

## Assessing the Constitutionality of Capital Child Rape Statutes

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# NOTES

## ASSESSING THE CONSTITUTIONALITY OF CAPITAL CHILD RAPE STATUTES

*Death is factually different. Death is final. Death is irremediable. Death is unknowable; it goes beyond this world . . . . Death is different . . . .*<sup>1</sup>

These words resound throughout capital punishment jurisprudence,<sup>2</sup> and refer to the punishment of death and its finality. But what of the crimes that death is imposed for—must they too be of a different kind? Must the punishment of death follow the *lex talionis* philosophy of an “eye for an eye”<sup>3</sup> and take one life only where another life has been taken? The Supreme Court has held that the death penalty itself is not per se

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<sup>1</sup> See RANDALL COYNE & LYN ENTZEROTH, CAPITAL PUNISHMENT AND THE JUDICIAL PROCESS 104 (1994) (quoting Professor Amsterdam in his oral argument in *Jurek v. Texas*, 428 U.S. 262 (1976)).

<sup>2</sup> See *Furman v. Georgia*, 408 U.S. 238, 306 (1972) (Stewart, J., concurring) (“The penalty of death differs from all other forms of criminal punishment, not in degree but in kind.”). As of April 1, 1999, over 3,500 men and women across the United States sit on death row awaiting execution—each one for the crime of murder. See NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., DEATH ROW U.S.A. (1999).

<sup>3</sup> See RAYMOND PATERNOSTER, CAPITAL PUNISHMENT IN AMERICA 252 (1991). *Lex talionis* is the retributive principle that the punishment must fit the crime. See *id.*; JAMES J. MEGIVERN, THE DEATH PENALTY: AN HISTORICAL AND THEOLOGICAL SURVEY 44, 224, 465 (1997). *Lex talionis* is “an eye for an eye, a finger for a finger, then a life for a life.” *Id.* at 44 (applying the requisite proportional punishment to the injuries inflicted against another). “[It is] simple straightforward revenge.” *Id.* at 465 (quoting JEAN-MARIE AUBERT, CHRETIENS ET PEINE DE MORT [CHRISTIANS AND THE DEATH PENALTY] 67 (Paris: Relais Desclee, 1978)); see also *Exodus* 21:23–25 (“[Y]ou shall give life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burn for burn, wound for wound, stripe for stripe.”); Anthony F. Granucci, “*Nor Cruel and Unusual Punishments Inflicted: The Original Meaning*,” 57 CAL. L. REV. 839, 844 (1969) (explaining that “[*lex talionis*] is generally considered a law of retribution—the product of a vengeful deity”).

unconstitutional,<sup>4</sup> but the Court has never concretely answered the question posed above. The Court has never specifically held that only the taking of another human life may lead to the punishment of death.

Many states and the federal government have statutes on their books allowing capital punishment for non-homicidal crimes.<sup>5</sup> Capital child rape statutes, which call for the death penalty when a person is convicted of raping a child under a specified age, have been added to this list of non-homicidal death penalty statutes.<sup>6</sup> These capital child rape statutes are intended to protect our children from offenders.<sup>7</sup> Although children need

<sup>4</sup> See *Gregg v. Georgia*, 428 U.S. 153, 177-78 (1976) ("For nearly two centuries, this Court, repeatedly and often expressly, has recognized that capital punishment is not invalid *per se*."); *In re Kemmler*, 136 U.S. 436, 447 (1890) (stating that "the punishment of death is not cruel within the meaning of . . . the Constitution").

<sup>5</sup> These "non-homicidal" crimes include treason, kidnapping, drug trafficking and aircraft hijacking. See 18 U.S.C. § 3591 (1994) (treason); 21 U.S.C. § 848(e) (1994) (continuing criminal enterprise); ARK. CODE ANN. § 5-51-201 (Michie 1997) (treason); CAL. PENAL CODE § 37 (Deering Supp. 1999) (treason); COLO. REV. STAT. § 18-3-301 (1999) (kidnapping); FLA. STAT. chs. 893.135, 921.142 (1999) (drug trafficking); GA. CODE ANN. § 16-5-44 (1996) (aircraft hijacking); GA. CODE ANN. § 16-11-1 (1996) (treason).

<sup>6</sup> The sexual abuse of children has come to the forefront of this country's attention. Legislatures have passed numerous laws aimed at child molesters. See, e.g., LA. REV. STAT. ANN. § 14:42(A)(4), (D)(2) (West Supp. 1999). The statute states that:

Aggravated rape is a rape committed upon a person . . . where the . . . sexual intercourse is deemed to be without lawful consent of the victim because it is committed under any one or more of the following circumstances: . . . [w]hen the victim is under the age of twelve years. Lack of knowledge of the victim's age shall not be a defense. . . . Whoever commits the crime of aggravated rape shall be punished by life imprisonment. . . . However, if the victim was under the age of twelve years . . . the offender shall be punished by death or life imprisonment . . . .

*Id.*; see also H.B. 801, 144th Gen. Assembly, Reg. Sess. (Ga. 1997) (proposing to amend the current rape statute to state "a person convicted of the offense of rape of a person who is less than 12 years of age on the date of the offense shall be punished by death, by imprisonment for life without parole, or by imprisonment for not less than ten nor more than 20 years"). Georgia's House carried the vote over to the 1998 session, where it was passed and adopted on February 18, 1998. See *id.* This bill has been reintroduced in the 1999 Regular Session of the Georgia House of Representatives. See H.B. 116, 145th Gen. Assembly, Reg. Sess. (Ga. 1999); see also Megan O'Matz, *Pa. House GOP Chiefs Eye Death Penalty for Sex Crimes But Legal Experts Say the State Would Be on Shaky Ground to Do So*, ALLENTOWN MORNING CALL, Jan. 28, 1997, at A1 (discussing how Pennsylvania's House Republican leaders intend to work to pass legislation calling for the death penalty for habitual sex offenders).

<sup>7</sup> See H.R. 116, 145th Gen. Assembly, Reg. Sess. (Ga. 1999) (stating that the purpose of the Act is to "protect children from the heinous crime of rape and

protection, this Note argues that the imposition of the death penalty under these statutes violates the United States Constitution's Eighth Amendment prohibition against "cruel and unusual punishment."<sup>8</sup>

This Note will explore those theories which must be considered to determine the constitutionality of a capital child rape statute.<sup>9</sup> Part I reviews the history of the Supreme Court's creation of a "proportionality test" in applying the Eighth Amendment to the punishment of death. Part II discusses the application of the proportionality test to capital child rape statutes and illustrates that, as a prerequisite to imposing the death penalty, the Court requires that the victim is murdered. Part III presents the requirement of mental culpability for the victim's death, which is found in decisions imposing capital punishment for "non-triggerman" felony-murderers. This part also discusses the fact that even where death has occurred, aggravating circumstances must exist for capital punishment to be constitutionally imposed. It posits that these requirements in homicide cases further illustrate that the death of the victim is a prerequisite to imposing capital punishment. Part IV discusses what the Court must consider when it determines the value of

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aggravated sodomy"); see also O'Matz, *supra* note 6 (indicating that lawmakers were proposing a capital child rape statute to stop the molestation of children by chronic abusers).

<sup>8</sup> U.S. CONST. amend. VIII. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." *Id.*

<sup>9</sup> The Supreme Court was petitioned to review a Louisiana decision finding a capital child rape statute constitutional, but the Court declined to hear the case. See *Bethley v. Louisiana*, 520 U.S. 1259 (1997). Three Justices, however, attached a statement to the memorandum indicating that they could hear such a case if one of the men petitioning was actually sentenced. See *id.* Justices Stevens, Ginsburg, and Breyer noted that the Supreme Court only has jurisdiction over state-court decisions when the highest court of the state has issued a final judgment. See *id.* (citing 28 U.S.C. § 1257(a) (1994)). The petitioner in *Bethley*, however, had not been sentenced, or even convicted, therefore there was no controversy subject to the Court's review. See *id.*; see also *Flynt v. Ohio*, 451 U.S. 619, 620 (1981) (noting that a criminal prosecution is not final until the defendant has been sentenced); WALTER F. MURPHY ET AL., *AMERICAN CONSTITUTIONAL INTERPRETATION* 80 (2d ed. 1995) (explaining that the Supreme Court only has jurisdiction over a " 'case or controversy' [under Article III, section 2, clause 2 of the U.S. Constitution], that is, a real dispute between genuinely adverse parties involving injury, or immediate threat of injury, to a legally protected right"). See *Bethley*, 520 U.S. 1259 (noting that the denial of certiorari was not a reflection on the merits of the case). Many people have concluded that this means that once someone is convicted under this statute the Court will grant a writ of certiorari.

such a statute in protecting our children. This Note submits that the punishment of death for the rape of a child is a violation of the Eighth Amendment because capital child rape statutes would not pass the Supreme Court's proportionality test under the Eighth Amendment. Furthermore, the crime lacks the bright-line prerequisite death of the victim. Indeed, the threat of death for a child rapist is more of a danger to the child victims than it is a safeguard from these predators. Thus, arguably, any state with such a statute breaches its duty to protect children.

## I. THE HISTORY OF THE DEATH PENALTY AND THE EIGHTH AMENDMENT: A REQUIREMENT OF PROPORTIONALITY

### A. *The Eighth Amendment*

The Eighth Amendment states that, "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."<sup>10</sup> The "cruel and unusual punishment" clause was adopted from the English Bill of Rights of 1689,<sup>11</sup> where it was not only a prohibition against certain forms of punishment, but "a reiteration of the English policy against disproportionate penalties."<sup>12</sup> Nevertheless, after the adoption of the American Bill of Rights, "state and federal jurists accepted the view that the clause [only] prohibited certain methods of punishment[]." <sup>13</sup>

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<sup>10</sup> U.S. CONST. amend. VIII.

<sup>11</sup> See Granucci, *supra* note 3, at 840.

<sup>12</sup> *Id.* at 860.

<sup>13</sup> *Id.* at 842. As early as the 1870s the Supreme Court, in reviewing capital cases, focused on the constitutionality of the particular method of execution rather than capital punishment in and of itself. See *Wilkerson v. Utah*, 99 U.S. 130 (1878). In *Wilkerson*, the defendant challenged his sentence of execution by firing squad. See *id.* at 131. In upholding the constitutionality of this mode of execution, the Court stated that it is difficult to define exactly the meaning of the cruel and unusual punishment clause. See *id.* at 135-36. The Court held, however, that "it is safe to affirm that punishments of torture . . . and all others in the same line of unnecessary cruelty, are forbidden by that amendment to the Constitution." *Id.* at 136. The Court reiterated this view in *In re Kemmler*, where it held that death by electrocution was not a cruel and unusual form of punishment, because it resulted in an instantaneous and painless death. See *In re Kemmler*, 136 U.S. 436, 443 (1890) (citing *People v. Durston*, 7 N.Y.S. 813 (1889)). The Court stated, "[p]unishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous, something more than the mere extinguishment of life." *Id.* at 447.

The Supreme Court's review of the "cruel and unusual punishment" clause did not include a consideration of the proportionality of a punishment to the crime until *Weems v. United States*.<sup>14</sup> There, the Court stated that "it is a precept of justice that punishment for [a] crime should be graduated and proportioned to [the] offense."<sup>15</sup> The Court then applied this precept to the Eighth Amendment. In *Weems*, the Supreme Court brought a new meaning to the words "cruel and unusual punishment" in the Eighth Amendment—the Court required proportionality of the punishment to the crime—and new challenges to the punishment of death.<sup>16</sup> Even so, it took the Court many years to set forth the requirements of the proportionality test brought forth in *Weems*.

### *B. Modern Death Penalty Jurisprudence: The Proportionality Test*

Almost fifty years after *Weems*, the Court stated that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing

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The proportionality factor was not reintroduced into death penalty jurisprudence until 1892. See *O'Neil v. Vermont*, 144 U.S. 323 (1892). The Court was asked to review a punishment of a fine of \$6,638.72, or if the defendant defaulted, imprisonment at hard labor for 19,914 days, imposed by the state of Vermont for a violation of state liquor laws. See *id.* at 330. In ruling that the Eighth Amendment did not apply to the states, the Court did not reach the question of the excessiveness of the punishment. See *id.* at 331–32. Three dissenting judges, however, indicated that, given the offense charged, an otherwise acceptable form of punishment could be cruel because it was excessive in length or severity and, therefore, greatly disproportionate to the crime. See *id.* at 339–40 (Field, J., dissenting); *id.* at 370–71 (Harlan, J., dissenting).

<sup>14</sup> 217 U.S. 349 (1910). In *Weems*, the Court found that a sentence of imprisonment for fifteen years for falsifying public and official documents was a cruel and unusual punishment, in violation of the Eighth Amendment. See *id.* at 380–81. In its analysis, the Court pointed out that the meaning of "cruel and unusual punishment" was never exactly decided—the Framers themselves felt the meaning of the clause was too indefinite to include, but it was agreed to by a majority and adopted anyway. See *id.* at 369. The Court found that, although it had previously held that the ban on "cruel and unusual punishment" referred only to torture or some other such barbarous method of punishment, "[i]n the application of a constitution . . . [the Court's] contemplation cannot be only of what has been but of what may be." *Id.* at 373.

<sup>15</sup> *Id.* at 367.

<sup>16</sup> See *id.* at 349. *Weems* actually brought forth three pivotal pronouncements: (1) that the meaning of the Eighth Amendment is not limited to the Framers' intent; (2) that the Eighth Amendment bars excessive punishments; and (3) that what is considered excessive changes with time. See PATERNOSTER *supra* note 3, at 52.

society."<sup>17</sup> This sentiment has echoed throughout modern death penalty jurisprudence.<sup>18</sup> By the early 1970s, the evolving standards of decency changed the course of what the prohibition against "cruel and unusual punishment" and the requirement of proportionality meant with respect to capital punishment. In *Furman v. Georgia*,<sup>19</sup> the Supreme Court paved a new road for those seeking to challenge the death penalty by requiring that capital sentences be dealt out in a non-arbitrary and non-capricious manner.<sup>20</sup> The statutes in *Furman* were typical of

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<sup>17</sup> *Trop v. Dulles*, 356 U.S. 86, 101 (1958). In *Trop*, the Court reviewed the constitutionality of the punishment of denationalization imposed on an Army deserter. The case was not decided on the concept of proportionality. Rather, the Court found that it was unconstitutional to strip a man of his most fundamental right—to have rights. *See id.* at 101–02. The plurality, however, in dicta, stated that certain punishments may be imposed "depending upon the enormity of the crime." *Id.* at 100.

<sup>18</sup> "Perhaps the most important principle in analyzing 'cruel and unusual' punishment questions is one that is reiterated again and again . . . [the] language 'must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.'" *Furman v. Georgia*, 408 U.S. 238, 329 (1972) (Marshall, J., concurring) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)); *see also Tison v. Arizona*, 481 U.S. 137, 156 (1987) ("Deeply ingrained in our legal tradition is the idea that the more purposeful is the criminal conduct, the more serious is the offense, and, therefore, the more severely it ought to be punished."); *Enmund v. Florida*, 458 U.S. 782, 797–99 (1982) (quoting *Gregg v. Georgia*, 428 U.S. 153, 184 (1976)) (holding that the death penalty is appropriate only when the crime is a "grievous . . . affront to humanity" and discussing the relevance of intent in all decisions to impose the death penalty); *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (holding that, in determining whether a punishment comports with the Eighth Amendment, the Court must consider "the public attitudes concerning a particular sentence"); *Gregg*, 428 U.S. at 173 ("[A]n assessment of contemporary values concerning the infliction of a challenged sanction is relevant to the application of the Eighth Amendment.").

<sup>19</sup> 408 U.S. 238 (1972) (per curiam).

<sup>20</sup> *Furman* was a decision unique in length and kind. It was "the longest decision ever to appear in the *U.S. Reports*." Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 362 (1995). The Court issued a brief plurality opinion. Each Justice, both in the majority and dissent, wrote his own opinion. No one opinion clearly indicated which arguments would prevail in future death penalty decisions. *See id.* at 362–63. It was also the first time the Court seriously questioned the constitutionality of the death penalty itself. *See Gregg*, 428 U.S. at 168–69. The *Furman* Court, in its five to four decision, determined that the imposition of capital punishment, in a murder case and two rape cases, was a violation of the Eighth Amendment. *See Furman*, 408 U.S. at 239–40. Ultimately invalidating the death penalty statutes of Georgia and Texas, the *Furman* Court found that death was being imposed in an arbitrary and capricious manner. Due to the lack of standard guidelines, the determination of whether a defendant should live or die was left to the uncontrolled discretion of judges or juries, allowing

almost every other state's death penalty statutes. Thus, *Furman* effectively invalidated almost every existing death penalty statute. In response, legislatures throughout the country quickly modified their statutes to retain the death penalty as a form of punishment.<sup>21</sup>

The Supreme Court was called upon to review these revised statutes in *Gregg v. Georgia*<sup>22</sup> and four accompanying decisions.<sup>23</sup>

discrimination to permeate the decision-making process. *See id.* at 253. (Douglas, J., concurring). Justice Stewart further stated that “[t]hese death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual.” *Id.* at 309 (Stewart, J., concurring). He further opined that it is unconstitutional to inflict the “sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.” *Id.* at 310. Although two Justices argued that the death penalty was cruel and unusual in all cases, *see id.* at 257 (Brennan, J., concurring) and *id.* at 314 (White, J., concurring), the decision was limited to the holding that it is cruel and unusual punishment when the sentencing authority has total discretion to impose the death penalty in capital cases. *See id.* at 240.

The high service rendered by the ‘cruel and unusual’ punishment clause of the Eighth Amendment is to require legislatures to write penal laws that are evenhanded, nonselective, and nonarbitrary, and to require judges to see to it that general laws are not applied sparsely, selectively, and spottily to unpopular groups. . . .

[T]hese discretionary statutes are unconstitutional in their operation. They are pregnant with discrimination and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on ‘cruel and unusual’ punishments.

*Id.* at 256–57 (Douglas, J. concurring):

[P]ast and present legislative judgment with respect to the death penalty loses much of its force when viewed in light of the recurring practice of delegating sentencing authority to the jury and the fact that a jury, in its own discretion and without violating its trust or any statutory policy, may refuse to impose the death penalty no matter what the circumstances of the crime.

*Id.* at 314 (White, J., concurring).

<sup>21</sup> *See* PATERNOSTER, *supra* note 3, at 58. In order to eliminate the problems associated with jury discretion, state legislatures passed statutes calling for mandatory death penalty sentences or created guided discretion statutes. *See id.* The mandatory death penalty statutes removed all sentencing discretion from the jury. Once a defendant was convicted of a narrowly classified murder, the death sentence was automatically imposed. Guided discretion statutes left some sentencing discretion with the juries. *See id.* at 59–60. These guided discretion statutes called for bifurcated capital trials where the defendant’s guilt was determined at a “guilt phase,” followed by a “penalty phase” where the jury determined what penalty to impose. *Id.* at 60. These discretionary statutes “restrict[ed the jury’s] exercise [of discretion] by providing a list of relevant factors” which were aggravating and mitigating circumstances that the jury was required to consider during the penalty phase of the trial. *Id.*

<sup>22</sup> 428 U.S. 153.

<sup>23</sup> *See* *Roberts v. Louisiana*, 428 U.S. 325 (1976) (reviewing Louisiana’s murder statute, which mandated the death penalty whenever the jury found a specific



This time, the Supreme Court upheld the discretionary statutes because they ensured that the death penalty would not be imposed in an arbitrary and capricious manner by requiring individualized consideration of each particular defendant.<sup>24</sup> The Court also enumerated the requirements of the proportionality test in reviewing capital statutes. The proportionality test required them to "look to objective indicia that reflect the public attitude toward a given sanction."<sup>25</sup> In determining whether these contemporary standards were met, the Court looked to many things including: 1) history and precedent;<sup>26</sup> 2) legislative

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intent to kill or inflict great bodily harm and that the defendant was engaged in an armed robbery); *Woodson v. North Carolina*, 428 U.S. 280 (1976) (considering North Carolina's mandatory death penalty for first degree murder); *Jurek v. Texas*, 428 U.S. 262 (1976) (reviewing Texas's guided discretion statute, which required that a separate sentencing proceeding be conducted before the jury that issued the conviction, that all relevant evidence be admitted, and that both the prosecution and the defense be permitted to argue for and against the death penalty); *Proffitt v. Florida*, 428 U.S. 242 (1976) (reviewing a similar Florida statute that also required the parties to produce evidence relating to aggravating and mitigating factors specified by law).

<sup>24</sup> The statutes in these states called for bifurcated capital trials, a consideration during the penalty phase of both aggravating and mitigating factors, and an independent review of the appropriateness of the capital punishment in each case. See generally *Jurek*, 428 U.S. at 267; *Proffitt*, 428 U.S. at 248; *Gregg*, 428 U.S. at 163-64. The mandatory statutes were struck down because they did not allow for individualized consideration. See *Woodson*, 428 U.S. at 304 (citing *Trop v. Dulles*, 356 U.S. 86, 100 (1958)).

While the prevailing practice of individualizing sentencing determinations generally reflects simply enlightened policy rather than a constitutional imperative, we believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.

*Id.* (citation omitted); *Roberts*, 428 U.S. at 333 ("The constitutional vice of mandatory death sentence statutes—lack of focus on the circumstances of the particular offense and the character and propensities of the offender—is not resolved by Louisiana's limitation of first-degree murder to various categories of killings."); see also *Lockett v. Ohio*, 438 U.S. 586, 605 (1978).

Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases. . . . The nonavailability of corrective or modifying mechanisms with respect to an executed capital sentence underscores the need for individualized consideration as a constitutional requirement in imposing the death sentence.

*Id.*

<sup>25</sup> *Gregg*, 428 U.S. at 173.

<sup>26</sup> See *id.* at 176-77 (discussing the historical acceptance of capital punishment for murder).

judgments;<sup>27</sup> 3) jury decisions;<sup>28</sup> 4) the retributive and deterrent effects of the punishment;<sup>29</sup> and 5) “whether [the punishment] comports with the basic concept of human dignity.”<sup>30</sup> Although the Court emphasized the importance of society’s standards, it reserved its right to review the excessiveness of the punishment.<sup>31</sup> *Gregg*, and its accompanying cases, provided constitutional sanction to capital punishment for murder. The Court applied the proportionality test to the “cruel and unusual punishment” clause because man’s evolving standards of decency called for it.<sup>32</sup>

## II. APPLYING THE EIGHTH AMENDMENT TO THE DEATH PENALTY FOR RAPE

The Supreme Court, in *Gregg*, upheld the death penalty as a constitutionally permissible punishment for murder.<sup>33</sup> But, under what other circumstances could the death penalty be justified? As early as the 1600s, “idolatry, witchcraft,

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<sup>27</sup> See *id.* at 175–80 (noting that “legislative judgment weighs heavily in ascertaining [contemporary] standards [of decency]” and that 35 states have enacted new capital murder statutes).

<sup>28</sup> See *id.* at 182 (stating that “the actions of juries in many states since *Furman* are fully compatible with the legislative judgments . . . as to the continued utility and necessity of capital punishment in appropriate [murder] cases”).

<sup>29</sup> See *id.* at 184–86 (indicating that retributively capital punishment is “the appropriate sanction in extreme cases” but that there is no concrete statistical evidence indicating whether or not capital punishment has any deterrent effect).

<sup>30</sup> *Id.* at 182, 183 (noting that an imposed sanction “cannot be so totally without penological justification that it results in the gratuitous infliction of suffering”).

<sup>31</sup> See *id.* at 173–74 (“[O]ur cases also make clear that public perceptions of standards of decency with respect to criminal sanctions are not conclusive. A penalty also must accord with ‘the dignity of man,’ which is the ‘basic concept underlying the Eighth Amendment.’”). Using this proportionality test, the *Gregg* Court ultimately proclaimed that “the punishment of death does not invariably violate the Constitution.” *Id.* at 169. Moreover, the Court held that capital punishment for the crime of murder is not a disproportionate punishment and, therefore, capital punishment for murder is constitutional. See *id.* at 187 (“[W]hen a life has been taken deliberately by the offender, we cannot say that the punishment is invariably disproportionate to the crime. It is an extreme sanction, suitable to the most extreme of crimes.”).

<sup>32</sup> The Supreme Court looked to the state legislatures’ reactions to *Furman* as objective indicia of society’s view of the death penalty. The Court found that “at least 35 [s]tates ha[d] enacted new statutes that provide for the death penalty for at least some crimes that result in the death of another person.” *Id.* at 179–80 (footnote omitted). Reasoning that “legislative judgment weighs heavily in ascertaining [society’s] standards,” the Court concluded that capital punishment had not been rejected by the people. *Id.* at 175.

<sup>33</sup> See *id.* at 187.

blasphemy, murder, assault in sudden anger, sodomy, buggery, adultery, statutory rape, rape, manstealing, perjury in a capital trial, and rebellion" were all classified as capital offenses in America.<sup>34</sup> Whether the modern day test of proportionality and the evolving standards of decency permit statutes, which impose capital punishment for non-homicidal crimes, such as child rape, to pass constitutional muster is, however, another question.

*A. The Proportionality Requirement as Applied to the Death Penalty for Rape*

Prior to *Furman*<sup>35</sup> and *Gregg*,<sup>36</sup> the Supreme Court refused to review the constitutionality of imposing capital punishment for the crime of rape. In 1953, in *Rudolph v. Alabama*,<sup>37</sup> the Supreme Court denied a writ of certiorari where a defendant appealed a sentence of death for the rape of a young woman.<sup>38</sup> Three Justices dissented, however, maintaining that there was a substantial question as to whether the Constitution permitted "the imposition of the death penalty on a convicted rapist who has neither taken life nor endangered human life."<sup>39</sup> The dissent noted the modern trend towards the abolishment of the death penalty for rape.<sup>40</sup> The dissenters questioned whether a less severe penalty for the crime of rape would more likely achieve the goals of punishment.<sup>41</sup> Furthermore, they also questioned whether the constitutional ban on disproportionate punishments permitted "the taking of human life to protect a value other than human life."<sup>42</sup>

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<sup>34</sup> *Furman*, 408 U.S. at 335 (Marshall, J., concurring).

<sup>35</sup> *See id.*

<sup>36</sup> *See Gregg*, 428 U.S. at 153.

<sup>37</sup> *Rudolph v. State*, 152 So. 2d 662 (Ala. 1963), *cert. denied*, 375 U.S. 889 (1963).

<sup>38</sup> *See Rudolph*, 375 U.S. 889, 889; *Rudolph*, 152 So. 2d at 663.

<sup>39</sup> *Rudolph*, 375 U.S. at 889 (Goldberg, J.; Douglas, J.; Brennan, J., dissenting).

<sup>40</sup> *See id.*

<sup>41</sup> *See id.* at 891. Deterrence, isolation and rehabilitation have been found to be permissible aims of punishment. *See id.* n.5. The Court noted that, in Canada, rape ceased to be punishable by death in 1954. Thereafter, there was a steady decrease in rape convictions (56 to 44) for the years 1957 to 1959 despite the population increasing by 27 percent during the same period. *See id.* n.6. The Court, however, pointed out that "[s]uch statistics must of course be regarded with caution." *Id.*

<sup>42</sup> *Id.*

In 1970, the Fourth Circuit adopted the dissenters' contentions in *Ralph v. Warden*.<sup>43</sup> The court reiterated the requirement of proportionality set forth in *Weems*.<sup>44</sup> The court reasoned that its review of the punishment of death for the crime of rape "cannot rest on the subjective opinions of the judges who imposed the sentence or of the judges who must review the case."<sup>45</sup> Finding that "the cruel and unusual punishment clause is 'progressive' and 'is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice,'"<sup>46</sup> the court looked to "objective indication[s] of society's 'evolving standards of decency'" to determine the constitutionality of imposing the death penalty for rape.<sup>47</sup> The court relied greatly on empirical data showing a trend toward the statutory abolition of the death penalty for rape,<sup>48</sup> and the infrequency with which the death penalty was imposed for rape,<sup>49</sup> in ultimately holding that capital punishment is disproportionate for the crime of rape when no life has been taken or endangered.<sup>50</sup> Even so, the Fourth Circuit limited its finding to the type of rape that had occurred in *Ralph*.<sup>51</sup> It was

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<sup>43</sup> 438 F.2d 786 (4th Cir. 1970). *Ralph* broke into the victim's home late at night, where she and her son were asleep. He forcibly raped and sodomized the young mother, threatening her and her son with death if she did not submit. *See id.* at 788.

<sup>44</sup> *See supra* notes 14–16 and accompanying text.

<sup>45</sup> *Ralph*, 438 F.2d at 789.

<sup>46</sup> *Id.* at 790 (quoting *Weems v. United States*, 217 U.S. 349, 378 (1910)).

<sup>47</sup> *Id.* (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

<sup>48</sup> *See id.* at 791–93. The Court noted:

[T]he overwhelming majority of the nations of the world, legislatures of more than two-thirds of the states of the union, and Congress, as evidenced by its amendment of the District of Columbia Code [removing death as a punishment for rape], now consider the death penalty to be an excessive punishment for the crime of rape.

*Id.* at 792.

<sup>49</sup> *See id.* (pointing out that in jurisdictions where the death penalty for rape is permitted "the extreme infrequency of execution belies the argument" that "a minority of jurisdictions [that do have capital rape statutes] accept the death penalty for rape because it remains part of their criminal codes").

<sup>50</sup> *See id.* at 793.

<sup>51</sup> *See id.* The court noted that the legislative trend has shown that death is considered an excessive punishment for rape in most jurisdictions. The court then went on to state that "when a rapist does not take or endanger the life of his victim, the selection of the death penalty from the range of punishment authorized by statute is anomalous when compared to the large number of rapists who are sentenced to prison." *Id.* The court "[did] not hold . . . that death is an unconstitutional punishment for all rapes." *Id.*

not until *Coker v. Georgia*<sup>52</sup> that the United States Supreme Court addressed the question of whether it was constitutional to impose the death penalty for the crime of rape.

The Court, in *Coker*, using the proportionality test, found that the death penalty is a grossly disproportionate and excessive punishment for the crime of rape of an adult woman and, therefore, is forbidden by the Eighth Amendment as cruel and unusual punishment.<sup>53</sup> To determine if the capital rape statute met this test, the Court looked to objective factors based on public sentiment.<sup>54</sup> These factors included: history and precedent, legislative attitudes, and juries' responses as reflected in their sentencing decisions.<sup>55</sup>

Looking at history, the Court pointed out that "[a]t no time in the last 50 years [had] the majority of States authorized death as a punishment for rape."<sup>56</sup> The Court did state, however, that the death penalty was accepted by the states as an appropriate form of punishment, as evidenced by the immediate reaction of legislatures that, after *Furman*, "reinstated the death penalty for at least limited kinds of crimes."<sup>57</sup> Even so, the Court found that those actions were an indication of the acceptance of the

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<sup>52</sup> 433 U.S. 584 (1977) (plurality opinion). *Coker*, although a review of a capital rape statute where the victim was an adult, is still the leading case that the Supreme Court should look to in assessing the constitutionality of capital child rape statutes, for it involves markedly the most factually similar situation that exists in modern death penalty jurisprudence.

*Coker* escaped from a Georgia prison where he was serving time for murder, rape, kidnapping, and aggravated assault. In the course of committing an armed robbery, amongst other offenses, he raped an adult woman in the presence of her husband. *See id.* Although a violent felon, the Court limited its review of *Coker's* case to the fact that death penalty for rape, regardless of the circumstances under which it was committed, is a violation of the Eighth Amendment. *See id.* at 599.

<sup>53</sup> *See id.* at 592. The Court reiterated the proportionality test set out in *Gregg* by stating that "a punishment is 'excessive' and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime." *Id.* (emphasizing that the "punishment might fail the [proportionality] test on either ground").

<sup>54</sup> *See id.*

<sup>55</sup> *See id.*

<sup>56</sup> *Id.* at 593 (noting that "[i]n 1925, 18 states, the District of Columbia, and the Federal Government authorized capital punishment for the rape of an adult female. By 1971 just prior to the decision in *Furman v. Georgia*, that number had declined . . . to 16 states plus the Federal Government") (footnote omitted).

<sup>57</sup> *Id.* at 593-94 (observing that thirty-five states enacted death penalty statutes based on the *Furman* decision); *see also* *Gregg v. Georgia*, 428 U.S. 153, 179-80 n.23 (listing the 35 state statutes).

death penalty for murder and that when looking at the legislative response to *Furman* in regard to capital rape statutes it told a different story.<sup>58</sup> Finding that Georgia was the only state that currently authorized the death penalty for the rape of an adult woman, the Court reasoned that “it obviously weighs very heavily on the side of rejecting capital punishment as a suitable penalty for raping an adult woman.”<sup>59</sup> Furthermore, the Court looked at jury decisions and found that, in most cases, the jury did not impose the death sentence for rape.<sup>60</sup> The Court held that the rejection, by state legislatures, of capital punishment for rape confirmed their finding that death is a disproportionate penalty for the rape of an adult woman.<sup>61</sup>

The Court’s inquiry was not limited to public sentiment because the Court concluded it must analyze for itself whether the punishment fits the crime.<sup>62</sup> The Court did not deny that rape was a serious and violent crime, acknowledging rape as “the ultimate violation of self.”<sup>63</sup> Even so, the Court found that injury to the victim, and the public, from the crime of rape does not compare to that of murder because “rape by definition does

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<sup>58</sup> *Coker*, 433 U.S. at 594. The Court stated that if “the ‘most marked indication of society’s endorsement of the death penalty for murder is the legislative response to *Furman*,’ it should also be a telling datum that the public judgment with respect to rape, as reflected in the statutes providing the punishment for that crime, has been dramatically different.” *Id.* (citation omitted). At the time of *Coker*, only three states (Georgia, North Carolina, and Louisiana) that previously had the death penalty for rape continued to do so in their revised death penalty statutes. *See id.* The Court further stated that two of those three states, Louisiana and North Carolina, had to revise their statutes because they called for mandatory death sentences. Death penalties could not be mandatory. *See id.* When they revised their statutes a second time, the legislatures authorized the death penalty for murder, but not for rape. *See id.* Additionally, the Court noted that the other states which had previously sanctioned the death penalty for rape, and needed to revise their mandatory death penalty laws, did not enact new death penalty statutes for rape. *See id.* The Court also noted that three other states (Florida, Mississippi, and Tennessee) authorized the death penalty for rape, but only where the rapist was an adult and the victim a child. *See id.* at 595.

<sup>59</sup> *Id.* at 596 (footnote omitted).

<sup>60</sup> *See id.* at 597. The Court noted that they could only look at jury decisions where the death penalty for the rape of an adult woman was an option, which left only Georgia jury statistics. *See id.* at 596. The state argued that juries only reserved the death penalty for the most aggravated rapes. *See id.* at 597. Even so, the Court stated that “[n]evertheless . . . [in] 9 out of 10 [cases], juries ha[d] not imposed the death sentence.” *Id.*

<sup>61</sup> *See id.*

<sup>62</sup> *See id.*

<sup>63</sup> *Id.* (footnote omitted).

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.<sup>64</sup> Furthermore, although Coker was found to have committed rape under two aggravating circumstances,<sup>65</sup> the Court stated that this did not change its holding that capital punishment is a disproportionate sentence for rape and, therefore, a violation of the Eighth Amendment.<sup>66</sup>

The Supreme Court has traditionally used precedent and societal standards in its death penalty jurisprudence.<sup>67</sup> The Supreme Court has indicated that when legislators, juries, and, thereby, society as a whole, indicate that they do not feel that the imposition of the death penalty for a particular crime is warranted, the Court will find such a sentence unconstitutional. The *Coker* case has shown that, historically, the death penalty was not a popular punishment for the crime of rape.<sup>68</sup> Society's stance on the death penalty for the crime of rape, as set forth in *Coker*, has not changed since. Society has not shown a strong standing behind the constitutionality of the death penalty for any category of rape.<sup>69</sup> The death penalty, as the *Coker* Court indicated, can only comport with contemporary standards of decency when it is imposed for crimes involving the death of the victim. Against this background, the Supreme Court should follow and extend the *Coker* decision if called upon to review the constitutionality of capital child rape statutes. In doing so, the imposition of the death penalty for the rape of a child would be

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<sup>64</sup> *Id.* at 598 (footnote omitted).

<sup>65</sup> *See id.* at 599 (noting that the jury had found that Coker had two aggravating circumstances: (1) a prior record of conviction for a capital felony and (2) that he had been engaged in the commission of another capital felony while committing the rape). The Georgia law required that at least one of several aggravating factors exist for the rapist to be sentenced to execution. *See id.* at 598–99 (enumerating the aggravating circumstances).

<sup>66</sup> *See id.* at 599.

<sup>67</sup> *See, e.g.,* *Penry v. Lynaugh*, 492 U.S. 302, 330–31 (1989) (explaining that the Eighth Amendment prohibits punishments deemed cruel and unusual at the time the Bill of Rights was adopted and punishments that offend society's evolving standards of decency).

<sup>68</sup> *See Coker*, 433 U.S. at 593.

<sup>69</sup> *See* Eric Pooley, *Death or Life*, *TIME*, June 16, 1997, at 31 (reporting that a survey indicated that more than 75% of individuals polled favored the death penalty for the murder of a President, a police officer, or an ordinary citizen, but only 47% of the same group of respondents thought the crime of rape warranted execution). *See id.* at 33.

found unconstitutional and a violation of the Eighth Amendment of the United States Constitution.

*B. Applying Coker and the Eighth Amendment Proportionality Test to Capital Child Rape Statutes*

After *Furman*,<sup>70</sup> the death penalty for the rape of a child was authorized by only three states—Tennessee, Mississippi, and Florida. Tennessee's statute was subsequently invalidated because the death sentence was mandatory.<sup>71</sup> Mississippi's law was rendered moot by other provisions in the state's statutory scheme,<sup>72</sup> which allowed for imposition of the death penalty only upon a finding of an actual killing, an attempt to kill, an intent to kill, or a crime committed with the contemplation that lethal force would be used.<sup>73</sup> Florida's capital child rape statute<sup>74</sup> remained law until 1981, when *Buford v. State* invalidated it.<sup>75</sup> The Florida Supreme Court, in the *Buford* decision, strongly emphasized the *Coker* Court's statement that, regardless of the circumstances of the rape, it did "not change the fact that the instant crime being punished is a rape not involving the taking of life."<sup>76</sup> The Florida Supreme Court held that the reasoning of the Justices in *Coker* compelled them to hold that the sentence of death for the crime of sexual assault, regardless of the victim's age, is a "grossly disproportionate and excessive punishment" and "forbidden by the Eighth Amendment as cruel and unusual

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<sup>70</sup> 408 U.S. 238 (1972) (per curiam).

<sup>71</sup> See *Collins v. State*, 550 S.W.2d 643, 646 (Tenn. 1977).

<sup>72</sup> See *Leatherwood v. State*, 548 So. 2d 389, 402 (Miss. 1989) (noting that it was not necessary to examine the *Coker* decision or the constitutionality of the death sentence in child rape cases because of Mississippi's statutory scheme).

<sup>73</sup> Mississippi had a statute on the books, which authorized the imposition of the death penalty for the rape of a female child under 12. See MISS. CODE ANN. § 97-3-65(1) (Supp. 1988). Another sentencing statute, however, precluded imposition of the death penalty for the crime of rape. See MISS. CODE ANN. § 99-19-101 (Supp. 1988). The legislature attempted to amend the statute so that the death penalty could be imposed for the rape of a child under the age of 14, however, the bill died in committee. See Miss. H.B. 558 (1997). In 1998, the entire section was rewritten as a non-capital statutory rape law. See MISS. CODE ANN. § 97-3-65 (Supp. 1999).

<sup>74</sup> See FLA. STAT. ch. 794.011(2) (1999) (making "sexual battery upon, or injur[y] to] . . . the sexual organs of, a person less than 12 years of age . . . a capital felony").

<sup>75</sup> 403 So. 2d 943, 951-54 (Fla. 1981) (repealing a statute that allowed for the death penalty for sexual battery (rape) upon a child under 11 years old); see also *Batie v. State*, 534 So. 2d 694, 695 (Fla. 1988) (reaffirming the *Buford* holding).

<sup>76</sup> *Buford*, 403 So. 2d at 951 (discussing at length the *Coker* decision and comparing the Georgia statute to the Florida statute).



punishment.<sup>77</sup> The Florida court found that the Court, in *Coker*, limited the constitutionality of the death penalty to crimes where the victim has died.<sup>78</sup>

Many agree with the Florida Supreme Court, yet two death penalty statutes for the rape of a child were still introduced into legislation, and both passed.<sup>79</sup> The Louisiana Supreme Court was the first court to pass upon the constitutionality of capital child rape statutes since *Buford*. In *State v. Wilson*,<sup>80</sup> the court found that *Coker* did not foreclose the issue of the constitutionality of the death penalty for the rape of a child.<sup>81</sup> The *Wilson* court differentiated the *Coker* decision by limiting it to its facts—specifically that the rape in *Coker* was of an adult woman, not a child.<sup>82</sup> Additionally, the *Wilson* court side-stepped the Court's test of proportionality and disregarded its statement that regardless of the circumstances of the rape, it did "not change the fact that the instant crime being punished [was] a rape not involving the taking of life."<sup>83</sup> The *Wilson* court, as set forth below, ignored the Supreme Court's apparent bright-line prerequisite of death for the constitutional imposition of the death penalty.<sup>84</sup>

### 1. Legislative Enactments

In following *Coker*'s proportionality test, the *Wilson* court looked at legislative enactments, which had hardly changed since *Coker*.<sup>85</sup> In fact, any state that had a capital child rape

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<sup>77</sup> *Id.*

<sup>78</sup> *See id.*

<sup>79</sup> *See supra* note 6 and accompanying text.

<sup>80</sup> 685 So. 2d 1063 (La. 1996).

<sup>81</sup> *See id.* at 1073 (reasoning that "[i]n reaching [our holding] we give great deference to our legislature's determination of the appropriateness of the penalty").

<sup>82</sup> *See id.* at 1066 (stating that "the plurality took great pains in referring only to the rape of adult women throughout their opinion, leaving open the question of the rape of a child") (footnote omitted). The *Wilson* court looked at the language of *Coker* and stated that the plurality decision only applied to the rape of an adult woman because the Court had referred specifically to that classification of rape fourteen times. *See id.* at 1066 n.2. If one is looking at semantics, this argument fails because the Louisiana court neglected to count the times the *Coker* Court referred to rape generally, not just to the rape of an adult woman. *See generally* *Coker v. Georgia*, 433 U.S. 584, 586-600 (1977) (plurality) (using the term "rape," without the words "of an adult woman," over 20 times).

<sup>83</sup> *Coker*, 433 U.S. at 599.

<sup>84</sup> *See infra* Part II.B.3.

<sup>85</sup> *See supra* notes 54-56 and accompanying text.

statute at the time of *Coker* had since repudiated their statute in one manner or another.<sup>86</sup> By the time *Wilson* was decided, Louisiana was the only state with any sort of capital rape statute on the books.<sup>87</sup> The Louisiana court, rather than following *Coker*'s proportionality requirements, created its own reasoning as to what legislative action, or inaction, indicated. The court referred to the small number of capital rape statutes that were passed prior to *Coker* as "hasty legislative compromise[s]" in response to the *Furman* decision.<sup>88</sup> The *Wilson* court reasoned that, unlike the *Coker* Court, they should not only look to the recent past to consider the constitutionality of a death penalty statute because the "[s]tatutes applied in one state can be carefully watched by other states so that the experience of the first state becomes available to all other states."<sup>89</sup> The court went on to state that, although it had been over a year since the passage of the Louisiana statute, other states may be watching to follow suit.<sup>90</sup> Therefore, the fact that Louisiana was the only state with such a statute could not "be deemed determinative."<sup>91</sup>

The *Wilson* court was neglectful in its assessments. The Louisiana court purported to follow the *Coker* test, which held that "legislative rejection of capital punishment for rape strongly confirms [its] own judgment, which is that death is indeed a disproportionate penalty for the crime of raping an adult woman."<sup>92</sup> Only Louisiana had a statute of this kind on its books, and today, only two other states have considered passing the same.<sup>93</sup> Furthermore, in the twenty-seven years since *Furman*, no state has enacted or reenacted any capital rape statutes aside from Louisiana. By indicating that legislative determinations were, in fact, not determinative, the Louisiana court overstepped years of national death penalty jurisprudence that held otherwise.<sup>94</sup> Additionally, in the past, the Supreme

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<sup>86</sup> See *supra* notes 67–75 and accompanying text.

<sup>87</sup> See *Wilson*, 685 So. 2d at 1068 (noting that Louisiana was, at that time, "the only state that . . . ha[d] a law in effect that provide[d] for the death penalty for the rape of a child less than twelve").

<sup>88</sup> *Id.* at 1068 (quoting *Coker*, 433 U.S. at 614 (Powell, J., dissenting)).

<sup>89</sup> *Id.* at 1069 (citation omitted).

<sup>90</sup> See *id.*

<sup>91</sup> *Id.* at 1068.

<sup>92</sup> *Coker*, 433 U.S. at 597.

<sup>93</sup> See *supra* note 6 and accompanying text.

<sup>94</sup> See, e.g., *Enmund v. Florida*, 458 U.S. 782, 792–93 (1982).

Court has addressed international law in its death penalty jurisprudence.<sup>95</sup> Had the *Wilson* court done so it would have seen that, “ [e]very Western industrial nation has stopped executing criminals [for any crime] except the United States.”<sup>96</sup>

Society, as indicated by legislatures and the rest of the world, has not been calling for capital punishment for any form of rape.<sup>97</sup> The *Wilson* court's argument that other states are “waiting around to see what happens” lacks strength and controverts the test of looking at legislation as one of the strongest objective indicators of society's evolving standards of decency.<sup>98</sup> Although the people of Louisiana may have called for their legislature to pass a capital child rape statute, the Supreme Court cannot constitutionally disregard the fact that the people of at least forty-seven other states have not.<sup>99</sup>

## 2. Jury Decisions and Public Sentiment

Since no one has yet been convicted under Louisiana's capital child rape statute, and it is the only state that has such a statute, it would be difficult to analyze jury behavior regarding capital punishment for the rape of a child. Nevertheless, the history of capital punishment and rape, as set forth in *Coker*,

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[T]he current legislative judgment with respect to imposition of the death penalty where a defendant did not take life, attempt to take it, or intend to take life is neither ‘wholly unanimous among state legislatures,’ nor as compelling as the legislative judgments considered in *Coker*, it nevertheless weighs on the side of rejecting capital punishment for the crime at issue.

*Id.* (citation omitted); *Coker*, 433 U.S. at 597 (“[T]he 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 rap[e] . . .”); *Gregg v. Georgia*, 428 U.S. 153, 175 (1976) (holding that legislative judgment is given heavy weight in determining whether society's standards of decency would allow capital punishment for a particular crime).

<sup>95</sup> See *Enmund*, 458 U.S. at 796–97 n.22 (noting the international trend against expanding the death penalty to crimes other than murder). See generally Kristi Tumminello Prinzo, *The United States—“Capital” of the World: An Analysis of Why the United States Practices Capital Punishment While the International Trend is Toward Its Abolition*, 24 BROOK. J. INT'L L. 855 (1999).

<sup>96</sup> Rudolph J. Gerber, *Death Is Not Worth It*, 28 ARIZ. ST. L.J. 335, 353 (1996) (quoting VICTOR E. KAPPELER ET AL., *THE MYTHOLOGY OF CRIME AND CRIMINAL JUSTICE* 196–97 (1993)).

<sup>97</sup> See *id.*; see also *supra* note 69 and accompanying text.

<sup>98</sup> See *supra* notes 38, 46–49, 58, 61, 67–69, 95 and accompanying text.

<sup>99</sup> See *supra* note 6 and accompanying text. Louisiana and Mississippi currently have capital rape statutes, while Georgia's statute has passed the legislature.

indicates that public sentiment does not often call for such a severe punishment.<sup>100</sup> Moreover, although there are non-homicidal capital statutes on the books,<sup>101</sup> “no defendant has been executed for a nonhomicid[al] crime in the United States since 1975, and since 1977 no judge or jury in the United States has imposed the death penalty on a defendant in a nonhomicid[al] case.”<sup>102</sup> Furthermore, the public has shown that, when given alternative punishments, people are not in favor of imposing the death penalty.<sup>103</sup> The Louisiana court in *Wilson*, however, does not address these facts. Should the Supreme Court be called upon to review the constitutionality of capital child rape statutes, this indicia supports finding capital child rape statutes unconstitutional. It appears that society is not ready to impose such a severe and final punishment as death for crimes not involving the taking of a human life.

### 3. Crime Without Death

The *Coker* Court was emphatic in its proclamation that it was unconstitutional to take a human life where one was not taken.<sup>104</sup> The *Wilson* court disregarded this reasoning and stated that “[w]hile the rape of an adult female is in itself reprehensible, the legislature has concluded that rape becomes much more detestable when the victim is a child.”<sup>105</sup> The *Wilson* court discussed the need to protect children as a special class of people because of their particular vulnerabilities.<sup>106</sup> The court

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<sup>100</sup> See *supra* notes 54–58 and accompanying text. The Court, in *Coker*, examined jury decisions regarding capital punishment for rape as another indicator of society’s standards of decency, finding that, in nine out of ten cases, juries did not impose the death sentence. See *supra* notes 57–60 and accompanying text.

<sup>101</sup> See *supra* note 5 and accompanying text.

<sup>102</sup> *State v. Gardner*, 947 P.2d 630, 650 (Utah 1997) (finding the death penalty for aggravated assault by a prisoner unconstitutionally cruel and unusual).

<sup>103</sup> See DEATH PENALTY INFORMATION CENTER, FACTS ABOUT THE DEATH PENALTY 4 (1997) (“Public support for the death penalty drops below 50% when voters are offered alternative sentences. More people would support life without parole plus restitution to the victim’s family than would choose the death penalty.”). It is important to note that public support for the death penalty drops when restitution is awarded to the victim’s family.

<sup>104</sup> See *Coker v. Georgia*, 433 U.S. 594, 598 (1977) (plurality opinion) (stating that rape “does not compare with murder” and that the Court has “the abiding conviction” that capital punishment for rape is excessive).

<sup>105</sup> 685 So. 2d 1063, 1066 (La. 1996).

<sup>106</sup> See *id.* at 1067. But see *infra* Part IV (discussing the effect of a capital child rape statute on the child victims).

ultimately found that "given the appalling nature of the crime, the severity of the harm inflicted upon the victim, and the harm imposed on society, the death penalty is not an excessive penalty for the crime of rape when the victim is a child under the age of twelve years old."<sup>107</sup> Despite the Louisiana court's positing of the importance of protecting the children, this is not enough to disregard the Supreme Court's prior interpretation of the Eighth Amendment—that death cannot be imposed where a life has not been taken.

The *Coker* Court found that as reprehensible as the crime of rape is, "it does not compare with murder, which does involve the unjustified taking of human life . . . . We have the abiding conviction that the death penalty, which 'is unique in its severity and irrevocability,' is an excessive penalty for the rapist who, as such, does not take human life."<sup>108</sup> Furthermore, the Court stated that "[i]t is difficult to accept the notion, and we do not, that the rapist . . . should be punished more heavily than the deliberate killer as long as the rapist does not himself take the life of his victim."<sup>109</sup> It is apparent from the language in *Coker* that the Court was not simply barring the imposition of the death penalty for the crime of rape of an adult woman, but rather barring the death penalty for any form of rape so long as no death had occurred. Although, in *Wilson*, the Louisiana court looked to the language of *Coker* for its rationale, it mistakenly disregarded the language requiring a prerequisite of death for the imposition of the death penalty.

Furthermore, the dissenting Justices in *Coker* came to their own conclusions with respect to the meaning of the plurality opinion. Justice Powell asserted that the plurality's opinion was not limited to the case before the Court. He wrote that the "opinion . . . ranges well beyond what is necessary, it holds that capital punishment *always*—regardless of the circumstances—is a disproportionate penalty for the crime of rape."<sup>110</sup> He believed that the plurality opinion prevented state legislatures from creating capital rape statutes for a narrowly defined crime of aggravated rape, thus foreclosing the issue of the

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<sup>107</sup> *Id.* at 1070.

<sup>108</sup> 433 U.S. at 598 (quoting *Gregg v. Georgia*, 428 U.S. 153, 187 (1976)).

<sup>109</sup> *Id.* at 600.

<sup>110</sup> *Id.* at 601 (Powell, J., concurring in part and dissenting in part).

constitutionality of capital punishment for any form of rape.<sup>111</sup> He averred that the plurality's "expansive pronouncement . . . draws a bright line between murder and all rapes—regardless of the degree of brutality of the rape or the effect upon the victim."<sup>112</sup> Justice Burger ventured further in his dissent, stating that "[t]he clear implication of today's holding appears to be that the death penalty may be properly imposed only as to crimes resulting in death of the victim."<sup>113</sup>

The Louisiana court used the language of the *Coker* Court and the reasoning in *Coker's* dissent to support its findings that a capital child rape statute is constitutional.<sup>114</sup> It is submitted that the Louisiana court should have also viewed the dissent as an indicator of the true meaning of *Coker*. This Note, and many others, contend that the "bright-line" between murder and rape, spoken of by Justice Powell, is not limited to rape cases—but, rather, that the "bright-line" extends to any crime where a death has not occurred.<sup>115</sup> Aside from disregarding the *Coker* proportionality test and creating its own line of reasoning, the Louisiana court in *Wilson* stepped over this bright-line prerequisite of death. Although the dissent in *Coker* is not binding on any court, it is a strong indicator that the Court's plurality opinion was limiting the constitutional imposition of the death penalty to crimes involving the death of the victim.

It is also important to note the fear that constitutionally sanctioning the death penalty for the rape of a child may result in a "slippery slope" problem.<sup>116</sup> Once there is a departure from

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<sup>111</sup> See *id.* at 602.

<sup>112</sup> *Id.* at 603.

<sup>113</sup> *Id.* at 621 (Burger, J., dissenting).

<sup>114</sup> See *State v. Wilson*, 685 So. 2d 1063, 1069 (La. 1996).

<sup>115</sup> See generally Sandra R. Acosta, *Imposing the Death Penalty Upon Drug Kingpins*, 27 HARV. J. ON LEGIS. 596 (1990) (exploring the death penalty for some drug crimes not involving a death); Andrew H. Friedman, *Tison v. Arizona: The Death Penalty and the Non-Triggerman: The Scales of Justice Are Broken*, 75 CORNELL L. REV. 123 (1989) (discussing the idea that the execution of a non-triggerman accomplice is cruel and unusual punishment); Neil C. Schur, *Assessing the Constitutionality and Policy Implications of the 1994 Drug Kingpin Death Penalty*, 2 TEX. F. ON CIV. L. & CIV. RTS. 141 (1996) (opining that imposing the death penalty is bad policy where there is no unjustified taking of a life).

<sup>116</sup> See Acosta, *supra* note 115, at 611 (discussing the dangers of allowing the death penalty for less serious crimes); Joe Gyan, Jr., *Justices Won't Review Child Rape Law Again*, BATON ROUGE ADVOC., Jan. 8, 1997, at 14 ("[D]eath penalty for attempted murders and for child abuse cannot be far behind"); Michael Higgins, *Is Capital Punishment for Killers Only?* A.B.A. J., Aug. 1997, at 30, 30-31 (discussing a

the "bright-line prerequisite of a victim's death in imposing capital punishment" the death sentence may begin to be authorized for even less severe crimes.<sup>117</sup> Consequently, constitutionally sanctioning capital child rape statutes defies Supreme Court precedent and may alter our high standards of justice in capital punishment jurisprudence.

The Supreme Court, in its own assessment of the constitutionality of capital rape statutes, will not allow the imposition of the death penalty where no life has been taken. Thus, allowing the death penalty for the rape of a child would be a disproportionate punishment in violation of the Eighth Amendment of the United States Constitution. The Court has created a bright-line prerequisite, and if the Court allows the imposition of the death penalty for the rape of a child, as the Louisiana court did, the Court would cross its own constitutional boundaries.

### III. THE EIGHTH AMENDMENT REQUIREMENTS OF MENTAL CULPABILITY AND AGGRAVATING CIRCUMSTANCES IN DEATH PENALTY JURISPRUDENCE

Part of the premise of the Court's death penalty jurisprudence is that capital punishment is "cruel and unusual punishment" where the defendant has not taken the life of the victim. Even when a case involves a murder, a degree of participation and culpability is required for a capital sentence to be upheld. Furthermore, where a defendant is convicted of murder, the jury must then find at least one aggravating circumstance to constitutionally impose the death penalty. Therefore, the murderer must do more than intentionally murder,<sup>118</sup> and an accomplice to felony-murder must carry some requisite mental state and degree of participation before the death penalty can be imposed.<sup>119</sup>

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law professor's opinion, the article states "[h]e fears a slippery slope leading to the death penalty for less serious crimes").

<sup>117</sup> Acosta, *supra* note 115, at 611.

<sup>118</sup> See discussion *infra* Part III.B (discussing the requirement of aggravating circumstances).

<sup>119</sup> See discussion *infra* Part III.A (exploring the requisite mental state for imposition of the death penalty).

### A. *The Eighth Amendment's Mental Culpability Requirement*

In 1978, the Supreme Court, in *Lockett v. Ohio*,<sup>120</sup> reversed the death sentence of a non-triggerman involved in a felony-murder. The Court found the sentence unconstitutional because the statute did not permit the individualized consideration of mitigating factors necessary to treat the defendant "with [the] degree of respect due the uniqueness of the individual."<sup>121</sup> *Lockett* challenged the ruling that the jury could not consider her lack of specific intent to cause death, and her relatively minor part in the crime.<sup>122</sup> In its decision, the Court implied that it was necessary, in capital non-triggerman cases, to consider this lack of intent to kill as a mitigating circumstance in order for the death penalty to be constitutionally imposed.<sup>123</sup>

Expanding upon this premise in *Enmund v. Florida*,<sup>124</sup> the Court directly addressed the question of whether the Eighth Amendment allows the imposition of the death penalty in a case where the defendant did not himself kill, attempt to kill, nor intend to kill. The Court explained that imposition of the death penalty must serve retributive or deterrent goals.<sup>125</sup> Not convinced that the death penalty would deter, the Court stated that "the threat that the death penalty will be imposed for murder will [not] measurably deter one who does not kill and has no intention or purpose that life will be taken."<sup>126</sup> Furthermore, retributive goals would not be met because "[p]utting Enmund to death to avenge two killings that he did not commit and had no intention of committing . . . does not

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<sup>120</sup> 438 U.S. 586, 608 (1978).

<sup>121</sup> *Id.* at 605.

<sup>122</sup> *See id.* at 597. *Lockett* was with a group of people who needed some money and formed a plan to rob a pawnshop. There was no plan to kill the owner of the shop in the process, but they did plan to use a gun. She knew the owner of the shop, so she would not enter the store. Even so, she brought the others to the store to commit the robbery, while she waited in the getaway car. During the robbery, the pawnbroker grabbed the gun, it went off, and he was killed. *See id.* at 590.

<sup>123</sup> *See id.* at 605 (discussing the need to consider mitigating factors in capital cases). The Court found that the sentencer must give individualized consideration to mitigating factors, including looking at the circumstances of the offense. *See id.*

<sup>124</sup> 458 U.S. 782 (1982). *Enmund* involved the robbery and fatal shooting of an elderly couple in their Florida farmhouse. One witness saw the defendant, Enmund, as a passenger in the get-away car prior to the shooting. After the shooting, the witness saw Enmund driving the same car at a high-rate of speed with two people lying down in the backseat. *See id.* at 784.

<sup>125</sup> *See id.* at 798 (citing *Gregg v. Georgia*, 428 U.S. 153 (1976)).

<sup>126</sup> *Id.* at 798-99.



measurably contribute to the retributive end of ensuring that the criminal gets his just deserts.<sup>127</sup> The Court also reviewed legislation<sup>128</sup> and jury decisions rejecting the death penalty for accomplice liability in felony-murder cases. Ultimately, the Court held that "absence of proof that Enmund killed or attempted to kill, and regardless of whether Enmund intended or contemplated that life would be taken," the imposition of the death penalty was unconstitutional for a felony-murder accomplice.<sup>129</sup>

Five years later, in *Tison v. Arizona*,<sup>130</sup> the Court qualified its decision in *Enmund* and added another degree of mental culpability to the category of accomplice felony-murder offenders who could qualify for the death sentence. While Enmund only had minor participation in the felony, the Tison brothers significantly participated in the underlying felony.<sup>131</sup> The brothers showed a "reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death."<sup>132</sup> The Court held, therefore, that the Tisons' highly culpable mental state, in combination with their major participation in the felony committed, made the imposition of the

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<sup>127</sup> *Id.* at 801.

<sup>128</sup> Eight states allowed for the imposition of the death penalty solely for participating in a robbery where another robber killed. Eleven more states allowed for the death penalty for an accomplice felony-murderer only if there is proof of the defendant's culpability. *See id.* at 789. The Court went on to evaluate other state capital statutes and concluded that the legislative judgments "weigh[ed] on the side of rejecting capital punishment for the crime at issue [accomplice felony murder]." *Id.* at 793.

<sup>129</sup> *Id.* at 801; *see also* *Cabana v. Bullock*, 474 U.S. 376 (1986). *Cabana* involved a defendant who was sentenced to death for felony-murder. He challenged the conviction, claiming that the jury's verdict did not reflect a finding that he himself killed, intended to kill, or attempted to kill, as required by *Enmund*. *See id.* at 383. The Court stated that *Enmund* "imposes a categorical rule: a person who has not in fact killed, attempted to kill, or intended that a killing take place or that lethal force be used may not be sentenced to death." *Id.* at 386.

<sup>130</sup> 481 U.S. 137 (1987).

<sup>131</sup> *See id.* The defendant brothers, along with other family members, helped their father escape from prison. He was serving a life sentence for killing a guard during a previous escape. They were fully armed, assisted in kidnapping and robbing a family, and watched as their father killed that family. Although the defendants claim they did not expect the shootings, they made no attempt to help the family escape. *See id.* at 137. The Court used the brothers "substantial" participation in the crime as one of the major factors in justifying the imposition of the death penalty for their crime. *Id.* at 158.

<sup>132</sup> *Id.* at 157.

death penalty constitutional.<sup>133</sup> Consequently, the Court expanded the culpability requirement—even in the absence of an intent to kill, a showing of reckless disregard for human life where a death had occurred justified the death penalty.<sup>134</sup>

Even when a death occurs, the Supreme Court requires a degree of participation and culpability in order to uphold a capital sentence. In fact, in the *Enmund* case, the Court echoed *Coker*:

“[Robbery] does not compare with murder, which does involve the unjustified taking of human life. Although it may be accompanied by another crime, [robbery] by definition does not include the death of or even the serious injury to another person. The murderer kills; the [robber], if no more than that, does not. Life is over for the victim of the murderer; for the [robbery] victim, life . . . is not over and normally is not beyond repair” . . . . As was said of the crime of rape in *Coker*, we have the abiding conviction that the death penalty . . . is an excessive penalty for the robber who, as such, does not take human life.<sup>135</sup>

In *Enmund*, the Court required criminal culpability to be limited to the crime committed, “and his punishment must be tailored to his personal responsibility and moral guilt.”<sup>136</sup> In *Tison*,<sup>137</sup> the Court narrowed the culpability requirement, concluding that there was an “apparent consensus that substantial participation in a violent felony under circumstances likely to result in the loss of innocent human life may justify the death penalty even absent an ‘intent to kill.’”<sup>138</sup> An individual’s culpability is given particularly close attention in capital

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<sup>133</sup> See *id.* at 158.

<sup>134</sup> See *id.* (holding that “major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement”). In fact, on remand, the prosecution was unable to prove the *Tison* brothers had the necessary mental culpability and both of their death sentences were reduced to life imprisonment. See J.W. Brown, *Second Tison Resentenced to Life Terms*, PHOENIX GAZETTE, July 20, 1992, at B2; Pamela Manson, *Ricky Tison Taken Off Death Row*, ARIZONA REPUBLIC, July 11, 1992, at B2.

<sup>135</sup> *Enmund v. Florida*, 458 U.S. 782, 797 (citations omitted).

<sup>136</sup> *Id.* at 801. The Court held that the fact that *Enmund* did not kill nor attempt to kill requires it to find the punishment of death unconstitutionally excessive. See *id.* at 798.

<sup>137</sup> 481 U.S. 137.

<sup>138</sup> *Id.* at 154.

cases.<sup>139</sup> Thus, the *Tison* and *Enmund* cases established a culpability requirement in sentencing a felony murderer to death when the defendant himself had not killed the victim. The Court made it clear that in the absence of the defendant's requisite mental culpability, and proof of the defendant's substantial participation in the victim's death, a capital sentence cannot be constitutionally imposed. Since the rape of a child does not involve a victim's death, imposing capital punishment for the crime does not meet these requirements.

### B. *The Requirement of Aggravating Circumstances in Capital Cases*

Another consideration in determining the constitutionality of statutes calling for capital punishment for the rape of a child is whether there are sufficient aggravating circumstances for the jury to consider. Even when murder is involved, aggravating circumstances must be found.<sup>140</sup> The trier of fact must find beyond a reasonable doubt that at least one statutory aggravating factor exists before death can constitutionally be imposed.<sup>141</sup> Capital child rape statutes conflict with this requirement because the only aggravating circumstance is the strict liability element of the victim's age.<sup>142</sup> The Supreme Court has held that a death sentence is not invalid, even where the only aggravating circumstance found by the jury is an element of the crime.<sup>143</sup> The jury, however, must find that this aggravating

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<sup>139</sup> See *Gregg v. Georgia*, 428 U.S. 153, 187 (1976) ("When a defendant's life is at stake, the Court has been particularly sensitive to insure that every safeguard is observed.").

<sup>140</sup> See *Godfrey v. Georgia*, 446 U.S. 420 (1980) (holding that proof of two murders without grisly facts did not qualify as the aggravating circumstances need to justify execution).

<sup>141</sup> See *Gregg*, 428 U.S. at 193-95. Examples of statutory aggravating circumstances include: murder committed by a convict in prison; the defendant created a great risk of death to many persons; the murder was especially heinous, atrocious or cruel. See *id.* at 193 n.44 (detailing the aggravating circumstances cited in the Model Penal Code).

<sup>142</sup> See LA. REV. STAT. ANN. § 14:42(A)(4) (West Supp. 1997).

<sup>143</sup> See *Lowenfeld v. Phelps*, 484 U.S. 231, 241 (1988) (holding that the jury's task is two-fold: to find that the defendant, beyond a reasonable doubt, is both guilty of the crime itself and that the aggravating circumstance has been proven to the same degree of proof); see also Sandra D. Jordan, *Death For Drug Related Killings: Revival of the Federal Death Penalty*, 67 CHL-KENT L. REV. 79, 104 (1991) (referencing *Lowenfeld*, and noting that when the aggravating factors in a statute include the mens rea necessary for conviction of the underlying offense, once the

factor exists beyond a reasonable doubt.<sup>144</sup> In a capital rape statute, the child's age is a strict liability aggravating circumstance,<sup>145</sup> and as such, would not conform to the requirement of sentences being imposed in a non-arbitrary and non-capricious manner because the existing aggravating circumstance, the defendant's knowledge of the child's age, would not have to be proven beyond a reasonable doubt.<sup>146</sup> This does not follow the Court's requirements regarding aggravating circumstances, and, therefore, would not pass constitutional review. Furthermore, society's standards of decency would not allow someone to be executed where a strict liability element is the factor that calls for the punishment of death.<sup>147</sup>

Additionally, the Court, in *Coker*, makes a strong argument in stating that:

[E]ven where the killing is deliberate, it is not punishable by death absent proof of aggravating circumstances. It is difficult to accept the notion, and we do not, that the rapist, with or without aggravating circumstances, should be punished more heavily than the deliberate killer as long as the rapist does not himself take the life of his victim.<sup>148</sup>

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prosecutor has proven a defendant guilty, "the prosecutor has already proven a substantial case for death").

<sup>144</sup> See *Lowenfeld*, 484 U.S. at 242.

<sup>145</sup> See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 130 (1995). Statutory rape is ordinarily considered to be a strict liability crime in regard to the age of the victim. "Thus, [the defendant's] erroneous belief, no matter how reasonable, that the female was above the statutory age of consent, does not exculpate him." *Id.*; see also LA. REV. STAT. ANN § 14:42(A)(4) ("Lack of knowledge of the victim's age shall not be a defense.").

<sup>146</sup> See DRESSLER, *supra* note 145, at 136.

<sup>147</sup> See Higgins, *supra* note 116, at 31 ("You could have the death penalty [based on] strict liability . . . [and t]hat would be pretty amazing.'). Additionally, consider "a 16-year-old boy [who has] consensual intercourse with a girl one day shy of her 12th birthday and physically developed beyond her years." Gyan, *supra* note 116, at 14. Are we going to put him to death? And, consider this fact: "It is estimated that there are over 600 thousand juvenile prostitutes ranging in age from 6 to 16 years." PAULA ALLEN-MEARS, SOCIAL WORK WITH CHILDREN AND ADOLESCENTS 196 (1995). If a man is found with a prostitute under the age of 12 who sells sex for a living, are we going to put him to death too? *But see* State v. Wilson, 685 So. 2d 1063, 1072 (La. 1996) (arguing that a defendant may be permitted to introduce mitigating evidence regarding his belief about the girl's age).

<sup>148</sup> *Coker v. Georgia*, 433 U.S. 584, 600 (1977). Even though the *Coker* jury found two of the aggravating circumstances set forth in the Georgia statute, the court did not change its conclusion that death is a disproportionate punishment for rape. See *id.* at 599.

Therefore, regardless of whether aggravating circumstances are found under a particular statute, the Court has indicated that death is a prerequisite to capital punishment.

#### IV. THE STATE'S DUTY TO PROTECT ITS CHILDREN: CONSIDERING THE CHILD VICTIMS

The sexual abuse of children is at the forefront of our country's attention, and capital child rape statutes are being enacted to protect children from sexual predators.<sup>149</sup> In *Wilson*, the Louisiana court distinguished capital punishment for the rape of a child from the rape of an adult woman by finding that the legislature passed the statute under the notion that "rape becomes much more detestable when the victim is a child . . . . Since children cannot protect themselves, the State is given the responsibility to protect them."<sup>150</sup>

While the *Wilson* court's reasoning seeks to protect children, the decision may have the unfortunate consequence of subjecting child rape victims to greater harm. The rape of a child is one of the most reprehensible and heinous crimes, thereby deserving a severe punishment. The Court, however, in reviewing capital child rape statutes, need not only consider the injuries the crime inflicts on the victim and society,<sup>151</sup> but must also consider the duty the state has to protect children from greater harm.

First, a child rapist may kill the victim knowing that once he<sup>152</sup> rapes a child the penalty is just as severe as if he had murdered the child. The rapist may feel he is better off killing the child, therefore ridding himself of the prime witness against him and perhaps escaping detection as the perpetrator of the crime.<sup>153</sup> This argument has been made in other areas where the

<sup>149</sup> See *supra* note 7 and accompanying text.

<sup>150</sup> *Wilson*, 685 So. 2d at 1066-67.

<sup>151</sup> The *Coker* Court stated that "[rape] is the 'ultimate violation of self . . . [and] [b]ecause it undermines the community's sense of security, there is public injury as well.'" *Coker*, 433 U.S. at 597-98.

<sup>152</sup> I use "he" here because it has been shown that most sexual offenses against children are committed by males. See LAWRENCE A. GREENFELD, BUREAU OF JUSTICE STATISTICS EXECUTIVE SUMMARY, CHILD VICTIMIZERS: VIOLENT OFFENDERS AND THEIR VICTIMS 2 (1996) (stating that "[a]ll but 3% of offenders who commit[] violent crimes against children [are] male").

<sup>153</sup> See Margery B. Koosed, Letters, *Death for Rapists Endangers Public Safety*, NAT'L L.J., Aug. 25, 1997, at A18 ("Fear of the death penalty could lead some offenders to kill their victims to escape detection or punishment."); Joe Gyan, Jr., *Justices Hear Arguments On New Death Penalty Law*, BATON ROUGE ADVOC., Oct.

death penalty is inflicted for a crime where no death has occurred, particularly the crime of kidnapping.<sup>154</sup> This contention strongly suggests that a capital child rape statute would not be an effective deterrent against a child rapist, but rather an incentive for the rapist to become a killer.

The second consideration is that not only has the child suffered psychological traumatization from the rape itself, but then must suffer through the subsequent trial.<sup>155</sup> Sexual abuse cases are some of the most difficult cases to try.<sup>156</sup> The child who has been raped is the prosecution's key witness.<sup>157</sup> Children who testify at sexual abuse trials are often attacked by defense attorneys under the premise that they are fabricating their story of sexual abuse.<sup>158</sup> A study examined the emotional effects upon a child who testifies in a courtroom.<sup>159</sup> It compared children who had testified in sexual assault cases to those who had not, and

16, 1996, at 18 (noting that opponents of Louisiana's capital child rape statute fear that it will "give rapists incentives to murder their victims if the penalty for murder and child rape were the same"); Dan M. Kahan, *Between Economics and Sociology: The New Path of Deterrence*, 95 MICH. L. REV. 2477, 2490 (1997) (propounding that increasing the severity of sentence for rape to life imprisonment, let alone the death penalty, would more likely cause the rapist to kill his victim).

<sup>154</sup> See ALA. CODE § 13-A-6-44 (Michie 1994) (cmt). In discussing the implications of a capital kidnapping statute it was said.

"What was originally intended as a protection to the victim, through deterring infliction of serious harm to the ransom kidnap victim, was converted into an invitation to the criminal to kill the victim. . . since the defendant thereby became eligible for the death penalty he was in no worse case legally if he killed the victim and thus removed the best prosecution witness against him."

*Id.* (quoting Michigan Revised Criminal Code, Committee Commentary to sections 2210 and 2211).

<sup>155</sup> See JOHN E. B. MYERS, *LEGAL ISSUES IN CHILD ABUSE AND NEGLECT* 171-75 (2d ed., 1992) (observing that "[f]or many children the most traumatic aspect of testifying is facing the adult accused of abusing them").

<sup>156</sup> See generally NANCY WALKER PERRY & LAWRENCE S. WRIGHTSMAN, *THE CHILD WITNESS: LEGAL ISSUES AND DILEMMAS* (1991); Robert T. Mertens, *Child Sexual Abuse in California: Legislative and Judicial Responses*, 15 GOLDEN GATE U. L. REV. 437 (1985); Charles R. Petrof, *Protecting the Anonymity of Child Sexual Assault Victims*, 40 WAYNE L. REV. 1677 (1994).

<sup>157</sup> See Comment, *Child Sexual Abuse: A New Decade for Protection of Our Children?*, 39 EMORY L.J. 581, 607 (1990) ("Child victims are usually the key witnesses in child abuse prosecutions; their testimony is likely to be indispensable to the conviction of the person who committed the crime."); see also MYERS, *supra* note 155, at 31.

<sup>158</sup> See MYERS, *supra* note 155, at 31 (contending that a child's memories and sense of imagination are fertile grounds for a defense attorney to plant seeds of doubt in the jurors' minds as to what actually happened). See generally *id.* at 30-83.

<sup>159</sup> See Petrof, *supra* note 156, at 1687.

found that for those who did testify "the healing process [from the rape] is delayed during court proceedings."<sup>160</sup> The fact that these rape statutes involve the death penalty further extends the child's trauma from the assault. Death penalty trials are often long and arduous<sup>161</sup> and, consequently, if children become involved in the judicial process, the horrible experience they have gone through will become even more psychologically traumatizing. Subjecting a child to a capital trial seemingly precludes an easy healing process for the child and would subject the child to more pain. As important as it is to protect children from child rapists, it is equally important to protect them from any further emotional trauma.

Alternative sources of injury to children must also be considered. One of the major problems with child sexual abuse is that it often goes unreported.<sup>162</sup> The main reason stems from the fact that most sexual offenses against children are committed by a father, stepfather, or someone the child knows.<sup>163</sup> A study of incarcerated child victimizers found that in the majority of cases the victim was someone the offender knew before the crime was committed.<sup>164</sup> Approximately one in seven child victimizers reported that the victim was a stranger to them. One-third of the prisoners had committed offenses against their own child, and almost half had some sort of relationship with the victim as a friend, acquaintance, or relative prior to the crime.<sup>165</sup> Furthermore, in a National Incidence Study of Child Abuse and Neglect it was found that over fifty percent of

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<sup>160</sup> *Id.* at 1688.

<sup>161</sup> See PATERNOSTER, *supra* note 3, at 191-213 (discussing the cost of a capital trial because of the requirement of a guilt and penalty phase, as well as a long and costly appeals process). As the mother of a seven-year-old child who was kidnapped and murdered said, "[t]he death penalty causes family members more pain than other sentences. The continuous sequence of courtroom scenes inherent in death penalty cases only serve to keep emotional wounds raw and in pain for years." REV. JESSE JACKSON, LEGAL LYNCHING: RACE, INJUSTICE AND THE DEATH PENALTY 57 (1996).

<sup>162</sup> The actual number of abused children is unknown because countless cases of child abuse go unreported. See BARBARA TATEM KELLEY ET AL., U.S. DEP'T OF JUSTICE, JUVENILE JUSTICE BULL., IN THE WAKE OF CHILDHOOD MALTREATMENT 1 (1997).

<sup>163</sup> See DEBRA WHITCOMB, NATIONAL INSTITUTE OF JUSTICE: ISSUES AND PRACTICES, WHEN THE VICTIM IS A CHILD 2 (2d ed. 1992); see also Mertens, *supra* note 156, at 441-42 (1985).

<sup>164</sup> See GREENFELD, *supra* note 152, at 2.

<sup>165</sup> See *id.*

sexually abused children were the victims of a parent, or a non-parent acquaintance or parent-substitute.<sup>166</sup> When the sexual offender is a member or acquaintance of the family, the family is less willing to report the crime.<sup>167</sup> For instance, in incest cases mothers often do not stop the abuse because they either refuse to believe the child or they feel too frightened or dependent on their husbands to take action.<sup>168</sup> Furthermore, the rapist can use his potential death sentence to deter the child from reporting the rape to another adult. All of this leads to the conclusion that authorizing death for the rape of a child will diminish the willingness to report the rape and, therefore, allow the child rapist to walk free and rape again.<sup>169</sup>

Capital child rape statutes may incapacitate a child rapist by putting him to death for his crime, but these statutes will not meet the State's duty to protect our children. These statutes do more harm than good. In effectuating the death sentence for child rapists, legislatures are: (1) increasing the likelihood that the child being raped will also be killed; (2) drawing out the psychological effects of rape by extending the child's traumatic experience to a long capital sentencing process; and (3) diminishing the likelihood that these rapes will be reported. Capital child rape statutes are not the most effective way to afford children special protection from harm.

### CONCLUSION

Capital punishment has been an acceptable criminal penalty since the time of the American colonies. Although the Supreme Court first evaluated the disposition of capital punishment in relation to the way a criminal was executed, the Court's, and

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<sup>166</sup> See ANDREA J. SEDLAK & DIANE D. BROADHURST, U.S. DEPT OF HEALTH & HUMAN SERVICES, *THIRD NATIONAL INCIDENCE STUDY OF CHILD ABUSE AND NEGLECT: FINAL REPORT 12-13* (1996).

<sup>167</sup> See Phyllis Coleman, *Creating Therapist—Incest Offender Exception to Mandatory Child Abuse Reporting Statutes—When Psychiatrist Knows Best*, 54 U. CIN. L. REV. 1113, 1116 (1986) (stating when there are no witnesses or the witnesses are family members, there is a reluctance for the victim to testify).

<sup>168</sup> See ELAINE LANDAU, *CHILD ABUSE: AN AMERICAN EPIDEMIC* 72 (1984) (noting that nonaction leads to the sacrificing of their daughters to their husband's desire and whim).

<sup>169</sup> See John Holdridge, *Letters: Capital Rape*, A.B.A. J., Oct. 1997, at 106 (noting that in the *Bethley amici* brief it was argued that “[a]uthorizing the death penalty for this crime will only make the victims and their mothers even less willing to come forward”).



society's, standards have evolved to require proportionality in imposing death. Furthermore, our "evolving standards of decency" have led the Court to conclude that the punishment of death is only deserved where a life has been taken. The bright-line prerequisite for the death penalty to be constitutionally imposed—the victim's death—has been etched into death penalty jurisprudence. Ultimately, the Court has expounded on its resounding pronouncements that death is different. Death *is* different; it is so severe and final, that it is reserved as a punishment only for instances where a life has been taken; only death can bring forth the punishment of death. Consequently, statutes that call for the death penalty for the rape of a child do not stand up to constitutional scrutiny. Although noble in their efforts, legislatures must find other constitutionally effective ways to protect children from their most dangerous enemies—child rapists.

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