

Sentencing *Coker v. Georgia* to Death: Capital Child Rape Statutes Provide the Supreme Court an Opportunity to Return Meaning to the Eighth Amendment

Matthew Silversten*

It is important . . . that the habits of thinking in a free country should inspire caution in those intrusted with its administration, to confine themselves within their respective constitutional spheres, avoiding in the exercise of the powers of one department, to encroach upon another.¹

TABLE OF CONTENTS

I. INTRODUCTION	121
II. THE ORIGINAL AND EVOLVING MEANINGS OF THE EIGHTH AMENDMENT	123
A. <i>The Original Meaning of the Eighth Amendment and the Early Cases</i>	124
B. <i>The Evolving Meaning of the Eighth Amendment</i>	126
C. <i>The Procedural Cases</i>	128
III. <i>COKER V. GEORGIA</i> —THE SUPREME COURT TAKES ON A NEW ROLE	140
A. <i>The Plurality's Objective Analysis</i>	142
B. <i>The Plurality's Subjective Analysis</i>	145
IV. THE SUPREME COURT AS A SUPER-LEGISLATURE AND A SUPER-JURY	147
V. <i>COKER'S</i> AFFECT ON RECENTLY ENACTED STATUTES	157
VI. CONCLUSION	165

I. INTRODUCTION

In 1995, Louisiana's legislature passed a statute that gave prosecutors the discretion to seek the death penalty against defendants convicted of child rape.²

*. Wake Forest University, B.A. 1998; The Ohio State University, J.D. 2001; Judicial Clerk for the Honorable Howell Cobb, Eastern District of Texas, 2001-02.

1. WASHINGTON'S FAREWELL ADDRESS § 6, at 22 (W. Clark Hanna et al. eds., General Society, Sons of the Revolution 1982).

2. See LA. REV. STAT. ANN. § 14:42(D) (West 1997 & Supp. 2000); see also State v. Wilson, 96-1392, p.6 n.5 (La. 12/13/96), 685 So. 2d 1063, 1067 n.5.

For example, the legislature decided that an HIV positive man who raped three girls, between the ages ranging from five to nine years old, one of whom was his daughter, should be punished by death or life imprisonment.³ In 1999, the Georgia legislature passed similar legislation making Georgia the second state in four years to declare child rape a death penalty eligible offense.⁴ Although both of the statutes were debated and drafted by members of the Louisiana and Georgia legislatures and were signed into law by each state's governor, the fate of the statutes is still very much in doubt because one United States Supreme Court case authorizes the Court to act as a final arbiter of state criminal sanctions.⁵

The Eighth Amendment to the United States Constitution, as incorporated through the Fourteenth Amendment, prohibits state governments from imposing "cruel and unusual punishments."⁶ For most of our country's history, the meaning of the Eighth Amendment remained consistent with the original understanding of the amendment as it was enacted in 1791.⁷ This consistency began to deteriorate in 1910 when the Supreme Court seemingly began to read additional limitations of a state government's ability to sanction its citizens into the Eighth Amendment.⁸ For the past ninety years, the Supreme Court has continued to move away from the original understanding of the Eighth Amendment and ultimately created a provision, in *Coker*, that allowed it to act as the ultimate arbiter of criminal sanctions for the country.⁹

The Supreme Court decision of *Coker v. Georgia* has hung over states as a pall of orthodoxy—setting one national standard.¹⁰ The decision violates the fundamental principles of federalism and separation of powers inherent in our constitutional system, while at the same time usurping the functions of the state legislature, disregarding the findings of juries, and conflicting with several other

3. *Wilson*, 96-1392 at 2, 685 So. 2d at 1065. The statute was introduced by State Representative Pete Schneider who believed "child rape is such a heinous crime that those convicted of it should receive the ultimate penalty—death." Marsha Shuler, *House Passes Death Penalty for Child Rape*, BATON ROUGE ADVOC., Apr. 27, 1995, at 1B;S, available at 1995 WL 6326943; see also *State v. Polkey*, 529 So. 2d 474, 475 (La. Ct. App. 1988) (providing an example of a defendant who repeatedly raped his five-year-old niece over a two year period).

4. See GA. CODE ANN. § 16-6-1(b) (1999).

5. See *Coker v. Georgia*, 433 U.S. 584, 591-92 (1977) (plurality opinion).

6. U.S. CONST. amend. XIV; U.S. CONST. amend. VIII; see also *Robinson v. California*, 370 U.S. 660, 666-67 (1962) (incorporating the Eighth Amendment under the Fourteenth).

7. See *infra* text accompanying notes 25-29.

8. See *infra* notes 32-40 and accompanying text.

9. See *Coker*, 433 U.S. at 591-92.

10. See *id.* at 612-13.

Supreme Court precedents.¹¹ These two child rape statutes pose the first serious challenge to *Coker* since it was decided in 1977. Scholars,¹² courts,¹³ and legislators¹⁴ on both sides of the issue are either extolling the virtues of *Coker*, in order to have the child rape statutes struck down, or arguing that *Coker* does not control, which would render these statutes constitutional. This Comment takes a different approach and argues that the Supreme Court should simply overrule *Coker*.

This Comment begins with a discussion on the original meaning of the Eighth Amendment's Cruel and Unusual Punishment Clause and how the Supreme Court has changed this meaning over the years by adding the concepts of "proportionality" and "evolving standards of decency" to its definition. Accordingly, the Court began reviewing the procedure by which states decide whether certain convicted defendants would receive a death sentence. This first section concludes by reviewing these decisions and their contribution to the evolving meaning of the Eighth Amendment.

Next, the Comment looks specifically at *Coker v. Georgia*, concluding that this decision creates several unnecessary roles for the Court to play in our constitutional system. Next, it discusses several problems inherent in the Court's new roles established by *Coker*.

Finally, the Comment examines specific problems *Coker* poses for states, such as Louisiana and Georgia, who wish to experiment with their criminal sentencing laws. This Comment will argue that normally our dual system of government allows such experimentation at the state sovereign level.

II. THE ORIGINAL AND EVOLVING MEANINGS OF THE EIGHTH AMENDMENT

Before the impact of the *Coker* decision can be fully understood, it is important to appreciate the extent to which the Court's use of the Eighth Amendment has changed since its adoption. This Comment has divided the Eighth Amendment's history regarding death penalty jurisprudence¹⁵ before

11. See *In re Kemmler*, 136 U.S. 436, 447-48 (1890).

12. See *infra* notes 311-12 and accompanying text.

13. See generally *State v. Wilson*, 96-1392, p.9-19 (La. 12/13/96), 685 So. 2d 1063, 1068-74.

14. See *infra* notes 301-03 and accompanying text.

15. The Supreme Court has on several occasions applied the cruel and unusual clause of the Eighth Amendment to non-capital cases. See, e.g., *Hudson v. McMillian*, 503 U.S. 1, 4 (1992) (holding that the use of excessive force against a prisoner may constitute cruel and unusual punishment even though the prisoner does not suffer serious injury); *Harmelin v. Michigan*, 501 U.S. 957, 994-95 (1991) (holding that the cruel and unusual punishment clause is not violated when a defendant is sentenced to life in prison without the possibility

Coker into three sections entitled, “The Original Meaning of the Eighth Amendment and the Early Cases”; “The Evolving Meaning of the Eighth Amendment”; and “The Procedural Cases.” This Comment will show how the Eighth Amendment has evolved through the *Coker* decision and how the Supreme Court began to stray from its role as the judiciary and took on that of the legislature.

A. *The Original Meaning of the Eighth
Amendment and the Early Cases*

The Eighth Amendment states that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”¹⁶ This language mirrors the English Declaration of Rights of 1689, which provided “[t]hat excessive Baile ought not to be required nor excessive Fines imposed nor cruell and unusuall Punishments inflicted.”¹⁷ The declaration of rights did not specifically remove the death penalty as an acceptable form of punishment.¹⁸ This language, combined with the fact that England had more than two hundred capital crimes as late as 1800, some for rather trivial crimes like stealing a few shillings, demonstrates that the declaration of rights did not intend to prohibit the death penalty, nor did it require punishment to be proportional to the crime charges.¹⁹ Thus, the English Declaration of Rights, which the Eighth Amendment mirrors, did not prohibit the death penalty or require proportional punishment.²⁰

Likewise, it appears that the framers of the Constitution did not see the death penalty as violating the Cruel and Unusual Punishment Clause. At the time the Eighth Amendment was adopted, the colonies authorized the death penalty for as many as eighteen different crimes.²¹ Additionally, the Fifth Amendment contemplates the state having the ability to take life but warns that

of parole for possession of 650 grams of cocaine); *Rummel v. Estelle*, 445 U.S. 263, 284-85 (1980) (holding that a state recidivist statute does not violate the cruel and unusual clause when a defendant could receive a sentence of life in prison with the possibility of parole for his third felony conviction).

16. U.S. CONST. amend. VIII.

17. *Harmelin v. Michigan*, 501 U.S. 957, 966 (1991) (quoting The English Declaration of Rights of 1689).

18. RAOUL BERGER, *DEATH PENALTIES* 34-35 (1982).

19. *Id.* at 34.

20. *See Harmelin*, 501 U.S. at 974-85.

21. BERGER, *supra* note 18, at 44; *see also* Elizabeth Gray, Comment, *Death Penalty and Child Rape: An Eighth Amendment Analysis*, 42 ST. LOUIS U. L.J. 1443, 1446 & n.19 (1998) (noting that the first written capital crimes statute was called “The Capitall Lawes of New England” and included such crimes as rape, murder, sodomy, adultery, perjury in a capital trial, and rebellion).

life may not be taken without due process of law.²² The First Congress which adopted the Eighth Amendment, also enacted laws that authorized the death penalty for the crimes of murder, forgery of public securities, robbery, and rape.²³ This history demonstrates the original meaning of the Eighth Amendment did not prohibit the legislature from authorizing the death penalty nor did it prohibit the legislature from expanding the scope of a capital crime beyond murder.²⁴

From its adoption until the early twentieth century, courts interpreted the Cruel and Unusual Punishment Clause in accordance with the original understanding of the Framers as a prohibition on torturous or barbaric methods of punishment.²⁵ For instance, in 1890, the Supreme Court addressed the meaning of the Cruel and Unusual Punishment Clause; its ruling demonstrated an understanding and respect for the Amendment's original meaning.²⁶ In its decision, the Court stated, "Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there is something inhumane and barbarous, something more than the mere extinguishment of life."²⁷

The Eighth Amendment gave the Supreme Court the power to strike down a punishment as "cruel and unusual."²⁸ However, once the Court decided the punishment was constitutionally permissible, the Court's role in the debate should have been over.²⁹ The Eighth Amendment does not allow the Court to decide the appropriate punishment for each crime, as this is the role of the Legislature.³⁰ Nor does the Eighth Amendment authorize the judiciary to limit the types of crimes a constitutionality acceptable sanction could be used to punish.³¹

22. U.S. CONST. amend. V.

23. BERGER, *supra* note 18, at 47.

24. *See generally* BERGER, *supra* note 18, at 148-49.

25. Bridgette M. Palmer, Note, *Death as a Proportionate Penalty for the Rape of a Child: Considering One State's Current Law*, 15 GA. ST. U. L. REV. 843, 848 (1999).

26. *See In re Kemmler*, 136 U.S. 436, 449 (1890) (upholding a New York statute providing for a new method of execution—the electric chair). For a brief history of the development of the electric chair and other methods of execution, see FRANK G. CARRINGTON, *NEITHER CRUEL NOR UNUSUAL* 66-67 (1978). There are five means of execution authorized in the United States today: hanging, firing squad, electric chair, gas chamber, and lethal injection. RANDALL COYNE & LYN ENTZEROTH, *CAPITAL PUNISHMENT AND THE JUDICIAL PROCESS* 7-11 (1994).

27. *In re Kemmler*, 136 U.S. at 447.

28. *See generally id.* at 447-48.

29. *See generally id.*

30. *See Stanford v. Kentucky*, 492 U.S. 361, 378 (1989) ("The punishment is either 'cruel and unusual' (i.e., society has set its face against it) or it is not.").

31. *See id.* at 379.

B. *The Evolving Meaning of the Eighth Amendment*

Because most “barbaric” practices had been abandoned by nineteenth century Americans,³² the Supreme Court rarely analyzed the Eighth Amendment in the first 175 years of its existence.³³ In 1910, however, the Supreme Court in *Weems v. United States*³⁴ departed from the original meaning of the Eighth Amendment and decided that the Cruel and Unusual Punishment Clause protected citizens from more than just barbaric methods of punishment.³⁵ In *Weems*, the Court held that the Cruel and Unusual Punishment Clause required the punishment to be proportionate to the crime charged.³⁶

Fifty years later the Supreme Court expanded upon the proportionality requirement established in *Weems*. In *Trop v. Dulles*,³⁷ the Court stated that just because jurisdictions possess the authority to impose the death penalty does not mean that they are free “to devise any punishment short of death within the limit of its imagination.”³⁸ The Court acknowledged that it had never defined the exact scope of the clause and that “[t]he basic concept underlying the Eighth

32. See generally BERGER, *supra* note 18, at 44.

33. See Margaret Jane Radin, *The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishments Clause*, 126 U. PA. L. REV. 989, 997 & n.28 (1978) (listing the nine cases decided by the Supreme Court prior to 1960 discussing the Eighth Amendment: *Trop v. Dulles*, 356 U.S. 86 (1958); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947); *Badders v. United States*, 240 U.S. 391 (1916); *Weems v. United States*, 217 U.S. 349 (1910); *Howard v. Fleming*, 191 U.S. 126 (1903); *O’Neil v. Vermont*, 144 U.S. 323 (1892); *In re Kemmler*, 136 U.S. 436 (1890); *Wilkerson v. Utah*, 99 U.S. 130 (1878); and *Pervear v. Commonwealth*, 72 U.S. (5 Wall.) 475 (1867).

34. 217 U.S. 349, 368 (1910). In *Weems*, the Court reviewed a sentence of fifteen years painful and hard labor for the falsification of an official record. *Id.* at 357-59. In rejecting the sentence as a violation of the Cruel and Unusual Clause, the Court made “three pivotal pronouncements: (1) that the meaning of the Eighth Amendment is not limited to the Framers’ intent; (2) that the Eighth Amendment bars excessive punishments; and (3) that what is considered excessive changes with time.” Meryl P. Diamond, Note, *Assessing the Constitutionality of Capital Child Rape Statutes*, 73 ST. JOHN’S L. REV. 1159, 1163 n.16 (1999). But see MARK TUSHNET, *THE DEATH PENALTY* 17 (1994) (comparing the societal values and legislative decisions discussed in *Weems* to the death penalty cases and stating that the Court has a more difficult role to play when evaluating an enlightened public’s decision to invalidate the death penalty).

35. See *Weems*, 217 U.S. at 367 (stating that “it is a precept of justice that punishment for crime should be graduated and proportioned to offense”).

36. See *id.* at 381. The Justices agreed that originally the Cruel and Unusual Punishment Clause only outlawed barbarous punishments. BERGER, *supra* note 18, at 174. Thus, it is questionable whether the Supreme Court can justify substituting the original meaning of the amendment for a new meaning. See *id.* at 114.

37. 356 U.S. 86 (1958).

38. *Id.* at 99.

Amendment is nothing less than the dignity of man.”³⁹ The Court concluded that the Eighth Amendment “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”⁴⁰

The Court would later take the phrase “the evolving standards of decency” from *Trop v. Dulles* and use it to determine whether or not states’ death penalty statutes are constitutional.⁴¹ The *Trop* majority specifically set aside any discussion as to the constitutionality of the death penalty because capital punishment was deemed to be constitutional and not a violation of the concept of cruelty.⁴² Justice Powell, in *Furman v. Georgia*, stated that it was “anomalous” to use a standard to judge the constitutionality of a punishment when the decision that announced the standard rejected the idea that the standard should be applied to the punishment that was then under consideration.⁴³ Professor Berger was even more emphatic than Justice Powell when he called the Court’s use of this standard in its death penalty jurisprudence “perverse.”⁴⁴

To say the Constitution must change with the times and that those who disagree are foes of progress, fails to recognize that the need to change is not the same as being given the power to make the changes. The Constitution predicted that future generations would desire to change certain provisions within it and explicitly set forth procedures in Article V for these generations to alter it, but nowhere in the document was the Court given such a power.⁴⁵

Before *Weems* and *Trop*, the Eighth Amendment was interpreted consistent with its original meaning—as a prohibition against torture and barbaric forms of punishment.⁴⁶ With *Weems* and *Trop*, the Court began to read the concepts of proportionality and evolving standards of decency into the Eighth Amendment.⁴⁷ These two concepts have allowed the Court to play a greatly expanded role in deciding how states punish those convicted of crimes in the courts.⁴⁸ The effect of the Court’s expanded reading of the Eighth Amendment

39. *Id.* at 99-100. It could be that all punishment offends human dignity. See Daniel D. Polsby, *The Death of Capital Punishment?* *Furman v. Georgia*, 1972 SUP. CT. REV. 1, 19.

40. *Trop*, 356 U.S. at 101. See also *id.* at 103 (“The provisions of the Constitution are not time-worn adages or hollow shibboleths. They are vital, living principles that authorize and limit governmental powers in our Nation.”).

41. See, e.g., *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (plurality opinion) (quoting *Trop*, 356 U.S. at 101).

42. *Trop*, 356 U.S. at 99.

43. *Furman v. Georgia*, 408 U.S. 238, 425 (1972) (Powell, J., dissenting).

44. BERGER, *supra* note 18, at 116.

45. See *id.* at 60.

46. See *In re Kemmler*, 136 U.S. 436, 447 (1890).

47. See *supra* notes 34-40 and accompanying text.

48. See *supra* text accompanying notes 36-44.

was first seen in the procedural requirements the Court imposed upon states' death penalty statutes.⁴⁹

C. *The Procedural Cases*

In 1971, the Supreme Court decided that giving juries complete and unguided discretion to decide whether a person deserved the death penalty was not a violation of the Due Process Clause of the Fourteenth Amendment.⁵⁰ In *McGautha*, the Supreme Court addressed the issue of whether the Fourteenth Amendment's Due Process Clause required the states to develop guidelines to assist the jury in deciding if a convicted defendant should be sentenced to death.⁵¹ The Court began its analysis by reviewing the history of the death penalty in England and in the United States and by concentrating on the issue of jury discretion.⁵² The Court next looked at attempts to guide jury discretion and concluded that these attempts were not very successful.⁵³ The Court held that "committing to the untrammelled discretion of the jury the power to pronounce life or death in capital cases" does not violate the Due Process Clause of the Fourteenth Amendment.⁵⁴ In his dissent in *McGautha*, Justice Douglas admitted that the majority had "history on its side."⁵⁵ In attempting to argue that the Court does not owe history much deference, Douglas pointed out that history also demonstrates that people were at one time executed for stealing something above the value of a shilling.⁵⁶ Douglas then asked, "Who today would say it was not 'cruel and unusual punishment' within the meaning of the Eighth Amendment to impose the death sentence on a man who stole a loaf of bread . . . ?"⁵⁷

49. See *Furman v. Georgia*, 408 U.S. 238, 305 (1972) (Douglas, J., concurring in judgment); see *id.* at 309-10 (Stewart, J., concurring in judgment).

50. See *McGautha v. California*, 402 U.S. 183, 185-86 (1971).

51. *Id.* at 196.

52. *Id.* at 197-203.

53. *Id.* at 203-08.

54. *Id.* at 207.

55. *McGautha*, 402 U.S. at 241 (Douglas, J., dissenting).

56. *Id.*

57. *Id.* at 242. In the United States, no statute exists that makes stealing a loaf of bread a death penalty eligible offence, but if such a statute did exist, would it be the role of the Supreme Court to decide if the punishment was acceptable? If, today, Justice Douglas called a similar question, "Who would say it is not 'cruel and unusual' punishment to impose the death sentence on a man who rapes a child," the answer would be the people of the states of Louisiana and Georgia. In response to Douglas' question, Professor Berger asks: "Why, one wonders, should millions of Americans prefer [Justice Douglas's] 'gut reaction' to their own attachment to death penalties." BERGER, *supra* note 18, at 4-5. It is interesting to note that in a non-death penalty context, Justice Douglas wrote: "[The Justices'] individual preferences

One year later, in *Furman v. Georgia*,⁵⁸ the Court again analyzed the procedures states employed in deciding which convicted criminals would be put to death.⁵⁹ This time, in a 5-4 decision, the Supreme Court struck down the death penalty statutes of Georgia and Texas⁶⁰ because the statutes imposed the death penalty in an arbitrary and capricious manner *in violation of the Eighth and Fourteenth Amendments*.⁶¹ The statutes considered in *Furman* lacked any language guiding the sentencers' determination of whether the defendant should live or die.⁶² The Court refused to have a death penalty sentence depend upon the "whim of one man [(the judge)] or of 12 [(the jury)]."⁶³ Because the statutes in *Furman* were similar to almost every other death penalty statute in existence, the Court's decision had the practical effect of invalidating all death penalty statutes.⁶⁴

. . . are not like the constitutional standard." *Zorach v. Clauson*, 343 U.S. 306, 314 (1952).

58. 408 U.S. 238, 240 (1972) (per curiam). The *Furman* decision is the longest case in number of pages ever handed down by the Supreme Court. Diamond, *supra* note 34, at 1164 n.20. Each member of the majority and the dissent wrote a separate opinion. See *Furman*, 408 U.S. at 240.

59. *Furman*, 408 U.S. at 240.

60. *Id.* at 239-40. Ten years before the *Furman* decision, few would have thought that the Court would have handed down such a ruling, but the abolitionist had one big advantage when arguing the case—they appealed to Justices who hated the death penalty. See BERGER, *supra* note 18, at 4.

61. See, e.g., *Furman*, 408 U.S. at 256-57 (Douglas, J., concurring) ("Thus, these discretionary statutes are unconstitutional in their operation. They are pregnant with discrimination and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on 'cruel and unusual' punishments."); *Id.* at 274 (Brennan, J., concurring) ("In determining whether a punishment comports with human dignity, we are aided . . . by a . . . principle inherent in the Clause—that the State must not arbitrarily inflict a severe punishment."); *Id.* at 310 (Stewart, J., concurring) ("I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.").

62. See *Furman*, 408 U.S. at 253 (Douglas, J., concurring).

63. *Id.*; see also *id.* at 255 ("In a Nation committed to equal protection of the laws there is no permissible 'caste' aspect of law enforcement. Yet we know that the discretion of judges and juries in imposing the death penalty enables the penalty to be selectively applied, feeding prejudices against the accused."). See also *Godfrey v. Georgia*, 446 U.S. 420, 427 (1980) (summarizing the one thing the five Justices in the majority in *Furman* agreed on, "the penalty of death may not be imposed under sentencing procedures that create a substantial risk that the punishment will be inflicted in an arbitrary and capricious manner").

64. Diamond, *supra* note 34, at 1164-65. In fact, several contemporary observers of the *Furman* decision predicted that capital punishment would no longer be imposed in the United States. See AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF THE ULTIMATE PENAL SANCTION 6 (James R. Acker et al. eds., 1998). One leader of the death penalty abolitionist movement predicted that there would not be another execution in America in the twentieth century. HUGO ADAM BEDAU, THE

In some respects the *Furman* decision seems more appropriately a Fourteenth Amendment's Due Process Clause case instead of a case decided under the Eighth Amendment's Cruel and Unusual Punishment Clause because the Court was mainly troubled by the states' procedures for imposing the death penalty.⁶⁵ The Due Process Clause would seem to be the likely vehicle for correcting the Court's complaints regarding the states' procedures.⁶⁶ The *Furman* Court's use of the Eighth Amendment may simply be an accident of history because the *McGautha* decision rejected the Due Process argument, which the Court appeared to accept a year later in *Furman*.⁶⁷ Justice Douglas in his concurring opinion in *Furman* said as much when he wrote that the Court is "now imprisoned in the *McGautha* holding."⁶⁸

The *Furman* decision ushered in a new era in Supreme Court analysis of the Cruel and Unusual Punishment Clause.⁶⁹ In earlier decisions, with *Weems* and *Trop* being the exception, the Court examined the mode of the punishment to determine whether the Eighth Amendment was violated.⁷⁰ In this new era, the Court looked to the procedures states were employing to impose the death penalty,⁷¹ rather than to the method of execution which was the focus of past decisions.⁷² Only four years after the *Furman* decision, the Supreme Court addressed Eighth Amendment procedure in five decisions on one day.⁷³

COURTS, THE CONSTITUTION, AND CAPITAL PUNISHMENT 90 (1977). Several newspaper articles from around the country following the *Furman* decision heralded the Court's ruling as the end of capital punishment in America. See CRIME AND PUNISHMENT IN AMERICA 209 (Judith F. Buncher ed. 1978) (citing AFRO AM. (Balt.), July 15, 1972; *Id.* at 211 (citing CHI. SUN-TIMES, June 30, 1972); *Id.* at 217 (citing BOSTON GLOBE, June 30, 1972)).

65. See *McGautha v. California*, 402 U.S. 183, 248 (1971) (Brennan, J., dissenting).

66. *Id.*

67. See *Furman*, 408 U.S. at 248 & n.11 (Douglas, J., concurring).

68. *Id.*

69. See *supra* note 64.

70. See *supra* Parts II.A-B. But see Herbert L. Packer, Comment, *Making the Punishment Fit the Crime*, 77 HARV. L. REV. 1071, 1075-76 (1964) (stating that the facts of *Weems* make it more appropriately a cruel and unusual mode of punishment case than a proportionality case as many have viewed it).

71. See, e.g., *Gregg v. Georgia*, 428 U.S. 153, 192 (1976) (discussing the need for states to develop guidelines regarding the factors a jury should consider in making death sentence determinations); *Furman*, 408 U.S. at 256-57 (Douglas, J., concurring) ("Thus, these discretionary statutes are unconstitutional in their operation. They are pregnant with discrimination and discrimination is an ingredient not compatible with . . . the ban on 'cruel and unusual' punishments."); *infra* notes 126-68 and accompanying text (discussing the Court's analysis of discretionary and mandatory death penalty statutes).

72. See *supra* notes 25-27 and accompanying text.

73. *Roberts v. Louisiana*, 428 U.S. 325 (1976) (plurality opinion); *Woodson v. North Carolina*, 428 U.S. 280 (1976) (plurality opinion); *Jurek v. Texas*, 428 U.S. 262 (1976) (plurality opinion); *Proffitt v. Florida*, 428 U.S. 242 (1976) (plurality opinion); *Gregg v.*

Almost immediately after the Supreme Court struck down most state death penalty statutes in *Furman*, the states started redrafting the death penalty statutes to comply with the *Furman* decision.⁷⁴ On July 2, 1976, in response to a flood of new death penalty statutes enacted following *Furman*, the Supreme Court ruled on five cases that established the procedural guidelines for judges and juries to apply in deciding if a convicted defendant would receive the death penalty.⁷⁵ Of these cases, *Gregg v. Georgia*⁷⁶ was paramount as it discussed the *per se* constitutionality of the death penalty.⁷⁷ The other four cases dealt specifically with various procedures different states had crafted in response to *Furman*'s call for guided discretion.⁷⁸

In *Gregg*, Bob Moore and Fred Simmons picked up two hitchhikers in Florida, Troy Gregg and Floyd Allen.⁷⁹ Around midnight, the four stopped at a rest stop north of Atlanta.⁸⁰ The next morning the bodies of Simmons and Moore were found in a ditch near the rest area.⁸¹ Both died of bullet wounds to the head.⁸² Two days later Gregg and Allen were apprehended in Asheville, North Carolina and in a search incident to arrest the police discovered a .25-caliber pistol, which was later shown to be the gun that shot Simmons and Moore.⁸³ Gregg admitted shooting and robbing Simmons and Moore.⁸⁴

In *Gregg*, a plurality decision, the Court began by stating that although the Supreme Court had never squarely addressed the issue, the Court "on a number of occasions [had] both assumed and asserted the constitutionality of capital punishment."⁸⁵ Justice Stewart, writing for the plurality, discussed the history of the Cruel and Unusual Punishment Clause and prior Supreme Court cases

Georgia, 428 U.S. 153 (1976) (plurality opinion).

74. BEDAU, *supra* note 64, at 93. Within one year of the *Furman* decision, commissions had been formed in several states in order to draft new death penalty statutes and bills had already been introduced in more than thirty states, and within two years of the decision, twenty-eight states had new death penalty statutes and over a hundred persons had already been sentenced to death. *Id.*

75. *See supra* note 75.

76. 428 U.S. 153 (1976).

77. *Gregg*, 428 U.S. at 176.

78. *Roberts*, 428 U.S. at 333 (discussing procedure for mandatory death sentence); *Woodson*, 428 U.S. at 301 (discussing procedure for mandatory death sentence); *Jurek*, 428 U.S. at 273-74 (discussing procedure for jury); *Proffitt*, 428 U.S. at 251 (discussing procedure for judge to decide).

79. *Gregg*, 428 U.S. at 158.

80. *Id.* at 158-59.

81. *Id.* at 159.

82. *Id.*

83. *Id.*

84. *Gregg*, 428 U.S. at 159.

85. *Id.* at 168.

involving the clause⁸⁶ and concluded that the Eighth Amendment's meaning was not "static."⁸⁷ Rather, the plurality opinion stated the Eighth Amendment "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society."⁸⁸ The Court, therefore, was required to assess contemporary values concerning the imposition of a particular sanction in order to determine if it violated the Cruel and Unusual Punishment Clause.⁸⁹ The plurality noted "the Eighth Amendment must be applied with an awareness of the limited role" of the courts in determining punishment schemes.⁹⁰ Ordinarily, in a democratic society, it is the role of the legislature, not the judiciary, to assess and respond to the values of society.⁹¹ Because the role of establishing punishments in a democratic society falls primarily on the legislative branch, the *Gregg* plurality placed a heavy burden on a party attacking "the judgment of the representatives of the people."⁹² Hence, "in assessing a punishment selected by a democratically elected legislature against the constitutional measure, we presume its validity. We may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved."⁹³

However, the plurality stated the Court must look to more than just society's view of a particular punishment when it examined the sanction's constitutionality.⁹⁴ The plurality believed the Eighth Amendment also required

86. *Id.* at 169-73. It is interesting to note that early Eighth Amendment cases focused on the particular method of punishment and the constitutionality of the sentence of death was not an issue. *See, e.g., In re Kemmler*, 136 U.S. 436, 447 (1890); *Wilkerson v. Utah*, 99 U.S. 130, 136-37 (1879).

87. *Gregg*, 428 U.S. at 172.

88. *Id.* at 173 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)).

89. *Id.*

90. *See id.* at 174.

91. *Furman v. Georgia*, 408 U.S. 238, 383 (1972) (Burger, C.J., dissenting). The *Gregg* plurality quoted Justice Frankfurter's concurrence in *Dennis v. United States*, 341 U.S. 494, 525 (1951):

Courts are not representative bodies. They are not designed to be a good reflex of a democratic society. Their judgment is best informed, and therefore most dependable, within narrow limits. Their essential quality is detachment, founded on independence. History teaches that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic, and social pressures.

Gregg, 428 U.S. at 175 (quoting *Dennis*, 341 U.S. at 525 (Frankfurter, J., concurring in judgment)).

92. *Gregg*, 428 U.S. at 175.

93. *Id.*

94. *Id.* at 173.

the Court to determine whether the penalty was “excessive.”⁹⁵ Thus, in analyzing the issue of whether the death penalty was per se unconstitutional, the plurality stated two factors to be considered: whether the punishment comported with the “evolving standards of decency” and whether it was “excessive.”⁹⁶ Because the *Coker* plurality used the analysis laid out in *Gregg* as a roadmap for its own analysis,⁹⁷ it was important to go into some detail regarding *Gregg*’s analysis.

In examining society’s evolving view regarding the death penalty, the *Gregg* plurality began by noting that the Constitution did not ban capital punishment.⁹⁸ The plurality then discussed Supreme Court decisions where the constitutionality of the death penalty was simply assumed.⁹⁹ This led the *Gregg* plurality to the *Furman* decision, where the Court for the first time addressed the issue of whether capital punishment was a constitutional sanction.¹⁰⁰ The petitioner in *Furman* advanced the argument that the “standards of decency had evolved to the point where capital punishment no longer could be tolerated.”¹⁰¹ The petitioner in *Gregg* made the same argument, but this time a plurality of the Court rejected this contention.¹⁰²

The plurality maintained that the best indicator of society’s view on the death penalty was “the legislative response to *Furman*.”¹⁰³ This response was quite dramatic, for after the Court struck down every state’s death penalty

95. *Id.* In *Trop v. Dulles*, 356 U.S. 86 (1958), a plurality of the Court stated that the basic tenet of the Eighth Amendment was that a punishment must comport with the basic “dignity of man.” *Id.* at 100. The plurality in *Gregg* took this statement from *Trop* to mean at the very least that a punishment could not be excessive. *Gregg*, 428 U.S. at 173. The plurality in *Gregg* found excessiveness to have two prongs: 1) “the punishment must not involve the unnecessary and wanton infliction of pain” and 2) “the punishment must not be grossly out of proportion to the severity of the crime.” *Id.* (citing *Furman*, 408 U.S. at 392-93; *Trop*, 356 U.S. at 100 (plurality opinion) (dictum); *Weems v. United States*, 217 U.S. 349, 367 (1910)).

96. *Gregg*, 428 U.S. at 173 (quoting *Trop*, 356 U.S. at 101); *see also supra* notes 30-31 & 35.

97. *See Coker v. Georgia*, 433 U.S. 584, 591-96 (1977).

98. *Gregg*, 428 U.S. at 177-78. The Fifth Amendment of the Constitution states: No person shall be held to answer for a *capital*, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . ; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; . . . nor be deprived of *life*, liberty, or property, without due process of law

U.S. CONST. amend. V (emphasis added).

99. *See Gregg*, 428 U.S. at 178.

100. *See supra* notes 58-64 and accompanying text.

101. *Gregg*, 428 U.S. at 179; *Furman v. Georgia*, 408 U.S. 238, 269-70 (1972) (Brennan, J., concurring).

102. *See Gregg*, 428 U.S. at 179.

103. *Id.*

statute, thirty-five states enacted new death penalty statutes in less than four years.¹⁰⁴ Additionally, the plurality took note of the fact that Congress enacted a statute that authorized the death penalty for certain types of aircraft piracy.¹⁰⁵ It interpreted the reenactment of so many death penalty statutes as a strong signal that the death penalty had not been rejected by the American populace.¹⁰⁶

The plurality also recognized jury decisions as an indicator of the “evolving standards of decency.”¹⁰⁷ The plurality viewed the jury as a link in each capital case between the judicial system and the community, stating that statistics showing juries refuse to impose the death penalty in a large number of capital cases is not a *per se* indication that the community rejects capital punishment.¹⁰⁸ In surveying jurors’ responses to the new death penalty statutes, the plurality found that by the end of December of 1974 there were already 254 people on death row and by March of 1976 juries had sentenced more than 460 people to death.¹⁰⁹ Using the statutes enacted by state legislatures and the decisions of juries in individual cases, the plurality concluded the death penalty did not offend the country’s evolving standards of decency.¹¹⁰

In addition, the plurality wanted to ensure that the sanction comported with “the basic concept of human dignity.”¹¹¹ Two factors were laid out to test whether the death penalty infringed upon “the basic concept of human dignity.”¹¹² First, the punishment needed to serve a legitimate penological goal, rather than merely gratuitously inflicting suffering upon the defendant.¹¹³ Second, the punishment could not be disproportionate to the crime for which the defendant was charged.¹¹⁴

104. *Id.* at 179-80 & n.23 (listing the thirty-five state statutes enacted since the *Furman* decision only four years earlier).

105. *Id.* at 180; *see also* 49 U.S.C. § 46, 502(a)-(b) (1994 & Supp. V 1999).

106. *Gregg*, 428 U.S. at 180-81.

107. *Id.* at 190 (quoting *Witherspoon v. Illinois*, 391 U.S. 510, 519 n.15 (1968)).

108. *Id.* at 181-82. The Court realized that jury reluctance in imposing the death penalty could possibly be a result of the jurors wanting to reserve this most severe of punishments for the most extreme cases. *Id.* at 182; *see also Furman v. Georgia*, 408 U.S. 238, 388 (1972) (Burger, C.J., dissenting):

The selectivity of juries in imposing the punishment of death is properly viewed as a refinement on, rather than a repudiation of, the statutory authorization for that penalty. Legislatures prescribe the categories of crimes for which the death penalty should be available, and, acting as ‘the conscience of the community,’ juries are entrusted to determine in individual cases that the ultimate punishment is warranted.

109. *See Gregg*, 428 U.S. at 182.

110. *See id.* at 181-82.

111. *See id.* (citing *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (plurality opinion)).

112. *See id.* at 182-87.

113. *See id.* at 182-83.

114. *See Gregg*, 428 U.S. at 187.

The death penalty complied with the first factor, according to the plurality, because it was said to promote the goals of retribution and deterrence.¹¹⁵ The plurality stated that a community might find capital punishment to be the only appropriate response to crimes the community finds to be the most grievous, thus satisfying the community's need for retribution.¹¹⁶ Furthermore, while the plurality recognized that the deterrent effect of capital punishment had not been "proven,"¹¹⁷ they stated that no convincing evidence demonstrated the sanction failed to deter.¹¹⁸ The plurality ultimately concluded that the deterrent effect of the death penalty is a complicated issue best left for the state legislatures.¹¹⁹ Thus, the plurality stated, with due deference to state legislatures, that the death penalty as a punishment for murder did serve legitimate penological goals and was not merely a gratuitous infliction of suffering.¹²⁰

The second factor of the plurality's analysis was to determine whether the sanction was disproportionate to the defendant's crime.¹²¹ The *Gregg* plurality stated that the death penalty was different in both its severity and in its irrevocability than any other penalty the government imposes on criminals.¹²² In *Gregg*, the petitioner was convicted of murder.¹²³ The plurality was willing to hold the death penalty as a proportionate punishment for a deliberate killing.¹²⁴ The plurality employed no additional analysis to this factor.¹²⁵ Thus, it appears that the second factor was completely dependant upon the Justices' subjective opinion concerning the proportionality of the punishment.

115. *See id.* at 183. The Court also mentioned that the goal of incapacitation could be served by the imposition of the death penalty. *Id.* at 183 n.28.

116. *See id.* at 184.

117. *Id.* at 184-85.

118. *Id.* The Court contemplated murders where it was reasonable to expect that the killers considered the consequences of their actions before committing the crime, such as murders for hire. *Id.* at 185-86. Also, the Court recognized that without the death penalty, other sanctions may not be adequate in dealing with someone already serving a life sentence. *Id.* at 186. Incidentally, this last argument was exactly the same as one of the theories the state of Georgia made and the Court rejected in *Coker v. Georgia*, 433 U.S. 584, 605-06 (1977) (Burger, C.J., dissenting).

119. *Gregg*, 428 U.S. at 186. In fact, the Court stated that the newly enacted death penalty statutes attempted, in the Court's opinion, to define those crimes and criminals that could be most likely deterred by a death penalty. *Id.*

120. *Id.* at 186-87.

121. *Id.* at 187.

122. *Id.*

123. *Id.* at 160.

124. *See Gregg*, 428 U.S. at 187 ("[The death penalty] is an extreme sanction, suitable to the most extreme of crimes."). The Court reserved the question of whether the death penalty would be deemed disproportionate for other crimes where the victim was not deprived of life. *Id.* at 187 n.35.

125. *See id.* at 187.

On the same day the Supreme Court decided *Gregg v. Georgia*,¹²⁶ the Court also ruled on the constitutionality of four other states' death penalty statutes: North Carolina,¹²⁷ Louisiana,¹²⁸ Florida,¹²⁹ and Texas.¹³⁰ Between the *Furman* decision and the *Gregg* decision, thirty-five states and the federal government passed new death penalty statutes.¹³¹ These new statutes attempted to cure the *Furman* Court's concerns¹³² in one of two ways:¹³³ (1) by providing the sentencer with guidance on when the death penalty should be imposed¹³⁴ or (2) by requiring the death penalty to be imposed in all cases where the jury finds the defendant guilty of a capital crime.¹³⁵ The Court analyzed whether either of these methods were constitutionally permissible procedures for dealing with *Furman's* mandate.¹³⁶

After *Furman*, the states of North Carolina and Louisiana adopted mandatory death penalty statutes.¹³⁷ If a jury in either of these states found a defendant guilty of a capital crime, there was no discretion—the defendant had

126. *See id.* at 153 (*Gregg* was decided on July 2, 1976, as were its four companion cases).

127. *Woodson v. North Carolina*, 428 U.S. 280, 281 (1976).

128. *Roberts v. Louisiana*, 428 U.S. 325, 327 (1976).

129. *Proffitt v. Florida*, 428 U.S. 242, 244 (1976).

130. *Jurek v. Texas*, 428 U.S. 262, 264 (1976).

131. *Gregg*, 428 U.S. at 179-80.

132. *See supra* notes 58-64 and accompanying text; *see also Gregg*, 428 U.S. at 188 (summarizing the *Furman* holding by stating: "Because of the uniqueness of the death penalty, *Furman* held that it could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner.>").

133. *See, e.g., Lockett v. Ohio*, 438 U.S. 586, 599 (1978) (stating that the *Furman* decision created a great deal of confusion as to what the Eighth Amendment required in order to impose the death penalty); *Woodson*, 428 U.S. at 298-99. Abolitionists at the time of the *Furman* decision realized that the Court had left two possible methods of experimentation available to proponents of the death penalty—mandatory sentences and guided discretion. *See BEDAU, supra* note 64, at 92.

134. *See, e.g., Gregg*, 428 U.S. at 162-68 (describing the mechanics and operation of Georgia's death penalty statutes); *see also Jurek*, 428 U.S. at 268-71 (describing the mechanics and operation of Texas' death penalty statutes); *Proffitt*, 428 U.S. at 247-51 (describing the mechanics and operation of Florida's death penalty statutes).

135. *See, e.g., Woodson*, 428 U.S. at 286 (providing the mandatory statute adopted by the North Carolina legislature under which petitioner was sentenced); *see also Roberts v. Louisiana*, 428 U.S. 325, 329-31 & n.3 (1976) (providing Louisiana's mandatory death penalty statute and describing how the new statute differs from the pre-*Furman* statute).

136. *See supra* notes 58-64 and accompanying text; *see also Gregg*, 428 U.S. at 188 (summarizing the *Furman* holding by stating, "Because of the uniqueness of the death penalty, *Furman* held that it could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner.>").

137. *See supra* note 135.

to be sentenced to death.¹³⁸ The rationale being, if the *Furman* Court was concerned with the penalty of death being imposed in an arbitrary and capricious manner, then these states would cure this problem by removing all discretion from the sentencer.¹³⁹ The Court in *Woodson* stated it would analyze mandatory death penalty statutes in the same way it examined the constitutionality of the death penalty in *Gregg*—by examining contemporary standards regarding the imposition of mandatory death sentences.¹⁴⁰

At the time the Eighth Amendment was written, it was a common practice to punish a whole host of crimes with a mandatory death sentence.¹⁴¹ States found that juries were acquitting clearly guilty defendants instead of convicting and sentencing them to death.¹⁴² In response to this realization, states began to limit the types of crimes punishable by death,¹⁴³ and then abandoned the mandatory sentencing scheme all together.¹⁴⁴

The mandatory imposition of the death penalty came to an end because of two changes in the American criminal justice system.¹⁴⁵ First, states began adopting degrees of murder; thus, the jury could convict a defendant of a lower degree of murder that was not punished by death.¹⁴⁶ In 1794, Pennsylvania became the first state to adopt varying degrees of murder.¹⁴⁷ States then began to give juries discretion on whether a defendant should receive the death penalty.¹⁴⁸ In 1838, Tennessee became the first state to give juries death penalty discretion.¹⁴⁹

By the beginning of the twentieth century, almost half the jurisdictions in the United States had replaced any remaining mandatory death penalty sentencing statutes with discretionary statutes.¹⁵⁰ By 1963, every jurisdiction had enacted discretionary death penalty sentencing statutes.¹⁵¹ Furthermore, with a single exception, every jurisdiction that abandoned mandatory sentencing

138. See *supra* note 135.

139. See generally *State v. Waddell*, 194 S.E.2d 19, 26-28 (N.C. 1973) (holding the North Carolina discretionary death penalty statute unconstitutional. Yet, the court also found the discretionary provision was severable, thus making the statute a mandatory death penalty statute).

140. *Woodson*, 428 U.S. at 288.

141. See *id.* at 289; TUSHNET, *supra* note 34, at 20-21.

142. *Woodson*, 428 U.S. at 289-91.

143. *Id.* at 289-90.

144. *Id.* at 291-92.

145. TUSHNET, *supra* note 34, at 21.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Woodson v. North Carolina*, 428 U.S. 280, 291 (1976) (plurality opinion).

151. *Id.* at 291-92.

never re-instituted the procedure until after the *Furman* decision invalidated all the then current death penalty procedures.¹⁵² Thus, the Court stated that “[t]he history of mandatory death penalty statutes in the United States thus reveals that the practice of sentencing to death all persons convicted of a particular offense has been rejected as unduly harsh and unworkably rigid.”¹⁵³

The Court in *Woodson v. North Carolina* also noted that in cases where a state used a discretionary system for imposing the death penalty, juries often failed to sentence defendants convicted of capital crimes to death.¹⁵⁴ The Court viewed the history of juries under discretionary systems as indicating that society did not believe simply being convicted of a certain crime should translate into a particular punishment.¹⁵⁵ The mandatory statutes of North Carolina and Louisiana treated all defendants in capital cases as a faceless class of criminals.¹⁵⁶ In *Roberts v. Louisiana*, the Court stated, “individual culpability is not always measured by the category of crime committed.”¹⁵⁷

According to the Court’s holding in *Woodson* and *Roberts*, the Eighth Amendment “requires consideration of the character and record of the individual offender and the circumstances of the particular offense.”¹⁵⁸ Justice Stevens succinctly wrote for the Court:

A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.¹⁵⁹

152. *Id.* at 295 n.30. In 1911, Vermont first decided to give juries death penalty discretion, but then, the next year, returned to mandatory sentencing. *Id.* However, Vermont got rid of the mandatory system for good in 1957 and returned to a discretionary death penalty system. *Id.*

153. *Id.* at 292-93. Legislative enactments and jury findings were the two key factors for determining “the evolving standards of decency” and the Court in *Woodson* interpreted both of these indicators as moving away from a system where the death penalty was automatically applied to those found guilty of certain crimes. *Id.* at 293.

154. *Id.* at 295-96.

155. *See Woodson*, 428 U.S. at 295-96.

156. *Id.* at 304.

157. *Roberts v. Louisiana*, 428 U.S. 325, 333 (1976) (plurality opinion) (quoting *Furman v. Georgia*, 408 U.S. 238, 402 (1972) (Burger, C.J., dissenting)).

158. *Woodson*, 428 U.S. at 304; *see also Roberts*, 428 U.S. at 333-34 (describing Louisiana’s mandatory statute as not allowing the sentencer to consider the diversity of factors that could be relevant to the imposition of the death penalty).

159. *Woodson*, 428 U.S. at 304.

The *Roberts* Court stated that the constitutional flaw in mandatory death penalty statutes was that such statutes fail to focus the sentencer's attention on the circumstances of the particular offender and the particular offense.¹⁶⁰ Thus, the Supreme Court in *Woodson* and *Roberts* struck down the mandatory imposition of the death penalty in capital cases and added an individualization component to the Eighth Amendment.¹⁶¹

It should not be surprising after reading the preceding discussion concerning the mandatory death penalty statutes of North Carolina and Louisiana that the Supreme Court had a different stance on the statutes in Georgia,¹⁶² Florida,¹⁶³ and Texas.¹⁶⁴ The Court in *Gregg* interpreted the *Furman* decision to require state legislatures to guide and limit the discretion of the sentencing body imposing the death penalty on a defendant, thus reducing the risk the penalty would be imposed in an arbitrary manner.¹⁶⁵ The Court believed that a legislature could satisfy the dictates of *Furman* by carefully drafting a statute that ensured the sentencing authority had adequate guidance in deciding who should and who should not receive the death penalty.¹⁶⁶ Under the pre-*Furman* death penalty statute, juries could decide what factors to consider without giving a reason for their decision.¹⁶⁷ The dispositive difference between the pre-*Furman* statutes and the three statutes the Court upheld was that the Georgia, Florida, and Texas statutes all required the sentencer "to focus on the circumstances of the crime and the character of the individual defendant."¹⁶⁸

Thus, on one day in 1976, the Supreme Court handed down five cases that set out the basic procedures states would be required to follow, when deciding who would receive the death penalty, in order to be consistent with the

160. *Roberts*, 428 U.S. at 333.

161. *See Roberts*, 428 U.S. at 333-34; *Woodson*, 428 U.S. at 304.

162. *See Gregg v. Georgia*, 428 U.S. 153, 165 n.9 (1976) (providing the Georgia discretionary statute).

163. *See Proffitt v. Florida*, 428 U.S. 242, 248 n.6 (1976) (providing the Florida discretionary statute).

164. *See Jurek v. Texas*, 428 U.S. 262, 265 n.1 (1976) (providing the Texas discretionary statute).

165. *Gregg*, 428 U.S. at 189.

166. *Id.* at 195; *Jurek*, 428 U.S. at 273-74; *Proffitt*, 428 U.S. at 252-53. The Court did not feel that requiring the jury to be given directions on how they should make their decision was unusual in our legal system. *Gregg*, 428 U.S. at 192-93. The Court called giving juries guidance and instructions for their deliberations a "hallmark" of our legal system. *Id.* at 193.

167. *See supra* note 50.

168. *Proffitt*, 428 U.S. at 251; *see also Jurek*, 428 U.S. at 273-74 ("It thus appears that, as in Georgia and Florida, the Texas capital-sentencing procedure guides and focuses the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender before it can impose a sentence of death.").

principles the Supreme Court now held the Eighth Amendment mandated.¹⁶⁹ These procedures required the states to guide the discretion of the sentencer in such a manner as to ensure a careful “consideration of the character and record of the individual offender and the circumstances of the particular offense.”¹⁷⁰ After establishing these procedural guidelines in the *Gregg* series of cases, the Court began to apply the Eighth Amendment to states’ death penalty statutes by stating what sanctions the states could (or could not) impose upon its prisoners, taking the evolution of the Cruel and Unusual Punishment Clause to a new level.¹⁷¹

III. *COKER V. GEORGIA*—THE SUPREME COURT TAKES ON A NEW ROLE

In 1977, the Supreme Court for the first time examined whether the death penalty could be applied, consistent with the Eighth Amendment, to the crime of rape.¹⁷² In December of 1971, Ehrlich Coker raped and then stabbed to death

169. *Roberts v. Louisiana*, 428 U.S. 325, 335-36 (1976); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976); *Jurek*, 428 U.S. at 276-77; *Proffitt*, 428 U.S. at 259-60; *Gregg*, 428 U.S. at 206-07.

170. *Woodson*, 428 U.S. at 304.

171. See *Coker v. Georgia*, 433 U.S. 584, 591-92 (1977) (plurality opinion).

172. See generally *Coker*, 433 U.S. at 586. In 1963, Justice Goldberg and his law clerk, Alan Dershowitz, picked out cases involving the death penalty and wrote memoranda, despite these cases having not been accepted for review by the Court. See TUSHNET, *supra* note 34, at 27. Goldberg took this unusual step for a Justice to spark discussion among members of the Court on the topic of the death penalty. *Id.* Yet, Goldberg was unable to garner enough support to have the issue of the death penalty discussed before the Court, and, in *Rudolph v. Alabama*, the Supreme Court denied certiorari to a defendant convicted of rape and sentenced to death. 375 U.S. 889, 889 (1963). Two Justices concurred in Justice Goldberg’s dissent of the decision to deny certiorari. *Id.* Goldberg wanted the Court to consider whether the imposition of the death penalty for the crime of rape violated evolving standards of decency. *Id.* at 889-90. Professor Herbert Packer found it hard to believe that Goldberg believed the evolving standards did not accept the death penalty for rape since nineteen states made rape a capital crime. Packer, *supra* note 70, at 1073-74. Packer concluded that what Goldberg was really concerned with was not the death penalty for rape, but the death penalty. *Id.* at 1081. Packer also criticized Goldberg’s proportionality argument against the death penalty for rape stating that there was only one case, *Weems v. United States*, that remotely supported the proposition that the Eighth Amendment had a proportionality requirement, and the unique facts of *Weems* made it more properly a cruel and unusual case rather than a proportionality case. *Id.* at 1074-76; see also *supra* notes 34-36 and accompanying text (describing the *Weems* decision). Packer found the Court’s “righteous indignation at the description of practices that are . . . unknown in this country” as a sign that the *Weems* Court struck down the statute as a violation of the Eighth Amendment under the traditional cruel and unusual mode of punishment rationale. Packer, *supra* note 70, at 1075-76. *Coker v. Georgia* may have been the first time the Court as a whole considered a capital rape case, but the subject for many years had been a topic of discussion for the Justices and for academics.

a young woman.¹⁷³ Almost eight months later, Coker kidnapped and raped a sixteen-year-old woman.¹⁷⁴ Coker did not kill this victim; rather, he stripped her, raped her twice, beat her with a club, dragged her into the woods, and left her for dead.¹⁷⁵ Coker was subsequently apprehended and plead guilty to all charges.¹⁷⁶ He was sentenced to three life terms, two twenty-year terms, and one eight year term.¹⁷⁷ Each of these terms were to run consecutively.¹⁷⁸

This was not the end of Mr. Coker's criminal career, however, because eighteen months later, he escaped from Georgia's Ware Correctional Institution, the prison where he was to serve out these consecutive sentences.¹⁷⁹ The night of his escape Coker broke into the house of Mr. and Mrs. Carver.¹⁸⁰ Coker tied up Mr. Carver and, brandishing a knife he had found in their kitchen, raped Mrs. Carver.¹⁸¹ Coker then preceded to take some money, the keys to their car, and Mrs. Carver as a hostage.¹⁸² Coker warned Mr. Carver that he would kill Mrs. Carver if they were stopped by the police.¹⁸³ Mr. Carver, later testified at Coker's trial that Coker told him "he didn't have nothing to lose [because he was already] in prison for the rest of his life."¹⁸⁴ When Coker was caught, Mrs. Carver had not been harmed.¹⁸⁵ The state decided that instead of adding time to his three consecutive life sentences, it would seek the death penalty.¹⁸⁶ The jury found Coker guilty of escape, armed robbery, motor vehicle theft, kidnapping, and rape, and sentenced Coker to death by electrocution.¹⁸⁷ The Supreme Court of Georgia affirmed Coker's conviction and sentence.¹⁸⁸

In *Coker v. Georgia*,¹⁸⁹ the plurality applied the analysis developed in *Gregg* and concluded that the sanction of death for the rape of an adult woman was a "grossly disproportionate and excessive punishment."¹⁹⁰ The *Coker* result

173. *Coker*, 433 U.S. at 605 (Burger, C.J., dissenting).

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *Coker*, 433 U.S. at 605 (Burger, C.J., dissenting).

179. *Id.* at 587 (plurality opinion).

180. *Id.*

181. *Id.*

182. *Id.*

183. *Coker*, 433 U.S. at 609 n.4 (Burger, C.J., dissenting).

184. *Id.* (emphasis omitted).

185. *Id.* at 587 (plurality opinion).

186. *Id.* at 587-88.

187. *Id.* at 587-91.

188. See generally *Coker v. State*, 216 S.E.2d 782, 797 (1975), *rev'd*, 433 U.S. 584 (1977).

189. 433 U.S. 584 (1977) (plurality opinion).

190. *Id.* at 592.

differed greatly from the results of the *Gregg* line of cases because the *Coker* Court was not concerned with procedure as it was in the *Gregg* case.¹⁹¹ Rather, the *Coker* Court examined the validity of the punishment as imposed by a state and jury for a particular crime.¹⁹² *Gregg* and its progeny did not completely restrict the states from imposing the death penalty; they only limited the procedure by which it was imposed.¹⁹³ In contrast, the *Coker* decision prohibited a state's ability to impose the death penalty, under any circumstances, for a particular crime.¹⁹⁴ However, the *Coker* holding, as the following discussion will demonstrate, was justified on little more than the Justices' opinion of the proper punishment for rape.¹⁹⁵ The next two sections will discuss the objective analysis and the subjective analysis of the *Coker* opinion.

A. *The Plurality's Objective Analysis*

As the Court did in *Gregg*,¹⁹⁶ the first factor the *Coker* plurality examined was how jurisdictions responded to *Furman* with regard to the crime of rape.¹⁹⁷ The plurality found that at no time in the last fifty years had a majority of the states authorized the death penalty for rape.¹⁹⁸ At the time *Furman* was decided, sixteen states and the federal government made rape a capital crime.¹⁹⁹ After *Furman* invalidated every state's death penalty statutes, only three states—Georgia, North Carolina, and Louisiana—redrafted their statutes to make rape a capital crime.²⁰⁰ The Court found it telling that although only three states redrafted their statutes to include rape as a capital crime, thirty-five states redrafted their statutes to make murder a capital crime.²⁰¹ The Court discounted the weight of North Carolina's and Louisiana's statutes because both states made the imposition of the death penalty mandatory upon finding the defendant

191. *See supra* notes 85-171.

192. *See infra* notes 196-231 and accompanying text.

193. *See supra* notes 85-171.

194. *See Coker*, 433 U.S. at 598 (plurality opinion).

195. The *Coker* plurality acknowledged that Eighth Amendment decisions should not be decided on the purely subjective views of the Justices, *see id.* at 592, but as the following discussion demonstrates, the *Coker* decision does not rest on much more than the subjective views of the Justices.

196. *See supra* notes 103-06 and accompanying text.

197. *See Coker*, 433 U.S. at 593-96.

198. *Id.* at 593.

199. *Id.*

200. *Id.* at 594.

201. *Id.* at 593-94; *see Gregg v. Georgia*, 428 U.S. 153, 179-80 & n.23 (1976) (listing the thirty-five states that redrafted their capital statutes to include murder).

guilty.²⁰² As discussed above, the Court found mandatory death penalty statutes unconstitutional,²⁰³ and when North Carolina and Louisiana re-drafted their death penalty statutes, they made murder a capital crime, but not rape.²⁰⁴ Because of this “re-draft,” the plurality counted only the state of Georgia as having a capital statute that included the rape of an adult woman.²⁰⁵ The plurality noted that three states made the rape of a child a capital offense.²⁰⁶

In addition, the plurality stated that although the decision to impose the death penalty in rape cases was not unanimous among state legislatures, the majority leaned heavily in favor of rejecting the death penalty as a sanction for rape.²⁰⁷ The Court also noted that it is not “irrelevant” to the analysis of what jurisdictions within the United States do in regard to the death penalty to look at what jurisdictions outside of the United States do with their death penalty statutes.²⁰⁸ In this regard, the Court took notice of a 1965 survey of sixty “major nations” that found only three of these “major nations” had the death penalty as a sanction for rape.²⁰⁹

202. *Coker*, 433 U.S. at 594.

203. *See Woodson v. North Carolina*, 428 U.S. 280, 305 (1976); *see also Roberts v. Louisiana*, 428 U.S. 325, 336 (1976).

204. *Coker*, 433 U.S. at 594.

205. *Id.* at 595-96.

206. *Id.* at 595. Following *Furman v. Georgia*, Tennessee, Florida, and Mississippi enacted capital child rape statutes. *Id.*

207. *Id.* at 596.

208. *Id.* at 596 n.10.

209. *Coker*, 433 U.S. at 596 n.10. *But see Furman v. Georgia*, 408 U.S. 238, 404 (1972) (per curiam) (Burger, C.J., dissenting) (noting that the international trend away from capital punishment more often has been accomplished through legislative action than judicial fiat).

To say that international opinion on the death penalty is not irrelevant may in fact be correct, but it definitely does not appear to be very relevant to the Supreme Court. For example, in a 1989 case, Justice Scalia, writing for a majority of the Court, rejected petitioners' claims that the practices of other nations in imposing the death penalty are relevant to a determination of the “evolving standards of decency” in the United States. *Stanford v. Kentucky*, 492 U.S. 361, 369 & n.1 (1989). Justice Scalia wrote that the sentencing policies of international countries “cannot serve to establish the first Eighth Amendment prerequisite, that the practice is accepted among our people.” *Id.* at 369 n.1. Furthermore, a comparison of the countries that authorize and do not authorize the death penalty should establish the fact that international opinion does not have any real significance on our interpretation of the evolving standards of decency. For example, in 1994 the following countries had executed people within the last ten years: Afghanistan, Bangladesh, Bosnia-Herzegovina, Botswana, Bulgaria, China, Cuba, Guatemala, India, Kazakhstan, Kenya, Laos, Libya, Nigeria, Pakistan, Poland, Somalia, Sudan, Swaziland, Syria, Uganda, the United States of America, Uzbekistan, and Yemen. COYNE & ENTZEROTH, *supra* note 26, at 703. Whereas, as of 1994, the following countries had abolished the death penalty for all offenses: Australia, New Zealand, Portugal, France, Ireland, the Netherlands, Spain, Greece, Hong Kong, and Switzerland. *Id.* at 704. Further, both Great Britain and Canada had banned the death penalty in the mid-1960s, long before the *Gregg* decision stated the death penalty was

Continuing to follow the *Gregg* plurality's analysis, the Court in *Coker* reviewed jury decisions.²¹⁰ In analyzing jury responses to the crime of rape, the plurality found that in the four years prior to the *Coker* decision, Georgia juries sentenced six of sixty-three²¹¹ convicted rapists to death.²¹² Of these six, the Georgia Supreme Court set aside one sentence, thus leaving five convicted rapists on Georgia Death Row.²¹³ The plurality did not find the fact that six juries were willing to sentence convicted rapists insignificant; however, it focused on the fact that, in the vast majority of cases, a convicted rapist did not receive the death penalty.²¹⁴

not per se unconstitutional. See TUSHNET, *supra* note 34, at 132-33. If the United States was actually looking to the international community for guidance on how our standards of decency were evolving, Great Britain, France, or Canada would seem to be better places to look for assistance than Afghanistan, Cuba, or Libya. It seems disingenuous to look to Great Britain for the issue of executing rapists, but not to look there (or possibly to look to Libya) for the broader issue of whether the United States should permit capital punishment at all.

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

211. The Court did not have a total number of rape convictions but used the sixty-three rape convictions reviewed by the Georgia Supreme Court for its calculations. See *id.* at 596-97.

212. *Id.*; see also Palmer, *supra* note 25, at 853 (stating that the *Coker* Court neglected to consider whether the small number of death sentences could be a factor of the success of the *Furman* and *Woodson* safeguards). The Court overlooked the fact that juries rarely convicted the defendant of rape; one study showed that in only three of every forty-two rape trials ended in a conviction. BERGER, *supra* note 18, at 148 n.166. However, between 1955 and 1977, seventy-two people were executed in the country for the crime of rape. See Gray, *supra* note 21, at 1467.

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

214. *Id.* at 597. The State of Georgia argued that the rare imposition of the death penalty demonstrated that juries took their responsibilities seriously and only imposed death in the most egregious cases. *Id.* The *Coker* Court did not directly address this issue, but rather it dismissed it by simply stating: "Nevertheless, it is true that in the vast majority of cases, at least 9 out of 10, juries have not imposed the death sentence." *Id.* It is interesting to note that the Supreme Court has, both before and after the *Coker* decision, not only accepted the State of Georgia's argument, but has embraced it; the plurality opinion in *Gregg* stated:

It may be true that evolving standards [of decency] have influenced juries in recent decades to be more discriminating in imposing the sentence of death. But the relative infrequency of jury verdicts imposing the death sentence does not indicate rejection of capital punishment *per se*. Rather, the reluctance of juries in many cases to impose the sentence may well reflect the humane feeling that this most irrevocable of sanctions should be reserved for a small number of extreme cases.

Gregg v. Georgia, 428 U.S. 153, 181-82 (1976) (plurality opinion) (citation omitted); see also *Furman*, 408 U.S. at 388 (Burger, C.J., dissenting) (stating that jury selectivity in imposing death penalty should be viewed as a "refinement" of the state's authorization of the death penalty, not a "repudiation" of it).

B. *The Plurality's Subjective Analysis*

After concluding that the objective indicators of legislative enactments and jury sentencing decisions indicated that society had rejected the imposition of the death penalty for the crime of raping an adult woman, the plurality moved on to subjectively analyze whether the death penalty was a disproportionate penalty for those convicted of raping an adult woman.²¹⁵ The plurality began its subjective analysis by stating that rape was “highly reprehensible” and that “[s]hort of homicide, it is the ‘ultimate violation of self.’”²¹⁶ The plurality continued by contrasting rape and murder and came to the conclusion that a murder results in a death, but a “rape by definition does not include the death of or *even the serious injury to* another person.”²¹⁷ The plurality concluded that the death penalty “is an excessive penalty for the rapist who, as such, does not take human life.”²¹⁸ The Court then analyzed Georgia’s death penalty statute as applied to persons convicted of rape and persons convicted of murder and found that the statute was unconstitutionally drafted because of the manner in which the death penalty was imposed upon those convicted of rape.²¹⁹ This is important because Justice Powell, who concurred in the judgment, believed that the petitioner should not receive the death penalty for the crime of raping an adult woman only because of the facts and circumstances of the case.²²⁰ Justice Powell thought that it was “quite unnecessary for the plurality to write in terms so sweeping as to foreclose each of the 50 state legislatures from creating a narrowly defined substantive crime of aggravated rape punishable by death.”²²¹ There was nothing more to the plurality’s subjective analysis.²²² It found the sanction of death to be disproportionate to the crime of rape and, in conjunction with its objective analysis, ruled that the imposition of the death penalty for the crime of raping an adult woman violated the mandates of the Eighth Amendment.²²³

215. *Coker*, 433 U.S. at 597-98.

216. *Id.* at 597. The Court also noted that rape may cause physical, mental, and psychological damage to the victim. *Id.* at 597-98.

217. *Id.* at 598 (emphasis added). Chief Justice Burger rebuffs the plurality in his dissent by stating, “To speak blandly . . . of rape victims who are ‘unharm’d’ . . . takes too little account of the profound suffering the crime imposes upon the victims and their loved ones.” *Id.* at 612 (Burger, C.J., dissenting). See Arthur H. Garrison, *Rape Trauma Syndrome: A Review of a Behavioral Science Theory and Its Admissibility in Criminal Trials*, 23 AM. J. TRIAL ADVOC. 591, 594-625 (2000) (describing the initial “lot” of rape victims).

218. *Coker*, 433 U.S. at 598.

219. *Id.* at 598-600.

220. *Id.* at 601 (Powell, J., concurring in judgment in part and dissenting in part).

221. *Id.* at 602.

222. See generally *id.* at 597-98 (presenting the plurality analysis).

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

It is interesting to note that nowhere in the plurality's opinion did Justice White discuss or even acknowledge the limited role courts play in our system of separated powers.²²⁴ The plurality merely stated that the Eighth Amendment should not be applied according to "the subjective views of individual Justices."²²⁵ Justice White's omission is contrasted with the *Gregg* opinion that starts by first recognizing the fact that the Supreme Court is not a legislature and cannot substitute its judgment for that of the people as expressed through their elected legislature.²²⁶

The evolving meaning of the Eighth Amendment reached its most egregious state with *Coker v. Georgia*. Here, the Amendment was altered in such a manner that it gave the Court the authority to veto legislation properly enacted by state legislatures and to disregard the decisions of juries.²²⁷ Following *Coker*, the Court is free to substitute its will for the will of the people.²²⁸ The Cruel and Unusual Punishment Clause, as originally adopted, was interpreted to only prohibit torturous or barbaric methods of punishment and had no concept of proportionality.²²⁹ Yet, it was now being used by some of the Justices on the Supreme Court to dictate the range of punishments for particular crimes.²³⁰ What principle was to guide the Justices in making their determination of the range of permissible punishments? In sum, there was no guiding principle.²³¹ After *Coker*, if the Justices agreed that a particular punishment was appropriate for a crime, then the Eighth Amendment was satisfied, but if the Justices disagreed, then the Amendment was violated.²³² Essentially, this made the Supreme Court a Super-Legislature and a Super-Jury for these issues.²³³

224. *See id.* at 586-600.

225. *Id.* at 592.

226. *Gregg v. Georgia*, 428 U.S. 153, 174-75 (1976) (plurality opinion); *see also* *Stanford v. Kentucky*, 492 U.S. 361, 379 (1989) (stating that the idea that the dictates of the Eighth Amendment are determined by the "evolving standards of decency" has never meant whatever a majority of the Court wanted to allow or prohibit).

227. *See generally Coker*, 433 U.S. at 597 (holding that the Eighth Amendment grants authority to the Justices on issues concerning capital punishment).

228. *See id.*

229. *See supra* Part II.A.

230. *See Coker*, 433 U.S. at 592.

231. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 44-47 (1997) (criticizing those who believe the Constitution evolves over time for having no guiding principles for this evolution).

232. *See generally Coker*, 433 U.S. at 597 (holding that the Eighth Amendment grants authority to the Justices on issues concerning capital punishment).

233. *See id.*

IV. THE SUPREME COURT AS A SUPER-LEGISLATURE AND A SUPER-JURY

By establishing the Supreme Court as a Super-Legislature for issues of criminal punishment, *Coker* disrupted the balance of power as set forth in the Constitution.²³⁴ Under our system of government, the legislatures, and not the courts, speak for the will of the people.²³⁵ Clearly, the Supreme Court has the authority to strike down a state statute if the statute violates the Constitution.²³⁶ However, the Court can only strike down such a statute if it offends the Constitution, not because it offends the Justices.²³⁷ Yet, this is not what happened in *Coker*.²³⁸ The *Coker* plurality relied on the Court's newly created requirements for the Eighth Amendment and held that the amendment allowed the Justices to determine if a punishment was appropriate for a particular crime,²³⁹ thus allowing the Court to substitute its will for the will of the people as expressed through the state legislature.²⁴⁰ In an area of law traditionally governed by the individual state legislatures,²⁴¹ the *Coker* plurality told the

234. See U.S. CONST. art. I; U.S. CONST. art. III (granting Congress the power to legislate and the court the power to adjudicate).

235. Compare U.S. CONST. art. I, with U.S. CONST. art. III; see also *Furman v. Georgia*, 408 U.S. 238, 383 (1972) (Burger, C.J., dissenting) (stating that legislatures and not courts are responsible for responding to the will of the people).

236. See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992) (striking down a city ordinance as a content-based restriction of the First Amendment).

Article III of the Constitution creates the Supreme Court, but leaves it to Congress to create lower federal courts. U.S. CONST. art. III, § 1. Thus, as originally created, the entire federal judicial system was comprised of only one court—the Supreme Court. As the only court in the federal system, the Constitution gave the Supreme Court original jurisdiction over certain types of cases, but it also gave the Court appellate jurisdiction over other types of cases. U.S. CONST. art. III, § 2. The Constitution's delegation of appellate jurisdiction to the Supreme Court when the Constitution only required the existence of one court in the federal system implies the Supreme Court has the jurisdiction to hear appellate cases originally decided in the state court systems.

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

238. See *id.* at 591-600.

239. See *id.* at 597.

240. See *id.*

241. See *United States v. Morrison*, 529 U.S. 598, 617 (2000) (“The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States.”); *Furman v. Georgia*, 408 U.S. 238, 431 (1972) (Powell, J., dissenting) (“The designation of punishments for crimes is a matter peculiarly within the sphere of the state and federal legislative bodies.”).

Georgia legislature that the Justices on the Supreme Court knew Georgians' sentiment regarding the appropriate punishment for a particular crime better than the Legislature itself.²⁴²

Under the federalist system of government, the states are "prescribed areas of jurisdiction that cannot be invaded" by the federal government.²⁴³ By creating a federal government with enumerated powers and reserving all other powers to the states,²⁴⁴ the framers of the Constitution created a unique two-sovereignty system²⁴⁵ wherein the federal sovereign is required to respect the sovereignty of the various states.²⁴⁶ Under such a system, there is a basic assumption that state

242. See *Coker*, 433 U.S. at 597.

243. Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 911 (1994). In one Supreme Court case, the majority recognized that the Constitution never would have been ratified if the states lost more sovereignty than was expressly provided for in the Constitution. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 n.2 (1985).

244. See U.S. CONST. amend. X; see also *United States v. Morrison*, 529 U.S. 598, 619 (2000) ("With its careful enumeration of federal powers and explicit statement that all powers not granted to the Federal Government are reserved, the Constitution cannot realistically be interpreted as granting the Federal Government an unlimited license to regulate."). In describing this relationship between the federal and state scopes of power, Justice O'Connor quoted James Madison:

The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. . . . The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.

Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) (quoting THE FEDERALIST No. 45, at 236 (James Madison) (Buccaneer Books 1992)). What could be more a "concern [of] the lives, liberties, and properties of the people" or more related to the "internal order" of a state than its criminal laws and punishments?

245. Federalism has been called "the unique American contribution to political and governmental theory." Richard Levy & Stephen R. McAllister, *Defining the Roles of the National and State Governments in the American Federal System: A Symposium*, 45 U. KAN. L. REV. 971, 971 (1997).

246. See *Gregory*, 501 U.S. at 459 ("If [federalism] is to be effective, there must be a proper balance between the States and the Federal Government. These twin powers will act as mutual restraints only if both are credible. In the tension between federal and state power lies the promise of liberty."); *Atascadero State Hosp.*, 473 U.S. at 239 n.2 ("The Framers believed that the States played a vital role in our system and that strong state governments were essential to serve as a 'counterpoise' to the power of the Federal Government."); *Gregg v. Georgia*, 428 U.S. 153, 176 (1976) (plurality opinion) ("The deference we owe to the decisions of the state legislatures under our federal system, is enhanced where the specification of punishments is concerned, for 'these are peculiarly questions of legislative policy.'") (citation omitted) (quoting *Gore v. United States*, 357 U.S. 386, 393 (1958)); see also THE FEDERALIST Nos. 39, 45 (James Madison) (discussing James Madison's views with regard to state sovereignty); BERGER, *supra* note 18, at 5 n.19 (stating that respect under principles of federalism for states is important to our system of government); Deborah Jones

governments should be able to govern free from excessive intervention from the federal government.²⁴⁷ A system with fifty separate sovereignties will have diversity in its laws,²⁴⁸ but, in order for our government to work properly, there must be a healthy amount of respect for this diversity.²⁴⁹

By breaking down the *Coker* analysis, it is easy to see how the opinion disregards the principles of federalism and sets up the Supreme Court as a Super-Legislature.²⁵⁰ First, the plurality applied an objective analysis by surveying the fifty states and found only one state (Georgia, the state whose

Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 10 (1988) (“The Supreme Court has always recognized the importance of maintaining independent state governments.”).

247. See Harold J. Krent, *The Supreme Court as an Enforcement Agency*, 55 WASH. & LEE L. REV. 1149, 1168 (1998). Federalism is seen as a way for people to get more involved in government. Gregory, 501 U.S. at 458. Justice O’Connor noted that Alexis de Tocqueville found participation in local government to be the cornerstone of American democracy; she quoted his writing:

It is incontestably true that the love and the habits of republican government in the United States were engendered in the townships and in the provincial assemblies. [I]t is this same republican spirit, it is these manners and customs of a free people, which are engendered and nurtured in the different States, to be afterwards applied to the country at large.

FERC v. Mississippi, 456 U.S. 742, 789-90 (1982) (O’Connor, J., concurring in judgment in part and dissenting in part) (quoting 1 A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 181 (H. Reeve trans., 1961)).

248. See C. Lloyd Brown-John, *Self-Determination, Autonomy and State Secession in Federal Constitutional and International Law*, 40 S. TEX. L. REV. 567, 576 (1999) (stating that “[d]iversity is a characteristic of federal political systems” and “if there is no appropriate respect for the democracy of diversity[,] [it] cannot be said to be a truly open political system”).

One recent law review article argued that a sign that there is no national consensus with regard to imposing the death penalty on people convicted of raping a child is that one state has decided to pass a “more progressive and humane” statute to deal with child rapists. See Emily Marie Moeller, *Devolving Standards of Decency: Using the Death Penalty to Punish Child Rapists*, 102 DICK. L. REV. 621, 645 (1998). This author cites to a Kansas statute that provides for involuntary civil commitment for those convicted or charged with a “sexually violent offense.” *Id.* (citing KAN. ST. ANN. § 59-29a02 (1996)). However, one must question whether the principles of federalism should go out the window with the will of the people of Louisiana because the people of Kansas have decided to test a different, “more progressive and humane” method of dealing with a serious situation.

The fact that the Kansas Legislature and the Louisiana and Georgia Legislatures have identified similar problems and have chosen to attack the problem from different angles shows that states are acting as laboratories for issue of child rape. Thus, the system is working properly and the Supreme Court should sit back and let it.

249. *Id.*; see also Jamison E. Colburn, *Rethinking Constitutionalism*, 28 RUTGERS L.J. 873, 898 (1997) (discussing the “Federalism Discount” and how the Supreme Court must be careful in its constitutional rulings as these decisions set a national rule that may handcuff states and reduce state experimentation).

250. See *infra* notes 251-300.

statute was being examined) that was currently imposing the death penalty on individuals convicted of rape.²⁵¹ The Court continued the objective analysis by looking at jury decisions; it determined that although juries in Georgia were willing to impose the death penalty upon convicted rapist only six times in the four preceding years stating that “in the vast majority of cases . . . juries have not imposed the death sentence.”²⁵² The plurality then completely discounted the jury data and stated that “the legislative rejection of capital punishment for rape *strongly confirms our own judgment*, which is that death is indeed a disproportionate penalty for the crime of raping an adult woman.”²⁵³ The plurality then moved from its objective analysis to its “subjective” analysis and concluded that the death penalty was an excessive punishment for rape.²⁵⁴

Under the *Coker* analysis, it would appear that the next time the Court reviews a statute from a state that punished a particular crime with death, the Court would simply skip the objective analysis and decide the constitutionality of the statute based solely on the Court’s view about the crime.²⁵⁵ Invalidation of the statute under this scenario destroys the concept of federalism, making the Supreme Court a Super-Legislature over the statutes passed by the state

251. *Coker v. Georgia*, 433 U.S. 584, 595-96 (1977) (plurality opinion).

252. *Id.* at 596-97. *But see supra* notes 108, 214 (explaining how the Court has on other occasions taken jury reluctance to be a sign that they were simply saving the ultimate sanction for the worst offenses).

253. *Coker*, 433 U.S. at 597 (emphasis added).

254. *Id.* at 597-98. It may be incorrect to say that the plurality began with an objective analysis and then moved to a subjective analysis because as the plurality stated the objective analysis merely confirmed what the plurality had already thought about imposing the death penalty for the crime of rape. *Id.* at 597. It may be better to say simply that the plurality decided to discuss the objective analysis before the Justices decided to state their own opinions on the subject.

255. In *Coker*, Justice White in his opinion striking down the statute emphasized the fact that Georgia was the only state to currently impose the death penalty on those convicted of raping an adult woman. *Id.* at 595-96. Professor Berger’s reply to such a rationale is that Justice White makes this statement “[a]s if the Constitution empowered the Court to impose one and the same standard on every State in the Union.” BERGER, *supra* note 18, at 149 n.170. Also consider that in 1980, the Supreme Court reviewed a Texas statute that imposed the sanction of life imprisonment upon a person convicted of his third felony. *Rummel v. Estelle*, 445 U.S. 263, 266 (1980). The petitioner was convicted over a course of nine years of three non-violent felonies, the last of which was for obtaining \$120.75 by false pretenses. *Id.* at 265-66. The petitioner argued he would have received a substantially lower amount of punishment in most other states except West Virginia and Washington. *Id.* at 279. The Court rejected this argument stating: “Even were we to assume that the statute employed against [petitioner] was the most stringent found in the 50 States, that severity hardly would render [petitioner’s] punishment ‘grossly disproportionate’ to his offenses or to the punishment he would have received in the other States.” *Id.* at 281. The Court noted that states make all sorts of sanction in decisions and “[a]bsent a constitutionally imposed uniformity inimical to traditional notions of federalism, some State will always bear the distinction of treating particular offenders more severely than any other State.” *Id.* at 282.

legislature.²⁵⁶ As a Super-Legislature, the Supreme Court will exercise the ultimate discretion on whether the statute will actually become law.²⁵⁷ If the statute imposes a punishment that the Justices do not think is “right,” the Court can simply “veto” the bill.²⁵⁸

The problem is that this is not a bill,²⁵⁹ but a statute that has been passed by a state legislature²⁶⁰ and has been signed into law by the state’s governor.²⁶¹ Members of the legislature and the governor are elected officials who exercise power delegated by and are accountable to the people of their state.²⁶² Under the *Coker* analysis, the non-elected Justices of the Supreme Court are able to disregard the will of the people of a particular state merely because the Justices disagree with the elected voice of the people of that state.²⁶³ The Justices based their subjective judgment on the grounds that the Eighth Amendment requires

256. See Merritt, *supra* note 246, at 25 (arguing that the Guarantee Clause, U.S. CONST. art. IV, § 4, promises the citizens of each state a government based upon popular control and that “as long as the states adhere to republican principles, the clause forbids the federal government from interfering with state governments in a way that would destroy their republican character”). It was widely acknowledged at the time the Constitution was adopted that the Guarantee Clause was a major marker of the boundary between federal power and state sovereignty. *Id.* at 35.

257. See THE FEDERALIST No. 47 (James Madison) (defending the constitutional separation of powers). After reviewing the history of the Eighth Amendment, Professor Berger concluded: “The [Cruel and Unusual Punishment] clause . . . left the measure of punishment, whether it should be more or less, in the legislature’s discretion, so long as it was not ‘barbarous.’” BERGER, *supra* note 18, at 174. Justice Holmes stated that the constitutionality of a statute has nothing to do with whether or not the Justices of the Supreme Court think that the statute makes for a good public policy. *Adkins v. Children’s Hosp.*, 261 U.S. 525, 570 (1923) (Holmes, J., dissenting), *overruled in part by* *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

258. See BERGER, *supra* note 18, at 123 (stating that the Framers of the Constitution “rejected judicial participation in legislative policymaking”). The courts have been said to be ill-equipped to respond to the changing needs of a “democratic society.” *Dennis v. United States*, 341 U.S. 494, 525 (1951) (Frankfurter, J., concurring). Also, the Framers decided to entrust the President, as a representative of the executive branch, with the ability to veto bills passed by the legislature. See U.S. CONST. art. I, § 7.

259. Forgetting, for the moment, that the judiciary does not possess the authority to veto a bill, see *supra* notes 196-231 and accompanying text.

260. See *infra* note 304.

261. See *infra* note 304.

262. *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934) (saying state statutes “are the authentic forms through which the sense of Justice of the People . . . expresses itself in law”), *overruled in part by* *Malloy v. Hogan*, 378 U.S. 1 (1964).

263. See SIDNEY HOOK, PHILOSOPHY AND PUBLIC POLICY 28-29 (1980) (calling it very “arrogant” for nine Justices to assume that they are better able to determine what is in the best interest of the populace than the populace is able to do for themselves). Another scholar stated that “the theory that the legislature does not truly speak for the people’s values, but the Court does, is ludicrous.” JOHN HART ELY, DEMOCRACY AND DISTRUST 68 (1980).

them to assess contemporary standards with regard to this sanction under these circumstances;²⁶⁴ however, the *Coker* plurality failed to cite to any precedent requiring Eighth Amendment analysis to include the Justices' opinion of the issue.²⁶⁵

In *Gregg*, the plurality stated that the assessment was not a subjective one, but one that relied upon objective indicia;²⁶⁶ however, after looking at the objective indicia, the plurality simply stated its subjective view of the death penalty.²⁶⁷ The plurality cited no precedent that called for them to give their subjective opinion on the constitutionality of the death penalty.

When the *Coker* plurality analyzed the Georgia statute, it found legislative inaction to be a sign that the states rejected the imposition of the death penalty for the rape of an adult woman.²⁶⁸ As in the *Gregg* decision, the plurality stated their opinion, or rather, their "abiding conviction" that the death penalty in that situation was unconstitutional.²⁶⁹ Also, like the *Gregg* plurality, the *Coker* plurality failed to cite any precedent (not even the *Gregg* decision) for the proposition that their subjective opinion was relevant to the issue of the constitutionality of executing those convicted of raping an adult woman.

It has been argued that by reading requirements into the Eighth Amendment that the Framers did not intend the Court to change the Constitution.²⁷⁰ The Court simply was not meant to have that power; the Framers explicitly set forward a procedure for changing the Constitution:

The concept of a written constitution is that it defines the authority of government and its limits, that government is the creature of the constitution and cannot do what it does not authorize *A priori*, such a constitution could have only a fixed and unchanging meaning, if it were to

264. See BERGER, *supra* note 18, at 60 (stating that the procedure by which the Justices divine the will of the people in order to determine the evolving standards of decency has been compared to the art of soothsaying, and its accuracy as reliable as soothsaying's reliability). However, Justice Frankfurter once wrote that a judge should "have antennae registering feeling and judgment beyond logical, let alone quantitative, proof." FELIX FRANKFURTER, *The Judicial Process and the Supreme Court, in OF LAW AND MEN* 39 (Philip Elman ed., 1956). It seems as if Justice Frankfurter either did not always believe Justices should have their "antennae" up or that he changed his opinion about the role of the judiciary from 1951 to 1956 because in his 1951 concurring opinion in *Dennis v. United States*, Frankfurter wrote: "Courts are not representative bodies. They are not designed to be a good reflex of a democratic society." 341 U.S. 494, 525 (1951) (Frankfurter, J., concurring).

265. See *Coker v. Georgia*, 433 U.S. 584, 586-600 (1977) (plurality opinion).

266. *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (plurality opinion).

267. See *id.* at 187.

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

269. *Id.* at 598.

270. See BERGER, *supra* note 18, at 9 ("Control of death penalties and of the sentencing process, it may confidently be asserted, was left by the Constitution to the States.").

fulfill its function. For changed conditions, the instrument itself made provision for amendment which, in accordance with the concept of a written constitution, was expected to be the only form of change²⁷¹

The idea that the Constitution is “certain and fixed” was recognized very early in the Court’s history.²⁷² The Court does not have the authority to change the requirements of the Constitution by methods other than that set forth in Article V of the Constitution simply because the Court finds the procedure in that article cumbersome.²⁷³

It is also important to note that *Coker* case never would have been before the Supreme Court of the United States if a jury, in the original criminal trial, was not convinced that the defendant deserved to have the death sentence.²⁷⁴ Thus, not only was the Supreme Court acting as a Super-Legislature in overturning Georgia’s rape statute, but it was also acting as a Super-Jury in rejecting the sentencing decision of the original jury.²⁷⁵ In so doing, the Supreme Court sat as a sentencing review committee, a position it was not empowered or well-suited to hold,²⁷⁶ by substituting its view for that of the jury,²⁷⁷ the institution traditionally deemed the “conscience of the community.”²⁷⁸ In a procedural system that did away with mandatory death sentences because the Court wanted a jury to consider the individual defendant and the particular circumstances of the defendant’s crime,²⁷⁹ it would seem that the Court should be extremely wary of taking sentencing decisions out of the jury’s hands, for not to do so would remove a key link between “contemporary community values and the penal system.”²⁸⁰ The Supreme Court stated, in *Roberts v. Louisiana*, “individual culpability is not always measured by the category of the crime

271. PHILIP B. KURLAND, *WATERGATE AND THE CONSTITUTION* 7 (1978).

272. *Van Horne’s Lessee v. Dorrance*, 2 U.S. (1 Dall.) 304, 308 (1795).

273. BERGER, *supra* note 18, at 7.

274. *See* U.S. CONST. art. III, § 2 (establishing judicial power over cases involving constitutional questions).

275. *See Coker v. Georgia*, 433 U.S. 584, 597 (1977) (plurality opinion).

276. *Furman v. Georgia*, 408 U.S. 238, 458 (1972) (Powell, J., dissenting) (“This Court is not empowered to sit as a court of sentencing review, implementing the personal views of its members on the proper role of penology. To do so is to usurp a function committed to the Legislative Branch and beyond the power and competency of this Court.”).

277. The plurality substituted its view of the defendant’s culpability for that of the jury’s because those Justices did not feel that the defendant’s culpability rose to a level deserving of death, although the jury clearly did.

278. *Gregg v. Georgia*, 428 U.S. 153, 190 (1976) (plurality opinion).

279. *See supra* notes 126-78 and accompanying text.

280. *Woodson v. North Carolina*, 428 U.S. 280, 295 (1976) (plurality opinion) (quoting *Witherspoon v. Illinois*, 391 U.S. 510, 519 n.15 (1968)).

committed.”²⁸¹ Hence, a defendant should not simply be sentenced to death if convicted of a crime; rather, the jury should consider the particular circumstances of the crime and of the defendant.²⁸² However, the result of *Coker* was to reject a jury’s finding regarding individual culpability because of nothing more than the category of the crime committed.²⁸³ In *Coker*, the plurality reversed the reasoning that supported the *Roberts* holding, as it grouped faceless defendants together despite the varying despicableness of the facts surrounding each defendant’s crime.²⁸⁴

In analyzing the constitutionality of mandatory death penalty statutes, the Court stated that “[t]he actions of sentencing juries suggest that under contemporary standards of decency death is viewed as an inappropriate punishment for a substantial portion of convicted first-degree murderers.”²⁸⁵ This statement was meant to highlight the fact that mandatory sentencing schemes treat all convicted defendants the same, and that when a jury is given discretion, it does not treat all defendants in a like manner.²⁸⁶ Implicit in this passage is the belief that juries are capable of differentiating between the circumstances surrounding various first-degree murders.²⁸⁷ If the Supreme Court is confident in a jury’s ability to differentiate between the culpability of first-degree murderers, why would the Court not have an equal confidence in a jury’s ability to differentiate the culpability of rapists?²⁸⁸ The *Coker* decision,

281. 428 U.S. 325, 333 (1976) (plurality opinion) (quoting *Furman v. Georgia*, 408 U.S. 238, 402 (1972) (Burger, C.J., dissenting)).

282. *Woodson*, 428 U.S. at 303-05.

283. *Coker v. Georgia*, 433 U.S. 584, 591-93 (1977) (plurality opinion).

284. *Id.* at 591-92.

285. *Woodson*, 428 U.S. at 295-96.

286. *See id.* at 295-97.

287. *See id.* at 303.

288. Dwight Doskey, the New Orleans attorney who represented Anthony Wilson before the Louisiana Supreme court in the child rape case posited the hypothetical situation of a sixteen-year-old boy who had consensual intercourse with a girl one day before she turned twelve and being tried as an adult with the prosecutor seeking the death penalty. Joe Gyan, Jr., *Justices Won't Review Child Rape Law Again*, BATON ROUGE ADVOC., Jan. 8, 1997, at 14A, available at 1997 WL 7230584. While Mr. Doskey is correct that such a case could arise, his alarm over the possibility of such a system seems to demonstrate little confidence in a jury’s ability to differentiate between levels of culpability. For almost every crime, there is a spectrum of conduct that violates the letter of that crime’s statute, but that does not mean that the sentencer does not take into consideration that not every defendant is equally blameworthy. This is one of the main reasons the Supreme Court rejected the mandatory imposition of death sentences for people convicted of certain crimes. *See Woodson*, 428 U.S. at 295-96. Certainly the hypothetical that Mr. Doskey proposes is at one end of the spectrum and at the other end of the spectrum is a man, knowing he is HIV positive, who rapes a five-year-old, a seven-year-old, and a nine-year-old (one of whom is his daughter). *State v. Wilson*, 96-1392, p.2 (La. 12/13/96), 685 So. 2d 1063, 1065 (discussing the charges filed against Patrick Bethley). It is the job of a jury in a death penalty sentencing hearing to determine at

however, takes that ability away from the jury because the Court, acting as the voice of contemporary community values, has decided that no person who has raped an adult woman is ever deserving of capital punishment.²⁸⁹ In essence, the *Coker* plurality decided it could better determine the contemporary community values of the citizens of Georgia than the citizens of Georgia that composed the jury in *Coker*'s trial.²⁹⁰ The Supreme Court, acting as a true Super-Jury, decided that under no circumstances would a jury be correctly assessing the community's values in imposing a sentence of death upon someone convicted of raping an adult woman.²⁹¹

what point along this spectrum does someone's culpability deserve to be punished with death. As the link between the contemporary community values and the penal system, *see Woodson*, 428 U.S. at 295, the jury should be allowed and trusted to do its job.

Opponents of non-homicide capital statutes often make slippery-slope arguments to buttress their viewpoint. *See, e.g.,* Sandra R. Acosta, *Imposing the Death Penalty Upon Drug Kingpins*, 27 HARV. J. ON LEGIS. 596, 611 (1990); Diamond, *supra* note 34, at 1179-80; Jeffrey C. Matura, Note, *When Will It Stop? The Use of the Death Penalty for Non-Homicide Crimes*, 24 J. LEGIS. 249, 250 (1998). Justice Scalia argues that the strength of a "Parade of Horribles" argument is related to "(1) the certitude that the provision in question was meant to exclude the very evil represented by the imagined parade, and (2) the probability that the parade will in fact materialize." *Harmelin v. Michigan*, 501 U.S. 957, 986 n.11 (1991). Scalia concluded by stating,

It seems to us no more reasonable to hold that the Eighth Amendment forbids "disproportionate punishment" because otherwise the State could impose life imprisonment for a parking offense than it would be to hold that the Takings Clause forbids "disproportionate taxation" because otherwise the State could tax away all income above the subsistence level.

Id.; *see also* *New York v. United States*, 326 U.S. 572, 583 (1946) ("The process of Constitutional adjudication does not thrive on conjuring up horrible possibilities that never happen in the real world and devising doctrines sufficiently comprehensive in detail to cover the remotest contingency."). Are we really concerned that a legislature is thinking that as soon as the child rape statutes passes constitutional muster, they can start working on a parking violation death penalty statute? Claiming that the death penalty will be instituted to punish parking violators is an Eighth Amendment argument for not having the death penalty at all, not for limiting the types of crimes it can be used to punish. As Justice Scalia wrote: "The punishment is either 'cruel and unusual' (i.e., society has set its face against it) or it is not." *Stanford v. Kentucky*, 492 U.S. 361, 378 (1989).

Furthermore, before anyone is sentenced to death, a legislature must make a crime a death penalty eligible offense, a jury has to find the defendant guilty, and the sentencer has to sentence the defendant to death. *See Furman v. Georgia*, 408 U.S. 238, 384 (1972) (Burger, C.J., dissenting) ("The paucity of judicial decisions invalidating legislatively prescribed punishments is powerful evidence that in this country legislatures have in fact been responsive . . . to changes in social attitudes and moral values.").

289. *See Coker*, 433 U.S. at 592.

290. *See id.* at 591-93; *see also id.* at 604 (Burger, J., dissenting) ("In striking down the death penalty imposed upon the petitioner in this case, the Court has overstepped the bounds of proper constitutional adjudication by substituting its policy judgment for that of the state legislature.").

291. *See Furman*, 408 U.S. at 462 (Powell, J., dissenting) (discussing how opinions like

The analysis employed in the *Coker* decision conflicts with many principles of our country's constitutional framework and other Supreme Court's holdings relating to the death penalty.²⁹² For example, allowing the Court to subjectively decide whether a state's statute is constitutional is almost a contradiction under a test that assumes the validity of the state's statute.²⁹³ At the same time, rejecting the jury's findings as to the convicted defendant's culpability for a particular crime conflicts with the established holdings of *Gregg*²⁹⁴ and *Woodson*.²⁹⁵ Additionally, merely relying on the subjective opinions of the Justices of the Supreme Court does not demonstrate sufficient (if any) deference to the decisions of the state legislature, as the Court is required to do under the *Gregg* test,²⁹⁶ or to the jury's decision regarding a defendant's individual culpability for the crime.²⁹⁷ What the Court in *Coker* seemed to focus on was whether a man should be executed for raping an adult woman,²⁹⁸ but what it overlooked was "whether the Court [was] authorized to take that decision away from the legislature and the people."²⁹⁹ Basically, the Court in *Coker* became what it once warned it could not become—"the ultimate arbiter of the standards of criminal responsibility . . . throughout the country."³⁰⁰ Because the *Coker*

Furman prohibit the democratic process from changing in the future and impose an inflexible standard); *id.* at 405 (Blackmun, J., dissenting) ("The highest judicial duty is to recognize the limits of judicial power and to permit the democratic processes to deal with matters falling outside of those limits.").

292. See *Coker*, 433 U.S. at 604, 610-11 (Burger, J., dissenting).

293. See *Gregg v. Georgia*, 428 U.S. 153, 175 (1976) (plurality opinion). It is important to remember, as the majority points out in *Stanford v. Kentucky*, that the challenged state does not have the burden to show a national consensus in its favor, but it is the "heavy burden" of the petitioner to show a national consensus against the state's statute. 492 U.S. 361, 373 (1989).

294. See *supra* notes 85-124 and accompanying text.

295. See *supra* notes 126-59 and accompanying text.

296. See *Gregg*, 428 U.S. at 176. One would think that the "personal scruples" of the Justices would yield to basic principles of our form of government. See BERGER, *supra* note 18, at 5-6.

297. See *Woodson v. North Carolina*, 428 U.S. 280, 295 (1976).

298. See *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion).

299. See BERGER, *supra* note 18, at 128.

300. *Gregg*, 428 U.S. at 176 (quoting *Powell v. Texas*, 392 U.S. 514, 533 (1968) (plurality opinion)). The dissent in a Utah non-homicide capital statute case made the point that these determinations of what is a proportionate punishment are very hard to make. *State v. Gardner*, 947 P.2d 630, 656 (Utah 1997) (Russon, J., dissenting). Justice Russon in his dissent asked, "While we agree that the death penalty is a disproportionate penalty for littering, would everyone agree that it is *always* disproportionate in a case where the victim did not die? Does it not depend on the factual circumstances of the crime?" *Id.* To strike down a statute as being disproportionate punishment for a crime without knowing the facts of the crime was something the dissent in *Gardner* was unable to do. *Id.*

analysis suffers from these infirmities, the Court should reconsider *Coker's* holding.

V. *COKER'S* AFFECT ON RECENTLY ENACTED STATUTES

Recently two states, Louisiana³⁰¹ and Georgia,³⁰² adopted statutes that could offer the Supreme Court a chance to reconsider the holding of *Coker*.³⁰³ These two states passed statutes that make the rape of a child a death penalty eligible offense.³⁰⁴ During the Louisiana House deliberation on the child rape bill, there was a proposed amendment to the bill that would substitute a life sentence with castration for the death penalty as the maximum punishment for raping a child, but this amendment was defeated 27-70.³⁰⁵ Some hold the opinion that murderers are not the most deserving of the death penalty, but rather those that engage in a repeated pattern of violent and dangerous behavior like sex offenders.³⁰⁶ Murders are often quite situational, but it has been argued that those who have demonstrated a propensity for violent and dangerous behavior are most deserving of society's most severe form of incapacitation.³⁰⁷ Representative Massey, who proposed the amendment to the rape statute, consciously chose to include the death penalty language in the statute because he believed this language as it pertained to the rape of a child under the age of ten sufficiently met the aggravated circumstances needed to overcome the *Coker* decision.³⁰⁸ After the *Coker* decision, the Georgia legislature never changed the

301. LA. REV. STAT. ANN. § 14:42 (West 1997 & Supp. 2002); see also Marsha Shuler, *House Passes Death Penalty for Child Rape*, ADVOCATE (Baton Rouge), Apr. 27, 1995, at 1B.

302. GA. CODE ANN. § 16-6-1 (2000).

303. Several other states have considered passing statutes similar to Louisiana's and Georgia's, but, as of yet, there are only two such statutes in the country. See Palmer, *supra* note 25, at 869 (stating that California and Pennsylvania have considered child rape death penalty laws); 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, 352 (2000) (including Montana as a state that has considered adding a child rape death penalty provision to its criminal code); Matura, *supra* note 288, at 256 (stating that "each year more state legislatures are taking a serious look at enacting" non-homicide death penalty crimes).

304. See GA. CODE ANN. § 16-6-1; LA. REV. STAT. ANN. § 14:42(D).

305. Moeller, Comment, *supra* note 248, at 637 (citing Ed Anderson, *Death for Rapists Approved, Castration Provision Rejected*, NEW ORLEANS TIMES-PICAYUNE, Apr. 27, 1995, at A2, available at 1995 WL 6071114).

306. See *supra* Part III; Packer, *supra* note 70, at 1080.

307. Packer, *supra* note 70, at 1080.

308. Karen L. Dayton, *Sexual Offenses: Change the Provisions Relating to the Offense of Rape; Change Penalty Provisions to Require Life in Prison Without Parole*, 16 GA. ST. U. L. REV. 99, 104 (1999).

state's rape statute.³⁰⁹ Members of the Georgia Senate decided to leave the death penalty language as it pertained to the rape of an adult woman in the event that the Supreme Court would reverse the *Coker* decision.³¹⁰ Thus, it appears twenty years after the *Coker* decision the legislature of Georgia remains committed to the idea that the death penalty is a fitting punishment for the crime of rape, whether it is the rape of an adult or a child.

Commentators have been feverishly pumping out articles either citing *Coker* as controlling authority for the proposition that these statutes are unconstitutional³¹¹ or attempting to differentiate the child rape statutes from *Coker* in support of the opposite viewpoint.³¹² In fact, the Louisiana statute was facially challenged by two men indicted under it,³¹³ and the Supreme Court of Louisiana upheld the constitutionality of the statute by differentiating it from *Coker*.³¹⁴ Proponents of these statutes primarily attempt to differentiate them

309. *Id.* at 103-04.

310. *Id.*; see also Yale Glazer, *Child Rapists Beware! The Death Penalty and Louisiana's Amended Aggravated Rape Statute*, 25 AM. J. CRIM. L. 79, 102 n.168 (1997). The Georgia legislature was cognizant of the *Coker* decision when it was crafting its child rape death penalty statute, but it decided "that '[i]n recognition of the serious increase [of] the evidence of these terrible sexual offenses against children and the devastating results of these offenses, society has an obligation to impose the ultimate penalty for these offenses against children.'" *Id.* (quoting S. 258, 144th Leg. Reg. Sess. (Ga. 1997)).

311. See, e.g., Diamond, *supra* note 34, at 1172; Matura, *supra* note 288, at 252; Schaaf, *supra* note 303, at 349.

312. See, e.g., Gray, *supra* note 21, at 1468-69; Michael Mello, *Executing Rapists: A Reluctant Essay on the Ethics of Legal Scholarship*, 4 WM. & MARY L. REV. 129, 135 (1997).

313. See *State v. Wilson*, 96-1392, p.1-2 (La. 12/13/96), 685 So. 2d 1063, 1064-65. The Supreme Court denied the defendants' request for review, *Bethley v. Louisiana*, 520 U.S. 1259 (1997), but it is important to note that at that time no one had been sentenced to death under the statute—these defendants were making a facial challenge to the statute.

314. See *Wilson*, 96-1392 at 4 & n.2, 685 So. 2d at 1066 & n.2 (stating that the plurality in *Coker* went to great lengths to demonstrate the opinion was only deciding the issue of whether the death penalty could be imposed for the rape of an adult woman and listing the fourteen times the opinion referred to the rape of an adult woman); *Id.* at 5-6, 685 So. 2d at 1066-67 (concluding that the state legislature determined that rape becomes more reprehensible and detestable when the victim is a child and that it is the state legislature that a court must look to for guidance with regard to society's attitudes); *Id.* (distinguishing the *Coker* Court's analysis of states' rape laws in general from states' child rape laws); see also Palmer, *supra* note 25, at 858-62 (stating that the law as a matter of course treats children differently than it treats adults and regularly punishes defendants whose victims are children more harshly than those whose victims are adults). The State of Louisiana argued that the fact the *Coker* Court failed to address the issue of child rape is proof that the Court believed there was a constitutional difference that justified punishing child rape more severely than the rape of an adult woman. Glazer, *supra* note 310, at 90 n.68. Of course the reason the Court in *Coker* may not have addressed the issue of imposing the death penalty in cases of child rape is that this question was not before the Court. *Id.* However, as Justice Powell's separate opinion in *Coker* demonstrates, the plurality did not seem too concerned about addressing

from *Coker* by claiming the rape of a child is significantly more reprehensible than the rape of an adult woman and the state has a greater duty to protect children.³¹⁵ However, the proponents' attempts to differentiate would seem to fail the plurality's subjective analysis in *Coker* where the plurality stated the death penalty "is an excessive penalty for the rapist who . . . *does not take human life.*"³¹⁶ Thus, it appears that the *Coker* plurality would allow a crime to be punished by death only if the crime resulted in a death and because "[child rape] by definition does not include the death of or even the serious injury to another person,"³¹⁷ it is doubtful the Court would have upheld a death penalty sentence for child rape.

From the preceding section's discussion, it should be quite apparent what problems arise by applying the *Coker* rationale to the Louisiana and Georgia child rape statutes.³¹⁸ *Coker* would allow the Supreme Court to substitute its will for the will of the legislatures of these two states in violation of the principles of federalism and separation of powers.³¹⁹ At the same time, this rationale repudiates either a Louisiana or Georgia jury's assessment of their community's values in relation to a convicted defendant's culpability and replaces the jury's assessment with the Court's own opinion of the defendant's culpability.³²⁰ In addition to these previously discussed faults of *Coker*, if the *Coker* rationale is applied to these two new statutes, another negative consequence of the decision appears—a barrier is established that prevents states from experimenting with their criminal sentencing statutes.³²¹

Under our federalist system, the states are not only able to, but are expected

issues that were not before the Court or about expanding the breadth of the decision past what was needed to decide the case. *See Coker v. Georgia*, 433 U.S. 584, 601 (1977) (Powell, J., concurring in judgment in part and dissenting in part).

315. Glazer, *supra* note 310, at 87. In 1992, there were over 109,000 reported cases of rape in America and over 17,000 of these victims were under the age of twelve. *See Palmer, supra* note 25, at 844. The 17,000 figure is merely an estimate and may be as much as three times greater because experts believe that child rape is underreported. *Id.* According to the U.S. Department of Justice, a sexual predator that targets children is more than twice as likely to have multiple victims as one that targets adults. *Id.* at 866. The average pedophile commits 282 illegal acts with over 150 different victims. *Id.* The statistics for all rapes show a remarkable increase of sixteen percent for the number of people arrested for rape between 1983 and 1992. *Id.* at 845; *see also* Glazer, *supra* note 310, at 87-89 (discussing the short and long term effects of rape on children); Palmer, *supra* note 25, at 864 (stating that the effects of a rape during childhood can have severe effects on the victim for years to come).

316. *Coker*, 433 U.S. at 598 (plurality opinion) (emphasis added).

317. *Id.*

318. *See id.* at 592.

319. *See supra* Part III.

320. *See supra* Part III.

321. *See FERC v. Mississippi*, 456 U.S. 742, 788-89 (1982) (O'Connor, J., concurring in judgment in part and dissenting in part).

to address problems in vastly different manners according to the time and social attitudes.³²² In this way, the states can experiment with different solutions to problems, and if one method seems to work better than others, states are able to adopt the more effective method.³²³ Justice Brandeis wrote the following about our system of state and federal sovereignties: "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."³²⁴

In fact, at times, both the states and the federal government respond to a similar problem and the states are able to solve the problem more effectively. An example from our nation's criminal justice system highlights this situation nicely. In 1972, Marvin Frankel, a federal district court judge, wrote about the problems caused by the unchecked discretion given to judges in our federal criminal system.³²⁵ Frankel proposed that the legislature adopt a purpose for criminal sanctions and then develop a guideline system that would check the discretion given to judges and help achieve the proposed legislative purpose.³²⁶ The first jurisdiction to take up Frankel's challenge was not the federal government, but the State of Minnesota by adapting sentencing guidelines.³²⁷ Furthermore, Frase concludes that the best state guideline systems work better than the federal system and "the development of sentencing guidelines remains an area of state, not federal leadership."³²⁸ Frase goes on to write that the contribution of the federal government to the development of sentencing guidelines has been primarily negative and that the "states have adopted guidelines despite the federal example, not because of it."³²⁹ Finally, the Frase article ends by stating that although no two guideline systems are the same, the Minnesota guidelines work the best, but he acknowledges that "in any case, the great diversity of guidelines systems provides a rich menu of reform options and

322. See *Harmelin v. Michigan*, 501 U.S. 957, 985 (1991). For example, Justice Scalia in his opinion in *Harmelin* points out that Massachusetts punishes sodomy with up to twenty years in prison, whereas other states do not make sodomy a crime. *Id.* at 987.

323. See *FERC v. Mississippi*, 456 U.S. at 788-89 (listing several examples of innovations pioneered by one state that were later adopted by many, if not, every other state); Merritt, *supra* note 246, at 9 & n.46.

324. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

325. See generally MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* 3-45 (1973).

326. See generally *id.* at 103-24; Richard S. Frase, *Sentencing Guidelines in Minnesota, Other States, and the Federal Courts: A Twenty-Year Retrospective*, 12 *FED. SENTENCING REP.* 69, 69 (1999).

327. Frase, *supra* note 326, at 69.

328. *Id.* at 80-81.

329. *Id.* at 81.

experience to guide sentencing reformers in other states—and in the federal system—in their efforts to design, implement, improve, and preserve guidelines systems.”³³⁰ There is no reason to believe that the federal government has a monopoly on good ideas or that the most popular method of operation is the only way it should be done.

The *Coker* opinion interferes with states’ ability to experiment because it sets up a ban on their ability to invoke the death penalty.³³¹ As discussed above, the per se ban established in *Coker* was due, in large part, to the fact that the Georgia statute struck down by the plurality was the only one of its kind in the nation, thus allowing the plurality to easily move to its subjective analysis of the statute.³³² The plurality felt comfortable in finding the death penalty to be a disproportionate punishment for the crime of raping an adult woman because only one other statute had decided to punish rape in this way.³³³ This poses a dilemma for a state wanting to experiment with the idea of punishing non-homicide crimes with the death penalty because often it will be the only state punishing that crime with death.³³⁴ As the Louisiana Supreme Court stated in *State v. Wilson*: “There is no constitutional infirmity in a state’s statute simply because that jurisdiction chose to be first,”³³⁵ but the *Coker* analysis would seem to disagree with this statement.³³⁶ Applying the *Coker* rationale, if only one or two states punish a particular crime with the death penalty, the Court only needs to use its own subjective opinion in deciding whether the statute violates the Eighth Amendment.³³⁷

It has been argued that if the Court was to reconsider its *Coker* decision, the Court should not simply count the number of states that impose the death penalty for a particular crime that does not necessarily involve a death (like child rape for example); rather, the Court should count up all the states that

330. *Id.*

331. *See, e.g.*, *Buford v. State*, 403 So. 2d 943, 951 (Fla. 1981) (citing *Coker* to strike a statute allowing the death penalty to be imposed upon someone convicted of sexual assault); *Collins v. State*, 236 S.E.2d 759, 760-61 (Ga. 1977) (citing *Coker* to strike statutes imposing the death penalty for kidnapping and armed robbery); *State v. Gardner*, 947 P.2d 630, 649-53 (Utah 1997) (citing *Coker* as requiring the court to strike down a state statute authorizing the death penalty for prisoners convicted of aggravated assault). Some commentators have argued that *Coker* prohibits states from imposing the death penalty for all non-homicide crimes. *See, e.g.*, Matura, *supra* note 288, at 262; Lisa White Shirley, *State v. Wilson: The Louisiana Supreme Court Sanctions the Death Penalty for Child Rape*, 72 TUL. L. REV. 1913, 1922 (1998).

332. *See Coker v. Georgia*, 433 U.S. 584, 595-96 (1977) (plurality opinion).

333. *See id.*

334. *See State v. Wilson*, 96-1392, p.10 (La. 12/13/96), 685 So. 2d 1063, 1069.

335. *Id.*

336. *Coker*, 433 U.S. at 595-96.

337. *See id.*

have statutes that make a non-homicide crime death penalty eligible.³³⁸ If the Court was to count all non-homicide crimes that are death penalty eligible, the Court would find that fourteen states punish twenty-one different crimes with death.³³⁹ Additionally, the Court would find several federal statutes that allow the death penalty to be imposed as punishment for crimes not necessarily involving death.³⁴⁰ Presumptively, Justice Douglas would be relieved to know that stealing a loaf of bread is not one of the non-homicide crimes eligible to be punished by death.³⁴¹

This number becomes an even stronger indicator if the Court continues to follow recent decisions where it only looked to states that authorized the death penalty to determine if a death penalty procedure or policy was generally accepted by American society.³⁴² In the plurality opinion in *Stanford*, Justice Scalia wrote that the number of states that have abolished the death penalty in its entirety are relevant to issue of whether there is a consensus against the death penalty altogether, but it is irrelevant to the question of whether the death penalty may be imposed upon defendants under the age of eighteen.³⁴³ Scalia compared the view of counting abolitionist states in this analysis to “discerning

338. Mello, *supra* note 312, at 156-61.

339. See ARK. CODE ANN. § 5-51-201 (Michie 1987) (treason); CAL. PENAL CODE § 37 (West 1999) (treason); COLO. REV. STAT. ANN. § 16-11-802 (West 2001) (class 1 felonies are death penalty eligible); COLO. REV. STAT. ANN. § 18-3-301 (West 2001) (first degree kidnapping is a class 1 felony); COLO. REV. STAT. ANN. § 18-11-101 (West 2001) (treason is a class 1 felony); FLA. STAT. ANN. § 893.135 (West 2000) (drug trafficking); GA. CODE ANN. § 16-5-44 (1999) (airplane hijacking); GA. CODE ANN. § 16-6-1 (1999) (rape); GA. CODE ANN. § 16-8-41 (1999) (armed robbery); GA. CODE ANN. § 16-11-1 (1999) (treason); IDAHO CODE § 18-4502 (Michie 1997) (first degree kidnapping); IDAHO CODE § 18-4504 (Michie 1997 & Supp. 2001) (first degree kidnapping is death penalty eligible); 720 ILL. COMP. STAT. ANN. 5/30-1 (West 1993) (treason); LA. REV. STAT. ANN. § 14:42 (West 1997 & Supp. 2002) (child rape); LA. REV. STAT. ANN. § 14:113 (West 1086) (treason); MISS. CODE ANN. § 97-7-67 (2000) (treason); MISS. CODE ANN. § 97-25-55 (2000) (aircraft piracy); MONT. CODE ANN. § 45-5-303 (2001) (aggravated kidnapping); MONT. CODE ANN. § 46-18-220 (2001) (attempted murder, aggravated assault, or aggravated kidnapping while in official detention); N.M. STAT. ANN. § 20-12-42 (Michie 1989) (espionage); S.D. CODIFIED LAWS § 22-6-1 (Michie 1998) (class A felonies are death penalty eligible); S.D. CODIFIED LAWS § 22-19-1 (Michie 1998) (kidnapping is a class A felony); UTAH CODE ANN. § 76-5-103.5 (1999 & Supp. 2001) (aggravated assault by prisoner); WASH. REV. CODE § 9.82.010 (2001) (treason).

340. See 10 U.S.C. § 890 (1994) (assaulting or willfully disobeying a superior commissioned officer); 10 U.S.C. § 894 (1994) (mutiny or sedition); 10 U.S.C. § 904 (1994) (aiding the enemy); 10 U.S.C. § 906 (1994) (spying during time of war); 10 U.S.C. § 920 (1994 & Supp. V 1999) (rape); 18 U.S.C. § 794 (1994 & Supp. V 1999) (espionage); 18 U.S.C. § 2381 (1994) (treason); 18 U.S.C. § 3591(b) (1994) (drug trafficking).

341. See *supra* note 36.

342. See *Stanford v. Kentucky*, 492 U.S. 361, 370 n.2 (1989) (plurality opinion); *Tison v. Arizona*, 481 U.S. 137, 153-54 (1987).

343. *Stanford*, 492 U.S. at 370 n.2.

a national consensus that wagering on cockfights is inhumane by counting within that consensus those States that bar all wagering."³⁴⁴ In other words, the states that have banned wagering have said nothing about whether they find wagering on cockfights particularly distasteful.

In analyzing the objective criteria from the *Gregg* and *Coker* decisions, the Court should not only take notice of the number of states that have non-homicide crimes that are death penalty eligible, but also the Court should take notice of the increase of such statutes in recent year. In 1993, six states authorized the death penalty for non-homicide crimes.³⁴⁵ Whereas, by 1997, a total of thirteen states had passed laws allowing crimes not involving death to be punished by the death penalty.³⁴⁶ The Supreme Court has stated that when a "substantial and recent legislative authorization of the death penalty" exists for a particular circumstance, it suggests that society does not reject the imposition of the death penalty under those particular circumstances.³⁴⁷

The Supreme Court has upheld a death penalty statute when only three jurisdictions had similar statutes.³⁴⁸ Florida, along with two other states, allowed the judge to override the jury's decision and impose the death penalty, even though the jury decided that the convicted defendant deserved life imprisonment.³⁴⁹ The Supreme Court found the Florida statute constitutional and stated:

The fact that a majority of jurisdictions have adopted a different practice, however, does not establish that contemporary standards of decency are offended by the jury override. The Eighth Amendment is not violated every time a State reaches a conclusion different from a majority of its sisters over how best to administer its criminal laws.³⁵⁰

Its hard to reconcile *Spaziano* with *Coker*—three jurisdictions to one—except to admit that the real factor that determines constitutionality under the Eighth Amendment is the Justices' subjective opinion on the issue.

Opponents of the non-homicide statutes argue that everyone on death row was convicted of a crime that involved a killing and that no one has been

344. *Id.*

345. NATIONAL SURVEY OF STATE LAWS 59 (Richard A. Leiter, ed., 1993); *id.* at 60-73 (listing California, Florida, Georgia, Kentucky, Mississippi, and Montana).

346. NATIONAL SURVEY OF STATE LAWS 65 (Richard A. Leiter, ed., 2d ed. 1997); *id.* at 67-81 (listing Arkansas, California, Colorado, Florida, Georgia, Idaho, Illinois, Louisiana, Mississippi, Missouri, Montana, New Mexico, and Washington).

347. *Tison v. Arizona*, 481 U.S. 137, 154 (1987).

348. *Spaziano v. Florida*, 468 U.S. 447, 463-64 (1984).

349. *Id.*

350. *Id.* at 464.

executed for a non-homicide crime since 1975.³⁵¹ While it may be true to say that no one presently on death row was convicted of a non-homicide crime, it would be incorrect to say that since *Coker* no jury has sentenced a defendant to death for a non-homicide crime.³⁵² Juries have been willing to impose the death penalty on defendants convicted of non-homicide crimes, but state supreme courts, usually citing *Coker*, refuse to allow these sentences to be carried out.³⁵³ In a facial challenge to a capital statute, the State Supreme Court of Utah relying upon *Coker* held that a statute authorizing the death penalty for aggravated assault while in prison was unconstitutional.³⁵⁴ In this case, a majority of the Utah Supreme Court believed the statute was constitutional under state law, but a majority of the court believed that *Coker* was controlling and struck down the statute.³⁵⁵

If the Court were to review the child rape statutes and if it refused to consider them as part of a larger group of non-homicide death penalty statutes, it would then have a similar set of objective facts as it did in *Coker*—two statutes authorizing the death penalty for child rape. However, if the Court decided to look at all non-homicide death penalty statutes when considering the child rape statutes, the objective analysis of *Coker* could turn out quite differently from how it did in 1977. It will all depend upon how the Justices decide to count. This situation, however, typifies one of the main problems with the Court's interpretation of the Eighth Amendment in that the meaning of the Constitution changes because a few states pass similar statutes. Thus, what was once constitutional was made unconstitutional and now may be constitutional once again. Something seems amiss when the meaning of the U.S. Constitution changes because a few states pass a new law or the Justices of the Supreme Court disagree with a state's decision to punish rapists with death.

If the Supreme Court applies the subjective analysis of *Coker* to strike down the child rape statutes,³⁵⁶ it will again be placing itself in the roles of a Super-Legislature and Super-Jury, acting as if it knows what the people of Georgia and Louisiana really want.³⁵⁷ As a result of the *Coker* decision, more state statutes could be struck down because five non-elected Justices in

351. See Schaaf, *supra* note 303, at 367; see also Diamond, *supra* note 34, at 1177.

352. A Mississippi jury unanimously voted to sentence child rapist, who did not kill, to death, but the Supreme Court of Mississippi reversed conviction on grounds not related to imposition of death penalty for crime of rape. *Leatherwood v. Mississippi*, 548 So. 2d 389, 390 (Miss. 1989).

353. *Collins v. State*, 236 S.E.2d 759 (Ga. 1977); *Leatherwood v. Mississippi*, 548 So. 2d 389 (Miss. 1989).

354. *State v. Gardner*, 947 P.2d 630, 652-53 (Utah 1997).

355. See *id.* at 653 (Zimmerman, C.J., concurring in part and concurring in judgment).

356. See *Coker v. Georgia*, 433 U.S. 584, 598 (1977) (plurality opinion).

357. See *supra* Part IV.

Washington D.C. can overrule a jury of twelve, a legislature, and a governor.³⁵⁸ Some people may not have a problem with the Supreme Court substituting its will for the will of the people³⁵⁹—the difficulty for the Court with the substitution of wills is that the Constitution, which the Justices are suppose to be upholding, does not authorize it.³⁶⁰

VI. CONCLUSION

Over two hundred ago, President George Washington warned his successors to be cautious and to confine their activities to such activities that fell within their respective constitutional spheres, so as to not encroach upon the constitutional powers of others.³⁶¹ In *Coker v. Georgia*, the Supreme Court completely disregarded this warning and the resulting decision placed the Supreme Court in the new roles of Super-Legislature and Super-Jury.³⁶² Ironically, in carrying out the “duties” for its new roles, the Court disregarded its prior precedents.³⁶³ Furthermore, in carrying out these duties, the Court disavowed all guiding principles, except the subjective opinions of the Justices.³⁶⁴ The Court, acting as a Super-Legislature and Super-Jury and insulated from public accountability, exercised its “veto power” over a democratically enacted state statute.³⁶⁵ In so doing, the Court substituted its will for the will of the people of the state.³⁶⁶

The *Coker* decision has far-reaching effects in that if it is blindly applied to newly enacted statutes, such as the capital child rape statutes, these statutes will most likely be struck down or, at the very least, their constitutionality will depend upon the subjective judgment of the Justices.³⁶⁷ A written constitution must have a more concrete meaning than one whose meaning shifts back and forth with the changing composition of the Court.³⁶⁸ Under *Coker*, a capital statute could be constitutional; then, with a change in the composition of the Court, the statute could become unconstitutional; yet again, with another change in the Court, the statute could once again become constitutional.³⁶⁹

358. See *supra* Part IV.

359. See SCALIA, *supra* note 231, at 44.

360. See *Coker*, 433 U.S. at 604 (Burger, J., dissenting).

361. See WASHINGTON’S FAREWELL ADDRESS, *supra* note 1, at 22.

362. See *Coker*, 433 U.S. at 604 (Burger, J., dissenting).

363. See *id.* at 610-11.

364. See *id.* at 619.

365. See *id.* at 604.

366. See *id.*

367. See *supra* Part V.

368. See *Coker*, 433 U.S. at 619 (Burger, J., dissenting).

369. See *supra* Part III.

Under such a system, the Eighth Amendment is left truly without meaning.

Instead of blindly applying *Coker* to the capital child rape statutes, the Supreme Court should use these statutes as an opportunity to re-evaluate *Coker's* reasoning. In so doing, the Court should consider the decision's many infirmities discussed within this Comment and then overrule *Coker v. Georgia* and return meaning to the Eighth Amendment.