COMMENTS

STATE CONSTITUTIONAL ADJUDICATION IN A FOOTNOTE? A CRITIQUE OF THE SUPREME COURT OF LOUISIANA'S DECISION IN *STATE V. KENNEDY*

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I. INTRODUCTION

The Supreme Court of Louisiana recently upheld a death sentence for a conviction of aggravated rape of a minor in *State v. Kennedy*.[1] While the potential implications of this decision on the proportionality jurisprudence of the Federal Constitution have yet to be finalized,[2] the decision poses some interesting questions regarding Louisiana's state constitutional proportionality jurisprudence. Like many states, the Constitution of Louisiana contains provisions that provide rights similar to those provided by the Federal Constitution.[3] Where the Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted,"[4] the Constitution of Louisiana provides that "[n]o law shall subject any person to euthanasia, to torture, or to cruel, excessive, or unusual punishment."[5] While both of these respective provisions

* Albany Law School, J.D., 2009; University at Albany, B.A., 2001. Many thanks are owed to Kathryn Coleman, who made numerous comments and suggestions, which vastly improved the form and substance of this piece, and to Professor Bonventre for suggesting that I submit this piece for publication, and for teaching several splendid courses that have greatly enhanced my academic life. Finally, thank you to my family for supporting me so completely, and for remaining ever patient and understanding.

[1] 957 So. 2d 757 (La. 2007). The defendant, Patrick Kennedy, was sentenced to death for the rape of his eight-year-old stepdaughter on August 26, 2003. *Id.* at 760.

[2] The defendant has subsequently filed for certiorari to the United States Supreme Court. State v. Kennedy, 957 So. 2d 757 (La. 2007), *cert. granted*, 76 U.S.L.W. 3113 (U.S. Jan. 4, 2008) (No. 07-343).

[3] *See* Shirley S. Abrahamson, *Reincarnation of State Courts*, 36 SW. L.J. 951, 954, 956 (1982).

[4] U.S. CONST. amend. VIII.

[5] LA. CONST. art. I, § 20.

undoubtedly serve similar functions, the protections provided by the Constitution of Louisiana seem facially more expansive.[6]

The Supreme Court of Louisiana dealt with the state constitutional challenge to the death sentence summarily in a footnote.[7] The entirety of the state constitutional analysis of the proportionality challenge to the death sentence consisted of the following:

> In *State v. Perry*, . . . we held that "[t]he framers of our state constitution clearly intended for this guarantee to go beyond the scope of the Eighth Amendment in some respects and to provide at least the same level of protection as the Bill of Rights and the Fourteenth Amendment and all others." Indeed, distinct from the Eighth Amendment, Art. 1, § 20 expressly prohibits "euthanasia," "excessive" punishment, and "cruel *or* unusual" punishment. However, for purposes of capital punishment for child rape, we find this language does not provide any additional protections beyond those provided by the Eighth Amendment.[8]

The problem with this analysis is not that the Supreme Court of Louisiana finds that the death penalty for child rape is not contrary to the proportionality requirement of the Constitution of Louisiana, but that the court fails to articulate what that standard is, and why the death penalty for child rape fails to violate that standard. The purpose of this Note is to explore what the standard for excessive punishment under the Constitution of Louisiana is, and how the Supreme Court of Louisiana could have adjudicated this matter more appropriately. Part II will explore the historic role of state constitutions, and state high courts, in providing individual rights to their citizens for the purpose of providing a context against which the actions of the Supreme Court of Louisiana can be evaluated. Part III will identify and discuss the various methodologies utilized by state high courts to adjudicate issues concerning fundamental rights under either the Federal Constitution or their state constitutions. These methodologies will provide a theoretical framework to identify and further evaluate what the court has done

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[6] Justice Scalia has noted that "excessive" does not modify "punishments," and from that, he has inferred that there is no proportionality requirement for punishment under the Federal Constitution. *See* Harmelin v. Michigan, 501 U.S. 957, 967 (1991). Unlike the Eighth Amendment, "excessive" modifies "punishment" in the Constitution of Louisiana. LA. CONST. art. I, § 20.

[7] *Kennedy*, 957 So. 2d at 779 n.24.

[8] *Id.* (emphasis in original).

in its jurisprudence. Part IV will explore how other state high courts have treated challenges to punishments under their respective excessive punishment provisions, which will further contextualize our inquiry. Answering the first part of our inquiry, Part V will determine, according to the jurisprudence of the Supreme Court of Louisiana, what the standard for excessive punishment under the Constitution of Louisiana is. Finally, addressing the second part of our inquiry, Part VI will critique the decision in light of the findings of Parts IV and V, and will discuss the possible reasoning for the approach adopted by the Supreme Court of Louisiana.

II. THE ROLE OF STATE CONSTITUTIONS

Since the end of the Warren Court era and the Supreme Court's decision in *Michigan v. Long*,[9] state high courts and constitutions have played an increasingly important role in the recognition and protection of fundamental rights.[10] This trend does not mark any new innovation in constitutional law, but is a re-emergence of the former state of affairs of constitutional law.[11] In fact, the status of state courts as the defenders of fundamental rights, and state constitutions as the foundation of those rights, is, if anything, the norm for our Republic.[12] Prior to the emergence of the activist Supreme Court of the mid-twentieth century, it was the state high courts that recognized and defended individual liberties.[13] When the Federal Constitution was ratified, there was no Federal Bill of

[9] 463 U.S. 1032 (1983). The Court held that when a state court bases its decision primarily on federal law, or in such a fashion that it interweaves federal and state law, the Court will assume jurisdiction in the case, unless there is a "plain statement" that the decision is based on "independent" and "adequate" state law grounds. *Id.* at 1040–41.

[10] *See* Abrahamson, *supra* note 3, at 957–59; Vincent Martin Bonventre, *Changing Roles: The Supreme Court and the State High Courts in Safeguarding Rights*, 70 ALB. L. REV. 841, 842 (2007) (noting that the duty "to enforce rights and liberties" has fallen on the state high courts).

[11] *See generally* Abrahamson, *supra* note 3, at 955–59 (discussing how citizens have historically had to rely on their individual state constitutions for protection in their interactions with state and local governments).

[12] *See id.* at 956 ("[F]or most of the history of this country—namely, for 138 years, from 1787 to 1925 . . . the federal Bill of Rights offered citizens little or no protection in their relations with the state and local governments. The individual state constitutions offered them those protections.").

[13] *See id.* at 953, 955–57. This movement toward the eighteenth-century norm has been christened "new federalism" by some. *See* Lisa D. Munyon, Comment, *"It's a Sorry Frog Who Won't Holler in His Own Pond": The Louisiana Supreme Court's Response to the Challenges of New Federalism*, 42 LOY. L. REV. 313, 314 (1996).

Rights attached;[14] in fact, the Bill of Rights was not ratified until four years after the Federal Constitution was drafted.[15] The initial theory of the Federalists was that a bill of rights was not necessary, because the enumerated powers of the federal government would be sufficient to protect individual liberties from possible infringements by the federal government.[16] Furthermore, the Federalists believed that the protection of individual liberties was the province of the states' constitutions and governments.[17]

This view was largely undisturbed for the majority of our nation's history, even after the ratification of the Fourteenth Amendment,[18] which extends the protection of fundamental rights from infringement by the federal government to infringement by the state governments.[19] The Supreme Court, however, did not begin to recognize this extension of the protection of fundamental rights from state action until 1925.[20] In *Gitlow v. New York*,[21] the

[14] Abrahamson, *supra* note 3, at 955 ("Although the state constitutions had bills of rights, the federal Constitution as originally drafted in 1787 had no bill of rights, no list of protections of individual rights.").

[15] *Id.* at 955–56 ("The Bill of Rights . . . was adopted by Congress on September 25, 1789, and ratified on December 15, 1791.").

[16] Calvin R. Massey, *The Anti-Federalist Ninth Amendment and Its Implications for State Constitutional Law*, 1990 WIS. L. REV. 1229, 1235 ("[T]o Madison and the Federalists there was no need for an enumerated bill of rights, because the sovereign people had made an explicit, and quite narrow, delegation of power to the central government in the new Constitution.").

[17] *Id.* (citing Arthur E. Wilmarth, Jr., *The Original Purpose of the Bill of Rights: James Madison and the Founders' Search for a Workable Balance Between Federal and State Power*, 26 AM. CRIM. L. REV. 1261, 1272 (1989)) ("[T]he expectation of the framers was 'that the protection of citizen rights was a matter to be governed by state constitutional law' . . . .").

[18] *See* Abrahamson, *supra* note 3, at 956.

[19] *See* Washington v. Glucksberg, 521 U.S. 702, 722 (1997) ("'[L]ibert[ies]' specially protected by the Fourteenth Amendment . . . have at least been carefully refined by concrete examples involving fundamental rights found to be deeply rooted in our legal tradition."); Herring v. New York, 422 U.S. 853, 856–57 (1975) (holding that right of the accused "to a 'speedy and public trial,' to an 'impartial jury,' to notice of the 'nature and cause of the accusation,' to be 'confronted' with opposing witnesses, to 'compulsory process' for defense witnesses, and to the 'Assistance of Counsel'" are "fundamental rights . . . extended to a defendant in a state criminal prosecution through the Fourteenth Amendment" (quoting U.S. CONST. amend. VI)); Malloy v. Hogan, 378 U.S. 1, 25 (1964) (Harlan, J., dissenting) ("'Freedom of speech and of the press are fundamental rights which are safeguarded by the due process clause of the Fourteenth Amendment of the Federal Constitution.'" (quoting De Jonge v. Oregon, 299 U.S. 353, 364 (1937))). *See generally* Robert C. Farrell, *An Excess of Methods: Identifying Implied Fundamental Rights in the Supreme Court*, 26 ST. LOUIS U. PUB. L. REV. 203, 216–47 (2007) (explaining the different methods that the Supreme Court has used to identify fundamental rights incorporated against the states by the Fourteenth Amendment).

[20] *See* Abrahamson, *supra* note 3, at 956. Although it was argued in the Slaughter-House Cases of 1872 that the Fourteenth Amendment had the effect of extending the protections of the original Bill of Rights as limitations on state action, the Court refused to adopt that

Supreme Court first recognized that the protection of fundamental rights from state action was provided by the Fourteenth Amendment.[22] The Court gradually expanded those rights that it recognized as fundamental rights protected by the Fourteenth Amendment over the next fifty years or so, becoming the most protective of fundamental rights during the Warren Court.[23] With the emergence of the Burger Court, the Court became less protective of fundamental rights,[24] and then, during the Rehnquist Court, it completely abdicated its assumed role as the principal protector of our fundamental rights.[25]

The Supreme Court's decision in *Michigan v. Long* is arguably where this change in the Court becomes most obvious. In *Long*, the Court assumed jurisdiction and reversed the judgment of the Supreme Court of Michigan. It did so because that court had announced that the search in question was unconstitutional under both the Constitution of Michigan and the Federal Constitution and because that court had analyzed federal search and seizure jurisprudence too narrowly and provided too broad a protection of the rights of the accused.[26] The Supreme Court basically said two related things. First, if it is not clear that a state high court decision rests on adequate and independent state grounds, we will

theory. *Id.*

[21] 268 U.S. 652 (1925).

[22] *See id.* at 666 (noting that the free speech guarantees of the First Amendment were fundamental liberties protected by the due process clause of the Fourteenth Amendment from infringement by the states).

[23] *See* Abrahamson, *supra* note 3, at 957–58 ("As the federal constitutional guarantees grew during the Warren Court years, the protection of individual rights under the state constitutions almost came to a halt. In the 1960s the United States Supreme Court went faster and probably farther than many of the state courts were willing to go."); Bonventre, *supra* note 10, at 844–46 (discussing the recognition by the Supreme Court of fundamental rights protected by the Fourteenth Amendment in various landmark cases).

[24] *See* Abrahamson, *supra* note 3, at 958.

[25] *See* Bonventre, *supra* note 10, at 846–50, 852 (discussing the Court's review of state high court decisions that are too protective of individual rights, and its newfound dedication to ensuring a "minimal safety net," which states should not exceed when interpreting the Federal Constitution).

[26] *See* Michigan v. Long, 463 U.S. 1032, 1043–44, 1050–52 (1983) (holding that the Court did not lack jurisdiction, because the Supreme Court of Michigan appeared to rest its decision primarily on federal law, and that the circumstances of the search of Long's vehicle provided basis for a reasonable protective search under *Terry v. Ohio*, 392 U.S. 1 (1968)); People v. Long, 320 N.W.2d 866, 869–70 (Mich. 1982) (finding that the circumstances of the search of Long's vehicle failed to meet the criteria set out in *Terry* for a "limited warrantless protective search of [a] person during an investigatory stop," and that that search violated both the Federal Constitution and article one, section eleven of the Constitution of Michigan, and accordingly, any fruits of that illegal police action should be suppressed).

assume we have jurisdiction.[27] Second, a state high court may protect rights more expansively by interpreting its own state constitution, but not by interpreting the Federal Constitution.[28] The former proposition marks a drastic change in the way the Court approached the review of decisions of state high courts.[29] Formerly, the Supreme Court would only assume jurisdiction if it was clear the decision had been based on federal law.[30] The approach adopted in *Long* amounts to a 180-degree shift in its jurisdictional jurisprudence over state high courts with the Court now presuming jurisdiction over cases with "at least a scintilla of federal law involved."[31] The latter proposition is affirmed by one of the motivations the Court had for adopting its new approach to the review of state high court decisions. The Court reasoned that this new approach would give state high courts an "opportunity to develop state jurisprudence unimpeded by federal interference, and yet will preserve the integrity of federal law."[32]

The *Long* decision can almost be viewed as a commandment to the state high courts to interpret their respective constitutions to protect rights to whatever extent they desire, but not to mess with the Federal Constitution, or federal jurisprudence.[33] If a state high court bases its decision on "adequate and independent state grounds," the Supreme Court will not presume jurisdiction and review the decision.[34] In essence, the state high court is free to interpret the state constitution and law to be as protective of individual rights as it would like when its decision rests on "adequate and independent state grounds."[35] On the other hand, if the state high court invokes federal precedent in the absence of a plain statement indicating that the decision is based on state law, then the Court will presume that it has jurisdiction.[36] Basically, by

[27] *See Long*, 463 U.S. at 1040–42.

[28] *See id.* at 1041–44.

[29] *See* Bonventre, *supra* note 10, at 850–51.

[30] *See id.* at 852 n.43 (citing *Long*, 463 U.S. at 1040–42).

[31] *See id.* at 852.

[32] *Long*, 463 U.S. at 1041.

[33] *See id.* at 1040–42.

[34] *Id.* at 1041–42.

[35] *Id.* The state high court, however, can only enforce a decision that observes the minimal protection afforded to the particular right under the Federal Constitution. *See* Bonventre, *supra* note 10, at 852.

[36] *See Long*, 463 U.S. at 1040–41 ("Accordingly, when, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court

invoking the Federal Constitution or federal precedent, the state high court surrenders exclusive jurisdiction.[37] In that event, the state high court's ruling is constrained by the Supreme Court's interpretations of the Federal Constitution, and federal jurisprudence.[38] It is in this context that the methodologies utilized by state high courts to adjudicate issues of fundamental rights can be properly understood and explored.

III. METHODOLOGIES

When we refer to what methodology a state high court is using to adjudicate an issue concerning a fundamental right, we are referring to what law the court is using to resolve the issue and the order that the court proceeds in its analysis of the applicable state or federal law. The questions being asked when you make these determinations are: (1) Is the court using state or federal law or both and (2) In what order are the respective laws analyzed? There are four basic methodologies a state high court can employ to adjudicate an issue concerning a fundamental right: the primacy approach, the dual sovereignty approach, the supplemental approach,[39] and the lock-step approach.[40] The particular approach adopted by the respective court matters as to whether the court's decision is subject to review by the Supreme Court under *Michigan v. Long*,[41] and as to the ultimate result reached in the case, depending on how much the state constitutional and federal

decided the case the way it did because it believed that federal law required it to do so. If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached.").

[37] *See id.*

[38] *See id.*

[39] *See* Stewart G. Pollock, *Adequate and Independent State Grounds as a Means of Balancing the Relationship Between State and Federal Courts*, 63 TEX. L. REV. 977, 983 (1985) (discussing the evolving methods used to analyze constitutional claims as including a dual sovereignty approach, a primacy approach, and a supplemental approach); Robert F. Utter, *Swimming in the Jaws of the Crocodile: State Court Comment on Federal Constitutional Issues When Disposing of Cases on State Constitutional Grounds*, 63 TEX. L. REV. 1025, 1027–30 (1985) (stating that the "primacy" and "dual sovereignty models" are among the different analytical approaches taken by state courts).

[40] Earl M. Maltz, *Lockstep Analysis and the Concept of Federalism*, 496 ANNALS AM. ACAD. POL. & SOC. SCI. 98, 99 (1988) (discussing the use and criticism of the "lockstep approach" to constitutional analysis).

[41] *See* Bonventre, *supra* note 10, at 852 ("[W]henever a state court allows even the possibility that it has answered a federal question or based its decision in any measure on federal law, the Supreme Court presumes jurisdiction over the case.").

constitutional jurisprudence diverge.

The primacy approach focuses on the respective state constitution as the source of fundamental rights, and accordingly looks to the state constitution and state law before resorting to consulting federal law.[42] Only in instances where the state court denies that there is a protected right under the state law is it necessary to consult the federal jurisprudence.[43] "In short, the primacy model relegates federal law to a secondary position."[44] Accordingly, when a state court utilizes the primacy approach, state law is examined first. If a right is determined to be a protected right under the state constitution, then it is not necessary to consult federal jurisprudence; however, if a right is determined to be unprotected by the state constitution, it becomes necessary to consult federal jurisprudence to ensure that there is no violation of the Federal Constitution.[45] The pragmatic benefit of utilizing this methodology is that the state high court decision is not subject to review by the Supreme Court under *Long*.[46] More importantly, this approach develops a body of state constitutional jurisprudence that can be tailored to the unique history and identity of the particular state.[47]

The dual sovereignty approach is characterized by an evaluation of both the federal and state law.[48] Under this approach, the case is decided on both state and federal constitutional grounds.[49] Courts adopting this approach interpret federal constitutional provisions, even when their holdings explicitly rest on adequate and independent state grounds.[50] Courts must "signal with utmost care" that their holdings rest on state law in order to avoid review under *Michigan v. Long*.[51] The criticism of this approach is that this dual

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[42] Utter, *supra* note 39, at 1027–28.

[43] *Id.* at 1028.

[44] *Id.*

[45] It should be noted, regardless of the particular approach a state court adopts, federal jurisprudence should be consulted any time a court denies that a right is violated. Conversely, the state constitution should be consulted anytime the Federal Constitution is not a bar to the particular state action.

[46] *See* Pollock, *supra* note 39, at 983.

[47] *See id.* at 985 ("If one emphasizes the independence of the individual states, then the primacy approach would have substantial appeal."); Utter, *supra* note 39, at 1028 (noting that "the primacy model urges that the court look first to the state provision and to state history, doctrine, and structure").

[48] Utter, *supra* note 39, at 1029.

[49] *Id.*

[50] *Id.* at 1029–31. This approach also makes the decision subject to review under *Michigan v. Long*, 463 U.S. 1032, 1040–44 (1983).

[51] *See* Utter, *supra* note 39, at 1050. The careless use of this approach makes the decision subject to review under *Michigan v. Long*. *See Long*, 463 U.S. at 1040–44.

analysis of state and federal constitutional law generates advisory opinions.[52] While this commentary on federal law is non-binding dicta, it is believed that this commentary on federal law may aid the evolution of federal law.[53] One commentator argues that this approach "broaden[s] our understanding of the federal constitution," and that "[f]ailure to continue to engage in the federal debate can only weaken the values that underlie our federal system."[54] For many years, many state courts utilized this approach to interpret similar state constitutional provisions according to the federal construction of the equivalent provisions of the Federal Constitution, but that has not necessarily been the case in recent years.[55]

The supplemental approach, also known as the interstitial approach, recognizes federal doctrine as the floor for enforceable fundamental rights, and looks to the state constitution as a means of supplementing rights in areas where the federal jurisprudence suggests the potential violation of fundamental rights is valid or is silent on the matter.[56] In the event that there is a violation of the Federal Constitution, it is not necessary to consult the state constitution under the supplemental approach.[57] Accordingly, under the supplemental approach, a state court analyzes the federal jurisprudence first. If the court determines there is a violation of

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[52] *See* Utter, *supra* note 39, at 1029–30. To clarify, a state high court is generating an advisory opinion in regard to federal law when it issues an opinion grounded on both state and federal grounds, because the federal analysis in the state high court's opinion is not binding federal precedent, where the state analysis is binding precedent on the court of that state. *See* BLACK'S LAW DICTIONARY 1125 (8th ed. 2004) ("A nonbinding statement by a court of its interpretation of the law on a matter submitted for that purpose."). In the event that the state constitutional protections of a right fall below the protections provided by the Federal Constitution, or those protections are virtually identical, then a state high court may issue an opinion based on both state and federal grounds that is binding on all the courts of that respective state, and therefore not an advisory opinion. *See* Pollock, *supra* note 39, at 983.

[53] Utter, *supra* note 39, at 1047–49.

[54] *Id.* at 1050.

[55] *See id.* at 1029 (citing State v. Coe, 679 P.2d 353 (Wash. 1984); State v. Badger, 450 A.2d 336 (Vt. 1982)).

[56] Pollock, *supra* note 39, at 984. The issue of the federal jurisprudence serving as a floor for enforceable rights is often misunderstood to prohibit a state high court from interpreting its own constitution as providing less protection than the Federal Constitution. The truth of the matter is that a state high court can interpret the rights provided by the state constitution to provide less or more protection than the Federal Constitution, but any decision a state court renders must not violate the Federal Constitution. *See* Maltz, *supra* note 40, at 102–03. The requirements of the federal floor represent the minimal enforceable rights that any decision rendered by a state court must observe, not a limitation on how state courts may interpret their respective state constitutions. *See id.*

[57] Pollock, *supra* note 39, at 984.

the Federal Constitution, then the analysis ends. If the court determines the Federal Constitution is no bar to the particular state action, then it becomes necessary to consult state jurisprudence to determine the validity of the particular state action.[58] The danger of this approach is that if a state high court erroneously interprets federal precedent to be a bar to a particular state action, then the case is subject to review under *Michigan v. Long*.[59] In the event that the case is reviewed and reversed by the Supreme Court, then the respective state high court may decide the case on state grounds, but at the additional expense of judicial economy.

The lockstep approach is not a method of analysis in the same sense as the preceding three, but rather a theory that state constitutional provisions should be interpreted to provide exactly the same protections as their counterparts in the Federal Constitution, and the practice of interpreting state constitutional provisions as such.[60] This approach is not identifiable by examining the order of state and federal analysis, as the primacy and supplemental approaches can be. In fact, this approach can be contained in the other three previously discussed approaches. A hallmark of this approach is the use of mandatory federal precedent to interpret state constitutional provisions.[61] One commentator argues that this approach is proper, because the judgment of state legislatures should not be "subordinated to the sense of fairness of . . . two sets of judges."[62] It is true that state legislatures will always be constrained by the United States Supreme Court's interpretation of the Federal Constitution.[63] But lockstep theory presupposes two things: first, that the framers of the state constitution had the same intention as the Framers of the Federal Constitution,[64] and, second, that the Supreme Court's interpretation is the correct interpretation of the respective constitutional provision. While it may be the case that the drafters of the state constitution had the same intention as the drafters of the Federal Constitution, it may not always be the case that the interpretation of the Supreme Court accurately reflects the intent of either set of

[58] *Id.*

[59] *See* Michigan v. Long, 463 U.S. 1032, 1040–44 (1983).

[60] Maltz, *supra* note 40, at 99.

[61] *See id.*

[62] *Id.* at 106.

[63] *See id.* at 102.

[64] Considering that some of the constitutions of the original states predate the Federal Constitution, that could not be the case for those states.

drafters. All states provide for some measure of electoral involvement in the selection of the judges of the state high court, whether it is through the election of the governor or through state legislation. In this light, the oversight of the state high court does not seem like an illegitimate constraint on the state legislature. With an understanding of these approaches to state constitutional adjudication in hand, we should be well-equipped to understand what the Louisiana Supreme Court has been doing in its proportionality jurisprudence.

IV. ALTERNATIVES

Prior to determining the standard of proportionality under Louisiana's state constitutional jurisprudence, it will be useful to examine other state high court decisions in the area of proportionality to illustrate the possible approaches a court can take in analyzing a fundamental right under state or federal law, and what tools a court can utilize in such an analysis. While the substance of these opinions will be discussed to varying degrees, the important things to consider are the approach adopted and the tools used in the analysis by each respective court. Is the court looking only to the federal law to adjudicate the matter, or looking to it prior to examining the state constitution and law? Is the court looking to the state constitution only, or looking to it prior to examining federal law? Is a state constitutional provision being interpreted differently than its federal constitutional counterpart? What texts or tests is the court utilizing to interpret the state constitution? These are the types of questions that should be thought about as the following three cases are presented. The first two deal with the proportionality of the death penalty, while the third deals with proportionality of punishment more generally.

In *State v. Gardner*,[65] the Supreme Court of Utah followed the supplemental approach to adjudicate a claim of disproportionate punishment.[66] Specifically, the court had to determine the constitutionality of a Utah statute that authorized the death penalty for a prisoner who committed aggravated assault while serving a sentence for a first-degree felony.[67] The majority decided the case under federal jurisprudence, specifically under *Coker v.*

[65] 947 P.2d 630 (Utah 1997).
[66] *See id.* at 632–33.
[67] *Id.* at 631.

Georgia.[68] Accordingly, the majority followed the supplemental approach because the court relied on federal precedent to adjudicate whether the fundamental right was violated.[69] What is unusual about this decision is that the majority opinion is contained only in the last two paragraphs of Justice Durham's concurrence, which examined the state constitution prior to examining the federal jurisprudence.[70] The opinion then is doubly illustrative, because it contains an example of both the supplemental and primacy approaches. Justice Durham's analysis of Utah's constitutional standard was conducted in three parts.[71] The analysis began with an examination of the plain meaning of article 1, section 9 of the Utah Constitution.[72] The analysis continued with an examination of the history of the enactment of the Utah Constitution.[73] The analysis concluded with the application of a comparative test used by other jurisdictions to determine whether the statute authorizing the death penalty for aggravated assault by a prisoner serving a sentence for a first-degree felony failed to comport with the proportionality requirement of the Utah Constitution.[74] Justice Durham found that the death penalty was "disproportionately harsh" in light of the analysis of the relevant factors in her state constitutional analysis.[75] While it is unfortunate that Justice

[68] *Id.* at 653. It is difficult to ascertain the specific holding of the court because the majority opinion consists of the last two paragraphs of Justice Durham's concurring opinion. *Id.* The probable holding is that the death penalty is not an appropriate punishment for crimes that do not result in death. *See id.* at 652–654. In *Coker*, the Court held that "the death penalty . . . is an excessive penalty for the rapist." Coker v. Georgia, 433 U.S. 584, 598–600 (1977) (citation omitted). In so holding, the court noted that "[i]t is difficult to accept the notion . . . that the rapist, with or without aggravating circumstances, should be punished more heavily than the deliberate killer as long as the rapist does not himself take the life of his victim." *Id.* at 600.

[69] *See, e.g.*, *Gardner*, 947 P.2d at 645 (analyzing "cruel and unusual punishment" in the context of Eighth Amendment jurisprudence).

[70] The majority opinion follows the supplemental approach because it decides the case on federal grounds and undertakes no additional analysis of the state law upon finding a violation of the Federal Constitution. *See id.* at 653; *see also supra* Part III (discussing that under the supplemental approach, analyzing state jurisprudence is only necessary if the challenged state action is not barred under the Federal Constitution).

[71] *Gardner*, 947 P.2d at 633–53.

[72] *See id.* at 633–35 (finding that punishment is excessively cruel and barred by the state constitution when it exceeds what is necessary to serve the legitimate objectives of punishment).

[73] *Id.* at 635–39 (finding that the framers of the Constitution of Utah would have understood the prohibition against "cruel and unusual punishment" as based on its historical underpinnings in the English Bill of Rights of 1689 and on comments made by the framers in regard to natural rights).

[74] *Id.* at 639–40.

[75] *Id.* at 640. The factors examined in this tri-part comparative test are (1) the nature of

Durham's concurring opinion was not adopted in its entirety as the majority, it serves as an excellent example of the primacy approach in action.[76] Since the majority opinion is based solely on federal precedent, however, the decision is properly categorized as an example of the supplemental approach.

In *State v. Ross*,[77] the Supreme Court of Connecticut appears to have employed the supplemental approach.[78] The court was presented with the issue of whether capital punishment generally violated the cruel and unusual punishment protection provided in the due process clauses of the Constitution of Connecticut.[79] Unlike the Federal Constitution, the Constitution of Connecticut contains no provision that explicitly prohibits "cruel and unusual punishment," or an explicit provision that acts as its equivalent.[80] However, the Supreme Court of Connecticut noted that it is "free to interpret" the due process clauses of the Constitution of Connecticut "to prohibit governmental infliction of cruel and unusual punishments."[81] The court concluded that the state's due process clauses provided an implied protection from "cruel and unusual punishment" because the common law in Connecticut prior to the enactment of its constitution "recognized that the state did not have unlimited authority to inflict punishment."[82] Before addressing the merits of the question presented, the court also noted that its analysis of the state constitutional issues "may proceed independently from the decisions of the United States Supreme Court upholding the constitutionality of the death penalty."[83] In

the offender and offense and the dangers each respectively presents to society, (2) how the challenged penalty compares with the penalties for more serious offenses within the same jurisdiction, and (3) how the challenged penalty compares with punishments for the same offense in jurisdictions with identical or similar constitutional provisions. *Id.* at 639–40.

[76] Chief Justice Zimmerman felt it unnecessary to address the state constitutional issues once the statute was found to be unconstitutional under the Eighth Amendment of the Federal Constitution. *Id.* at 653 (Zimmerman, J., concurring in part and concurring in the result).

[77] 646 A.2d 1318 (Conn. 1994).

[78] *See id.* at 1347–59.

[79] *Id.* at 1354. The defendant appealed his conviction on a number of grounds under the Federal Constitution and the Constitution of Connecticut. *Id.* at 1330–31. Since this inquiry is principally concerned with the manner in which state high courts adjudicate "cruel and unusual punishment" clauses, or proportionality clauses, under their own constitutions, the discussion of this case is limited as such to those matters.

[80] *Id.* at 1354.

[81] *Id.* at 1354 (citing State v. Kreminski, 422 A.2d 294, 298 & n.4 (Conn. 1979); State v. Kyles, 363 A.2d 97, 99–100 (Conn. 1975)).

[82] *Id.* at 1355.

[83] *Id.* The court goes on to express its independence and role in state law in the following:

> We may find greater protection of individual rights under our state constitution than

determining whether the death penalty violated the implied protection from "cruel and unusual punishment" in the due process clauses of the Constitution of Connecticut, as a matter of first impression, the court "identified six factors to be considered: (1) the text of the constitutional provisions; (2) related Connecticut precedents; (3) persuasive federal precedents; (4) persuasive precedents of other state courts; (5) historical insights into the intent of our constitutional forbearers; and (6) contemporary understandings of applicable economic and sociological norms."[84] The court found that the first five did not support the defendant's contention that the death penalty was "cruel and unusual punishment" under the due process clauses of the state constitution.[85] In regard to the sixth factor, the court concluded that contemporary understandings of norms was no bar to the death penalty because those norms were embodied in the enactments of the legislature, and the jurisprudence of the state, sister states, and the federal courts.[86] Accordingly, the court found the Constitution of Connecticut as a general matter does not prohibit the death penalty.[87]

The decision dealt with various challenges to the death penalty statute as administered in the defendant's case under federal

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> that provided by the federal constitution. It is well established that federal constitutional law establishes a minimum national standard for the exercise of individual rights and does not inhibit state governments from affording higher levels of protection for such rights. . . . Moreover, we have held that in the area of fundamental civil liberties—which includes all protections of the declaration of rights contained in article first of the Connecticut constitution—we sit as a court of last resort. In such constitutional adjudication, our first referent is Connecticut law and the full panoply of rights Connecticut citizens have come to expect as their due. Accordingly, decisions of the United States Supreme Court defining fundamental rights are persuasive authority to be afforded respectful consideration, but they are to be followed by Connecticut courts only when they provide no less individual protection than is guaranteed by Connecticut law. . . . Recognizing that our state constitution is an instrument of progress . . . is intended to stand for a great length of time and should not be interpreted too narrowly or too literally . . . we have concluded in several cases that the state constitution provides broader protection of individual rights than does the federal constitution.

Id. (quoting State v. Miller, 630 A.2d 1315, 1323 (Conn. 1993) (alterations in original) (footnote omitted).

[84] *Id.* at 1356.

[85] *Id.* at 1356–57 (noting that the state constitution contains references to capital offenses; the state case law has upheld the death penalty on federal grounds repeatedly; federal case law presents no bar to the death penalty generally, nor does the jurisprudence of sister states; and that the death penalty was in existence at the time of the adoption of the State Constitution, and was considered constitutional).

[86] *Id.* at 1357.

[87] *Id.* (noting that while the death penalty is not generally prohibited, there are some constitutional constraints to its imposition).

jurisprudence, and addressed the state constitutional claims afterward.[88] Generally, it appears that the decision was rendered under the supplemental approach, but such a classification may be inappropriate, since it is not clear if the court adopted the approach for doctrinal reasons. The court was dealing with a wide variety of challenges to the death sentence, and may have adopted its approach as a matter of convenience. Regardless of the label we give to the case, it is the analysis of the state constitution that is illustrative of the type of analysis a state high court can engage in when evaluating a challenge to a violation of a fundamental right.

In *State v. Harris*,[89] the Supreme Court of Tennessee seemingly utilized the supplemental approach.[90] The court was presented with the question of whether a twenty-year sentence was disproportionate punishment for aggravated sexual battery of a minor.[91] By considering sentences that have been upheld, the court found that the sentence was presumptively constitutional under federal jurisprudence, despite "the precise contours of the federal proportionality guarantee [being] unclear."[92] The court began its analysis of article I, section 16 of the Tennessee Constitution by noting that, although the language of the state provision "is virtually identical to that of the Eighth Amendment, [that] does not foreclose [the court from adopting] a more expansive interpretation."[93] The court then went on to state that the proper means of evaluating a proportionality challenge is the standard set out in Justice Kennedy's concurrence in *Harmelin v. Michigan*.[94] At the first prong of the analysis, the court determined that the punishment is not grossly disproportionate, and that it was unnecessary to engage in the inter- and intra-jurisdictional analysis of sentences.[95] Accordingly, the court affirmed the sentence.[96] The order of the analysis suggests the supplemental approach.[97] The

[88] *See id.* at 1346–59.

[89] 844 S.W.2d 601 (Tenn. 1992).

[90] *See id.* at 603.

[91] *Id.* at 602 (noting that the Court announced no new standard under the Constitution of Tennessee, but only clarified the existing standard, and only reviewed the sentence on account that the issue was raised properly on appeal, but not addressed in the decision of the intermediate court).

[92] *Id.*

[93] *Id.* at 602–03.

[94] *Id.* at 603 (citing Harmelin v. Michigan, 501 U.S. 957, 996–1009 (1991) (Kennedy, J., concurring in part and concurring in the judgment)).

[95] *Id.* at 603.

[96] *Id.*

[97] *See id.* at 602–03.

court's interpretation of the state constitution cannot properly be characterized as lockstep because the court adopted non-binding federal precedent as the standard of review of proportionality claims under the state constitution.[98]

V. LOUISIANA'S EXCESSIVE PUNISHMENT STANDARD

Since the Supreme Court of Louisiana failed to articulate the standard for excessive punishment, one must search the jurisprudence of the court to identify the standard that the court could have articulated. The most logical starting point to the inquiry seems to be *State v. Perry*,[99] the case the court cited in its state constitutional analysis.[100] In *Perry*, the court was confronted with the issue of whether it was "cruel, excessive, [or] unusual punishment" to forcibly medicate an inmate with psychotropic drugs to make him competent to stand execution.[101] The court rested its decision solely on independent state constitutional grounds, invoking the primacy approach.[102] Ultimately, the court found that the forcible medication of an inmate with psychotropic drugs in

[98] Although not particularly relevant to the current inquiry, it is worth noting that Justice Daughtrey sets forth a more detailed analysis of the state constitutional claim under the same standard and reaches a different result in dissent. *See id.* at 603–12 (Daughtrey, J., dissenting).

[99] 610 So. 2d 746 (La. 1992).

[100] *See* State v. Kennedy, 957 So. 2d 757, 779 n.24 (La. 2007).

[101] *Perry*, 610 So. 2d at 747. Perry was diagnosed with schizophrenia in his teenage years, and murdered his family when he was 28 years old while living with his parents "due to his long history of mental illness." *Id.* at 748. Initially, it was determined he was incompetent to stand trial, but he was transferred to a state treatment facility where he was placed on an antipsychotic drug regime. *Id.* A year and a half later, he was determined to be competent to stand trial. *Id.* Against the advice of counsel, Perry withdrew his insanity plea and entered a plea of not guilty. *Id.* He was convicted of five counts of murder and sentenced to death. *Id.* After his conviction, the trial court determined he was only competent to stand execution if his medication was maintained. *Id.* Accordingly, the trial court ordered that his prescribed medications were maintained. *Id.* After several appeals, the trial court reinstated its order. *Id.* The Supreme Court of Louisiana granted a writ of review and issued an order staying any further forcible medication of Perry. *Id.*

[102] *See id.* at 751 ("[W]e set to one side, without deciding, the federal constitutional issues and proceed to resolve this case on state constitutional grounds."). It is interesting to note that the court states the following before reaching the conclusion to base its decision on state constitutional grounds:

> Because of our oaths to support the constitution and laws of our state as faithfully and diligently as those of the federal government, we are obliged to independently interpret and apply our state constitution in each case. As long as one party's state rights are expanded without infringement on another individual's federal right, our state constitution may be used to supplement or expand federally guaranteed constitutional rights.

Id. (citation omitted).

order to make him competent to face execution constituted "cruel, excessive and unusual punishment."[103] The analysis of the court of this state constitutional issue was extensive. The court began by analyzing the language of the Constitution of Louisiana.[104] It noted that the language of the state constitution expands on the Eighth Amendment protections by deliberately including a prohibition against excessive punishment.[105] The court then analyzed four principles for assessing the constitutionality of a punishment derived from the concurrences of Justices in *Furman v. Georgia*,[106] as well as other state court decisions.[107] According to these four principles, a punishment must not be "degrading to the dignity of human beings; . . . arbitrarily inflicted; . . . unacceptable to contemporary society; or . . . disproportionate to the crime or failing to serve a penal purpose more effectively than a less severe punishment."[108]

The court noted that the fundamental premise underlying the prohibition against "cruel and unusual punishment" was that even the vilest of offenders remained human beings deserving of common human dignity; therefore, intentionally treating a person as a means to the state's end by inflicting degrading physical or mental suffering is an affront to the first principle prohibiting punishment that is "degrading to the dignity of human beings."[109] The court recognized the three remaining principles as complementary to the concept of human dignity, and that they served as "specific indicia of inhumane treatment."[110] For instance, when a state inflicts severe punishment upon an offender or class of offenders that it does not inflict on offenders committing the same act or offense—or when the punishment is inflicted in an arbitrary manner—the state fails to respect human dignity.[111] Additionally, when a state inflicts

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[103] *Id.* at 771.

[104] *Id.* at 761–62.

[105] *Id.* at 762 ("Because of this provision, a person is protected not only from punishment that is cruel, excessive or unusual per se or as applied to particular categories of crimes or classes of offenders, but also from any excessive feature of a particular sentence produced by an abuse of the sentencer's discretion, even though the sentence is otherwise within constitutional limits." (citing State v. Telsee, 425 So. 2d 1251 (La. 1983); State v. Sepulvado, 367 So. 2d 762 (La. 1979))).

[106] 408 U.S. 238 (1972).

[107] *Id.* at 239. Because this is non-binding federal precedent, the court's use of this precedent cannot properly be characterized as lockstep. *See* discussion *supra* Part III.

[108] *Perry*, 610 So. 2d at 762 (citing State v. Stetson, 317 So. 2d 172, 177 (La. 1975)).

[109] *Id.* at 762–63.

[110] *Id.*

[111] *Id.* at 763.

punishment that is unnecessary and unrelated to the legitimate goals of punishment,[112] or when the state inflicts a punishment that is grossly out of proportion to the severity of the crime,[113] the state fails to "comport with human dignity."[114] Finally, when a severe punishment is unacceptable to contemporary society, that rejection by society serves as a strong indication that the punishment "does not comport with human dignity."[115] These four principles provide general criteria by which the court can determine if a challenged punishment is "'cruel, excessive or unusual.'"[116]

In analyzing whether forcibly medicating an inmate with psychotropic drugs for the purpose of rendering that inmate competent for execution, the court made the following three findings when applying the four factors. First, the punishment of Perry was degrading to human dignity, because "he [would] be forced to linger for a protracted period, stripped of the vestiges of humanity and dignity usually reserved to death row inmates, with the growing awareness that the state is converting his own mind and body into a vehicle for his execution."[117] Second, the punishment was both arbitrarily inflicted and unacceptable to contemporary society, because "[t]here [was] no statute in this or any other jurisdiction authorizing the execution of an insane offender or the involuntary medication of a prisoner for this purpose."[118] Third, the punishment was excessive, because it made no measurable contribution to the acceptable goals of capital punishment: deterrence and retribution.[119] Accordingly, the court found the forcible medication of the inmate for the purposes of making the inmate competent to stand execution was unconstitutional under the "cruel, excessive [or] unusual punishment" clause of the state constitution.[120]

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[112] Those goals are retribution and deterrence. *Id.* at 761.

[113] Although the principle of gross disproportionality is recognized as a distinct aspect of the inquiry, it seems to this author to be merely a more specific restatement of the first aspect of the excessive punishment inquiry.

[114] *Perry*, 610 So. 2d at 764.

[115] *Id.* at 765.

[116] *Id.*

[117] *Id.* at 766 ("In short, Perry will be treated as a thing, rather than a human being, and deliberately subjected to 'something inhuman, barbarous' and analogous to torture.").

[118] *Id.*

[119] *Id.* at 766–67 (discussing the deterrence utility of the matter at issue, that it is unlikely that "a capital offender, capable of the kind of cost-benefit analysis that would make him susceptible to being deterred by the possibility of execution, would attach crucial weight to the fact that he cannot be executed should he become insane after being apprehended, convicted and sentenced to death").

[120] *See id.* at 770–71.

Perry represents the fullest and most exhaustive articulation of the "cruel, excessive [or] unusual punishment"[121] clause of the Constitution of Louisiana. However, the court has dealt with this issue differently in other cases. The standard utilized by the *Perry* court was first articulated in *State v. Stetson*.[122] In *Stetson*, the court was confronted with the question of whether a life sentence for the distribution of heroin constituted "cruel and unusual punishment."[123] Applying the four principles reiterated in *Perry*, the court answered the question in the negative, and upheld the defendant's sentence in a relatively brief section of the opinion.[124] The court analyzed both the federal and state constitutional claims concurrently,[125] which suggests the opinion is an example of the dual sovereignty approach.[126] Admittedly, the court had to deal with both the federal and state constitutional issues because it was denying that either right was being violated. The interweaving of federal and state law in the opinion, in lieu of treating each respective constitutional issue as distinct, strongly suggests a dual sovereignty analysis.

The next notable case in the Supreme Court of Louisiana's jurisprudence is *State v. Sepulvado*.[127] In *Sepulvado*, the court was presented with the issue of whether a three-and-one-half-year sentence was excessive punishment for an eighteen-year-old boy who engaged in consensual sex with a fifteen-and-one-half-year-old girl.[128] The court engaged in a thorough analysis of the state constitution and state law, and made the following findings. First, the court found that the inclusion of "excessive" in the Constitution of Louisiana grants protections to defendants beyond that of the Federal Constitution.[129] Second, by reviewing the constitutional conventional transcripts, the court found that it has authority to review sentences.[130] Although the Constitution of Louisiana states, "'No law shall subject' any person to [cruel, excessive, or unusual]

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[121] *Id.* at 779.

[122] 317 So. 2d 172, 176 (La. 1975).

[123] *Id.* at 173–74.

[124] *Id.* at 176–77 (citing People v. McNair, 363 N.Y.S.2d 151, 156 (App. Div. 1975)). It is interesting to note that the court cites to a New York appellate case out of the Fourth Department when adopting this standard.

[125] *Id.*

[126] It should be noted that this case predates *Michigan v. Long*, 436 U.S. 1032 (1983).

[127] 367 So. 2d 762 (La. 1979).

[128] *See id.* at 763–64.

[129] *See id.* at 764.

[130] *Id.* at 765–66.

punishment," it was the purpose of the framers to protect defendants from all state action.[131] The court further reasoned that every imposition of statutory punishment is done by law, even when judges act as the law's instrument.[132] Third, considering the circumstances of the defendant's conduct, his good standing in the community, and the burden the sentence represented to his dependents, the court found the sentence to be unconstitutionally excessive under the state constitution and its imposition to be an abuse of the trial court's discretion, even though it fell within the statutory limits.[133] The court reasoned that giving a sentence so near the statutory maximum to this teenager in the absence of aggravating circumstances would depreciate the seriousness of such an offense committed with aggravating circumstances by a more mature individual.[134] As such, the sentence was so inappropriate that it represented an abuse of discretion, which violated the defendant's right against excessive punishments.[135] Accordingly, the sentence was vacated and the case was remanded for re-sentencing.[136] The court's analysis of the issue was entirely based on the state constitution and state law. Therefore, the court utilized the primacy approach in this case. The only reference to the Federal Constitution in the discussion was of the general difficulties presented by reviewing sentences for excessiveness in the federal courts.[137]

In *State v. Cox*,[138] the Supreme Court of Louisiana reaffirmed the holding in *Sepulvado* that a sentence imposed within statutory limits "may violate a defendant's constitutional rights against excessive punishment."[139] The decision rested entirely on state law, and was therefore rendered under the primacy approach. In *Cox*, the court was presented with the issue of whether consecutive life sentences for convictions of armed robbery and attempted murder were excessive in the case of a defendant with no previous criminal

[131] *Id.* at 766 (quoting State v. Williams, 340 So. 2d 1382, 1386–87 (La. 1976) (Tate, J., concurring)).

[132] *See id.* at 767.

[133] *Id.* at 770–73.

[134] *Id.* at 772. The court also concluded that the mitigating factors outweighed the aggravating circumstances. *Id.*

[135] *Id.* at 773.

[136] *Id.*

[137] *See id.* at 764–65.

[138] 369 So. 2d 118 (La. 1979).

[139] *Id.* at 120 (quoting *Sepulvado*, 367 So. 2d at 767).

record, and no history of violent conduct.[140] The court noted that the usual rule for the defendant who has no criminal record or who does not present a risk to the public safety is to impose concurrent sentences.[141] Furthermore, the court noted that consecutive sentences should only be imposed upon habitual or dangerous offenders because such offenders present a danger to the safety of the public.[142] Upon examining the record, the court found no evidence to indicate the consecutive sentences were warranted.[143] The court reasoned that "[a] single violent incident does not justify characterizing a convicted person as a dangerous offender likely to be a public danger because of the probability of recurring violent episodes."[144] Accordingly, the court vacated the sentence for attempted murder, and remanded the case for a hearing to determine whether consecutive sentences should be imposed and for re-sentencing according to statutory guidelines.[145] This case was decided exclusively under state law, with no reference to federal jurisprudence.

In *State v. Goode*,[146] the Supreme Court of Louisiana declared a statute, which added a mandatory additional consecutive sentence of five years minimum without benefit of parole, probation, or suspension of sentence to any conviction of a number of crimes committed against a person sixty-five years or older, unconstitutional under the state constitution.[147] The court examined the statute and determined that the addition of five years to a wide class of offenses, including misdemeanors, made the statute completely unconstitutional.[148] In its analysis, the court relied on state law and state precedent.[149] The court discussed federal jurisprudence prior to rendering its decision on state grounds, but appeared to make no conclusions based on it.[150]

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[140] *Id.* at 120, 124.

[141] *Id.* at 124.

[142] *Id.* (citing ADVISORY COMM. ON SENTENCING AND REVIEW, AM. BAR ASS'N, STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES § 3.4(c), at 177 (1968)).

[143] *Id.* at 123–25.

[144] *Id.* at 124.

[145] *Id.* at 125.

[146] 380 So. 2d 1361 (La. 1980).

[147] *Id.* at 1362, 1364.

[148] *Id.* at 1363–64. The crime that the defendant was convicted of was simple battery, which carried a maximum sentence of six months. *Id.* at 1364.

[149] *See id.* at 1363.

[150] *See id.* at 1363–64. It appears the court employed the discussion of federal jurisprudence to illustrate the differences between the respective protections under state and federal law. *See id.* Additionally, the court references a federal case to illustrate a point in its

Interestingly, the court adopted a rule from a concurring opinion in *State v. Williams*,[151] in which the court compared the harshness of the penalty with the severity of the offense to determine if the punishment was proportionate.[152] The court reasoned that the sentencing statute suffered from two infirmities under this analysis.[153] First, the mandatory nature of the statute could lead to penalties that were disproportionate to the severity of the individual offense.[154] The court explicitly declared that the statute, as applied in this particular case, would be disproportionate to the offense.[155] Second, the statute failed to limit the maximum sentence that a court could impose.[156] According to the court, a defendant could potentially serve a life sentence for an underlying misdemeanor offense.[157]

Upon review of the cases, it appears that there are two common tests the court utilized to decide whether a sentence is excessive.[158] The first test is "whether the trial court abused its broad sentencing discretion."[159] The court limits its inquiry to the exercise of discretion by the trial court and does not consider whether another sentence was more appropriate.[160] This approach is typically used to uphold sentences within the statutory limits,[161] but the court has been willing to find an abuse of authority to overturn sentences that it finds excessive in light of the mitigating circumstances.[162] This

state analysis. *See id.* at 1364.

[151] 340 So. 2d 1382 (La. 1977).

[152] *Goode*, 380 So. 2d at 1364 (citing *Williams*, 340 So. 2d at 1385–86 (Tate, J., concurring)).

[153] *Id.*

[154] *Id.*

[155] *Id.*

[156] *Id.*

[157] *Id.*

[158] The standard announced in *State v. Stetson*, and utilized in *State v. Perry*, is rarely used to review proportionality claims. *See*, *e.g.*, State v. Williams, 708 So. 2d 1086, 1088 (La. Ct. App. 1998); State v. Wright, 664 So. 2d 712, 715 (La. Ct. App. 1995); State v. Soraparu, 649 So. 2d 1100, 1108–09 (La Ct. App. 1995); State v. Shields, 454 So. 2d 405, 407 (La. Ct. App. 1984); Williams v. Delcambre, 413 So. 2d 324, 326 (La. Ct. App. 1982).

[159] *See* State v. Humphrey, 445 So. 2d 1155, 1165 (La. 1984) (citing State v. Williams, 412 So. 2d 1327 (La. 1982)) (finding a twenty-one year sentence for manslaughter was not excessive).

[160] *Id.*

[161] *See id.*; State v. Cook, 674 So. 2d 957, 958–59 (La. 1996) (citing *Humphrey*, 445 So. 2d at 1165) (finding a sentence of nine years hard labor for vehicular homicide was not excessive); State v. Smith, 437 So. 2d 252, 255 (La. 1983) (citing State v. Washington, 414 So. 2d 313 (La. 1982)) (finding a twenty-one year sentence for manslaughter for a co-conspirator was not excessive).

[162] *See* State v. Cox, 369 So. 2d 118, 123–25 (La. 1979); State v. Sepulvado, 367 So. 2d 762, 770–73 (La. 1979).

approach is only used to review the sentences imposed by the trial judge within the statutory limits, as the constitutionality of statutes under which defendants are sentenced is the province of the court's other test. The second test is whether the penalty, in light of the harm caused to society by the offense, is so disproportionate that it shocks the conscience.[163] This approach is used to evaluate the statute under which the defendant was sentenced.[164] Typically, the court has been unwilling to overrule legislative judgments on the severity of crimes, but it has been willing to exercise its constitutional authority in extraordinary cases.[165]

To review, there are three basic standards that the Supreme Court of Louisiana uses to evaluate proportionality claims under the Constitution of Louisiana: (1) the judicial discretion standard announced in *Sepulvado*, (2) the legislative standard announced in *Goode*, and (3) the four-part analysis utilized in *Stetson* and *Perry*. The common thread among these three standards is that they all consider whether the punishment fits the crime, or is "nothing more than the purposeless and needless imposition of pain,"[166] or simply whether it is grossly disproportionate. The circumstances where the court has declared sentences and statutes unconstitutional have been relatively straightforward. A defendant sentenced to five-and-one-half years for a misdemeanor, punishable by a maximum six-month sentence without the aggravating factor, is an obvious instance of a grossly disproportionate sentence.[167] A teenager sentenced to three-and-one-half years for consensual sexual contact with the young girl to whom he is now married, and with whom he has a child also seems an obvious example of a grossly disproportionate sentence.[168] A defendant, with no previous convictions, sentenced to fifty consecutive years for battery and attempted murder also received an obviously disproportionate

[163] *See* State v. Beavers, 382 So. 2d 943, 944 (La. 1980) (holding that a minimum penalty of ten years imprisonment at hard labor was not cruel, excessive or unusual punishment for an offender who had been found guilty of DWI at least four times in a five-year period).

[164] *See id.*; State v. Hogan, 480 So. 2d 288, 291 (La. 1985) (holding that sentence enhancing statute for the use of firearms during the commission of a felony was constitutional); State v. Goode, 380 So. 2d 1361, 1364 (La. 1980) (holding that a statute imposing an additional five-year sentence to misdemeanor battery was unconstitutional per se).

[165] *See Goode*, 380 So. 2d at 1364.

[166] *See id.*; *accord Hogan*, 480 So. 2d at 290–91 (citing *Goode*, 380 So. 2d at 1361); State v. Bonnano, 384 So. 2d 355, 357 (La. 1980) (citing *Goode*, 380 So. 2d at 1361).

[167] *See Goode*, 380 So. 2d at 1364.

[168] *See* State v. Sepulvado, 367 So. 2d 762, 771–73 (La. 1979).

sentence.[169] The court has not varied the state proportionality standard much from the gross proportionality standard of federal jurisprudence, regardless of what it has said.

VI. POSSIBILITIES AND MOTIVATIONS

Our inquiry is now limited to two issues. First, what could the Supreme Court of Louisiana have said regarding the proportionality challenge to the death sentence for the crime of aggravated rape of a minor? Second, why did the Supreme Court of Louisiana decide to base its decision solely on federal grounds? The Supreme Court of Louisiana could have articulated the standard it has utilized to evaluate sentencing statutes under the state jurisprudence. For instance, the court could have discussed how punishments are viewed in light of the harm the offense causes society, and are only unconstitutional if they are so disproportionate that they shock the conscience.[170] The court could have determined that the rape of a child causes such serious injury to society that the deterrence factor of such a punishment is a legitimate legislative enactment. The court makes a very similar argument under the federal jurisprudence in *Kennedy*.[171] Furthermore, the court could have chosen to evaluate the punishment under the factors analyzed in *Stetson* and *Perry*. Specifically, the court could have discussed whether the punishment was "degrading to the dignity of human beings; . . . arbitrarily inflicted; . . . unacceptable to contemporary society; or . . . disproportionate to the crime or failing to serve a penal purpose more effectively than a less severe punishment."[172] The court could have determined that these factors were not violated and upheld the statute and the sentence on those grounds. In fact, the court makes many of these various arguments in its federal analysis of the issue.[173]

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[169] *See* State v. Cox, 369 So. 2d 118, 124–25 (La. 1979).

[170] The same standard was utilized in *State v. Goode*, *State v. Hogan*, and *State v. Bonnanno*. *See Hogan*, 480 So. 2d at 291; *Bonnano*, 384 So. 2d at 357; *Goode*, 380 So. 2d at 1364.

[171] *See* State v. Kennedy, 957 So. 2d 757, 788–89 (La. 2007) (citing State v. Wilson, 685 So. 2d 1063 (La. 1996)) (holding that the death penalty for child rape was constitutional, relying almost exclusively on federal jurisprudence).

[172] State v. Perry, 610 So. 2d 746, 762 (La. 1992) (citing State v. Stetson, 317 So. 2d 172, 177 (La. 1975)).

[173] *See Kennedy*, 957 So. 2d at 781–91. The only *Stetson-Perry* factor the court fails to address is the human dignity factor. *See id.* The court could not have used the judicial standard for proportionality analysis because the death sentence was imposed by a jury. *See id.* at 760.

As one could observe in the three state high court cases above, state high courts can approach their state constitutions in a variety of ways. The respective state high court can choose to not reach the state constitutional issue when upholding a right or uphold a right exclusively under the state constitution. But when a state high court is confronted with the potential violation of a fundamental right, the court should address the issue and give some basis for its decision to deny the right was violated under the state constitution. Additionally, there are various tools the respective court can use when conducting its analysis of the state constitutional claim. The court can look to binding or non-binding federal precedent. The court can examine the history of the state constitution, or its prior decisions. The court can consult the jurisprudence of sister states for guidance when interpreting its own constitution.

According to the court's own jurisprudence, the Supreme Court of Louisiana is obligated to interpret the state constitution in each case "[b]ecause of [their] oaths to support the constitution and laws of [Louisiana] as faithfully and diligently as those of the federal government."[174] Offering a footnote to a claim under the state constitution hardly seems to meet that obligation. Given the possibilities available to the court, it is difficult to understand why the justices did not engage in an actual analysis of the state constitutional issues. The court does reference its prior decision of *State v. Wilson*,[175] where it first upheld the death penalty statute under federal jurisprudence,[176] but does not seem to use the opinion as anything more than a transitional phrase to introduce its federal constitutional analysis.[177] The *Wilson* decision also fails to provide an actual analysis of the constitutionality of the death penalty for child rape under the Constitution of Louisiana.[178] In total, there appear to be references to three state cases,[179] but the analysis of

[174] *See Perry*, 610 So. 2d at 751 (citing LA. CONST. art. X, § 30; Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74 (1980)).

[175] 685 So. 2d 1063 (La. 1996).

[176] *Id.* at 1065–73.

[177] *Kennedy*, 957 So. 2d at 781 (citing *Wilson*, 685 So. 2d 1063).

[178] *See Wilson*, 685 So. 2d at 1065–73. The court cites two state cases for the proposition that "[t]he legislature alone determines what are punishable as crimes and the proscribed penalties." *Id.* at 1067 (citing State v. Baxley, 656 So. 2d 973 (La. 1995); State v. Dorthey, 623 So. 2d 1276 (La. 1993)). The court also cites to *State v. Griffin*, another state case, for the proposition that "legislative enactments are presumed constitutional under both the Federal and the State Constitutions." *Id.* (citing Gregg v. Georgia, 428 U.S. 153 (1976); State v. Griffin, 495 So. 2d 1306 (La. 1986)).

[179] *See id.* (citing *Baxley*, 656 So. 2d 973; *Dorthey*, 623 So. 2d 1276; *Griffin*, 495 So. 2d 1306).

the substantive issues of the death penalty for child rape are analyzed entirely under federal jurisprudence.[180] Still, referencing a previous decision of the court and analyzing the state constitutional claim under that case would be preferable to a footnote, even if the decision on which that analysis was based relied primarily on federal law.

Regarding the second part of the current inquiry, the Supreme Court of Louisiana had to examine federal jurisprudence, because it was denying that a fundamental right protected by the Federal Constitution was violated. But the necessity of federal analysis in this particular case does not explain the lack of state constitutional analysis. The court does have a history of struggling with the challenges of state constitutional analysis in the era of new federalism.[181] Moreover, Justice Dennis, the author of the *Perry* opinion and the strongest advocate of independent state constitutional analysis, is no longer a member of the court.[182] So the decision to forego analysis of the state constitutional claim in any meaningful way could be reflective of the changing membership of the court. The *Perry* decision, however, seems to offer an insight into why the court failed to offer a state constitutional analysis. As discussed earlier in *Perry*, the Supreme Court of Louisiana held a court order to medicate an inmate to make him competent to stand execution was unconstitutional.[183] When addressing an argument by the state advocating a deferential judicial review standard adopted by the United States Supreme Court, the court rebutted the prosecution by explaining the reasoning behind the Supreme Court's policy of deference to the state legislatures.

"The reasons cited for these rules were the deference the [Supreme Court] owes to state legislatures under our federal system, its reluctance to become the arbiter of the standards of criminal responsibility throughout the country, and the difficulty of changing the high court's interpretations through constitutional amendment."[184]

This quote illustrates the Supreme Court of Louisiana's belief

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[180] *See id.* at 1065–73.

[181] *See* Munyon, *supra* note 13, at 331–32 (discussing the court's use of the state constitution to adjudicate the fundamental rights of privacy, freedom from unreasonable search and seizures, and freedom of expression).

[182] *See id.*; Louisiana Supreme Court, Biographies of the Justices of the Louisiana Supreme Court, http://www.lasc.org/about_the_court/justices_bio.asp (last visited Sept. 1, 2008).

[183] State v. Perry, 610 So. 2d 746, 771 (La. 1992).

[184] *Id.* at 769.

that the United States Supreme Court should defer to the state legislatures. In this context, the *Kennedy* decision can be properly understood. The *Kennedy* decision is obviously not intended to advance state constitutional law. The court was challenging the Supreme Court's proportionality jurisprudence and made arguments to the Supreme Court of the United States to affirm the judgment of the Legislature of Louisiana,[185] which has determined by the enactment of the death penalty statute that such a punishment is within constitutional bounds. Perhaps because the court is fully aware that the Supreme Court does not wish to engage in any analysis of state jurisprudence,[186] the court divorced its opinion entirely of the analysis of state constitutional issues.

VII. CONCLUSION

The post-Warren Court era, and *Michigan v. Long*, challenges state high courts to adjudicate cases involving fundamental rights under state law, and the Supreme Court of Louisiana has failed to meet those challenges in *Kennedy*. Furthermore, the court has failed to meet its own obligations to the people of Louisiana by continuing to articulate and develop its proportionality jurisprudence in what may be its most scrutinized case since the adoption of the 1974 Constitution of Louisiana. Specifically, the court's focus on legitimizing the judgment of the state legislature has resulted its failure to meet its obligation "to support the constitution and laws of [Louisiana] as faithfully and diligently as those of the federal government."[187] Only when the Supreme Court renders its decision later this year, will it be known if the court's failure is complete. Reversal or affirmation of their judgment will, however, offer no measure of vindication for criticisms offered here of the state constitutional analysis.

AFTERWORD

In late June, the Supreme Court of the United States declared

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[185] *See* State v. Kennedy, 957 So. 2d 757, 781–91 (La. 2007).

[186] *See* Michigan v. Long, 463 U.S. 1032, 1039 (1983) ("The process of examining state law is unsatisfactory because it requires us to interpret state laws with which we are generally unfamiliar, and which often, as in this case, have not been discussed at length by the parties.").

[187] *Perry*, 610 So. 2d at 751 (citing LA. CONST. art. X, § 30; Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74 (1980)).

that the Eighth Amendment barred the death penalty as a punishment for the crime of child rape.[188] As noted in the conclusion, this development in no way diminishes the strength of the criticism offered against the decision in *State v. Kennedy*.[189] The Supreme Court of Louisiana failed to offer any substantive state constitutional analysis on the issue, regardless of the subsequent findings made by the Supreme Court under the Federal Constitution.[190]

[188] Kennedy v. Louisiana, 128 S. Ct. 2641, 2645–46 (2008).
[189] *See supra* Part VII.
[190] *See id.*; State v. Kennedy, 957 So. 2d 757, 779 n.24 (La. 2007).