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Executing Rapists: A Reluctant Essay on the Ethics of Legal Scholarship

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EXECUTING RAPISTS: A RELUCTANT ESSAY ON THE ETHICS OF LEGAL SCHOLARSHIP

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I. INTRODUCTION

> He didn't clean war up a bit, nor did he add a drop of extra crimson. . . . Like the fellow says, facts are plain unbeatable.[1]

Since Gary Gilmore's state-assisted suicide in 1977,[2] more than 400 people have been executed in America — all for capital murder.[3] More than 3,000 prisoners live on America's death rows, awaiting execution — all for murder.[4] No person has been executed

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This essay is dedicated to the courage of two poets: Samuel Hazo and Edward Kanter.

Socrates, in the dialogue *Laches*, distinguished between "foolish endurance" and "wise endurance"; "only the wise endurance is courage." Socrates, *Laches*, in 1 THE DIALOGUES OF PLATO 55, 68 (B. Jowett trans., 1892). Building upon *Laches*, Tim O'Brien, in his 1969 Vietnam memoir, *If I Die in a Combat Zone*, argues that:

> [m]en must *know* what they do is courageous, they must *know* it is right, and that kind of knowledge is wisdom and nothing else. Which is why I know few brave men. Either they are stupid and do not know what is right. Or they know what is right and cannot bring themselves to do it. . . . Or they know what is right and do it, but do not feel and understand the fear that must be overcome.

TIM O'BRIEN, IF I DIE IN A COMBAT ZONE 137 (1969) (emphasis added).

O'Brien was looking for courage — in himself and those around him — in Vietnam. He was looking for "proper courage," courage "exercised by men who know what they do is proper. Proper courage is wise courage. It's acting wisely, acting wisely when fear would have a man act otherwise. It is the endurance of the soul in spite of fear — wisely." *Id.* at 131. Courage is partly experience and partly reflection of that experience. O'Brien's heroes in Vietnam "had been out long enough to know; experienced and wise . . . . Realistic and able to speak the truth. Conceited? Never. And, most strikingly, each of the heroes *thought* about courage, *cared* about being brave, at least enough to talk about it and wonder to others about it." *Id.* at 138 (emphasis added).

What Plato and Tim O'Brien define, Sam Hazo and Edward Kanter personify. "Inasmuch as you have done to the least of my brothers [and sisters], you have done to me." *Matthew* 25:40.

1. ALLAN GURGANUS, OLDEST LIVING CONFEDERATE WIDOW TELLS ALL 53 (1984) [hereinafter, CONFEDERATE WIDOW].

2. *See generally* NORMAN MAILER, THE EXECUTIONER'S SONG (1977).

3. *See* DEATH ROW, USA (NAACP ed., 1997) (unpublished compilation).

4. *See id.*

in America for a non-homicide offense since 1964.[5] In 1977, the Supreme Court held in *Coker v. Georgia*[6] that death is, as a matter of federal constitutional law, an excessive punishment for the crime of raping an adult woman.

All of this may be about to change.[7] In 1995 Louisiana became the first state post-*Coker* to enact a statute authorizing death for offenders who rape a child under age twelve.[8] Under the statute, Anthony Wilson was charged by grand jury indictment with the aggravated rape of a five year old girl. His motion to quash the indictment, which alleged that the death penalty was not authorized for a crime of rape, was granted by the trial court. The state appealed to the Louisiana Supreme Court.

In a parallel case, Patrick Dewayne Bethley was charged with raping three girls — ages five, seven, and nine — one of whom was his daughter.[9] At the time of the rapes, Bethley allegedly knew he was HIV-positive. Bethley filed a motion to quash the indictment, arguing that the statute authorizing the death penalty was unconstitutional. The trial court granted the defendant's motion, finding that the statute was unconstitutional because the class of death-eligible defendants was not sufficiently narrowed. The state appealed to the Louisiana Supreme Court, which considered the two cases.

The Louisiana Supreme Court held that the death penalty was not an excessive punishment for the crime of rape of a child under the age of twelve, nor was it susceptible to arbitrary and capricious application in the case of the rape of a child under the age of twelve. The court rejected the defendants' challenges, distinguishing *Coker v. Georgia*. According to the *Wilson* court, the plurality in *Coker* "took great pains in referring only to the rape of an adult woman throughout their opinion, leaving open the question of the rape of

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5. *See* WILLIAM BOWERS, LEGAL HOMICIDE app. A at 395 (1984).

6. 433 U.S. 584 (1977).

7. John Q. Barrett, *Death for Child Rapists May Not Save Children*, NAT'L L.J., Aug. 18, 1997, at A21; Michael Higgins, *Is Capital Punishment for Killers Only?*, A.B.A. J., Aug. 1997, at 30.

8. *See* State v. Wilson, 685 So. 2d 1063 (La. 1996).

> LA. R[EV]. S[TAT]. 14:42(C) was amended by [1995 LA. ACTS 397] of the Louisiana Legislature. This amendment began as House Bill 55 which passed in the House of Representatives with a vote of 79 yeas to 22 nays. The Bill was then sent to the Senate which passed it with a vote of 34 yeas to 1 nay. The Bill was then signed into law by Governor Edwards on [June 17, 1995] to become effective on [August 15, 1995].

Id. at 1067 n.5.

9. *See id.* at 1065.

a child."[10] The rape victim in *Coker*, however, was only sixteen-years-old.[11]

To determine whether a penalty is excessive as applied to a particular class of crime, the *Wilson* court reasoned, one must look to the "evolving standards of decency."[12] The Louisiana Supreme Court found that the Louisiana legislature had determined a "standard of decency"[13] by amending the law to permit capital punishment in cases of child rape. "[D]eference must be given to that decision," the court explained.[14]

The court acknowledged that Louisiana was the only state to authorize death for child rapists, but found that "it [did] not do without the suggestion of some trend or suggestion from several other states that their citizens desire the death penalty for such a heinous crime."[15] The court concluded that a state's capital

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10. *Id.* at 1066. The *Wilson* court also observed:

> The various justices, either in the plurality opinion, concurring opinion, or dissenting opinion, refer to "adult woman" fourteen times: (1) Justice White, writing for the plurality, writes: "That question, with respect to rape of an adult woman, is now before us." *Coker*, *supra* at 592 .... (2) Justice White: "we seek guidance ... concerning the acceptability of death as a penalty for rape of an adult woman." *Id.* at 593 .... (3) Justice White: "[Four] of the [sixteen] States did not take the mandatory course and also did not continue rape of an adult woman as a capital offense." *Id.* at 596 .... (4) Justice White: "The upshot is that Georgia is the sole jurisdiction ... that authorizes a sentence of death when the rape victim is an adult woman...." *Id.* at 596 .... (5) Justice White: "but it obviously weighs very heavily on the side of rejecting capital punishment as a suitable penalty for raping an adult woman." *Id.* at 596 .... (6) Justice White: "death is indeed a disproportionate penalty for the crime of raping an adult woman." *Id.* at 597. (7) Justice Powell, concurring in part and dissenting in part, writes: "ordinarily death is disproportionate punishment for the crime of raping an adult woman." *Id.* at 601 .... (8) Chief Justice Burger, in his dissent joined by Justice Rehnquist, writes: "Since the Court now invalidates the death penalty as a sanction for all rapes of adults...." *Id.* at 611 .... (9) Chief Justice Burger: "Georgia is the sole jurisdiction ... that authorizes a sentence of death when the rape victim is an adult woman." *Id.* at 613 .... (10) Chief Justice Burger: "Louisiana and North Carolina have enacted death penalty statutes for adult rape...." *Id.* at 613 .... (11) Chief Justice Burger: "Failure of more States to enact statutes imposing death for rape of an adult woman...." *Id.* at 614 .... (12) Chief Justice Burger: "Georgia has been the only State whose adult rape death penalty statute has not otherwise been invalidated...." *Id.* at 615 .... (13) Chief Justice Burger: "an appropriate punishment for the rape of an adult woman...." *Id.* at 615 .... (14) Chief Justice Burger: "rejecting capital punishment as a suitable penalty for raping an adult woman...." *Id.* at 618 ....

Id. at n.2.

11. *See* Coker v. Georgia, 433 U.S. 584, 607-08 n.2 (1977) (Burger, C.J., dissenting).

12. *Id.* at 1067.

13. *Id.*

14. State v. Wilson, 685 So. 2d 1063, 1067 (La. 1996).

15. *Id.* at 1069. In *Leatherwood v. State*, 548 So. 2d 389 (Miss. 1989), the Mississippi

punishment law is not unconstitutional "simply because that jurisdiction chose to be first."[16]

The *Wilson* court accurately predicted that Louisiana would not long remain alone in making capital punishment an option, even when the crime committed produced no death. The court reasoned: "given the appalling nature of the crime, the severity of the crime inflicted upon the victim, and the harm imposed on society, the death penalty is not an excessive penalty when the victim is a child under the age of twelve years old."[17] This prediction proved prophetic. In 1997, Georgia enacted its own bill authorizing capital punishment for child rape.[18]

The *Wilson* court concluded:

> While Louisiana is the only state that permits the death penalty for the rape of a child less than twelve, it is difficult to believe that it will remain alone in punishing rape by death if the years ahead demonstrate a dramatic reduction in the incidence of child rape, an increase in cooperation by rape victims in the apprehension and prosecution of rapists, and a greater confidence in the role of law on the part of the people. This experience will be a consideration for this and other states' legislatures.

Supreme Court ducked an opportunity to decide whether *Coker* applied to child rapists. Alfred Dale Leatherwood was convicted of raping an 11-year-old girl in 1985 and sentenced to death. On appeal, Leatherwood "argue[d] that imposition of the death penalty for rape violates . . . *Coker* . . . ." *Id.* at 402. The court found that it "need not address the question of whether *Coker* would be applicable to rape of a child . . . because it is clear that (Mississippi statutes) preclude imposition of the death penalty." *Id.* The court ordered a retrial on other grounds.

16. *Wilson*, 685 So. 2d at 1069.

> Louisiana is the only state that has a law in effect that provides for the death penalty for the rape of a child less than twelve. This fact, however, cannot be deemed determinative. The *Coker* court pointed out in its discussion of the history of the death penalty that three states, Florida, Mississippi, and Tennessee authorized the death penalty in rape cases when the victim was a child and the offender was an adult. . . . The Tennessee statute was invalidated in 1977 because the death sentence was mandatory. *Id.* And as previously noted, Florida's and Mississippi's death statutes were invalidated in 1981 and 1989 respectively. The Florida Supreme Court found the *Coker* analysis controlling in its invalidation of their statute, but the Mississippi Supreme Court invalidated the death penalty for the rape of a child without ever passing on the constitutionality of the law. Even though these states' statutes were subsequently invalidated, the simple fact that they enacted such statutes since the *Furman* decision may suggest the beginning of a trend and public opinion favoring such penalties — an evolution of a standard to deal with this heinous crime.

Id. at 1068 (footnotes omitted).

17. *Id.* at 1070.

18. *See* Higgins, *supra* note 7.

> Our holding today permits the death penalty without a death actually occurring. In reaching this conclusion, we give great deference to our legislature's determination of the appropriateness of the penalty. This is not to say, however, that the legislature has free reign in proscribing penalties. They must still conform to the mandates of the Eighth Amendment and Article I, § 20 of the Louisiana Constitution, and they are still subject to judicial review by the courts. We hold only that in the case of the rape of a child under the age of twelve, the death penalty is not an excessive punishment nor is it susceptible of being applied arbitrarily and capriciously.[19]

On June 2, 1997, the United States Supreme Court denied Wilson's and Bethley's petitions for writ of certiorari.[20] Accompanying the denial was a statement by Justice Stevens, joined by Justices Ginsburg and Breyer, reiterating that a decision to deny a petition for writ of certiorari "does not in any sense constitute a ruling on the merits of the case in which the writ is sought."[21] Stevens found it "worth noting the existence of an arguable jurisdictional bar"[22] to review by the high court — the fact that neither defendant had yet been convicted of any crime.

According to an August 18, 1997 estimate, in addition to those two accused capital rapists now facing trial, "about [thirty] other pending Louisiana rape cases, may now go to trial and produce death sentences."[23] Louisiana's capital statute for child rapists is a "harbinger of new efforts."[24] In April 1997, Georgia passed a statute similar to Louisiana's.[25] "A Montana state senator

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19. *Wilson*, 685 So. 2d. at 1073. Chief Justice Calogero dissented, finding the statute facially unconstitutional under the Eighth Amendment.

20. *See* Bethley v. Louisana, 117 S. Ct. 2425 (1997).

21. *Id.* at 2425.

22. *Id.*

23. Barrett, *supra* note 7.

24. *Id.*

25. *See* Higgins, *supra* note 7. This article prompted two fascinating letters.

> I was lead counsel in *State of Louisiana v. Bethley*, in which the state supreme court upheld the death penalty for statutory rape ("Is Capital Punishment for Killers Only?" August, page 30). Had your reporter called me, he would have learned:
>
> • Women's and victim's rights groups filed an amici curiae brief in support of the defendant. Statutory rape is vastly underreported, they explained, in large part because about 95 percent of child victims are attacked by family or close family friends, and the overwhelming majority are attacked by their father or stepfather. "[A]uthorizing the death penalty for this crime will only make victims and their mothers even less willing to come forward," amici argued.

introduced death penalty legislation for second convictions of rape involving serious bodily injury. Pennsylvania's Republican party seeks death penalty legislation for repeated sexual assaults on children."[26]

Once these new statutes produce actual death sentences, the Supreme Court will be confronted with the constitutional question it reserved in *Coker*: assuming that the Constitution forbids the executions of rapists of adult women (as *Coker* held), does the

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Amici also stated that capital punishment would intensify the already-substantial fear, stress and guilt of victims who agree to assist law enforcement.

• The racial issue is one of the key ones raised by Louisiana's law. All statistical analyses of pre-*Furman* rape cases found no correlation between victim's age and the likelihood of a defendant execution. The critical variables were the victim's and defendant's races. A recent study shows Louisiana executed 14 rape defendants since 1941: All were black, and 13 of the victims were white. Furthermore, of the three cases known to involve victims under age 18, all involved black defendants and white victims.

John Holdridge
New Orleans

To say I enthusiastically join District Attorney Jerry Jones' opinion that *Coker v. Georgia* was wrongly decided would be stating my opinion languidly.

The facts are curdling. Coker, who was convicted in three rapes, first raped and stabbed to death a young woman. Eight months later he raped, stripped and clubbed a 16-year-old, leaving her for dead in the woods. For the conviction upon which the plurality based its wrong-headed decision, Coker invaded a home, bound a young husband, stripped a 16-year-old bride, held a butcher knife to her neck and raped her repeatedly in front of her husband. That, the Y chromosomes on the *Coker* Court blandly described, was "moderately brutal," not worthy of the death penalty.

I was reminded of this attitude by a male colleague's lunchtime response to reports of a molestation/rape that began when a girl was [five] and continued into her mid-teens. Discussing the case, he observed, "I hear it's kinda hard for women to get over that. Pass the butter, please."

That and similar comments lead me to conclude that, in general, most men do not understand the horror that sexual assault injects into women's lives. Yet, upon hearing of a man's rape of a boy, most men immediately, on a gut level, identify with the victim's horror. Perhaps by binding the psychic images of male-male rape to male-female rape, female victims may achieve a greater degree of justice and stronger penalties against sexual predators.

Unfortunately, but perhaps appropriately, Lady Justice has been bound, gagged and blindfolded to the atrocity, all the while having a testosterone-laced voice whisper in her ear that the crime is only moderately brutal. I see no time, even on the distant horizon, when she can unblind herself and give voice to what her own eyes might see.

Ronda R. Storms
Tampa, Fla.

Letter to the Editor, A.B.A. J., Oct. 1997, at 10.

26. Barrett, *supra* note 7.

Constitution also forbid the executions of rapists of children? In other words, should *Coker* be extended to cover child rapists?[27]

The question presented by the new child rape statutes — whether *Coker* should be extended to include this class of offenses — is important and interesting in its own right.[28] I agree with Professor John Barrett's suggestion that a principled line could be crafted between rapists of children and rapists of adults. The "spate of legislation providing for death penalties in child rape cases may thus help to establish its constitutionality."[29] Further, "[Forty-five] states and the federal government [have] acted to protect children from nearby convicted sex offenders by enacting 'Megan's Laws' that require community notification. The next step could be death penalty laws that try to eliminate the possibility that convicted sex offenders will return to the community."[30] Further, "death sentences under the new statutes would not be vulnerable to arguments (raised in *Coker* by Ms. Ginsburg in a brief for the ACLU) that they are vestiges of viewing rape victims as male

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27. One state supreme court ruled, in the years following *Coker* and basing its reasoning on *Coker*, that when no life is taken, "a sentence of death is grossly disproportionate and excessive punishment for the crime of sexual assault and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment." Buford v. State, 403 So. 2d 943, 951 (Fla. 1981); *accord* Nussdorf v. State, 495 So. 2d 819, 820 (Fla. Dist. Ct. App. 1986); Perez v. State, 545 So. 2d 1357, 1359 (Fla. 1989) (Overton, J., dissenting). The statute invalidated in *Buford* authorized the death penalty for sexual assault on a person age 11 or younger. "After *Buford*, death was no longer a possible penalty in Florida for sexual battery [i.e., rape], regardless of the age of the victim." Cooper v. State, 453 So. 2d 67, 67 (Fla. Dist. Ct. App. 1984).

28. The Louisiana Supreme Court in *Wilson* argued:

> Rape of a child less than twelve years of age is like no other crime. Since children cannot protect themselves, the State is given the responsibility to protect them. Children are a class of people that need special protection; they are particularly vulnerable since they are not mature enough nor capable of defending themselves. A "maturing society", through its legislature has recognized the degradation and devastation of child rape, and the permeation of harm resulting to victims of rape in this age category. The damage a child suffers as a result of rape is devastating to the child as well as to the community. As noted previously, in determining whether a penalty is excessive, the Supreme Court has declared that we should take into account the "evolving standards of decency," and in making this determination, the courts should not look to their own subjective conceptions, but should look instead to the conceptions of modern American society as reflected by objective evidence. As evidence of society's attitudes, we look to the judgment of the state legislators, who are representatives of society.

State v. Wilson, 685 So. 2d 1063, 1067 (La. 1996).

29. Barrett, *supra* note 7.

30. *Id.*

property."[31] The Supreme Court does have some experience drawing age-based lines in cases involving capital murder.[32]

The sixteen-year-old rape victim in *Coker* was, under Georgia law, a minor. In Georgia, a minor is defined as a person under age eighteen unless otherwise provided by statute.[33] A person under age eighteen cannot vote in any Georgia state-wide primary or general election,[34] or in any municipal primary or election;[35] cannot serve as a grand juror;[36] cannot buy or possess alcoholic beverages; [37] cannot play bingo[38] or assist in the conduct of bingo;[39]

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31. *Id.* As in *Coker*, however, several women's groups in the Louisiana cases filed *amici* briefs opposing capital punishment in those cases. *See, Letter to the Editor*, *supra* note 25.

32. *Compare* Thompson v. Oklahoma, 487 U.S. 815 (1988) *with* Stanford v. Kentucky, 492 U.S. 361 (1989). In an *amici curiae* brief in *Thompson*, James Coleman and I argued that the Constitution sets a minimum age of 18 for eligibility for execution. *See generally* Brief of the National Legal Aid Association and Defender Association, the National Association of Criminal Defense Lawyers, and the American Jewish Committee as Amici Curiae in Support of Petitioner, Thompson v. Oklahoma, 487 U.S. 815 (1988) (No. 86-6169). [hereinafter National Legal Aid Brief].

33. *See* GA. CODE ANN. § 39-1-1 (1995).

34. *See* § 21-2-219 (1993).

35. *See* § 21-3-125 (1993).

36. *See* § 15-12-60(a) (1994).

37. *See* § 3-3-23(a)(2) (1990) (stating that a person must be 21-years-old to buy alcohol). Georgia's statutory minimum drinking age reflects a national trend to *raise* the drinking age from 18 to 21. In 1984 Congress overwhelmingly passed the National Minimum Drinking Age Act withholding federal highway funds from states that failed to raise their drinking age to 21. The House of Representatives agreed to the measure by unanimous consent without reported debate.

The focus of the Senate debate was that teenagers should be singled out for special treatment because:

> [T]he facts speak for themselves. Teenagers comprise only [eight] percent of the population, drive only [six] percent of all highway miles, yet are involved in 15% of all alcohol-related accidents. Studies by the National Highway Traffic Safety Administration have demonstrated that the rate of alcohol-related crashes declined dramatically, an average 28%, just after the age of 21.

130 CONG. REC. 18,676 (1984) (remarks by Sen. Mattingly).

> As a rule, young people under the age of 21 are, generally, still inexperienced, both as drinkers and drivers. The consequences of this inexperience are often reflected in statistics about highway death and accidents. It is our responsibility to protect these drivers from these consequences . . . [and from] youthful recklessness.

Id. at 18,680 (remarks by Sen. Byrd). "Statistics indicate that we have to do something to help this particular age group of our society against their own actions and misconduct." *Id.* at 18,663 (remarks by Sen. Exon). *See also id.* at 18,670-71 (remarks by Sen. Durenberger). An editorial from the *Christian Science Monitor*, read into the *Congressional Record*, appeared to capture the tone of the proponents of the national minimum drinking age: "Although many young people are mature in outlook, large numbers of others are not. This lack of maturity leads some to use bad judgment by driving while intoxicated; in another two or three years they would be more likely to use better judgment." *Id.* at 18,642.

38. *See* § 16-12-58 (1996).

39. *See* § 16-12-58 (1996).

cannot obtain a driver's license without parental consent;[40] cannot obtain a license to carry a pistol or revolver[41] or to sell firearms;[42] cannot consent to most forms of medical treatment;[43] cannot refuse medical treatment;[44] cannot donate any part of his or her body as a gift to take effect upon death;[45] cannot serve as a notary public,[46] court reporter,[47] clerk,[48] district attorney,[49] judge,[50] county administra-tor,[51] or state adjutant general;[52] cannot hold public office;[53] cannot be licensed or employed as a peace officer,[54] state trooper,[55] narcotics agent,[56] firefighter,[57] pharmacist,[58] dietician,[59] nursing home administrator,[60] dispensing optician,[61] private detective,[62] or assistant employed by a private detective,[63] real estate sales-person[64] or broker;[65] cannot be an incorporator of a bank or trust company;[66] cannot be a director of a business corporation;[67] and cannot be a director of a nonprofit corporation.[68]

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40. *See* § 40-5-26(a) (1997); *see also* GA. CODE ANN. § 40-5-26(b) (1997) (stating that the driver's license of any person under age 21 shall be readily distinguishable in appearance from the license of persons over age 21).

41. *See* § 16-11-129 (1996) (stating licensee must be at least 21-years-old).

42. *See* § 43-16-3 (1994) (requiring seller to be 21-years-old).

43. *See* § 31-9-2(a)(1) (1996); *c.f.* § 31-9-2(a)(3), (5) (1985) (stating, for example, that any married person may consent for himself or his spouse; female may consent for herself when given in connection with pregnancy or the prevention thereof or childbirth).

44. *See* § 31-9-7 (1996).

45. *See* § 44-5-143(a) (1991).

46. *See* § 45-17-2(a) (1990).

47. *See* § 15-14-29 (1994).

48. *See* § 15-60-50 (b)(1)(D) (1994) (requiring clerk to be 25-years-old).

49. *See* § 15-18-3 (1994) (requiring district attorney to be 25-years-old).

50. *See* §§ 15-6-4, 15-9-4(b) (1994) (requiring judge to be at least 30-years-old).

51. *See* § 53-6-91(a) (1997) (stating that court administrator must be 21-years-old).

52. *See* § 38-2-150 (1995) (stating that adjuntant general must be 30-years-old).

53. *See* § 45-2-1(1) (1990) (stating that a person must be 21-years-old to hold public office, except where local ordinance provides for age 18 to hold county or municipal offices, except such offices of a judicial nature).

54. *See* § 35-8-8 (1993).

55. *See* § 35-2-43 (1993) (stating that a state trooper must be 21-years-old).

56. *See* § 35-3-9(e) (1993).

57. *See* § 25-4-89(a)(1) (1997).

58. *See* § 26-4-72(a)(1) (1997).

59. *See* § 43-11A-9 (1994).

60. *See* § 43-27-6 (1994) (requiring administrator to be 21-years-old).

61. *See* § 43-29-7 (1994).

62. *See* § 43-38-6(b)(1) (1994).

63. *See* § 43-38-7(c)(1) (1994).

64. *See* § 43-40-8(a)(1) (1994).

65. *See* § 43-40-8(b)(1) (1994).

66. *See* § 7-1-390 (1994).

67. *See* 14-2-802 (1994).

68. *See* § 14-3-802 (1994).

Georgia is not unique. Minority status, a designation of individuals younger than age eighteen, confers a host of statutory disabilities.[69] Congress and the states selected eighteen-years as the government voting age in their enactment and ratification of the Twenty-sixth Amendment to the Constitution. Following extensive hearings, both state and federal legislatures agreed to give constitutional significance to age eighteen as the time when young people should first participate in the most basic civic responsibility of adults in a democracy. Eighteen also is the minimum age at which the armed services may draft an individual as well as the minimum age at which a person may enlist without parental consent.

In most states and for most purposes, a "minor" means one below age eighteen:[70]

> All jurisdictions set the age of majority at age [eighteen] or older. Forty-four jurisdictions set age [eighteen] as the age of majority; two jurisdictions set the age of [twenty-one], three set it at [nineteen], and two do not set a uniform age of majority. . . . Forty-five jurisdictions require jurors to be [eighteen] years or older, while three require jurors to be at least [nineteen] years and three require jurors to be at least [twenty-one]. . . . No State has lowered its voting age below [eighteen]. . . . All jurisdictions but three require unemancipated minors to be [eighteen] years old to marry without parental consent. In one jurisdiction, the minimum age is [nineteen]; in one jurisdiction the minimum age is [sixteen]; in another jurisdiction, females may marry at age [fifteen] without parental consent. . . . Thirty-seven jurisdictions establish [eighteen] as the age of consent for most forms of non-emergency medical treatment; one jurisdiction puts the age at [seventeen], one jurisdiction puts the age at [sixteen], one sets the age at [fifteen], one jurisdiction puts the age at [fourteen], two permit treatment if the minor is able to understand the decision, and eight jurisdictions have no legislation in this area. . . . Thirty-four jurisdictions require a person to be age [eighteen] to receive a driver's

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69. *See generally* Lawrence A. Vanore, Note, *The Decency of Capital Punishment for Minors: Contemporary Standards and the Dignity of Juveniles*, 61 IND. L.J. 757, 775-80 (1986). These legal disabilities are not without exceptions. The "emancipation" of a minor — by marriage or enlistment in the armed services — may free a minor from the legal disabilities prior to the actual date of his or her majority. *E.g.*, CAL. CIV. CODE § 62 (West 1982); UTAH CODE ANN. § 15-2-1 (1996). Parental consent, however, is required for minors to marry. The "mature minor" notion also permits a child to consent to medical treatment if he or she is capable of appreciating its nature and consequences. *E.g.*, ARK. CODE. ANN. § 20-9-602(7) (Michie 1987). Few jurisdictions, however, recognize this concept.

70. *See* National Legal Aid Brief, *supra* note 32, at 8.

> license without parental consent; four jurisdictions set the age at [seventeen], while thirteen set it at [sixteen]. . . . In forty-one jurisdictions, a person must be age [eighteen] to purchase pornographic materials; five jurisdictions set the age at [seventeen], one jurisdiction sets it at [sixteen], one sets it at [nineteen], one has simply outlawed obscenity by statute, one has no specified minimum age, and one jurisdiction has no legislation in this area. . . . Of the thirty-nine jurisdictions which permit gambling, thirty-one set the minimum age at [eighteen], four set it at [twenty-one], one sets it at [nineteen], one at [seventeen], and two at [sixteen]. . . . Of the twenty-two jurisdictions which set a minimum age for admission to pool halls, eighteen jurisdictions put the age at [eighteen], three set the age at [sixteen], and one puts it at [nineteen]. . . . Of the thirty jurisdictions which set a minimum age for the right to pawn property or to sell to junk or precious metal dealers, twenty-seven set the age at [eighteen], while three set the age at [sixteen].[71]

America's feeling toward child rapists is neither subtle nor difficult to ascertain: we hate them. If the law will not punish them severely enough for our satisfaction, then individual citizens might well take matters into their own hands — and be hailed as heroes for their vigilante actions. (Even on death row, pedophiles are despised).[72] If one social goal of capital punishment is to infuse the citizenry with the sense that justice is dispensed to those criminals who inspire our society's greatest outrage — with the corollary idea that by imposing severe enough punishments, members of the law-abiding majority population will feel less inclined to resort to vigilante justice — then executing child rapists might further this revenge-utilitarian goal of the death penalty.[73]

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71. *Id.* at 8-9.

72. *See* DAVE VON DREHLE, AMONG THE LOWEST OF THE DEAD 48 (1995) (noting how Arthur Frederick Goode was despised on death row).

73. For example, on September 8, 1997, a front-page news story in the *Boston Globe*, titled *Anger at Molesters, Courts Win Sympathy for Vigilantes*, by Michael Grunwald, reported:

> DELAWARE, Ohio — The way Doc Bradley sees it, Rodney Hosler got lucky.
>
> Sure, Hosler was abducted, tortured, and sodomized with a cucumber by his wife, her mother, and her aunt. Sure, the woman scrawled "I am a child molester" all over his body, then dumped him in his hometown, naked except for a pink-and-green Minnie Mouse blanket.
>
> But at least Hosler is alive. If he ever returns to Bradley's bar, now that people know he abused his [five]-year-old stepdaughter, he might not be as fortunate.

I believe, however, that these cases will also present the Court with far greater constitutional conundrums. Has the proportionality reasoning of *Coker* withstood the test of time? Has American culture *circa* 1997 rejected the idea that *any* rape of an adult woman — no matter how aggravated, and no matter what the circumstances — can *never*, as a matter of federal constitutional law, be a crime sufficiently heinous, atrocious and cruel to warrant death as an appropriate societal response? Should *Coker v. Georgia* be overruled?

II. COKER V. GEORGIA: THE CASE, ITS ANTECEDENTS, AND ITS SUCCESSORS

A. *Proportionality Articulated: The Road to* Coker v. Georgia

> But the odd part, I never want to quit at least *expecting* fairness. Even after all that's snagged me and mine, I want the lack of "fair" to always shock me.[74]

The Eighth Amendment to the United States Constitution prohibits "cruel and unusual punishment," or, as the Court has put it, forbids punishments that violate "the evolving standards of decency that mark the progress of a maturing society."[75] In the capital punishment context, the Eighth Amendment imposes both procedural and substantive limits on the government's freedom to decide who dies. Procedurally, the Constitution requires that the death decision be lined with procedural safeguards to enhance the

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> "Those women are heroes in this town," said Bradley, a bushy-bearded grandfather who used to serve drinks to Hosler. "The only thing is, they should've left their cucumber home and used a shotgun instead."
>
> It sounds like a David Lynch version of "Thelma and Louise," but Ohio's so-called cucumber case is also a modern morality tale, a graphic display of America's growing frustration with pedophiles. People are losing faith in the justice system's ability to stop sexual predators from repeating their crimes, so they can identify with these angry women who tried to do it themselves.
>
> Hosler, 27, had to serve just 16 months in jail after pleading guilty to "gross sexual imposition" in 1995. The overwhelming sentiment here is that he got a more appropriate eye-for-an-eye punishment on July 26 from his wife, Jewel; her mother, Mary Franks; and her aunt, Vickie Coulter.
>
> "Those girls gave Rodney exactly what he deserved," said Lisa Gale, Hosler's neighbor and co-worker. "Now he knows how it feels to be molested."

Michael Grunwald, *Anger at Molesters, Courts Win Sympathy for Vigilantes*, BOSTON GLOBE, Sept. 8, 1997, at A1.

74. CONFEDERATE WIDOW, *supra* note 1, at 19.

75. Trop v. Dullus, 356 U.S. 86, 101 (1958).

reliability of the capital punishment selection process. Substantively, the Constitution excludes certain classes of people or crimes from death eligibility. For example, execution of children or pickpockets would be disproportionate and therefore unconstitutional.

First, however, the Court had to decide whether execution of *any* citizen for *any* crime was disproportionate — whether capital punishment itself was "cruel or unusual" because it offended the "evolving standards of decency that mark the progress of a maturing society."[76]

The United States Supreme Court's modern death penalty jurisprudence began with *McGautha v. California*[77] in 1971, although pressure for a ruling on the constitutionality of the penalty had been building for at least a decade.[78] In that case the defendant, Dennis McGautha, argued that the due process clause of the Fourteenth Amendment mandates standards to limit a capital sentencer's discretion on the penalty issue.[79] The Court rejected McGautha's challenge, in part because development of such standards would be impossible.[80] Justice Harlan, writing for the majority, reasoned that "to identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability."[81] Justice Harlan concluded that the "infinite variety of cases and facets to each case would make general standards either meaningless 'boiler plate' or a statement of the obvious that no jury would need."[82]

A year later, in *Furman v. Georgia*, the Court held that the Eighth Amendment forbade infliction of the death penalty under statutes which leave a jury with undirected discretion over the death decision.[83] The *Furman* holding, which resulted in vacated death sentences for all 629 persons on death row nationally at the time of the decision,[84] was handed down in a short per curiam

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76. *Id.*

77. 402 U.S. 183 (1971).

78. *See generally* MICHAEL MELTSNER, CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT (1973) (tracing pre-*Furman* litigation strategy of death penalty abolitionists).

79. *See McGautha*, 402 U.S. at 183.

80. *See id.* at 196.

81. 402 U.S. at 204.

82. *Id.* at 208.

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

84. *See* Jack Greenberg, *Capital Punishment as a System*, 91 YALE L.J. 908, 915 (1982).

opinion that stated, without elaboration, that "the imposition and carrying out of the death penalty in these cases [before the Court] constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments."[85] Each of the nine Justices wrote separately, and no Justice in the five-person majority joined any other.[86] The individual opinions suggest, however, that the central concern of the three crucial Justices was that the statutes at issue in *Furman* lacked sentencing standards. Justice Douglas wrote that "we deal with a system of law and of justice that leaves to the uncontrolled discretion of judges or juries the determination whether defendants committing these crimes should die or be imprisoned."[87] Given this absence of guidance, it is not surprising that the penalty is applied "selectively to minorities whose numbers are few, who are outcasts of society, and who are unpopular, but whom society is willing to see suffer though it would not countenance general application of the same penalty across the board."[88] Justice Stewart also stressed the randomness of the penalty:

> These death sentences are cruel and unusual in the same way that being struck by lightening is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed.[89]

Justice White reached the same conclusion based on his experience as a Justice.[90] Because Justice Brennan[91] and Justice Marshall[92] would have declared the death penalty unconstitutional per se, the "holding" of the case must be found in the opinions by Justices Douglas, Stewart, and White. The Court has in subsequent opinions noted that:

> a fair statement of the consensus expressed by the Court in *Furman* is that "where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably

85. 408 U.S. at 239-40.

86. *See* Daniel D. Polsby, *The Death of Capital Punishment?* Furman v. Georgia, 1972 SUP. CT. REV. 1 (analyzing separate opinions).

87. 408 U.S. at 253 (Douglas, J., concurring).

88. *Id.* at 245.

89. *Id.* at 309-10 (Stewart, J., concurring).

90. *See id.* at 313-14 (White, J., concurring).

91. *See id.* at 257-306.

92. *See id.* at 314-71.

> directed and limited so as to minimize the risk of wholly arbitrary and capricious action."[93]

State legislatures, confronted with *McGautha's* statement that the formulation of capital sentencing standards was impossible and *Furman's* statement that unbridled sentencing discretion violated the Eighth Amendment,[94] set about redrafting their death penalty statutes to conform with the Constitution. Florida was the first state to do so,[95] and was later followed by Georgia. By 1976, thirty-six jurisdictions had re-instituted the death penalty.[96] The Florida and Georgia statutes were similar. Both were "guided discretion" statutes, designed to channel the sentencer's discretion by specifying aggravating and mitigating factors to be weighed in deciding who dies. Most of the listed aggravating circumstances referred to objectively ascertainable facts: whether the crime was committed for pecuniary gain; whether the defendant was under sentence of imprisonment at the time of the offense; whether a defendant had a significant history of prior criminal history; and whether the defendant was previously convicted of a felony.[97]

In *Gregg v. Georgia*, in 1976, the Court held the death penalty was not excessive or disproportionate punishment as applied to the crime of deliberate murder.[98] In providing analytical content to the facially vague phrase "the evolving standards of decency that mark the progress of a maturing society,"[99] the court in *Gregg* crafted a two-prong test. The first prong was an attempt to identify the objective indicia of the evolving standards. These objective indicia involved examining societal values as reflected in legislative

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93. Zant v. Stephens, 103 S. Ct. 2733, 2741 (1983) (quoting Gregg v. Georgia, 428 U.S. 153, 189 (1976)).

94. The tension between *McGautha* and *Furman* was noted by the dissenters in *Furman*. *See* 408 U.S. at 399 (Burger, C.J., dissenting); *id.* at 427 n.11 (Powell, J., dissenting). The tension was also noted by several commentators. *See, e.g.*, Polsby, *supra* note 86 at 1-4; Margaret J. Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143, 1143-49 (1980); Ernest A. Renda, Note, *The Bitter Fruit of* McGautha*: Eddings v. Oklahoma and the Need for Weighing Method Articulation in Capital Sentencing*, 20 AM. CRIM. L. REV. 63, 63-64 (1982). *See generally* Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305.

95. *See generally* Charles H. Ehrhardt & L. Harold Levinson, *Florida's Legislative Response to* Furman*: An Exercise in Futility?*, 64 J. CRIM. L. & CRIMINOLOGY 10 (1973); Tim Thornton, Note, *Florida's Legislative and Judicial Response to* Furman v. Georgia*: An Analysis and Criticism*, 2 FLA. ST. U. L. REV. 108 (1974).

96. *See Gregg*, 428 U.S. at 179-80 n.23.

97. *Compare Gregg*, 428 U.S. at 166 n.9, *with* Proffitt v. Florida, 428 U.S. 242, 249 n.6 (1976).

98. *See* 428 U.S. 153, 182-83, 186-87 (1976).

99. Trop v. Dullus, 356 U.S. 86, 101 (1958).

enactments, jury decisions, and lower court rulings.[100] The second prong of *Gregg*'s proportionality analysis was subjective. It required the justices to determine whether the punishment at issue served legitimate goals of punishment — principally retribution and deterrence.[101]

Applying its two-prong test to the facts of *Gregg*, a majority of the court held that capital punishment for the crime of intentional murder found wide support among the objective indicia; it also served the legitimate penological goals of retribution and deterrence. Thus, capital punishment for murder was not disproportionate. It was constitutional, because it was proportionate.

One year after *Gregg*, the court applied the same two-prong proportionality test to the crime of rape. In *Coker v. Georgia*, the court held that execution for the "nonaggravated" rape of a sixteen-year-old adult woman was unconstitutionally disproportionate.[102]

B. Proportionality Reaffirmed: Coker v. Georgia

> Anyhow, Marsden's losing Ned, his seeing what followed, it changed so much in him. Even war's ending didn't switch that around. When your appendix is gone, you've still got the scar proving right where knives went in to find it. Something was taken clear out of the child.[103]

If capital punishment for aggravated rape is ever appropriate, Ehrlich Anthony Coker and his history of sexual terrorism seem to make Coker a prime candidate. On December 5, 1971, Coker raped and stabbed a young woman to death. Eight months later, he kidnaped a sixteen-year-old girl, raped her twice, stripped her, beat her with a club, and dragged her to a wooded area where he left her for dead. He was caught, plead guilty to these offenses, and received three life terms, two twenty-year terms, and one eight-year term. These sentences were to run consecutively rather than concurrently.

Approximately one and a half years later, on September 2, 1974, Coker and two other inmates escaped from the maximum security prison where they were being held. At approximately eleven o'clock that night, Coker entered the house of Allen and Elnita Carver, waving a three-foot-long board over his head and

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100. *See Gregg*, 428 U.S. at 173.
101. *See id.* at 183.
102. 433 U.S. 584 (1976).
103. CONFEDERATE WIDOW, *supra* note 1, at 19.

threatening the couple. The Carvers were sixteen-year-olds. Mrs. Carver had returned from the hospital after giving birth to her first child only three weeks before. Coker forced Mrs. Carver to tie her husband's hands and feet together and, after that was done, he tied Mr. Carver to a shower rod in the bathroom. Coker then took Mr. Carver's wallet and obtained a four-inch knife from the kitchen. Putting a gag in Mr. Carver's mouth, Coker proceeded to rape Mrs. Carver — in view of her husband. After raping her, Coker held the knife to her and threatened to kill her if the police followed. With Mrs. Carver beside him, Coker drove off in the Carvers' car. Mr. Carver managed to free himself and call the police. A police search ensued and Coker was found approximately ten minutes later.[104]

Coker was charged with armed robbery, rape, kidnaping, motor vehicle theft, and escape. He was sentenced to death on the charge of rape, life imprisonment for armed robbery, twenty years imprisonment for kidnaping, seven years for motor vehicle theft, and five years for escape. The Georgia Supreme Court affirmed the conviction and the sentence of death.[105]

The United States Supreme Court then heard the case to determine whether a sentence of death for rape is a disproportionate penalty.[106] The Supreme Court reversed the holding of the Georgia Supreme Court. The Court, went even further, however, holding that the death penalty for rape is violative of the Eighth Amendment's cruel and unusual punishment clause in that it is a grossly disproportionate and excessive punishment for the crime of raping an adult woman. The *Coker* plurality discusses rape as a serious crime, finding it:

> highly reprehensible, both in a moral sense and in its almost total contempt for the personal integrity and autonomy of the female victim. Short of homicide, it is the ultimate violation of self . . . . Rape is without doubt deserving of serious punishment; but in terms of moral depravity and of the injury to the person and to the public, it does not compare with murder, which does involve the unjustified taking of human life. Although it may be accompanied by another crime, rape by definition does not include the death or even the serious injury to another person. The murderer kills; the rapist, if no more than that, does not. Life is over for the victim of the murderer;

104. *See* 433 U.S. 584, 587 (1976) (describing the facts of the case).

105. *See id.*

106. *See generally* David J. Karp, Note, Coker v. Georgia*: Disproportionate Punishment and the Death Penalty for Rape*, 78 COLUM. L. REV. 1714 (1978); Note, *The Death Penalty for Rape*, 38 LA. L. REV. 868 (1978).

> for the rape victim, life may not be nearly so happy as it was, but it is not over and normally is not beyond repair. 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.[107]

Reaffirming, clarifying, and applying *Gregg*'s two-prong proportionality analysis, a plurality of the Court in *Coker* held that capital punishment was a disproportionate penalty for the rape of an adult woman. Explaining the objective first prong, the *Coker* plurality explained that line drawing here should be "informed by objective factors to the maximum possible extent."[108] Objective indicia such as legislative enactments and jury verdicts were the beginning of proportionality analysis, but they were not the end. "[T]he Constitution contemplates that in the end our own [the Court's] judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment."[109] Hence the importance of the second prong. The court's independent judgment is informed by "the two principal social purposes" of the death penalty: retribution and deterrence.[110]

In *Coker*, the Supreme Court held that the death penalty was disproportionate for the crime of rape of a sixteen-year-old "adult" woman. The *Coker* plurality acknowledged that the death penalty might legitimately serve the goals of retribution and deterrence. Based on a review of objective factors such as jury decisions and state statutes, the Court held, however, 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."[111]

C. *Proportionality Post*-Coker

> When a beautiful house burns, remember its last great party.[112]

While the proportionality cases immediately following *Coker* reaffirmed the two-prong test of *Coker* and *Gregg*,[113] the most recent Supreme Court cases have destabilized the doctrinal foundations of

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107. Coker v. Georgia, 433 U.S. 584, 597-98 (1977).
108. *Id.* at 592.
109. *Id.* at 597; *accord* Gregg v. Georgia, 428 U.S. 153, 182-83 (1976).
110. *Gregg*, 428 U.S. at 183; *see* Enmund v. Florida, 458 U.S. 782, 798-99 (1982).
111. *Coker*, 433 U.S. at 598.
112. CONFEDERATE WIDOW, *supra* note 1, at 231.
113. *See Enmund*, 458 U.S. at 798-99.

the two-prong proportionality analysis articulated in *Gregg,* and have reaffirmed and refined the analysis in *Coker.*[114]

In 1982, the Court decided *Enmund v. Florida,*[115] where the defendant, Enmund, had been the driver of the getaway car in the robbery and murder of two elderly people. Enmund's accomplices robbed and killed the elderly couple during the robbery, while Enmund waited in the getaway car.[116] The facts indicated that the killings were not intended at the outset of the robbery, but the trial court instructed the jury that Enmund could be found guilty of first degree murder based upon the felony murder statute of Florida at that time.[117] The jury convicted Enmund of first degree murder and sentenced him to death.[118]

Upon review, the Florida Supreme Court affirmed Enmund's conviction and death sentence,[119] finding that because Enmund was a major participant in the felony, he was still responsible for the death of the elderly couple.[120]

Certiorari was granted by the United States Supreme Court to decide whether the imposition of the death penalty upon a non-triggerman accomplice to a felony murder violated the Eighth Amendment prohibition against cruel and unusual punishment.[121] In a majority opinion written by Justice White,[122] the Court reversed the Florida Supreme Court, holding that without a showing that the defendant killed, attempted to kill, or intended to kill, the death penalty was disproportionate and therefore unconstitutional.[123]

The Court in *Enmund* utilized the proportionality review of *Gregg*[124] and *Coker*[125] by reviewing state statutes which provided an objective indication of public attitudes towards the imposition of the death penalty on a defendant like Enmund.[126] After reviewing the

114. Justice Scalia has argued that the Eighth Amendment does not require proportional punishments. *See* Harmelin v. Michigan, 501 U.S. 957, 961-95 (1991).

115. 458 U.S. 782 (1982).

116. *See id.* at 783.

117. *See id.* at 785.

118. *See id.*

119. *See* Enmund v. State, 399 So. 2d 1362, 1373 (Fla. 1981).

120. *See id.* at 1369-70.

121. *See Enmund,* 458 U.S. at 797.

122. *See id.* Justice White was joined by Justices Brennan, Marshall, Blackmun, and Stevens. Justice O'Connor wrote a dissenting opinion, and was joined by Chief Justice Burger, Justices Powell and Rehnquist. *Id.* at 801 (O'Connor, J., dissenting).

123. *See id.* at 797.

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

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

126. *See Enmund,* 458 U.S. at 789-93.

state statutes, the Court concluded that only eight states would allow the imposition of the death penalty on such a defendant.[127] The current legislative judgment, therefore, seemed to reject capital punishment for Enmund's crime.[128]

This evaluation of the current legislative judgment highlighted what has continued to be a point of contention between the two opposing sides on the United States Supreme Court. Depending upon how one characterizes the defendant's culpable mental state, as well as the defendant's degree of participation, one can assemble or disassemble a configuration of states where the defendant may or may not be subject to capital punishment.[129]

Justice O'Connor concluded differently in her dissent, stating that even without a showing of intent, twenty-three states would impose the death penalty for a crime such as Enmund's.[130] Justice O'Connor arrived at this number by taking Enmund's degree of participation into account, as well as a possible finding that Enmund had shown "extreme indifference to human life,"[131] which would therefore trigger additional statutes not included by the majority.[132]

Justice White, for the majority, surveyed jury decisions for additional objective indicia of public attitudes about imposing capital punishment on a defendant like Enmund.[133] The result showed that out of 362 cases since 1954, juries had imposed death upon a non-triggerman felony murder accomplice only six times.[134] In addition, the Court found that for the previous twenty-five years, no one convicted of felony murder who had not killed, attempted to kill, or intended the death of the victim, had been executed.[135] Therefore, the Court concluded that "[t]he evidence is overwhelming that American juries have repudiated imposition of the death penalty for crimes such as [Enmund's]."[136]

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127. *See id.* at 793.

128. *See id.*

129. *See Enmund*, 458 U.S. at 822-23 (O'Connor, J., dissenting); Tison v. Arizona, 481 U.S. 137, 170-72 (Brennan, J., dissenting).

130. *See Enmund*, 458 U.S. at 822-23 (O'Connor, J., dissenting).

131. *Id.* at 822.

132. *See id.*

133. *See id.* at 794.

134. *See id.*

135. *See id.* at 796. Justice White stated, "The fact remains that we are not aware of a single person convicted of a felony murder over the past quarter century who did not kill or attempt to kill, and did not intend the death of the victim, who has been executed, and that only three persons in that category are presently sentenced to die." *Id.*

136. *Id.* at 794.

After making this objective inquiry of state and public indicators, the Court engaged in the subjective review of *Gregg*[137] and *Coker*[138] to decide whether the death penalty was excessive punishment for the crime committed.[139] Comparing murder with robbery, the Court stated that:

> the focus must be on [Enmund's] culpability, not on that of those who committed the robbery and shot the victims, for we insist on "individualized consideration as a constitutional requirement in imposing the death sentence," which means that we must focus on "relevant facets of the character and record of the individual offender."[140]

Based on this comparison, and the requirement for individualized consideration, the Court concluded that intentional harm must be treated more severely than causing harm unintentionally.[141] To treat Enmund, who did not kill or intend to kill, in the same manner as his co-felons who did, was violative of the Eighth Amendment.[142]

The Court also found that since those like Enmund had not intended to kill, there would be little deterrence value in subjecting Enmund to death.[143] The Court reasoned that the possibility of a killing occurring during the course of a robbery is too small for there to be any deterrence effect from imposing capital punishment on those like Enmund.[144]

The Court also stated that the goal of retribution 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 or causing does not measurably contribute to the retributive end of ensuring that the criminal gets his just desserts . . . . Thus the Court restricted retribution as a justification to those cases in which individual culpability is specifically proven.[145]

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

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

139. *See Enmund*, 458 U.S. at 797.

140. *Enmund*, 458 U.S. at 798 (citing Locket v. Ohio, 438 U.S. 586, 605 (1978), Woodson v. North Carolina, 428 U.S. 280, 304 (1976)).

141. *See id.*

142. *See id.*

143. *See id.* at 799.

144. *See id.*

145. Lilly Kling, Note, *Constitutionalizing the Death Penalty for Accomplices to Felony Murder*, 26 AM. CRIM. L. REV. 463, 470 (1988) (quoting Enmund, 458 U.S. 782, 801 (1982)).

Justice O'Connor, and the other dissenters, were very troubled at what they regarded as an improper incorporation of an intent requirement into Eighth Amendment proportionality analysis.[146] The dissent, relying upon *Weems v. United States*,[147] urged a spectrum of culpability which would provide for the individualized assessment of *Lockett*,[148] and at the same time allow determination of the degree of the defendant's participation in the crime and a determination of the defendant's awareness of a substantial risk of death.[149] Thus, the dissent would make intent one of several factors to be evaluated at the trial level, to be weighed as an aggravating or mitigating factor, and to be combined with the other relevant factors.[150] But intent, in the dissent's opinion, should not be required as a matter of constitutional law.[151]

In 1978, two brothers, Ricky and Raymond Tison, smuggled weapons into an Arizona prison, and helped their father and another convicted murderer escape.[152] Later, the group persuaded a car carrying the Lyons family to pull over in the Arizona desert in order to provide assistance to the Tisons. The Tison father and the other escaped prisoner murdered the Lyons family.[153] There was no evidence that either brother contemplated or intended the murders to take place.[154] The record further shows that the brothers had in fact gone to their car to get some water for the Lyons family believing their father had decided to leave the Lyons family in the desert and take the Lyons' car.[155] The brothers were later captured in a shoot out with police, and their father escaped into the desert where he died from exposure.[156]

The Arizona trial judge found three statutory aggravating factors and no statutory mitigating factors, and sentenced the Tison Brothers to death.[157] Upon appeal, the Arizona Supreme Court affirmed the death sentence despite finding that the Tison brothers

146. "The Court's holding today is especially disturbing because it makes intent a matter of federal constitutional law, requiring this Court both to review highly subjective definitional problems customarily left to state criminal law and to develop an Eighth Amendment meaning of intent." Enmund, 458 U.S. at 824 (O'Connor, J., dissenting).

147. 217 U.S. 349 (1910).

148. Lockett v. Ohio, 438 U.S. 586 (1978).

149. *See Enmund*, 458 U.S. at 824.

150. *See id.* at 825.

151. *See id.* at 831.

152. *See* Tison v. Arizona, 481 U.S. 137, 139-41 (1987).

153. *See id.*

154. *See id.*

155. *See id.*

156. *See id.*

157. *See id.* at 142.

did not "specifically intend" the deaths and "did not actually pull the trigger."[158] Despite these findings, the Arizona Supreme Court held that the requirements of *Enmund* were satisfied because the defendants could have anticipated the use of lethal force during the felony.[159]

The United States Supreme Court held improper this characterization of the *Enmund* requirement as a "species of foreseeability."[160] The Court then enunciated a new standard which would allow defendants such as Raymond and Ricky Tison to be put to death. Despite the attempt by the Court to distinguish *Tison* from *Enmund*, it is fairly clear that the *Tison* Court abandoned the *Enmund* standard, and formulated a new standard.[161]

The Court attempted to point to factual differences between *Enmund* and *Tison*. The Tisons brought weapons into the prison and helped their father, a convicted murderer, escape while Enmund waited in the getaway car.[162] The Tisons were present at the killing and did nothing to stop it; Enmund was away from the killing in the getaway car.[163] Based on this factual distinction, the majority found that the Tisons' participation in the felony was major, while Enmunds' only minor.[164]

The Court found that the question of excessiveness and culpability was not simply an either/or distinction for felony murder. It was in fact a spectrum of many levels of participation

158. State v. Tison, 129 Ariz. 526, 545, 633 P.2d 335, 354 (1981). "This case, however, was decided prior to *Enmund*, and following *Enmund*, the Tisons applied to the Arizona Supreme Court for post-conviction relief." Tison, 481 U.S. at 162 (Brennan, J., dissenting). After previously holding that the Tison brothers did not intend the killings to occur, the Arizona Supreme Court attempted to fit the murders into the box prescribed by *Enmund* by defining intent broadly enough to include the activities of the Tisons. According to the Arizona definition, "[i]ntend [sic] to kill includes the situation in which the defendant intended, contemplated, or anticipated that lethal force would or might be used or that life would or might be taken in accomplishing the underlying felony." Richard A. Rosen, *Felony Murder and the Eighth Amendment Jurisprudence of Death*, 31 B.C. L. REV. 1103, 1170 n.162 (1990) (citing State v. Tison, 142 Ariz. 454, 456, 690 P.2d 755, 757 (1984).

159. *Tison*, 142 Ariz. at 456, 690 P.2d. at 757.

160. *Tison*, 481 U.S. at 150-51.

161. *See* Kling, *supra* note 145, at 477. *See generally The Supreme Court, 1986 Term Leading Cases, I. Constitutional Law, A. Criminal Law and Procedure, 3. Death Penalty — Felony Murder*, 101 HARV. L. REV. 138 (1987). Kathryn A. Watson, Tison v. Arizona: *No Intent Required for Death Penalty of Accomplice in Felony Murder*, 10 CRIM. JUST. J. 167, 177 (1987). "At this point, the Court could simply have reversed the death sentences against the Tison brothers in accordance with *Enmund*; however, the Court proceeded to create a completely new substantive standard for capital liability." Andrew H. Friedman, Note, Tison v. Arizona: *The Death Penalty and the Non-Triggerman: The Scales of Justice are Broken*, 75 CORNELL L. REV. 123, 140 (1989).

162. *See Tison*, 481 U.S. at 150-152.

163. *See id.*

164. *See id.*

and culpability. At one end was Enmund, whose participation had been minor, and at the other end was the felony murderer, who actually pulled the trigger. The Tisons, the Court held, fell in between at a level that showed "reckless indifference to human life."[165] The Court held that "major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement."[166]

The Court then gave cursory treatment to the proportionality test set out in *Coker*,[167] *Gregg*,[168] and *Enmund*.[169] Justice O'Connor found that of the states imposing the death penalty, twenty-one would allow the Tisons to be sentenced to death, while eleven would not.[170] Justice O'Connor relied upon six jury decisions which she used in conjunction with the state statutes to conclude 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.'"[171]

The dissenters, led by Justice Brennan, cried foul at this manipulation of the proportionality analysis, charging that the majority had not included those jurisdictions which do not impose capital punishment.[172] If these jurisdictions are included, the dissent claimed, "the Court's view is itself distinctly the minority position."[173]

Justice Brennan also criticized the basic failure of the majority's proportionality analysis to explain why "major participation in a felony with a state of mind of reckless indifference to human life deserves the same punishment as intending to commit a murder or actually committing a murder."[174] This basic questioning of the proportionality analysis was the heart of Justice Brennan's dissent. He stated that, "differential punishment of reckless and intentional actions is . . . essential if we are to retain 'the relation between

165. *Id.*at 151.
166. *Id.* at 158.
167. Coker v. Georgia, 433 U.S. 584 (1977).
168. Gregg v. Georgia, 428 U.S. 153 (1976).
169. Enmund v. State, 458 U.S. 782, 788 (1982).
170. *See Tison*, 481 U.S. at 152-54.
171. *Id.* at 154.
172. *See id.* at 175 (Brennan, J., dissenting).
173. *Id.* (Brennan, J., dissenting).
174. *Id.* at 168 (Brennan, J., dissenting).

criminal liability and moral culpability' on which criminal justice depends."[175]

Justice Brennan also wondered what had happened to the Court's assessment of whether imposing capital punishment for a certain type of crime would further the goals of retribution and deterrence. Somehow this step of the historical proportionality analysis had escaped the majority's attention.[176]

Two years after the Court decided *Tison*, it decided *Stanford v. Kentucky*.[177] Like *Tison* and *Coker*, *Stanford* was a proportionality case. Specifically, the question presented in *Stanford* was whether the Constitution forbids execution of people who were sixteen- or seventeen-years-old at the time they committed their capital crimes. Answering this question in the negative, the *Stanford* Court followed the proportionality analysis of *Tison* rather than *Coker*. Bean counting reigned supreme.[178]

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175. *Id.* at 171 (Brennan, J., dissenting) (quoting People v. Washington, 402 P.2d 130, 134 (1965)).

176. *See id.* at 172 (Brennan, J., dissenting).

177. 109 S. Ct. 2969 (1989).

178. Lower courts continue to cite *Coker* with approval as a proportionality case. *E.g.*, House v. State, 696 So. 2d 515, 518 (Fla. Dist. Ct. App. 1997); Gantorius v, State, 693 So. 2d 1040, 1042 (Fla. Dist. Ct. App. 1997); Kills on Top v. State, 928 P.2d 182, 198 (Mont. 1997); Morris v. State, 940 S.W.2d 610, 616 (Tex. Crim. App. 1996); State v. Webb, 680 A.2d 147, 208 (Conn. 1996) (citing *Coker* for proposition that "death sentence for rape inherently disproportionate"); State v. Jackson, 918 P.2d 1038, 1042 (Ariz. 1996) (citing *Coker* for proposition that, "in invalidating the death penalty for rape of an adult woman, Court stressed that Georgia was the only jurisdiction that authorized such a punishment"); State v. Viree, 670 So. 2d 733, 736 (La. Ct. App. 1996); Logan v. State, 666 So. 2d 260, 260 (Fla. Dist. Ct. App. 1996); Thomas v. State, 916 S.W.2d 578, 582 (Tex. Crim. App. 1996); State v. Callaway, 658 So. 2d 983, 986 (Fla. 1995); State v. Dunban, 657 So. 2d 429, 935 (La. Ct. App. 1995); Robertson v. State, 888 P.2d 1023, 1024 (Okla. Crim. App. 1995); State v. Martini, 651 A.2d 949, 957 (N.J. 1994); People v. Davis, 872 P.2d 591, 604 (Cal. 1994); Ex parte Woodward, 631 So. 2d 1065, 1072 (Ala. Crim. App. 1993) (citing *Coker* for proposition that "the death penalty is constitutionally excessive punishment for rape"); James v. State, 615 So. 2d 668, 670 (Fla. 1993) (dissent); People v. Escobar, 837 P.2d 1100 (Cal. 1992); State v. Marshall, 613 A.2d 1059, 1068, (N.J. 1992) (citing *Coker* as "declaring death sentence disproportionate for crime of rape"); Ormond v. State, 599 So. 2d 951, 953 n.1 (Miss. 1992) (citing *Coker* for proposition that "because of disproportionality and excessiveness of punishment, [E]ighth [A]mendment forbids death sentence for crime of rape of adult woman"); State v. Hood, 584 So. 2d 1238, 1241 (La. Ct. App. 1991); State v. Black, 815 S.W.2d 166, 190 (Tenn. 1991) (citing *Coker* for proposition that "death may be disproportionate per se when the offense does not involve the death of the victim"); Jackson v. State, 575 So. 2d 181, 190 (Fla. 1991) (citing *Coker* as "holding the death penalty disproportional to the crime of rape"); Sanders v. State, 585 A.2d 117, 135 (Del. 1990) (citing *Coker* as holding "unconstitutional to execute the defendant convicted of rape"); Commonwealth v. Strunk, 582 A.2d 1326, 1331 (Pa. Super. Ct. 1990); People v. Milbourn, 461 N.W.2d 1, 9 (Mich. 1990); State v. Jesus, 565 So. 2d 1361, 1364 (Fla. Dist. Ct. App. 1990); State v. Massey, 803 P.2d 340, 348 (Wash. 1990); State v. Glenn, 558 So. 2d 4, 6 (Fla. 1990) (citing *Coker* for proposition that "death penalty inappropriate in rape cases"); State v. Conway, 556 So. 2d 1323, 1329 (La. Ct. App. 1990) ("*Coker*. . . held that a death sentence for rape is excessive punishment under the Eighth

By focusing their proportionality analysis exclusively on legislative enactments, the *Tison* and *Stanford* Courts abdicated their duty to undertake an independent judicial review of the penological justifications for the legislative decisions to extend capital punishment to include particular classes of crimes or criminals. By deferring entirely to the elected legislatures, the federal judiciary renders itself powerless to act as a counterweight to the political pressures that very often drive legislative decisionmaking on matters of capital punishment at this moment in American history.[179] Anyone who has been closely involved with the legislative politics of death — as I was, in Florida during the mid-1980s — must acknowledge the primary role of electoral politics as a driving force in legislative decisionmaking in this context.

This judicial abdication would be especially unfortunate in the case of capital punishment for the crime of rape. It would require the Supreme Court to ignore the very real policy arguments that capital punishment for rape would not well serve the penological goals of capital punishment specifically and the criminal law generally. For example, making rape itself a capital crime might have the unintended consequence of increasing the likelihood that rapes will end with the murder of the rape victim. If rape is a noncapital crime, while murder is a capital crime, then rapists have an incentive not to kill the victim to eliminate a witnesses to their crimes. If rape itself is capital, however, then the incentive calculus shifts significantly. The calculating criminal, engaging in a risk-benefit analysis, might well cooly calculate as follows: "Since the rape itself makes me death-eligible, I don't have much to lose by

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Amendment."); State v. Woodall, 385 S.E.2d 253, 263 (W. Va. 1989) (citing *Coker* for proposition that "a death sentence for the crime of rape does violate the protection against cruel and unusual punishment"); State v. Walker, 540 So. 2d 1059, 1061 (La. Ct. App. 1989) (citing that "[i]n *Coker*. . . the U.S. Supreme Court struck down the death penalty in an aggravated rape conviction noting that the punishment did not match the crime."); State v. Keith, 754 P.2d 474, 482 (Mont. 1988) (citing *Coker* for proposition that "capital punishment is excessive and therefore unconstitutional if imposed for the charge of rape alone"); People v. Crews, 522 N.E.2d 1167, 1174 (Ill. 1988); Trevino v. State, 739 P.2d 1019, 1022 n.1 (Okla. Crim. App. 1987); State v. Hernandez, 528 A.2d 794, 800 (Conn. 1987); State v. Ramseur, 524 A.2d 188, 213 (N.J. 1987).

179. On the judicial politics of capital punishment, *see generally* Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death*, 75 B.U. L. REV. 759, 760-65 (1995); Glenn L. Pierce & Michael L. Radelet, *The Role and Consequences of the Death Penalty in American Politics*, 18 N.Y.C. REV. L. & SOC. CHANGE 711 (1990-91); Paul Reidinger, *The Politics of Judging*, A.B.A. J., Apr. 1, 1987, at 52; Gerald F. Uelman, *Review of Death Penalty Judgments*, 23 LOY. L.A. L. REV. 237 (1989); Stephen P. Garvy, *Politicizing Who Dies*, 101 YALE L.J. 187 (1991); Symposium, *Politics and the Death Penalty*, 21 FORDHAM URB. L.J. 239 (1994).

killing my rape victim, and I have everything to gain by eliminating a powerful witness against me at my trial."

Legislators, as well as life-tenured Supreme Court justices, can and should take these policy matters into consideration. Assuming, however, that legislators do — as the *Tison* and *Stanford* Courts seem to require — ignores the palpable reality of the politics of death that drive legislative decisionmaking when it comes to capital punishment. If this is federalism, then it is ostrich federalism.

Still, in light of *Stanford* and *Tison*, the linchpin of the proportionality analysis is the survey of legislative activity — what I call legislative bean counting. As I will now discuss, on the matter of bean counting, *Coker* is especially vulnerable.[180]

III. DECONSTRUCTING *COKER*

> One thinks of Novalis' advice, highly applicable in light of our Confederate topic: "After losing a war, one should only write comedies."[181]

The reasoning of the *Coker* opinion itself is flawed in three respects — two concerning what the opinion said, and the third concerning what the opinion didn't say. First, the *Coker* opinion's bean counting of the objective indicia of the evolving standards of decency erroneously focused on legislative enactments circa 1977, disregarding the chilling effect of *Furman*'s uncertain commands on the willingness of reasonably risk-averse state legislatures to enact capital rape statutes. Second, the *Coker* Court's minimization of the harm inflicted upon the victims of rape. Third, the *Coker* Court's failure to engage the issue of the long history of racism in America's experience with the crime of capital rape.[182]

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180. *Coker* is also vulnerable because it was a plurality rather than a majority opinion. In any event, the current Supreme Court is not shy about overruling precedent in capital cases with which it disagrees. *Compare* Booth v. Maryland, 116 S. Ct. 251 (1995), *cert. denied*, and Gathers v. South Carolina, 369 S.E.2d. 140 (1988), *with* Payne v. Tennessee, 791 S.W.2d 10 (1990).

181. CONFEDERATE WIDOW, *supra* note 1, at 228.

182. Commentators have noted the *Coker* Court's skirting of the social science research showing capital punishment for rape to be discriminatorily applied. *See e.g.*, Dennis Dorin, *Two Different Worlds: Criminologists, Justices and Racial Discrimination in the Imposition of Capital Punishment in Rape Cases*, 72 J. CRIM. L. & CRIMINOLOGY 1667 (1981).

A. *Counting the Wrong Beans?*

> It is inconceivable what noise and bloodshed might break upon us in first light .... I feel myself becoming half-accomplished at it [war]. There are many things we should all remain quite bad at.[183]

The Court in *Gregg* explained that "[t]he most marked indication of society's endorsement of the death penalty for murder is the legislative response to *Furman*."[184] Justice White's opinion for the *Coker* Court focused on bean-counting of objective indicia, and the beans that counted most for him were those prevailing in 1977, the year *Coker* was decided.

"In 1926, twenty American jurisdictions (eighteen States, the federal government, and the District of Columbia) provided the death penalty as a possible punishment for the rape of an adult female."[185] The *Coker* Court wrote that in "no time in the last [fifty] years have a majority of the States authorized death as a punishment for rape."[186]

Following *Furman*, thirty-five states enacted new capital statutes. None of the states that had not authorized capital punishment for rape prior to *Furman* did so immediately post-*Furman*.[187] Of the sixteen states that made rape a capital offense at the time of *Furman*, only three — Georgia, North Carolina and Louisiana — authorized the death penalty for rape of an adult woman in their revised statutes,[188] although three other states did make rape of a child a capital crime.[189] The mandatory-death capital statutes of North Carolina and Louisiana, however, were invalidated in 1976. When Louisiana and North Carolina revised their statutes again, both states abandoned authorization of the death penalty for rape.[190]

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183. CONFEDERATE WIDOW, *supra* note 1, at 30.

184. Gregg v. Georgia, 428 U.S. 153, 179 (1976).

185. Brief for Petitioner at 38-39, Coker v. Georgia, 433 U.S. 584 (1977) (No. 75-5444) [hereinafter Brief for Petitioner].

186. 433 U.S. at 593.

187. *See id.*

188. *See id.* at 594.

189. Florida, Mississippi and Tennessee. *See* Brief for Petitioner, *supra* note 194, at 39-40. Florida's post-*Furman* statute defined two "capital felonies": First degree murder and sexual battery committed by a defendant eighteen years of age or older upon a child, eleven years of age or younger. *See* Brief for Petitioner at 31 n.14, Proffitt v. Florida, 428 U.S. 242 (1976) (No. 75-5706).

190. This bean counting maneuver is a bit disingenuous by the *Coker* plurality. If the goal of bean counting is to objectify the nation's "evolving standards of decency," then what matters is that these state legislatures *enacted* statutes authorizing death for rapists of adult

Thus, according to the *Coker* plurality, in 1977 Georgia stood alone as the only post-*Furman* state to authorize capital punishment for rape of an adult woman. That was enough for the Court. The Court found the objective evidence that Georgia was out of step with the other states "obviously weighs very heavily on the side of rejecting capital punishment as a suitable penalty for raping an adult woman."[191]

"Obviously." When courts in capital cases use words like "obviously," beware. Here, the *Coker* Court's isolation of Georgia was something of a judicial sleight of hand. The State of Georgia argued:

> The petitioner makes his strongest and most forceful argument when he asserts that the "minuscule" number of states making rape a capital crime in the wake of *Furman v. Georgia*, is evidence of the contemporary repudiation of death as a punishment for rape. But the petitioner's argument necessarily assumes that the post-*Furman* enactments resulted from a societal rejection of death as a punishment for rape and not from *Furman* itself. For this reason, the argument is flawed.
>
> The legislative reaction to *Furman* can perhaps best be described as being as diverse as the concurring opinions that made the majority.... Of the sixteen states that punished rape as a capital crime prior to *Furman*, eleven later enacted general capital punishment statutes that are at least arguably suspect in light of *Woodson v. North Carolina*.
>
> Rape, *as a class* of crime, is no doubt generally viewed as less serious than murder. Thus, it is not surprising that those states opting for so-called mandatory statutes eliminated rape as a capital crime entirely or else retained rape as a capital crime in only narrow circumstances. About all that can be said about the legislatures that enacted these statutes is that they apparently read *Furman* as requiring mandatory sentencing; given a choice between executing all rapists and executing none, or almost none, the legislatures opted for executing none. The choice says little in terms of society suddenly rejecting the death penalty for rape .... For similar reasons, those legislatures enacting discretionary statutes, but eliminating rape as a capital crime, likely perceived that *Furman* required a narrowing of the overall process whereby some offenders are sentenced

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women — not that those legislative enactments were subsequently held not to pass constitutional muster under the uncertain commands of *Furman v. Georgia*. This *Coker* sleight of hand suggests the perils of bean counting as a method of constitutional adjudication.

191. *Coker*, 433 U.S. at 596.

to death and others, convicted of similarly defined crimes, are not. That some states may have narrowed the definitions of crimes more than was constitutionally necessary, and eliminated some crimes entirely, tells us little about societal rejection of death as a punishment for rape.

The varied legislative responses to *Furman* are hardly an accurate assessment of contemporary standards *as they pertain to rape.* An examination of the legislative enactments existing at the time of the *Furman* decision would no doubt provide a more reliable assessment; after all, the standard had remained relatively constant for fifty years.

In terms of his reliance on statutes that *presently* sanction the death penalty for rape, the petitioner has overstated his contemporary standards argument. The legislative response to *Furman* is simply no basis upon which to conclude that contemporary society rejects death as a punishment for all rapes.[192]

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192. Brief for Respondent at 18-20, Coker v. Georgia, 433 U.S. 584 (1977) (No. 75-5444). In *Wilson*, the Louisiana Supreme Court reasoned:

> Since *Coker*, only Florida's statute has been invalidated under its reasoning. Mississippi's statute and Tennessee's statute were invalidated for infirmities in the statute or sentencing schemes of their respective states. While Louisiana remains the sole jurisdiction with such a statute in effect, it does not do so without the suggestion of some trend or suggestion from several other states that their citizens desire the death penalty for such a heinous crime.
>
> The *Coker* Court took into account the recent past in considering what society deems to be cruel and unusual punishment. Coker, *supra* at 614 (Powell,J., dissenting). We cannot look solely at what the legislatures have refrained from doing under conditions of great uncertainty arising from the Supreme Court's "less than lucid holdings on the Eighth Amendment." *Id.* at 614. The fact that Louisiana is presently the sole state allowing the death penalty for the rape of a child is not conclusive. There is no constitutional infirmity in a state's statute simply because that jurisdiction chose to be first. Statutes 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. Coker, *supra* at 616 (Burger, C.J., dissenting). That one State is "presently a minority does not, in my view, make [its] judgment less worthy of deference. Our concern for human life must not be confined to the guilty; a state legislature is not to be thought insensitive to human values because it acts firmly to protect the lives and related values of the innocent." *Id.* The needs and standards of society change, and these changes are a result of experience and knowledge. If no state could pass a law without other states passing the same or similar law, new laws could never be passed. To make this the controlling factor leads only to absurd results. Some suggest that it has been over a year since Louisiana has amended its law to permit the death penalty for the rape of a child, and that no other state has followed suit. Since its enactment, the statute has been under constant scrutiny. It is quite possible that other states are awaiting the outcome of the challenges to the constitutionality of the subject statute before enacting their own.

State v. Wilson, 685 So. 2d 1063, 1070 (La. 1996).

There is some strength to this contention. The problem with *Coker*'s bean counting was that it counted the wrong beans — or it counted the right beans at the wrong time. By focusing on legislative enactments in 1977, post-*Furman,* the Court failed to account for the chilling effect that *Furman* doubtlessly had on the willingness to enact capital statutes for crimes other than murder. After all, it was not even clear from the *Furman* opinions that capital punishment for *murder* was constitutional. By constricting its temporal frame of reference to 1977, rather than 1971 or earlier, the *Coker* Court warped its own survey of the legislative indicia concerning the proportionality of capital punishment for rape.

"What, then [were] the capital offenses in America . . . before the U.S. Supreme Court's *Furman* decision of June 1972 effectively abolished existing capital statutes?"[193] Hugo Bedau's tabulation of crimes in the United States for which death was an available punishment, as of January 1967 in fifty-five jurisdictions (the fifty states plus the District of Columbia, Puerto Rico, Virgin Islands, and federal civil and military authority), found that rape was punishable by death in nineteen jurisdictions.[194] By 1971, the year before *Furman*, that number had dropped to sixteen.[195] Statutes authorizing death for rapists were concentrated in the sixteen southern states: "[Fourteen] of the [eighteen] capital jurisdictions and [twenty-seven] of the [thirty-three] capital [statutory] provisions were in the south. All eight of the southwestern and border states had the death penalty for rape."[196]

These objective indicia were not limited to capital punishment for rapists and were not abstract. American law did not simply authorize capital punishment for rapists; it also sentenced people to death for rape, and executed them. Since "1930 capital punishment has been widely used only for homicide and rape . . . . [E]ighteen . . . .death penalty jurisdictions for rape have executed rapists. By contrast, very few jurisdictions have actually executed offenders for any [other] crimes."[197] Bedau wrote in 1987 that "[a]s recently as the end of World War II in the southern states as many as 20 percent (of executions) each year were for rape. Executions occurred nationally at the rate of ten each month."[198]

193. WILLIAM J. BOWERS, LEGAL HOMICIDE: DEATH AS PUNISHMENT IN AMERICA, 1864-1982, at 32 (1984).

194. *See id.* at 33 tbl. 1-7.

195. *See Coker*, 433 U.S. at 593.

196. BOWERS, *supra* note 193, at 35.

197. *Id.* at 34.

198. HUGO BEDAU, DEATH IS DIFFERENT 131 (1987).

In the world following *Furman*'s 1972 constitutional earthquake, state legislatures were understandably risk-averse in re-enacting capital statutes for murder.[199] It was far from clear that, if capital punishment was constitutional at all, it was constitutional for the crime of murder. Not until 1976 did the Court put its constitutional seal of approval on the death penalty for murder. One year later, in *Coker*, the court threw out capital punishment for rape. In the face of *Coker*'s holding, state legislatures have been reluctant to enact new statutes authorizing death for rapists. If *Furman* had a chilling effect on state legislatures' enacting rape statutes, *Coker*'s effect was more like deep freeze.

Still, notwithstanding *Coker*'s brooding omnipresence, as of August 1997 at least two jurisdictions, Louisiana and Georgia, authorized capital punishment for the forcible rape of a child.[200] In a different factual context — the jury override — the Supreme Court has held that three states are enough.[201]

Two out of thirty-eight jurisdictions is not impressive objective indicia that our "evolving standards of decency"[202] condone executing rapists. If the field of vision, however, is expanded to include statutes authorizing death for all *nonhomicide* crimes, including rape, the bean counting looks a bit different. As of 1993, there were thirty-six capital punishment states in the United States. Of these thirty-six, at least six authorized death for non-homicides ranging from aircraft hijacking, treason, attempted murder, kidnaping with gross permanent physical injury inflicted on the victim, and rape of a child.[203] By 1997 that number had jumped to fourteen — more

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199. In Florida, the legislative risk-aversion to tinkering with a capital statute that has already passed Constitutional muster is captured in the phrase, "If it ain't broken, don't fix it." Michael Mello & Ruthann Robson, *Judge Over Jury: Florida's Practice of Imposing Death Over Life in Capital Cases*, 13 FLA. ST. U. L. REV. 31, 68 & n.176 (1985).

200. *See* Higgins, *supra* note 7. In *Wilson*, the Louisiana Supreme Court wrote:

> Another body of people play a role in determining the contemporary standards of our society. That body is the juries who make the determination of whether a certain defendant deserves the death penalty for his particular crime. The Coker Court concluded that "in the vast majority of [rape] cases, at least 9 out of 10, juries have not imposed the death sentence." *Coker*, *supra* at 596-597, 97 S. Ct. at 2868-2869. However, in drawing this conclusion, the Court does not say whether these rape cases were the rape of an adult or of a child. Moreover, the reluctance of the juries to impose the death penalty may reflect the humane feeling that this most irrevocable of sanctions should be reserved for extreme cases. *Furman*, *supra* at 388, 92 S. Ct. at 2803. (Burger, C.J., dissenting).

State v. Wilson, 685 So. 2d 1063, 1067 (La. 1996).

201. *See* Spaziano v. Florida, 104 S. Ct. 3154 (1984).

202. Trop v. Dulles, 356 U.S. 86, 101 (1958).

203. *See* HUGO BEDAU, *in* THE DEATH PENALTY IN AMERICA 37 tbl. 2-1 (Hugo Bedau ed., 4th ed. 1997).

than doubling in only four years.[204] Those fourteen jurisdictions were, according to the *ABA Journal*:

> Arkansas: treason; California: treason; Colorado: kidnaping where victim is harmed, treason; Florida: drug trafficking; Georgia: aircraft hijacking, treason, rape of children; Idaho: kidnaping where victim is harmed; Illinois: treason, aggravated kidnaping for ransom; Louisiana: treason, rape of child under 12; Mississippi: treason, aircraft piracy; Missouri: several felonies including treason, drug dealing near schools; Montana: aggravated assault or kidnaping by a person in state prison for murder or persistent felonies; New Mexico: espionage; Washington: treason; Federal government: treason, drug dealing by a drug kingpin who heads a drug business[205]

Further, our national legislature has evidenced, under the leadership of President Clinton, an attitude receptive to extending the federal death penalty to include nonhomicides. The 1994 Federal Death Penalty Act created two such new federal capital crimes: Drug trafficking in large quantities, even if no death results, and attempting, authorizing or advising the killing of any public officer, regardless whether such a killing actually occurs.[206]

Viewed in rarefied isolation, these figures might not appear to be sufficient objective indicia that our standards of decency have not rejected capital punishment for rape. When viewed, however, in the atmospheric context of *Coker*'s chilling effect on legislative enactment of such statutes, the numbers, and the trend of their increase, might be enough to persuade the Rehnquist/Thomas/Scalia Court that no national consensus exists for the proposition that death is a "grossly disproportionate"[207] societal response to the crime of aggravated rape.

B. It's Only Rape: Rape as "A Crime of Patriarchy" [208]

> You know how some doctors say a person can't remember pain from one hurt to the next? Ha. For pain, I got a photogenic memory.[209]

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204. *See* Higgins, *supra* note 7.
205. *Id.*
206. *See* DEATH PENALTY, *supra* note 203, at 39 tbl. 2-12.
207. Coker v. Georgia, 433 U.S. 584, 592 (1977).
208. JUDITH BAER, WOMEN IN AMERICAN LAW 244 (1991).
209. CONFEDERATE WIDOW, *supra* note 1, at 199.

Mrs. Carver [the victim] was unharmed.[210]

In a brilliant amicus brief on behalf of NOW, other women's groups, and the ACLU, Ruth Bader Ginsburg argued:

> I. The death penalty for rape should be rejected as a vestige of an ancient, patriarchal system in which women were viewed both as the property of men and as entitled to a crippling "chivalric protection." It is part of the fabric of laws and enforcement practices surrounding rape which in fact hamper prosecution and convictions for that crime, thus leaving women with little real protection against rape.[211]
> II. The death sentence for rape is impermissible under the Eighth Amendment because it does not meet "contemporary standards regarding the infliction of punishment" and is inadvisable since it diminishes legal protection afforded rape victims.[212]

Amici proffered persuasive arguments opposing the death penalty for the rape of an adult woman. Arguing that the death penalty was a disincentive to treating rape seriously, *amici* suggested that the Court find the death penalty for rape to be unconstitutional. *Amici* traced the history of the death penalty for rape and informed the Court that the penalty was an anachronism, bound up in sexist notions of women as the property of men.

The Court ignored *amici*'s arguments. Although it reached the desired result regarding the inappropriateness of capital punishment for rape, its opinion failed to take into account the reality of rape. Rather, the Supreme Court decided *Coker* as if it were "just another" death penalty case. By rendering its decision from the inside of a self-created doctrinal box, the Court exposed its own sexism.

All nine men who wrote or joined in opinions in *Coker* purported to recognize the seriousness of rape as a crime. Justice White wrote that the Court did not discount the "seriousness of rape as a crime."[213] He explained that the Court appreciated that rape violated the victim's personal integrity and autonomy. He

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210. *Coker*, 433 U.S. at 587 (plurality opinion written by J. Byron White).

211. Brief for Amici Curiae of the American Civil Liberties Union, The Center for Constitutional Rights, The National Organization for Women Legal Defense and Education Fund, The Women's Law Project, The Center for Women Policy Studies, The Women's Legal Defense Fund, and Equal Rights Advocates, Inc. at 11, Coker v. Georgia, 433 U.S. 584 (1977) (No. 75-5444) [hereinafter ACLU Amici].

212. *Id.* at 22.

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

expressed the Court's understanding of rape as "a violent crime because it normally involves force, or the threat of force or intimidation, to overcome the will and the capacity of the victim to resist,"[214] and he added that rape also undermines "the community's sense of security."[215] Nevertheless, the Court concluded that death is an excessive penalty for a rape that is not accompanied by murder.[216]

Justice Brennan, adhering to his view that the death penalty is per se cruel and unusual punishment,[217] concurred in the *Coker* ruling that the death penalty for rape is excessive.[218] Justice Marshall also concurred in the *Coker* judgment and referred to his opinion in *Furman*.[219] In *Furman*, Justice Marshall discussed evidence of racial discrimination in capital sentencing of convicted rapists. He found that "capital punishment is imposed discriminatorily against certain identifiable classes of people."[220] With regard to executions for rape, Justice Marshall noted that of the 455 persons executed for rape between 1930-1968, forty-eight men were white and 405 men were black.[221] He concluded that "[i]t is the poor, and the members of minority groups who are least able to voice their complaints against capital punishment. Their impotence leaves them victims of a sanction that the wealthier, better-represented, just-as-guilty person can escape."[222] He con-tinued to support that view in *Coker*.

Justice Powell concurred in the *Coker* judgment as to the facts of the case and supported the view that "ordinarily death is disproportionate punishment for the crime of raping an adult woman."[223] He did not, however, join in the majority's view that the death penalty was excessive punishment for the crime of rape in all cases. Rather, Justice Powell explained that there were "extreme variations"[224] in types of rapes, as well as "extreme variation in the 'degree of culpability of rapists.' "[225] He concluded that, although "it is not the Court's function to formulate the relevant criteria that might distinguish aggravated rape from the more usual case," the

214. *Id.*
215. *Id.* at 598.
216. *See id.* at 599, 600.
217. *See generally* MICHAEL MELLO, AGAINST THE DEATH PENALTY (1996).
218. *See Coker*, 433 U.S. at 600 (Brennan, J., concurring).
219. *See id.* (Marshall, J., concurring).
220. Furman v. Georgia, 408 U.S. 238, 364 (1972) (Marshall, J., concurring).
221. *See id.*
222. *Id.* at 366.
223. *Coker*, 433 U.S. at 601 (Powell, J., concurring).
224. *Id.* at 603 (quoting Snider v. Reyton, 356 F.2d 626, 627 (4th Cir. 1966)).
225. *Id.*

death penalty indeed might be warranted in some cases of rape, but not others.[226]

Finally, for Chief Justice Burger and Justice Rehnquist, federalism was the primary objection to the *Coker* ruling. The dissent accepted the proposition that the Eighth Amendment bars imposition of the death penalty for minor crimes, but they professed that rape was not a minor crime. Consequently, the dissent believed that the State of Georgia should punish *Coker* in whatever manner it deemed effective for the crime of rape.

The dissent was particularly troubled by the nature of Anthony Coker's crime and by his record. After describing two previous rapes and a murder for which Coker was serving a life term, the dissent described the present crime. Chief Justice Burger was especially troubled because Coker raped "Mrs. Carver" in the presence of her husband.[227] The defendant was fairly portrayed in the dissent as a depraved human being who "by his life pattern . . . has shown that he presents a particular danger to the safety, welfare and chastity of women . . . ."[228]

The dissent rejected Justice Powell's "bifurcation of rape into categories of harmful and non-harmful."[229] Instead, foreshadowing a generation of feminist scholarship, the dissent characterized rape as inherently brutal. Referring to the facts of the case, Chief Justice Burger asked, "Can any Member of the Court state with confidence that a [sixteen]-year-old woman who is raped in the presence of her husband three weeks after giving birth to a baby sustained [no] . . . injury?"[230] Agreeing with the majority that rape causes more than physical harm, Chief Justice Burger commented, "Rape is not a mere physical attack — it is destructive of the human personality. The remainder of the victim's life may be gravely affected, and in turn may have a serious detrimental effect upon her husband and any children she may have."[231]

Spurning the Court's sweeping rejection of the death penalty for all rapes, the dissent reflected:

> The question of whether the death penalty is an appropriate punishment for rape is surely an open one. It is arguable that many prospective rapists would be deterred by the possibility that they could suffer death for their offense; it is also arguable

226. *Id.* at 602 n.1, 603.
227. *See id.* at 605 (Burger, C.J., dissenting).
228. *Id.* at 606.
229. *Id.* at 608 n.2.
230. *Id.*
231. *Id.* at 612.

> that the death penalty would have only minimal deterrent effect. It may well be that rape victims would become more willing to report the crime and aid in the apprehension of the criminals if they knew that community disapproval of rapists was sufficiently strong to inflict the extreme penalty. . . . Quite possibly, the occasional, well publicized execution of egregious rapists may cause citizens to feel greater security in their daily lives . . . .[232]

But the times they were a changin'. In 1975, two years before *Coker* was decided, Susan Brownmiller published a book entitled *Against Our Will: Men, Women and Rape.*[233] Brownmiller's book, although not without its own flaws and exaggerations, was responsible, more than any other single event, for sparking a transformation of American culture's consciousness about the seriousness and pervasiveness of rape. Judith Baer was not exaggerating when she wrote in 1991 that, in recent years, "[n]ot only has the law's basic approach to the crime of rape changed, but social attitudes could hardly be more different now from what they were fifty years ago . . . . Much of the credit for this success belongs to one author, Susan Brownmiller, and one book, *Against Our Will.*"[234]

Building on Brownmiller's work, feminist legal scholars like Susan Estrich,[235] Catharine MacKinnon,[236] Judith Baer,[237] Deborah Rhode[238] and others,[239] have demonstrated, convincingly, that the American legal system has historically and systematically minimized the seriousness of rape, in part by characterizing rape between strangers as "real rape," rape in the true sense, while dismissing rapes between all other persons as less serious.

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232. *Id.* at 617.

233. SUSAN BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN AND RAPE (1975).

234. BAER, *supra* note 208, at 244.

235. *See* SUSAN ESTRICH, REAL RAPE (1987).

236. *See* CATHARINE MACKINNON, FEMINISM UNMODIFIED 81 (1987).

237. *See* BAER, *supra* note 208, at 244-586.

238. *See* DEBORAH RHODE, GENDER AND JUSTICE 244-52 (1989).

239. *See generally* LORENNE CLARK & DEBRA LEWIS, RAPE: THE PRICE OF COERCIVE SEXUALITY (1977); SUSAN ESTRICH, REAL RAPE (1987); NANCY GAGER & CATHLEEN SCHURR, SEXUAL ASSAULT: CONFRONTING RAPE IN AMERICA (1976); SUSAN GRIFFIN, RAPE: THE POLITICS OF CONSCIOUSNESS (1986); CATHARINE MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 171-83 (1989); ANDREA MEDEA & KATHLEEN THOMPSON, AGAINST RAPE (1974); KATE MILLETT, SEXUAL POLITICS 44, 184, 335 (1970); DIANA RUSSELL, RAPE IN MARRIAGE (1982); DIANA RUSSELL, THE POLITICS OF RAPE: THE VICTIM'S PERSPECTIVE (1975); CAROL SMART, FEMINISM AND THE POWER OF LAW 26-49 (1989); Susan Estrich, *Rape*, 95 YALE L.J. 1087 (1986).

Rape was punishable by death as far back as ancient Babylonia. As a crime against a man's property, rape had to be dealt with severely. According to Brownmiller, rape was "the theft of virginity, an embezzlement of . . . (the woman's) fair price on the market."[240] Death was viewed as the appropriate penalty because rape was a crime against men and a crime against the chastity of women.

This attitude carried over into Western law. According to amici filed before the Supreme Court in *Coker*, "[t]he death penalty as a potential sanction for rape is part of the fabric of laws and enforcement patterns based on obsolete and demeaning notions about women which inevitably yields lack of enforcement of rape laws, rather than protection of women."[241]

States which had authorized the death penalty for rape, justified the sanction by claiming it was for the protection of women. A review of the impact of the death penalty for rape reveals that instead, capital punishment served as a symbol of white man's outrage over the defilement of their property. This property tradition was especially evident in Southern death penalty states.

History points to the inescapable truth that the death penalty for rape was imposed disproportionately against black men. Black men who raped white women, the sexual property of white men, were responsible in the law's eyes for devaluing the worth of the white men's sexual possession. In fact, only white men were exempt from the death penalty for the rape of a white woman in the pre-Civil War South. The double standard was codified in Georgia law until a year after the abolition of slavery.[242] Before 1861, the Georgia penal code expressly provided that rape committed by white men would be punished by a maximum prison term of twenty years, while slaves and "free persons of color" were to be put to death for the rape of free white women.[243]

Although facially neutral statutes were enacted during Reconstruction, imposition of the death penalty for rape continued to fall disproportionately to black men convicted of raping white women.[244] Only Justice Marshall faced the reality of racism in his *Furman* concurrence (later reaffirmed in *Coker*) by proffering statistics which showed that of 455 men executed for rape between 1930-1968, forty-eight were white and 405 were black.

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240. BROWNMILLER, *supra* note 233, at 18.
241. ACLU Amici, *supra* note 211, at 8-9.
242. *See generally id.*
243. *See generally id.*
244. *See id.*

Moreover, in the South, the worth of a white woman was determined by her purity.[245] Southern rape law emphasized the importance of chastity. In *Camp v. State*, a nineteenth-century case, a Georgia court proclaimed that rape of a virgin, "the citadel of whose character is virtue" is the ultimate degradation.[246] Fully a century later, another Georgia court upheld the death penalty for rape as "necessary for the protection of the mothers of mankind"[247] from "the forcible sexual invasion of her body, the temple of her soul, thereby soiling for life her purity, the most precious attribute of all mankind."[248] In 1977 in *Coker*, Chief Justice Burger, in advocating the death penalty for rape, described the defendant as a depraved human being who "presents a particular danger to the . . . chastity of women."[249]

Coker is inseparable from matters of sex and gender — those characteristics imposed upon biological sex by acculturation and socialization. Gender is a complex amalgam of meanings which society creates and attaches to biological sex. Gender is usually spoken of by researchers and theorists as socially constructed, not biologically determined.[250] This is because maleness is the one obvious trait shared by virtually all known capital rapists.

"Feminism" is not monolithic, and it never has been. New dissenting voices Katie Roiphe, Rene Denfeld, Camille Paglia, and Christine Hoff Sommers have joined the debate with long-time critics like Midge Decter.[251] Cogent criticisms of "feminism" and feminist scholarship notwithstanding, any intelligible discussion of

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245. *See id.* (noting also that the South did not even recognize the rape of black women slaves by their masters because they were already the latter's property, an interesting and disturbing analogy to the marital rape exemption).

246. 3 Ga. 417, 422 (1847).

247. Sims v. Balkom, 220 Ga. 7, 10, 136 S.E.2d. 766, 769 (1964).

248. *Id.* at 11.

249. Coker v. Georgia, 433 U.S. 584, 606 (1977) (Burger, C.J., dissenting).

250. *See, e.g.*, JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY (1990); GAYLE RUBIN, THINKING SEX: NOTES FOR A RADICAL THEORY OF THE POLITICS OF SEXUALITY, *IN* PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY (Carole S. Vance ed. 1984); *see also* RUTH BLEIER, SCIENCE AND GENDER (1984); LAURIE DAVIDSON & LAURA KRAMER GORDON, THE SOCIOLOGY OF GENDER 1-33 (1979); SIMONE DE BEAUVOIR, THE SECOND SEX 1-47 (1953); *See generally* ANNE FAUSTO-STERLING, MYTHS OF GENDER (1985); EVELYN FOX KELLER, REFLECTIONS ON GENDER AND SCIENCE (1985); SUZANNE KESSLER & WENDY MCKENNA, GENDER (1978).

251. *See, e.g.*, Wendy Kaminer, *Feminism's Identity Crisis*, ATLANTIC, Oct. 1993, at 51; *see also* KATIE ROIPHE, THE MORNING AFTER (1993); CHRISTINA HOFF SOMMERS, WHO STOLE FEMINISM? (1994); RENE DENFELD, THE NEW VICTORIANS (1995); CAMILLE PAGLIA, SEX, ART, AND AMERICAN CULTURE (1992); MIDGE DECTER, THE NEW CHASTITY AND OTHER ARGUMENTS AGAINST WOMEN'S LIBERATION (1972); MIDGE DECTER, THE LIBERATED WOMAN AND OTHER AMERICANS (1971).

sexual murder or serial murder[252] must bring questions of gender to the forefront. Traditional literature on the topic all but ignores gender. Disregarding gender buries the most salient issue of who is doing the raping — and the killing — and who is doing the dying. First and most important, only such scholarship recognizes the centrality of gender to any meaningful inquiry into serial sexual murder. To ignore or minimize gender, as virtually all traditional scholarship in this area does, disregards the critical point of who is raping whom.

Further, feminist scholarship at its best is useful because it tends to be interdisciplinary and inclusive rather than insular. Cameron and Frazer, for example, wrote:

> One further sign of our commitment to feminism is the consciously interdisciplinary focus of *The Lust to Kill* and the fact that we have felt able to venture into academic territory where we have no special claims to expertise. Feminists are notorious for not respecting the "proper" boundaries of academic disciplines, and in our opinion that is all to the good.[253]

Feminist learning typically employs gender as a fundamental organizing category of human experience, stressing that men and women have different perceptions or experiences in the same contexts — the male perspective having been dominant if not exclusive in fields of knowledge. Feminism further stresses that gender is not a natural biological fact but a social construct, a learned quality, an assigned status, which is therefore subject to identification by humanistic disciplines. Some poststructuralists, reacting to liberal feminism's focus on the experiences of white, middle class, heterosexual women, question the preeminence of gender. They posit that there is no essential womanness: "no woman but many women."[254] These writers appear not to reject gender as a frame of reference. They claim instead that gender cannot be understood in isolation; experiences based on gender cannot be separated from experiences based on race, class, sexual

252. *See, e.g.*, ROBERT RESSLER ET AL., SEXUAL HOMICIDE: PATTERNS AND MOTIVES (1988).

253. DEBORAH CAMERON & ELIZABETH FRAZER, THE LUST TO KILL at xv (1987).

254. For treatments of the debate, *see* DIANA FUSS, ESSENTIALLY SPEAKING (1989); ELIZABETH SPELMAN, INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT (1988); Angela P. Harris, *Race and Essentialism in Feminist Thought*, 42 STAN. L. REV. 581 (1990). For an accessible discussion of how poststructuralist thought might influence feminist jurisprudence, see Marie Ashe, *Mind's Opportunity: Birthing a Poststructuralist Feminist Jurisprudence*, 38 SYRACUSE L. REV. 1129 (1987).

preference, cultural identity, and the like.[255] These post-structuralists have as their goal the crafting of "a synthesis of class, race and gender perspectives into a holistic and inclusive feminist theory and practice."[256] Their challenge goes to the heart of the matter of gender. Thornhill, for one, demands that white feminists re-edit their work in a way that the "experiences of Black women . . . are not 'merely tacked on as window dressing, dismissed in parentheses, or hidden in footnotes.'"[257] Feminist theory often begins by describing, defining, and exposing patriarchy. The word is a wide conceptual umbrella that covers systems of male dominance which oppress women through social, political, and economic institutions.

In the criminal law area, feminists have attempted to demonstrate that "what is perhaps the most paradigmatic expression of patriarchical force — rape — is not, as the common mythology insists, a crime of desire, passion, frustrated attraction, victim provocation or uncontrollable biological urges."[258]

Less convincingly, feminists such as Susan Brownmiller assert that sexual violence against women is culturally condoned and widespread. Given the possibility of rape as well as its pervasive actuality, Brownmiller described rape as "nothing more or less than a conscious process of intimidation by which *all men* keep *all women* in a state of fear."[259] She included all men because any man could be a rapist, and even men who do not rape are the beneficiaries of the climate of coercion created by men who do. She defined rape as an institution, because the weight of patriarchal culture conspires with the rapist. She thus viewed rape as an insidious form of social control, because rape is a constant reminder to all women of their vulnerable condition. Andrea Dworkin argued that

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255. *See, e.g.*, Combahee River Collective, *A Black Feminist Statement*, in ALL THE WOMEN ARE WHITE, ALL THE BLACKS ARE MEN, BUT SOME OF US ARE BRAVE 13 (Gloria T. Hull et al., ed. 1982).

256. Maxine Baca Zinn et al., *The Costs of Exclusionary Practices in Women's Studies*, in MAKING FACE, MAKING SOUL: HACIENDO CARAS: CREATIVE AND CRITICAL PERSPECTIVES BY FEMINISTS OF COLOR 29, 35 (1990).

257. Marlee Kline, *Race, Racism, and Feminist Legal Theory*, 12 HARV. WOMEN'S L.J. 115, 117 (1989) (quoting Esmeralda Thornhill, *Focus on Black Women*, 1 CAN. J. WOMEN & L. 153, 160 (1985)). For other critiques of white feminist theory and practice, *see, e.g.*, COMMON DIFFERENCES: CONFLICTS IN BLACK AND WHITE FEMINIST PERSPECTIVES (Gloria Joseph & Jill Lewis eds. 1981); HOME GIRLS: A BLACK FEMINIST ANTHOLOGY (Barbara Smith ed. 1983); BELL HOOKS, AIN'T I A WOMAN: BLACK WOMEN AND FEMINISM (1984); BELL HOOKS, FEMINIST THEORY: FROM MARGIN TO CENTER (1984).

258. JANE CAPUTI, THE AGE OF THE SEX CRIME 3 (1987).

259. BROWNMILLER, supra note 233, at 15 (emphasis in original).

the driving engine of male history is male violence.[260] In *Intercourse*,[261] Dworkin also contended, unpersuasively, that pornography underpins male supremacy.

Feminist theory is right to define rape not only as a violent act, but also as a social institution which can have the effect of perpetuating patriarchal domination. The perpetrators are thus not "an aberrant fringe. Rather, rape is a social expression of sexual politics, an institutionalized and ritual enactment of male domination, a form of terror which functions to maintain the status quo."[262]

Brownmiller, Estrich, and others are also right that the law's definitions and categories of rape are too narrow. Date rape is real rape. Marital rape is real rape. Workplace rape is real rape. But by arguing that all men are rapists, Brownmiller dilutes the idea of rape. By obliterating real distinctions between rapists and non-rapists, she minimizes the real harm caused by real rape. If *all* men are rapists then *none* are.

One need not subscribe to Brownmiller's entire, facile worldview — I prefer to be agnostic at the moment — to appreciate her insight that rapists are not so different from the rest of us as we might like to believe. As Greg Cook put it: "It's a penis thing."[263]

As mentioned at the outset of this section, the transformation of our intellectual and cultural understanding of rape had its genesis in Brownmiller's 1975 book — only two years before *Coker* was decided. Today, twenty years after *Coker* and twenty-two years after Brownmiller's book, it could well be argued that Professor Barrett is correct that the new capital rape statutes "would not be vulnerable to the arguments (raised by Ms. Ginsburg [in her *Coker amicus*]) that they are vestiges of viewing rape victims as male property."[264]

IV. RECONSTRUCTING *COKER*: THE RIGHT RESULT BUT FOR THE WRONG REASONS, AND AN ALTERNATIVE HOLDING THAT THE DEATH PENALTY FOR RAPE IS UNCONSTITUTIONAL: RACISM

> The South before the war had mighty rigid codes: Slave owners, feeling none too firm on the Ethics end, got mighty interested in Manners.[265]

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260. *See* ANDREA DWORKIN, WOMAN HATING (1974); ANDREA DWORKIN, PORNOGRAPHY: MEN POSSESSING WOMEN (1981).

261. *See* ANDREA DWORKIN, INTERCOURSE (1987).

262. CAPUTI, *supra* note 258, at 3.

263. Telephone conversation with the pacifist, Greg Cook (Aug. 27, 1994).

264. Barrett, *supra* note 7, at A21.

265. CONFEDERATE WIDOW, *supra* note 1, at 225.

A. *Rape, Race and Death*

> The second-saddest thing to fighting a war is remembering it inch by inch decades later.[266]

The history of capital punishment for rape in America — particularly in the American South — has been largely the history of race;[267] as has the history of constitutional challenges to the legality of capital punishment in the American legal system.

The numbers are stark. In their "definitive"[268] study of the racial dimensions of capital rape, Wolfgang and Riedel found that of the 455 persons executed for rape between 1930 and 1972, 89.5% were nonwhite.[269] Wolfgang's and Riedel's "ambitious" study

> sampled the case records of some three thousand convicted rapists in eleven southern states (although the analysis has thus far been limited to data from representative counties in six of these states). The study found . . . that other considerations such as the degree of force used by the offender, the extent of injury suffered by the victim, the fact of some other contemporaneous felony, and the like, did not begin to account for the racial differences in sentencing.[270]

Even Solicitor General Robert Bork, in his *amicus* brief in *Gregg v. Georgia*, conceded the validity of the Wolfgang and Riedel study.[271]

In a national study of death row demographics at the time *Furman* was decided in 1972, Marquart and Sorensen agreed, "Our data reveal a clear pattern of discrimination that parallels the findings of Wolfgang and Riedel. Of the eighty rapists on death row

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266. *Id.* at 323.

267. On race and rape, *see generally*, JAMES MARQUART ET AL., THE ROPE, THE CHAIR, AND THE NEEDLE 38-65 (1995); THORSTEN SELLIN, THE PENALTY OF DEATH 13-40 (1980); William B. Huie, *The South Kills Another Negro*, *in* THE DEATH PENALTY: A LITERACY AND HISTORICAL APPROACH (E. McGehee & W. Hilderbrand eds., 1964); Rupert Koeninger, *Capital Punishment in Texas*, 15 CRIME & DELINQ. 132 (1969); Coramae Mann & Lance Selva, *The Sexualization of Racism*, 3 W. J. BLACK STUD. 168 (1979); Donald H. Partington, *The Incidence of the Death Penalty for Rape in Virginia*, 22 WASH. & LEE L. Rev. 43 (1965).

268. *See* James W. Marquart & Jonathan R. Sorensen, *A National Study of the Furman-Commuted Inmates*, *in* THE DEATH PENALTY IN AMERICA, supra note 193, at 167.

269. *See* Marvin E. Wolfgang & Marc Riedel, *Racial Discrimination, Rape and The Death Penalty*, *in* THE DEATH PENALTY IN AMERICA 194 (Hugo Bedau ed., 1982).

270. BOWERS, *supra* note 193, at 70.

271. *See* Brief of the United States as *Amicus Curiae*, at 11-12, Gregg v. Georgia, 428 U.S. 153 (1976) (No. 74-6257).

at the time of the *Furman* decision, all were incarcerated in southern prison systems."[272] Of these eighty, "sixty-eight (85%) were non-white. The victims of these offenses were overwhelmingly white."[273]

And William Bowers' studies confirmed that actual executions (as opposed to lynchings) for rape were "eight times as common among blacks as among whites (17.9 as opposed to 2.2%, respectively) who have been put to death under state authority. Indeed, the absolute numbers reveal that the death penalty for rape has been imposed overwhelmingly on blacks — 502 to 58 — by a nine-to-one ratio."[274]

Given these numbers, it is perhaps unsurprising that when civil rights organizations first began, in the early 1960s, to challenge the legality of capital punishment as an American legal system, they focused on race and rape. In attacking capital punishment as a fixture in American law since the creation of the Republic, however, those civil rights lawyers had a substantial burden of history to overcome.

1. The Old Days

> The widow Mardsen's Lilac-Time Gala was a beloved tradition hereabouts — but then too, so was slavery.[275]

The framers of the Constitution clearly contemplated the validity of capital punishment; the Fifth Amendment spoke of deprivations of "life or limb" by the federal courts without "due process of law," a requirement extended to the state courts when the Fourteenth Amendment was enacted during Reconstruction.

For the first century and a quarter of the nation, few seriously questioned the constitutionality of capital punishment for rape or murder.[276] On August 27, 1927, however, Massachusetts executed Nicola Sacco and Bartholomew Vanzetti, two Italian immigrants,

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272. Marquart and Sorensen, *supra* note 268, at 168.

273. *Id.*

274. BOWERS, *supra* note 193, at 74 & tbl. 3-1.

275. CONFEDERATE WIDOW, *supra* note 1, at 231.

276. Florida's history of capital punishment is illustrative. In 1822, when Florida became a territory, it became necessary to enact a criminal code. The First Legislative Council of Florida, meeting in Pensacola, passed an act which provided for the first sanctioned death penalty under Florida's territorial or state authority, and designated three offenses as capital: murder, rape, and arson. *See* Michael Mello, *The Jurisdiction To Do Justice: Florida's Jury Override and the State Constitution*, 18 FLA. ST. U. L. REV. 923, 963-64 (1991). Subsequent Florida legislative enactments retained capital punishment for rape. *Id.* at 964-66.

who were also considered political radicals. Caught up in the Palmer Raids and the first Red Scare following World War I, Sacco and Vanzetti were likely innocent of the South Braintree robbery and murder for which they were executed (another man had confessed to the crimes).[277] Sacco and Vanzetti lived on death row for six years, while their claims of innocence and prejudice of the trial judge worked their way through the courts. The final United States Supreme Court opinion, written by Justice Oliver Wendell Holmes, stated that in habeas corpus proceedings judicial prejudice is not a specific violation of the Constitution, and that absent such a constitutional violation the federal courts could not intervene into a state criminal trial.[278]

The Sacco and Vanzetti execution caused some thinking Americans to wonder, not about the abstract wisdom of capital punishment, but about the way in which the penalty was applied.[279] Capital punishment was becoming a civil rights issue. It is thus perhaps understandable that the two preeminent national civil rights organizations — the ACLU, founded in 1920, and the NAACP, founded in 1939 — began taking a hard look at who was being executed and under what circumstances.

Burton Wolfe, in his fascinating history *Pileup on Death Row*, writes that the national protest demonstrations against the Sacco and Vanzetti executions led the federal Department of Prisons, a division of the Department of Justice, to begin keeping track of executions in America for the first time.[280] Americans received the first realistic picture of death row demographics. During the first six years of the record-keeping, 1930-1935, the record revealed that the South executed four times as many people as any of the three regions of the United States, and that it sentenced twice as many blacks to death as whites.[281]

These government statistics provided quantitative and disinterested support for facts that any Southerner worth his salt knew all along. Capital punishment was a predominately Southern phenomenon, disapportionately applied against black men, especially black men accused of raping white women.

The demographics of executing rapists led the NAACP's Legal Defense and Educational Fund (LDF), in 1950, to take on the defense of black men accused of raping white women. Death was

277. *See* MICHAEL L. RADELET, ET AL, IN SPITE OF INNOCENCE (1992).
278. *See* ROBERTA STRAUSS FEURLIGHT, JUSTICE CRUCIFIED (1977).
279. *See* BURTON H. WOLFE, PILEUP ON DEATH ROW (1973).
280. *See id.* at 80.
281. *See id.*

not the only issue on LDF's plate, of course. By the early 1950s, LDF's legal challenges to the *Plessey v. Ferguson*[282] "separate but equal" doctrine and segregated public schools were chugging along towards the landmark 1954 decision in *Brown v. Board of Education.*[283] Under the leadership of LDF's Thurgood Marshall, the organization and its allies crafted a brilliant strategy of undermining *Plessey* before finishing it off.[284] Rather than waging a frontal attack on *Plessey*'s "separate" but "equal" doctrine, Thurgood Marshall brought a series of cases[285] to the Supreme Court arguing, in various factual settings, that "separate" could *never* be "equal."[286] These early cases prepared the justices to overrule *Plessey* when the frontal attack did arrive, in *Brown v. Board.* The cases prepared the justices — psychologically and emotionally, as well as legally and doctrinally — to accept Marshall's coup de grace to *Plessey* in *Brown.* "Look," Marshall in effect said, "over the past few years we have been proving, in case after case, that in a wide variety of factual settings, 'separate' means 'unequal.' What we have been proving is that 'separate but equal' is a doctrine that is not applied fairly. It just does not work. The court should reject it."

This two-step litigation approach — undermining a noxious precedent before asking for its outright rejection — is functionally similar to the slow demise of the *Betts v. Brady*[287] "special circumstances" rule for counsel, during the time between *Betts v. Brady* in 1942 and *Gideon v. Wainwright*[288] in 1963.[289] It also is similar to LDF's challenges to capital punishment, which I will discuss now.

If Thurgood Marshall was the grand architect of *Brown v. Board of Education,* Anthony Amsterdam was the architect of *Brown*'s capital punishment counterpart: the 1972 decision in *Furman v. Georgia*[290] outlawing capital punishment as then administered in America and clearing every death row in every state. As the pre-*Brown* cases set the stage for *Plessey*'s eventual overruling in *Brown,* so the pre-*Furman* cases set the stage for the *Furman* court's rejection of capital punishment as then applied.

Sometimes individual justices of the Supreme Court send signals to the legal world outside the Court — lawyers and lower

282. 163 U.S. 537 (1896).
283. 347 U.S. 483 (1954).
284. *See* RICHARD KLUGER, SIMPLE JUSTICE (1975).
285. *See id.*
286. *See id.*
287. 316 U.S. 455 (1942).
288. 372 U.S. 335 (1963).
289. *See* ANTHONY LEWIS, GIDEON'S TRUMPET (1966).
290. 408 U.S. 238 (1972).

court judges — indicating that, although a majority of the Court was not quite ready to hear and decide particular constitutional questions, the justices were interested in those issues and the attorneys should persevere and keep on asking the Court to decide those constitutional questions. One such method of telegraphing this message is dissenting from the denial of petition for writ of certiorari (plenary review). In 1963 such a dissent galvanized the nascent legal campaign to outlaw capital punishment.[291]

In an Alabama rape case, Justice Arthur Goldberg, along with Justices William O. Douglas and William Brennan, signaled that the Court might be receptive to constitutional challenges to capital punishment for rape.[292] Six justices voted against hearing the Alabama rape case, but Goldberg's dissent suggested that in the future the Court might be receptive to considering whether, in light of the worldwide trend against the death penalty for rape, executing rapists violates the "evolving standards of decency that mark the progress of a maturing society."[293] Also, the three dissenters wrote that the questions of disproportionality and "unnecessary cruelty" of death for rapists deserved the Court's full consideration.[294]

Herbert Haines, in his indispensable book *Against Capital Punishment,*[295] writes that the Goldberg dissent was an intentional signal to the lawyers who were considering the use of the courts to abolish capital punishment for rape.[296] That signal was received "loud and clear" at LDF and ACLU. Borrowing a page from Thurgood's playbook in *Brown v. Board of Education*, LDF capital litigators, now led by Jack Greenberg, reasoned that the Court was not likely to strike down capital punishment on constitutional grounds "in one judicial stroke."[297] Thus, LDF

> chose to attack the death penalty *indirectly*. They began working on a strategy that would attack the *process* by which convicted criminals were sentenced to die. There were two parts to this strategy. One involved a concerted assault on racial discrimination in death sentencing and the other pertained to selected trial procedures in capital cases.[298]

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291. *See* HERBERT H. HAINES, AGAINST CAPITAL PUNISHMENT (1996); WOLFE, *supra* note 279, MELTSNER, *supra* note 78.

292. 375 U.S. 889 (1963) *cert. denied.*

293. Trop v. Dullus, 356 U.S. 86, 101 (1958).

294. 375 U.S. at 891.

295. *See* HAINES, *supra* note 291.

296. *See id.*

297. *Id.* at 27.

298. *Id.*

The latter attack focused on three common features of capital trials at the time. First, the exclusion of "death scrupled"[299] jurors from sitting on capital juries, thus depriving capital defendants of the right to a jury composed of a fair cross section of the community.[300] Second, the simultaneous determination by the jury of guilt and sentence in a single, unified trial. Third, the absence of clear and objective standards to guide the jury's process of deciding who dies.[301]

2. *Pileup on Death Row*

During war nothing comes at you on the level.[302]

These challenges, and the appeals they generated, proved to be a successful strategy for convincing courts to put executions on hold until the lower courts, and eventually the United States Supreme Court, had a chance to consider and decide the various constitutional issues LDF was asserting in individual capital cases all across the country. By the mid-1960s, Amsterdam and LDF had won a virtual moratorium on executions in the United States. If a death row prisoner had a lawyer to file the legal papers mass-produced by LDF — called "Last Aid Kits" — the condemned prisoner was entitled to a stay of execution. Amsterdam explained the strategy to Burton:

> As papers came across my desk, I kept seeing cases of blacks sentenced to death in the South. I was constantly confronted with the fact that in dealing with the death penalty, we were not merely dealing with a barbaric relic of civilization in its most savage days, but also with discrimination against blacks, the poor, the pariahs and outcasts of society. At the same time, as I looked at all the violence going on in our society, the death penalty came to symbolize to me the tendency to resort to violence instead of reason in seeking the solution to problems. This insight came to me while I was handling attacks on the death penalty on a case by case basis, on specific issues such as exclusion of black people and poor people from juries, loss of rights to counsel, and so on. This larger insight came together with a case by case study of discrimination against blacks in the South, often involving the death sentence.

299. *Id.* at 28.
300. *See id.*
301. *See id.*
302. CONFEDERATE WIDOW, *supra* note 1, at 62.

> When I pulled all of that together, I knew that abolishing the death penalty altogether was the major job to be done.[303]

But what if the death row prisoner did not *have* a lawyer? LDF might be able to find him one. But what if LDF did not even know of that prisoner's existence? What if LDF did not know a person with a pending execution date even needed a lawyer?

Such was the situation in Florida in 1966: the second largest death row population in the nation (fifty-two condemned men) and not enough lawyers to file LDF's form papers to stay the execution.[304] Until 1966, Florida's death row population was not at risk of imminent executions. The state had been governed, in succession, by three adversaries of capital punishment: Leroy Collins, Faris Bryant, and Haydon Burns. But in 1966, Claude Kirk was elected governor. Governor Kirk was elected following campaign promises to enforce the death penalty. Kirk was determined to keep his promise.[305]

Thus, Florida became one of the principal crises states for Amsterdam and LDF. If Florida began executing people, the entire shaky national moratorium on execution was in jeopardy of coming apart. Much of the moratorium's power was grounded in perception. Amsterdam and LDF had persuaded various judges and governors in the capital punishment states that the United States Supreme Court would countenance no executions until the Supreme Court had sorted out the challenges to the legality of capital punishment as a legal system. The moratorium was thus in part a self-fulfilling prophecy. If Florida broke ranks, then other states might as well.

The Florida Supreme Court would let those executions proceed, even though those people electrocuted by "Old Sparky" lacked lawyers to raise the very constitutional claims that were causing stays in many other states. This was, after all, the same Florida Supreme Court that had refused to give Clarence Earl Gideon a lawyer in his felony robbery trial.[306] It was not until the United States Supreme Court reversed in *Gideon v. Wainwright*[307] that the Florida Supreme Court joined the rest of the nation in providing court-appointed lawyers to citizens on trial for non-capital felonies. Since the Florida Supreme Court did not think lawyers were a

303. WOLFE, *supra* note 279, at 232-33.
304. *See id.* at 229.
305. *See id.* at 230.
306. *See* LEWIS, *supra* note 289.
307. 372 U.S. 335 (1963).

fundamental right at felony trials, the justices could hardly be expected to extend *Gideon* to require counsel for habeas corpus proceedings in federal court.

Thus, the capital counsel problem in Florida was as follows: a large (and undefined) death row population; no lawyers for each individual prisoner; a governor intent on signing death warrants on an unknown quantity of those prisoners; and a state supreme court willing to allow unrepresented people be executed. That was the problem.

The solution was crafted by Toby Simon, president of the Florida ACLU. Simon's strategy — called "Simon's Frolic" by some LDF lawyers[308] — was to file a class action on behalf of *all* Florida death row prisoners. Up until then, challenges to capital punishment had been raised in individual cases. A class action permits a group of similarly situated people (such as a state's death row population) to establish the rights of the entire class, and to do it in a single court case. As Amsterdam explained:

> Until Kirk became governor in Florida, this was still on a piecemeal basis. But the way he was talking, it looked as though there was going to be a bloodbath. So, there was no time for a case by case procedure any longer. Realizing this led Toby Simon [Tobias Simon, Miami attorney who spent many years fighting against capital punishment on his own and for the ACLU] to suggest filing a class action. The legal team we put together adopted this idea and used it to argue on the constitutionality of the death penalty itself instead of just the measures that were being used to inflict it: measures such as all-white juries.[309]

Toby Simon's class action strategy worked. The class action lawsuit was filed in April 1967 in federal district court in Jacksonville, Florida. On April 13, 1967, federal district judge William McCrae, Jr. issued a temporary stay of all Florida executions pending further proceedings. The moratorium would hold in Florida.

But not elsewhere, at least not yet. The day after McCrae issued his Florida stay, Aaron Mitchell was executed by lethal gas in California. On June 2, 1967, Jose Monge was hanged in Colorado. Monge would be the last execution for ten years in America, however, until Gary Gilmore volunteered for death by Utah firing squad in 1977.

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308. *See*, MELTSNER, *supra* note 78, at 130.
309. WOLFE, *supra* note 279, at 233.

Anthony Amsterdam, the moratorium's master planner, described to Wolfe how the executions of Mitchell and Monge made LDF lawyers feel:

> It was very upsetting. We were so busy with the [Florida] class action that we had no idea any execution had been scheduled elsewhere. Right after that we got calls from people in California who said: "Hey, look what's going on out here. It's the same thing as in Florida. We've got a new governor [Reagan] who favors capital punishment and doesn't even attend clemency hearings. We need help to stop a bloodbath here, too." So, we flew to California and filed our class action there as well . . . .
>
> In the fall of 1967 we decided to go public rather than continue working on our own in seclusion," Tony Amsterdam recalled three years later, his agony over the deaths of Mitchell and Monge still unabated. "The first reason was that we'd proved we had the methods and the power to stop executions, but new execution dates were being set too fast for us to get prepared for them. The Mitchell case really focused our thinking on this because it caught us completely unprepared and we had to watch him die without being able to do anything about it. Drawings of the gas-chamber scene appeared in the newspapers and on television; it was like we were observing it, and we were horrified. This gave us an imperative, a moral duty, to see to it that it never happened again.
>
> The second reason for going public was that we felt if we could produce a public network that would stop executions for a while, then when we got up to the state or federal supreme court it would be harder for justices to turn down our appeals based on the Constitution and start the executions up again. Once we stopped the executions, the courts would then have to face the awful reality that a decision in favor of capital punishment would start the bloodbath again.
>
> Let me explain it this way: the main difficulty we have been faced with is this argument that capital punishment is still needed in our society as retribution against the worst offenders, as a preventive of crime, as a way of bringing about greater morality. It's a ridiculous argument with absolutely nothing to back it up, but it's so emotional and so deeply ingrained in our society that it's hard to get rid of it. But if we could actually stop the executions, establish this condition that so many people are afraid of, and then show that the country was not falling apart because of it, then we could stop the judges from thinking along the lines of this emotional argument.

> So, that's why we set up a public network — to stop the executions and set the groundwork for our effort to get rid of the death penalty on constitutional grounds in the court. Stopping executions, *all* executions, became our business."[310]

LDF's strategy led to the 1967-77 moratorium on executions in America while the courts sorted through the legal challenges to capital punishment. Also, on the road to the 1971 and 1972 cases in which the Supreme Court squarely addressed, for the first time, the legality of capital punishment itself, the Court revolutionized the death-deciding process in state capital trials. In 1968 the Court struck down the "Lindbergh Law" which made defendants subject to capital punishment only if they exercised their right to jury trial. Also in 1968, the Court, in the *Witherspoon* case, sharply limited the states' ability to exclude from capital cases potential jurors with moral doubts about the death penalty.[311]

These cases were stage-setters to the Supreme Court's confrontation with the legality of capital punishment itself. Two false starts, *Boykin*[312] in 1969 and *Maxwell*[313] in 1970, provided the justices with opportunities to address the larger issue of capital punishment's constitutionality, but in both cases the Court ducked, deciding both cases on narrower, case-specific procedural grounds. The Supreme Court, however, finally decided the big issues. It was the culmination of Amsterdam's and LDF's constitutional attack on capital punishment, and it seemed that they had lost.

In 1970, the Court granted certiorari review in *McGautha v. California*.[314] Amsterdam and LDF raised the full range of their procedural challenges to capital punishment, arguing that the unitary trail and the absence of sentencing standards offended the Fourteenth Amendment's guarantee of "due process of law."[315] The Supreme Court issued its decision in *McGautha* in 1971. Amsterdam and LDF had lost by a vote of six to three.

3. Constitutional Earthquake

> War ended and stillness suddenly got scarier than noise.[316]

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310. *Id.* at 234, 244-45.
311. Witherspoon v. Illinois, 391 U.S. 510 (1968).
312. Boykin v. Alabama, 395 U.S. 238 (1969).
313. Maxwell v. Bishop, 398 U.S. 262 (1970).
314. 402 U.S. 183 (1971).
315. *See id.*
316. CONFEDERATE WIDOW, *supra* note 1, at 170.

The moratorium on executions appeared to be over. Now that the Court had spoken, LDF prepared for a "bloodbath." In mid-May an emergency conference was held at Columbia Law School. Haines writes that, "the central conclusion" to be drawn from *McGautha* and its companion cases, Amsterdam told the conferees, was that "the Supreme Court could not be expected to take any favorable action on the death penalty anytime soon."[317]

LDF still had its Eighth Amendment "cruel and unusual punishment" angle to present to the Supreme Court; it would be a relatively simple matter for LDF to repackage its "due process" challenges as Eighth Amendment challenges. If, however, the procedural challenges had a chance of persuading the Court to outlaw capital punishment itself, "due process of law" seemed to provide the justices with the best constitutional hook. LDF, however, had lost the due process claim in *McGautha*.

Less than two months after *McGautha* was decided, however, the Court agreed to hear four cases to decide the Eighth Amendment challenge to capital punishment as a legal system. Two cases involved murder and two involved rape. This package of four cases became known as *Furman v. Georgia*.[318]

The Supreme Court heard oral arguments on *Furman* and its three companion cases on January 17, 1972. Amsterdam argued *Furman* brilliantly. Still, there was little reason for optimism. LDF's best arguments had been shot down in *McGautha*. Two new Nixon appointments to the Court did not help LDF's odds.

Then lightning struck. On June 29, 1972, the Supreme Court announced its decision in *Furman*. Amsterdam and LDF had won, five votes to four. The very procedural challenges to capital punishment that the Court had rejected one year earlier, in *McGautha* in 1971, had carried the day in *Furman* in 1972. The legal system of capital punishment, as it then existed, was history. Every capital statute was invalidated. Every death sentence of every person on death row was to be reduced to life imprisonment. In a stroke more than six hundred condemned people were no longer subject to execution.

Haines writes that the news of *Furman* struck LDF's New York headquarters "like an earthquake . . . . That evening, while a rock band called 'The Eighth Amendment' played in the library of their headquarters on Columbus Circle, [LDF] staffers celebrated into

317. HAINES, *supra* note 291, at 36.
318. 408 U.S. 238 (1972).

the wee hours."[319] Michael Meltsner describes the scene as the news of *Furman* first came in:

> within minutes the story began to appear on every major wire service ticker. Calls jammed the [LDF] switchboard. Lawyers and secretaries produced transistor radios. General disbelief. Numbness. Tears in people's eyes. Slowly smiles replaced gaping jaws; laughter and embraces filled the halls. "This place looks like we just landed a man on the moon," [staffer Douglas] Lyons shouted into a phone.[320]

4. Aftershocks

> It's tough, being a good housekeeper for pretty much total chaos.[321]

June 29, 1972, is a singular date in the history of American jurisprudence. Although *Furman* marked the end of one era of capital punishment and of the courts, it also marked the beginning of a new and, in many respects, more complicated era. *Furman* did not outlaw capital punishment per se; only two justices, Thurgood Marshall and William Brennan, would have gone that far. The three other justices in the five to four *Furman* majority only voted to eliminate the capital punishment legal system *as it was then applied.* Thus, seven justices — the three other than Brennan and Marshall in the *Furman* majority, plus the four dissenters, seemed to leave open the possibility that states could retool and restore capital punishment as a legal system, and that such new statutes would pass constitutional muster. In fact, the primary procedural defects in the death penalty statues struck down in *Furman* appeared easy to correct. Replace the unitary trial with a bifurcated trial, at which guilt and sentence would be tried and decided in two separate proceedings. Also, provide the sentencing jury with standards (statutorily-listed aggravating and mitigating circumstances, for example) to guide its consideration of whether the particular defendant has lost his moral entitlement to live, and deserves to die for his crimes.

Thus, *Furman* shifted the battleground from the courts to the state legislatures. State legislatures were left with the task of crafting and enacting revised capital statutes responsive to the

319. HAINES, *supra* note 291, at 38.
320. MELTSNER, *supra* note 78, at 290.
321. CONFEDERATE WIDOW, *supra* note 1, at 21.

commands of the *Furman* decision. The problem was that there was no single "opinion" of the five justices in the *Furman* majority. Each of the five wrote separate opinions, and no justice in the majority joined the opinion of any other justice in the majority. The four dissenters also wrote their own opinions. In all, *Furman* produced nine complicated opinions by all nine justices — the longest series of opinions in a single case in the history of the United States Supreme Court.

Despite the confusion generated by *Furman*'s fractured Court, state legislatures set about drafting and enacting revised death penalty statutes. Florida led the way, enacting its new statute in December 1972.[322] Other states quickly followed suit. Over the next few years, thirty-five states would enact revised death penalty statutes.[323] In 1976 the Supreme Court upheld the abstract constitutionality of the new statutes in Florida, Georgia, and Texas.[324]

America had seen no executions since 1967, and the courts grappled with the constitutional dimensions of capital punishment. The moratorium on executions lasted ten years and it ended with Gary Gilmore. Gilmore had murdered a gas station attendant and a motel clerk and was sentenced to death. Gilmore wanted to die, and decided to abandon all possible legal challenges to his death sentence.[325]

A few months after Gilmore's statute-assisted suicide, the Supreme Court decided *Coker v. Georgia*.[326] In the lead brief for Anthony Coker, LDF attorney David Kendall and his colleagues argued the racist history of capital punishment for rape. Yet not a single justice addressed the race issue in an opinion in *Coker*. Why not? I have always wondered.

I do not know, but I can speculate. I have long thought that the court ignored the racial dimensions of capital punishment for rape because they were looking ahead to constitutional challenges to capital punishment for murder. If the social studies on rape and race had constitutional significance, then later studies demonstrating a connection between race and capital punishment for murder would also rise to constitutional magnitude. In other words, basing *Coker* on Wolfgang's study would expose the murder statutes, that the court had just upheld the year before, to attack based on future

322. *See* FLA. STAT. ANN. §921.141 (West 1972).
323. *See* Gregg v. Georgia, 428 U.S. 153 (1976).
324. *See id.*
325. *See* MAILER, *supra* note 2.
326. Coker v. Georgia, 433 U.S. 584 (1977).

social science studies. If capital punishment as applied to rape was unconstitutionally racist, then capital punishment as applied to murder might be unconstitutionally racist as well.

Perhaps the justices in *Coker* intuited that social science would be able to document racism in capital punishment for murder — as Wolfgang and others had documented racism in capital punishment for rape. If so, the justices were right. David Baldus directed the study, which reached the Supreme Court in the case of Warren McCleskey. The court decided *McCleskey v. Kemp*[327] in 1987, ten years after it had decided *Coker v. Georgia.*

B. McCleskey: The Study

> It's our duty, imagining each other.[328]

Numerous statistical studies of the post-*Furman* administration of capital punishment for murder have found that the death penalty is rarely imposed when the victim's race is black, regardless of the race of the defendant. These patterns have been documented by David Baldus, William Bowers, Glenn Pierce, Samuel Gross and other scholars.[329] Baldus and his colleagues, however, conducted

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327. 481 U.S. 279 (1987).

328. CONFEDERATE WIDOW, *supra* note 1, at 266.

329. *See generally* DAVID BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY (1990) [hereinafter BALDUS, EQUAL JUSTICE]; SAMUEL GROSS & ROBERT MAURO, DEATH AND DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING (1989); Raymond Paternoster & Ann-Marie Kazyaka, *Racial Considerations in Capital Punishment: The Failure of Evenhanded Justice, in* CHALLENGING CAPITAL PUNISHMENT (Kenneth C. Haas & James A. Inciardi eds., 1988); William Bowers, *The Persuasiveness of Arbitrariness and Discrimination Under Post-*Furman *Capital Statutes*, 74 J. CRIM. L. & CRIMINOLOGY 1067, 1071-72 (1983); William Bowers & Glenn Pierce, *Arbitrariness and Discrimination Under Post-*Furman *Capital Statutes*, 26 CRIME & DELINQ. 563 (1980); Peter W. Lewis et al., *A Post-*Furman *Profile of Florida's Condemned — a Question of Discrimination in Terms of the Race of the Victim and a Comment on* Spinkellink v. Wainwright, 9 STETSON L. REV. 1, 16 (1979); Michael Radelet, *Racial Characteristics and the Imposition of the Death Penalty*, 46 AM. SOC. REV. 918 (1981); Michael Radelet & Glenn Pierce, *Race and Prosecutorial Discretion in Homicide Cases*, 19 L. & SOC'Y REV. 587 (1985); Hans Zeisel, *Race Bias in the Administration of the Death Penalty; the Florida Experience*, 95 HARV. L. REV. 456 (1981); Samuel Gross, *Race and Death*, 18 U.C. DAVIS L. REV. 1275 (1985); BOWERS, *supra* note 193; David Baldus, *Arbitrariness and Discrimination in the Administration of the Death Penalty*, 15 STETSON L. REV. 133 (1986); David Baldus et al., *Monitoring and Evaluating Contemporary Death Sentencing Systems: Lessons from Georgia*, 18 U.C. DAVIS L. REV. 1375 (1985); David Baldus et al., *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661 (1983); Samuel Gross & Robert Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 STAN. L. REV. 27 (1984); Joseph Jacoby & Raymond Paternoster, *Sentence Disparity and Jury Picking*, 73 J. CRIM. L. & CRIMINOLOGY 379 (1982); Elmer Johnson, *Selective Factors in Capital Punishment*, 36 SOC. FORCES 165 (1957); Rupert Keoniger, *Capital Punishment in*

the most comprehensive study ever of capital sentencing patterns. The study examined the state of Georgia. This study became the basis of the now definitive Supreme Court decision addressing the constitutional consequences of racial disparities in capital sentencing.

The legal conversation about racism in the capital punishment system has occurred principally in constitutional terms. The Supreme Court ended this conversation at the federal constitutional level in 1987 when, in *McCleskey v. Kemp*,[330] the Court held that a constitutional challenge to such racism must show intentional discrimination without the benefit of presumptions of the type that are used in other areas of discrimination law, such as employment or jury selection. The Court also held the statistical study at issue in that case — the Baldus study of Georgia's capital punishment system, a state-of-the-art study costing $500,000 and rightly called "the Cadillac of race studies" — insufficient to require a finding of discriminatory intent under the Eighth and Fourteenth Amendments.

David Baldus and his colleagues presented two sets of data. The first set was taken from the Procedural Reform Study (PRS), which began prior to 1980. The second and major set of data was the Charging and Sentencing Study (CSS).[331]

The study was designed to compare pre- and post-*Furman* sentencing of those convicted of murder in Georgia.[332] Its purpose was to evaluate the effectiveness of *Furman*-mandated statutory reform in reducing arbitrariness and discrimination.[333] It focused

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Texas 1924-1968, 15 CRIME & DELINQ. 132 (1969); Raymond Paternoster, *Prosecutorial Discretion in Requesting the Death Penalty*, 18 L. & SOC'Y REV. 437 (1984); Raymond Paternoster, *Race of the Victim and Location of the Crime*, 74 J. CRIM. L. & CRIMINOLOGY 754 (1983); M. Dwayne Smith, *Patterns of Discrimination in Assessments of the Death Penalty: The Case of Louisiana*, 15 J. CRIM. JUST. 279 (1987); Marvin Wolfgang, *Race, Judicial Discretion, and the Death Penalty*, 407 ANNALS AM. ACAD. POL. & SOC. SCI. 119 (1973).

330. 481 U.S. 279 (1987). Warren McCleskey was executed on September 25, 1991. *See* Peter Appelbome, *Georgia Inmate is Executed After "Chaotic" Legal Move*, N.Y. TIMES, Sept. 26, 1991, at A18.

331. *See* BALDUS, EQUAL JUSTICE, *supra* note 329, at 310-14 (discussing the background of the hearing in *McCleskey* and the study results offered). *See* GROSS & MAURO, *supra* note 329, at 153 n.20 (noting that, contrary to the slights the Baldus study received in the courts, the study has garnered high praise from social science professionals). A member of the National Academy of Sciences panel which reviews criminal sentencing research called the CSS "far and away the most complete and thorough analysis of sentencing." McCleskey v. Kemp, 753 F.2d 877, 907 (11th Cir. 1985) (Johnson, J., dissenting in part and concurring in part). It received the Kalven award for excellence in empirical research of the law, given by the Law and Society Association.

332. BALDUS, EQUAL JUSTICE, *supra* note 329, at 42.

333. *See id.*

on the two steps following conviction: the prosecutor's decision to seek the death penalty, and the jury's decision following the penalty trial.[334]

The PRS findings presented in federal court were of two types. First, there were a series of multiple regression analyses which adjusted variously for between five and 150 nonracial aggravating and nonaggravating factors.[335] This analysis showed disparities among defendants convicted at trial of between eight and nine percentage points at a significance level "at or beyond" .05, based on the race of their victims. Generally there are two levels of statistical significance which are deemed to validate the strength of the independent variable(s). The first level is .05 ($p<.05$). This means that the probability is less than one in twenty that the contributing factor could occur by chance. As the probability value decreases the degree of significance increases.[336] In other words, if someone threw a coin toss twenty times and nineteen of the throws came up heads, there is a less than five percent probability that this outcome occurred because of chance. If someone threw a coin toss one hundred times and the coin came up heads ninety-nine times, then it can be said that there is a less than one percent probability that this outcome occurred because of chance. In this latter case the statistical level of significance is known as .01 ($p<.01$). The smaller the p-value, the less likely the probability that a given event occurred by chance. In either case the individual tossing the coin would have to look for other factors (independent variables) to account for the outcome, for example, faulty coin, fixed toss, etc. While acceptance of the statistically significant standards of .05 and .01 are widely recognized as being arbitrary, they have long been widely accepted by statisticians and the courts.

There are several basic areas of concern about the validity of regression analysis. One is whether or not the model which is used is complete: have all relevant variables been included? Another is the issue of the fit of the data to the assumptions about the data: does the cumulative data in fact support the assumption? Third is the question of sampling error: was the sample size large enough; did it truly reflect the population; and were there any unexplained effects from the particular sample? The most important of these issues is that of "goodness of fit." If the fit is good then the estimates or predictions of the data should agree with the observ-

334. *See id.*
335. *See id.* at 312.
336. *See id.*

able data. The statistical model should be able to explain what has actually occurred; in other words, if there is "goodness of fit" then the independent variables which were tested should provide an answer to why the dependent variable occurred in the first place, and these results should be observable. There is, however, a point of diminishing return. Providing too many variables makes the procedure too specific to the sample size at hand, thus making claims of generalizability more difficult and less valid. The goal is not to answer questions related to a particular model, but to provide a basis for predicting similar situations in the future.[337] This analysis showed disparities among defendants convicted at trial of between eight and nine percentage points, at a significance level "at or beyond" .05, based on the race of their victims.[338] The second study consisted of small-scale logistic-regression analyses controlling for five to ten legitimate background factors such as prior record or number of victims.[339] These findings yielded odds multipliers[340] of 2.8 and 3.0, at the .01 significance level, for those who were convicted of murdering whites.[341]

The CSS reported on death-sentencing rates among defendants convicted of murder or voluntary manslaughter in Georgia from 1973 through 1979, from the point of indictment through the penalty trial jury decision.[342] The range of the CSS, then, was wider than the PRS.[343] The CSS data was taken from the Georgia Board of Pardons and Paroles.[344]

During the period of 1973 through 1979 there were 2,484 defendants convicted of voluntary manslaughter or murder, 1,066 of whom formed the "stratified random sample" used in the CSS study.[345] The overall death sentencing rate for the entire 2,484 cases was five percent, or 128 defendants.[346] Unadjusted figures in the Baldus study showed that the death penalty rate for white-victim cases was 108 out of 981, while that for black-victim cases

337. *See id.*
338. *Id.*
339. See *id.* at 312-13.
340. "'[O]dds multiplier' . . . indicates the degree to which the average defendant's odds of receiving a death sentence are enhanced by having a white rather than a black victim after controlling statistically for all of the other independent variables in the analyses." *Id.* at 383-84.
341. *See id.* at 312, 354, & 354 tbl. 4.
342. *See id.* at 45, 313.
343. *See id.* at 45.
344. *See id.* at 46.
345. *See id.* at 45 & 67 n.10.
346. *See id.* at 314.

was twenty out of 1,503.[347] Thus, white-victim defendants were sentenced to death at a rate 8.3 times higher than black-victim defendants.[348]

What Baldus calls the "centerpiece" of the evidence presented in *McCleskey* was a logistic-regression analysis utilizing thirty-nine conceptually and statistically important variables, which produced an odds multiplier of 4.3 for those convicted of killing whites, significant at the .005 level.[349] This "core model" of thirty-nine variables included those that "appeared to exercise the greatest influence in determining which defendants indicted for murder would actually receive a death sentence."[350] In addition to the "core model," the CSS also included supplemental linear and logistic multiple-regression analyses which controlled for varying numbers of background factors.[351] A 230-variable model yielded a race-of-victim partial coefficient of .06, significant at the .01 level.[352]

Warren McCleskey's own case fell in a "mid-range" aggravation level.[353] At this level, the race-of-victim effects were more pronounced than in cases with low aggravation or extremely high aggravation.[354] Whereas there were six to seven percentage point disparities estimated for all 2,484 cases,[355] the mid-range cases' estimated disparities ranged from eleven to twenty-nine percentage points, with the "best estimate" being seventeen percentage points, at the ninety-five percent confidence level.[356] Thus, in cases with aggravation levels similar to McCleskey's, defendants in white-victim murders were sentenced to death at a rate between .34 and .43, while defendants with black victims were sentenced to death at

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347. *See id.* at 315 tbl. 50.

348. *See id.*

349. *See id.* at 316. For an explanation of the odds multiplier, *see id.* at 383-84. Baldus notes that this 4.3 odds multiplier "is virtually identical to the race-of-victim disparity estimated for the Procedural Reform Study in a comparable analysis of defendants found guilty of murder at trial." *Id.* at 316.

350. *See id.*

351. *See id.* at 317 tbl. 51.

352. *See id.* This .06 figure was misunderstood by the United States Court of Appeals for the Eleventh Circuit when it considered the Baldus study in *McCleskey v. Kemp.* A coefficient such as .06 indicates a percentage point disparity. Baldus uses the following example. If the base rate for death sentences among a group of black-victim cases is 10%, then the .06 coefficient attached to this 10% rate will yield a comparable rate for white-victim cases of 16% (.06 x 100% = 6%; 10% + 6% = 16%). This is an *increase* of *60%* (16% is 60% greater than 10%). Thus, the "bottom line" in this example is not 6% but 60%.

353. *See id.* at 320-21 & 321 fig. 32.

354. *See id.*

355. This is the .06 coefficient.

356. BALDUS, EQUAL JUSTICE, *supra* note 329, at 320-21.

rates between .14 and .23.[357] Furthermore, within the 472 most aggravated cases, which accounted for ninety percent of the death sentences, there was a mid-range of cases showing disparities by race-of-victim of twenty to thirty percentage points.[358]

The CSS study included analysis of race-of-victim effects in the prosecutors' decisions to seek the death penalty following a murder conviction in Georgia.[359] Here, the odds multiplier of 3.1 was black-victim cases, significant at the .01 level.[360] Race-of-victim effects at the jury penalty trial phase, however, were "weak . . . [and] not statistically significant."[361] At the pre-trial phase, race-of-victim effects showed up in the prosecutors' decisions to permit voluntary manslaughter pleas after murder indictments: black-victim cases were "far more likely" to result in the manslaughter pleas.[362] Baldus concluded that "the race-of-victim effects in death sentencing observed among defendants indicted for murder were attributable principally to prosecutorial decisions made both before and after trial."[363]

Baldus concluded that his study demonstrated disparities sufficiently stark to create an inference of intentional discrimination, as that concept has come to be understood in the Supreme Court's constitutional cases defining discrimination in jury selection and employment discrimination. As such, the study established a violation of the Eighth and Fourteenth Amendments of the United States Constitution. As the following section explains, the Supreme Court rejected the Fourteenth Amendment claim on the ground that intentional discrimination in McCleskey's own case had not been established. The Court rejected the Eighth Amendment claim on the ground that the risk of discrimination in McCleskey's case was not sufficiently great to constitute a violation of the Cruel and Unusual Punishment Clause of the Eighth Amendment.

Samuel Gross put these figures in perspective:

> Coronary heart disease, it is well known, is associated with cigarette smoking. But what is the magnitude of the effect? One of the pioneering studies in the field, by Hammond and

357. *See id.* at 321.
358. *See id.* at 321-22 & 322 tbl. 53.
359. *See id.* at 326 & 327 tbl. 56.
360. *See id.* at 327.
361. *Id.*
362. *Id.* at 328.
363. *Id.*

> Horn,[364] studied 187,783 men between the ages of fifty and sixty-nine over a forty-four month period. Deaths from coronary artery disease during the study period were fairly rare — a total of 5297 or 2.8% of the sample — but cigarette smokers came in far more than their share: controlling for age, smokers were 1.7 times more likely to die of coronary artery disease than non-smokers.[365] Expressing this effect as an odds ratio hardly changes its magnitude at all.[366] This is not an isolated example. Another well-known study, by Joseph T. Doyle and colleagues, reports that the smokers it followed faced two times the risk of death from coronary heart disease as the nonsmokers,[367] and many other medical studies reach the same conclusion: smoking cigarettes increases the risk of death from heart disease greatly, but by a considerably smaller amount than the race-of-victim effect [of the Baldus study] . . . .[368]

C. *McCleskey: The Man*

> The Civil War and the First World One, those were the last wars where the general of one side kept his opposite's general's portrait in his tent. . . . When your enemy — like ours nowadays — ceases having a nose, two eyes, one mouth, then you've got troubles. You're up against a dervish and a ghost, an evil empire. Me, in my time, us in our time — we were lucky, we knew the shoe size of the opposition.[369]

Warren McCleskey, an African-American, was charged with killing a white police officer during the course of an armed robbery. He was convicted and condemned in Georgia. McCleskey claimed first in state court and then in federal district court that Georgia's capital statute allows race factors to affect the administration of capital sentencing. As proof, he offered the results of the statistical study performed by Professor David Baldus and his colleagues, the most sophisticated study of sentencing patterns ever undertaken.

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364. Samuel Gross, *Race and Death: The Judicial Evaluation of Evidence of Discrimination in Capital Sentencing*, 18 U.C. DAVIS L. REV. 1275, 1307 (1985) (citing Hammond & Horn, *Smoking and Death Rates — Report on Forty-Four Months of Follow-up of 187,783 Men*, 166 J.A.M.A. 1294 (1958)).

365. *Id.* (citing Hammond & Horn, *Smoking and Death Rates — Report on Forty-Four Months of Follow-up of 187,783 Men*, 166 J.A.M.A. 1294, 1295 tbl. 1 (1958)).

366. When, as here, P (probability) is small, then (1-P) is very close in value to 1 and the odds ratio — P/(1/P) — becomes very close in value to P.

367. Id. (citing Doyle et al., *The Relationship of Cigarette Smoking to Coronary Heart Disease*, 190 J.A.M.A. 866, 889 tbl. 3 (1964)).

368. *Id.* at 1308.

369. CONFEDERATE WIDOW, *supra* note 1, at 121, 122-23.

The district court rejected McCleskey's claim, holding that the Baldus study was statistically flawed and would not support McCleskey's constitutional challenges to the statute.[370] The court held that McCleskey had failed to establish a prima facie case of racial discrimination.[371]

The Eleventh Circuit, taking the case *en banc* in the first instance, affirmed. The court purported to presume the study acceptable.[372] It was, however, unwilling to accept the principal inference that it established proof of a case of class-wide race-of-victim discrimination.[373] The majority opinion held that the same standards of proof govern racial discrimination challenged under the Equal Protection Clause of the Fourteenth Amendment and the Cruel and Unusual Punishments Clause of the Eighth Amendment.[374] Intentional discrimination must be shown under either constitutional provision. The majority opinion recognized that "[d]ue process and cruel and unusual punishment cases do not usually focus on the intent of the government actor,"[375] but the court ultimately held that when the content of the claim is racial discrimination in sentencing decisions "intent and motive are a natural component of the proof . . . ."[376] To prevail under either constitutional theory, a prisoner must offer proof of a "disparate impact [that] is so great that it compels a conclusion that the system is unprincipled, irrational, arbitrary and capricious such that purposeful discrimination . . . can be presumed to permeate the system."[377]

Applying this analytical framework to the Baldus study, the majority opinion reaffirmed the court's previous holdings that statistical evidence of racial discrimination "may be so strong that the results permit no other inference . . . ."[378] No evidentiary hearing, however, would be required on statistical studies of capital sentencing discrimination — regardless of their quality — unless they "reflect a disparity so great as to inevitably lead to a conclusion that the disparity results from intent or motivation."[379] The court

370. McCleskey v. Zant, 580 F. Supp. 338, 379-80 (N.D. Ga. 1984).
371. *See id.* at 379.
372. *See* McCleskey v. Kemp, 753 F.2d 877, 881, 886-87 (11th Cir. 1985).
373. *See id.*
374. *See id.* at 891-92.
375. *Id.* at 892.
376. 753 F.2d at 892.
377. *Id.*
378. *Id.* (quoting Smith v. Balkcom, 671 F.2d 840, 859 (5th Cir. 1982), *cert. denied*, 459 U.S. 882 (1982)).
379. *Id.* at 894.

reasoned that "it is a legal question as to how much [racial] disparity is required before a federal court will accept it as evidence of the constitutional flaws in the system."[380]

The Supreme Court granted certiorari and affirmed by a razor-thin vote of five to four.[381] The justices considered McCleskey's certiorari petition for one year before deciding to grant it. This was an early signal that "the case was uncommonly troublesome."[382] This early warning sign was later confirmed by the Court's decision: "It is clear from the majority and dissenting opinions that this was a difficult and divisive case; it is also clear that the Court's judgment marked the end of an era in the constitutional regulation of the death penalty in the United States."[383] The majority did not deny the racism demonstrated by the Baldus study, and purported to presume the study valid. The Court abdicated its power to do anything about the disparities disclosed by the study. The opinion stands as a declaration of impotence.

Former Justice Lewis Powell cast the decisive fifth vote to constitute a majority of the Court and wrote the Court's opinion. This courtly Virginian's record on matters of race, as chair of the Richmond school board during the crucial period from 1952 to 1961, was mixed even according to his admirers.[384] Powell's opinion

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380. *Id.* at 893.

381. *See* 499 U.S. 467 (1991).

382. GROSS & MAURO, *supra* note 329, at 159.

383. *Id.*

384. Professor (now federal judge) J. Harvie Wilkinson, a former clerk for Justice Powell and admirer of the Justice, provided a balanced view of Powell's tenure on the Richmond, Virginia school board:

> As chairman of the Richmond school board from 1952 to 1961, Powell wrestled with the agonies of transition *Brown* had brought to the South. At the Senate hearings on his confirmation, two quite opposite views emerged on his tenure. The first was that of a man "in a position of complex responsibility during some very turbulent and confused times" whose "primary concern was to keep the schools of Virginia open and to preserve the public education system for all pupils." Possibly "Mr. Powell's outstanding contribution to Virginia," noted the Norfolk *Virginian-Pilot*, "was his leadership in the quiet sabotage by a business-industrial-professional group of Senator Byrd's Massive Resistance." In later articles Powell blamed much of the lawlessness of the 1960's on southern defiance of the *Brown* decision. He was not unsympathetic to the Negro's plight: "It is true," he noted in 1966, "that the Negro has had, until recent years, little reason to respect the law. The entire legal process, from the police and sheriff to the citizens who serve on juries, has too often applied a double standard of justice. Even some of the courts at lower levels have failed to administer equal justice . . . . There were also the discriminatory state and local laws, the denial of voting rights, and the absence of economic and educational opportunity for the Negro. Finally, there was the small and depraved minority which resorted to physical violence and intimidation. These

assumed the factual validity of the Baldus study (i.e., that the study proved what it said it proved), and concluded as a matter of federal constitutional law, that the touchstone of McCleskey's constitutional claims must be intentional discrimination against him personally, and that the proof cannot rely on the presumptions applied when similar statistically based claims are offered to establish class-wide discrimination in employment or in jury selection cases.[385] Assuming as valid the Baldus data that death sentences are *four times* more likely when the victim is white, the majority reasoned that discrepancies were inevitable.[386] "Because discretion is essential to the criminal justice process," the Court "would demand exceptionally clear proof before [it] would infer that the discretion has been abused."[387] Without additional proof of individual discrimination, statistical studies were insufficient.[388]

Powell noted that statistical disparities ordinarily must be "stark" before gaining acceptance as the sole proof of discriminatory

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conditions, which have sullied our proud boast of equal justice under law, set the stage for the civil rights movement."

By most measures of opinion in the aftermath of *Brown*, Powell was very much a moderate. That meant he was also a gradualist, a symbol to Negroes of the frustrating pace of progress in the South. By 1961, when Powell left the school board, only 37 Richmond Negroes out of more than 23,000 had enrolled in white schools. Shortly afterward, the Fourth Circuit found in Richmond a system of dual attendance zones and feeder schools designed to keep racial integration to a minimum. "Notwithstanding the fact that the [state] Pupil Placement Board assigns pupils to the various Richmond schools without recommendation of the local officials," observed the Fourth Circuit, "we do not believe that the City School Board can disavow all responsibility for the maintenance of the discriminatory system which has apparently undergone no basic change since its adoption." Simply because Powell "had sense enough to recognize the futility of the massive resistance program and to go for a more sophisticated scheme of evading the *Brown* decision

[should] not affect your decision," argued the prominent Richmond black attorney Henry Marsh to the Senate Judiciary Committee. "The Constitution outlaws the ingenious as well as the obvious scheme, and the fact that Mr. Powell had the knowledge to . . . evade the Constitution more effectively, as he did in the City of Richmond during the massive resistance era, without having integration, does not commend him to the Supreme Court." John Conyers of Michigan, representing the Congressional Black Caucus, was more explicit: "We would conclude . . . Mr. Powell's own activities on the boards of education, his close association with a variety of corporate giants, . . . his membership in the largest all-white law firm in Richmond, his support of segregated social clubs, and his defense of the status quo, are inconsistent with the kind of jurist that . . . is desperately needed for the court in the 1970's and the 1980's."

J. HARVIE WILKINSON III, *BROWN TO BAKKE* 163-64 (1979) (footnotes omitted).

385. 481 U.S. 279, 292 (1987).

386. *See id.* at 291 n.7.

387. *Id.* at 297.

388. *See id.* at 294.

intent.[389] Apparently, the Baldus study's showing of a three to four-hundred percent disparity was not sufficiently stark, even when that disparity cannot be justified in a nonracist way.

Powell also offered a rationale that Justice Scalia had raised during oral argument: accepting McCleskey's race discrimination claim would mean that ugly people would be the next group to cry discrimination. Criminal defendants would not be satisfied with raising proportionality claims based on race. They would, the Court prophesied, assert claims that discrepancies in sentencing were based upon sex, or membership in other minority groups, or indeed, "upon any arbitrary variable, such as the defendant's facial characteristics, or the physical attractiveness of the defendant or the victim . . . ."[390] The Constitution "does not require that a State eliminate any demonstrable disparity that correlates with a potentially irrelevant factor in order to operate a criminal justice system that includes capital punishment."[391] Thus the Supreme Court equated the American dilemma of race with any other demonstrable, banal quality, such as ugliness or hair color.

Justice Brennan wrote an eloquent dissent,[392] which will resonate down the years, and which was clearly an opinion written for the future.[393] "[W]e cannot pretend that in three decades we have completely escaped the grip of a historical legacy spanning centuries,"[394] Brennan observed. McCleskey's evidence

> confronts us with the subtle and persistent influence of the past. His message is a disturbing one to a society that has formally repudiated racism . . . . Nonetheless, we ignore him at our peril, for we remain imprisoned by the past as long as we deny its influence on the present.[395]

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389. *See id.* at 293.

390. *Id.* at 317 (citation omitted).

391. *Id.* at 319.

392. Justice Powell had the grace to acknowledge the dissent's eloquence. *See id.* at 313 n.37.

393. For a fascinating discussion in another context of Brennan's use of rhetorical and literary techniques, see A. W. Phinney, *Feminism, Epistemology, and the Rhetoric of Law: Reading* Bowen v. Gilliard, 12 HARV. WOMEN'S L.J. 151 (1989). *Guilliard* was decided the same term as *McCleskey*, and Brennan's dissents in the two cases share striking rhetorical similarities. For an accessible survey of the recent literature on the connection between literature and law, *see* RICHARD POSNER, LAW AND LITERATURE 269-316 (1988); *see also* Walker Gibson, *Literary Minds and Judicial Style*, 36 N.Y.U. L. REV. 915 (1961); Robert Weisberg, *Law, Literature, and Cardozo's Judicial Poetics*, 1 CARDOZO L. REV. 283 (1979); Robert Weisberg, *How Judges Speak*, 57 N.Y.U. L. REV. 1 (1982); Robin West, *Jurisprudence as Narrative*, 60 N.Y.U. L. REV. 145 (1985).

394. 481 U.S. at 344 (Brennan, J., dissenting).

395. *Id.*

Brennan refocused the case on Warren McCleskey — a black person condemned to die in the Georgia electric chair.[396] By restoring "a face and a name"[397] to the statistical abstractions emphasized by the majority, Brennan reminded us that, at bottom, the case was not about numbers, even though it was full of numbers, data, and statistical jargon. There was a numbing banality in using all of this ciphering to resolve an ultimately moral question. Brennan captured the human dimension lurking behind the statistics:

> At some point in this case, Warren McCleskey doubtless asked his lawyer whether a jury was likely to sentence him to die. A candid reply to this question would have been disturbing. First, counsel would have to tell McCleskey that few of the details of the crime or of McCleskey's past criminal conduct were more important than the fact that his victim was white. Furthermore, counsel would feel bound to tell McCleskey that defendants charged with killing white victims in Georgia are 4.3 times as likely to be sentenced to death as defendants charged with killing blacks. In addition, frankness would compel the disclosure that it was more likely than not that the race of McCleskey's victim would determine whether he received a death sentence: 6 of every 11 defendants convicted of killing a white person would not have received the death penalty if their victims had been black, while, among defendants with aggravating and mitigating factors comparable to McCleskey, 20 of every 34 would not have been sentenced to die if their victims had been black. Finally, the assessment would not be complete without the information that cases involving black defendants and white victims are more likely to result in a death sentence than cases featuring any other racial combination of defendant and victim. The story could be told in a variety of ways, but McCleskey could not fail to grasp its essential narrative line: there was a significant chance that race would play a prominent role in determining if he lived or died.[398]

Brennan also warned that:

> It is tempting to pretend that minorities on death row share a fate in no way connected to our own, that our treatment of them

396. *Cf.* Phinney, *supra* note 393, at 158-61 (similar technique used in Brennan's dissent in *Bowen*).

397. *Id.* at 161.

398. McCleskey v. Kemp, 481 U.S. 279, 321 (1987) (Brennan, J., dissenting) (footnotes omitted).

> sounds no echoes beyond the chambers in which they die. Such an illusion is ultimately corrosive, for the reverberations of injustice are not so easily confirmed .... [T]he way in which we choose those who will die reveals the depth of moral commitment among the living.[399]

Warren McCleskey was executed in 1991.

D. *McCleskey: The Legacy*

> How soon, Sugar, the terrible becomes routine. We've all got this dangerous built-in talent: For turning horrors into errands. You hear folks wonder how the Germans could've *done* it? I believe part of the answer is: they made extermination a 9-to-5 activity. You know, salaries? Lunch breaks? And the staff came in and did their job and went home and ate their supper and slept and woke up and came back and did their job — That's partly how you get anything done, especially a chore that's dreadful, dreadful. — Honey? We've all got to be real careful of what we can get used to.[400]

The statistics at issue in *McCleskey* were impressive — impressive enough to come within one vote of victory in the Rehnquist Court. But even the Baldus study's numbers paled beside the pre-*Furman* statistics on rape.

The *McCleskey* decision itself might turn out to have a limited shelf life. Since retirement, Powell reportedly has changed his mind about *McCleskey*, in particular, and capital punishment's constitutionality in general.[401] Lewis Powell's post-retirement

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399. *Id.* at 344.

400. CONFEDERATE WIDOW, supra note 1, at 263.

401. JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 451-52 (1994). Jeffries wrote:

> In an interview given in 1990, he went further. "[I]f I were in the state legislature, I would vote against capital punishment. There are approximately 2,500 people who have been convicted of murder and sentenced to death ... and there have been only about 125 to 130 executions. Capital punishment, though constitutional, is not being enforced. I think it reflects discredit on the law to have a major component of the law that is simply not enforced."
>
> One year later, he took the final step. In conversation with the author in the summer of 1991, Powell was asked whether he would change his vote in any case:
>
> "Yes, *McCleskey v. Kemp*,"
>
> "Do you mean you would no accept the argument from statistics?"
>
> "No, I would vote the other way in any capital case."
>
> "In *any* capital case?"
>
> "Yes."
>
> "Even in *Furman v. Georgia*?"

repudiation of his own handiwork in *McCleskey* suggests that the court might refuse to extend *McCleskey* to the rape context — where the numbers are far stronger, and where the racism identified was race of the *defendant* as well as race of the victim. Powell's other most scabrous example of judicial bigotry — *Bowers v. Hardwick* — was studiously ignored by the Court in its decision in *Romer v. Evans*.[402]

Someday, perhaps, the Supreme Court will bury *McCleskey* the way it buried another racist opinion from another era, *Dred Scott v. Sanford*.[403] Catharine MacKinnon, quoting Bruce Catton, has noted that Justice Felix Frankfurter "is said to have remarked that *Dred Scott* was never mentioned by the Supreme Court any more than ropes and scaffolds were mentioned by a family that had lost

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"Yes. I have come to think that capital punishment should be abolished." Capital punishment, Powell added, "serves no useful purpose." The United States was "unique among the industrialized nations of the West in maintaining the death penalty," and it was enforced so rarely that it could not deter. Most important, the haggling and delay and seemingly endless litigation in every capital case brought the law itself into disrepute. "It brings discredit on the whole legal system, that the sentence upheld by the Supreme Court and adopted by more than thirty states can't be or isn't carried out."

For Powell, this was the heart of the matter. The death penalty should be barred, not because it was intrinsically wrong but because it could not be fairly and expeditiously enforced. The endless waiting, merry-go-round litigation, last-minute stays, and midnight executions offended Powell's sense of dignity and his conception of the majesty of the law. The spectacle of nonenforcement bred cynicism about the law's announced purposes and contempt for the courts that could not or would not carry them out. Better to have done with the whole ugly mess than to continue an indecent, embarrassing, and wasteful charade.

But this cannot be the whole story. It is easy to see that the death penalty cases would offend Powell's sensibilities, but it is not so obvious why he eventually came to oppose capital punishment. His reverence for the law could also have been salvaged by more rigorous enforcement. The path of Chief Justice Rehnquist — and increasingly of the court he led — was not to abolish the death penalty but to see that it could be carried out. After all, the remedy for nonenforcement was more enforcement, and the cure for delay was dispatch.

Essentially, Rehnquist wanted to make death routine. This was not bloodthirst. No one enjoyed capital cases or wanted death sentences to be given casually or rashly or with anything less than scrupulous fairness. But the conservatives did want to get on with it. If it were to be done at all, better that it be done with reasonable speed and confidence — and without repeated intervention by the Supreme Court.

When then did Powell disagree? Why did he side in the end with Brennan and Marshall rather than with his traditional allies? Why did the man who worked so hard to preserve the constitutionality of the death penalty in *Furman v. Georgia* come twenty years later to renounce it?

The answer lay partly in the bitter education of the cases. From them Powell learned that the death penalty would never be routinely applied. Lawyers would exploit every chance for delay, and judges would be sufficiently beset with doubts to give them frequent opportunity. This much he learned from himself.

Id.

402. 517 U.S. 620 (1996).

403. 60 U.S. 393 (1856).

one of its number to the hangman."[404] And, as Don Ferrenbacher observed, *Dred Scott* "was law to be cited, a lesson to be learned, judicial vigor to be emulated, political imprudence to be regretted, but most of all, as time passed, it was an embarrassment — the Court's highly visible skeleton in a transparent closet."[405]

V. CONCLUSION

Monsieur Camus, you gave
    The stone of our absurdity a name.
Daily we roll it to our graves.
There's no reprieve.
Later, you wrote that we are best
    When we rebel — against the casual
Unfairness of this world, against
Acceptance and the cowardice
It hides, against rebellion
Itself.
    Rebelling with your pen,
You called the evil of our age
Our willingness to kill within
The law.[406]

Because I am a healer, all that I do heals.[407]

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

There is no reason to expect that *Coker* eliminated the warping effects of racism on the criminal justice system. Susan Estrich wrote in 1987 that "[a]lthough the death penalty for rape is now prohibited, at least one study has found that black men convicted of raping white women continue to receive the harshest

404. MACKINNON, *supra* note 236 at 206 (footnote omitted).

405. *Id.* (quoting DON FERRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS).

406. Samuel Hazo, *Stop and Be Stopped in Lourmain*, *in* THE HOLY SURPRISE OF THE RIGHT NOW, 239, 239 (1996).

407. MARTIN AMIS, TIME'S ARROW 74 (1991).

penalties."[408] Overrule *Coker* — or limit *Coker*'s scope to those who rape adult women — and the structural effects of racism can be expected to re-emerge, unless the prosecutors cook the books.[409]

From a purely racial perspective, it is indeed appropriate that Louisiana is the state leading the charge to reinstate capital punishment for rape in a post-*Coker* world.[410] Between Louisiana's enactment in 1973 of its post-*Furman* statute and 1975, thirty-three men were condemned to die: fifteen for rape and twenty-two for murder.[411] Of the fifteen condemned rapists, all but two were Black: Cordell Lee (sentenced on August 19, 1975);[412] James Hawthorn (sentenced on August 15, 1975);[413] Hillery Preston (sentenced on July 28, 1975);[414] Shedrick Noble (sentenced on June 6, 1975);[415] Eugene Stripling (sentenced May 30, 1975);[416] Andrew Johnson (sentenced May 3, 1975);[417] Arthur Jones (sentenced March 31, 1975);[418] Johnny Ross (sentenced March 21, 1975);[419] Billy Monroe (sentenced October 22, 1974);[420] Joseph Gleason (sentenced October 18, 1974);[421] Robert Leonard (sentenced July 18, 1974);[422] Lawrence Watts (sentenced July 15, 1974);[423] and Herbert Nicholson (sentenced June 7, 1974).[424]

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408. ESTRICH, *supra* note 235, at 107 n.2 (citing Gary D. LaFree, *The Effect of Sexual Stratification by Race on Official Reactions to Rape*, 45 AM. SOC. REV. 842, 842-54 (1980)); *see generally*, Jennifier Wriggins, *Rape, Racism, and the Law*, 6 HARV. WOMEN'S L.J. 103 (1983).

409. *See, e.g.*, Hans Zeisel, *Race Bias in the Administration of the Death Penalty: The Florida Experience*, 95 HARV. L. REV. 456 (1981).'

410. One analysis of Louisiana prison records found that capital punishment was reserved almost exclusively for Blacks. *See* Oakly Johnson, *Is The Punishment of Rape Equally Administered to Negroes and Whites in the State of Louisiana, in* WE CHARGE GENOCIDE: THE HISTORIC PETITION TO THE UNITED NATIONS FOR RELIEF FROM A CRIME OF THE UNITED STATES GOVERNMENT AGAINST THE NEGRO PEOPLE 216 (William L. Patterson ed., 1970).

411. Brief for Petitioner at app. 1a - 4a, Roberts v. Louisiana, 428 U.S. 325 (1976)(No. 75-5844).

412. *See id.*

413. *See id.*

414. *See id.*

415. *See id.*

416. *See id.*

417. *See id.*

418. *See id.*

419. *See id.*

420. *See id.*

421. *See id.*

422. *See id.*

423. *See id.*

424. *See id.*

Between Florida's enactment of its post-*Furman* statute[425] in December 1972 and 1975, at least two men were sentenced to death in that state for capital rape.[426] Houston Owens, Jr., who was black, was sentenced to death for the rape of a nine-year-old white girl.[427] Jackie Gentry, also black, was capitally sentenced for the especially brutal rape and nearly-successful murder of his six-year-old niece.[428] He

> broke into his sister's house where four children were sleeping, picked up the victim, and walked out of the house, taking her to the railroad tracks where he left her nude and unconscious body between the rails. He was arrested once he returned home but refused to say where the child was. The next day, [thirteen] cars of a train ran over her before the engineer could stop the train. Extensive surgery on the victim was necessary.[429]

By the time of Georgia's enactment of its post-*Furman* capital statute in 1975, at least three men were sentenced to death "for committing rape in especially serious circumstances (violent recidivism or brutality)."[430]

This law journal essay — my last — has argued that states probably can, consistent with the court's recent proportionality cases, execute rapists. This essay exonerates neither capital punishment generally nor capital punishment for rape specifically, rather it damns both the Constitution and the Court that allowed the death penalty to deform the Constitution.

It was one of those crazily surreal moments that even sane people have every once in a while. I was testifying before the Senate Judiciary Committee on the constitutionality of proposed legislation[431] that would have extended the federal death penalty to include certain non-homicide crimes, such as attempted assassination of the President.[432] Senator Herbert Kohl asked me whether

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425. *See generally* Charles Ehrhardt & Harold Levinson, *Florida's Legislative Response to* Furman*: An Excercise in Futility?*, 64 J. CRIM. L. & CRIMINOLOGY 10 (1973); Note, *Florida's Legislative and Judicial Response to* Furman v. Georgia*: An Analysis and Criticism*, 2 FLA. ST. U.L. REV. 108 (1974).

426. *See* Brief for Petitioner at 8a, 114a, Proffitt v. Florida, 428 U.S. 242 (1976) (No. 75-5706).

427. *See id.* at 8a, 9a.

428. *See id.* at 114a, 115a.

429. *Id.* at 115a.

430. Brief for Respondent at 23 n.1, Gregg v. Georgia, 428 U.S. 153 (1976) (No. 74-6257).

431. *See Death Penalty: Hearings on S. 32, S. 1225, and S. 1696 Before the Comm. on the Judiciary*, 101st Cong. 304 (1989) (statement of Michael W. Mello, Assistant Professor of Law, Vermont Law School) [hereinafter *Hearings*].

432. *See generally* S. 32, S. 1225, S. 1696, 101st Cong. (1989).

I thought that an attempted assassination of the President was a pretty heinous crime.[433] Of course, I agreed with the Senator.[434] Attempted assassination *is* a very bad crime, but that is not the right question. The right question, I suggested, is whether *attempted* assassination is a crime worse than rape.[435] Rape, I argued, is the relevant datum of heinousness.[436] This is so because in 1977 the United States Supreme Court held in *Coker v. Georgia*, that, as a categorical matter, capital punishment was a disproportionate punishment for the crime of rape of an adult woman.

Senator Kohl did not ask me the next question — the one I dreaded: Would the Court decide *Coker* the same way today? To some extent, this essay is my answer to Senator Kohl's unasked question.

433. *Hearings*, supra note 431, at 430.
434. *Id.*
435. *Id.*
436. *Id.*