

MURDERING INNOCENCE: THE CONSTITUTIONALITY OF CAPITAL CHILD RAPE STATUTES

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I. INTRODUCTION

It is . . . to my three children . . . [that] I owe my very being. In attempting to fulfill my duty to them as a mother, I met the challenge of their helplessness, their innocence, their dependence. Despising cowardice in others, I wished to prove myself no coward. Believing in the good, the gentle, the beautiful things of life, I addressed myself to the sweet duty of keeping these attributes for my children's sake and my own.¹

The rape of a child is an inherently brutal act. Rape of a child is an intentional crime; “[o]ne does not ‘accidentally’ rape a child.”² Children who have been raped suffer from physical, emotional, and mental scars that continue to haunt them for the rest of their lives.³ Although adult rape can also leave these scars, the physical and emotional vulnerability of a child subjects childhood rape victims, on the whole, to far greater physical, emotional, and mental devastation than their adult counterparts.⁴

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1. ALICE FOOTE MACDOUGALL, *THE AUTOBIOGRAPHY OF A BUSINESS WOMAN* 143 (1928).

2. *State v. Wilson*, 685 So. 2d 1063, 1073–74 (La. 1996), *cert. denied by Bethley v. Louisiana*, 520 U.S. 1259 (The Court specifically stated that their decision to deny the petition for certiorari did not constitute a ruling on the merits, but was instead based on procedural concerns.).

3. See discussion *infra* Part IV.

4. See *Wilson*, 685 So. 2d at 1067; J. Richard Broughton, “*On Horror’s Head Horrors Accumulate*”: *A Reflective Comment on Capital Child Rape Legislation*, 39 *DUQ. L. REV.* 1, 8 (2000) (noting that the degree of force and penetration of rape causes severe

Rape is one of the most prevalent crimes in the United States—it is estimated that a rape is reported every two to six minutes.⁵ In 1992 alone, there were 109,062 reported rapes.⁶ Approximately 17,000 of those victims were girls under the age of twelve.⁷ Studies suggest that nearly two-thirds of all rapes are child rapes.⁸ These statistics are only estimates; experts believe that less than one-third of all sexual abuse and rape is actually reported and investigated by child protective authorities.⁹ Childhood sexual abuse and child rape are not only costly to the victim in terms of physical and mental suffering, but they are also costly to society in terms of tax dollars spent on medical care and social services.¹⁰ In 1987, “taxpayers spent between \$138,000 and \$152,000 for each sexually abused child.”¹¹ Child rape is a devastating crime—devastating to both the victim and to the conscience and resources of society.

In recognition of the seriousness of the crime and to combat the reported increase in child rape,¹² two states have passed statutes allowing convicted child rapists to be sentenced to death, and several more states are considering such legislation.¹³ This Note considers the constitutionality of a state’s power to

damage to the “more delicate and underdeveloped” body of a child); Bridgette M. Palmer, *Death as a Proportionate Penalty for the Rape of a Child: Considering One State’s Current Law*, 15 GA. ST. U. L. REV. 843, 858–59 (1999).

5. Yale Glazer, *Child Rapists Beware! The Death Penalty and Louisiana’s Amended Aggravated Rape Statute*, 25 AM. J. CRIM. L. 79, 85 (1997). Rape, and child rape in particular, is also becoming extremely prevalent in South Africa—a recent study reported 21,000 cases of child rape in just twelve months. Charlayne Hunter-Gault, *Infant Rape Crisis Jolts South Africa*, at <http://www.cnn.com/2001/WORLD/africa/12/10/infant.rape> (Dec 12, 2001). These rapes have been committed against children as young as five months old, due in part to a widespread belief that having sex with a virgin will cure AIDS. *Id.* For the purposes of this article, a child will be considered an individual less than twelve years of age.

6. Patrick A. Langan, Ph.D. & Caroline Wolf Harlow, Ph.D., *Bureau of Justice Statistics Crime Data Brief*, at <http://www.ojp.usdoj.gov/bjs/pub/ascii/childrape.txt> (June 1994).

7. *Id.* Furthermore, a recent study by the National Center on Child Abuse and Neglect estimated that there are roughly 100,000 cases of childhood sexual abuse each year. HANDBOOK ON SEXUAL ABUSE OF CHILDREN: ASSESSMENT AND ISSUES 4 (Lenore E. Auerbach Walker ed., 1988) [hereinafter HANDBOOK].

8. See Donald Dripps et al., *Men, Women and Rape*, 63 FORDHAM L. REV. 125, 136 (1994).

9. Palmer, *supra* note 4, at 844.

10. See *id.* at 866–67.

11. *Id.* at 867.

12. “From 1976 to 1986, the number of reported cases of child sexual abuse grew from 6,000 to 132,000, an increase of 2100%. By 1991, the number of cases totaled 432,000, an increase of another 227%.” Arthur J. Lurigio et al., *Child Sexual Abuse: Its Causes, Consequences, and Implications for Probation Practice*, 59 FED. PROBATION 69, 69 (1995); see also Jean Peters-Baker, *Challenging Traditional Notions of Managing Sex Offenders: Prognosis is Lifetime Management*, 66 UMKC L. REV. 629, 638 (1998) (noting that the Bureau of Justice statistics “reveal a 600 percent increase in forcible rape per 100,000 residents from 1960 to 1993”).

13. See discussion *infra* Part VI.

sentence convicted child rapists to death.¹⁴ In *Coker v. Georgia*,¹⁵ the Supreme Court held that capital punishment for the rape of an adult woman was a disproportionate penalty.¹⁶ The *Coker* decision did not preclude imposition of the death penalty for the crime of child rape. This Note argues that statutes allowing convicted child rapists to be sentenced to death are likely to be upheld under the Supreme Court's capital punishment jurisprudence. This Note also makes recommendations as to how to craft capital child rape statutes, so as to fully comply with the Court's capital punishment jurisprudence.

The death penalty has been a cornerstone of American jurisprudence since the beginnings of this country.¹⁷ Although there have been many challenges to the constitutionality of the death penalty,¹⁸ the Supreme Court has consistently held that the death penalty is constitutional.¹⁹ This Note does not analyze or discuss the moral or constitutional underpinnings of the government's right to impose the death penalty, but simply addresses the Court's current death penalty jurisprudence and the place of capital child rape statutes in that scheme.

Part II of this Note will examine the history of capital punishment in the United States with respect to the crime of rape in general, and rape of children in particular. Part III begins by addressing the Supreme Court's decision in *Coker v. Georgia* and the Court's subsequent death penalty case law, which relaxes the proportionality standard enunciated in *Coker*. The Court's continual relaxation of the proportionality standard over the past twenty-five years makes it more likely that capital child rape statutes will be found constitutional. Part IV examines the increased interest states have in protecting children from rape, based on the fact that children are likely to suffer greater medical, emotional, and psychological trauma from rape than adult women. Part V discusses how recent state and federal statutory enactments—such as capital statutes for non-homicide crimes,²⁰ the recent changes to the Federal Rules of Evidence,²¹ and “Megan's Laws,”²²—demonstrate a greater social acceptance of the death penalty for child rapists. Part VI examines the recent capital child rape enactments, and through a detailed examination of the Louisiana Supreme Court's decision in *State v. Wilson*,²³ argues that such state legislation is constitutional. Finally, in Part VII, this Note

14. See discussion *infra* Parts II through VI.

15. 433 U.S. 584 (1977) (plurality opinion). The only question before the Court was the constitutionality of the death penalty with respect to the rape of an adult woman. *Id.* at 592 (plurality opinion).

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

17. See discussion *infra* Part II.

18. See, e.g., *Atkins v. Virginia*, 122 S. Ct. 2242 (2002); *Penry v. Lynaugh*, 492 U.S. 302 (1989); *Stanford v. Kentucky*, 492 U.S. 361 (1989); *Tison v. Arizona*, 481 U.S. 137 (1987); *Coker*, 433 U.S. 584; *Gregg v. Georgia*, 428 U.S. 153 (1976); *Furman v. Georgia*, 408 U.S. 238 (1972).

19. *Gregg*, 428 U.S. at 169 (“We now hold that the punishment of death does not invariably violate the Constitution.”). *But see Furman*, 408 U.S. 238, 256–57 (holding that capital statutes that are too discretionary in their application are unconstitutional).

20. See discussion *infra* Part V.A.

21. See discussion *infra* Part V.B.

22. See discussion *infra* Part V.C.

23. 685 So. 2d 1063 (La. 1996).

suggests how states can draft capital child rape legislation that will comply with the Supreme Court's constitutional requirements.

II. IMPOSITION OF THE DEATH PENALTY FOR RAPE PRIOR TO *COKER V. GEORGIA*

A. *The Deference to Capital Punishment Prior to Furman v. Georgia*²⁴

“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”²⁵

Historically, rape has been a death penalty crime.²⁶ Rape was punishable by death in Jewish, Saxon, and English law.²⁷ The American colonies also made rape a capital crime.²⁸ The Framers understood the death penalty to be an integral part of the criminal justice system, and they interpreted the Eighth Amendment to merely prevent torturous or barbaric methods of punishment.²⁹ Rape remained a death penalty crime throughout much of American history—in 1897, when the number of federal capital offenses was reduced from sixty to only three, rape was one of the offenses kept as a capital crime.³⁰ In 1910, the Supreme Court changed its focus from considering the historical definition of cruel and unusual punishment to “a precept of justice that punishment for crime should be graduated and proportioned to [the] offense.”³¹ Even with this new focus, eighteen states and the federal government authorized the death penalty for rape in 1925.³² At the time of the Court's decision in *Furman v. Georgia*, sixteen states still authorized the use

24. 408 U.S. 238 (1972).

25. U.S. CONST. amend. VIII.

26. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *210–15.

27. *Id.*

28. LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 42 (1993); see Meryl P. Diamond, Note, *Assessing the Constitutionality of Capital Child Rape Statutes*, 73 ST. JOHN'S L. REV. 1159, 1189 (1999).

29. Palmer, *supra* note 4, at 848; see Neil C. Shur, *Assessing the Constitutionality and Policy Implications of the 1994 Drug Kingpin Death Penalty*, 2 TEX. F. ON C.L. & C.R. 141, 143 (1996).

30. Elizabeth Gray, Comment, *Death Penalty and Child Rape: An Eighth Amendment Analysis*, 42 ST. LOUIS U. L.J. 1443, 1447 (1998). Murder and treason were the other two. *Id.*

31. *Weems v. United States*, 217 U.S. 349, 367 (1910). The defendant in *Weems* was convicted of falsifying an official document. *Id.* at 357. The statute at issue provided for “[t]he penalties of *cadena temporal* and a fine of from 1,250 to 12,500 pesetas” for falsifying an official document. *Id.* at 363. The punishment of *cadena temporal* provides for between twelve and twenty years in prison, bound in ankle and wrist chains, and employed at “hard and painful labor.” *Id.* at 364. The Court found this punishment “cruel and unusual” for the crime of falsifying a document. *Id.* at 382.

32. Gray, *supra* note 30, at 1447.

of the death penalty for rape, roughly half the number of states that permitted the death penalty for murder, hardly an insignificant number.³³

Prior to the 1970s, the Court was deferential to state capital punishment legislation. Such legislation allowed for the imposition of the death penalty for a variety of crimes, including rape.³⁴ Beginning in the 1970s, however, the Supreme Court began invalidating capital punishment schemes starting with the case of *Furman v. Georgia*.³⁵

B. Changing the Face of Capital Punishment: *Furman v. Georgia and Gregg v. Georgia*

In *Furman*, the Court held all capital sentencing schemes that left almost complete discretion to the jury in meting out capital punishment unconstitutional.³⁶ The Court found that allowing the jury such unbridled discretion led to arbitrary and capricious application of the death penalty.³⁷ The *Furman* decision effectively nullified the capital punishment statutes in every state in which the death penalty was then imposed.³⁸ The legislatures in thirty-five states, however, enacted new death penalty statutes immediately after *Furman*,³⁹ of those, three re-enacted the death penalty for rape⁴⁰ and three enacted statutes providing for the death penalty for rape of children under twelve.⁴¹ The new statutes addressed the concerns raised by the Court in *Furman* by adopting more narrowly tailored sentencing

33. *Id.* at 1451. Thirty-five states allowed for the death penalty; of those, sixteen states imposed the death penalty for rape. *Id.* There were seventy-two executions for rape between 1955 and the *Coker* decision in 1977. *Id.* at 1467.

34. Broughton, *supra* note 4, at 2; see Diamond, *supra* note 28, at 1168 (“Prior to *Furman* and *Gregg*, the Supreme Court [had] refused to review the constitutionality of imposing capital punishment for the crime of rape.”).

35. 408 U.S. 238 (1972).

36. *Furman*, 408 U.S. at 239–40; see *Gregg v. Georgia*, 428 U.S. 153, 179 (1976) (noting that three Justices found the procedures by which the convicted defendants were selected for the death penalty made the statutes constitutionally invalid; only two Justices believed that the death penalty was *per se* unconstitutional). *Furman* represented a combined appeal from three defendants, two of which were sentenced to death for rape of adult women and one of whom was sentenced to death for murder. *Furman*, 408 U.S. at 252–54.

37. *Furman*, 408 U.S. at 253 (“Under these laws no standards govern the selection of the penalty. People live or die, dependent on the whim of one man or of 12.”).

38. Broughton, *supra* note 4, at 3; see Diamond, *supra* note 28, at 1165 (“[*Furman* effectively invalidated almost every existing death penalty statute.”).

39. *Gregg*, 428 U.S. at 179–80.

40. *Coker v. Georgia*, 433 U.S. 584, 594 (1977) (plurality opinion) (Georgia, North Carolina, and Louisiana). Both Louisiana’s and North Carolina’s capital rape laws were subsequently invalidated because the death sentences were mandatory, and thus invalid. *Woodson v. North Carolina*, 428 U.S. 280, 295 (1976); see David W. Schaaf, Note, *What If the Victim Is a Child? Examining the Constitutionality of Louisiana’s Challenge to Coker v. Georgia*, 2000 U. ILL. L. REV. 347, 361 (2000).

41. Schaaf, *supra* note 40, at 350 (Florida, Mississippi, and Tennessee). “Since *Coker*, all three statutes have been overturned.” *Id.*; see *infra* note 172 and accompanying text.

guidelines,⁴² thereby eliminating arbitrary and capricious application of the death penalty.⁴³ In *Gregg v. Georgia*, the Court upheld the constitutionality of these new capital statutes as they applied to homicide, declaring: “[W]e now hold that the punishment of death does not invariably violate the Constitution.”⁴⁴ In *Coker v. Georgia*, the Court subsequently had its first opportunity to decide whether imposition of the death penalty for a non-homicidal crime was constitutional.⁴⁵

III. THE *COKER* DECISION AND ITS PROGENY

A. Rape of an Adult Woman Is Not Enough: The Coker Decision

In *Coker v. Georgia*, a plurality of the Court, in a decision written by Justice White, held that capital punishment for the rape of an adult woman was a disproportionate penalty,⁴⁶ and hence, violated the Eighth Amendment’s prohibition on cruel and unusual punishment. The holding of *Coker* is limited only to application of the death penalty to those defendants who rape adult women. As the plurality noted at the outset of its opinion, “[t]hat question, with respect to rape of an adult woman, is now before us.”⁴⁷ Furthermore, the plurality decision used the term “adult woman” fourteen separate times in its opinion.⁴⁸ The

42. *Gregg*, 428 U.S. at 180. Statutes addressed concerns of *Furman* by: (1) specifying the factors to be weighed and the procedures to be followed in deciding when to impose a capital sentence, or (2) making the death penalty mandatory for specified crimes. *Id.* The mandatory statutes were later struck down because they did not allow for individualized consideration. *Woodson*, 428 U.S. at 295. The statutes that called for bifurcated capital trials, consideration during the penalty phase of both aggravating and mitigating factors, and an independent review of the appropriateness of the capital punishment in each case were upheld. *See generally* *Jurek v. Texas*, 428 U.S. 262, 267 (1976); *Proffitt v. Florida*, 428 U.S. 242, 248 (1976); *Gregg*, 428 U.S. at 163–64.

43. *See* *Diamond*, *supra* note 28, at 1166.

44. *Gregg*, 428 U.S. at 169. The defendant in *Gregg* had been convicted of armed robbery and murder. *Id.* at 158.

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

46. *See id.* at 597. Ehrlich Anthony Coker, who was serving sentences for murder, rape, kidnapping, and aggravated assault, escaped from jail, entered the home of Allen and Elnita Carver, and raped Mrs. Carver at knife-point. *Id.* at 587. He then abducted Mrs. Carver and escaped in the Carvers’ car, but was later apprehended. *Id.* Mrs. Carver was sixteen at the time, but was considered an adult by virtue of her marriage. *Id.* at 605.

47. *Id.* at 592; *see* *Atkins v. Virginia*, 122 S. Ct. 2242, 2247 (2002) (“[W]e have held that death is an impermissibly excessive punishment for the rape of an adult woman [in *Coker v. Georgia*] . . .”).

48. *Coker*, 433 U.S. at 592–600; *see* *State v. Wilson*, 685 So. 2d 1063 (La. 1996). The Louisiana court further stated that the *Coker* plurality “took great pains in referring only to the rape of adult women throughout their opinion, leaving open the question of the rape of a child.” *Id.* at 1066 (emphasis omitted); *see* *Upshaw v. State*, 350 So. 2d 1358, 1360 (Miss. 1977) (noting that the *Coker* plurality took great pains to limit its decision to applicability of the death penalty for the rape of an adult woman; court refrained from deciding issue in the case of rape of a female child under the age of twelve years); Glazer, *supra* note 5, at 83–84 (citing that it was “abundantly clear” that the Court confined its holding to the permissible penalties for the rape of an adult woman and did not render a decision on the constitutionality of the death penalty for the rape of a child).

constitutionality of imposing the death penalty for the crime of child rape has not been decided since the *Coker* decision. Thus, the question of whether a state may choose to punish those defendants who rape children under the age of twelve is still an open constitutional question.⁴⁹ Any capital rape statute, however, whether for the rape of an adult or a child, is likely to first be analyzed under *Coker*.⁵⁰

The plurality in *Coker* considered the death penalty “excessive,” and hence unconstitutional, if it (1) makes no measurable contribution to acceptable goals of punishment, or (2) is grossly disproportionate to the severity of the crime.⁵¹ “The first prong requires the Court to determine whether the punishment furthers the penal goals of deterrence or retribution.”⁵² The second prong compares “the gravity of the offense,” understood to include not only the injury caused, but also the defendant’s moral culpability, with “the harshness of the penalty.”⁵³ The Court stated that the second prong should be informed by objective factors to the maximum extent possible⁵⁴ and, hence, attention must be given to legislative enactments, public attitudes concerning a particular sentence, history and precedent, legislative attitudes, and the response of juries as reflected in their sentencing decisions.⁵⁵ Of these, legislative enactments are given the most weight.⁵⁶

In analyzing legislative enactments, the *Coker* plurality found persuasive that “at no time in the last fifty years have a majority of the States authorized death as a punishment for rape,” and that only three had re-enacted death penalty legislation for rape after the Court’s decision in *Furman*.⁵⁷ The plurality viewed this as evidence “[weighing] very heavily on the side of rejecting capital

49. See *supra* note 48.

50. See *Wilson*, 685 So. 2d at 1065–66; *Leatherwood v. State*, 548 So. 2d 389, 402 (Miss. 1989) (noting that it did not need to address *Coker* because imposition of the death penalty for child rape was prohibited by state statute).

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

52. Barry Latzer, *The Failure of Comparative Proportionality Review of Capital Cases (With Lessons From New Jersey)*, 64 ALB. L. REV. 1161, 1191 (2001). The Court did not consider the first prong in *Coker*, but instead based its decision on the second prong. See *id.*

53. *Penry v. Lynaugh*, 492 U.S. 302, 343 (1989) (Brennan, J., concurring in part and dissenting in part) (quoting *Solem v. Helm*, 463 U.S. 277, 291–92 (1983)), *overruled on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002).

54. *Coker*, 433 U.S. at 592 (“Eighth Amendment judgments should not be, or appear to be, merely the subjective views of individual justices; judgment should be informed by objective factors to the maximum possible extent.”); *Atkins v. Virginia*, 122 S. Ct. 2242, 2247 (2002).

55. *Coker*, 433 U.S. at 592; see Latzer, *supra* note 42, at 1192. “Objective” test “requires a count of statutes and verdicts indicating approval of . . . a death sentence.” Latzer, *supra* note 42, at 1192. The Court, however, did not consider public opinion, community values, or international laws as the *Gregg* decision suggested. Palmer, *supra* note 4, at 852.

56. *Atkins*, 122 S. Ct. at 2247 (“We have pinpointed that the ‘clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country’s legislatures.’”) (quoting *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989)).

57. *Coker*, 433 U.S. at 593–94.

punishment.”⁵⁸ The plurality then analyzed the actions of juries in Georgia, since it was the only state with a death penalty for rape at the time, and concluded that because nine out of ten juries did not impose the death penalty in Georgia, that finding also weighed on the side of rejecting capital punishment for the crime of rape.⁵⁹ Finally, the plurality made a subjective decision, finding that while rape was “highly reprehensible” and “short of homicide . . . the ultimate violation of self,” rape did not compare with murder.⁶⁰ In the plurality’s view, “[I]f life is over for the victim of the murderer; for the rape victim, life may not be nearly so happy as it was, but it is not over and normally is not beyond repair.”⁶¹ Commentators have suggested that this section of the opinion proves that the *Coker* plurality considered the death penalty disproportionate to any crime in which death does not result.⁶²

Justices Brennan and Marshall concurred, expressing their belief that the death penalty is cruel and unusual punishment in all circumstances.⁶³ Justice Powell agreed with the majority that the death penalty is “ordinarily” a disproportionate punishment for the crime of raping an adult woman; however, he disagreed that there was a “bright line” difference between murder and rape.⁶⁴ Powell argued that there is a great variation in the crime of rape, and that in some cases, a victim’s life might be beyond repair.⁶⁵ Thus Justice Powell’s reasoning recognizes that some kinds of rape would be deserving of the death penalty.

The dissent by Chief Justice Burger and Justice Rehnquist criticized the plurality’s characterization of rape, noting that rape is the most brutal act one human being can inflict on another.⁶⁶ The dissent also criticized the plurality’s “circular” reasoning, arguing that Georgia’s position as the only state to authorize capital punishment for the crime of rape could be explained by the uncertainty created by the *Furman* decision.⁶⁷ “[I]t is myopic to base sweeping constitutional principles upon the narrow experience of the past five years.”⁶⁸ The dissent also criticized the plurality for taking away the right of states to experiment with criminal laws, noting that “[s]tatutory provisions in criminal justice applied in one part of the country can be carefully watched by other state legislatures, so that the

58. *Id.* at 596.

59. *Id.* at 596–97 (six out of sixty-three cases since 1973).

60. *Id.* at 597–98.

61. *Id.* at 598.

62. See Annaliese Flynn Fleming, Comment, *Louisiana’s Newest Capital Crime: The Death Penalty for Child Rape*, 89 J. CRIM. L. & CRIMINOLOGY 717, 737 (1999) (“[T]he Court in *Coker* drew the line: if the perpetrator of the crime does not take human life, the death penalty is disproportionate.”).

63. *Coker*, 433 U.S. at 600 (Brennan, J., concurring.); *id.* at 600–01 (Marshall, J., concurring).

64. *Id.* at 603 (Powell, J., concurring in part and dissenting in part).

65. *Id.*

66. *Id.* at 607–08 (Burger, C.J., dissenting). The dissent was careful to note that this defendant had “within the space of three years, raped three separate women, killing one and attempting to kill another” and that, because *Coker* was already serving a life sentence, there was no further punishment outside of the death penalty. *Id.* at 607.

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

68. *Id.*

experience of one State becomes available to all.”⁶⁹ Finally, the dissent took the plurality to task for its subjective view that the death penalty is disproportionate for the crime of rape simply because it does not result in the death of the victim.⁷⁰ The dissent found that rape was not a crime “‘light years’ removed from murder in the degree of its heinousness,” and thus it was reasonable for states to enact death penalty legislation for the crime of rape.⁷¹ Thus, the major disagreement between the plurality, Justice Powell’s concurring opinion, and the dissent was the nature of death penalty proportionality review and how the Court should apply it. This disagreement shows up repeatedly in the Court’s death penalty jurisprudence after *Coker*.

B. Limiting *Coker*: The Court’s Decisions in *Tison v. Arizona*, *Stanford v. Kentucky*, *Penry v. Lynaugh*, and *Atkins v. Virginia*

Subsequent to *Coker*, the Court has continually relaxed its approach to proportionality review. In *Tison v. Arizona*,⁷² the Court found that a statute imposing the death penalty for felony murderers whose participation in a crime evinced a “reckless indifference to human life” was constitutional under the Eighth Amendment.⁷³ The Court held that while the defendants did not commit murder, they participated in the murders to such a degree that they had a culpable mental state of reckless indifference to human life.⁷⁴ In applying the “proportionality” prong to determine the constitutionality of the death penalty in this case, the Court looked exclusively to how many states viewed the death penalty as proportional to the defendant’s crimes.⁷⁵ The Court did not examine the behavior of sentencing juries as it did in *Coker*.⁷⁶ The Court then asked whether the mental state of the defendant should have any bearing on the proportionality of the sentence imposed.⁷⁷ The Court answered this question in the affirmative, finding that the mental state of a criminal “is nearly as important as his actions.”⁷⁸

69. *Id.* at 616 (Burger, C.J., dissenting). The dissent further noted that “[a]lthough human lives are in the balance, it must be remembered that failure to allow flexibility may also jeopardize human lives[:] those of the victims of undeterred criminal conduct.” *Id.*

70. *See id.* at 619 (Burger, C.J., dissenting).

71. *Id.* at 620 (Burger, C.J., dissenting).

72. 481 U.S. 137 (1987).

73. *Id.* at 158. Gary Tison, a convicted murderer, escaped from prison with the help of his three sons. After flagging down a passing car with the intent to steal the car, Tison and his cellmate murdered the four occupants of the car (a husband, wife, and their two-year-old son and fifteen-year-old niece) with a shotgun while Tison’s three sons stood by and watched. *Id.* at 139–40. Tison’s sons, although they did not commit the murders, were sentenced to death. *Id.* at 143.

74. *Id.* at 151.

75. *Id.* at 152–54; see Matthew E. Albers, Note, *Legislative Deference in Eighth Amendment Capital Sentencing Challenges: The Constitutional Inadequacy of the Current Judicial Approach*, 50 CASE. W. RES. L. REV. 467, 477–78 (1999).

76. Albers, *supra* note 75, at 478.

77. *Tison*, 481 U.S. at 158.

78. *Id.* at 157; see Albers, *supra* note 75, at 478.

Tison suggests that the behavior of sentencing juries need not be examined to uphold capital statutes, including capital child rape statutes. Furthermore, *Tison* holds that a criminal's mental state is important in determining whether the death penalty is proportional to a given crime.⁷⁹ In *Tison*, the mental state necessary for finding that capital punishment is proportional to the crime of felony-murder was that of "reckless indifference to human life."⁸⁰ Thus, the mental state of a child rapist could be relevant to the constitutionality of the death penalty for child rape. If the mental state of a child rapist rises to the level of "reckless indifference to human life," the child rapist may be eligible for the death penalty.⁸¹

The Court further relaxed its Eighth Amendment jurisprudence in *Stanford v. Kentucky*.⁸² In *Stanford*, the Court held a state law providing for imposition of the death penalty on a sixteen- or seventeen-year-old defendant was constitutional under the Eighth Amendment.⁸³ In a plurality opinion by Justice Scalia, the Court held that the legislative enactments of the states and the behavior of sentencing juries are the *only* relevant factors in determining whether the Eighth Amendment bars a particular punishment.⁸⁴

[S]everal of our cases have engaged in so-called 'proportionality' analysis . . . (but) we have never invalidated a punishment on this basis alone. All of our cases condemning a punishment under this mode of analysis also found that the objective indicators of state laws or jury determinations evidenced a societal consensus against that penalty.⁸⁵

The majority's analysis of the behavior of sentencing juries, however, was cursory at best—it encompassed only one paragraph and found that the behavior of sentencing juries weighed in favor of the death penalty even though the last time a person under the age of seventeen was executed was 1959, thirty years prior to *Stanford*.⁸⁶ *Stanford* thus represents a limiting of so-called "proportionality analysis," demonstrating a shift toward using legislative enactments as the exclusive indicator of society's acceptance of the death penalty, and thus, of the constitutionality of the death penalty.

A further limiting of proportionality review came in *Penry v. Lynaugh*.⁸⁷ In *Penry*, the Court held that the imposition of the death penalty on mentally retarded adults was constitutional under the Eighth Amendment.⁸⁸ The Court

79. *Tison*, 481 U.S. at 156.

80. *Id.* at 158.

81. See discussion *infra* Part III; see also discussion *infra* Part VII (providing a list of aggravating factors for the crime of child rape).

82. 492 U.S. 361 (1989).

83. *Id.* at 380 (plurality opinion).

84. *Id.* at 379 (plurality opinion); see Albers, *supra* note 75, at 481 (discussing legislative enactments by the states).

85. *Stanford*, 492 U.S. at 379 (plurality opinion).

86. *Id.* at 373–74.

87. 492 U.S. 302 (1989), *overruled on other grounds by* *Atkins v. Virginia*, 536 U.S. 304 (2002).

88. *Id.* at 340. This holding was subsequently overruled by a majority of the Court in *Atkins v. Virginia*, 536 U.S. 304 (2002).

engaged in severely limited proportionality review, basing its holding solely on a survey of state legislatures and jury determinations.⁸⁹ Justice Scalia, in his concurring opinion, advocated total abandonment of the Court's Eighth Amendment proportionality review, stating:

[The proportionality inquiry] has no place in our Eighth Amendment jurisprudence. "The punishment is either cruel *and* unusual (i.e., society has set its face against it) or it is not." If it is not unusual, that is, if an objective examination of laws and jury determinations fails to demonstrate society's disapproval of it, the punishment is not unconstitutional even if out of accord with the theories of penology favored by the Justices of this Court.⁹⁰

This severely restricted proportionality review was reiterated in the Court's decision in *Atkins v. Virginia*,⁹¹ which overruled *Penry v. Lynaugh*. In *Atkins*, a majority of the Court again looked exclusively toward state legislative enactments in invalidating imposition of the death penalty on the mentally retarded.⁹² The Court reasoned that even though a majority of the states had not prohibited capital punishment for the mentally retarded,⁹³ there was a sufficiently consistent trend by state legislatures in prohibiting capital punishment for the mentally retarded to hold such sentencing disproportionate, and hence, unconstitutional under the Eighth Amendment.⁹⁴ Thus, after *Atkins*, proportionality analysis is severely limited to consideration of state legislation. However, a strict majority of states is not required to validate or invalidate a capital punishment statute, only a persuasive consistency of state legislation is needed.

In the cases subsequent to *Coker*, it is clear that the Court has severely limited the proportionality review it applies in death penalty cases.⁹⁵ The standard for assessing the constitutionality of capital statutes has moved almost exclusively to an assessment of state legislative enactments. *Tison* and *Atkins* suggest that jury determinations and other evidence of society's attitudes toward the death penalty are not necessary to uphold the constitutionality of a capital statute. This leaves only the assessment of state legislative enactments for the Court to consider. A

89. *Penry*, 492 U.S. at 334–35; see Albers, *supra* note 75, at 483.

90. *Penry*, 492 U.S. at 351 (Scalia, J., concurring in part and dissenting in part) (quoting *Stanford*, 492 U.S. at 378 (plurality opinion)) (emphasis in original).

91. 122 S. Ct. 2242 (2002).

92. *Id.* at 2248–49. The Court also considered that mentally retarded defendants are a special class of defendants who are unable to fully understand the scope of their crimes, and are thus less "morally culpable" and less subject to being deterred by the death penalty. *Id.* at 2251. The Court also noted that the mentally retarded are more likely to make false confessions and give less meaningful assistance to counsel because of their retardation. *Id.* at 2252. These considerations would not apply to the Court's analysis of a non-mentally retarded defendant who was sentenced to die for the crime of child rape.

93. *Id.* at 2252 (Rehnquist, C.J. dissenting) (noting that twenty states allowed mentally retarded defendants to be put to death, while eighteen states did not).

94. *Id.*

95. Glazer, *supra* note 5, at 84–85. Glazer notes that a limited proportionality review remains in effect for death penalty cases, but the Supreme Court's recent trend has been to eliminate any review of the proportionality of sentencing for all non-capital offenses. *Id.*

severely limited proportionality review favors finding child rape death penalty laws to be constitutional when a number of states are moving toward enacting capital child rape legislation.⁹⁶ There is no need for a state to justify the death penalty as a proportionate penalty for the crime of child rape. “By focusing its proportionality analysis almost exclusively on the prevalence of legislative enactments, the Court may have abdicated control of capital punishment (at least as far as proportionality arguments go) to the states.”⁹⁷

IV. THE RAPE OF A CHILD IS DISTINCTLY DEVASTATING

A. The Physical, Psychological, and Social Effects of Child Rape

Rape has been called a “fate worse than death”⁹⁸ and “one of the most egregiously brutal acts one human being can inflict upon another.”⁹⁹ Justice Powell, concurring in *Coker*, noted that “[t]he deliberate viciousness of the rapist may be greater than that of the murderer. . . . Some victims are so grievously injured physically or psychologically that life is beyond repair.”¹⁰⁰ Justice Powell’s statement is even more powerful in the context of child rape. Children suffer devastating and long-term physical, emotional, and mental trauma after being raped.¹⁰¹ Long-term follow-up studies with child sexual abuse victims demonstrate that childhood sexual abuse is “grossly intrusive in the lives of children and is harmful to their normal psychological, emotional, and sexual development in ways which no just or humane society can tolerate.”¹⁰²

“Physical problems resulting from child rape include . . . abdominal pain, vomiting, urinary tract infections, perineal bruises and tears, pharyngeal infections,

96. *Cf. Atkins*, 122 S. Ct. at 2249. (“It is not so much the number of States that is significant, but the consistency of the direction of change.”).

97. Schaaf, *supra* note 40, at 370.

98. MARCIA J. WALKER & STANLEY L. BRODSKY, *SEXUAL ASSAULT: THE VICTIM AND THE RAPIST* 135 (1976); see Michael Higgins, *Is Capital Punishment for Killers Only? State Seeks Death Penalty Against Child Rapists, Raising Constitutional Questions*, A.B.A. J., Aug. 1997, at 30 (“Who’s to say that it’s more traumatic to die than it is to live with being brutalized?” (quoting a prosecuting attorney who had just interviewed a child rape victim)).

99. *Coker v. Georgia*, 433 U.S. 584, 607–08 (1977) (Burger, C.J., dissenting).

100. *Id.* at 603 (Powell, J., concurring in part and dissenting in part); see *Brown v. State*, 692 S.W.2d 146, 151 (Tex. App. 1985) (relating evidence that victim had attempted suicide twice, the first time a month after the rape); David J. Karp, Comment, *Coker v. Georgia: Disproportionate Punishment and the Death Penalty for Rape*, 78 COLUM. L. REV. 1714, 1720 (1978) (“[I]n some cases women have preferred death to being raped, or have preferred not to continue living after being raped.”).

101. See *State v. Wilson*, 685 So. 2d 1063, 1066 (La. 1996) (“While rape of an adult is in itself reprehensible . . . rape becomes much more detestable when the victim is a child.”); *State v. Brown*, 660 So. 2d 123, 126 (La. Ct. App. 1995) (noting that childhood sexual abuse leaves lasting scars on children that can carry on for generations); CHRISTOPHER BAGLEY & KATHLEEN KING, *CHILD SEXUAL ABUSE: THE SEARCH FOR HEALING* 2 (1990).

102. BAGLEY & KING, *supra* note 101, at 2.

and venereal diseases.”¹⁰³ Moreover, a possible cause of the early onset of cervical cancer may be the result of the trauma sustained by a child during a rape.¹⁰⁴ According to one study, twenty-seven percent of those females raped as children had subsequent infections severe enough that they were forced to undergo hysterectomies.¹⁰⁵

Aside from these severe, often life-threatening physical injuries, there are potentially severe psychological problems. Psychological problems stemming from child rape include depression, insomnia, sleep disturbances, nightmares, compulsive masturbation, loss of toilet training, sudden school failure, and unprovoked crying.¹⁰⁶ The child who has been raped is also subject to feelings of guilt, poor self-esteem, feelings of inferiority, self-destructive behavior, a greater likelihood of becoming a drug or alcohol addict, and increased suicide attempts.¹⁰⁷ Furthermore, evidence suggests that these disturbances follow the child into adulthood.¹⁰⁸ In short, rape of a child “not only immediately traumatizes the child, but it also alters the child’s life forever. . . .”¹⁰⁹ That child must not only recover physically, but must attempt to resume a normal existence.¹¹⁰ The immaturity and vulnerability of a child, both physically and psychologically, adds a devastating dimension to rape that is not present when an adult is raped.¹¹¹ The psychological trauma of child rape is even greater when a family member rapes the child—such victimization at the hands of someone the child trusts can lead to lifelong familial and trust issues.¹¹²

B. The State’s Special Interest in Protecting Children

States have a special interest in protecting children. Children are a special class of people—they are particularly vulnerable because they are immature and incapable of defending themselves.¹¹³ Because children are an especially vulnerable class of people, the state is given the responsibility of protecting

103. Glazer, *supra* note 5, at 87–88.

104. See BAGLEY & KING, *supra* note 101, at 2. There is a proportionality argument for imposition of the death penalty anytime a rapist “inflicts” a death penalty on his victim, whether through immediate death, the transference of AIDS, or trauma so great as to induce a life-threatening form of cancer. See *infra* text accompanying note 185.

105. See BAGLEY & KING, *supra* note 101, at 119.

106. See HANDBOOK, *supra* note 7, at 6–7.

107. Glazer, *supra* note 5, at 87–88; see *Snider v. Peyton*, 356 F.2d 626, 627 (4th Cir. 1966) (“The psychological harm done a child of tender years when subjected to such a searing experience may be heavier by far than the physical.”).

108. Lurigio et al., *supra* note 12, at 70. Forty percent of pre-adolescent rape victims are considered “seriously disturbed.” *Id.* at 70. There is also evidence that some adult survivors of childhood sexual abuse and rape turn into sexual abusers themselves, creating a continuous cycle of abuse. See *id.*

109. Palmer, *supra* note 4, at 843.

110. See *id.* at 863.

111. See *supra* note 4 and accompanying text.

112. Palmer, *supra* note 4, at 864–65. According to 1994 crime data, about ninety-six percent of victims of child rape had a prior relationship with their attacker. Twenty percent of those victims were raped by their fathers. *Id.* at 865.

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

them.¹¹⁴ The state's duty to a victim of child rape is even more pressing because many children are raped by a family member, who normally should be providing protection, and thus these children are forced to rely solely on the state for protection.¹¹⁵

One way in which lawmakers extend different protection to children is in the area of labor regulation. Both states and the federal government have different labor regulations for children than for adults, in order to prohibit exploiting children's vulnerability and immaturity in the workplace.¹¹⁶ "State laws also treat child victims of sexual offenses differently than adult victims" because of the state's interest in protecting a child's vulnerability and immaturity.¹¹⁷ For example, many states have enacted statutory rape laws, which provide that intercourse is considered, as a matter of law, "nonconsensual" if the child is under a certain age.¹¹⁸ Similarly, in some states, the age of the rape victim determines the degree or class of the felony, thereby enacting harsher penalties in inverse proportion to the age of the victim.¹¹⁹

From a state's point of view, children require increased protection. Imposition of the death penalty for the crime of child rape addresses a state's concern for the welfare of its children and in deterring and punishing those who would prey upon the vulnerability and immaturity of a child.

V. A SOCIAL SHIFT TOWARD ACCEPTING HARSHER PUNISHMENTS FOR CHILD RAPISTS: NON-HOMICIDE CAPITAL STATUTES, THE NEW FEDERAL RULES OF EVIDENCE, AND MEGAN'S LAWS.

A. The Recent Enactment of Non-Homicide Capital Statutes in State and Federal Law

Perhaps perceiving a shift in the Supreme Court's death penalty jurisprudence, a number of states have recently enacted the death penalty for crimes in which the victim is not killed. Between 1993 and 1997, the number of jurisdictions allowing the death penalty for non-homicide crimes more than

114. See *id.*; Palmer, *supra* note 4, at 859 (noting that juvenile jurisprudence presumes that children cannot protect themselves, and thus the state takes on the role of a surrogate parent, or *parens patriae*, and thereby has a duty to protect the child's best interest).

115. Diamond, *supra* note 28, at 1188–89. Diamond notes that "in a recent National Incidence Study of Child Abuse and Neglect it was found that over fifty percent of sexually abused children were the victims of a parent, or a non-parent acquaintance or parent-substitute." *Id.* at 1189.

116. See Palmer, *supra* note 4, at 859; Michael A. Pignatella, Note, *The Recurring Nightmare of Child Labor Abuse—Causes and Solutions for the 90s*, 15 B.C. THIRD WORLD L.J. 171 (1995) (discussing child labor laws).

117. Palmer, *supra* note 4, at 859.

118. *Id.* at 860.

119. *Id.* at 860–61. "For example, in Kentucky, the rape of a child under the age of twelve is automatically considered a Class A felony," while "the rape of a person over the age of twelve is considered a Class B felony unless the rape" causes serious physical injury. *Id.*; see KY. REV. STAT. ANN. § 510.070 (Michie 2001).

doubled.¹²⁰ As of 1997, fourteen jurisdictions impose the death penalty for crimes in which the victim is not killed:¹²¹ Arkansas (treason),¹²² California (treason),¹²³ Colorado (kidnapping where victim is harmed, treason),¹²⁴ Florida (drug trafficking),¹²⁵ Georgia (aircraft hijacking, treason, rape of child under twelve),¹²⁶ Idaho (kidnapping where victim is harmed),¹²⁷ Illinois (treason),¹²⁸ Louisiana (treason, rape of child under twelve),¹²⁹ Mississippi (treason, aircraft piracy),¹³⁰ Missouri (treason, kidnapping, placing bombs near bus terminals),¹³¹ Montana (aggravated assault or kidnapping while incarcerated in state prison for murder or persistent felonies, aggravated kidnapping, rape by a repeat offender causing serious bodily injury),¹³² New Mexico (espionage),¹³³ Utah (aggravated assault intentionally causing harm if imprisoned for first-degree felony conviction),¹³⁴ and

120. Schaaf, *supra* note 40, at 366.

121. See Higgins, *supra* note 98, at 30; Schaaf, *supra* note 40, at 366. It should be noted that no defendant has been executed for a non-homicide crime since 1977. Schaaf, *supra* note 40, at 360. “[N]o one in the United States is [currently] on death row for a non-homicide crime.” Palmer, *supra* note 4, at 873.

122. ARK. CODE ANN. § 5-51-201 (Michie 1997).

123. CAL. PENAL CODE § 37 (West 1999).

124. COLO. REV. STAT. ANN. §§ 18-3-301, 18-11-101, 18-1.3-401 (West 2002) (kidnapping where victim suffers serious bodily injury, treason, and defining classes of felonies).

125. FLA. STAT. ANN. §§ 893.135, 921.142 (West 2001).

126. GA. CODE ANN. §§ 16-5-44, 16-11-1, 16-6-1 (1996) (aircraft hijacking, treason and rape of a child under twelve).

127. IDAHO CODE §§ 18-4502, 18-4504 (Michie 2000).

128. 720 ILL. COMP. STAT. ANN. 5/30-1 (West 1993). Governor George Ryan of Illinois placed an indefinite moratorium on the state’s death penalty on January 31, 2000, pending the results of an investigation into why so many more death penalty convictions have been overturned, rather than carried through. Cable News Network (CNN), *Illinois Suspends Death Penalty—Governor Calls for Review of “Flawed” System* (Jan. 31, 2000), at <http://www.cnn.com/2000/US/01/31/illinois.executions.02/index/html>. Governor Ryan said, however, that he still believed in the death penalty and would keep all death row prisoners on death row. *Id.* A death penalty panel appointed by Governor Ryan suggested reformation of Illinois’ death penalty system in April 2002, but the moratorium still remains in place. CNN, *Illinois Panel Recommends Death Penalty Reforms* (Apr. 14, 2002), at <http://www.cnn.com/2002/LAW/04/15/death.penalty.report/index.html>.

129. LA. REV. STAT. ANN. §§ 14:113, 14:42(D)(2) (West 2001) (treason and aggravated rape of a child under the age of twelve).

130. MISS. CODE ANN. §§ 97-7-67, 97-25-55 (1999) (treason and aircraft piracy).

131. MO. REV. STAT. §§ 576.070, 565.110, 578.310, 557.021 (2001) (treason, kidnapping, placing bombs near bus terminals, and defining classes of criminals).

132. MONT. CODE ANN. §§ 46-18-220, 45-5-303, 45-5-503 (2001) (aggravated assault or kidnapping while imprisoned, aggravated kidnapping and rape by a repeat offender causing serious bodily injury).

133. N.M. STAT. ANN. § 20-12-42 (Michie 1989).

134. UTAH CODE ANN. § 76-5-103.5 (1995). This imposition of the death penalty for aggravated assault has subsequently been invalidated on Eighth Amendment grounds by the Supreme Court of Utah. *State v. Gardner*, 947 P.2d 630 (Utah 1997). The Supreme Court of Utah found that imposition of the death penalty for the crime of aggravated assault was grossly disproportionate to the gravity of the crime. *Id.* at 652. The Utah court appeared to be especially influenced by the United States Supreme Court’s decision in *Coker v.*

Washington (treason).¹³⁵ Furthermore, the federal government authorizes the death penalty for the crimes of treason, espionage, and drug dealing by a drug kingpin.¹³⁶

The existence of non-homicide capital statutes indicates that at least some state legislatures approve of the death penalty for non-homicide crimes, including child rape.¹³⁷ Presumably, the legislatures represent the will of the citizens.¹³⁸ Accordingly, the federal statutes may indicate a nationwide consensus approving of the death penalty for at least some non-homicide crimes.¹³⁹ Polls suggest that approximately seventy to seventy-five percent of the American public supports the death penalty.¹⁴⁰ One poll indicates that sixty-five percent of the American public would support the death penalty for child molesters.¹⁴¹ Moreover, both federal and state statutes directly contradict the notion that the death penalty is not proportionate to the crime unless murder is involved.¹⁴²

B. Shifting Attitudes Toward Sex Offenders at the Federal Level: The New Federal Rules of Evidence

Not only have Congress and numerous states imposed the death penalty for non-homicide crimes, but Congress has also specifically changed the rules of evidence to make it easier to convict child rapists.¹⁴³ Propensity evidence in

Georgia, 433 U.S. 584 (1977) (plurality opinion). The Supreme Court of Utah found that rape of an adult woman was a much more serious crime than aggravated assault, and reasoned that if the Supreme Court found the imposition of the death penalty for rape of an adult woman unconstitutional, then the imposition of the death penalty on those who commit aggravated assault was likewise unconstitutional. *Id.* at 652–53.

135. WASH. REV. CODE ANN. § 9.82.010 (West 1998).

136. 18 U.S.C. §§ 2381, 794, 3591(b) (2000) (treason, espionage and capital drug trafficking).

137. Schaaf, *supra* note 40, at 366 (“[T]hese laws seem to support the notion that society accepts the death penalty as punishment for non-homicide crimes, a category including the rape of a child under the age of twelve.”).

138. *State v. Wilson*, 685 So. 2d 1063, 1067 (La. 1996) (“As evidence of society’s attitudes, we look to the judgment of state legislators, who are representatives of society.”).

139. See Jeffrey C. Matura, Note, *When Will It Stop? The Use of the Death Penalty for Non-Homicide Crimes*, 24 J. LEGIS. 249, 259 (1998).

140. Palmer, *supra* note 4, at 871; see *State v. Gardner*, 947 P.2d 630, 649 (Utah 1997) (stating that the Supreme Court’s belief in capital punishment has been bolstered by the fact that “a large proportion of American society continues to regard [capital punishment] as an appropriate and necessary legal sanction.”) (quoting *Gregg v. Georgia*, 428 U.S. 153, 179 (1976)).

141. See Palmer, *supra* note 4, at 871. The Court’s recent decision in *Atkins v. Virginia* suggests that while polling data is not determinative of the Justices’ decisions on the death penalty, it is a factor they consider as “additional evidence” when reviewing the constitutionality of death penalty statutes. *Atkins v. Virginia*, 122 S. Ct. 2242, 2249 n.21 (2002).

142. See Palmer, *supra* note 4, at 872 (noting that if *Coker* is read to support such a proposition, the aforementioned laws directly challenge that decision).

143. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No 103-322, § 320935, 108 Stat. 1796, 2136-37 (1994) (enacting FED. R. EVID. 413–15).

criminal and civil trials is generally not allowed,¹⁴⁴ but sex crimes are considered unique. Congress has recently amended the Federal Rules of Evidence in order to allow propensity character evidence to be used in both civil and criminal trials against sex offenders of children.¹⁴⁵ In a criminal trial for child molestation, Rules 413 and 414 allow the prosecution to put forth evidence of a defendant's past sexual offenses.¹⁴⁶ In addition, Rule 415 allows the use of such evidence in civil cases involving child molestation.¹⁴⁷ Courts almost uniformly allow propensity evidence in cases involving child molestation after conducting a Rule 403 balancing test.¹⁴⁸

Proponents of the new rules argued that the new rules were essential to protect children from rapists and child molesters because the crimes of child rape and child molestation are distinctive in nature.¹⁴⁹ The rate of recidivism for adult rape is between seven and thirty-five percent, while the rate of recidivism for child molesters reaches as high as forty percent.¹⁵⁰ "Sex offenders, especially those who target children, are unlikely to stop after [only] one incident."¹⁵¹ A recent United States Justice Department survey found that a sexual predator who victimizes children is more than twice as likely to have multiple victims than a sex offender who targets adults.¹⁵² It is estimated that the average pedophile "commits 282 illegal acts with 150 different victims."¹⁵³ The new Federal Rules of Evidence

144. Christina E. Wells & Erin Elliott Motley, *Reinforcing the Myth of the Crazy Rapist: A Feminist Critique of Recent Rape Legislation*, 81 B.U. L. REV. 127, 174 (2001) ("The general rule barring the use of character evidence at trials is an institution in the law of evidence. To many it is one of those fundamental tenets of fairness that marks our justice system."); see also Louis M. Natali, Jr. & R. Stephen Stigall, "Are You Going to Arraign His Whole Life?": *How Sexual Propensity Evidence Violates the Due Process Clause*, 28 LOY. U. CHI. L.J. 1, 13-14 (1996) (describing the ban on propensity evidence as a "fundamental conception of how defendants should be tried in American courtrooms").

145. Violent Crime Control and Law Enforcement Act § 320935.

146. FED. R. EVID. 413(a), 414(a). The new rules were enacted in 1995.

147. FED. R. EVID. 415(a).

148. FED. R. EVID. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."); see *United States v. Sumner*, 204 F.3d 1182, 1187 (8th Cir. 2000) (allowing evidence of past molestation of children in current child molestation case); *United States v. McHorse*, 179 F.3d 889, 899 (10th Cir. 1999) (allowing evidence of past molestation in pending molestation case); *United States v. Eagle*, 137 F.3d 1011, 1016 (8th Cir. 1998) (allowing evidence of a ten-year-old conviction for carnal knowledge of a child in current molestation case); Wells & Motley, *supra* note 144, at 174.

149. Wells & Motley, *supra* note 144, at 140; see 140 Cong. Rec. H2415-04 (statement of Rep. Kyl), available at 1994 WL 137668.

150. Michael L. AtLee, Casenote, *Kansas v. Hendricks: Fighting for Children on the Slippery Slope*, 49 MERCER L. REV. 835, 842-43 (1998).

151. Robert Teir & Kevin Coy, *Approaches to Sexual Predators: Community Notification and Civil Commitment*, 23 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 405, 407 (1997).

152. Palmer, *supra* note 4, at 866.

153. AtLee, *supra* note 150, at 843 (quoting Michael G. Planty & Louise van der Does, *Megan's Laws Aren't Enough*, WALL ST. J., July 17, 1997, at A22). For example,

acknowledge that sexual crimes committed against children are different to such a degree that these crimes warrant exceptions to the general rule against propensity evidence. This acknowledgement indicates that Congress believes sexual crimes against children need to be punished more often and more severely.¹⁵⁴

C. The Widespread Enactment of Megan's Laws

Congress and all fifty state legislatures have enacted statutes requiring authorities to notify the public of the location of registered sex offenders.¹⁵⁵ Such widespread enactment demonstrates a willingness to subject sex offenders who target children to harsh treatment.¹⁵⁶ In 1994, Congress enacted the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program that requires states, as a prerequisite to receiving certain federal funds, to establish registration systems for persons convicted of certain sexual offenses.¹⁵⁷ Specifically, the federal law directs states to notify the public about those persons who commit violent sexual offenses,¹⁵⁸ offenses against minors,¹⁵⁹ and those who are violent sexual predators.¹⁶⁰ In response, almost all states have enacted a notification law of one type or another.¹⁶¹ For example, in Delaware, persons

John J. Geoghan, a former priest for the archdiocese of Boston, is alleged to have molested over 100 children. Joseph J. Guido, *The Importance of Perspective: Understanding the Sexual Abuse of Children by Priests*, AMERICA, April 1, 2002, at 21.

154. Further evidence that Congress' attitudes toward sexual violence against children are changing can be found in the Violence Against Women Act (VAWA), which provides a civil rights action for victims of sexual violence motivated by gender. 42 U.S.C. § 13981 (West 1995). Although VAWA does not distinguish between adults and children, it demonstrates an overall tougher federal stance on all rapes and sexual offenses, including those against children. One of the purposes of VAWA was to recognize sexual violence for "what it is—a hate crime." S. Rep. No. 103-138, at 49 (1993). Although the civil rights remedy available under VAWA has been struck down as being beyond Congress' regulatory powers, *see* *United States v. Morrison*, 120 S. Ct. 1740, 1744 (2000), it still evidences a desire on the part of the federal legislature to recognize the seriousness of, and provide federal remedies to, gender-motivated crimes of violence, including those of child rape. *See* 42 U.S.C. § 13981(c) (West 1995).

155. *See* Wells & Motley, *supra* note 144, at 131.

156. *See* Schaaf, *supra* note 40, at 370; Palmer, *supra* note 4, at 861–62.

157. 42 U.S.C. § 14071(a)(1) (2002) (requiring sexually violent offenders to register their current addresses after release from incarceration). States that fail to initiate sexual offender registration programs are denied ten percent of funds they would otherwise receive from federal grants for assistance with law enforcement; those funds are then reallocated to other states that do comply with the law. § 14071(g)(2).

158. § 14071(a)(1)(A) (requiring registration of persons convicted of a sexually violent offense against anyone). Sexually violent offenses include the crime of rape as defined by 18 U.S.C. §§ 2241, 2242 or state law. § 14071 (a)(3)(B).

159. 42 U.S.C. § 14071(a)(1)(A)(2002) (requiring registration of adults convicted of any criminal offense against a minor).

160. § 14071(a)(1)(B). A sexually violent predator is an individual "convicted of a violent sexual offense who suffers from a mental abnormality or personality disorder that makes the person likely to engage in predatory sexually violent offenses." § 14071(a)(3)(C).

161. *See* Michele L. Earl-Hubbard, Comment, *The Child Sex Offender Registration Laws: The Punishment, Liberty Deprivation, and Unintended Results*

convicted of a sexual offense against a child are required to have their drivers' licenses coded with a "Y" to symbolize that they have been convicted of such a crime.¹⁶²

These registration laws have resulted mainly from the public outcry surrounding several high-profile sex crimes and murders committed against children. The most notable is the case of Megan Kanka, the child for whom these "Megan's Laws" are named.¹⁶³ In 1994, Megan Kanka's neighbor lured her into his home by promising to show her his new puppy.¹⁶⁴ He used a belt to choke her, placed plastic bags over her head, raped her, and left her dead body in a park.¹⁶⁵ Megan was seven years old when she was raped and murdered.¹⁶⁶

Another reason for the widespread passage of Megan's Laws has been the finding that sex offenders who target children are recidivists¹⁶⁷ and should thus be monitored closely by their communities. The House Report accompanying the federal law noted that:

[e]vidence suggests that child sex offenders are generally serial offenders. Indeed, one recent study concluded [that] the "behavior is highly repetitive, to the point of compulsion," and found that 74% of imprisoned child sex offenders had one or more prior convictions for a sexual offense against a child.¹⁶⁸

State laws make similar findings. For example, the New Jersey Legislature justified its sex offender registration statute in the following way:

The danger of recidivism posed by sex offenders and offenders who commit other predatory acts against children, and the dangers posed by persons who prey on others as a result of mental illness, require a system of registration that will permit law enforcement officials to identify and alert the public when necessary for the public safety.¹⁶⁹

Associated with the Scarlet Letter Laws of the 1990s, 90 NW. U. L. REV. 788, 790 (1996). (noting that forty-six states had passed some type of child sex offender registration law).

162. DEL. CODE ANN. tit. 21, § 2718(e) (2001).

163. See, e.g., Jennifer L. Cordle, *State v. Wilson: Social Discontent, Retribution, and the Constitutionality of Capital Punishment for Raping a Child*, 27 CAP. U. L. REV. 135, 143 (1998).

164. See Earl-Hubbard, *supra* note 161, at 789.

165. *Id.*

166. Cordle, *supra* note 163, at 143. Sadly, Megan Kanka's brutal torture was not the only case of child rape to electrify the country. In 1989, a seven-year-old Washington boy was found wandering in the woods after a convicted sex offender lured him there, raped him, and attempted to kill him. See Kate Shatzkin, *Shriner Conviction: 'A Feeling of Completion' Relief Comes to Young Victim and Parents*, SEATTLE TIMES, Feb. 8, 1990, at A1. In 1993, ten-year-old Zachary Snider was raped and murdered by a local resident whom the boy thought was romantically involved with his mother. See Susan Schramm, *Tape Played in Molester's Slaying Trial*, INDIANAPOLIS STAR, Feb 7, 1995, at E1.

167. See discussion *supra* Part V.B.

168. See H.R. Rep. 103-392 (1993), available at 1993 WL 484758; see also Earl-Hubbard, *supra* note 161, at 795. One study suggested that the average child sex offender molested 117 children during his lifetime. See *id.*

169. N.J. STAT. ANN. § 2C:7-1(a) (West 2002).

Similarly, New York's registration law bases its necessity on the "danger of recidivism posed by sex offenders, especially those sexually violent offenders who commit predatory acts characterized by repetitive and compulsive behavior."¹⁷⁰

The recent enactment of non-homicide capital legislation indicates a society more willing to punish non-homicide crimes, including child rape, with the death penalty. The new legislation also directly challenges the notion that capital punishment is a disproportionate penalty unless a homicide is involved. The scope of Federal Rules of Evidence 413, 414, and 415, which make it easier to convict child abusers and rapists, indicates a Congress willing to change the evidentiary requirements so that child rapists and abusers are punished more often and more severely. Finally, the prevalence and scope of Megan's Laws demonstrate a society more comfortable with the severe punishment and deterrence of child rapists and child molesters. Taken together, these changes to the legislative and legal landscape indicate a society willing to impose the death penalty on child rapists, and thus, a Supreme Court more likely to uphold capital child rape statutes as constitutional under the Eighth Amendment.

VI. RECENT CAPITAL CHILD RAPE STATUTES AND THE LOUISIANA SUPREME COURT'S DECISION IN *STATE V. WILSON*

A. Recent Capital Child Rape Statutes

In 1995, the Louisiana state legislature provided that the death penalty may be imposed on a defendant convicted of raping a child under twelve.¹⁷¹ The state was the first in the United States to do so since 1989.¹⁷² In 1997, Georgia,

170. N. Y. CORRECT. LAW § 168 (McKinney Supp. 1998) (Statement of Legislative Findings and Intent).

171. The Louisiana statute states in relevant part:

Aggravated rape is a rape committed upon a person sixty-five years or older or where the anal or vaginal sexual intercourse is deemed to be without lawful consent of the victim because it is committed . . . [w]hen the victim is under the age of twelve years. Lack of knowledge of the victim's age shall not be a defense. . . . Whoever commits the crime of aggravated rape shall be punished by life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. . . . However, if the victim was under the age of twelve years . . . [a]nd if the district attorney seeks a capital verdict, the offender shall be punished by death or life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence, in accordance with the determination of the jury. . . . [I]f the district attorney does not seek a capital verdict, the offender shall be punished by life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. . . .

LA. REV. STAT. ANN. § 14:42 (West 2001).

172. Glazer, *supra* note 5, at 80 n.2. Prior to 1989, three states—Florida, Mississippi, and Tennessee—authorized the death penalty when the victim of the rape was a child; all of these statutes have been subsequently overturned. *Id.* The Tennessee statute was invalidated in 1977 because the statute provided for a mandatory death penalty. *See Collins v. State*, 550 S.W.2d 643 (Tenn. 1977). The Florida statute was invalidated on the same

following Louisiana, passed a statute authorizing the death penalty for a person convicted of raping a girl under the age of ten.¹⁷³ Similar proposals have been introduced in Mississippi,¹⁷⁴ Massachusetts,¹⁷⁵ Pennsylvania,¹⁷⁶ Montana,¹⁷⁷ and California.¹⁷⁸ Thus, in the past seven years, two states have successfully passed capital child rape legislation, and another five states have attempted to do so.

While seven states do not represent a majority, these recent attempts at enacting capital child rape legislation indicate an increased interest in using capital child rape legislation to deter and punish child rapists. More importantly, these recent attempts indicate that state legislatures are increasingly viewing the death penalty as a permissible punishment for child rape.¹⁷⁹ Coupled with the more widespread acceptance of capital statutes for non-homicide crimes, it is likely that a greater number of states will enact capital child rape statutes if the states that

grounds as in *Coker*. See *Buford v. State*, 403 So. 2d 943, 951 (Fla. 1981). Finally, the Mississippi statute was invalidated on the basis of a conflict with another statute. See *Leatherwood v. State*, 548 So. 2d 389, 403 (Miss. 1989). The court in *Leatherwood* did not reach the constitutionality of the statute. *Id.*

173. The Georgia statute states in relevant part:

A person commits the offense of rape when he has carnal knowledge of . . . [a] female who is less than ten years of age. Carnal knowledge in rape occurs when there is any penetration of the female sex organ by the male sex organ. . . . A person convicted of the offense of rape shall be punished by death, by imprisonment for life without parole, by imprisonment for life, or by imprisonment for not less than 10 nor more than 20 years. . . .

GA. CODE ANN. § 16-6-1(a), (a)(2), (b) (2001).

174. Mississippi had a statute that authorized imposition of the death penalty for the rape of a child under the age of twelve. MISS. CODE ANN. § 97-3-65(1) (Supp. 1988). Another sentencing statute, however, precluded imposition of the death penalty for rape. MISS. CODE ANN. § 99-19-101 (Supp. 1988). The legislature attempted to amend the statute so that the death penalty could be imposed for the rape of a child under fourteen, but the bill died in committee. H.B. 558, 1997 Reg. Sess. (Miss. 1997), available at http://billstatus.ls.state.ms.us/1997/all_measures/allmsrs.htm (last visited Dec. 18, 2002).

175. See Gray, *supra* note 30, at 1467.

176. See Michael Mello, *Executing Rapists: A Reluctant Essay on the Ethics of Legal Scholarship*, 4 WM. & MARY J. WOMEN & L. 129, 134 (1997) (noting that Pennsylvania's Republican party sought the death penalty for repeated sexual assaults on children).

177. *Id.* (noting that a Montana state senator introduced death penalty legislation for second convictions of child rape that involved serious bodily injury).

178. See Palmer, *supra* note 4, at 869. California lawmakers introduced a bill in 1998 and amended in 1999 authorizing the death penalty when a defendant commits "lewd and lascivious acts on a child under the age of [fourteen] years, if that defendant has a prior conviction for that offense that has been pled and proved." AB 35, 1999-2000 Reg. Sess. (Cal. 1999) (quoting Legislative Counsel's Digest), available at <http://www.leginfo.ca.gov> (last visited Dec. 18, 2002).

179. Recently, the Supreme Court indicated that it was the consistency of the direction of change, not the bare number of States, that was important when looking to state legislative enactments in order to determine the constitutionality of imposing the death penalty for any particular crime. *Atkins v. Virginia*, 122 S. Ct. 2242, 2249 (2002).

already have them in force find them successful in deterring child rape.¹⁸⁰ “It is difficult to believe that Louisiana will remain alone in punishing the rape of a child by death if the next decade demonstrates a reduction in rapes against children in Louisiana”¹⁸¹

B. State v. Wilson—*The Louisiana Supreme Court Distinguishes Coker*

In its 1996 decision, *Wilson*,¹⁸² the Louisiana Supreme Court became the first court to uphold the constitutionality of a capital child rape statute. In *Wilson*, the Louisiana Supreme Court squarely held that the imposition of the death penalty for the rape of a child under twelve was not cruel and unusual punishment under the Eighth Amendment.

[W]e conclude that given the appalling nature of the crime, the severity of the harm inflicted upon the victim, and the harm imposed on society, the death penalty is not an excessive penalty for the crime of rape when the victim is a child under the age of twelve years old.¹⁸³

The case involved two defendants—Wilson, who was convicted of aggravated rape of a five-year-old girl and Bethley, who was convicted of raping three girls, ages five, seven, and nine, one of whom was his own daughter.¹⁸⁴ Furthermore, Bethley allegedly knew that he was HIV positive at the time of the rapes.¹⁸⁵

The Louisiana Supreme Court first distinguished *Coker* on the ground that the United States Supreme Court decided only whether the death penalty was an acceptable punishment for the rape of an adult woman.¹⁸⁶ The court then went on to distinguish the crime of child rape from the crime of raping an adult woman. “Rape of a child less than twelve years of age is like no other crime . . . they are particularly vulnerable since they are not mature enough nor capable of defending themselves.”¹⁸⁷ The court also noted that while the rape of an adult female “is in

180. See *State v. Wilson*, 685 So. 2d 1063, 1069 (La. 1996); Palmer, *supra* note 4, at 877–78.

181. Palmer, *supra* note 4, at 877. Tougher laws against those who sexually assault children appear to already be successful in getting more child rapists off the street. Between 1983 and 1992, arrests for rape increased nearly sixteen percent. *Id.* at 845. Corollary data suggests that many of these sex offenders’ victims were children. *Id.* Palmer notes that it is unclear from the data whether the increase in arrests is due to tougher laws or simply more rapes. *Id.* It is also possible that the increase in arrests is due to better reporting based on a higher awareness of child rape as a crime.

182. 685 So. 2d 1063.

183. *Id.* at 1070.

184. *Id.* at 1064–65.

185. *Id.* There is an argument that a person who rapes a victim when he is aware that he is infected with HIV should be eligible for the death penalty if he transfers the virus to the victim, as he is “murdering” the defendant slowly over the course of time. See Stefanie S. Wepner, Note, *The Death Penalty: A Solution to the Problem of Intentional AIDS Transmission Through Rape*, 26 J. MARSHALL L. REV. 941, 941 (1993).

186. *Wilson*, 685 So. 2d at 1065–66. The court also noted that the various Justices in *Coker* referred to “adult woman” fourteen times in the various opinions. *Id.* at n.2.

187. *Id.* at 1067.

itself reprehensible,” the Louisiana legislature concluded that rape “becomes much more detestable when the victim is a child.”¹⁸⁸ The Louisiana Supreme Court found that “[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.”¹⁸⁹ Thus, the Louisiana Supreme Court recognized the state’s heightened interest in protecting children: “Children are a class of people that need special protection.”¹⁹⁰

The court went on to find that the “legislature alone determines what are punishable as crimes and the proscribed penalties.”¹⁹¹ The court held that such legislative enactments are to be presumed constitutional under both the Federal and State constitutions,¹⁹² noting that a “heavy burden” bears on those challenging the constitutionality of a statute.¹⁹³

The court then examined *Coker’s* analysis of death penalty statutes across the United States.¹⁹⁴ The court admitted that Louisiana was, at the time of *Wilson*, the only state that had passed a law declaring child rape a death penalty offense, but the court found that this fact alone was not determinative.¹⁹⁵ Rather, the court found that there is no “constitutional infirmity in a state’s statute simply because that jurisdiction chose to be first.”¹⁹⁶ The court reasoned that the Supreme Court cannot look solely to 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.’”¹⁹⁷ The court noted that “[i]f no state could pass a law without other states passing the same or similar law, new laws could never be passed.”¹⁹⁸ The court further noted that while Louisiana was the only jurisdiction with a capital child rape statute in effect at the time of *Wilson*, “[Louisiana did] not [enact such legislation] without the suggestion of some trend or suggestion from several other states that their citizens desire the death penalty for such a heinous crime.”¹⁹⁹

188. *Id.* at 1066.

189. *Id.* at 1067.

190. *Id.*

191. *Id.*

192. *Id.*; see *Gregg v. Georgia*, 428 U.S. 153, 175–76 (1976).

193. *Wilson*, 685 So. 2d at 1067; see *Gregg*, 428 U.S. at 175.

194. *Wilson*, 685 So. 2d at 1068–69.

195. *Id.* at 1068.

196. *Wilson*, 685 So. 2d at 1069. The court also noted that the analysis of present statutes is one of the most “conservative” methods in determining excessiveness. *Id.* at 1067.

197. *Id.* at 1069 (quoting *Coker v. Georgia*, 433 U.S. 584, 614 (Burger, C.J., dissenting)).

198. *Id.* at 1069; see *Coker*, 433 U.S. at 615–16 (Burger, C.J., dissenting); *State v. Gardner*, 947 P.2d 630, 654 (Utah 1997) (Russon, J., dissenting) (limiting legislation to what sister states enact would prevent states from ever “enact[ing] a novel or distinctive law without being thwarted by a constitutional challenge.”); *Harmelin v. Michigan*, 501 U.S. 957, 989–90 (1991) (plurality opinion) (noting that states are entitled to punish criminals differently than do other states).

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

The Louisiana Supreme Court then found that imposition of the death penalty for the crime of child rape served legitimate goals of punishment, namely retribution and deterrence,²⁰⁰ and was not arbitrary and capricious in application.²⁰¹ The court weighed its decision heavily on the goal of retribution, noting that “[i]n part, capital punishment is an expression of society’s moral outrage at a particularly offensive conduct. This function . . . is essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs.”²⁰² Furthermore, the court found the statute was not arbitrary and capricious in nature because the statute narrows the class of persons eligible for the death penalty, provides for a bifurcated trial with a separate sentencing hearing, provides that the jury must find at least one aggravating factor beyond a reasonable doubt, allows the defendant to present any relevant mitigating factors, and provides for mandatory review of any guilty verdict in a capital case.²⁰³

Thus, the Louisiana Supreme Court, distinguishing *Wilson* from *Coker*, found that it was constitutional to impose the death penalty on those defendants convicted of raping children under the age of twelve.²⁰⁴ In its decision, the court distinguished the state’s interest in protecting children versus protecting adult women.²⁰⁵ The court also found that child rape was, in nature, more heinous than the rape of an adult woman.²⁰⁶ The court thus found the imposition of the death penalty on child rapists proportional to the crime.²⁰⁷ The *Wilson* court also found that Louisiana’s capital child rape statute met permissible goals of punishment, especially the goal of retribution.²⁰⁸

Finally, the court carefully critiqued the Supreme Court’s objective factors test, finding that the Court cannot be taken literally, otherwise, the Court’s objective factors test would never allow a state to pass new laws.²⁰⁹ Rather, the court found that *Coker*’s objective test means that the Supreme Court will look toward trends in the states to see if a particular capital statute is permissible in society’s eyes, and hence constitutional under the Eighth Amendment.²¹⁰ This

200. *Id.* at 1073.

201. *Id.* at 1070–73.

202. *Id.* at 1070 (quoting *Gregg v. Georgia*, 428 U.S. 153, 183 (1976)). The court noted that imposition of the death penalty for the crime of rape would have a deterrent effect on child rapists, but spoke of it in terms of the future, stating that the experience of Louisiana will be helpful to other states in determining whether to pass similar laws. *Id.* at 1073.

203. *Id.* at 1070–71.

204. *Id.* at 1064.

205. *Id.* at 1066–67.

206. *Id.*

207. *Id.* at 1067, 1073.

208. *Id.* at 1070–71; *see Ring v. Arizona*, 122 S. Ct. 2428, 2446 (2002) (Breyer, J. concurring) (“[R]etribution provides the main justification for capital punishment . . .”).

209. *See Wilson*, 685 So. 2d at 1069; *Coker v. Georgia*, 433 U.S. 584, 584 (1977) (plurality opinion).

210. This interpretation of *Coker*’s objective factors test gives more deference to state legislative enactments and promotes experimentation with criminal laws. *Wilson*, 685 So. 2d at 1069; *see Coker*, 433 U.S. at 615–16 (Burger, C.J., dissenting); *State v. Gardner*, 947 P.2d 630, 654 (Utah 1997) (Russon, J., dissenting) (limiting legislation to what sister

view was recently supported by the Supreme Court in *Atkins v. Virginia*: “It is not so much the number of these States that is significant, but the consistency of the direction of change.”²¹¹ Given that seven states have already passed or have considered passing capital child rape legislation, and that both states and Congress have passed increasingly tougher legislation against sex offenders that target children, imposing the death penalty on a defendant who rapes a child under the age of twelve would seem to comply with the constitutional requirements of *Coker*.

VII. STATUTORY SUGGESTIONS FOR STATES SEEKING TO IMPOSE THE DEATH PENALTY ON CHILD RAPISTS

To be constitutional under the Eighth Amendment, a capital statute must not be arbitrary or capricious.²¹² Accordingly, the statute must meet three requirements. The first requirement is that the state must sufficiently narrow the class of persons eligible for the death penalty.²¹³ The second requirement is that of a bifurcated trial. If the defendant is found guilty of a capital offense, an additional separate hearing must be held to determine the appropriate punishment and to consider the circumstances of the crime.²¹⁴

The third requirement is that, when determining the appropriate punishment, sentencing bodies must consider relevant aggravating and mitigating circumstances.²¹⁵ In *Lowenfeld v. Phelps*,²¹⁶ the Supreme Court held that imposition of the death penalty is permissible when one of the aggravating factors is an element of the crime.²¹⁷ Therefore, it is possible that in a statute providing for capital punishment for the rape of a child under twelve, the victim’s age can be

states enact would prevent states from ever “enact[ing] a novel or distinctive law without being thwarted by a constitutional challenge”); *Harmelin v. Michigan*, 501 U.S. 957 (1991) (plurality opinion) (noting that states are entitled to punish criminals differently than do other states).

211. *Atkins v. Virginia*, 122 S. Ct. 2242, 2249 (2002).

212. *See Furman v. Georgia*, 408 U.S. 238, 313 (1972).

213. *See Palmer, supra* note 4, at 849.

214. *Gregg v. Georgia*, 428 U.S. 153, 191–92 (1976); *Palmer, supra* note 4, at 850.

215. *See Palmer, supra* note 4, at 875. This requirement comes from the Supreme Court’s decision in *Woodson*, which held that statutes that did not provide for consideration of relevant mitigating circumstances did not allow for individualization. *Woodson v. North Carolina*, 428 U.S. 280, 302–03 (1976). According to *Woodson*, a capital statute must allow for “particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death.” *Id.* at 303.

216. 484 U.S. 231 (1988).

217. *Id.* at 241–42 (holding that jury’s task is two-fold: to find that the defendant, beyond a reasonable doubt, (1) is guilty of the crime and (2) that the aggravating circumstance has been proven to the same degree of proof); *see Diamond, supra* note 28, at 1184; *Palmer, supra* note 4, at 875; Sandra D. Jordan, *Death for Drug Related Killings: Revival of the Federal Death Penalty*, 67 *CHI.-KENT L. REV.* 79, 104 (1991) (noting that when aggravating factors in a statute include the *mens rea* necessary for conviction of the underlying offense, the prosecutor has already “proven a substantial case for death” upon proving the defendant guilty).

considered an aggravating factor. *Lowenfeld*, however, was decided in the context of a capital murder statute, and thus, states may want to consider providing for additional aggravating factors in their capital child rape statutes in order to ensure compliance with the aggravating and mitigating circumstances requirement.²¹⁸

The following capital child rape statute is a modified version of the Louisiana child rape legislation. This proposed statute is suggested as capital child rape legislation that is constitutionally permissible under the Eighth Amendment:

Section 1

A. Child rape is a rape where the anal, oral, or vaginal sexual intercourse is deemed to be without lawful consent of the victim because the victim is under the age of twelve years. Lack of knowledge of the victim's age shall not be a defense.

B. Aggravated child rape is child rape as defined in (A) that is aggravated because it is committed under any one or more of the following circumstances:

(1) When the victim is threatened with great and immediate bodily harm.

(2) The victim suffers great bodily harm incidental to the rape or in addition to the rape.

(3) The victim is tortured or disfigured. "Torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for purposes of punishment, coercion, or intimidation.

(4) The offender rapes the child with knowledge that the offender carries a life-threatening illness that can be spread through such contact.

(5) The offender is armed with a dangerous weapon.

(6) The victim suffers from a physical infirmity or is mentally retarded.

(7) When two or more offenders participate in the rape, either by committing the act of rape, or assisting in the act of rape.

(8) When the offender has been previously convicted of child rape.

C. Whoever commits the crime of aggravated child rape shall be punished by death or life imprisonment without benefit of parole, probation, or suspension of sentence, in accordance with the determination of the jury.²¹⁹ The provisions of Section 2 shall apply to cases in which the punishment may be capital.

218. See Diamond, *supra* note 28, at 1184–85; Glazer, *supra* note 5, at 112–13; Schaaf, *supra* note 40, at 374–5; Cordle, *supra* note 163, at 155–56.

219. LA. REV. STAT. ANN. § 14:42(D)(2)(a) (West 2001).

Section 2

A. Following a verdict or plea of guilty in a capital case, a sentence of death may be imposed only after a sentencing hearing as provided herein.²²⁰

(1) The sentencing hearing shall be commenced no sooner than twenty-four hours after a verdict or plea of guilty, except on joint motion of the state and the defendant.²²¹

(2) The sentencing hearing shall be conducted before the same jury that determined the issue of guilt, except as provided in part (3).²²²

(3) If an error occurs during the sentencing hearing which would necessitate the declaration of a mistrial, or the granting of a new trial by the trial court, or if an appellate court finds an error that occurred only in the sentencing hearing which would necessitate a remand and a new trial, then the trial court shall be empowered to empanel a new jury for determining only the issue of punishment.²²³

(4) If the defendant is an indigent, the defendant must be represented by a “death-certified” attorney.

(5) The sentencing hearing shall focus on the circumstances of the offense, the character and propensities of the offender, and the victim, and the impact that the crime has had on the victim, family members, friends, and associates. Evidence relative to aggravating or mitigating circumstances shall be relevant irrespective of whether the defendant places his character at issue. The jury may consider any evidence offered at the trial on the issue of guilt.²²⁴

(6) A sentence of death shall not be imposed unless the jury finds beyond a reasonable doubt that at least one statutory aggravating circumstance exists and, after consideration of any mitigating circumstances, determines that the sentence of death should be imposed. The court shall instruct the jury concerning all of the statutory mitigating circumstances. The court shall also instruct the jury concerning the statutory aggravating circumstances but may decline to instruct the jury on any aggravating circumstance not supported by evidence. The court may provide the jury with a list of the mitigating and aggravating circumstances upon which the jury was instructed.²²⁵

220. LA. CODE CRIM. PROC. ANN. art. 905(A) (West 2001).

221. *Id.* art. 905(C).

222. *Id.* art. 905.1(A). Under the Sixth Amendment, it is constitutionally required that a jury, not a judge, imposes the sentence of death after hearing all mitigating and aggravating factors. *Ring v. Arizona*, 122 S. Ct. 2428, 2432 (2002) (“Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment.”).

223. LA. CODE CRIM. PROC. ANN. art. 905.1(B) (West 2001).

224. *Id.* art. 905.2(A).

225. *Id.* art. 905.2(B).

VIII. CONCLUSION

Imposition of the death penalty for those who rape children under the age of twelve is constitutional under the Supreme Court's death penalty jurisprudence. One who takes another's life is a murderer; one who rapes a child under the age of twelve murders innocence. Two states have made the decision to treat these two murders as equally deserving of the harshest of punishments. Five other states have considered such legislation. It is likely that if Louisiana and Georgia experience success with their child rape legislation, in the form of deterrence or retribution, other states will follow. This is one of the strengths of federalism—states are allowed, and even encouraged, to experiment with criminal laws in order to find a system that deters and punishes criminals, providing that the punishment does not violate the Eighth Amendment.²²⁶

Capital child rape statutes do not violate the Eighth Amendment because the rape of a child is different from that of an adult woman. Rape of a child is different because the physical and mental effects of rape on a child are egregiously degrading and devastating.²²⁷ Rape of a child is different because children are a special class of people who require more state protection than adults do. Society has recognized that the rape of a child is different through capital child rape legislation, the changes to the Federal Rules of Evidence, and the widespread enactment of Megan's Laws. The Supreme Court's death penalty jurisprudence relies almost exclusively on social acceptance of the death penalty for a particular crime in order to determine the constitutionality of imposing the death penalty for that crime. Society, by enacting capital child rape statutes, the changes to the Federal Rules of Evidence, and Megan's Laws, has demonstrated a trend toward increasing social acceptance of imposing the death penalty on child rapists. Until the Supreme Court is ready to decide that the death penalty is, in and of itself, unconstitutional or that the death penalty is only constitutional when applied to homicidal crimes, imposition of the death penalty on child rapists passes constitutional muster under the Supreme Court's Eighth Amendment jurisprudence.

226. See *State v. Wilson*, 685 So. 2d 1063, 1069; see also *Coker v. Georgia*, 433 U.S. 584, 615–16 (1977) (Burger, C.J., dissenting); *State v. Gardner*, 947 P.2d 630, 654 (Utah 1997) (Russon, J., dissenting) (limiting legislation to what sister states enact would prevent states from ever “enact[ing] a novel or distinctive law without being thwarted by a constitutional challenge.”); *Harmelin v. Michigan*, 501 U.S. 957, 989–90 (1991) (plurality opinion) (noting that states are entitled to punish criminals differently than do other states).

227. See *Wilson*, 685 So. 2d at 1067 (“Rape of a child less than twelve years of age is like no other crime. . . . 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.”).