional Adjudication and the Death Penalty: A View from the Court*, 100 HARV. L. REV. 313, 328 (1986).

13. Sandra R. Acosta, *Imposing the Death Penalty Upon Drug Kingpins*, 27 HARV. J. ON LEGIS. 596, 599-600 (1990).

14. *Furman*, 408 U.S. at 339 app. at 372. These states included Iowa, Oregon, South Dakota,

ment against the death penalty and by 1935 the rate of executions again rose to an extraordinary level of almost four per week.¹⁵ Not until after World War II did the high number of executions finally end.

All of these early executions, however, were not for murder or other crimes involving the death of a person. For instance, between 1930 and 1982, 3340 people were executed for murder, 455 were executed for rape, and 70 were executed for crimes such as armed robbery, espionage, kidnapping and burglary.¹⁶ Nevertheless, since the Supreme Court's holding in *Coker v. Georgia*¹⁷ in 1977, virtually all death sentences have been for crimes involving the murder of another person.¹⁸ In *Coker*, the Court found that it was unconstitutional to sentence a defendant to death for the rape of an adult woman. The *Coker* Court, however, did not completely resolve the issue on using the death penalty for other crimes, but rather carefully pointed out that the death penalty is not always a barbaric form of punishment, nor even necessarily cruel and unusual punishment.¹⁹ The Court also made it clear that the death penalty could be an acceptable form of punishment and that it is not automatically disproportionate to a crime in which no one was killed.²⁰ Unfortunately, the *Coker* Court did not elaborate on this point, but this part of the holding was the slight opening that Congress and the state legislatures needed to create the non-homicide death penalty statutes now under examination.

III. FACTUAL BACKGROUND OF NON-HOMICIDE DEATH PENALTY STATUTES

A. Supreme Court Cases: *Furman* and *Coker*

*Furman v. Georgia*²¹ is likely the most important case concerning the application of the death penalty. In *Furman*, the Supreme Court held that Georgia's death penalty sentencing guidelines violated the cruel and unusual punishment clause of the Eighth Amendment because no standards existed to aid the jury in their discretion. The lack of standards, in turn, usually resulted in racially arbitrary applications of the death penalty.²² *Furman* is historically important because the Court declared that a state could constitutionally administer the death penalty so long as it followed certain minimum procedural safeguards. Four years later, the Court reaffirmed this position when it again considered the constitutionality of the death penalty, and this time found Georgia's newly revised sentencing structure cured of any Eighth Amendment problems.²³

The development of the death penalty and its application to non-homicide crimes continued in *Coker*. The Court in *Coker* reversed a death sentence for the rapist of an adult woman because the Court believed the sentence violated the cruel and unusual

Kansas, Missouri, Washington, Minnesota, Wisconsin, Maine, and Colorado). *Id.*

15. Acosta, *supra* note 13, at 600.

16. Faye A. Silas, *America's 14,000 Executions*, 71 A.B.A. J., April 1985, at 53.

17. *Coker v. Georgia*, 433 U.S. 584 (1977).

18. Acosta, *supra* note 13, at 600.

19. *Coker*, 433 U.S. at 591.

20. *Id.*

21. *Furman v. Georgia*, 408 U.S. 238 (1972).

22. *Id.* at 240.

23. *Gregg v. Georgia*, 428 U.S. 153 (1976).

punishment clause of the Eighth Amendment.²⁴ *Coker* is crucial because the Court specifically stated that using the death penalty for a non-homicide crime, such as rape, was invalid under the Constitution. In reaching this decision, the *Coker* plurality looked at two issues. The first was public support for providing the death penalty in rape convictions, as measured by the number of state legislatures which had chosen to include rape as a capital offense, and second, the number of juries across the country which actually sentenced a rapist to death.²⁵

In analyzing the public support for providing capital punishment in rape convictions, the *Coker* Court pointed out that since the revival of the death penalty in *Furman*, no state that previously authorized the death penalty for rape included it in their post-*Furman* list of capital offenses.²⁶ In fact, when *Coker* was decided, Georgia was the only jurisdiction in the United States which provided the death penalty for the rape of an adult woman.²⁷ The Court found this point significant because it demonstrated that the state legislatures across the country did not unanimously support the notion of sentencing a defendant to death for the crime of rape.

The second factor the *Coker* Court examined was the way juries rule on the issue. The role of juries is meaningful because, in the Court's opinion, "[t]he jury . . . is a significant and reliable objective index of contemporary values."²⁸ Because Georgia was the only state in which juries had the actual choice of imposing the death penalty for rape, the Court looked exclusively at the Georgia juries. In doing so, the Court found that since 1973 only six out of a total of sixty-three juries had sentenced a defendant to death for rape.²⁹ While noting that this number was not insignificant, the Court stated that the fact that at least nine out of ten juries had not imposed the death penalty for rape demonstrated that the Georgia juries did not overwhelmingly support such a severe penalty for the crime. Taking this factor into consideration, along with the various state legislatures' responses since *Furman*, the *Coker* Court held that a sentence of death for rape is unconstitutionally disproportionate.³⁰

The plurality in *Coker* chose to draw a bright-line rule between homicide and non-homicide crimes when it came to the application of the death penalty. Justice Powell, however, who dissented in part and concurred in the *Coker* decision, did not endorse such a strong holding. Specifically, Justice Powell stated that "the plurality draws a bright line between murder and all rapes regardless of the degree of brutality of the rape or the effect upon the victim. I dissent because I am not persuaded that such a bright line is appropriate."³¹ Justice Powell continued by noting that not only is there a great variation in the culpability of rapists, but also that the "deliberate viciousness" of a rapist may be even greater than that of a murderer.³² Additionally, Justice Powell argued that the plurality inaccurately analyzed the role of the legislatures and juries in reaching its decision because the plurality failed to show that society

24. *Coker*, 433 U.S. at 592.

25. *Id.* at 592.

26. *Id.* at 594.

27. *Id.*

28. *Id.* at 596.

29. *Id.*

30. *Id.* at 597.

31. *Coker v. Georgia*, 433 U.S. 584, 603 (1977) (Powell, J., dissenting in part and concurring in part).

32. *Id.*

finds capital punishment disproportionate for all types of rapes.³³ According to Powell, it was entirely possible that both juries and legislatures have reserved the use of the death penalty for the most serious rape cases which result in lasting and serious harm to the victim.³⁴

While Justice Powell's argument is persuasive, his idea of measuring society's view on the proper punishment for every type of rape is impracticable because every rape is unique with its own set of facts and circumstances. Justice Powell chose to focus on the invariably difficult task of requiring a jury to determine the exact degree of the culpability of a rapist, rather than adopt the plurality's clear distinction between homicide and non-homicide crimes. Justice Powell refused to fall under the plurality's bright-line ruling and instead kept the possibility alive that, in certain instances, the death penalty could be used as a proper punishment for a non-homicide crime.

Chief Justice Burger, with whom Justice Rehnquist joined, also dissented from the plurality opinion in *Coker*. In his dissent, Chief Justice Burger specifically dealt with the issue of using the death penalty for non-homicide crimes. His primary concern with the plurality's holding was that it would limit the state legislatures' freedom in using the death penalty for other types of crimes. Chief Justice Burger stated:

[T]oday's holding does even more harm than is initially apparent. We cannot avoid taking judicial notice that crimes such as airplane hijacking, kidnaping, and mass terrorist activity constitute a serious and increasing danger to the safety of the public. It would be unfortunate indeed if the effect of today's holding were to inhibit States and the Federal Government from experimenting with various remedies including possibly imposition of the penalty of death to prevent and deter such crimes.³⁵

The combined impact of Justice Powell and Chief Justice Burger's dissents made it clear that even though the plurality held otherwise, support still existed on the Court for using the death penalty for non-homicide crimes, a fact that would become increasingly important as state legislatures began to move away from the *Coker* holding and towards an expanded use of the death penalty.

B. Meaning of the Eighth Amendment

The Eighth Amendment of the United States Constitution, adopted in 1791, states that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."³⁶ Perhaps the most controversial part of the Eighth Amendment is the meaning of the phrase cruel and unusual punishment. Since the 1800's, courts have tried to define the meaning of the phrase and how to apply it. The debate over its meaning is centered around one crucial issue: should a court interpret the meaning of the clause from the perspective of the Founders, in which case any cruel and unusual punishment is prohibited? Or, rather, should a court judge the cruel and unusual clause against the standards of the time period in which it is analyzed? The answers to these questions are instrumental to state legislatures' arguments in favor of using the death penalty for non-homicide crimes.

33. *Id.* at 604.

34. *Id.*

35. *Id.* at 621 (Burger, C.J., dissenting).

36. U.S. CONST. amend. VIII.

One way to determine what the cruel and unusual phrase means is to examine its history. As it appears in the Constitution, the actual wording of cruel and unusual can be traced back to the English Declaration of Rights of 1688.³⁷ Beyond this, though, little evidence exists of the Framers' intent and why they chose to include such a clause among the other governmental limitations in the Bill of Rights. For instance, there is no evidence of what attracted the Framers to that specific language or what that language meant to the English.³⁸

The most logical place for the Court to begin its attempt to understand the principles behind the Eighth Amendment is to define the meaning of the words cruel and unusual. In 1958, the Court took advantage of this opportunity in *Trop v. Dulles*.³⁹ Although *Trop* was not a death penalty case, the Court still analyzed the Eighth Amendment's cruel and unusual clause and its bar on the penalty of denationalization for the crime of military desertion. During its discussion of the Eighth Amendment, the *Trop* Court recognized that the words cruel and unusual were not precise terms, but rather drew their meaning from the "evolving standards . . . of a maturing society."⁴⁰ However, the Court noted that the meaning of the words cruel and unusual could be significant:

Whether the word 'unusual' has any qualitative meaning different from 'cruel' is not clear. On the few occasions this Court has had to consider the meaning of the phrase, precise distinctions between cruelty and unusualness do not seem to have been drawn. These cases indicate that the Court simply examines the particular punishment involved in light of the basic prohibition against inhuman [sic] treatment, without regard to any subtleties of meaning that might be latent in the word 'unusual.' If the word 'unusual' is to have any meaning apart from the word 'cruel,' however, the meaning should be the ordinary one, signifying something different from that which is generally done.⁴¹

The Court, therefore, when determining the validity of the non-homicide death penalty statutes, should not try to interpret the clause based on the definitions of the words but rather should look at the broader principles of the Constitution and how the cruel and unusual clause fits within that general framework.

If the Court is going to examine the cruel and unusual clause within the broader principles of the Eighth Amendment, the key question then becomes how does the Court currently view the Eighth Amendment? This question is important because upon challenge to the Supreme Court, the state statutes authorizing the death penalty for non-homicide crimes must overcome any guiding principles of the Eighth Amendment. An initial Eighth Amendment principle came out of *Furman*, in which Chief Justice Burger stated that "[a] punishment is inordinately cruel . . . chiefly as perceived by the society so characterizing it. The standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change."⁴² Considering that all of the dissenters joined in this language in *Furman*, the Court as a whole at least

37. *Trop v. Dulles*, 356 U.S. 86, 100 (1958).

38. Brennan, *supra* note 12, at 323.

39. *Trop v. Dulles*, 356 U.S. 86 (1958).

40. *Id.* at 101.

41. *Id.* n.32 (citations omitted).

42. *Furman*, 408 U.S. at 382 (Burger, C.J., dissenting).

agreed on the fundamental point that the Eighth Amendment should not be frozen in time nor confined to the practices undertaken by societies centuries before.

The Court also agreed on one other Eighth Amendment principle, which is that the Court must "turn to evolving standards of decency in order to determine what the [cruel and unusual] clause permits and what it prohibits."⁴³ Further, the Court agrees that the cruel and unusual clause may be "progressive, and is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice."⁴⁴ The *evolving standards of decency* principle, therefore, appears to be the answer to how the Court should interpret the cruel and unusual punishment clause of the Eighth Amendment. However, this principle is really only the beginning of the inquiry because before such a standard can be applied, the Court must first decide what these evolving standards are and how to judge them.

The Court has consistently turned to legislation proposed and enacted by state legislatures for some guidance on defining these evolving standards of decency. The Court reaffirmed its commitment to state legislatures when it recently accepted that the Eighth Amendment's prohibition against cruel and unusual punishment draws its meaning from the evolving standards of decency which mark the progress of a maturing society, and that the "best evidence of these evolving standards 'is the legislation enacted by the country's legislatures.'"⁴⁵ Therefore, the legislatures play a fairly significant role in assisting the Court to define the limits of the Eighth Amendment.

In summary, a historical look at the Court shows that it has undertaken the almost impossible job of attempting to define the words of the Eighth Amendment and to apply its constantly changing meaning to today's problems. Presently, the Eighth Amendment appears to be grounded in standards set by society and by state legislatures and their enacted laws. The Court, therefore, should analyze the current non-homicide death penalty statutes within this framework. Whether the Court would uphold these statutes under this analysis is the topic of Section IV.

C. Current Non-Homicide Death Penalty Statutes

Even though the Supreme Court struck down the use of the death penalty for the rape of an adult woman only twenty years ago, Louisiana currently has legislation which provides for the death penalty for the rape of a child under twelve years of age.⁴⁶ Georgia is also very close to enacting similar legislation.⁴⁷ The legislatures in these states have apparently decided to draw a distinction between the rape of an adult woman and the rape of a minor. However, the *Coker* Court did not make such a distinction, so whether the Court would uphold these statutes cannot be predicted. Nonetheless, these Georgia and Louisiana decisions were just the beginning of a national trend where states have increasingly begun to favor using the death penalty for non-homicide crimes. For example, Florida and Mississippi passed laws making the rape of a child a capital offense, but the Florida Supreme Court struck down their law under

43. Brennan, *supra* note 12.

44. *Weems v. United States*, 217 U.S. 349, 378 (1910).

45. *Campbell v. Wood*, 511 U.S. 1119, 1120 (1994) (quoting *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989)).

46. LA. REV. STAT. ANN. § 14:42 (West 1996).

47. House Bill 801, offered by Representative Warren Massey, was recently defeated in the Senate; however, it was sent back to the committee and will be reconsidered in January, 1998.

Coker and the Mississippi law was invalidated for other reasons.⁴⁸ These invalidated laws were significant because they represent the state legislatures' general movement toward the use of the death penalty for non-homicide crimes, which would limit the holding in *Coker*.

In addition to the use of capital punishment for the rape of a minor, strong support also exists across the country for the use of capital punishment for other crimes where the victim is not killed. In fact, thirteen states currently have laws that permit the death penalty for a non-homicide crime.⁴⁹ Most of these laws center around crimes of treason, aggravated kidnapping, and aircraft hijacking.⁵⁰ Several other states also provide the death penalty for such crimes as espionage,⁵¹ drug trafficking,⁵² placing bombs near bus terminals,⁵³ and aggravated assault or kidnapping while incarcerated in state prison for murder or persistent felonies.⁵⁴ Further, in 1994, Congress passed a law authorizing the death penalty for drug kingpins who generate more than \$20 million a year.⁵⁵

Despite the increase in the number of non-homicide death penalty laws, no one is currently on death row for a crime which did not involve the death of another person. Although no defendant has been sentenced under one of these non-homicide death penalty statutes, each year more state legislatures are taking a serious look at enacting such laws. Also, the reason even more state legislatures have not enacted similar statutes is because many of them are waiting to see how the Supreme Court rules on the issue.

D. *Bethley v. Louisiana*

As mentioned earlier, the Louisiana Supreme Court recently upheld a state law that authorizes the death penalty for the rape of a twelve year old minor. On June 2, 1997, the United States Supreme Court, in *Bethley v. Louisiana*, declined to review this decision by the Louisiana Supreme Court.⁵⁶ Justices Stevens, Ginsburg, and Breyer wrote that the Court denied the petition because the "[p]etitioner has been neither convicted of nor sentenced for any crime."⁵⁷ In essence, the Court is reserving its right to examine the non-homicide death penalty statutes until a defendant is actually convicted under one of them. This situation creates an interesting tension between the state legislatures and the Court, because many of the state legislatures are waiting for the Court to rule on the non-homicide statutes before they enact more laws. At the same time, however, the Court is waiting for state legislatures to fully enforce and actually use these laws before it will make its ruling. It is likely that the slow, but

48. Higgins, *supra* note 2.

49. *Id.*

50. See ARK. CODE ANN. § 5-51-201 (Michie 1995); CAL. PENAL CODE § 37 (West 1988); COLO. REV. STAT. ANN. § 18-3-301 (West 1990); GA. CODE ANN. § 17-10-30 (1997); 720 ILL. COMP. STAT. ANN. 5/30-1 (West 1993); LA. REV. STAT. ANN. § 113 (West 1986); MISS. CODE ANN. § 97-7-67 (1972); WASH. REV. CODE ANN. § 9.82.010 (West 1988).

51. See N.M. STAT. ANN. § 20-12-42 (Michie 1978).

52. See FLA. STAT. ANN. § 893.13 (West 1997).

53. See MO. ANN. STAT. § 578.310 (West 1996).

54. See MONT. CODE ANN. § 46-18-220 (1996).

55. See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (codified as amended in scattered sections of 18 U.S.C.).

56. *Bethley v. Louisiana*, 117 S. Ct. 2425, 2425 (1997).

57. *Id.*

deliberate, expansion of these non-homicide laws will eventually result in the conviction of a defendant and a sentence of death for a non-homicide crime. At that time, the Supreme Court should agree to hear the case and rule on the constitutionality of these laws.

IV. ANALYSIS

A. Method of Analysis

The Supreme Court has traditionally used two main substantive indicators to develop the law concerning the use of the death penalty. The first is the concept of proportionality, which looks at whether the use of the death penalty is excessive or disproportionate to the offense committed. The second indicator is the evolving standards of decency test which reflects the growth and development of a mature society. Embodied in this second indicator is an analysis of state legislatures and the level of public support for the use of the death penalty. By using these two indicators, the Court can make a fair and rational judgment concerning the use of the death penalty for non-homicide crimes. The purpose of this section is to work through these two indicators, to point out the key issues within each factor, and then to determine how the Supreme Court should rule in light of these factors.

B. Proportionality and Excessiveness

In *Coker*, the Court set forth a definition for proportionality and decided that proportionality is guided by the excessive nature of the punishment for the crime committed.⁵⁸ Also, the *Coker* Court viewed the proportionality test as merely one prong in the test for excessiveness.⁵⁹ Under *Coker*, if a punishment is disproportionate to the crime committed, then that punishment is excessive and unconstitutional. The real question, then, seems to be the test for excessiveness.

The *Coker* Court believed that a fundamental basis of the Eighth Amendment is that it bars those punishments that are excessive in relation to the crime committed.⁶⁰ Furthermore, a punishment is excessive if it: "(1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime."⁶¹ The operative part of this definition is the word "or," which indicates that a punishment is excessive and therefore unconstitutional under the Eighth Amendment if it fails either prong of the test. In determining the result under the first prong of the test, the individual justices should not base their decisions solely upon subjective views, but rather should take into consideration as many objective factors as possible, including public opinion, legislative attitudes, and the response of juries to such punishment.⁶² Therefore, the excessiveness test laid out in *Coker* encompasses nearly every aspect of the major substantive indicators that the Supreme Court has dealt with concerning the death penalty, ranging from the proportionality of the punishment to the role of the legislatures, juries and public opinion.

58. *Coker*, 433 U.S. at 592.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

1. Does the Punishment Make a Measurable Contribution to the Acceptable Goals of Punishment or is It Nothing More than the Purposeless and Needless Imposition of Pain?

The first prong of the excessiveness test described in *Coker* is whether the punishment makes a measurable contribution to the acceptable goals of punishment, or if the punishment is nothing more than the purposeless and needless imposition of pain. As mentioned before, the way to determine the answer to this part of the test is to look at the state legislatures, public opinion, and juries across the nation.

Conflicting views exist on what role the state legislatures should play and how much influence they should have over the Court's decisions. Justice Brennan offered one view and stated that "it seems to me beyond dispute that we should not permit the legislatures to define for us the scope of permissible punishment."⁶³ Justice Brennan continued, noting that "[t]he very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."⁶⁴ Based on this view, Justice Brennan did not highly regard the state legislatures, and certainly did not feel that the Court should give them much weight when determining legal issues.

On the other end of the spectrum is Justice White, who was part of the *Coker* plurality. Concerning the amount of deference the Court should give state legislatures, Justice White stated:

[I]n assessing a punishment selected by a democratically elected legislature against the constitutional measure, we presume its validity. We may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved. And a heavy burden rests on those who would attack the judgment of the representatives of the people.⁶⁵

This perspective is quite different than that of Justice Brennan. Justice White defers a lot of credibility to the role of the state legislatures and affords them an opportunity to influence legal issues in front of the Court. Of the two approaches, Justice White's argument seems more persuasive because it takes into consideration the desires of the public through their elected representatives, whereas Justice Brennan reserves judgment on the proper form of punishment to a small group of appointed intellects. In addition, Justice White's analysis appears more complete because it gives the legislatures some influence over the law, but at the same time has the courts in place to monitor the process. Although this debate continues, recent Supreme Court cases have stated that one of the factors the Court will look at is how legislatures rule on the issue.

Thirteen state legislatures across the country support the use of the death penalty for non-homicide crimes. Furthermore, Congress recently passed a federal law permitting such a punishment for drug trafficking.⁶⁶ While thirteen states are not a majority, this number represents the beginning of a national trend toward the expanded use of

63. Brennan, *supra* note 12.

64. *Id.*, at 328-29.

65. *Gregg v. Georgia*, 428 U.S. 153, 175 (1976).

66. *Higgins*, *supra* note 2, at 31.

the death penalty. Therefore, the state legislatures' support cannot be underestimated and is a strong factor that the Court should take into consideration.

The next factor in analyzing whether a punishment makes any measurable contribution to its goals is to look at how the general public feels about the punishment. While an exact measurement of how the public feels about using the death penalty for non-homicide crimes is impossible, many studies show strong public support for using the death penalty for certain isolated crimes. For example, a 1989 survey conducted by the National Law Journal showed that over 60% of Americans favor capital punishment for drug criminals.⁶⁷

Another indicator of public support for the expanded use of the death penalty is the ease with which the Violent Crime Control and Law Enforcement Act of 1994 passed in Congress.⁶⁸ In this Act, Congress vastly expanded the number of federal crimes for which the death penalty is a permissible sentence. Apparently, members of Congress believe that the death penalty is a valid punishment for many non-homicide crimes, and that such a punishment is the only way to solve many criminal issues facing this country. Senator Joseph Biden summed up this general sentiment when he agreed that "tougher penalties for violent offenders are important. That is why . . . we have included the largest ever expansion of the death penalty."⁶⁹ In the end, the expanded death penalty provisions of the Act passed by a margin of three to one.⁷⁰

An increase in support for the expanded use of capital punishment to include non-homicide crimes is not surprising because the overall support for the death penalty is currently at an all-time high throughout the country. There are numerous studies which demonstrate this wide and growing support. For example, in 1979, just seven years after the Supreme Court's decision in *Furman*, The Playboy Report on American Men reported that 60% of American men favored the death penalty.⁷¹ In South Carolina, a 1985 newspaper survey reported that among those asked in the local population, the death penalty was supported by more than three to one, with only 11% undecided.⁷² Finally, in 1987, *Parade* magazine reported that of the nearly 40,000 people interviewed from all over the country, 80% believed there should be capital punishment in general and almost 55% thought there should be no minimum age for the death penalty.⁷³ All of these statistics support the general proposition that public support for the death penalty has increased over the past two decades from about 65% in 1980 to

67. Acosta, *supra* note 13, at 606.

68. See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (codified as amended in scattered sections of 18 U.S.C.).

69. 140 CONG. REC. S6078-02 (daily ed. May 19, 1994) (statement of Sen. Biden); see also 140 CONG. REC. E1851-01 (daily ed. Aug. 21, 1994) (statement of Rep. Rostenkowski) ("[The crime bill] is a tough, comprehensive initiative to stem the rising tide of crime in this country The death penalty is expanded to include over sixty violent crimes."); 140 CONG. REC. H9526 (daily ed. Sept. 22, 1994) (statement of Rep. Gingrich) ("Let us get tough with an effective, believable, and timely death penalty for violent criminals."); 140 CONG. REC. S12421-01 (daily ed. Aug. 24, 1994) (statement of Sen. Kerrey) ("[T]here is a consensus amongst Nebraskans that our laws must be tougher on the criminals That is why this bill expands the Federal death penalty to cover about sixty new offenses").

70. Editorial Board, *Dozens of Death Penalties*, WASH. POST, Apr. 18, 1994, at A18.

71. See Hugo Adam Bedau, *Interpreting the Eighth Amendment: Principled vs. Populist Strategies*, 13 T.M. COOLEY L. REV. 789, 799 (1996).

72. *Id.*

73. Lynn Minton, *What's Up This Week: Readers Respond on Capital Punishment*, PARADE MAG., Jan. 25, 1987, at 10.

a high of 80% today.⁷⁴ Perhaps psychologist Phoebe Ellsworth and law professor Samuel Gross summarized the situation best when they stated that “[s]upport for the death penalty is at an all time high, both in the proportion of Americans who favor capital punishment and in the intensity of their feelings.”⁷⁵

In summary, the wide public support for the death penalty and its use to avenge certain non-homicide crimes has increased over the years. The Supreme Court, therefore, should consider this factor when faced with these non-homicide death penalty statutes. Combined with the growing legislative support for such laws, the Court will not be able to deny the feelings of the nation and anything less than upholding these non-homicide laws would be contrary to public opinion.⁷⁶

The final factor which the Supreme Court has traditionally examined to determine if a punishment furthers its goal or is merely the needless imposition of pain, is how juries across the country react to a punishment. Unfortunately, this factor is difficult to determine because currently no one is on death row for a crime that did not involve the death of another person. Therefore, either no jury has had the opportunity to sentence a defendant to death under these non-homicide laws or no jury has actually chosen to sentence a defendant to death for a non-homicide crime. As Justice Brennan stated, “Rejection by society . . . is a strong indication that a severe punishment does not comport with human dignity.”⁷⁷ Whether the current situation demonstrates a rejection by society remains to be seen.

After examining each of these factors, the Court will have to find a high level of support across the country if it is to uphold these non-homicide death penalty laws. As a result, the Court should rule that the use of the death penalty for non-homicide crimes makes a measurable contribution to the aims of punishment and is not simply the needless imposition of pain and suffering.

2. *Is the Punishment Grossly Out of Proportion to the Crime Committed?*

Even though the Supreme Court should find that the non-homicide death penalty statutes make a reasonable contribution to the acceptable goals of punishment and are not merely the needless imposition of pain, the Court must still analyze the other prong of the *Coker* test, which is whether a punishment is grossly out of proportion to the severity of the crime. It is important to note that the test is grossly disproportionate and not merely disproportionate. The Court, unfortunately, provides little guidance on what types of punishments are grossly disproportionate to the crime committed, especially concerning capital punishment for non-homicide crimes. However, in two recent

74. GEORGE GALLUP, JR., *THE GALLUP POLL: PUBLIC OPINION 1994*, 148-49 (1995).

75. Phoebe C. Ellsworth & Samuel R. Gross, *Hardening of the Attitudes: Americans' Views on the Death Penalty*, 50 J. SOC. ISSUES 19, 40 (1994).

76. Three different types of arguments have been advanced to discredit the apparent nationwide support for the death penalty. First, there is the Marshall Hypothesis, which was first articulated by Justice Marshall in *Furman*. This hypothesis argues that if people were fully informed as to the purposes and liabilities of the death penalty they would find it unjust and unacceptable. The second argument attempts to undercut the apparent strong support for the death penalty by stating that although the support is certainly wide, it is not very deep. In other words, when people are given an adequate alternative choice to the death penalty, such as life without parole, the support drops significantly. The third argument focuses on the sentencing patterns of the juries across the country and asserts that only a few hundred defendants have been sentenced to death since *Furman* was decided so there really is not as much support as it might first appear. Bedau, *supra* note 71, at 801-06.

77. *Furman*, 408 U.S. at 277 (Brennan, J., concurring).

cases, the Court briefly discussed the use of capital punishment on a defendant who did not kill anyone.

In *Enmund v. Florida*,⁷⁸ the defendant was convicted of robbery and murder in the first degree and was sentenced to death. The facts, however, showed that the defendant was not involved in the killing directly but merely aided and abetted the felony robbery. The defendant was still convicted of first-degree murder and sentenced to death under Florida's felony-murder statute.⁷⁹ After hearing the case, the Supreme Court decided to reverse the sentence of death because it found that the punishment was inconsistent with the Eighth Amendment.⁸⁰

In reaching its decision, the *Enmund* Court held that the death penalty was disproportionate to the crime of felony robbery.⁸¹ The Court found that although robbery is a serious crime that deserves a severe punishment, robbery is not a crime that is "so grievous an affront to humanity that the only adequate response may be the penalty of death."⁸² Further, the *Enmund* Court stated that the crime of robbery simply "does not compare with murder, which does involve the unjustified taking of human life."⁸³ A murder victim loses their life forever, whereas a robbery victim merely loses some tangible object that is rightfully theirs. The Court, therefore, could not find that the same punishment should be allowed for both of these crimes given their many differences in terms of the severity of each crime and the affect on the victim.

Applying this logic to the current non-homicide death penalty statutes, the Supreme Court should come to the same conclusion. As mentioned earlier, the current non-homicide statutes deal with such crimes as treason, kidnapping, aircraft hijacking, drug dealing, and the rape of a minor. While these are all severe crimes, not one of them necessarily involves the death of another human being. For example, an airplane hijacker does not need to kill anyone to achieve the goal of hijacking a plane. The same is true for a drug dealer or a kidnapper. Murder, on the other hand, by its very definition involves the death of another person before its objectives are fulfilled. Therefore, the Court should follow their *Enmund* decision and find very few similarities between murder and all of the other less severe crimes. As a result, the Court should hold that the current non-homicide death penalty statutes impose an inconsistent and grossly disproportionate punishment for the crime committed.

Coker is the second case which offers some help in the analysis of what type of punishment is grossly disproportionate. In *Coker*, the plurality briefly compared the crime of rape to murder and found that in terms of moral depravity and the injury to the person and to the public, rape cannot compare to murder.⁸⁴ The *Coker* Court conceded that a rape victim suffers a great harm, but the victim's life is certainly not beyond repair, as it is for a murder victim.⁸⁵ In the end, the Court found a distinct

78. *Enmund v. Florida*, 458 U.S. 782 (1982).

79. Under Florida law, in order to sustain a conviction of felony-murder, which is when a defendant did not actively participate in the killing but participated in the underlying felony which led to the killing, the evidence must establish beyond a reasonable doubt that the defendant was present and actively aided and abetted the underlying felony, and also that the killing occurred in the perpetration of the felony. See FLA. STAT. ANN. § 921.141(5)(d) (West 1981).

80. *Enmund*, 458 U.S. at 801.

81. *Id.*

82. *Id.* at 797 (quoting *Gregg v. Georgia*, 428 U.S. 153, 184 (1976)).

83. *Id.* (quoting *Coker v. Georgia*, 433 U.S. 584, 598 (1977)).

84. *Coker*, 433 U.S. at 598 (1977).

85. *Id.*

difference between murder and rape, and this distinction was crucial when the Court chose to strike down the imposition of the death penalty for the crime of rape.

Combining the *Coker* reasoning with the logic behind the *Enmund* decision, the Supreme Court today should find that the use of the death penalty for a crime which does not involve the death of another human being is grossly disproportionate. As argued in *Enmund* and *Coker*, a qualitative difference exists between murder and all other crimes. To date, the Court has not extended the use of the death penalty, which it describes as "unique in its severity and irrevocability,"⁸⁶ to crimes that are less severe than murder. The Court should therefore find these non-homicide statutes grossly disproportionate and unconstitutionally impermissible under the Eighth Amendment.

Both prongs of the excessiveness test from *Coker* have now been analyzed. As mentioned earlier, a punishment is excessive and unconstitutional if it fails either one of the two prongs. The result of the current analysis shows that the use of the death penalty for a non-homicide crime does not fail the first prong, because the punishment arguably makes some measurable contribution to the acceptable goals of punishment. However, the use of the death penalty for a non-homicide crime does fail the second prong because the punishment is grossly disproportionate to the severity of the crime. Therefore, under the precedent set by *Enmund* and *Coker*, the Supreme Court should hold that the non-homicide death penalty statutes across the country are unconstitutional under the Eighth Amendment.

V. PROPOSAL

Because the Supremacy Clause⁸⁷ binds the state courts to enforce and follow the Eighth Amendment rights concerning the death penalty, the only way the state legislatures will have any influence over the law is if they are able to draw up a non-homicide death penalty statute which passes the Supreme Court's test. Given the analysis of the preceding section, the current non-homicide death penalty statutes simply will not work. Therefore, the state legislatures must develop a new type of law.

The primary problem with the current non-homicide death penalty laws is that they deviate from the Court's clear bright-line rule concerning the death penalty and homicide. For the past twenty years, the Court has viewed the death penalty as applicable only in cases in which a person is killed. This bright-line rule is simple, predictable, and makes sense. Now, the state legislatures are trying to change that rule to one in which, even if no one is killed, the defendant could still receive the death sentence. The concern with the state legislatures' proposal, though, is where the legislatures will draw the new line. One state legislature may authorize the death penalty for bank robbery, another state may permit it for armed car hijacking, and perhaps a third state would allow the punishment for assault with a deadly weapon. The possibilities and variations between the states are endless. If the states were given the unchallenged freedom to decide which crimes deserve the death penalty, then before long such factors as political biases or geographic beliefs could dictate the application of the punishment, which is a situation the Court will surely prohibit. A different approach, therefore, is needed if the state legislatures will have any success in their efforts.

86. *Id.*

87. U.S. CONST. art. VI, § 2.

The state legislatures have two main options regarding the non-homicide death penalty statutes. First, the legislatures could change their focus away from non-homicide death penalty statutes and towards an increased use of the death penalty for crimes which traditionally involve the death of another person, such as murder. Very few juries currently sentence a murderer to death. Instead, many juries choose a lesser sentence of life in prison without parole. This option would allow state legislatures to keep their emphasis on an increased use of the death penalty and at the same time remain within the boundaries of the Constitution. Or, second, rather than enacting laws which authorize the death penalty for crimes such as treason, kidnapping, and drug trafficking, the state legislatures could try to increase the punishment for those crimes to life in prison with or without parole plus retribution to any individuals harmed. Even though this option may not meet the desires of some legislatures that want an increase in the death penalty, it would allow the legislatures to continue their *tough on crime* campaign with the public. With either option, the state legislatures can continue to take a hard line against crime and violent offenders without worrying that the Supreme Court will eventually invalidate their laws.

VI. CONCLUSION

Thirteen states and the federal government have enacted laws which authorize the use of the death penalty for crimes in which no one was killed. At some time in the near future, a defendant will be sentenced to death under one of these statutes and the Supreme Court will be forced to step in and decide the constitutionality of these laws. When this happens, the Court should strike down these statutes because the punishment is grossly disproportionate to the crime committed, despite any showing of overwhelming support for such statutes.

Because the Court will likely find the non-homicide death penalty statutes unconstitutional, the state legislatures and Congress should begin to look into the future and plan for the time when the Court confronts the issue. The best option is for the state legislatures and Congress to advocate for tougher sentences against violent offenders, short of the death penalty, so that if the Supreme Court does invalidate the non-homicide death penalty statutes, a set of new laws are already in place to handle the situation.

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