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“On Horror’s Head Horrors Accumulate”:* A Reflective Comment on Capital Child Rape Legislation

*J. Richard Broughton***

I. INTRODUCTION

The severity with which political communities have historically punished rape indicates, among other things, a powerful, collective civil social view that rape encompasses brutality deserving of a people’s harshest moral and legal sanction. Blackstone informs us that, at both Jewish and Saxon law, rape was punishable by death.¹ Moreover, English law, though disagreeing at times on the point, recognized that “rape is a most detestable crime, and therefore ought severely and impartially to be punished with death.”² Knowing their Blackstone and Hale, and recognizing that the horrific act of forcing a woman to engage in sex warranted severe moral disapprobation through criminal and penal law, the early

* WILLIAM SHAKESPEARE, *OTHELLO*, act 3, sc. 3.

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1. 4 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* *210-11. Blackstone explains that rape was defined at common law as “the carnal knowledge of a woman forcibly and against her will.” *Id.* at *210. At Jewish law, according to Blackstone, rape was punishable by death where the woman was married to someone other than the rapist. *Id.* If she was unmarried, fifty shekels were to be paid to the victim’s father, “and she was to be the wife of the ravisher all the days of his life.” *Id.* The Saxon capital rape law was ultimately changed under William the Conqueror, who substituted for the death penalty the penalty of castration and loss of eyes. *Id.* at *211. This practice continued until the reign of Henry III. *Id.* See also DANIEL BOORSTIN, *THE MYSTERIOUS SCIENCE OF THE LAW* 115-16, 143 (1941) (describing Blackstone’s explanation of the treatment of rape under English law).

2. 1 MATTHEW HALE, *HISTORY OF THE PLEAS OF THE CROWN* *635. Lord Chief Justice Hale was careful to note, however, that “it must be remembered, that it is an accusation easy to be made, hard to be proved, but harder to be defended by the party accused, though innocent.” *Id.* See also 4 BLACKSTONE, *supra* note 1, at *214-15 (explaining Lord Chief Justice Hale’s views concerning the substantive law of rape and the rules of evidence that should obtain during a rape prosecution). For an excellent commentary on the way in which Lord Chief Justice Hale’s concerns about false accusations have influenced modern rape law and jurisprudence, see generally SUSAN ESTRICH, *REAL RAPE* (1987).

American colonists also made rape a capital crime, a practice that continued throughout much of American history.³ In doing so, lawmakers throughout the republic remained faithful to Publius' assertion that the states would have primary responsibility for the administration of criminal justice,⁴ effectuated through a body of representatives who, cognizant of human nature and recognizing the complexities of political life, would "refine and enlarge the public views" regarding crime and punishment.⁵

In like manner, the United States Supreme Court was historically deferential to lawmakers and courts in their imposition of capital punishment for a variety of crimes and in a variety of ways. Beginning in the 1970's, however, the Court stepped in its own way, and that of the political branches. Guided by the Eighth Amendment's prohibition on "cruel and unusual punishments,"⁶ and

3. See LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 42 (1993). Friedman's magisterial work explains that, while the death penalty was used "sparingly" in the colonies, rape was among those crimes for which it was invoked. *Id.* Indeed, at English law, as Friedman explains, one could be guilty of rape even if no violence occurred, where the woman raped was under ten years old. *Id.* For example, in Massachusetts Bay in the 1640's:

three servants of John Humfry had intercourse with his nine-year-old daughter. The General Court declined to impose the death penalty; there was no specific law on the subject, and it was not, biblically speaking, a capital crime. They fined the main villain, ordered his nostrils to be slit and seared, and made him wear a noose of rope around his neck. The other two culprits were fined and whipped. The General Court then made rape, including statutory rape, a capital offense.

Id.

4. THE FEDERALIST NO. 17, at 120 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Hamilton observed that, "there is one transcendent advantage belonging to the province of State governments – I mean the ordinary administration of criminal and civil justice. This, of all others, is the most powerful, most universal, and most attractive source of popular obedience and attachment." *Id.*

5. THE FEDERALIST NO. 10, at 82 (James Madison) (Clinton Rossiter ed., 1961).

6. U.S. CONST. amend. VIII. The Eighth Amendment provides, "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." *Id.* The meaning of the Eighth Amendment has proven to be a source of disagreement among members of the Supreme Court. Compare, e.g., Harmelin v. Michigan, 501 U.S. 957, 967-85 (1991) (describing, in Justice Scalia's opinion for the Court, the history of the Eighth Amendment and its pedigree), with *id.* at 1009-12 (White, J., dissenting) (contesting Justice Scalia's reading of the Eighth Amendment's history). See generally Anthony F. Granucci, "Nor Cruel and Unusual Punishments Inflicted:" *The Original Meaning*, 57 CALIF. L. REV. 839 (1969) (providing a comprehensive account of the Framers' view of the Eighth Amendment and concluding that the Framers "misinterpreted English law"); Roaul Berger, *The Cruel and Unusual Punishments Clause*, in THE BILL OF RIGHTS: ORIGINAL MEANING AND CURRENT UNDERSTANDING 303-08 (Eugene W. Hickok Jr. ed., 1991) (providing a detailed historical review of the Eighth Amendment); THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES 3-24 (Hugo Adam Bedau ed., 1997) (providing a brief but illuminating summary of the death penalty in America and the development of Eighth Amendment doctrine).

following Chief Justice Warren's earlier admonition that the constitutionality of criminal punishments should be gauged by the "evolving standards of decency that mark the progress of a maturing society,"⁷ the Court in *Furman v. Georgia* invalidated capital sentencing schemes that provided standardless discretion to judges and juries in imposing the death penalty.⁸ The decision resulted in a wholesale vacation of capital sentences nationally, and effectively nullified the capital statutes, including the sixteen for rape,⁹ in every state in which the penalty was then imposed.¹⁰ Seeing that the states had revised their practices to conform to *Furman*,¹¹ however, the Court reinstated its approval of the death penalty four years later in *Gregg v. Georgia*.¹² Among the post-*Furman* capital statutes were three (those of Georgia, North Carolina, and Louisiana) for the rape of an adult woman, and three more (Florida, Mississippi, and Tennessee) for the rape of a child only.¹³ The Court did not limit the class of constitutionally eligible capital defendants to those who kill their victims, but it did remind lawmakers that their capital regimes should not be disproportionate to the crimes for which capital punishment is imposed.¹⁴

Enter *Coker v. Georgia*, which held that capital punishment for

7. *Trop v. Dulles*, 356 U.S. 86, 101 (1958). *Trop* involved the government's deprivation of the defendant's citizenship after the defendant deserted the Army during World War II. *Id.* at 88. The Court, applying the "evolving standards of decency" rationale, found that the government's penalty violated the Eighth Amendment. *Id.* at 101.

8. 408 U.S. 238 (1972). *Furman* was a *per curiam* decision in which each of the nine Justices wrote separately. The controlling opinions are those of Justices Douglas, Stewart, and White, who argued that the statutes at issue lacked standards sufficient to ensure against arbitrary and capricious application of the death penalty. *See id.* at 253 (Douglas, J., concurring). *See also* Daniel D. Polsby, *The Death of Capital Punishment?: Furman v. Georgia*, 1972 SUP. CT. REV. 1 (conducting an analysis of the various opinions in *Furman*).

9. *See Coker v. Georgia*, 433 U.S. 584, 593 (1977).

10. *See* Jack Greenberg, *Capital Punishment as a System*, 91 YALE L.J. 908, 915 (1982) (explaining that *Furman* resulted in vacated sentences for all 629 persons on death row at the time of *Furman*).

11. *See* Jennifer L. Cordle, *State v. Wilson: Social Discontent, Retribution, and the Constitutionality of Capital Punishment for Raping a Child*, 27 CAP. U. L. REV. 135, 137 (1998). Cordle explains that states responded to *Furman* in two ways: "either they provided for a system of guided discretion, in which the trier of fact relied on aggravating and mitigating circumstances when deciding on a sentence, or they provided for mandatory imposition of the death penalty for particular offenses." *Id.* Of course, the latter of these alternatives, mandatory capital punishment, was invalidated in *Woodson v. North Carolina*, 428 U.S. 280, 303 (1976) and *Roberts v. Louisiana*, 428 U.S. 325, 336 (1976).

12. 428 U.S. 153 (1976).

13. *See Coker*, 433 U.S. at 594-95. Once again, two of these statutes, North Carolina's and Louisiana's, provided mandatory capital punishment for rape and were invalidated in *Woodson*, 428 U.S. at 303, and *Roberts*, 428 U.S. at 336.

14. *Gregg*, 428 U.S. at 173, 183.

the rape of an adult woman was a disproportionate penalty because, among other reasons, the victim was not killed.¹⁵ In the course of its holding, however, the *Coker* plurality vastly underestimated the severe psychological, emotional, and physiological effects of rape on the victim, as well as the violence done to the victim throughout the rape.¹⁶ In one decision, then, the Court not only invalidated capital rape laws, it also cast doubt on the states' abilities, consistent with long developed penal and jurisprudential traditions, to impose civil society's most severe legal and moral sanction for the variety of acts that the body politic had collectively determined to be most deserving of that sanction.

Herein lies the current controversy. Despite *Coker*, a number of states retain, and, indeed, have only recently enacted, the death penalty for crimes in which the victim is not killed.¹⁷ Perhaps the

15. *Coker*, 433 U.S. at 597-98 ("The murderer kills; the rapist, if no more than that, does not. Life is over for the victim of the murderer; for the rape victim, life may not be nearly so happy as it was, but it is not over and normally is not beyond repair."). Before *Coker*, the Court had refused to hear Eighth Amendment challenges to capital rape statutes but not without comment from some members of the Court. See, e.g., Rudolph v. Alabama, 375 U.S. 889-91 (1963) (opinion of Goldberg, J., joined by Douglas and Brennan, J.J., dissenting from denial of certiorari) (questioning whether the Eighth Amendment permits capital punishment for the crime of rape). For a critique of Justice Goldberg's dissent, see Herbert L. Packer, *Making the Punishment Fit the Crime*, 77 HARV. L. REV. 1071, 1072-73 (1964) (suggesting that Justice Goldberg's "questions" about the imposition of capital punishment for rape "may well be regarded as a sketch for an opinion on the merits").

16. See Owen D. Jones, *Sex, Culture, and the Biology of Rape: Toward Explanation and Prevention*, 87 CALIF. L. REV. 827, 920 (1999). Professor Jones likewise has difficulty with the *Coker* Court's assessment, stating that while the Court's claim about the rape-murder dichotomy "is purportedly objective . . . I am not presently convinced that men in the legal system should be quite so sanguine about their ability to make such assessments of female psychology in the context of rape." *Id.* See also Bridgett M. Palmer, *Death as a Proportionate Penalty for the Rape of a Child: Considering One State's Current Law*, 15 GA. ST. U. L. REV. 843, 863-65 (1999) (explaining that "while life ends for the murder victim, the rape victim must cope with far more than the initial physical pain of rape. The victim must also deal with the psychological pain of being raped."). The effects are particularly harmful in the context of child rape. See *id.* at 864; Arthur J. Lurgio et al., *Child Sexual Abuse: Its Causes, Consequences, and Implications for Probation Practice*, 59 FED. PROBATION 69, 70 (1995) (explaining the severe emotional and psychological effects of rape upon child victims); cf. ESTRICH, *supra*, note 2, at 82-83 (discussing the "rape as violence" reform view, which focuses on the violent aspects of rape (including rape as power) and which, for Professor Estrich, is "the better approach [to rape reform] both theoretically and strategically"); Lynn Hecht Schafran, *Maiming the Soul: Judges, Sentencing, and the Myth of the Nonviolent Rapist*, 20 FORDHAM URB. L.J. 439, 441 (1993) (arguing that the idea of a "nonviolent" rape is fictional and that "[j]udges and attorneys must expand their definitions of violence to include injury to the victim's psyche.").

17. See Michael Higgins, *Is Capital Punishment for Killers Only?*, 83 A.B.A. J. 30 (Aug. 1997). Higgins indicates that 14 jurisdictions, as of 1997, impose the death penalty for crimes in which the victim need not be killed: California (treason), Colorado (kidnapping where the victim is harmed, and treason), Florida (drug trafficking), Georgia (aircraft

most compelling of these regimes is Louisiana's, which by statute provides capital punishment for the rape of a child under the age of twelve.¹⁸ Louisiana thus seized upon the limiting "adult woman" language of *Coker*¹⁹ and upon *Coker's* considerably scattered Eighth Amendment progeny, which suggests that a specific intent to kill one's victim is not necessary to the imposition of capital punishment.²⁰ The Louisiana Supreme Court upheld the law in *State*

hijacking, treason, and rape of a child under 12), Idaho (kidnapping where the victim is harmed), Illinois (treason, and aggravated kidnapping for ransom), Louisiana (treason, and rape of a child under 12), Mississippi (treason, and aircraft piracy), Missouri (treason, kidnapping, dealing drugs near schools, and placing bombs near bus terminals), Montana (aggravated assault or kidnapping while incarcerated in state prison for murder or persistent felonies, and treason), New Mexico (espionage), Washington (treason), and the United States (treason, and drug dealing by a drug kingpin). *Id.*

Until 1997, Utah imposed capital punishment for aggravated assault by a prisoner serving a sentence for a first degree felony, when the prisoner intentionally caused serious bodily injury. UTAH CODE ANN. §76-5-103.5(2)(b) (1995). The Utah Supreme Court then invalidated the statute as imposing cruel and unusual punishment in violation of both the Utah and Federal Constitutions. *State v. Gardner*, 947 P.2d 630 (Utah 1997).

The notion of imposing capital punishment upon those who commit inherently serious crimes, but who did not take a human life, has a distinguished pedigree in law. Plato's Athenian Stranger (probably Socrates), for example, found it disgraceful but nonetheless necessary in a regime that legislates for human beings rather than "heroes and sons of gods" to provide capital punishment for the most severe offenses. PLATO, *THE LAWS* 355-56 (T.J. Saunders trans., 1970). These offenses included robbery from the temples, subversion, and treason. *Id.* at 356-60. *The Laws* thus modified Plato's utopian vision from *The Republic*, which posited that, because the ruling philosopher-kings can contemplate and administer justice perfectly, there is no need for extensive legislation. See generally PLATO, *THE REPUBLIC* (G.M.A. Grube trans., 1992). In addition, Blackstone explained that the law had traditionally punished with death the sexual "crimes against nature," although the crimes themselves did not involve the taking of a life. 4 BLACKSTONE, *supra* note 1, at *216.

18. See LA. REV. STAT. ANN. §14:42(C) (West 1996). Mississippi and Georgia have also moved to impose the death penalty upon child rapists. MISS. CODE ANN. § 97-3-65 (Supp. 1997); see also Higgins, *supra* note 17, at 30 (listing the jurisdictions, including Georgia, that impose the death penalty for the rape of a child).

19. *Coker*, 433 U.S. at 592, 593, 595-97, 601.

20. See *Tison v. Arizona*, 481 U.S. 137, 158 (1987) (holding that capital punishment is not excessive where the defendant, who is a major participant in the crime, demonstrates a reckless indifference to human life). See also *infra* Section II.B text and accompanying notes (providing an analysis of *Tison* and other recent Eighth Amendment cases bearing upon the question of whether capital punishment can be imposed for the rape of a child).

A number of commentators have commented upon the Court's ambiguous, and confusing Eighth Amendment jurisprudence. See, e.g., Scott W. Howe, *The Failed Case for Eighth Amendment Regulation of the Capital Sentencing Trial*, 146 U. PA. L. REV. 795, 797 (1998) (arguing that the Court's Eighth Amendment jurisprudence has ignored and complicated the purpose of the Eighth Amendment, which "speaks to the question of who can receive the death penalty and does so in terms that should guide the capital sentencer"); Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 359 (1995) (evaluating the Court's Eighth Amendment cases and describing them as "a body of law at once so messy and so meaningless"); Alex Kozinski & Sean Gallagher, *Death: The Ultimate Run-On Sentence*, 46

v. Wilson,²¹ and the Supreme Court has, for the moment, refused to review it.²² Nevertheless, the Louisiana law presents the question of whether, in a constitutional scheme in which criminal punishments must be "proportionate" to the crime committed, the imposition of capital punishment for the rape of a child is constitutionally permissible.²³ Undoubtedly, the answer to that question, given the

CASE W. RES. L. REV. 1, 29 (1995) (complaining that the Court's continued use of its Eighth Amendment jurisprudence "will continue to give opponents a legitimate platform from which to impede even the most determined efforts to carry out the death penalty on a routine basis"); Robert A. Burt, *Disorder in the Court: The Death Penalty and the Constitution*, 85 MICH. L. REV. 1741, 1819 (1987) (stating that "[t]he Justices have provided this lesson, though unwittingly, by embodying their conceptions of American society: In conflicts among implacably opposed adversaries, nothing is ever sensibly resolved or learned."); see also Packer, *supra* note 15, at 1081-82 (predicting the difficulties that would be raised were the Court to engage in regulation of capital sentencing legislation).

21. 685 So.2d 1063 (La. 1996), *cert. denied sub nom.* Bethley v. Louisiana, 520 U.S. 1259 (1997).

22. *Id.*

23. The literature on this issue and the constitutionality of this particular statute is most thoughtful. Although the authors divide on their approaches to determining whether the statute violates *Coker* and the Eighth Amendment, most all of these authors have urged that the existing statute is unconstitutional. Compare, e.g., Annaliese Flynn Fleming, *Louisiana's Newest Capital Crime: The Death Penalty for Child Rape*, 89 J. CRIM. L. & CRIMINOLOGY 717, 749 (1999) (contending that "[t]he crime of raping a child is clearly heinous and deserving of severe punishment; however, because the crime does not result in the loss of human life, the Court will likely follow the line drawn in *Coker* and prohibit imposing the death penalty for this crime."); and Pallie Zambrano, *The Death Penalty is Cruel and Unusual Punishment for the Crime of Rape - Even the Rape of a Child*, 39 SANTA CLARA L. REV. 1267, 1269 (1999) (concluding that "the sentence of death is too severe a punishment for the crime of rape or any crime that does not include intent to kill"); and Pamela J. Lormand, *Proportionate Sentencing for Rape of a Minor: The Death Penalty Dilemma*, 73 TUL. L. REV. 981, 1015 (1999) (arguing that capital child rape statutes impose an excessive punishment); and J. Chandler Bailey, *Death Is Different, Even on the Bayou: The Disproportionality of Crime and Punishment in Louisiana's Capital Child Rape Statute*, 55 WASH. & LEE L. REV. 1335, 1336-37 (1998) (arguing same); and Emily Marie Moeller, *Devolving Standards of Decency: Using the Death Penalty to Punish Child Rapists*, 102 DICK. L. REV. 621, 648 (1998) (arguing same); with Palmer, *supra* note 16, at 846-47 (arguing that the statute is constitutional but that the Court is likely to invalidate it under *Coker*); and Elizabeth Gray, *Death Penalty and Child Rape: An Eighth Amendment Analysis*, 42 ST. LOUIS L.J. 1443, 1469 (1998) (arguing that Louisiana must adopt greater procedural safeguards to constitutionally maintain the statute); and Yale Glazer, *Child Rapists Beware! The Death Penalty and Louisiana's Aggravated Rape Statute*, 25 AM. J. CRIM. L. 79, 112-13 (1997) (arguing that Louisiana's law could survive constitutional scrutiny if amended to provide for appropriate aggravating factors); see also Michael Mello, *Executing Rapists: A Reluctant Essay on the Ethics of Legal Scholarship*, 4 WM. & MARY J. WOMEN & L. 129, 170-71 (1997) (concluding that *Coker* was rightly decided but that racism counsels against capital punishment for rapists); Angelyn Miller, *Can a Convicted Rapist Be Sentenced to Death for Raping A Child Under Twelve Years of Age?*, 37 WASHBURN L.J. 187, 201-02 (1997) (concluding that although the Supreme Court is likely to invalidate the statute, capital punishment might be appropriate if the rapist transmitted HIV to the victim).

While this article relies upon the helpful work of these authors, as noted above, it differs

prevalence today of capital punishment legislation for a variety of non-homicide crimes, will weigh heavily on the related question of whether it is ever permissible for the state to impose capital punishment for crimes where no death has occurred.²⁴

This article examines that most difficult issue, which squarely challenges the *Coker* rape rationale. Section II analyzes the Court's decision in *Coker* and several important cruel and unusual punishment decisions that followed, many of which invoke, and attempt to refine, the *Coker* analysis. Section III examines Louisiana's capital child rape statute, the Louisiana Supreme Court's *Wilson* decision, and the practices of other states in providing capital punishment for non-homicide crimes. Section IV then argues that, despite questions inherent in the Court's inconsistent capital punishment jurisprudence, the Eighth Amendment permits capital child rape legislation. This conclusion is based on three premises: trends in recent precedent that urge greater deference to the political branches in criminal legislation; history and practice, viewed through a more expansive field of vision that includes consideration of legislation concerning other sex offenses and non-homicide capital crimes; and the brutality of rape itself, which undermines the *Coker* Court's proportionality analysis. This analysis therefore gives greater, though not unlimited, constitutional latitude to states in addressing inherently serious non-homicide crimes, especially the physically and psychologically devastating, and increasingly problematic, crime of rape, particularly as applied to the rape of a child. Finally, this article offers a cautionary note to lawmakers and others involved in criminal justice and rape sentencing reform, urging that they carefully consider the problem of racial discrimination when adopting and administering the new capital regimes, particularly those that include rape.

from the existing literature by suggesting that the confluence of precedent, "living tradition," and the effects of rape on the victim help to determine whether capital child rape statutes are valid pursuant to the Eighth Amendment, as the Court has understood it. As applied to the instant issue, this approach thus considers not only the history of capital rape laws but also their continued vitality in light of modern legislative practices and the modern psychology of rape, concluding that states should be permitted to execute child rapists in certain circumstances. See *infra* Section IV text and accompanying notes.

24. See Jeffrey C. Matura, *When Will it Stop?: The Use of the Death Penalty for Non-Homicide Crimes*, 24 J. LEGIS. 249, 262 (1998) (detailing the problem of imposing capital punishment for non-homicide offenses and suggesting that these efforts violate the Cruel and Unusual Punishments Clause).

II. *COKER V. GEORGIA* AND THE TRAIL IT HAS BLAZED

To better understand the constitutional dynamics inherent in recent legislative efforts to expand the imposition of capital punishment, it is important to view the decisions that have been the impetus for those efforts. This Section, therefore, will analyze the seminal decision in *Coker*, as well as the Court's several subsequent decisions attempting to refine the proportionality analysis explicated (for want of a better description) in *Coker*. What emerges from these decisions is a confusing and ambiguous doctrinal understanding of the Eighth Amendment. It is precisely this ambiguity and confusion upon which legislators, most particularly (for purposes of this paper) those in Louisiana, have seized in extending capital punishment to a range of non-homicide crimes.

A. *Coker v. Georgia*

On the evening of September 2, 1974, having been convicted in 1973 of murder, rape, kidnapping, and aggravated assault, Ehrlich Anthony Coker was serving three life sentences, two twenty-year sentences, and one eight-year sentence in the Ware Correctional Institute, located just outside Waycross, Georgia.²⁵ His year-and-a-half stay at Ware for those offenses, however, ended that evening as Coker escaped and made his way to the home of Allen and Elnita Carver.²⁶ After binding Mr. Carver's limbs and placing him in the family's bathroom, Coker obtained control of a kitchen knife, keys to the family car, and Mrs. Carver, whom, upon brandishing the knife, he raped.²⁷ Coker then drove away in the car with Mrs. Carver.²⁸ Mr. Carver untied himself and notified the police, who subsequently apprehended Coker and saved Mrs. Carver.²⁹ A Georgia jury subsequently convicted Coker of escape, armed robbery, motor vehicle theft, kidnapping, and rape.³⁰ Pursuant to the commands of Georgia's post-*Furman* capital

25. *Coker v. Georgia*, 433 U.S. 584, 587 (1977).

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* The plurality opinion, in describing this portion of the facts, wrote that "Mrs. Carver was unharmed." *Id.* As stated above, "saved" seems a better description, given the harrowing experience through which Mrs. Carver had been put physically, emotionally, and psychologically.

30. *Coker*, 433 U.S. at 587.

sentencing scheme,³¹ the jury sentenced Coker to death by electrocution for raping Mrs. Carver.³² The Georgia Supreme Court affirmed both the conviction and sentence.³³

On certiorari, the United States Supreme Court reversed, limiting its analysis to the issue of whether the imposition of capital punishment for rape constitutes cruel and unusual punishment within the meaning of the Eighth Amendment.³⁴ Conceding that "it is now settled" that the death penalty does not *per se* violate the Eighth Amendment,³⁵ Justice White's opinion for the plurality nonetheless cautioned that, under *Gregg*, the Eighth Amendment proscribes punishments that are " 'excessive' in relation to the crime committed."³⁶ This, the plurality noted, occurs when the punishment "(1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of suffering; or (2) is grossly out of proportion to the severity of the crime."³⁷ To confirm such a determination, courts should consider objective factors such as history, precedent, legislative practices, and the decisions of juries.³⁸ These factors satisfactorily confirm the conclusion that capital punishment for deliberate murder is not a disproportionate penalty.³⁹ Where the rape of an *adult* woman is concerned, however, the analysis changes somewhat.

Claiming the guidance of history and "objective evidence of the

31. See GA. CODE ANN. § 26-3102 (Supp. 1976) (providing for capital jury sentencing based on the existence of at least one aggravating circumstance and a recommendation of the death penalty).

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

33. See *Coker v. State*, 216 S.E.2d 782 (Ga. 1975).

34. *Coker*, 433 U.S. at 586. The Court did not address in any way the problem of racial discrimination in the imposition of capital punishment for rape. See RANDALL KENNEDY, RACE, CRIME, AND THE LAW 324 (1997) (explaining that the Court had an excuse for failing to mention race, as both the defendant and the victim were white); cf. Brief for Amici Curiae of the American Civil Liberties Union, The Center for Constitutional Rights, The National Organization for Women Legal Defense and Education Fund, The Women's Law Project, The Center for Women Policy Studies, The Women's Legal Defense Fund, and Equal Rights Advocates, Inc., *Coker v. Georgia*, 433 U.S. 584 (1977) (No. 75-5444) (stating, in a brief written by now-Justice Ruth Bader Ginsburg, that the death penalty for rape "is an outgrowth of both male patriarchal views of women no longer seriously maintained by society and gross racial injustice created in part out of that patriarchal foundation"). As Professor Mello explains, "[t]he Court ignored *amici's* arguments." Mello, *supra* note 23, at 162.

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

36. *Id.* at 592 (citing *Gregg v. Georgia*, 428 U.S. 153 (1976)).

37. *Id.*

38. *Id.*

39. *Id.*

country's present judgment concerning the acceptability of death as a penalty for the rape of an *adult* woman," the plurality noted that by the time of *Furman*, only sixteen states and the Federal Government authorized capital punishment for raping an *adult* woman.⁴⁰ After *Furman*, only three states revised their capital sentencing statutes and included rape of an *adult* woman among the capital offenses.⁴¹ This objective evidence, then, combined with the consistent refusal of Georgia juries to impose capital punishment for rape, weighed heavily in favor of a national judgment rejecting death as a punishment for the rape of an *adult* woman.⁴² This evidence, though, was merely a factor for the plurality, merely a series of elements confirming the Court's "own judgment" that death is a disproportionate penalty for the rape of an *adult* woman.⁴³ That "judgment" led the plurality to assert, rather remarkably, that, while rape is a serious crime,

in terms of moral depravity and of the injury to the person and to the public, it does not compare with murder, which does involve the unjustified taking of human life. . . . rape by definition does not include the death of or even the serious injury to another person. The murderer kills; the rapist, if no more than that, does not. Life is over for the victim of the murderer; for the rape victim, life may not be nearly so happy as it was, but it is not over and normally is not beyond repair.⁴⁴

Thus, for the plurality, the absence of loss of life was crucial in its

40. *Coker*, 433 U.S. at 593 (emphasis added).

41. *Id.* at 594. Florida, Mississippi, and Tennessee also adopted capital rape statutes after *Furman*, but those statutes punished only the rape of a child by an adult. See FLA. STAT. ANN. § 794.011(2) (1976); MISS. CODE ANN. § 97-3-65 (Supp. 1976); TENN. CODE ANN. § 39-3702 (1974). The Tennessee Supreme Court invalidated the state's capital child rape statute in 1977 because it provided a mandatory death sentence in contravention of *Woodson*. *Collins v. State*, 550 S.W.2d 643 (Tenn. 1977).

42. *Coker*, 433 U.S. at 596-97.

43. *Id.* at 597. The plurality wrote:

These recent events evidencing the attitude of state legislatures and sentencing juries do not wholly determine this controversy, for the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment. Nevertheless, the legislative rejection of capital punishment for rape strongly confirms our own judgment, which is that *death is indeed a disproportionate penalty for the crime of raping an adult woman.*

Id. (emphasis added).

44. *Id.* at 598. *But see, e.g., Jones, supra* note 16, at 920 (questioning the all-male Court's ability to adequately assess "female psychology in the context of rape").

independent proportionality assessment of Georgia's capital rape statute.

Justice Powell offered an important separate concurrence, agreeing that, on the available facts, Georgia's capital rape statute imposed a punishment disproportionate to the crime committed (the rape of an *adult* woman).⁴⁵ Justice Powell determined that "there is no indication that [Coker's] offense was committed with excessive brutality or that the victim sustained serious or lasting injury."⁴⁶ The plurality opinion, however, was unnecessarily broad because it purported to offer a *per se* rule on the disproportionality of capital punishment for rape, according to Justice Powell.⁴⁷ Therefore, Justice Powell dissented with regard to the plurality's bright line test, explaining persuasively that in some circumstances "[t]he deliberate viciousness of the rapist may be greater than that of the murderer. . . . [s]ome victims are so grievously injured physically or psychologically that life is beyond repair."⁴⁸ Despite the plurality's scrutiny of the "objective" factors, "it has not been shown that society finds the death penalty disproportionate for *all* rapes."⁴⁹

The psychological effect of rape on the victim was a particularly prominent component of Chief Justice Burger's dissent, which Justice Rehnquist joined. In that dissent, two primary themes emerge: judicial deference to legislative determinations and the psychology of rape. After beginning with a familiar caution in death penalty jurisprudence — that the Court's task "is not to give effect to our individual views on capital punishment" — the Chief Justice's dissent accused the plurality of doing just that: "engraft[ing] their conceptions of proper public policy onto the

45. *Coker*, 433 U.S. at 601 (Powell, J., concurring in the judgment in part and dissenting in part). Note also that Justices Brennan and Marshall concurred, adhering to their respective views that the death penalty is always cruel and unusual punishment. *See id.* at 600 (Brennan, J., concurring in the judgment; Marshall, J., concurring in the judgment).

46. *Id.* at 601 (Powell, J., concurring in the judgment in part and dissenting in part). One wonders whether Justice Powell realized the consequences of this particular statement, especially in light of his thoughtful arguments later in the opinion concerning the severe psychological harms that rape produces. After all, Coker threatened Mrs. Carver (age 16 at the time) with a kitchen knife, raped her in the presence of her husband, and kidnapped her. She lived, to be sure, but to say that she was not treated with "excessive brutality" or that she did not sustain "serious or lasting injury" woefully disregards the nature and psychology of rape, of which Justice Powell proved subsequently that he was well aware.

47. *Id.*

48. *Id.* at 603 (Powell, J., concurring in the judgment in part and dissenting in part).

49. *Id.* at 604 (Powell, J., concurring in the judgment in part and dissenting in part) (emphasis added).

considered legislative judgments of the States."⁵⁰ The plurality opinion, the Chief Justice complained, was too broad, going beyond the particular facts and circumstances of Mrs. Carver's rape.⁵¹ The plurality opinion, along with Justice Powell's concurring statement, ignored rape as an "inherently . . . egregiously brutal" crime and one that Coker was especially prone to committing.⁵² As for the plurality's use of the objective statistical data, the Chief Justice explained that *Furman* introduced "[c]onsiderable uncertainty . . . into this area of the law";⁵³ the failure of more states to impose death for the rape of an adult woman could easily be explained by political compromises, time pressures, or "a desire to wait on the experience of those States which *did* enact such statutes."⁵⁴ The plurality, according to the Chief Justice, was thus misguided in its use of post-*Furman* statistics as evidence of a national judgment on this issue.

In addition, the plurality ignored the substantial evidence available concerning the psychology of rape. On this point, the Chief Justice made eloquent use of the disturbing realities of rape:

A rapist not only violates a victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. The long-range effect upon the victim's life and health is likely to be irreparable; it is impossible to measure the harm which results Rape is not a mere physical attack — it is destructive of the human personality. The remainder of the victim's life may be gravely affected, and this in turn may have a serious detrimental effect upon her husband and any children she may have Victims may recover from the physical damage of knife or bullet wounds, or a beating with fists or a club, but recovery from such a gross assault on the human personality is not healed by medicine or surgery.⁵⁵

In light of these realities, the Chief Justice determined that the plurality's conclusion that death is an excessive punishment for rape is "inexplicable."⁵⁶

50. *Coker*, 433 U.S. at 604 (Burger, C.J., dissenting).

51. *Id.* at 606 (Burger, C.J., dissenting).

52. *Id.* at 607-08 (Burger, C.J., dissenting).

53. *Id.* at 614 (Burger, C.J., dissenting).

54. *Id.* (emphasis added).

55. *Coker*, 433 U.S. at 611-12 (Burger, C.J., dissenting).

56. *Id.* at 612 (Burger, C.J., dissenting).

The confusion that *Coker* has helped to precipitate is thus evident in the plurality opinion itself, which appears to rest on a number of questionable premises.⁵⁷ First, the plurality claims that rape is a reprehensible crime,⁵⁸ but fails to explain any of the available evidence concerning the profound and disturbing physical and psychological impact of rape on its victim. Only Justice Powell, the Chief Justice, and Justice Rehnquist demonstrated a persuasive recognition of these harsh realities.⁵⁹ Rather, the Court simply proceeds from the assumed premise that rape cannot compare sufficiently with murder as a capital offense because it involves no loss of life. Second, the Court claims to issue a judgment as to the disproportionality of capital punishment for rape generally, but then makes repeated references to the rape of an *adult* woman,⁶⁰ a linguistic peculiarity also found in Justice Powell's separate opinion.⁶¹ Finally, the plurality explains that history, precedent, legislation, and jury determinations guide the proportionality analysis. Its use of those factors, however, as the Chief Justice explained, is open to considerable question, for it gave scant attention to the long history of capital rape proscriptions both in English law and in American law and to the very real ambiguities inherent in the post-*Furman* and *Gregg* legislative worlds.⁶² The extent and constitutional contours of legislative power to punish serious crimes that do not cause or result in death to the victim thus were subject to even greater question after *Coker*, and demanded greater explanation and clarity.

B. Proportionality and the Eighth Amendment, Post-Coker

Such an explanation and clarity, however, were not to come. This is sufficiently apparent in a string of varied non-capital

57. See David J. Karp, *Coker v. Georgia: Disproportionate Punishment and the Death Penalty for Rape*, 78 COLUM. L. REV. 1714 (1978). Karp's article possesses much foresight, concluding that *Coker's* premises are untenable and predicts that, as to the loss of life requirement, "it is not certain that the Court will adhere to this principle in later cases." *Id.* at 1727.

58. *Coker*, 433 U.S. at 599 ("Short of homicide, rape is the 'ultimate violation of self.'").

59. *Id.* at 603 (Powell, J., concurring in the judgment in part and dissenting in part); *id.* at 611-12 (Burger, C.J., dissenting).

60. See *id.* at 592, 593, 596, 597.

61. See *id.* at 601 (Powell, J., concurring in the judgment in part and dissenting in part) (joining the plurality's reasoning on the facts here that "ordinarily death is disproportionate punishment for the crime of raping an adult woman.").

62. See *id.* at 614 (Burger, C.J., dissenting).

proportionality cases, in which the Court vacillated on the use of proportionality analysis where the death penalty is not imposed.⁶³ With reference to *Coker*, the Court consistently made clear that proportionality analysis *is* required in capital cases because, as the Court has recognized, "death is different."⁶⁴ Nonetheless, that analysis has proven equally vacillating in the capital arena.

In *Enmund v. Florida*,⁶⁵ the Court reversed the death sentence

63. See *Rummell v. Estelle*, 445 U.S. 263 (1980); *Hutto v. Davis*, 454 U.S. 370 (1982); *Solem v. Helm*, 463 U.S. 277 (1983); see also *Weems v. United States*, 217 U.S. 349 (1910) (holding unconstitutional under the Eighth Amendment defendant's sentence of 15 years in prison and "cadena temporal" punishment, which included hard labor in chains and attendant civil restrictions, for falsifying a public document).

In *Rummell*, the Court upheld a sentence of life in prison imposed upon a defendant pursuant to a Texas recidivist statute. *Rummell*, 445 U.S. at 266. The defendant's crimes were fraudulent use of a credit card to obtain \$80 in goods and services, passing a forged check for \$28.36, and obtaining \$120.75 by false pretenses. *Id.* at 265-66. Rejecting the Eighth Amendment proportionality challenge, the Court refused to apply the *Coker* rationale to a case that did not involve the death penalty, instead deferring to legislative judgment concerning the appropriate penalty for repeat offenders. *Id.* at 274.

In *Davis*, the Court (*per curiam*) upheld the defendant's forty-year prison sentence and \$20,000 fine for possession and distribution of less than nine ounces of marijuana. *Davis*, 454 U.S. at 371. The Court, as in *Rummell*, refused to employ a bright line proportionality test in non-capital cases, and chastised the lower courts for courting anarchy by "ignor[ing] the hierarchy of the federal court system." *Id.* at 374-75.

In *Solem*, however, the Court held that a life sentence imposed under a South Dakota recidivist statute upon a defendant who uttered a no account check for \$100 was disproportionate and thus violated the Eighth Amendment. *Solem*, 463 U.S. at 281. The defendant's previous offenses included three convictions for burglary, one for false pretenses, one for grand larceny, and one for a third offense of driving while intoxicated. *Id.* at 279-81. The Court argued that the Eighth Amendment, consistent with English and common law practice, required proportionality in sentencing. *Id.* at 284. The Court also applied the three-part test for proportionality that it had rejected in *Rummell* and *Davis* and that included consideration of the gravity of the offense compared to the punishment's severity, other penalties that the jurisdiction imposes for similar offenses, and penalties imposed in other jurisdictions for the same offense. *Id.* at 290-91.

Importantly, Justice Scalia, for himself and Chief Justice Rehnquist, argued in *Harmelin v. Michigan* that *Solem* read wrongly the history of the common law and of the Eighth Amendment, which did not require proportionality in non-capital cases, and, thus, that *Solem* should be overruled. See *Harmelin v. Michigan*, 501 U.S. 957, 974-985 (1991) (*per* Scalia, J., joined by Rehnquist, C.J.); see also Berger, *supra* note 6, at 305 (stating that *Solem*'s "proportionality statement is ahistorical. The Framers were far from adopting a principle of proportionality.").

For an excellent treatment of proportionality in these and related cases, see Steven Grossman, *Proportionality in Non-Capital Sentencing: The Supreme Court's Tortured Approach to Cruel and Unusual Punishment*, 84 Ky. L.J. 107 (1995-96).

64. See *Harmelin*, 501 U.S. at 994 ("Proportionality review is one of several respects in which we have held that 'death is different,' and have imposed protections that the Constitution nowhere else provides."); *Rummell*, 445 U.S. at 272 ("This theme, the *unique nature of the death penalty for purposes of Eighth Amendment analysis*, has been repeated time and again in our opinions") (citing *Furman*, *Gregg*, and *Woodson*) (emphasis added).

65. 458 U.S. 782 (1982).

of defendant Earl Enmund, who was convicted of first-degree felony murder after accompanying two co-defendants to a farmhouse where the co-defendants robbed and killed an elderly couple.⁶⁶ Enmund, however, merely served as passenger, and later driver, of the car in which the perpetrators arrived and fled.⁶⁷ In another opinion by Justice White, the Court again looked to objective evidence.⁶⁸ It found that only eight states imposed capital punishment upon a defendant who “somehow participated in a robbery in the course of which a murder was committed.”⁶⁹ It also found that juries have consistently rejected imposition of death for defendants like Enmund.⁷⁰ Again, however, the Court used the objective factors merely as elements that would either confirm or contradict the independent judgment of the Justices.⁷¹ And again, the Court concluded that unless the defendant’s criminal act demonstrates an actual taking, attempt to take, or intent to take a human life, a state cannot impose capital punishment for that crime.⁷² *Enmund* thus appeared to clarify the circumstances under which legislators could act in crafting capital punishment schemes, limiting imposition of the death penalty to circumstances where death to the victim is a product or object of a defendant’s intentions, expectations, or concomitant actions.

Five years after *Enmund*, however, the Court again muddied the capital punishment waters. *Tison v. Arizona*⁷³ involved three brothers who, along with their mother, uncle, and other relatives, planned the escape of their father, Gary, from an Arizona prison.⁷⁴ Without firing shots, the three Tison brothers effectuated the escape, which also included their father’s cellmate, Randy Greenawalt.⁷⁵ The five fled the prison grounds, and after losing two

66. *Id.* at 784-85.

67. *Id.* at 784.

68. *Id.* at 788-89.

69. *Id.* at 792.

70. *Enmund*, 458 U.S. at 795.

71. *Id.* at 797. Justice White wrote, as he did in *Coker*, that:

Although the judgments of legislatures, juries, and prosecutors weigh heavily in the balance, it is for us ultimately to judge whether the Eighth Amendment permits imposition of the death penalty on one such as *Enmund* who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force be employed.

Id.

72. *Id.*

73. 481 U.S. 137 (1987).

74. *Id.* at 139.

75. *Id.*

tires on their Lincoln automobile, decided to steal the car of an oncoming motorist.⁷⁶ The motorist, John Lyons, along with his wife, two-year-old son, and fifteen-year-old niece, stopped, expecting to render aid to the five.⁷⁷ The group, however, forced the Lyons family into the disabled Lincoln, where they were taken into the desert.⁷⁸ Later, after the Tison brothers were ordered to go to the Lyons' car for water, Gary Tison forced the Lyons family to stand in front of the Lincoln, where he shot the four captives.⁷⁹ The five perpetrators were later apprehended; one of the Tison brothers was killed, the other two were tried and convicted of capital murder, armed robbery, kidnapping, and automobile theft.⁸⁰ They challenged their death sentence pursuant to the *Enmund* proportionality rationale.⁸¹

The Court, however, proved unimpressed by the challenge. Justice O'Connor, a dissenter in *Enmund*,⁸² wrote for the Court that *Enmund* was limited to the particular circumstances of that case, where the defendant's participation in the murder was relatively attenuated.⁸³ Here, however, although the Tison brothers did not kill, intend to kill, or attempt to kill as *Enmund* described those categories of culpability, they were, nevertheless, major participants in the crimes that resulted in death.⁸⁴ Moreover, their participation, and failure to render aid once they became aware of the shooting, could have indicated a reckless indifference to human life.⁸⁵ Under these circumstances — where a criminal actor is a major participant in a felony and shows reckless indifference to human life — capital punishment is not a disproportionate penalty for the crime.⁸⁶ Having accepted the Arizona courts' determinations that the Tisons were major participants, the Court vacated the judgments and remanded for consideration the question of whether the brothers were recklessly indifferent.⁸⁷

76. *Id.* at 140.

77. *Id.*

78. *Tison*, 481 U.S. at 140.

79. *Id.* at 141.

80. *Id.*

81. *Id.* at 143.

82. *See Enmund v. Florida*, 458 U.S. 782, 801-02 (1982) (O'Connor, J., dissenting) (disagreeing with the Court's holding because it "interferes with state criteria for assessing legal guilt by recasting intent as a matter of federal constitutional law").

83. *Tison*, 458 U.S. at 149.

84. *Id.* at 151.

85. *Id.*

86. *Id.* at 158.

87. *Id.*

Tison thus provides greater latitude for legislatures in imposing capital punishment that meets the Court's proportionality standards, difficult though they are to discern. While *Coker* and *Enmund* placed in jeopardy any scheme that imposed capital punishment for a crime wherein the defendant did not kill, attempt to kill, or intend to kill, *Tison* left the door slightly ajar by expanding the *Enmund* culpability rule.⁸⁸ Pursuant to *Tison*, it appears that a state may still punish a broad range of criminal acts with death where those acts involve major participation and reckless indifference.

After *Tison*, the Court issued several important Eighth Amendment decisions, four in particular. Although these cases involved defendants who actually killed their victims, they are relevant to our inquiry here — the constitutionality of imposing capital punishment for child rape — not only because they touch upon proportionality but because they provide still further evidence of the Court's confused and confusing approach to Eighth Amendment questions generally. In *Thompson v. Oklahoma*,⁸⁹ for example, a plurality of the Court reversed the death sentence of a defendant who had committed murder at age fifteen.⁹⁰ In now familiar fashion, Justice Stevens's plurality opinion canvassed the various state legislative and jury sentencing trends, and found that the statistical data once again weighed against imposing capital punishment for a defendant who perpetrated a crime under age sixteen.⁹¹ Once again, however, the plurality ultimately relied upon its own judgment in determining that young teenagers lack sufficient experience and intelligence to fully appreciate the consequences of their conduct, and thus lack the level of culpability common to adult criminals.⁹² Therefore, the plurality concluded that imposing capital punishment upon one who commits a crime at age fifteen would not serve the goals of retribution or deterrence and is prohibited by the Eighth Amendment.⁹³ Interestingly, Justice O'Connor provided the crucial vote, arguing that Oklahoma's failure to provide a minimum age for execution in its statute created the likelihood that the state

88. Cf. Steiker & Steiker, *supra* note 20, at 376 (stating that "the Court subsequently retracted [the *Enmund*] standard" in *Tison*).

89. 487 U.S. 815 (1988).

90. *Id.* at 819.

91. *Id.* at 823-25.

92. *Id.* at 835.

93. *Id.* at 838.

legislature did not intend to impose capital punishment for defendants as young as Thompson.⁹⁴

In *Stanford v. Kentucky* and *Missouri v. Wilkins*,⁹⁵ however, the Court affirmed the death sentences of defendants who committed brutal murders at ages seventeen and sixteen, respectively.⁹⁶ Writing for the Court and giving greater weight than the Court had previously given to common law practice, Justice Scalia argued that the objective factors, most notably traditional legislative practices that were still continuing in the United States, clearly indicated that society had not “set its face against” the imposition of the death penalty for sixteen or seventeen-year-olds.⁹⁷ The burden of proving a national consensus against such a practice, Justice Scalia argued, fell on the defendants, who were unable to show such a consensus.⁹⁸ More notably, Justice Scalia argued that the Court should not engage in independent judgment on the issue of proportionality.⁹⁹ The Court’s consideration of the objective indicia of a societal consensus regarding particular applications of the death penalty itself determines whether that application is disproportionate.¹⁰⁰ Efforts to construct a proportionality analysis based on distinct methodologies are, therefore, misguided, ultimately giving effect to the individual political and philosophical preferences of the Justices rather than the traditions and conscience of the body politic, as expressed through the republican processes.¹⁰¹

Finally, in the same term, the Court held in *Penry v. Lynaugh* that the Eighth Amendment does not categorically prohibit the

94. *Thompson*, 487 U.S. at 857 (O’Connor, J., concurring in the judgment).

95. 492 U.S. 361 (1989). The Court consolidated these cases upon granting certiorari.

96. *Id.* at 365-66.

97. *Id.* at 370-73.

98. *Id.* at 373.

99. *Id.* at 378 (“[W]e emphatically reject petitioner’s suggestion that the issues in this case permit us to apply our ‘own informed judgment’ regarding the desirability of permitting the death penalty for crimes by 16- and 17-year-olds.”) (citation omitted).

100. *Stanford*, 492 U.S. at 380.

101. *Id.* at 379. Justice Scalia concluded that:

To say . . . that ‘it is for *us* ultimately to judge whether the Eighth Amendment permits imposition of the death penalty’ — and to mean it as the dissent means it, i.e., that it is for *us* to judge, not on the basis of what we perceive the Eighth Amendment originally prohibited, or on the basis of what we perceive society through its democratic processes now overwhelmingly disapproves, but on the basis of what we think ‘proportionate’ and ‘measurably contributory to acceptable goals of punishment’ — to say and mean that, is to replace judges of the law with a committee of philosopher-kings.

Id.

state from imposing the death penalty on a defendant who is mentally retarded.¹⁰² There, the defendant, who had been tested continually as possessing an IQ between fifty and sixty-three, was accused of raping, beating, and stabbing a woman in her Texas home.¹⁰³ A Texas jury found defendant competent to stand trial and convicted him of capital murder.¹⁰⁴ The Court upheld his death sentence on this ground.¹⁰⁵ Justice O'Connor's opinion for the Court found that the Eighth Amendment did not prohibit Penry's execution because (1) the jury found him competent to stand trial and rejected his insanity defense,¹⁰⁶ and (2) consistent with the legislative practices in nearly every state, the record did not indicate that Penry lacked the "cognitive, volitional, and moral capacity to act with the degree of culpability associated with the death penalty."¹⁰⁷ Thus, Penry's punishment was not disproportionate within the meaning of the Eighth Amendment.¹⁰⁸

What emerges from these later cases,¹⁰⁹ then, is a Court struggling to find a coherent methodological approach to Eighth Amendment proportionality problems. It is relatively clear that the Court has become comfortable with an analysis that considers legislative practice and (to some extent) history and tradition, what Professor Michael Mello has described as legislative "bean counting,"¹¹⁰ as well as the other objective indicia of societal consensus. The weight accorded the indicia, however, has clearly varied from case to case, from serving merely as helpful factors in guiding the Court's independent judgment in *Coker*¹¹¹ and *Enmund*,¹¹² to serving as dispositive factors in *Stanford*.¹¹³ This

102. 492 U.S. 302 (1989).

103. *Id.* at 307.

104. *Id.* at 308-11.

105. *Id.* at 340. Note that the Court did, however, reverse and remand on other grounds, namely that the jury had to be given instructions that it could consider mitigating evidence of Penry's retardation and background of abuse. *Id.* at 328.

106. *Id.* at 333.

107. *Penry*, 492 U.S. at 338.

108. *Id.* at 340.

109. *See also* *Herrera v. Collins*, 506 U.S. 390 (1993) (holding that the Eighth Amendment does not require federal habeas corpus relief for a death row inmate who claims actual innocence based on newly-discovered evidence).

110. *See* Mello, *supra* note 23, at 153 (explaining that under the *Stanford* and *Tison* explanations, which used essentially the same proportionality analysis, "[b]ean counting reigned supreme").

111. *See Coker v. Georgia*, 433 U.S. 584, 597 (1977) ("[I]n the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.").

112. *See Enmund v. Florida*, 458 U.S. 782, 797 (1982) ("[I]t is ultimately for us to judge

trend, combined with the developments in *Tison*, then, suggests that the current Court may well be more receptive than the Burger Court to legislative efforts to impose capital punishment for child rape, as well as other serious crimes that do not cause death.

III. LOUISIANA'S CAPITAL CHILD RAPE STATUTE AND *STATE V. WILSON*: BLAZING A NEW (AND AN OLD) TRAIL

As *Coker* indicated, as of 1977 two states, Mississippi and Florida, provided the death penalty for the rape of a child.¹¹⁴ Asserting that the *Coker* holding was confined to the rape of an adult woman, the Mississippi Supreme Court upheld that state's capital child rape law in *Upshaw v. State*,¹¹⁵ which was decided immediately after *Coker* in 1977. The court cited Chief Justice Burger's explanation of the strong deterrent effect of such laws, and concluded that the duty of prescribing appropriate penalties for crime rested ultimately in the legislative branch.¹¹⁶ Four years later, however, in *Buford v. State*,¹¹⁷ the Florida Supreme Court reached the opposite conclusion in reviewing that state's capital child sexual battery law. Concluding that *Coker* extended to those offenses that did not involve the taking of a life, the court found the death penalty "grossly disproportionate and excessive punishment for the crime of sexual assault."¹¹⁸ The confusion over *Coker* had thus made its way visibly into the state courts.

In 1995, taking advantage of ambiguous precedent and a growing national concern regarding punishment for those who commit offenses (particularly sexual ones) against children,¹¹⁹ the Louisiana

whether the Eighth Amendment permits imposition of the death penalty on one such as Enmund.").

113. See *Stanford*, 492 U.S. at 380 (" '[P]roportionality' analysis itself can only be conducted on the basis of the standard set by our own society; the only alternative, once again, would be our personal preferences.").

114. See *Coker*, 433 U.S. at 595.

115. 350 So.2d 1358 (Miss. 1977).

116. *Id.* at 1360-61. The Mississippi capital child rape statute was ultimately invalidated in 1989, but not on proportionality grounds. See *Leatherwood v. State*, 548 So.2d 389, 402-03 (Miss. 1989). In *Leatherwood*, the court found that life imprisonment was the maximum penalty that the state could impose for the rape of a child because state law required a finding that the defendant killed, attempted to kill, intended to kill, or contemplated the use of lethal force before the state could impose capital punishment. *Id.*

117. 403 So.2d 943 (Fla. 1981).

118. *Id.* at 951.

119. See John Q. Barrett, *Death Penalty for Child Rapists May Not Save Children*, NAT. L.J., Aug. 18, 1997, at A21 (describing a recent poll indicating that 65 percent of the public favors imposing the death penalty for child molesters); Mello, *supra* note 23, at 139 ("America's feeling toward child rapists is neither subtle nor difficult to ascertain: we hate

State Legislature enacted a capital child rape statute, the nation's only one at the time.¹²⁰ While the legislation proved innovative on its face, it actually returned to the treatment of rape that existed prior to the mid-twentieth century, one deeply rooted in common law tradition and practice.¹²¹ The statute provides that "[w]hoever commits the crime of aggravated rape . . . if the victim was under the age of twelve years . . . the offender shall be punished by death or life imprisonment at hard labor."¹²² If the prosecution seeks a capital verdict, Louisiana's statutes governing capital punishment are then invoked.¹²³ Originally introduced by state Representative Pete Schneider as House Bill 55, the statute passed the Louisiana House of Representatives by a vote of seventy-nine to twenty-two.¹²⁴ It then passed the Louisiana Senate — without debate — thirty-four to one.¹²⁵ Governor Edwards signed the bill into law on June 17, 1995, and it became effective that August.¹²⁶

The first constitutional challenge to the Louisiana statute arose only months after the law became effective. In December 1995, the state charged Anthony Wilson with the aggravated rape of a five-year-old girl.¹²⁷ The next year, the state charged Patrick Dewayne Bethley with the aggravated rape of three girls, ages five, seven, and nine.¹²⁸ One of the victims that the state accused Bethley of raping was his daughter.¹²⁹ Moreover, the state alleged that Bethley committed the rapes with the knowledge that he was HIV positive.¹³⁰ Both defendants moved to quash their indictments,

them.”)

120. See LA. REV. STAT. ANN. § 14-42(C)(1) (West 1998 Supp.).

121. See *supra* Section I text and accompanying notes.

122. § 14-42(c)(1).

123. § 14-42(C)(1)(a).

124. Joanna Weiss & Ed Anderson, *Rape Death Penalty Heads to House Floor*, NEW ORLEANS TIMES-PICAYUNE, April 20, 1995, at A3. Representative Schneider argued that “the facts show that [child rapists] are incurable. They are predators.” Marsha Schuler, *House Passes Death Penalty for Child Rape*, NEW ORLEANS TIMES-PICAYUNE, April 27, 1995, at 1B;S. The House ultimately rejected an amendment to the bill that would have required the castration of the convicted rapists while they awaited execution. Moeller, *supra* note 23, at 637. The House also rejected an amendment that would have required a life sentence with castration for child rapists, instead of the death penalty. *Id.*

125. See Schuler, *supra* note 124, at 1B;S.

126. See *State v. Wilson*, 685 So.2d 1063, 1067 n.5 (La. 1996), *cert. denied sub nom. Bethley v. Louisiana*, 520 U.S. 1259 (1997).

127. *Id.* at 1064.

128. *Id.* at 1065.

129. *Id.*

130. *Id.*

and, in both instances, the trial court granted the motions.¹³¹ The state filed appeals to the Louisiana Supreme Court which consolidated the cases.

The Louisiana Supreme Court in *State v. Wilson* reversed the decisions of both trial courts.¹³² In response to the defendants' reliance upon the *Coker* proportionality analysis, the court, in an opinion by Justice Bleich, first noted that *Coker's* repeated explicit language limited the holding there only to the rape of an adult woman.¹³³ Next, the court explained that it owed deference to the judgment of the legislature, "the representatives of society," which had determined that contemporary standards of decency permitted the execution of those who commit rape where the victim is under the age of twelve.¹³⁴ Although Louisiana was the only state at the time that authorized capital punishment for the rape of a child, the court explained that:

[t]here is no constitutional infirmity in a state's statute simply because that jurisdiction chose to be first The needs and standards of society change, and these changes are a result of experience and knowledge. If no state could pass a law without other states passing the same or similar law, new laws could never be passed.¹³⁵

The court thus turned *Coker's* analysis of the legislative indicia on its head, mindful of Chief Justice Burger's admonition in dissent that legislative practices and decisions can be viewed in a number of ways; in other words, refusal of various states to enact a particular law is not itself evidence that the jurisdiction has determined that such a law offends contemporary standards of decency.¹³⁶

The court also explained the limited application of both *Coker* and *Enmund* in examining proportionality, largely by ignoring them.¹³⁷ While both *Coker* and *Enmund* proved unfriendly to crimes that do not involve death, *Tison* introduced a new wrinkle into the

131. *Wilson*, 685 So.2d at 1065.

132. *Id.* at 1073.

133. *Id.* at 1066. The court noted 14 instances in which the *Coker* Court's various opinions referred explicitly to the rape of an adult woman. *Id.* at 1066 n.2; *Coker*, 433 U.S. at 592, 593, 595-97, 601 (Powell, J., concurring in the judgment and dissenting in part); *id.* at 611, 613-15 (Burger, C.J., dissenting).

134. *Wilson*, 685 So.2d at 1067.

135. *Id.* at 1069.

136. *Coker*, 433 U.S. at 614 (Burger, C.J., dissenting).

137. *Wilson*, 685 So.2d at 1069-70.

analysis.¹³⁸ Child rape, the court said, is a major crime, “appalling” in its nature, and inflicts severe harm — physical, emotional, and psychological — on the victim.¹³⁹ For these reasons, the court concluded, the death penalty is not an excessive penalty for raping a child under age twelve.¹⁴⁰ As for the defendant’s attacks upon the statute’s drafting infirmities — permitting the arbitrary and capricious application of the death penalty — the court noted that, first, aggravating circumstances *are* provided (although in the elements of the crime itself);¹⁴¹ and, second, because one cannot mistakenly rape a child, the class of death eligible defendants is sufficiently narrow.¹⁴² Finally, the court explained that the statute served the goals of punishment — retribution and deterrence.¹⁴³

Three Justices offered brief separate opinions. Justice Kimball’s concurrence stated simply that *Coker* did not preclude the death penalty for all rapes and that the state statute sufficiently narrowed the class of death eligible defendants, per the majority’s explanation.¹⁴⁴ Justice Victory also concurred, but urged the legislature to amend the state’s sentencing statutes to clarify the procedures for capital child rape.¹⁴⁵ Finally, Justice Calogero dissented, arguing that the statute on its face violated the Eighth Amendment.¹⁴⁶ Indeed, according to Justice Calogero, it is precisely because of this facial infirmity that no other state has chosen to adopt such a statute.¹⁴⁷

On June 2, 1997, the United States Supreme Court denied certiorari in Bethley’s case, but not without a comment from three

138. *Id.* at 1070.

139. *Id.* See also *State v. Brown*, 660 So.2d 123, 126 (La. Ct. App. 1995) (explaining the differences between adolescent teenagers and adolescent children and stating that injury from child abuse “is inherent in the offense”); *State v. Jackson*, 658 So.2d 722, 723 (La. Ct. App. 1995) (explaining that a child’s “tender age made her particularly vulnerable and incapable of resisting . . . considering [the] acutely deleterious consequences of [the] conduct on an eight-year-old child”).

140. *Wilson*, 685 So.2d at 1070.

• 141. *Id.* at 1071.

142. *Id.* at 1072-73.

143. *Id.* at 1073. *But see, e.g.,* Fleming, *supra* note 23, at 749 (arguing that the Louisiana capital child rape statute “does not serve the principle goals of punishment. The death penalty does not serve the goal of retribution because inherent in the concept of retribution is the notion of proportionality, which the statute violates. The punishment does not serve the principle of deterrence either” because it will decrease reporting of child rapes).

144. *Wilson*, 685 So.2d at 1073 (Kimball, J., concurring in the result).

145. *Id.* at 1073 (Victory, J., concurring with reasons).

146. *Id.* at 1074 (Calogero, J., dissenting).

147. *Id.*

Justices.¹⁴⁸ Justice Stevens, with whom Justices Ginsburg and Breyer joined, noted that the denial was not a statement about the merits of the case.¹⁴⁹ Rather, because Bethley had been neither convicted nor sentenced at the time, the case lacked the finality normally necessary in a death penalty challenge.¹⁵⁰

Thus, one cannot underestimate *Wilson's* impact and that of the Louisiana Legislature's aggressive decisionmaking. First, as explained further in the next Section, since the passage of the statute and the *Wilson* decision, numerous states have enacted or are contemplating the enactment of laws imposing capital punishment for child rape and other harsh penalties for sexual offenses committed against children.¹⁵¹ Second, the Louisiana statute and the *Wilson* decision possibly reflect a renewed societal judgment that capital punishment is appropriate for a number of non-homicide offenses that do not directly involve the protection of children.¹⁵² As yet, despite the growing momentum such laws are gaining, no jurisdiction has sentenced anyone to death under these statutes.¹⁵³ In addition, in *State v. Gardner*, the Utah Supreme Court, cognizant of *Wilson* but refusing to follow *Wilson's* lead, invalidated a state statute imposing the death penalty for aggravated assault by a prisoner.¹⁵⁴ Nevertheless, just as *Coker* and

148. *Bethley v. Louisiana*, 520 U.S. 1259 (1997).

149. *Id.* (Stevens, J., statement respecting denial of certiorari).

150. *Id.*

151. See Higgins, *supra* note 17, at 30; Barrett, *supra* note 119, at A21. See generally Jonathan Simon, *Managing the Monstrous: Sex Offenders and the New Penology*, 4 PSYCHOL. PUB. POL'Y & L. 452 (1998) (providing a detailed account of recently-enacted sex offender laws and concluding that the features of the "new penology . . . are largely immune from constitutional limits on judicial review").

152. See Matura, *supra* note 24, at 255 (stating that "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."); Mello, *supra* note 23, at 160-61 (considering the various non-homicide capital crimes nationally and concluding that this legislative trend "might be enough to persuade the Rehnquist/Thomas/Scalia Court that no national consensus exists for the proposition that death is a 'grossly disproportionate' societal response to the crime of aggravated rape"); Karp, *supra* note 57, at 1728-29 (considering the viability of capital punishment for armed robbery, kidnapping, and "life-dangering offenses" after *Coker*).

153. See Matura, *supra* note 24, at 256. Jeffrey Matura states that "each year more state legislatures are taking a serious look at enacting such laws. . . . [M]any of them are waiting to see how the Supreme Court rules on the issue." *Id.*

154. See *State v. Gardner*, 947 P.2d 630 (Utah 1997). Justice Durham, writing for the Gardner majority, cited *Wilson* but noted that "there were no convictions or sentences" in that case, "which, like the instant case, involved only a pretrial facial challenge of the statute's constitutionality." *Id.* at 650 n.11. In dissent, Justice Russon chided the majority's statement about *Wilson* as "irrelevant." *Id.* at 654 (Russon, J., dissenting).

its progeny suggest that constitutional ground for these statutes is uncertain,¹⁵⁵ *Wilson*, combined with *Tison* and subsequent Eighth Amendment decisions giving greater deference to legislative enactments, suggests that a previously skeptical Supreme Court may well find constitutional room for legislation that imposes capital punishment for non-homicide crimes.

IV. REEVALUATING THE DOCTRINE: A DEFENSE OF LOUISIANA'S CAPITAL CHILD RAPE STATUTE

To call the *Coker* decision ambiguous is to be at once repetitive and obvious. Its ambiguity thus makes it a difficult case to interpret and apply consistently. The plurality clearly expressed its concern about imposing capital punishment on those who do not kill,¹⁵⁶ but left open the possibility that some forms of rape could present circumstances of such brutality that the state could proportionately impose death as a punishment.¹⁵⁷ Given this ambiguity, and the ambiguities in capital punishment jurisprudence generally, it is unsurprising that the Louisiana Legislature took the aggressive step that it did. Nonetheless, it is equally unremarkable that many have found Louisiana's capital child rape statute constitutionally infirm under *Coker*, given the plurality's strong language concerning proportionality and the rape-homicide distinction.¹⁵⁸ Considering these conflicts, this Section concludes that the Louisiana statute

155. See Leigh Dingerson, *Reclaiming the Gavel: Making Sense Out of the Death Penalty Debate in State Legislatures*, 18 N.Y.U. REV. L. & SOC. CHANGE 873, 878 (1991) (concluding that *Coker* precludes imposition of the death penalty for crimes in which no death occurs); Stephen P. Garvey, "As the Gentle Rain from Heaven": *Mercy in Capital Sentencing*, 81 CORNELL L. REV. 989, 1009 n.74 (1996) (stating that courts understand *Coker* to preclude the death penalty for non-homicide crimes); Ved P. Nanda, *Recent Developments in the United States and Internationally Regarding Capital Punishment — An Appraisal*, 67 ST. JOHN'S L. REV. 523, 532 (1993) (stating that *Coker* requires a killing before a state may impose the death penalty).

156. *Coker v. Georgia*, 433 U.S. 584, 598 (1977) ("We have an abiding conviction that the death penalty . . . is an excessive penalty for the rapist who, as such, does not take human life.").

157. See, e.g., *id.* at 603 (Powell, J., concurring in the judgment in part and dissenting in part) ("[I]t may be that the death penalty is not disproportionate punishment for the crime of aggravated rape. Final resolution of the question must await careful inquiry into the objective indicators of society's 'evolving standards of decency.'").

158. See, e.g., Bailey, *supra* note 23, at 1372 (concluding that "the Court should explicitly adopt a standard for capital proportionality review that implicitly runs throughout *Coker*: without death in the crime, there will be no death in the punishment."); Lormand, *supra* note 23, at 1015 (explaining that "the severity of the crime must be determined, at least in part, by whether it results in the death of the victim or not."); Fleming, *supra* note 23, at 749 (arguing that society has rejected the death penalty for crimes "that do not result in death").

survives a challenge pursuant to *Coker* and its progeny for three reasons: first, it is consistent with recent precedent; second, it satisfies the objective factors that indicate that society has not set its face against this particular punishment; and, third, the nature and psychology of rape indicate the extreme brutality of the act, helping to satisfy proportionality analysis. Moreover, this analysis considers the broader consequences for capital punishment legislation based on these arguments.

A. *Precedent and the Louisiana Capital Child Rape Statute*

Capital child rape legislation like the Louisiana statute is consistent with the language of *Coker* and with recent trends in the Court's capital punishment cases, most notably with the *Tison* decision, which urge greater deference to the political branches in developing and effectuating penal law.¹⁵⁹ The *Coker* plurality's repeated references to the rape of an "adult woman" seemed to acknowledge that rapes of a minor would present a different case, decided with a different independent proportionality analysis, depending upon the circumstances.¹⁶⁰ The *Wilson* court recognized this rather unremarkable observation, noting the fourteen instances throughout the various *Coker* opinions, including six in Justice White's plurality opinion, that referred explicitly to the rape of an adult woman.¹⁶¹ Because the *Coker* Court left open the question of imposing capital punishment for child rape, we must proceed beyond *Coker* to determine whether precedent forecloses capital child rape legislation.

Those who oppose the constitutionality of the Louisiana statute argue correctly that *Enmund* precludes capital punishment for child rape where the rapist did not attempt or intend to kill the

159. See *Herrera v. Collins*, 506 U.S. 390 (1993) (holding that the Eighth Amendment does not require federal habeas corpus relief for a death row inmate claiming actual innocence based on newly discovered evidence); *Stanford v. Kentucky*, 492 U.S. 361 (1989) (holding that the Eighth Amendment does not prohibit the death penalty for a defendant who commits a capital crime at the age of seventeen); *Penry v. Lynaugh*, 492 U.S. 302 (1989) (holding that the Eighth Amendment does not categorically prohibit the execution of a mentally retarded defendant); *Tison v. Arizona*, 481 U.S. 137 (1987) (holding that the death penalty is not a disproportionate punishment for one who is a major participant in a felony and who acts with reckless indifference to human life).

160. See, e.g., *Coker*, 433 U.S. at 592 ("That question, with respect to the rape of an adult woman, is now before us.")

161. *State v. Wilson*, 685 So.2d 1063, 1066 n.2 (La. 1996), cert. denied sub nom. *Bethley v. Louisiana*, 520 U.S. 1259 (1997) (citing various portions of *Coker* for the proposition that *Coker's* holding was limited to the rape of an adult woman).

victim.¹⁶² *Tison*, however, made room for legislative innovation, such as capital child rape legislation. While *Tison* did not overrule *Enmund* — indeed, the Court seemed to go out of its way *not* to overrule *Enmund* — it certainly modified *Enmund* in a significant way.¹⁶³ To permit states to impose the death penalty where the defendant was a major participant in a serious felony and acted with reckless indifference to human life is to include an entire class of criminals that *Enmund* clearly excluded. As Professors Carol Steiker and Jordan Steiker explain, *Tison* “retracted that [*Enmund*] standard,” opening the door to several executions of “non-triggerman” felony murderers.¹⁶⁴ And there is no reason to believe, based solely on *Tison*’s broad language, that the Court intended its holding there to apply only to felony murder situations.

The class of perpetrators that fall within *Tison*’s ambit, therefore, includes child rapists. There can be little doubt that the rape of a child satisfies the first prong of the *Tison* standard, as the Court has itself recognized the seriousness of rape.¹⁶⁵ With the exception of murder, the *Coker* plurality noted, rape “is the ultimate violation of self.”¹⁶⁶ As to the second prong, many (though certainly not all) child rapes involve a reckless indifference to human life; it is these aggravated rapes that are proper subjects for the death penalty.¹⁶⁷ This standard is met sometimes by the rape itself, in which the

162. See Moeller, *supra* note 23, at 647 (concluding that “[t]he reasoning in *Enmund*, *Tison*, and *Coker* supports the conclusion that the death penalty is a disproportionate penalty for the crime of rape.”); Zambrano, *supra* note 23, at 1287-88 (citing *Enmund* and arguing that “[t]hrough the rape of a child is more heinous than the rape of an adult, it is still only rape and absent the intention to kill the victim the defendant should not be sentenced to die.”); Lisa White Shirley, Recent Development, *State v. Wilson: The Louisiana Supreme Court Sanctions the Death Penalty for Rape*, 72 TUL. L. REV. 1913, 1922 (1998) (explaining that, because *Enmund* forecloses the possibility of capital child rape legislation, the *Wilson* court was forced to rely on the *Enmund* dissent).

163. Compare *Enmund v. Florida*, 458 U.S. 782, 801 (1982) (holding that the Eighth Amendment would not permit imposition of capital punishment “in the absence of proof that *Enmund* killed or attempted to kill”), with *Tison*, 481 U.S. at 157 (explaining that while “*Enmund* held that when ‘intent to kill’ results in its logical though not inevitable consequence — the taking of human life — the Eighth Amendment permits the State to exact the death penalty,” this conclusion is consistent with the holding that “reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state, a mental state that may be taken into account in making a capital sentencing judgment.”).

164. Steiker & Steiker, *supra* note 20, at 376.

165. See *Coker*, 433 U.S. at 597-98 (“We do not discount the seriousness of rape as a crime. It is highly reprehensible Rape is very often accompanied by physical injury to the female and can also inflict mental and psychological damage.”).

166. *Id.* at 597.

167. See, e.g., LA. REV. STAT. ANN. § 14:42(D)(2) (West 2000 Supp.).

degree of force and penetration will likely cause severe damage to the more delicate and underdeveloped body of a child.¹⁶⁸ It is met where the rapist uses a deadly weapon, such as a gun or a knife, during the course of the rape, such as in *Coker*.¹⁶⁹ At bottom, the rape of a child involves grave (even greater than those attending adult rape) risks to human life.¹⁷⁰

Finally, and more broadly speaking, the Court's death penalty jurisprudence during the Rehnquist Court years has deliberately evolved in the direction of greater, not lesser, acceptance of the death penalty, with *Thompson* serving as the only real bump in the road.¹⁷¹ *Tison*, *Stanford*, *Penry*, and *Herrera v. Collins*, for example, indicate the Court's reluctance to interfere with the states' administration of penal law and its willingness to defer to the judgments of those political majorities who desire greater use of capital punishment to address crime.¹⁷² This jurisprudential trend suggests that recent precedent encourages, rather than forecloses, greater legislative experimentation in crafting crime and punishment regimes.

B. History, Current Practice, and the Louisiana Capital Child Rape Statute

The Louisiana statute also satisfies the objective criteria for determining whether a particular punishment is consistent with the

168. See *State v. Wilson*, 685 So.2d 1063, 1070 (La. 1996), *cert. denied sub nom. Bethley v. Louisiana*, 520 U.S. 1259 (1997) (quoting several Louisiana rape cases that describe the physical and mental effects of rape on children).

169. *Coker*, 433 U.S. at 587. This reckless indifference to human life may also exist where a child rape defendant, as in *Wilson*, is HIV positive. See *Miller*, *supra* note 23, at 202 (stating that the death penalty could be appropriate where the rapist is HIV positive); Stephanie S. Wepner, *The Death Penalty: A Solution to the Problem of Intentional AIDS Transmission Through Rape*, 26 J. MARSHALL L. REV. 941 (1993) (arguing that the death penalty is an appropriate response where the rapist is HIV positive).

170. See *Karp*, *supra* note 57, at 1727-28 (arguing that "it is conceivable that the rape of children may be distinguished from that of adults on the ground that it is typically more harmful to the victim and involves a higher degree of moral depravity.").

171. See *Thompson v. Oklahoma*, 487 U.S. 815 (1988) (overturning the death sentence of one who had committed murder at the age of fifteen).

172. See *Herrera v. Collins*, 506 U.S. 390 (1993) (holding that the Eighth Amendment does not require federal habeas corpus relief for a death row inmate claiming actual innocence based on newly discovered evidence); *Stanford v. Kentucky*, 492 U.S. 361 (1989) (holding that the Eighth Amendment does not prohibit the death penalty for a defendant who commits a capital crime at the age of seventeen); *Penry v. Lynaugh*, 492 U.S. 302 (1989) (holding that the Eighth Amendment does not categorically prohibit the execution of a mentally retarded defendant); *Tison v. Arizona*, 481 U.S. 137 (1987) (holding that the death penalty is not a disproportionate punishment for one who is a major participant in a felony and who acts with reckless indifference to human life).

“evolving standards of decency that mark the progress of a maturing society.”¹⁷³ *Coker*, following *Gregg*’s lead, helps make these factors significant to Eighth Amendment analysis.¹⁷⁴ Although the plurality ultimately turns to its own independent judgment about the constitutionality of Georgia’s capital rape statute,¹⁷⁵ it indicates the importance of looking to historical and contemporary civil practices concerning the imposition of the death penalty for rape.¹⁷⁶ This form of analysis has survived intact throughout the past two decades of capital punishment review and, as Justice Scalia recognized in *Stanford*, has become the crucial factor in determining contemporary standards of decency.¹⁷⁷ Indeed, this analysis is most consistent with the text of the Eighth Amendment, for courts can hardly determine what society deems “cruel” and “unusual” without considering civil social traditions, practices and trends, and its perpetuation (or rejection) of them.¹⁷⁸ The key, however, is to determine whether these are “living traditions,”¹⁷⁹ or whether the body politic, through the practices of legislatures, prosecutors, and juries, has rejected them as unacceptable or intolerable.¹⁸⁰ In the instant situation, because the revival of capital rape statutes is a recent phenomenon, it would hardly be useful to attempt an examination of prosecutorial or jury practices on the matter, for such data barely exists. That said, legislation, foremost among the objective factors, is most relevant.¹⁸¹

173. See *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

174. See *Coker*, 433 U.S. at 593 (stating that “we seek guidance in history and from the objective evidence of the country’s present judgment concerning the acceptability of death as a penalty for the rape of an adult woman.”); *Gregg v. Georgia*, 428 U.S. 153, 179-80 (1976) (stating that “the most marked indicator of society’s endorsement of the death penalty . . . is the legislative response to *Furman*.”).

175. *Coker*, 433 U.S. at 597.

176. *Id.* at 593.

177. See *Stanford*, 492 U.S. at 369.

178. See *Thompson v. Oklahoma*, 487 U.S. 815, 873 (1988) (Scalia, J., dissenting) (stating that “[o]n its face, the phrase ‘cruel and unusual punishment’ limits the evolving standards appropriate for our consideration to those entertained by the society rather than those dictated by our personal consciences.”).

179. Justice Harlan most poignantly articulated the “living tradition” theory in the context of individual rights. See *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting) (declaring that “tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound.”).

180. See *Stanford*, 492 U.S. at 378 (explaining that in discerning what is “cruel and unusual” the Court is determining whether “society has set its face against [a particular punishment]”).

181. See *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989) (explaining that “[t]he clearest and most reliable objective evidence of contemporary values is the legislation enacted by the

So, do nationwide legislative practices indicate a national consensus in opposition to capital punishment when it is applied to child rapists? If one considers the data in isolation, probably so.¹⁸² This highlights one difficulty with the “national consensus” standard that *Stanford* adopted: the *Coker* dissent and the *Wilson* majority ably note that there are many ways to interpret legislative, prosecutorial, and jury practices.¹⁸³ Legislatures, for example, often gauge their work by looking at the success of similar enactments by other legislative bodies.¹⁸⁴ They also respond differently to court decisions, particularly those — like *Furman* and *Coker* — that “introduce considerable uncertainty” into the area of crime and punishment.¹⁸⁵ Prosecutors and juries, too, are often driven by fact-finding and circumstances, making it difficult to discern *per se* rules from their decisions in a particular case. Moreover, as Justice Russon argued in his dissent in the Utah *Gardner* case, “each state is entitled to address its own problems individually. . . . If the basis for determining a statute’s constitutionality was how many states had similar statutes, no state could ever enact a novel or distinctive

country’s legislatures.”); *Stanford*, 492 U.S. at 370 (stating that “statutes passed by society’s elected representatives” are chief among the objective indicia of society’s evolving standards of decency).

182. See, e.g., Moeller, *supra* note 23, at 643 (considering only those states that have enacted, or are considering enacting, child rape laws, and concluding that no national consensus exists favoring capital child rape legislation); Mello, *supra* note 23, at 160 (stating that the data regarding the legislatures that currently impose the death penalty for child rape “is not impressive objective indicia”).

183. See *Coker v. Georgia*, 433 U.S. 584, 614 (1977) (Burger, C.J., dissenting). Chief Justice Burger explained:

[I]t is myopic to base sweeping constitutional principles on the experience of the past five years. Considerable uncertainty was introduced into this area of the law by this Court’s *Furman* decision. . . . legislatures were left in serious doubt by the expressions vacillating between discretionary and mandatory death penalties, as to whether this Court would sustain any statute imposing death as a criminal sanction. Failure of more states to enact statutes imposing death for rape of an adult woman may thus reflect hasty legislative compromise occasioned by time pressures following *Furman*, a desire to wait on the experience of those states which did enact such statutes, or simply an accurate forecast of today’s holding.

In any case . . . the plurality’s focus on the experience of the immediate past must be viewed as truly disingenuous.

Id. See also *State v. Wilson*, 685 So.2d 1063, 1069 (La. 1996), *cert. denied sub nom. Bethley v. Louisiana*, 520 U.S. 1259 (1997) (asserting that “[w]e cannot look solely at what the legislatures have refrained from doing under conditions of great uncertainty arising from the Supreme Court’s ‘less than lucid holdings on the Eighth Amendment.’”) (quoting *Coker*, 433 U.S. at 614 (Burger, C.J., dissenting)).

184. See *Coker*, 433 U.S. at 614 (Burger, C.J., dissenting).

185. *Id.*

law without being thwarted by a constitutional challenge.¹⁸⁶ Indeed, this is the essence of federalism.¹⁸⁷ That said, as the Supreme Court has explained, such objective factors as legislative practices are the best indicators of society's moral sanction regarding a particular punishment.¹⁸⁸ Thus, in fairness to federalism and to *society's* determinations about what constitutes "cruel" and "unusual" punishment, it is important to take a broader view of these historical and contemporary legislative practices, which, viewed in this way, indeed indicate an emerging national consensus regarding the imposition of capital punishment for serious non-homicide crimes (such as child rape) that involve substantial harm, and risk, to human life, particularly where the victim is a child.¹⁸⁹

Recall that at common law and early statutory law, rape was punishable by death.¹⁹⁰ In reflecting upon the propriety of such punishments, Blackstone observed that capital punishment was to be reserved for instances "of the highest necessity,"¹⁹¹ while punishment generally should be tailored to the "malignity," "heinousness, or "enormity" of the crime committed.¹⁹² As Daniel Boorstin tells us, Blackstone's description of English criminal law

186. *State v. Gardner*, 947 P.2d 630, 654 (Utah 1997) (Russon, J., dissenting).

187. *See, e.g., Miranda v. Arizona*, 384 U.S. 436, 524 (1966) (Harlan, J., dissenting) (recognizing the value of state experimentation in the area of criminal justice reform); THE FEDERALIST No. 17, at 120 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (arguing that the state would have primary responsibility for the administration of criminal justice).

188. *See, e.g., Penry v. Lynaugh*, 492 U.S. 302, 331 (1989).

189. *See Mello, supra* note 23, at 160. Professor Mello explains that while "two out of thirty-eight jurisdictions [imposing the death penalty for child rape] is not impressive objective indicia," the scene changes "[i]f the field of vision, however, is expanded to include statutes authorizing death for all nonhomicide crimes, including rape." *Id.* Thus,

When viewed in the atmospheric context of *Coker's* chilling effect on legislative enactment of such statutes, the numbers, and the trend of their increase, might be enough to persuade the Rehnquist/Thomas/Scalia Court that no national consensus exists for the proposition that death is a 'grossly disproportionate' societal response to the crime of aggravated rape.

Id. at 161.

190. 4 BLACKSTONE, *supra* note 1, at *210-11.

191. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *133. Blackstone also explains that "every humane legislator will be . . . extremely cautious of establishing laws that inflict the penalty of death, especially for slight offenses, or such as are merely positive." 4 BLACKSTONE, *supra* note 1, at *10.

192. Boorstin, *supra* note 1, at 144. *See also* 4 BLACKSTONE, *supra* note 1, at *9 (stating that "enormity, or dangerous tendency, of the crime that alone can warrant any earthly legislature in putting him to death that commits it."); *id.* at *17 (stating that it is "absurd and impolitic to apply the same punishment to crimes of different malignity"); *id.* at *196 (describing as "most detestable" the killing of one by poison).

and of capital punishment fit the complexities of human nature.¹⁹³ Humanity, reason, and nature thus demanded that rape, like other sexual crimes "against nature," be punished with death.¹⁹⁴ The colonies then adopted this common law trend, which continued in the United States well into the twentieth century.¹⁹⁵ Louisiana's legislation, then, proves to be less a new innovation than a return (albeit only a partial one, in light of *Coker*) to historical understandings about appropriate punishments for rape.

Moreover, it is a continuing trend and one that has evolved to include harsher punishments generally for crimes committed against children. As noted earlier, Mississippi has enacted a statute similar to Louisiana's,¹⁹⁶ and Georgia has moved in the same direction.¹⁹⁷ The Montana Senate has considered legislation providing capital punishment for a second rape conviction where the perpetrator inflicted serious bodily injury.¹⁹⁸ This trend is part of a larger element of American jurisprudence that has deliberately evolved to account for the particular harms that one causes when he or she commits an act of violence against a child.¹⁹⁹ Legislation that proscribes statutory rape,²⁰⁰ evidentiary exceptions for child witnesses,²⁰¹ and the new breed of recidivist and sex offender

193. Boorstin, *supra* note 1, at 142 ("Many statements in the Commentaries which seemed at first to be extolling mercy, were actually only additional ways of saying that English law, in harmony with natural law, did take account of the minutiae and complexities of human nature.").

194. *Id.* at 144.

195. FREIDMAN, *supra* note 3, at 42.

196. See MISS. CODE ANN. § 97-3-65 (Supp. 1997) (providing capital punishment for the rape of a child under age 14). Recently, Mississippi legislators introduced a bill to lower the victim's age to 13. H.B. 177, Reg. Sess. (Miss. 1998).

197. Barrett, *supra* note 119, at A21.

198. *Id.*

199. See Palmer, *supra* note 16, at 858-59 (explaining the various ways in which American law distinguishes children from adults).

200. See Heidi Kitrosser, *Meaningful Consent: Toward a New Generation of Statutory Rape Laws*, 4 VA. J. SOC. POL'Y & L. 287, 295 n.31 (1997) (citing and describing the statutory rape laws of 15 jurisdictions). See also Michael M. v. Superior Court of Sonoma County, 450 U.S. 464 (1981) (upholding California's statutory rape law against an Equal Protection Clause challenge, and asserting that the state has a strong interest in enforcing statutory rape laws because they help to deter and prevent teenage pregnancy).

201. See *Maryland v. Craig*, 497 U.S. 836 (1990). *Craig* involved the use of a Maryland statutory procedure that enabled a six-year-old sexual abuse victim and three other children to testify via closed circuit television against a kindergarten owner accused of the abuse. *Id.* at 840-43. The Court upheld the statute against a Confrontation Clause challenge, asserting that "a State's interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accusers in court." *Id.* at 853. At the time, 37 states permitted the use of videotaped testimony, 24 authorized closed circuit television testimony, and eight permitted

notification laws all help to form a system that recognizes the particular physical and psychological vulnerabilities of children.²⁰² Forty-five states and the United States, for example, have enacted laws to protect children from sexual predators by requiring community notification of sex offenders.²⁰³ In this regard, the legislatures received a boost not merely from the *Wilson* court but also from the United States Supreme Court, which, in *Kansas v. Hendricks*,²⁰⁴ recently upheld the use of indefinite civil commitment as a means of punishing dangerous sexual offenders. Although perhaps the solution upheld in *Hendricks* represents a more viable legislative alternative in dealing with the problem of child

the use of a two-way system in which child witnesses see the courtroom and defendant via a monitor, and where the judge and jury can see the child during the testimony. *Id.* at 853-54.

202. See Robert E. Freeman-Longo, *Reducing Sexual Abuse in America: Legislating Tougher Laws or Public Education and Prevention*, 23 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 303, 311-17 (1997). Freeman-Longo details the new forms of sex offender legislation, much of which is designed to address sexual abuse of children. *Id.* at 311. These legislative innovations include "Three Strikes and You're Out" laws, which impose life sentences on those convicted of three felonies (including sex offenses, such as child rape); sex offender registration laws, requiring law enforcement and other executive agencies to "track the whereabouts of sexual offenders"; public notification laws, which require public notification when a sex offender is released into a particular community ("Megan's Laws"); chemical and surgical castration (approved in California and under consideration in seven other states); and sexual predator laws, requiring the holding of sexual offenders for observation and treatment after their criminal sentence has expired. *Id.* at 311-16.

203. Barrett, *supra* note 119, at A21. These laws have earned the name "Megan's Laws," which refer to Megan Kanka, a seven-year-old New Jersey girl whose murderer had previously been convicted of several sexual assaults against other children. *Id.* For a fascinating discussion of the implications of Megan's law, see Nadine Strossen, *Critical Perspectives on Megan's Law: Protection vs. Privacy*, 13 N.Y. L. SCH. J. HUM. RTS. 1 (1996) (providing the statements of panelists during the New York Law School's symposium on Megan's Law).

The literature on Megan's Law has grown substantially in recent years. See, e.g., Freeman-Longo, *supra* note 202, at 313 (explaining the rise of Megan's Laws in America as part of a growing national trend toward imposing harsher punishments upon child offenders); Leonore M.J. Simon, *Sex Offender Legislation and the Antitherapeutic Effects on Victims*, 41 ARIZ. L. REV. 485 (1999) (explaining public attitudes toward sex offenders, particularly child sex offenders, and the incongruities of modern sex offender legislation); Brian D. Gallagher, *Now That We Know Where They Are, What Do We Do With Them?: The Placement of Sex Offenders in the Age of Megan's Law*, 7 WIDENER J. PUB. L. 39, 45-56 (1997) (describing the current debate over Megan's Law); Robert J. Martin, *Pursuing Public Protection Through Mandatory Community Notification of Convicted Sex Offenders*, 6 B.U. PUB. INT. L.J. 29 (1996) (describing the constitutional and political attacks on Megan's Law).

204. 521 U.S. 346 (1997). *Hendricks* involved a defendant, defined by state law as mentally abnormal, who admitted that he was likely to continue sexual assaults against children if he were released into the community. *Id.* at 354-55. The Court, in an opinion by Justice Thomas, held that the Kansas Sexually Violent Predator Act did not violate the Double Jeopardy Clause or the Ex Post Facto Clause, as the statute did not establish criminal proceedings. *Id.* at 361.

predators,²⁰⁵ it also suggests that the Court is poised to afford greater deference to legislative judgments in this area, even where that judgment involves use of the death penalty.

The national consensus on imposing death for non-homicide crimes also is evident in the case of non-sexual crimes that do not necessarily involve children. Thirteen jurisdictions, as varied as Florida, Illinois, Montana, and New Mexico, provide capital punishment for non-homicide crimes such as treason, aggravated kidnapping, aircraft hijacking, and espionage.²⁰⁶ Congress in 1994 approved legislation permitting capital punishment for drug kingpins who generate more than twenty million dollars per year.²⁰⁷ Fortunately, from an Eighth Amendment perspective, each of the proscribed offenses is inherently serious and presents significant risk to human life.²⁰⁸ Equally important, though, is that these pieces of legislation weigh heavily in favor of the conclusion that society has not set its face against the use of the death penalty for child rape merely because the crime does not necessarily involve the loss of human life.²⁰⁹ Indeed, these legislative trends toward more severe punishment for sex offenders and those who commit inherently serious non-homicide crimes may well suggest that the body politic is becoming more, not less, moral.

As a caveat, this is not to suggest that the Court analyze capital questions solely on the basis of historical majoritarian practices and preferences, for such an analysis would ultimately leave Eighth Amendment rights at the mercy of the many (thus defeating the purpose of giving such rights constitutional stature), and give effect to penal practices that contemporary political communities may

205. Barrett, *supra* note 119, at A21.

206. See Higgins, *supra* note 17, at 30. See also N.M. STAT. ANN. § 20-12-42 (Michie 1978) (providing capital punishment for espionage); FLA. STAT. ANN. § 893.13 (West 1997) (providing capital punishment for drug trafficking); MO. ANN. STAT. § 578.310 (West 1996) (providing capital punishment for placing a bomb near a bus terminal); MONT. CODE ANN. § 46-18-220 (1999) (providing capital punishment for aggravated assault or kidnapping while incarcerated for murder or repeated felonies); 720 ILL. COMP. STAT. ANN. 5/30-1 (West 1997) (providing capital punishment for treason against the state); MISS. CODE ANN. § 97-25-55 (1997) (providing capital punishment for aircraft piracy within state airspace). See also Matura, *supra* note 24, at 255-56 (describing the various non-homicide capital statutes); James G. Wilson, *Chaining the Leviathan: The Unconstitutionality of Executing Those Convicted of Treason*, 45 U. PITT. L. REV. 99, 156-57 (1983) (arguing that *Coker* and *Enmund* weigh against the constitutionality of capital treason statutes).

207. 18 U.S.C. § 3591(b)(1) (1994).

208. See *Tison v. Arizona*, 481 U.S. 137, 158 (1987) (finding that the death penalty is constitutionally appropriate where the defendant is a major participant in a felony and demonstrates reckless indifference to human life).

209. See Mello, *supra* note 23, at 161.

have rejected. Indeed, the Court has firmly rejected a purely historical analysis.²¹⁰ It merely indicates that the Eighth Amendment itself requires courts to consider civil social practices, traditions, and attitudes in discerning, but not dictating, the values of the larger political community.²¹¹ By doing so, courts remain appropriately respectful of legislative efforts to experiment in the area of crime and punishment and avoid substituting their own moral and philosophical predilections for those of politicians who are properly charged with “refin[ing] and enlarg[ing] the public view.”²¹²

C. Proportionality Analysis and the Nature and Psychology of Rape

Perhaps the most disturbing element of the *Coker* opinion is its conclusion concerning the severity of rape in comparison to murder.²¹³ The plurality explained that “rape by definition does not include the death of or even serious injury to another person.”²¹⁴ Where death is concerned, the definitional aspect of this assertion is true. To assert, however, that rape by definition does not include serious injury to the victim is to proffer a naïve definition of the act.

Others have offered more realistic descriptions. Generally as to rape, Professor Katherine Baker eloquently, but tragically, explains, “[r]ape’s prevalence forces women to live with a fear of violation and attack that is essentially unknown to men. This fear cripples women’s ability to move freely and to live life as autonomous

210. See *Stanford v. Kentucky*, 492 U.S. 361, 369 (1989) (citing and quoting *Gregg v. Georgia*, 428 U.S. 153, 171 (1976)) (proclaiming that “this Court has ‘not confined the prohibition embodied in the Eighth Amendment to ‘barbarous’ methods that were generally outlawed in the 18th century,’ but instead has interpreted the Amendment ‘in a flexible and dynamic manner.’”).

211. *Id.* at 369-70.

212. THE FEDERALIST NO. 10, at 82 (James Madison) (Clinton Rossiter ed., 1961). See also *Stanford*, 492 U.S. at 380 (explaining that “‘proportionality’ analysis itself can only be conducted on the basis of the standards set by our own society; the only alternative, once again, would be our personal preferences.”). But see Matthew E. Albers, *Legislative Deference in Eighth Amendment Capital Sentencing Challenges: The Constitutional Inadequacy of the Current Judicial Approach*, 50 CASE W. RES. L. REV. 467, 490 (1999) (arguing that deference to the state legislatures in the area of capital punishment “is unconstitutional because it allots power to states that is specifically reserved for the courts.”).

213. *Coker v. Georgia*, 433 U.S. 584, 598 (1977).

214. *Id.*

individuals."²¹⁵ Evelyn Marie Aswad likens rape to torture, stating that "the suffering of rape survivors is strikingly similar in intensity and duration to the suffering endured by torture survivors."²¹⁶ Specifically as to the *Coker* analysis, Professor Owen Jones expresses difficulty with the Court's understanding of the effects of rape, both from a biological and psychological perspective:

I am not presently convinced that men in the legal system should be quite so sanguine about their ability to make such assessments of female psychology in the context of rape. For everything we know about the biology of behavior suggests that male and female brains will tend to process and react to rape differently — and not solely because of the different ways in which they have been socialized. Consequently, a behavioral biology perspective on the psychology of rape's harms may prompt us to reevaluate the bases on which we compare it to other harms.²¹⁷

The *Coker* dissent took sufficient notice of these effects in tailoring its own proportionality analysis, explaining that "[r]ape is not a mere physical attack — it is destructive of the human personality."²¹⁸ Continuing, and conspicuously identifying a more realistic understanding of the aforementioned biology and psychology of rape, the dissent stated, "[t]o speak blandly, as the plurality does, of rape victims as 'unharm[ed],' or to classify the human outrage of rape . . . in terms of 'excessive[ly] brutal' versus

215. Katherine K. Baker, *Once A Rapist? Motivational Evidence and Relevancy in Rape Law*, 110 HARV. L. REV. 563, 564 (1997). Professor Baker's work in this area is excellent, often identifying and evaluating major sources of rape reform, always motivated by a desire to see that rape becomes much less prevalent and more harshly punished. *See id.* (stating that "[c]learly . . . there are powerful reasons for enacting rules that help to decrease the incidence of rape by securing more rape convictions."). *See also* Katherine K. Baker, *What Rape Is and What It Ought Not To Be*, 39 JURIMETRICS J. 233 (1999) (arguing that, despite what biologists tell us about rape, "the law must be concerned with trying to make [rape] not so. The law must try to stop rape.").

216. Evelyn Marie Aswad, *Torture By Means of Rape*, 84 GEO. L.J. 1913, 1931 (1996). Although much of Aswad's study treats the infliction of rape by governments for political purposes, her conclusions, particularly those concerning the physical and psychological harm of rape, apply to rape generally. In addition to such personal anguish, rape can result in isolation, both from the community and from intimate relationships. *Id.* at 1939-42.

217. Jones, *supra* note 16, at 920. Of course, as Professor Jones notes, "contextualizing the harm of rape within differently evolved male and female psychologies" carries with it the risk of further female exclusion from the active life of the community at the hands of those who view women as especially vulnerable (such as an employer's reluctance to hire women for particularly risky jobs). *Id.*

218. *Coker*, 433 U.S. at 612 (Burger, C.J., dissenting).

'moderately brutal,' takes too little account of the profound suffering the crime imposes upon the victims and their loved ones."²¹⁹

The reality, therefore, is that rape is inherently brutal. Objectively considered, the law recognizes some rapes as admittedly more so than others,²²⁰ and it is these aggravated rapes, like those that the Louisiana statute identifies,²²¹ that are most deserving of the most severe punishment. Thus, to draw a bright-line rule in proportionality analysis that makes the loss of life the standard of measurement is to ignore the real brutality of rape.²²² Indeed, as the brutality escalates with aggravation, many rapes may involve a brutality that, under certain circumstances, may well exceed that of any given murder.²²³ To suggest, then, that society's most severe moral and penal sanction is necessarily out of proportion to the harm caused by rape is to vastly underestimate the severe nature of rape and, ultimately, to undervalue the life and well-being of the victim.

As American law has recognized in other areas of human conduct,²²⁴ then, and as the *Wilson* court ably explained, the harms inflicted by the rapist upon a child are particularly acute and thus particularly deserving of that most harsh sanction.²²⁵ Here the

219. *Id.*

220. See ESTRICH, *supra* note 2, at 4-5 (discussing the distinctions between aggravated and simple rapes). See also Schafran, *supra* note 16, at 453 (stating that while most rapes may not involve physical injuries save for the penetration, "[t]he concept of a 'nonviolent rape' is a myth.").

221. See LA. REV. STAT. ANN. § 14:42 (c)(1) (West 1998 Supp.).

222. See, e.g., Wepner, *supra* note 169, at 941 (stating that "[r]ape is unique among acts of violence [because] it shatters not only a victim's physical well-being but also [destroys] her emotional world.").

223. Justice Powell presciently recognized this point in his separate opinion in *Coker*. See *Coker*, 433 U.S. at 603 (Powell, J., concurring in the judgment in part and dissenting in part). Justice Powell stated that:

The deliberate viciousness of the rapist may be greater than that of the murderer. Rape is never an act committed accidentally. Rarely can it be said to be unpremeditated. There is also wide variation in the effect on the victim Some victims are so grievously injured physically and psychologically that life is beyond repair.

Thus, it may be that the death penalty is not disproportionate punishment for the crime of aggravated rape.

Id.

224. See *supra* Section IV.B. text and accompanying notes.

225. See *State v. Wilson*, 685 So.2d 1063, 1070 (La. 1996), *cert. denied sub nom. Bethley v. Louisiana*, 520 U.S. 1259 (1997). The *Wilson* court explains, " 'Common experience tells us that there is a vast difference in mental and physical maturity of an adolescent teenager . . . and a pre-adolescent child It is well known that child abuse leaves lasting scars from generation to the next . . . such injury is inherent in the offense.' " *Id.* (quoting *State v.*

victim, largely because of physical and emotional immaturity, is “generally incapable of resisting the offender and [is] exceptionally vulnerable to the effects of rape.”²²⁶ These effects may well include physical harms that last throughout life. In addition, the child loses its innocence, and its dignity.²²⁷ One set of commentators on child sexual abuse explains the lasting psychological torment of sexual violence against a child by concluding that twenty to forty percent of victims experience psychiatric problems immediately after their attack.²²⁸ Child sexual abuse victims are “at greater risk for arrest as juveniles and adults,” are more likely than non-victims to run away from home as adolescents, and are likely to develop a wide range of psychiatric disorders, including posttraumatic stress disorder, sleep problems, repressed memory, hypervigilance, and dissociation.²²⁹ More problematically, the study indicates, “[c]hild victims never learn healthy ways to express their sexuality; as adult survivors, they may turn to dangerous sexual behaviors, experience sexual dysfunctions, or avoid sex altogether.”²³⁰ These effects, then, combined with the excessive brutality inherent in the act of rape itself, suggest strongly that child rape is virtually unmatched in harm to the victim among non-homicide crimes.

The reality of rape thus undermines the *Coker* plurality’s attempt to minimize the severity of rape by comparing it to murder in conducting the proportionality analysis. Loss of life *per se*, thus, cannot, and should not, serve as the dividing line between crimes for which the state may impose the death penalty. Rather, in conducting proportionality analysis of capital child rape legislation, courts, like the *Wilson* court, should be appropriately mindful of the severity of the offense committed and its effect on the victim.²³¹

Brown, 660 So.2d 123, 126 (La. Ct. App. 1995). The court continued, “. . . the child’s tender age made her particularly vulnerable and incapable of resisting . . . considering [the] acutely deleterious consequences of [such] conduct on an eight-year-old child.” *Id.* (quoting *State v. Jackson*, 658 So.2d 722 (La. Ct. App. 1995)).

226. Palmer, *supra* note 16, at 864.

227. See *id.* at 878 (stating that “if someone takes the life of another, that life can never be replaced. Similarly, if someone takes away the innocence of a child, that innocence can never be replaced. In this respect, the death penalty is not excessive for the crime of raping a child.”).

228. Lurgio et al., *supra* note 16, at 70.

229. *Id.*

230. *Id.* at 70-71.

231. *Wilson*, 685 So.2d at 1070. See also Palmer, *supra* note 16, at 863-65 (considering the impact of rape on the victim in analyzing the question of excessiveness of capital child rape legislation); Schafran, *supra* note 16, at 441 (explaining that “[t]he inability to recognize the damage caused by a ‘nonviolent rape’ trivializes the seriousness of the crime and devalues the individual victim. Judges and attorneys must expand their definitions of

D. A Cautionary Note on Race

This paper focuses upon whether the imposition of capital punishment for raping a child is cruel and unusual punishment within the meaning of the Eighth Amendment. Asserting that such a penalty is not cruel and unusual, however, is markedly different from arguing that the sanction is desirable or that it in all circumstances satisfies other constitutional provisions, such as the Due Process Clause or the Equal Protection Clause. That said, legislatures enacting, and prosecutors and juries carrying out, death sentences for child rapists should remain cautious to avoid application based on the race of the defendant and or the victim. This is an entirely unremarkable and obvious proposition. It seems necessary, however, given the historical connection between capital rape defendants and their racial identity.²³²

Coker, for example, involving as it did a white defendant and a white victim, never mentioned race, nor did it identify a relationship between racism and capital rape laws. Professor Randall Kennedy, however, has done so, and his remarks are particularly compelling.²³³ He states that historically many convicted rapists on death row raped white victims.²³⁴ As Professor Kennedy

violence to include injury to the victim's psyche.”).

232. See generally Jennifer Wriggins, *Rape, Racism, and the Law*, 6 HARV. WOMEN'S L.J. 103 (1983) (providing a comprehensive historical and contemporary account of the relationship between rape law and race, and arguing that “the legal system's treatment of rape both has furthered racism and has denied the reality of women's sexual subordination. It has disproportionately targeted Black men for punishment and made Black women both particularly vulnerable and particularly without redress.”). See also Adrien Katherine Wing & Sylke Merchan, *Rape, Ethnicity, and Culture: Spirit Injury from Bosnia to Black America*, 25 COLUM. HUM. RTS. L. REV. 1, 5 (1993) (stating that “[e]thnicity and culture complicate the analysis of the crime of rape Rape committed by someone of the same cultural or ethnic group may not be regarded in the same manner as if committed by someone from a different group.”). As Professor Wing and Merchan indicate, “[i]n America, for instance, the ultimate punishable rape has been the rape of a White woman by a Black man.” *Id.*

233. KENNEDY, *supra* note 34, at 324-25.

234. See *id.* at 312 (stating that “[t]he clearest example of both the presence of racial discrimination in sentencing and the determination of judges to avoid acknowledging that presence is the case law that arose from efforts to save from execution black men convicted of raping white women.”). Kennedy details the case of the Martinsville Seven, a group of black men sentenced to death for the rape of a white woman in Virginia. *Id.* at 312-17. Although the case, which involved the use of statistical data, “marked the first instance that death sentences for rape were seriously challenged on racial discrimination grounds,” the courts consistently upheld the verdict of the all-white jury and the Commonwealth sentenced the group to death by electrocution. *Id.* at 316. See also ERIC W. RISE, *THE MARTINSVILLE SEVEN* (1995) (providing a comprehensive account of the case); Carol S. Steiker, *Remembering Race, Rape, and Capital Punishment*, 83 VA. L. REV. 693, 706 (1997) (reviewing Rise's book and commenting that the Martinsville Seven's “attempt to present statistical proof of

explains, while black rapists are no longer given the harshest sentences at substantially greater rates than whites:

It would not be at all surprising to learn, though, that a racial hierarchy still exists under which, in many locales, the black offender-white victim case elicits harsher punishment than any other racial dyad: black offender-black victim, white offender-white victim, or white offender-black victim

The juncture at which sex, race, and violence meet, remains a place where the rape of a white woman by a black man is often still considered a more serious affront to decency than any other species of rape.²³⁵

Coker thus may have answered many (though clearly not all) questions about the relationship of rape to capital punishment, but, among the others already identified, it also left open questions concerning the relationship of race to both.²³⁶ To further complicate matters, *McClesky v. Kemp*²³⁷ set a high, in fact virtually impossible, standard for Equal Protection challenges based on statistics demonstrating racial disparities in capital sentencing. *McClesky* rejected a challenge to Georgia's capital sentencing regime based on a comprehensive statistical study that demonstrated that black defendants were disproportionately likely to receive the death penalty, particularly where their victims were white.²³⁸ The Court found that the statistics, without more, were insufficient to conclude that the state had deprived McClesky himself of any

discrimination in capital sentencing represents a 'road not taken' in all three major doctrinal areas implicated in their case — capital punishment, criminal procedure, and equal protection."); cf. *Wiggins*, *supra* note 232, at 104-05 (stating that "the kind of rape that has been treated most seriously . . . has been the illegal forcible rape of a white woman by a black man. The selective acknowledgement of Black accused/white victim rape was especially pronounced during slavery and through the first half of the twentieth century.").

235. KENNEDY, *supra* note 34, at 325.

236. Steiker, *supra* note 234, at 708. Professor Steiker states that, by failing to note the racial disparities that had characterized capital rape laws in the South:

[T]he [*Coker*] Court mooted the most troubling evidence that capital punishment was inevitably racially discriminatory — and did so without a single reference to the issue of race. With the decision in *Coker*, the racially charged campaign against the use of the death penalty for rape ended, not with a bang but a whimper.

Id.

See also Katherine R. Kruse, *Race, Angst, and Capital Punishment: The Burger Court's Existential Struggle*, 9 SETON HALL CONST. L.J. 67, 98 (1998) (concluding that in *Gregg* and *Coker*, "the Burger Court missed opportunities to tie its reinstatement of the death penalty to its concern for fair and nondiscriminatory capital sentencing.").

237. 481 U.S. 279 (1987).

238. *Id.* at 297. See generally DAVID BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY (1995) (detailing the statistical evidence that was proffered in the *McClesky* litigation).

constitutional rights.²³⁹ Still, despite the obstacles that it has placed in the path of those who wish to challenge the application of the death penalty on racial discrimination grounds, *McClesky* did not eliminate questions about the role of race in death penalty legislation and administration, particularly where the crime is rape.

Although Professor Michael Mello has done so,²⁴⁰ none of this is to suggest that legislators should avoid enacting capital rape legislation *merely* because of the racial concerns that the history of capital rape laws raises. Indeed, because capital sentencing for rape dissipated after *Furman*, *Gregg*, and *Coker*, little hard evidence exists for the proposition that black defendants will *necessarily* receive death sentences either because of their race or the race of their victim. Moreover, structural safeguards against racial bias now exist in capital sentencing, and in the criminal justice process generally, that did not exist before *Coker*.²⁴¹ Let us hope that we have at least come this far, as we have in so many other areas of political life.²⁴² But history urges sagacity and caution. Thus, legislators, prosecutors, and jurors should be wary of these concerns, carefully tailoring, enforcing, and administering capital child rape legislation to ensure that the role of race is mitigated, if not eliminated.

V. CONCLUSION

Publius reminds us that human nature is, and, thus, that human

239. *McClesky*, 481 U.S. at 297.

240. See Mello, *supra* note 23, at 198. Professor Mello writes:

I have suggested that, under prevailing proportionality law as interpreted by the current personnel of the United States Supreme Court, capital punishment for rape will likely be held to pass constitutional muster. I have also argued that the racist history of capital punishment for rape should invalidate it as applied, even under the base standards of Justice Powell's scabrous opinion in *McClesky*.

Id.

241. See, e.g., *Turner v. Murray*, 476 U.S. 28, 36-37 (1986) (holding that "a capital defendant accused of an interracial crime [is] entitled to have prospective jurors informed of the race of the victim and questioned [on voir dire] on the issue of racial bias."); *Batson v. Kentucky*, 476 U.S. 79, 97 (1986) (holding that the Equal Protection Clause prohibits prosecutors from using peremptory challenges to strike jurors solely on the basis of their race); *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (holding that the Eighth Amendment requires individualized sentencing to ensure that juries have complete and reliable information when weighing sentencing decisions).

242. Our modest political improvements in race relations have often come, ironically, after the prompting of the Supreme Court. See, e.g., *Brown v. Board of Education*, 347 U.S. 483 (1954) (holding that segregated schools violated the Equal Protection Clause); *Loving v. Virginia*, 388 U.S. 1 (1967) (holding that state anti-miscegenation laws violated the Equal Protection Clause).

communities are, complex. The legislator in these complicated, socially-constructed, and often tragic political communities is, therefore, charged with the unenviable task of crafting legislation that will at once enable the government to control the governed, as well as itself.²⁴³ Nowhere is this task more complicated than in the area of crime and punishment, where lawmakers are forced to address serious wrongs committed against individuals, and against the community itself, without irrationally acquiescing in a spirit of vengeance or hatred that often accompanies public opinion on questions of penal law. Capital child rape legislation such as Louisiana's implicates these most difficult conflicts, pitting the need and public desire for society's most severe penal sanction against the limitations on majoritarian conduct that the Eighth Amendment imposes. Precedent, our nation's living and evolving traditions, and the nature and psychology of child rape strongly suggest that the Cruel and Unusual Punishments Clause does not prohibit capital child rape legislation. By the same token, the survival of legislation such as Louisiana's suggests that the state may constitutionally punish a number of other non-homicide offenses with the death penalty, where those offenses, like child rape, are inherently serious and involve substantial risks of harm or death. Giving appropriate deference to the evolving standards of decency that these laws reflect, then, satisfies not only the court's role pursuant to the Cruel and Unusual Punishments Clause but also the Framers' vision of a constitutional republic in which the people's representatives enjoy ultimate authority to administer justice by enlarging and refining the public's view of penal law.

243. See THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961). James Madison explained that:

If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place, oblige it to control itself.

Id.