0091-4169/07/9801-0001
THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY
Vol. 98, No. 1
Printed in U.S.A.

CRIMINAL LAW

GRASSROOTS DEATH SENTENCES?: THE SOCIAL MOVEMENT FOR CAPITAL CHILD RAPE LAWS

MONICA C. BELL*

Despite the Supreme Court's 1977 ruling in Coker v. Georgia *declaring use of the death penalty for rape unconstitutional, there has been a recent explosion of state statutes making the death penalty available for the rape of a child. Numerous articles have tried to discern whether using the death penalty for child rape comports with the* Coker *holding—often reaching divergent conclusions—but none has focused first on the socio-political setting that brought about these laws to inform their constitutional analysis. This Article attempts to begin contextualizing capital child rape statutes within a social movements framework. I argue that capital child rape statutes can be attributed to three movements: the popular movement to shame, fear, and isolate sex offenders; the feminist movement for harsher punishment of sexual and intra-familial violence; and the legal and political movement to punish attacks against vulnerable victims with death. Understanding these statutes in a richer way helps shed light on their potential constitutional problems.*

I. INTRODUCTION

It is widely acknowledged that politics shapes the administration and legal construction of death penalty law. Commentators on the politics of

* J.D., expected 2009, Yale Law School; M.Sc., 2006, University College Dublin; B.A., 2003, Furman University. Many thanks to Mary Pyrdum, Embry Kidd, Ebunoluwa Taiwo, and Veronica Yepez for conversations that shaped this Article. Thanks to Howard and Elizabeth Fruster, Gathea and Eddie Thompson, and Christopher and Stacey Hagood. Thanks also to the editors of the *Journal of Criminal Law & Criminology*, especially Katherine Kunz and Alex Aixalá, for very helpful substantive comments. Thanks most of all to Stephen B. Bright, an inspiring advocate and wonderful teacher, who sparked my interest in this work.

the death penalty tend to focus primarily on *electoral* politics, especially in relation to judicial independence, clemency, and prosecutorial discretion.[1] Electoral politics is often the engine behind when and how "tough" crime bills are passed, why one offender is sentenced to death while another is sentenced to life imprisonment, and why one person on death row is granted clemency and another is not. There are also non-electoral socio-political movements that shape and are shaped by death penalty law. To borrow terminology from Dean Larry Kramer's 2004 book on popular constitutionalism, constitutional doctrine on the death penalty is contoured, and perhaps controlled, by "the people themselves."[2] The engagement of non-juridical actors in interpreting and influencing constitutional law through political action has already been analyzed in affirmative action debates, the labor movement, and the women's equality movement,[3] among others, but the expansion of death penalty law through popular re-interpretation of the Eighth Amendment has too often been dismissed as a campaign tactic and, thus, underanalyzed.[4]

This Article examines one of the most politicized changes in death penalty law today—states' authorization of capital punishment for child rape—through the lens of social movements. I argue that capital child rape statutes are formed at the nexus of three movements: the popular movement to shame, fear, and isolate sex offenders; the feminist movement for harsher

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[1] *See, e.g.*, Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759, 776-92 (1995). *See generally* Jeffrey Kubik & John Moran, *Lethal Elections: Gubernatorial Politics and the Timing of Executions*, 46 J.L. & ECON. 1 (2003) (offering empirical evidence that state executions are more likely to occur within gubernatorial election cycles).

[2] LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004).

[3] *See, e.g.*, Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436 (2005); William E. Forbath, *The Shaping of the American Labor Movement*, 102 HARV. L. REV. 1111 (1989); Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297 (2001). *Cf.* Amy Kapczynski, *The Access to Knowledge Mobilization and the New Politics of Intellectual Property*, 117 YALE L.J. 804 (2008) (arguing for the expansion of law and social movements scholarship to the realm of private and international law).

[4] *See, e.g.*, Douglas A. Berman, *Addressing Capital Punishment Through Statutory Reform*, 63 OHIO ST. L.J. 1, 10-11 (2002); Michael Mello, Essay, *A Letter on a Lawyer's Life of Death*, 38 S. TEX. L. REV. 121, 203 (1997). Note that, given the increasing popularity of 1436 capital child rape statutes, I would argue that the "sea-change" in state legislatures' attitudes toward the death penalty that Carol Steiker and Jordan Steiker document has not been uninterrupted. Carol S. Steiker & Jordan M. Steiker, *Should Abolitionists Support Legislative "Reform" of the Death Penalty?*, 63 OHIO ST. L.J. 417, 417 (2002); *cf.* Jeffrey L. Kirchmeier, *Casting a Wider Net: Another Decade of Legislative Expansion of the Death Penalty in the United States*, 34 PEPP. L. REV. 1 (2006) [hereinafter Kirchmeier, *Casting a Wider Net*].

punishment of sexual and intrafamilial violence; and the legal and political movement to punish attacks against vulnerable victims with death. In Part II, I place capital child rape laws in legal and historical context. Part III explains the recent burst of capital child rape legislation by focusing on the movement toward intense community fear of sex offenders. Part IV situates capital child rape laws within the feminist movement. Part V focuses on the movement to expand death penalty eligibility. Part VI compares the context of capital child rape statutes with the context surrounding *Coker*, particularly with regard to race and mob frenzy. In conclusion, Part VII suggests that the descriptive account of this Article leads to a normative conclusion: The context of the new capital child rape statutes raises serious questions about their constitutionality. Through a social movement account, we can better discern how these statutes permit and encourage "arbitrariness, discrimination, caprice, and mistake."[5]

II. THE FIRST POST-*COKER* CAPITAL CHILD RAPE LAW IN CONTEXT

A. THE BILLY PITTMAN AND SARA CUSIMANO STORY

The story of Billy Pittman and Sara Cusimano is instructive of the socio-political setting of capital child rape laws. On July 12, 1994, Billy Pittman sought psychiatric help. He had recently parted ways his girlfriend, he had been fired from his job as a short-order cook, and his temper was getting out of control. This was not the first time he had encountered difficulty managing his emotions. According to one psychologist, childhood physical and emotional abuse, along with substance abuse starting at age seven or eight, had contributed to a "life . . . filled with problems caused by rage, anger, violence and inability to get along with other people";[6] these problems included two felony convictions and a

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[5] *See* Callins v. Collins, 510 U.S. 1141, 1144 (1994) (Blackmun, J., dissenting). The Court emphasized the importance of avoiding arbitrariness in much of its early 1970s death penalty jurisprudence, most notably in *Gregg v. Georgia*, 428 U.S. 153, 189 (1976) ("[D]iscretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."), and *Furman v. Georgia*, 408 U.S. 238 (1972).

[6] Joe Darby, *Pittman Sought Psychiatric Help*, TIMES-PICAYUNE (New Orleans), Feb. 8, 1995, at B1 (summarizing the testimony of defense psychological expert Mark Zimmerman); *see also* James Varney, *Kidnap Suspect Has a Record: Victim Listed as Stable*, TIMES-PICAYUNE (New Orleans), Aug. 21, 1994, at B1 (discussing Pittman's previous legal problems). Pittman underscored these difficulties during questioning, calling himself a "stupid a— that can't cope with his own problems." Joe Darby, *Girl, 13, Recounts Carjack Attack; Says Defendant Raped, Shot Her*, TIMES-PICAYUNE (New Orleans), Feb. 7, 1995, at A1 [hereinafter Darby, *Girl, 13, Recounts Carjack Attack*]. The prosecution's psychiatric expert expressed concern that Pittman was falsely portraying the severity of his mental

number of other arrests.[7] Pittman sought to check himself into East Jefferson Mental Health Center in Metairie, Louisiana, a suburb of New Orleans, but the hospital turned him away. No beds were available, and the center's employees concluded that Pittman was not an emergency case.[8]

On August 18, Pittman, who may have been under the influence of crack cocaine,[9] went to Time Saver convenience store in Kenner intending to steal a car, as he had allegedly done about a week earlier from another convenience store.[10] Concurrently, Jefferson Parrish schoolteacher Andree Daigre picked up her thirteen-year-old daughter, Sara Cusimano, from a friend's home and stopped by Time Saver to get gas.[11] Cusimano stayed in the car while her mother went inside to pay.[12] Pittman jumped into the car, brandishing a small automatic pistol, and sped away with Cusimano.[13] After an indeterminate amount of time, Pittman drove to an isolated field, where he raped Cusimano and shot her once in the middle of her forehead.[14] She was found the next morning in a pile of weeds alongside a remote road.[15] Cusimano, miraculously, was still alive: the bullet shattered before it could enter her brain.[16]

The Kenner community's response was swift and vigorous. People rallied around Cusimano and her family, contributing to the "Kenner Victim Trust Fund" to help cover the medical bills.[17] Fellow Jefferson Parish

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illness. Darby, *Pittman Sought Psychiatric Help*, *supra* (summarizing testimony of prosecution psychiatric expert Dr. Robert Davis).

[7] Varney, *supra* note 6.

[8] Darby, *Pittman Sought Psychiatric Help*, *supra* note 6 (summarizing the testimony of defense witness Dr. Robert Greve, director of the East Jefferson Mental Health Center). Greve testified that Pittman fell into the least serious of the four admission categories because he did not appear to be suicidal, he had not threatened suicide, and he was not a former patient in relapse. *Id.*

[9] Varney, *supra* note 6.

[10] *See* Darby, *Girl, 13, Recounts Carjack Attack*, *supra* note 6 (summarizing defendant Billy Pittman's taped statement); Joe Darby, *Witness: He Bragged of Assault*, TIMES-PICAYUNE (New Orleans), Jan. 31, 1995, at A1 (summarizing the deposition of Patricia Rhodes, an acquaintance of Pittman's).

[11] Joe Darby, *Child-Rape Victim's Mother Points Out Pittman*, TIMES-PICAYUNE (New Orleans), Feb. 4, 1995, at B1 (summarizing the testimony of prosecution witness Andree Daigre); *see also* Pamela Coyle, *Teachers Get OK to Donate Days; Some Plan to Give Sick Time to Peer*, TIMES-PICAYUNE (New Orleans), Dec. 9, 1994, at B1.

[12] Darby, *supra* note 11.

[13] *Id.*

[14] Darby, *Girl, 13, Recounts Carjack Attack*, *supra* note 6 (summarizing the testimony of Sara Cusimano).

[15] Varney, *supra* note 6.

[16] Darby, *Girl, 13, Recounts Carjack Attack*, *supra* note 6.

[17] *Donations Sought for Injured Girl*, TIMES-PICAYUNE (New Orleans), Sept. 8, 1994, at B3. Cusimano's medical bills were a major concern for the family, and it likely motivated a

School District teachers donated their unused sick leave to Daigre.[18] The community's outrage was just as palpable as its sympathy: Police Chief Nick Congemi called the event "one of the most horrible episodes . . . in Kenner's history," and he described Pittman as "one of the most despicable human beings who will ever walk this earth."[19]

Pittman pleaded not guilty by reason of insanity to attempted first-degree murder, aggravated rape, second-degree kidnapping, and carjacking. After he was convicted on all counts, some of those closest to the case expressed thinly veiled regret that Pittman's punishment could not be more severe. Cusimano, commenting on "what white trash he is, how bad he is," stated that she "just want[ed] to get a call that he was killed in jail."[20] When Judge Melvin Zeno sentenced Pittman to life plus 160 years imprisonment, he expressed hope that "the only way [Pittman] will leave prison is 'in a body bag.'"[21] The prosecutor, Walter Rothschild, was more direct: "The penalty should be death for what this man did to a 13-year-old girl."[22] If the shooting had killed Cusimano, Pittman almost certainly would have been executed.[23] Both Cusimano and Pittman were, in some sense, lucky.

Louisiana passed its capital aggravated child rape provision in 1995[24] during this period of outcries for stiffer penalties[25] and sensationalized

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civil suit filed against Time Saver by Cusimano and Daigre alleging inadequate security, despite concerns that it would inhibit the criminal investigation. *See* Bob Warren, *Abducted Girl, Mom Sue Convenience Store*, TIMES-PICAYUNE (New Orleans), Aug. 30, 1994, at B1.

[18] Coyle, *supra* note 11.

[19] Varney, *supra* note 6.

[20] Joe Darby & Chris Gray, *Victim Breaks Silence After Attacker Convicted*, TIMES-PICAYUNE (New Orleans), Feb. 9, 1995, at A1.

[21] Joe Darby, *Rapist Sentenced to Life for Trying to Kill Girl*, TIMES-PICAYUNE (New Orleans), Mar. 16, 1995, at B1 [hereinafter Darby, *Rapist Sentenced to Life*]. A state appellate court eventually reduced Pittman's sentence, however fruitlessly, to life plus 120 years. Joe Darby, *Kenner Rapist's Kidnap Charge Dropped*, TIMES-PICAYUNE (New Orleans), Oct. 4, 1996, at B2.

[22] Darby, *Rapist Sentenced to Life*, *supra* note 21.

[23] Numerous murder defendants with similar or worse backgrounds and psychological profiles than Pittman's have been executed. For example, Varnell Weeks, who suffered from paranoid schizophrenia, and Richard Allan Moran, who was severely clinically depressed, were both declared competent. *See* Godinez v. Moran, 509 U.S. 389, 391 (1993) (holding that the standard for competency to plead guilty or waive the right to counsel and competency to stand trial are the same, and ultimately resulting in the 1996 execution of Moran despite evidence of mental illness); Weeks v. Jones, 26 F.3d 1030, 1047 (11th Cir. 1994) (finding Weeks competent to be executed because he could answer questions and tell the difference between right and wrong).

[24] LA. REV. STAT. ANN. § 14:42 (2007). The legislation was introduced in the previous session but did not get through. Although the outrage generated by the Pittman-Cusimano story helped set the stage for the legislation, Pittman, ironically, would not be death-eligible under the law because Cusimano was thirteen. The statute is limited to crimes in which the victim is under twelve.

stories of child rape.[26] Louisiana is now the only state with an inmate on death row for a non-homicide crime.[27] Similar legislation has arisen in other states. Florida and Mississippi had capital child rape statutes, but their state supreme courts struck them down in the 1980s.[28] Currently, six states—Florida, Georgia, Louisiana, South Carolina, Oklahoma, and Montana—have laws authorizing the death penalty for child rape.[29] Texas,[30] Tennessee,[31] and Alabama[32] are currently considering capital child

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[25] *See, e.g.*, James Gill, Editorial, *Death for Rapists Gets Green Light, but Not Castration*, TIMES-PICAYUNE (New Orleans), Apr. 28, 1995, at B7 (claiming that Louisiana legislators had been "unmanned" because they added a death penalty provision, but not a proposed castration provision, to the aggravated rape statute); Joseph W. Spohrer, Jr., Letter to the Editor, *Administer Cane Lashes for Rape*, ADVOCATE (Baton Rouge), Feb. 1, 1995, at 6B.

[26] *See, e.g.*, *Father Admits Raping 2 Baby Girls, Cops Say*, TIMES-PICAYUNE (New Orleans), Oct. 22, 1994, at B1 (rape of a five-month-old and a twenty-month-old by their father); *Judge Metes Life Sentence in Child Rape*, ADVOCATE (Baton Rouge), Jan. 20, 1995, at 10A (rape of a seven-year-old); Tim Talley, *Man Gets 75 Years for Sexual Assaults on Girls, 5, 3*, ADVOCATE (Baton Rouge), May 27, 1995, at 2B; Rebecca Theim, *Terrytown Man Found Guilty of Kidnapping, Molesting Tot*, TIMES-PICAYUNE (New Orleans), June 15, 1994, at B1 (rape of a four-year-old). Unsettling child rape stories from other states also appeared in local papers. *See, e.g.*, Marla Williams, *Circle of Pedophile Families Uncovered: 50 Children Used for Sex by Parents*, TIMES-PICAYUNE (New Orleans), June 18, 1995, at A22, *originally printed as* Marla Williams & Dee Norton, *The Unraveling of a Monstrous Secret*, SEATTLE TIMES, June 8, 1995, at A1.

[27] Dennis Powell, *Attorneys Ask Court to Declare Death Penalty "Cruel and Unusual" Punishment for Child Rapist: Louisiana Man Is Only Inmate on Death Row for a Nonhomicide Offense*, ABC NEWS, http://abcnews.go.com/TheLaw/SupremeCourt/story?id=3586601&page=1; *see also infra* text accompanying notes 69-78.

[28] *See* Buford v. State, 403 So. 2d 943 (Fla. 1981); Leatherwood v. State, 548 So. 2d 389 (Miss. 1989). For more information on how the Florida Supreme Court struck down Florida's capital child rape statute, see Adam Liptak, *Louisiana Sentence Renews Debate on the Death Penalty*, N.Y. TIMES, Aug. 31, 2003. Currently, Florida's default penalty for "capital sexual battery" is life imprisonment. FLA. STAT. ANN. §§ 794.011(2)(a), 775.082(2), 921.141(1) (West Supp. 2007).

[29] FLA. STAT. ANN. § 794.011(2)(a); GA. CODE ANN. § 16-6-1(a)-(b) (2001); LA. REV. STAT. ANN. § 14:42 (Supp. 2006); MONT. CODE ANN. 45-5-503(3)(c)(1) (2005); OKLA. STAT. ANN. tit. 10 § 7115.I (West Supp. 2007); S.C. CODE. ANN. § 16-3-655 (Supp. 2006) (limiting application to repeat offenders). *Coker v. Georgia* struck down Georgia's law. *See* 433 U.S. 584 (1977). Georgia legislators attempted to pass new capital child rape legislation in 1997 and 1999, but they were defeated both times. H.B. 116, 145th Gen. Assem., Reg. Sess. (Ga. 1999); H.B. 801, 144th Gen. Assem., Reg. Sess. (Ga. 1997).

[30] H.B. 8, 80th Leg., Reg. Sess. (Tex. 2007) (limiting application to death for second-time offenders). The leader of the Texas movement to toughen laws on child predators is new Lt. Gov. David Dewhurst who, at his inauguration, proclaimed in his discussion of Jessica's Law, "There's tough. And then there's Texas tough." David Dewhurst, Lieutenant Governor of Texas, Inaugural Address (Jan. 16, 2007), *available at* http://www.ltgov.state.tx.us (follow "Speeches" hyperlink; then follow "2007 Texas Inauguration Address" hyperlink). His stance has earned the support of *America's Most Wanted* producer John Walsh and Fox News host Bill O'Reilly, though Walsh is hesitant to

rape legislation. Several states, including Utah, Mississippi, California, Massachusetts, Pennsylvania, and possibly others, have considered but not passed capital child rape statutes.[33] It is uncertain whether these statutes would survive Eighth Amendment scrutiny.

B. THE LEGAL HISTORY OF CAPITAL CHILD RAPE LAWS

Capital child rape laws, though spurred by stories like Sara Cusimano's and resultant community outrage, rest upon a more nuanced legal history. Part II.B elaborates the legal history of capital child rape law through first examining *Coker v. Georgia*, the 1977 Supreme Court case that barred capital rape statutes.[34] I then examine how state courts and legal scholars have interpreted the *Coker* ruling.

1. Coker v. Georgia

In 1977's *Coker v. Georgia*, the Supreme Court struck down a Georgia law that made the death penalty available for the rape of an adult woman, finding the punishment "grossly disproportionate and excessive"[35] and therefore in violation of the Eighth Amendment. Erlich Anthony Coker, the petitioner, was serving a prison sentence for rape, murder, kidnapping, and

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support the death penalty provision. Hilary Hylton, *Death Penalty for Child Molesters?*, TIME, May 2, 2007, *available at* http://www.time.com/time/nation/article/0,8599,1616890,00.html. The bill has passed the Texas House and Senate.

[31] S.B. 22, 105th Gen. Assem., Reg. Sess. (Tenn. 2007); *see also* Beverly A. Carroll, *Bill Would Add Death Penalty for Child Rape*, CHATTANOOGA TIMES FREE PRESS, Jan. 13, 2007. The Tennessee statute may lose steam this session because Senator Doug Jackson, the bill's chief sponsor, has recently sponsored legislation calling for an examination of the state's entire death penalty, concerned that innocent people are being executed. Brian Lazenby, *Full Exam of Death Penalty Pushed*, CHATTANOOGA TIMES FREE PRESS, Apr. 16, 2007, at A1.

[32] H.B. 335, 2007 Reg. Sess. (Ala. 2007); *see, e.g.*, Eric Velasco, *Bill Seeks Death for Molestation*, BIRMINGHAM NEWS, Apr. 9, 2007, at 1A.

[33] *See* A.B. 35, 1999-2000 Reg. Sess. (Cal. 1999); H.B. 558, 1997 Reg. Sess. (Miss. 1997); *cf.* H.B. 86, 2007 Gen. Leg. Sess. (Utah 2007); Megan O'Matz, *Pa. House GOP Chiefs Eye Death Penalty for Sex Crimes*, MORNING CALL (Allentown, Pa.), Jan. 28. 1997, at A1. Seventy-five percent of Pennsylvanians polled while the bill was under consideration supported death for sex offenders. *See* Robert C. Sandl, Comment, *Wider Death Penalty Is Dangerous*, MORNING CALL (Allentown, Pa.), Feb. 7, 1997, at A14.

[34] 433 U.S. 584 (1977).

[35] *Id.* at 597. Only a plurality, Justices White, Stewart, Blackmun, and Stevens, agreed that capital punishment is generally constitutionally permissible, but using it as punishment for the rape of an adult woman is always unconstitutional. Justices Brennan and Marshall wrote separately to state that all capital punishment is unconstitutional; Justice Powell wrote separately to clarify that not all laws allowing the death penalty in rape cases are unconstitutional per se. It is also worth noting that the "adult woman" in *Coker* was sixteen years old. *Id.* at 605 (Burger, C.J., dissenting).

aggravated assault. Coker escaped from prison and entered the home of Allen and Elnita Carter, where he allegedly tied up and robbed Allen and raped and kidnapped Elnita. In the trial's guilt phase, a jury rejected Coker's insanity plea and found him guilty of escape, armed robbery, motor vehicle theft, kidnapping, and rape. In the penalty phase, a jury sentenced Coker to death under section 26-2001 of the Georgia Code Annotated,[36] which stipulated that "[a] person convicted of rape shall be punished by death or by imprisonment for life, or by imprisonment for not less than one nor more than 20 years." The jury considered as aggravating factors his prior conviction of a capital felony and the fact that the rape was committed in the course of another capital felony, armed robbery. The petitioner was sentenced for committing the rape of an "adult woman."

The Court's Eighth Amendment analysis centered around the concept of proportionality, which originated in *Weems v. United States*'s "precept of justice that punishment for crime should be graduated and proportioned to [the] offense."[37] The Court's plurality opinion by Justice White and joined by Justices Stewart, Blackmun, and Stevens used "guidance in history and from the objective evidence of the country's present judgment,"[38] such as states' traditional approach toward death penalty availability for rape, the behavior of sentencing juries, and the number of states that allowed the death penalty for rape. At the time, Georgia was the only state that made the death penalty available for rape, and the Court pointed out that at no point in history has a majority of states permitted death sentencing for rape.[39] Moreover, sentencing juries rarely imposed the death penalty for rape, doing so in only six of sixty-three cases that reached the state supreme court level. The Georgia Supreme Court overturned one of those,

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[36] GA. CODE ANN. § 26-2001 (1972).

[37] 217 U.S. 349, 367 (1910); *see also* Shawn E. Fields, Note, *Constitutional Comparativism and the Eighth Amendment: How a Flawed Proportionality Requirement Can Benefit from Foreign Law*, 86 B.U. L. REV. 963, 973 (2006). The most enduring legacy of *Coker* has been its application of the proportionality test in the death penalty context. The Court again applied the proportionality principle in *Enmund v. Florida*, 458 U.S. 782, 797 (1982), to find that capital punishment is disproportionate in cases where a perpetrator "does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed." The Court also employed proportionality review in *Atkins v. Virginia*, 536 U.S. 304, 311-13 (2002), which barred the execution of the mentally retarded, and *Roper v. Simmons*, 543 U.S. 551, 560-61 (2005), which ruled that death sentences for those under eighteen are cruel and unusual. Since *Coker*, various courts and Justices have debated whether the Eighth Amendment imposes a proportionality requirement for all criminal cases, not just death penalty cases. Justice Scalia, in particular, has explicitly rejected proportionality analysis. *See, e.g.*, Harmelin v. Michigan, 501 U.S. 957, 965 (1991) ("[T]he Eighth Amendment contains no proportionality guarantee.").

[38] *Coker*, 433 U.S. at 593 (plurality opinion).

[39] *Id.*

underscoring the rare implementation of death sentences in rape cases. The Court also examined a subjective component in its review, the effectiveness of death as a deterrent for rape.[40]

Justices Brennan and Marshall concurred in the judgment, citing their overall opposition to the death penalty.[41] Justice Powell concurred in part and dissented in part, arguing that, while the Court was correct in its determination that the death penalty is a disproportionate penalty in this case, the Court overreached by concluding that death is a disproportionate penalty in adult rape cases per se. Justice Powell was not ready to establish that death is a disproportionate penalty even for aggravated rape.[42] Finally, Chief Justice Burger, joined by Justice Rehnquist, dissented on several grounds. First, there was a federalism problem—the Chief Justice maintained that this rule encroached upon legislatures' ability to punish recidivists. Second, he argued that rape is a sufficiently heinous crime that causes enough damage that the death penalty could be justified. Third, he disagreed with the plurality's assessment of death's deterrence value in rape cases.[43]

Commentators disagree on whether the *Coker* ruling precluded using the death penalty for child rape. The conventional wisdom has been that the death penalty is barred in all non-homicide cases, but neither the language nor the posture of the opinion is conclusive. The plurality opinion was littered with statements from which one would infer that it intended to declare unconstitutional *all* capital punishment for non-homicidal rapes. The opinion straightforwardly states, "We have concluded that a sentence of death is grossly disproportionate and excessive punishment for the crime of rape and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment."[44] Even more convincingly, Justice Powell's concurrence assumes that the ruling applies to all rape and, in fact, he dissented in part on that basis: "[T]he plurality draws a bright line between murder and *all* rapes—regardless of the degree of brutality of the rape or the effect upon the victim."[45]

The countervailing opinion, however, is that the Court's frequent use of the phrase "the rape of an adult woman" was an effort to limit its holding. The petitioner's brief introduced this language, even though it was

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[40] For further explanation of the two-part proportionality test, see, for example, Ryan Norwood, *None Dare Call It Treason: The Constitutionality of the Death Penalty for Peacetime Espionage*, 87 CORNELL L. REV. 820, 827-33 (2002).

[41] *Coker*, 433 U.S. at 600 (Brennan, J., concurring; Marshall, J., concurring).

[42] *Id.* at 601.

[43] *Id.* at 604 (Burger, C.J., dissenting).

[44] *Id.* at 592 (plurality opinion).

[45] *Id.* at 603 (Powell, J., concurring) (emphasis added).

not in the statute,[46] and the Court embraced this age-based distinction.[47] The opinion thus opened a loophole in the holding, leaving available the possibility that the death penalty for more "extreme" rapes, like child rape or other aggravated rape, might not violate the Eighth Amendment. The federal death penalty law, which was expanded in 1994, permits death sentences in non-homicide cases like treason,[48] espionage,[49] large-scale drug trafficking,[50] and participation in the attempted murder of a juror, witness, or any other official involved in a case concerning a "Continuing Criminal Enterprise" (such as the Mafia).[51] A federal law passed in the 1990s may be a poor indicator of what the Court meant in the 1970s, but the availability of the death penalty through this statute may bolster the argument of those who do not find that *Coker* means that the death penalty is cruel and unusual in virtually all non-homicide cases. Legal scholars and others have identified the loophole that the "adult woman" language left in *Coker*. Eugene Volokh summarizes the debate surrounding non-homicide capital punishment most effectively:

> It is possible that the death penalty may still be available for child rape and for very serious national security crimes such as treason and espionage. But the Court must have understood *Coker* as practically limiting the death penalty almost exclusively to murder prosecutions, which is how it has indeed been applied in practice.[52]

Questions about constitutionality chilled deliberations in some states but intensified them in others. In Utah, police officer and Republican state representative Carl Wimmer had originally pushed in committee to make repeat child molestation punishable by death in his state's version of Jessica's Law.[53] However, he abandoned that effort because of concerns that the law would violate the Eighth Amendment.[54] Conversely, in South Carolina, the legislature heard testimony from the State Attorney General

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[46] Brief of Petitioner at 21, Coker v. Georgia, 433 U.S. 584, No. 75-5444 (1977) (No. 75-5444).

[47] *Coker*, 433 U.S. at 592-94 (plurality opinion); *see also id.* at 614-15 (Burger, C.J. and Rehnquist, J., dissenting).

[48] 18 U.S.C. § 2381 (2000).

[49] 18 U.S.C. § 794 (2000).

[50] 18 U.S.C. § 3591(b) (2000).

[51] 18 U.S.C. § 3591(b)(2).

[52] Eugene Volokh, *Crime Severity and Constitutional Line-Drawing*, 90 VA. L. REV. 1957, 1968 (2004).

[53] *See infra* Part III.

[54] Matt Canham, *Stern Sex-Offenders Penalty Bill Advances*, SALT LAKE TRIB., Feb. 3, 2007, at B6 ("Wimmer . . . wanted prosecutors to be able to seek the death penalty for repeat child molesters. Concerns about the constitutionality of such a move forced him to take a step back."). The Utah Attorney General nicknamed the bill that advanced to the full House, which made repeat child sex offenders eligible for life sentences, the "let them rot" bill. *Id.*

seeking to quell the debates about constitutionality that unsettled some legislators. The attorney general assured members that the law would not be overturned because Americans are more anti-crime and pro-death penalty than they were during the *Coker* era.[55] At least one commentator in a local op-ed noted that some supporters of the South Carolina statute were seeking a hearing before the Supreme Court; these activists hoped to capitalize on the *Coker* loophole because they believed the Supreme Court had become sufficiently conservative to uphold capital punishment for child rape.[56] Legislatures which pass these statutes are not merely responding to public opinion, but are on a deeper level asserting a popular constitutional conception that death is a suitable punishment for some types of rape. They are indirectly embracing Justice Powell's concurrence in *Coker*.

2. The Coker *Loophole in State Courts*

To date, the Court has not addressed the *Coker* loophole. *Bethley v. Louisiana* asked the Court to do so, but the Court denied certiorari.[57] *Bethley* was an appeal to *State v. Wilson*, the first case to challenge the Louisiana law.[58] Defendant Anthony Wilson was charged with raping a five-year-old girl; defendant Patrick Dewayne Bethley allegedly raped three girls, aged five, seven, and nine.[59] One of Bethley's alleged victims was his daughter, and, even more disturbingly, Bethley was HIV-positive.[60] The State contended Bethley was aware of his status when he raped the girls.[61] Wilson and Bethley were both indicted for aggravated rape but successfully sought to quash the indictment, arguing that capital punishment for aggravated rape is unconstitutional. The State appealed both cases.

The Louisiana Supreme Court upheld the capital rape statute. It used the proportionality analysis of *Coker*, but concluded that because "[r]ape of a child less than twelve years of age is like no other crime" and since "[c]hildren are a class of people that need special protection," child rape is

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[55] Schuyler Kropf, *Senate OKs Death for Repeat Child-Rape Offenders*, POST & COURIER (Charleston, S.C.), Mar. 30, 2006, at B1.

[56] Op-Ed., *Punishing Child Molesters*, ROCK HILL HERALD, Mar. 29, 2006, at 6A.

[57] 520 U.S. 1259 (1997). The Louisiana court ruled 3-2, and Chief Justice Calogero faced a nasty reelection campaign two years later as a result. *See* Joe Gyan Jr., *Campaign Stance, TV Ads Prompt Lawsuit*, ADVOCATE (Baton Rouge), Oct. 7, 1998, at 5B.

[58] 685 So. 2d 1063 (La. 1996).

[59] Rhonda Bell, *Rape Suspect Not Ready for Trial*, TIMES-PICAYUNE (New Orleans), Dec. 16, 1999, at B1.

[60] *Id.*

[61] Patrick Bethley ultimately struck a plea agreement and was sentenced to life imprisonment. *Id.* Anthony Wilson is mentally retarded, with an IQ of 61. It is unclear whether he was ever able to stand trial. *Id.* In light of *Atkins*, Wilson is now ineligible for the death penalty.

sufficiently heinous that a death sentence is proportionate punishment.[62] The Louisiana court also addressed the broader question of whether murder is in all instances a more serious crime that even adult rape, maintaining that "[i]n some cases women have preferred death to being raped or have preferred not to continue living after being raped."[63] The court also focused on the public injury that a child rapist inflicts. The *Wilson* court noted that the *Coker* Court also recognized both the importance of injury to the victim and public harm, and concluded that child rape may be sufficiently injurious to society that death is a warranted penalty.[64] The *Wilson* court did not specifically enumerate the harms done to society when a child is raped, but it relied upon them generally in its analysis.

When the Supreme Court denied Bethley's petition for certiorari, Justice Stevens, joined by Justices Ginsburg and Breyer, issued an addendum to reassert that the Court's decision to deny certiorari does not constitute a ruling on the merits.[65] Justice Stevens posited that there might be a jurisdictional defect in the case: because Bethley had not been sentenced, or even convicted of a crime, the state court's decision technically may not have been "final."[66] Perhaps these three Justices will grant certiorari in a case where defendants have actually been convicted of child rape and sentenced to death.

The controversy over capital child rape statutes largely fell by the wayside for several years. Then, in 2003, Patrick Kennedy was convicted of the 1998 rape of his eight-year-old stepdaughter. The girl was raped so brutally that an expert witness testified that her injuries were the most extensive that he had ever seen.[67] Before calling an ambulance to care for her, Kennedy telephoned a friend to ask him how to get blood stains out of a white carpet, professing that his stepdaughter "became a young lady."[68] Initially the girl claimed that the perpetrators were two teenage boys who

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[62] *Wilson*, 685 So. 2d at 1067; *see also* LA. CODE CRIM. PROC. ANN. art. 905.5 (2007). For further discussion, see, for example, Jennifer L. Cordle, Note, State v. Wilson: *Social Discontent, Retribution, and the Constitutionality of Capital Punishment for Raping a Child*, 27 CAP. U. L. REV. 135 (1998), and Annaliese Flynn Fleming, Comment, *Louisiana's Newest Capital Crime: The Death Penalty for Child Rape*, 89 J. CRIM. L. & CRIMINOLOGY 717 (1999).

[63] *Wilson*, 685 So. 2d at 1066 n.3.

[64] *Id.* at 1070.

[65] Bethley v. Louisiana, 520 U.S. 1259, 1259 (1997).

[66] *Id.* Justice Stevens implied that once a final judgment was rendered pursuant to Louisiana's revamped section 14:42 (which has happened in Patrick Kennedy's case, see *infra* text accompanying notes 73-79), these three Justices might be more inclined to grant certiorari.

[67] State v. Kennedy, 957 So. 2d 757, 761 (La. 2007).

[68] *Id.*

attacked her when she was selling Girl Scout cookies in her garage, but the physical evidence belied this claim. Once the girl was removed from her mother's care, she accused Kennedy.[69]

Kennedy became the only person in the United States on death row who had not been convicted of murder. His sentencing happened only a couple of years before the flurry to adopt Jessica's Law. *Kennedy* presented an ideal opportunity to re-litigate the issues first raised in *Wilson*. On May 22, 2007, the Louisiana Supreme Court again upheld the state's capital child rape law in *State v. Kennedy*.[70] The court's analysis was extensive.[71] The court reaffirmed the argument it made in *Wilson* based on the *Coker* proportionality test, then moved to an analysis of the statute in light of the new jurisprudence arising from *Atkins v. Virginia* and *Roper v. Simmons*, which uses an objective "evolving standards of decency" framework.[72] The Louisiana court conducted a survey of the thirty-eight states that have the death penalty and found that fourteen states permit death for non-homicide crimes. In addition to the states that permit capital punishment for child rape, five additional states permit death for crimes against the government, such as treason, espionage, and aircraft piracy.[73] Four states have capital aggravated kidnapping laws.[74] The court used the existence of several non-homicide capital crimes to argue that no national consensus exists that the death penalty for child rape is cruel and unusual.[75] Immediately after the court handed down the decision, attorney Jelpi Picou of Louisiana's Capital Appeals Project announced plans to request a rehearing and, if denied,

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[69] *Id.* at 767.

[70] *Id.* at 772-93. In addition to the constitutional claim, defense attorneys also raised claims about procedural errors and race bias in jury foreman selection because Kennedy is African-American. The defense unsuccessfully sought to overturn Kennedy's conviction, not just his death sentence. For more information about the oral arguments in *Kennedy*, see Paul Purpura, *Child Rapist Contests Death Penalty*, TIMES-PICAYUNE (New Orleans), Mar. 1, 2007, at 1. For a description of some of the more disturbing information the jury heard, see Billy Sothern, *A Cruel and Unusual Punishment*, NATION, Apr. 24, 2007, *available at* http://www.thenation.com/ doc/20070507/sothern.

[71] Compared to the *Wilson* opinion, the *Kennedy* opinion was probably so significantly detailed because there were numerous doctrinal omissions in the former, which was quite brief and unspecific. The court needed to provide a much more comprehensive analysis in order to increase the likelihood the capital child rape law would be upheld.

[72] For a richer analysis of the *Roper-Atkins* framework and capital child rape statutes, see Joanna H. D'Avella, Note, *Death Row for Child Rape?: Cruel and Unusual Punishment Under the* Roper-Atkins *"Evolving Standards of Decency" Framework*, 92 CORNELL L. REV. 129, 144-55 (2006).

[73] *Kennedy*, 957 So. 2d at 793 (listing these five states as Arkansas, California, Mississippi, New Mexico, and Washington).

[74] *Id.* (listing these states as Colorado, Idaho, Montana, and South Dakota).

[75] *Id.* at 792.

petition the U.S. Supreme Court for certiorari.[76] The recent upswing in capital child rape statutes and the procedural posture of this case may influence the Court to hear this case if petitioned.

3. Scholarly Responses to Capital Child Rape Laws and the Coker *Loophole*

Thus far, academic conversation about capital child rape statutes has focused mainly on constitutional doctrinal concerns.[77] The vast majority of scholarship has focused upon the proportionality issues raised in *Coker* and pointed to defects in the *Wilson* court's analysis; most commentators object to the interpretation of *Coker*'s "rape of an adult woman" language as a limitation on its application to capital child rape laws. One author argues that the *Wilson* court misapplied proportionality review, leaving out a crucial objective factor. In his view, the State failed to compare adequately the punishments for other crimes in Louisiana with the harshness of the punishment for child rape.[78] The author also found that the State failed to consider the behavior of sentencing juries, which chose not to sentence child rapists to death in 90% of cases.[79] Another author has criticized, among other issues, the *Wilson* court's analysis about arbitrariness and capriciousness. The *Wilson* court ignored that the list of mitigating factors used to limit which crimes are death-eligible was written to apply to murder crimes, meaning that juries would be ill-equipped to discern which factors should advise against death sentences in child rape cases.[80] Others focus less on critiques of *Wilson*'s reasoning per se and instead argue more broadly that only homicide is sufficiently severe to warrant the penalty of death.[81]

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[76] *Louisiana Supreme Court: Death Penalty OK for Child Rapist*, ASSOC. PRESS, May 23, 2007, *available at* http://www.foxnews.com/story/0,2933,274954,00.html.

[77] *See, e.g.*, Chandler Bailey, *Death Is Different, Even on the Bayou: The Disproportionality of Crime and Punishment in Louisiana's Capital Child Rape Statute*, 55 WASH. & LEE L. REV. 1335 (1998); Yale Glazer, *Child Rapists Beware! The Death Penalty and Louisiana's Amended Aggravated Rape Statute*, 25 AM. J. CRIM. L. 79 (1997); Pamela J. Lormand, *Proportionate Sentencing for Rape of a Minor: The Death Penalty Dilemma*, 73 TUL. L. REV. 981 (1999).

[78] Bailey, *supra* note 77, at 1366.

[79] *Id.* at 1367.

[80] Lormand, *supra* note 77, at 1007-08. For further discussion of the role of mitigating and aggravating factors in death penalty cases, see *infra* Part IV.

[81] *See, e.g.*, Pallie Zambrano, Comment, *The Death Penalty Is Cruel and Unusual Punishment for the Crime of Rape—Even the Rape of a Child*, 39 SANTA CLARA L. REV. 1267 (1999).

The newest articles take up the "evolving standards" question through the lens of *Atkins v. Virginia*[82] and *Roper v. Simmons*,[83] which asks, among other things, whether there is a "national consensus" in support of or against punishing the worst instances of child rape with death.[84] The scholarship reaches varied conclusions. One author contends that because only twelve of the thirty-eight death penalty states permit capital punishment for non-homicide crimes, there is a national consensus against all non-homicide death sentences, including those in reference to child rape.[85] Another author takes an opposite position, maintaining that capital child rape statutes should be held constitutional.[86] She looks to the "consistency of the direction of the trend," not merely the number of states with capital child rape laws, as evidence that there is a burgeoning national consensus that child rape is serious enough to warrant the penalty of death.[87] However, neither author engages with capital child rape statutes outside of the narrow question of whether enough legislatures have passed capital child rape laws to constitute a national consensus under the Court's definition. These articles do not explore the circumstances surrounding these statutes or the popular movements that have shaped how legislatures have behaved. Finally, one author takes a different approach, critically analyzing these statutes through a feminist lens by dissecting the language and approach of predominantly male judges, scholars, and legislators who advocate for capital child rape laws, concluding that their approach tends to reinforce patriarchal ideas.[88]

Scholarly discussion of these statutes has largely neglected the social and political context in which these statutes are being developed, and this context is an important piece of understanding how these statutes interact with constitutional law. A fairly recent trend in legal scholarship has been expanding the rote study of pure doctrine to examine the social context of legislation, because it is society—legislators, grassroots activists, popular culture—that shapes our legislative process and constitutional understandings. Often, it is not the Court's power to "say what the law is"

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[82] 536 U.S. 304 (2002) (declaring unconstitutional execution of the mentally retarded).

[83] 543 U.S. 551 (2005) (declaring unconstitutional use of the death penalty in cases where the convicted person is a juvenile at the time of the crime).

[84] The Court elaborated the current "evolving standards of decency" framework in *Atkins* and *Roper*. The phrase was originally employed by Justice Warren in *Trop v. Dulles*, 356 U.S. 86, 101 (1958). *See* D'Avella, *supra* note 72; Ashley M. Kearns, Note, *South Carolina's Evolving Standards of Decency*, 58 S.C. L. REV. 509 (2007).

[85] D'Avella, *supra* note 72, at 149-52.

[86] Kearns, *supra* note 84, at 511.

[87] *Id.* at 521-22.

[88] *See* Corey Rayburn, *Better Dead Than Raped?: The Patriarchal Rhetoric Driving Capital Rape Statutes*, 78 ST. JOHN'S L. REV. 1119, 1143-48 (2004).

that determines the interpretation of the Constitution; it is the citizens' interaction with legislatures and administrative agencies. As Reva Siegel writes, "[C]onstitutional culture enables movements to negotiate the law/politics distinction and propose (or resist) alternative understandings of the constitutional tradition."[89] In the case of capital child rape statutes, activists and lawmakers are, through participating in a social movement focusing on child molestation, proposing an alternative understanding of *Coker* that contradicts the conventional view that the case ruled out death penalty for all rape cases.

III. A REAWAKENING OF OUTRAGE: TOWARD "JESSICA'S LAW"

In *Wilson*, the Louisiana Supreme Court suggested that other states would soon follow Louisiana's lead by passing capital child rape provisions.[90] This prediction did not materialize until 2005, although Georgia attempted to pass a similar statute in 1997, which was ultimately defeated in the State Senate.[91] In February 2005, John Evander Couey kidnapped, raped, and murdered nine-year-old Jessica Lunsford of Homosassa, Florida.[92] The story enraptured the country,[93] much like stories of other young white female victims such as Megan Kanka and Polly Klaas.[94] Lunsford's death, similar to Kanka's, led to a national firestorm

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[89] Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA*, 94 CAL. L. REV. 1323, 1329 (2006). For a greater understanding of the popular constitutionalism or social movement-oriented legal theories, see LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004); Larry D. Kramer, *Popular Constitutionalism, Circa 2004*, 92 CAL. L. REV. 959 (2004); Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1 (2003); and Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408 (2007).

[90] State v. Wilson, 685 So. 2d 1063, 1068 (La. 1996) (suggesting "the beginning of a trend and public opinion favoring such penalties—an evolution of a standard to deal with this heinous crime").

[91] *See* Kathy Scruggs, *Ruling on Sexual Predators*, ATLANTA J. & CONST., June 28, 1997, at 5D.

[92] Couey confessed. *See Suspect in 9-year-old's Death Booked into Florida Jail*, CNN.COM, http://www.cnn.com/2005/US/03/19/missing.girl. Sheriff Jeff Dawsy called Couey "a piece of trash." *Id.*

[93] A LexisNexis search of the database "News, All (English, Full Text)" shows that Jessica Lunsford's name appeared in over 2000 articles—just in 2005.

[94] Seven-year-old Megan Kanka—the inspiration for "Megan's Law," Pub. L. No. 104-145, 110 Stat. 1345 (1996), which established sex offender registration in each state—was raped and murdered in 1994. Twelve-year-old Polly Klaas was abducted in 1993. For more information about Kanka, see The Megan Nicole Kanka Foundation, http://www.megannicolekankafoundation.org/ (last visited Mar. 12, 2008); for information on Klaas, see KlaasKids Foundation, *Polly's Story*, http://www.klaaskids.org/pg-pollystory.htm (last visited Mar. 12, 2008).

over the legal status of sex offenders and, ultimately, to a ubiquitous law bearing her name. Florida's then-Governor Jeb Bush signed the Jessica Lunsford Act on May 2, 2005, a fast-tracked piece of legislation that established twenty-five-year mandatory minimum sentences for offenses against children under the age of twelve and a satellite tracking system for sex offenses more generally.[95] The Jessica Marie Lunsford Foundation, led by Jessica's father, began to lobby nationwide for similar legislation.[96]

Spurred by grassroots and media activism,[97] state legislatures began to pursue their own versions of Jessica's Law. While most contained similar controls to Florida's, others were more zealous, instigated by recent local crimes. For example, shortly before the South Carolina Legislature began debating its capital child rape provision, the state's major newspapers reported that two teenaged women had been abducted, taken to an underground bunker, and raped. The defendant, Kenneth Glenn Hinson, had previously been convicted of raping another young girl. State political reporters directly linked the "dungeon rape" story to the capital child rape debate.[98] Hinson was eventually acquitted because of severe inconsistencies in the alleged victims' stories,[99] but the incident paved the way for the state's stiff version of Jessica's Law.

While Texas has not yet signed into law a capital child rape statute, the state is in the throes of an intense debate over H.B. 8 ("Texas Children First"), which after some delay has passed both the state house and senate and is now proceeding through additional conferencing.[100] Pressure from

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[95] H.B. 1877, *available at* http://election.dos.state.fl.us/laws/05laws/ch_2005-028.pdf; *see also* Richard Luscombe, *Florida's Tough Stand Against Child Molesters*, CHRISTIAN SCI. MONITOR, May 4, 2005, at 2.

[96] The Jessica Marie Lunsford Foundation, http://www.jmlfoundation.org (last visited Mar. 12, 2008).

[97] *See, e.g.*, Gil Bliss, *Milford Man Works for NH "Jessica's Law,"* UNION LEADER (Manchester, NH), July 26, 2005, at B1 (discussing a trucking company owner who planned a petition drive and rally to spur passage of Jessica's Law in New Hampshire). The father of two said that he "got to the point where [he]'d had enough and had to try and do something." *Id.* Media activism has been essential in the passage of Jessica's Law. Controversial Fox News host Bill O'Reilly has made Jessica's Law a central part of his show, launching a fifty-state campaign and encouraging viewers to start petition drives. *See* BillOReilly.com, Jessica's Law: A State-by-State Report Card of Child Protection Law, http://www.billoreilly.com/outragefunnels (last visited Dec. 9, 2007).

[98] John Frank, *Death Penalty for Some Molesters Ok'd*, POST & COURIER (Charleston, S.C.), June 1, 2006, at B1; Tim Smith, *High Court Called Key to Pedophile Execution*, GREENVILLE NEWS, Mar. 25, 2006, at 1A.

[99] Meg Kinnard, *Man Acquitted in "Dungeon" Rapes*, ASSOC. PRESS, Apr. 23, 2007, *available at* http://abcnews.go.com/US/wireStory?id=3067843.

[100] *See supra* note 30 and accompanying text; Emily Ramshaw, *Bill on Sex Offenders Delayed: Concerns Indicated over Measure That Would Allow Death Penalty*, DALLAS MORNING NEWS, Mar. 1, 2007, at 6A. The Senate version is S.B. 68. For discussion of the

national media figure Bill O'Reilly's referring to Texas's sex offender sentencing laws as "soft" convinced Governor Rick Perry to pursue a capital child rape law vigorously.[101]

The national frenzy surrounding sexual molestation is not new, nor is it limited to pockets of community outrage. Former Attorney General Alberto Gonzales has referred to an American "epidemic" of child sexual exploitation, referring not only to child rape itself, but also child pornography.[102] Pop culture has also spurred more widespread concern about sex offenders. For example, Dateline NBC's popular primetime television show *To Catch a Predator* features hidden camera investigations of "potential child predators," lured to various locations by investigators posing as children in Internet chat rooms. According to NBC, the stings have exposed over two hundred "potential child predators."[103] *To Catch a Predator*'s host, Chris Hansen, has become a folk hero of sorts and has even authored a successful book, *To Catch a Predator: Protecting Your Kids from Enemies Already in Your Home.*[104]

There are more serious, legal responses to fear of sex offenders. Post-release sex offender residency restrictions, which usually bar sex offenders from living within a certain radius of a school, a day care center, a park, a library, or a bus stop, have presented extreme challenges to municipalities. Thirteen states, including Alabama, Arkansas, California, Georgia, Iowa, Kentucky, Louisiana, Oklahoma, Oregon, and Tennessee, have passed such statutes over the past five years, and there are also a number of counties and municipalities with similar ordinances.[105] As an example of some of the

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political debate over "Texas Children First," see, for example, Polly Ross Hughes, *Death Penalty for Sex Offenders May Be Hard Sell*, HOUSTON CHRON., Mar. 10, 2007, at B1, and R.G. Ratcliffe, *Tougher Predator Law Gets Big Push*, HOUSTON CHRON., Jan. 14, 2007, at B1.

[101] *See supra* note 30. O'Reilly labeled thirteen states "soft on child offenders," including, ironically, Texas. Governor Perry objected to this label and appeared on O'Reilly's show to defend his state. He remarked, "[W]e've been called a lot of things in Texas. Soft on crime is not one of them." O'Reilly responded that the sentencing laws were not sufficiently stringent. *The O'Reilly Factor* (Fox News television broadcast July 12, 2005).

[102] Alberto Gonzales, Attorney General of the United States, Address to Employees at the National Center for Missing and Exploited Children (Apr. 20, 2006), *available at* http://www.usdoj.gov/ag/speeches/2006/ag_speech_ 060420.html.

[103] *See Online Enemies Already in Your Home*, MSNBC.COM, Mar. 14, 2007, http://www.msnbc.msn.com/id/ 17584928.

[104] CHRIS HANSEN, TO CATCH A PREDATOR: PROTECTING YOUR KIDS FROM ENEMIES ALREADY IN YOUR HOME (2007).

[105] Caleb Durling, *Never Going Home: Does It Make Us Safer? Does It Make Sense? Sex Offenders, Residency Restrictions, and Reforming Risk Management Law*, 97 J. CRIM. L. & CRIMINOLOGY 317, 322-25 (2006).

consequences of this explosion of ordinances, *The New York Times* has highlighted sex offenders with no other choice but to live under a bridge in Miami.[106]

States' consideration of lifetime sentences and the death penalty is understandable in light of these and other post-release challenges for sex offender reentry. For example, Oklahoma passed its capital child rape statute after the attack of one of five residents in a group home for sex offenders by a group of neighborhood men.[107] The owner of the house reported that it took months for the residents to find a location for the group home due to ordinances that require group homes to be a certain distance from schools.[108] The community, however, was unsympathetic: one woman, who said that she locks her children inside their house because of the group home, said that they were "the ones being punished."[109] Released sex offenders are also vulnerable to more serious cases of vigilante "justice." Perhaps no case better illustrates this than the 2006 murders of William Elliott and Joseph L. Gray, both registrants on Maine's sex offender website. A Canadian man obtained their names and addresses from the registry and murdered them both before committing suicide. Despite the risk of crime against offenders, Maine state legislators continue to support the registry.[110] Governments across the United States are struggling to discern what to do with released sex offenders, particularly those who committed offenses against a minor. One option, embodied in capital child rape statutes and life sentences without parole, is to never release them.

In addition to communities and mass culture, activists have been pressing for harsher penalties for sexual offense in ways that might prima facie justify capital child rape statutes. In particular, some iterations of feminism that focus on societal recognition of the evils of rape and domestic violence could be perversely interpreted to support these laws.

IV. FEMINISM AND LEGAL INTERVENTION IN SEXUAL VIOLENCE

One major and well-documented accomplishment of the feminist movement, and particularly the battered women's movement, has been the critique and gradual weakening of the line between the "personal" and the

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[106] Associated Press, *Sex Offenders Living Under Miami Bridge*, N.Y. TIMES, Apr. 8. 2007, at 22.

[107] Susan Hylton, *Meeting Draws Angry Neighbors*, TULSA WORLD, Apr. 14, 2006, at A1.

[108] *Id.*

[109] *Id.*

[110] Durling, *supra* note 105, at 326; *see also* John R. Ellement & Suzanne Smalley, *Sex Crime Disclosure Questioned*, BOSTON GLOBE, Apr. 18, 2006, at A1.

"political."[111] The breaking down of that distinction has enabled greater legal protection of women and children from physical and sexual violence within the home. In other words, the legal regime has moved from one that "will not invade the domestic forum or go behind the curtain"[112] to one that provides legal protection against physical spousal and child abuse, marital rape, and incest.[113] Battered women's advocates have brought about this legal change by working with unlikely allies, including conservatives. As Wayne Logan points out, domestic violence laws in particular brought activists on the Left and the Right together: "[A]lthough a 'women's issue,' they combined the appeal of the 'tough on crime' sensibility with a precept that liberals and conservatives alike could subscribe to: 'Beating women is wrong.'"[114]

The Violence Against Women Act ("VAWA")[115] is perhaps the most well-known result of feminist influence upon domestic violence policy. The National Organization for Women ("NOW") and the NOW Legal Defense Fund (now known as Legal Momentum) were key organizations calling for the passage of VAWA, and they formed and led a working group to draft and lobby for the legislation.[116] That coalition became known as the National Task Force to End Sexual and Domestic Violence Against Women, and it continues today the work it began in lobbying for VAWA.[117]

Advocates have also had incredible success in pushing for state laws and local ordinances that limit police officer and prosecutor discretion when responding to domestic violence complaints. For example, most states

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[111] *See, e.g.*, CATHARINE A. MACKINNON, FEMINISM UNMODIFIED 169 (1987); ELIZABETH PLECK, DOMESTIC TYRANNY 69-144 (1987); Cheryl Hanna, *The Paradox of Hope: The Crime and Punishment of Domestic Violence*, 39 WM. & MARY L. REV. 1505, 1514-16 (1998); Wayne A. Logan, *Criminal Law Sanctuaries*, 38 HARV. C.R.-C.L. L. REV. 321, 367 (2003); Elizabeth M. Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973, 974 (1991); *see also* Jeannie Suk, *Criminal Law Comes Home*, 116 YALE L.J. 2, 5-7, 11-12 (2006). *See generally* Deborah M. Weissman, *The Personal Is Political—and Economic: Rethinking Domestic Violence*, 2007 B.Y.U. L. REV. 387 (2007) (providing a broader discussion of the "violence as patriarchy" perspective).

[112] State v. Black, 60 N.C. (Win.) 266, 267 (1864).

[113] *See generally* ELIZABETH M. SCHNEIDER, BATTERED WOMEN & FEMINIST LAWMAKING (2001) (providing a rich explanation and analysis of feminist lawmaking with regard to intimate violence).

[114] Logan, *supra* note 111, at 374.

[115] Violence Against Women Act of 2000, Pub. L. No. 106-386, 114 Stat. 1491 (codified as amended in scattered sections of 42 U.S.C.).

[116] Press Release, National Organization for Women, Feminist Leaders Demand Passage of the Violence Against Women Act (Sept. 26, 2000) (on file at http://www.now.org/press/09-00/09-26-00-VAWA.html).

[117] Sally F. Goldfarb, *"No Civilized System of Justice": The Fate of the Violence Against Women Act*, 102 W. VA. L. REV. 499, 542-43 (2000).

require the police to arrest suspected batterers whenever there is probable cause.[118] Some feminist advocates, citing instances in which police officers failed to remove a batterer from the home because of socially constructed ideas about the acceptability of wife-beating or arrested both parties because they could not ascertain which party was the aggressor, rallied behind these laws. A second example is the "no-drop" policy in some cities and states, which establishes that prosecutors may not dismiss a domestic violence case because the victim changes her mind about pressing charges.[119] Feminist activism was essential in forming these laws.[120] While some feminists assert that these policies are problematic because they impinge upon women's freedom to decide whether to prosecute,[121] many feminist domestic violence activists and scholars have expressed support for these laws.[122] Feminist advocacy has brought about a wide range of policy changes on domestic violence prosecution, ranging from the broad and non-discretionary use of protective orders, to specialized domestic violence courts, to new federal evidentiary rules.[123]

Many feminist advocates who work within the battered women's and anti-rape movements frequently argue that the state still does not do enough to express societal outrage at crimes against women and children, thereby

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[118] Suk, *supra* note 111, at 12 n.26.

[119] *See* Donna Wills, *Domestic Violence: The Case for Aggressive Prosecution*, 7 UCLA WOMEN'S L.J. 173, 173 (1997).

[120] *See* Emily J. Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 WIS. L. REV. 1657, 1668-72 (2004) (explaining the movement toward mandatory arrest and no-drop policies across the United States in the 1980s and 1990s).

[121] *See, e.g.*, G. Kristian Miccio, *A House Divided: Mandatory Arrest, Domestic Violence, and the Conservatization of the Battered Women's Movement*, 42 HOUS. L. REV. 237, 243 (2005); Linda G. Mills, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention*, 113 HARV. L. REV. 550, 554 (1999).

[122] *See, e.g.*, Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1907-09 (1996); Lisa G. Lerman, *The Decontextualization of Domestic Violence*, 83 J. CRIM. L. & CRIMINOLOGY 217, 224-25 (1992) ("Even if a law enforcement approach fails to result in specific deterrence in some cases, enforcement of the law . . . sends an appropriate message to the community—that domestic violence is not acceptable."). Some advocates express concern that the laws are not as effective as they could be, but still support the message that they send about the gravity of intimate violence.

[123] Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741, 747 (2007); *see also* Tom Lininger, *Evidentiary Issues in Federal Prosecutions of Violence Against Women*, 36 IND. L. REV. 687, 687-90 (2003); Suk, *supra* note 111, at 12; Betsy Tsai, Note, *The Trend Toward Specialized Domestic Violence Courts: Improvements on an Effective Innovation*, 68 FORDHAM L. REV. 1285, 1287 (2000).

demonstrating its lack of regard for their lives.[124] Elizabeth Rapaport, among others, has written on this issue as it relates to spousal homicide.[125] Rapaport notes the existence of a "domestic discount" for killing women and children, arguing that domestic murders "are not merely among the worst expressions of domestic violence but also among the worst forms of lethal violence."[126] She postulates that "[i]n a world in which women—or women and children—wrote criminal statutes, domestic murder might trigger the possibility of capital prosecution."[127] Rapaport thus contends that true acknowledgment of the gravity of harming women and children would result in the harsh penalties for violating them, and the fact that many crimes against women and children occur within the family would not mitigate against the harshest penalties, including capital punishment.[128] While Rapaport is discussing homicide, not rape, her work is an additional demonstration of how some parts of the feminist movement have sought equality through deployment of the criminal law. Some feminist activists perceive the protectionist ethos and rhetoric of some advocates against intimate and intrafamilial violence as a perpetuation of a patriarchal, chivalric approach to women's equality,[129] but many feminists, especially those who work or research in the field of criminal law, share a view closer to Rapaport's.

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[124] *See* Deborah Tuerkheimer, *Recognizing and Remedying the Harm of Battering: A Call to Criminalize Domestic Violence*, 94 J. CRIM. L. & CRIMINOLOGY 959, 959-60 (2004) ("The disconnect between battering as it is practiced and battering as it is criminalized is vast and it is significant. Law's failure to define accurately the nature and harm of domestic violence negates the experiences of victims and effectively places battering outside the reach of criminal sanctions."). *Cf.* Martha Minow, *Between Vengeance and Forgiveness: Feminist Responses to Violent Injustice*, 32 NEW ENG. L. REV. 967, 976 (1998) ("[F]eminist activists tend to support adversarial trials and punishment as responses to harms to women.").

[125] Elizabeth Rapaport, *Capital Murder and the Domestic Discount: A Study of Capital Domestic Murder in the Post-*Furman *Era*, 49 SMU L. REV. 1507, 1508 (1996) (arguing against "automatic mitigation" for domestic homicides); *see also* Wendy Keller, *Disparate Treatment of Spouse Murder Defendants*, 6 S. CAL. REV. L. & WOMEN'S STUD. 255 (1996).

[126] Rapaport, *supra* note 125, at 1508.

[127] *Id.* at 1512.

[128] *Id.* at 1509-10, 1532.

[129] Importantly, leading feminists during the era of *Coker* actively opposed capital rape laws. Feminists, including now-Justice Ruth Bader Ginsburg, the NOW Legal Defense Fund, and the Women's Law Project, authored an amicus brief in *Coker* lambasting the capital rape laws as "a vestige of an ancient, patriarchal view of women as the property of men, as a reflection of societal ambivalence toward the woman victim, and as a barrier to proper and vigorous enforcement of rape laws." Brief for the American Civil Liberties Union et al. as Amici Curiae Supporting Petitioner at 9, Coker v. Georgia, 433 U.S. 584 (1977) (No. 75-5444); *see also* Miccio, *supra* note 121, at 241-42 (differentiating between protagonists and antagonists of mandatory arrest policies within the Battered Women's Movement).

Capital defense lawyer Phyllis L. Crocker speaks to the entwinement of feminism with criminal law advocacy in her essay *Feminism and Defending Men on Death Row.*[130] Crocker tells the story of her first capital defense in a rape-murder case, noting the "dissonance for a feminist" in both representing men who commit rape-murder crimes and in feeling "vindicated" by the state's demonstration for concern about women's and children's lives.[131] Capital child rape laws, like tighter laws on domestic homicide, might produce internal conflict for feminist anti-domestic violence and anti-sexual assault advocates. When one considers that a high proportion of child rapists are fathers, stepfathers, or other close relatives of their victims,[132] capital child rape statutes can be viewed, in some sense, as a form of resistance against intrafamilial violence. Of course, a death penalty statute is unlikely to be an effective intervention and may, in fact, be counterproductive given the already low rates at which victims of incest report crimes.[133]

The women's-equality-sparked sensibility to sexual and intrafamilial violence has been a fundamental improvement to our legal system. However, some strands of feminism may create a chilling effect on the progressive movement's inclination to resist capital child rape laws. Efforts to ensure that violence against women and children is treated with the same gravity as violence against men have led to the increasing deployment of criminal law in the domestic sphere, and, most relevantly for this inquiry, a ratcheting up in the availability of the death penalty for sexual and domestic crimes.

V. AGGRAVATING FACTORS AND VULNERABLE VICTIMS

In the 1972 landmark decision *Furman v. Georgia*, the Supreme Court ruled that the death penalty, as applied in every state that provided for it at

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[130] Phyllis L. Crocker, *Feminism and Defending Men on Death Row*, 29 ST. MARY'S L.J. 981 (1998).

[131] *Id.* at 982-83.

[132] *See, e.g.*, HOWARD N. SNYDER, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SEXUAL ASSAULT OF YOUNG CHILDREN AS REPORTED TO LAW ENFORCEMENT: VICTIM, INCIDENT, AND OFFENDER CHARACTERISTICS 10 (2000), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/saycrle.pdf. The Department of Justice reports that in over 34% of reported cases of juvenile sexual assault, the perpetrator was a family member. That number jumps to 42.4% if the child is between the ages six and eleven, and 48.6% when the child is between birth and five years of age. It is important to note that these are just cases reported to law enforcement—most sex crimes, especially those within families, go unreported. *See* Maggie Bruck et al., *Reliability and Credibility of Young Children's Reports: From Research to Policy and Practice*, *in* CHILDREN AND THE LAW: THE ESSENTIAL READINGS 87, 89 (Ray Bull ed., 2001).

[133] *See* Bruck et al., *supra* note 132, at 89.

the time, violated the Eighth and Fourteenth Amendments because of its arbitrariness and inconsistency.[134] *Furman* consolidated three cases which all resulted in death sentences: one defendant was convicted of murder and two were convicted of rape.[135] The Court concluded that because the juries had free reign to determine which crimes were heinous enough to warrant death, the punishment was cruel and unusual.[136] Because juries were not guided by legal standards for what constituted death-eligible crimes, there was too much space for irrational bias to taint capital sentencing.[137]

After *Furman*, the vast majority of states—at least thirty-five—revisited their death penalty statutes to find ways to limit juries' discretion and to thus rectify the arbitrariness problem.[138] States began to divide the guilt and sentencing phases of capital trials using different juries. States also started including statutory limits on which kinds of cases were eligible for death sentences and the kinds of information about defendants that juries should weigh in favor of not imposing a death sentence. In *Gregg v. Georgia*,[139] which overturned *Furman*'s moratorium on executions, the former set of statutory limits on death sentencing became labeled nationally as "aggravating circumstances" (or "aggravating factors") and the latter are "mitigating circumstances" (or "mitigating factors").[140]

Aggravating and mitigating factors require juries to consider individual attributes of both the crime and the offender. When the jurisprudence of aggravating and mitigating factors was still in its nascence, the purpose of aggravating factors was to narrow death-eligible crimes significantly to the most heinous acts.[141] Thus, early aggravating factors might include the existence of previous felony convictions or multiple victims. Initially, states deemed the worst crimes to be those that exacted some violence against the state or property. Criminal law, in general, considers whether a crime was committed in cold or hot blood—that is, whether the person who committed the crime was passionate or calculating.

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[134] 408 U.S. 238 (1972) (per curiam); *id.* at 255-57 (Douglas, J., concurring).

[135] *Id.* at 239.

[136] *Id.*

[137] *Id.* at 255-57 (Douglas, J., concurring). It is worth noting that *Furman* was litigated by NAACP Legal Defense Fund lawyers in the shadow of the Civil Rights Movement, and the Court understood that the arbitrariness of sentencing was at least partially attributable to racially biased jurors, although it did not accept the petitioners' race discrimination argument. *See id.* at 253 (Douglas, J., concurring).

[138] *See* Coker v. Georgia, 433 U.S. 584, 593-94 (1976); Gregg v. Georgia, 428 U.S. 153, 179-80 (1976).

[139] 428 U.S. 153 (1976) (plurality opinion).

[140] *See id. passim.*

[141] The requirement that aggravating factors "genuinely narrow the class of persons eligible for the death penalty" was established in *Zant v. Stephens*, 462 U.S. 862, 877 (1983).

Aggravating factors in most states' original post-*Gregg* death penalty statutes reflected this perspective, and the Supreme Court vigorously required clear aggravating circumstances.[142] In *Godfrey v. Georgia*, for example, the Court struck down a Georgia aggravating factor that the crime "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim," because of its subjectivity.[143] Similarly, in *Maynard v. Cartwright*, the Court overturned an Oklahoma defendant's death sentence because the jury based its sentence on its finding that the crime was "especially heinous, atrocious, or cruel."[144]

That began to change when the Court ruled in *Walton v. Arizona* that Arizona's "especially heinous, cruel or depraved manner" aggravating factor was not unconstitutionally vague.[145] In this case, Jeffrey Alan Walton and two friends were convicted of murdering Thomas Powell, an off-duty Marine whom they encountered at a bar.[146] The men robbed Powell at gunpoint, forced him into their car, and drove him to a secluded location.[147] There, defendant Walton shot him, but he did not die immediately—a coroner surmised that Powell died six days after the shooting of dehydration, starvation, and pneumonia.[148] A jury convicted Walton of first degree murder, and the trial judge conducted a sentencing hearing[149] in which he found that Walton's crime met two of Arizona's statutory aggravating factors: the murder was conducted for pecuniary gain[150] and it was committed in an "especially heinous, cruel, or depraved manner."[151] Despite *Gregg*'s admonition that states construct death penalty legislation so that potential arbitrariness is minimized,[152] the Court upheld the law.

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[142] *See, e.g.*, Maynard v. Cartwright, 486 U.S. 356, 363-64 (1988); Godfrey v. Georgia, 446 U.S. 420, 432 (1980) (plurality opinion).

[143] 446 U.S. at 432.

[144] 486 U.S. at 364.

[145] 497 U.S. 639 (1990), *overruled on other grounds by* Ring v. Arizona, 536 U.S. 584, 589 (2002).

[146] *Id.* at 644.

[147] *Id.*

[148] *Id.* at 644-45.

[149] The second important holding of *Walton* upheld judicial sentencing. The Supreme Court overturned this portion of the *Walton* holding in *Ring*.

[150] *Walton*, 497 U.S. at 645.

[151] *Id.*

[152] *See Gregg*, 428 U.S. at 189 ("[W]here discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.").

The Court distinguished on two grounds the sentencing scheme in Arizona from the ones it had earlier prohibited. First, in Arizona, all sentencing fact-finding and decision-making were carried out by the trial judge. The Court presumed this judge would mediate against arbitrariness because judges are supposedly more likely to follow the law than their personal views.[153] However, this factor is no longer applicable because judicial sentencing is no longer constitutional. Second, and more enduring, is the fact that case law subsequent to the addition of the "especially heinous, cruel, or depraved" factor had sufficiently clarified the legal content of the facially subjective standard so that it was no longer arbitrary.[154] The Court has continued to uphold similar aggravating factors if they have limiting constructions.

The Court again upheld a subjective factor, that the accused "exhibited utter disregard for human life," in *Arave v. Creech*.[155] *Creech* involved a mass murderer who had admitted to murdering or helping to murder at least twenty-six victims.[156] He claimed that he would not be able to stop killing people unless he was completely isolated for the rest of his life, and he plead guilty to his most recent crime, the murder of a fellow inmate. The judge, like other judges in Idaho at the time, carried out capital sentencing guided by the statutory aggravating factors.[157] Although the words of the statute themselves are vague, the Court found the Idaho Supreme Court's limiting construction that "utter disregard for human life . . . is meant to be reflective of acts or circumstances surrounding the crime which exhibit the highest, the utmost, callous disregard for human life, i.e., the cold-blooded, pitiless slayer" to be sufficient.[158]

Similar factors exist in other states. For example, Georgia now allows death sentences in homicides that are "outrageously wanton or vile," the language declared unconstitutional in *Godfrey*. The factor passes constitutional muster when tempered with the limiting language that the homicide "involved torture, depravity of mind, or an aggravated battery to the victim."[159]

In addition to aggravating factors becoming progressively more subjective, they have also increased in sheer numbers to include crimes that are, both directly and indirectly, sexual and intrafamilial. Professor Jeffrey Kirchmeier has documented this rapid expanse of aggravating factors,

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[153] *Walton*, 497 U.S. at 653.

[154] *Id.* at 655.

[155] 507 U.S. 463, 471 (1993).

[156] *Id.* at 465.

[157] *Id.* at 465-66.

[158] *Id.* at 468-69 (citing State v. Creech, 670 P.2d 463, 471 (Idaho 1983)).

[159] GA. CODE ANN. § 17-10-30 (2007).

despite increasing concern about the efficacy of the death penalty.[160] Aggravating factors now include child abuse or neglect, sexual abuse or exploitation of a child, that the defendant was under a domestic violence order of protection, that the victim was a child, that the victim was elderly or disabled, that the victim was a family member, or that the victim was an unborn child.[161]

While it is, on some level, encouraging to see that the government no longer devalues crimes against women and children to the same extent that it once did, these types of factors open the door for extraordinary race, gender, sexual orientation, and other biases. In a political climate that adds aggravating factors designed to value the most vulnerable and sympathetic, capital child rape statutes do not seem outrageous. In fact, they appear to be almost logical extensions of criminal and family law. However, it is precisely *because* these statutes are a tainted result of a charged and subjectivist political climate that they open the door for unconstitutional arbitrariness.

VI. CONCLUSION: NORMATIVE VALUE OF THE SOCIAL MOVEMENT ACCOUNT?

This Article's descriptive social movement account may shed some light on normative questions. An understanding of the factors that influence adoption of capital child rape laws leads us to consider the constitutionality of such laws. One concern that mirrors *Coker* is the potential for arbitrariness connected to prejudice. When the *Coker* Court ruled that using death as punishment for the rape of an adult woman was unconstitutional, it was not only disproportionality but a lack of a national consensus on capital rape law that shaped the Court's findings. *Coker* was litigated in the shadow of mass fear, intense racial prejudice, lobbying for harsher penalties for sex crimes, and experimental "tinker[ing] with the machinery of death."[162]

Abundant evidence supports the entwinement of race and rape. The perception of African-American men as rapists (and particularly as rapists of white women) has colored public discourse on issues ranging from

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[160] Jeffrey L. Kirchmeier, *Aggravating and Mitigating Factors: The Paradox of Today's Arbitrary and Mandatory Capital Punishment Scheme*, 6 WM. & MARY BILL RTS. J. 345, 363-81 (1998); Kirchmeier, *Casting a Wider Net*, *supra* note 4.

[161] Kirchmeier, *Casting a Wider Net*, *supra* note 4, at 18-25.

[162] *See* Callins v. Collins, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting). Given the Court's fairly recent decisions in *Atkins v. Virginia*, 536 U.S. 304 (2002), and *Roper v. Simmons*, 543 U.S. 551 (2005), not to mention the innocence movement, which has made some death penalty states more hesitant to execute people, the status of the death penalty seems almost as precarious as it did in 1977, one year after *Gregg* reinstated executions.

school integration to criminal justice.[163] The lynching epidemic that was only beginning to subside during this era can be tied to perceptions of black males' status as rapists.[164] The significance of the link between perpetrator race and age is evident in the *Coker* Petitioner's Brief. Despite the Court's silence on the historical racial context of the death penalty for rape in the opinion (and despite the fact that the defendant in *Coker* was white), the brief raises the race discrimination question as one of its central arguments.[165] Child rape statutes, though not laden with the exact same racial baggage as more general rape statutes, are still racialized. The "child molester" image has been deployed by some against Latino men in particular, a troubling stereotype in an age of rampant anti-immigrant bias that has focused primarily on Latinos.[166] The molester image has also been attached to the LGBT community as a weapon against gay marriage and gay adoption.[167]

The laws adopted in *Coker* also coincided with the Women's Liberation Movement, which in some corners lobbied for harsher penalties for rape. While the capital rape laws struck down in *Coker* may not have been adopted at feminists' behest—in fact, they might have been expressly opposed by many feminists because of their protectionist approach[168]—the potential tension between some strands of feminism and anti-death penalty advocacy is present in the capital child rape cases.

Moreover, the status of the death penalty is in flux now, as it was in 1977. At the same time that some states are adopting capital child rape statutes and expanding the list of aggravating factors, state legislatures are

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[163] *See* Frank Rudy Cooper, *Against Bipolar Black Masculinity*, 39 U.C. DAVIS L. REV. 853, 875-79 (2006).

[164] N. Jeremi Duru, *The Central Park Five, the Scottsboro Boys, and the Myth of the Bestial Black Man*, 25 CARDOZO L. REV. 1315, 1326-27 (2004).

[165] Brief for the Petitioner at 54, Coker v. Georgia 433 U.S. 584 (1977) (No. 75-5444) ("There is historical evidence that, in Georgia, the death penalty for rape was specifically devised as a punishment for the rape of white women by black men.").

[166] *See, e.g.*, Madeleine Cosman, *Violent Sexual Predators Who Are Illegal Aliens*, NEWSWITHVIEWS.COM (May 29, 2005), *available at* http://www.newswithviews.com/Cosman/madeleine5.htm; R. Cort Kirkwood, *"Family Values": Illegal Aliens and Their Sex Crimes*, CHRONICLES (Apr. 2007), *available at* http://www.chroniclesmagazine.org/?p=30. These views are hardly representative, but racial stereotypes of this nature infect the legal system and open the door for arbitrariness.

[167] *See, e.g.*, William N. Eskridge, Jr., *Body Politics:* Lawrence v. Texas *and the Constitution of Disgust and Contagion*, 57 FLA. L. REV. 1011, 1018 (2005) (describing an advertising campaign to nullify gay rights ordinances that associated homosexuality with danger to children).

[168] *See supra* note 129 and accompanying text (discussing the NOW Legal Defense Fund's amicus brief).

increasingly enacting moratoria on the death penalty.[169] While popular support for capital punishment continues,[170] the Supreme Court struck down the death penalty for juvenile offenders and the mentally retarded in *Roper* and *Atkins*.[171] None of these factors individually entail certain demise for capital child rape law supporters' claims, but they reflect a similar social and constitutional environment to that of *Coker*.

This Article has attempted to describe briefly how long-term social movements and short-term bursts of outrage are interacting with the political environment for capital child rape laws. This account attempts to lay a foundation for understanding precisely why capital child rape laws are just as constitutionally problematic as the capital rape laws in *Coker*. Public reaction may provide a strong ground for declaring these statutes unconstitutional since, as the era of lynching taught, mass outrage can lead to mob violence. Enlisting the state to legitimate this outrage, when law generally calls on actors to be as dispassionate as possible, is perverse. The subjectivity and emotionalism likely to inhere in widespread application of capital child rape laws will almost certainly yield extreme arbitrariness and inadequate process for many defendants.

When a law threatens to impinge on constitutional rights, and especially when those at risk are those whom society would most like to cast out or even exterminate, courts must understand and evaluate the social forces that motivated these laws. Today, child molestation sparks the same urge for community isolationism and spirit of vigilantism that rape did in the *Coker* era. An analysis of the multilayered political context of capital child rape laws suggests that the social forces surrounding the new legislation are inescapably too intense, too frenzied, too emotional, and too mired in racial and class-based prejudice to avoid arbitrariness and caprice.

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[169] *See, e.g.*, Michael L. Radelet, *More Trends Toward Moratoria on Executions*, 33 CONN. L. REV. 845, 848-51 (2001); Ronald J. Tabak, *Finality Without Fairness: Why We Are Moving Towards Moratoria on Executions, and the Potential Abolition of Capital Punishment*, 33 CONN. L. REV. 733, 752-62 (2001). *See also* Jeffrey L. Kirchmeier, *Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States*, 73 U. COLO. L. REV. 1, 5 (2002) (identifying a "Death Penalty Moratorium Movement").

[170] *See, e.g.*, ABC News/Washington Post Poll (June 22-25, 2006), *available at* http://www.pollingreport.com/crime.htm (last visited Oct. 20, 2007). In June 2006, 65% of adults polled nationwide supported the death penalty—this was down from 77% in August 1996, but still demonstrates a strong majority. *Id.*

[171] *See supra* note 37.