

**FREEZING SOCIETY’S PUNISHMENT PENDULUM:  
 COKER V. GEORGIA IMPROPERLY FORECLOSED THE  
 POSSIBILITY OF CAPITAL PUNISHMENT FOR RAPE**

BARBARA CLARE MORTON \*

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I. INTRODUCTION

Throughout British and American history the crime of rape has been punishable by death.<sup>1</sup> Billed as “a most detestable crime”<sup>2</sup> more

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\* LL. M. Georgetown University Center, J.D. Suffolk University Law School. The author would like to give special thanks to Laura Bedard and the staff at the Georgetown University Law Library, Special Collections Department, and to the staff at Willamette Law Review.

1. See *Woodson v. North Carolina*, 428 U.S. 280, 289 (1976) (noting that “[a]t the time the Eighth Amendment was adopted in 1791, the States uniformly followed the common-law practice of making death the exclusive and mandatory sentence for certain specified offenses. Although the range of capital offenses in the American Colonies was quite limited in comparison to the more than 200 offenses then punishable by death in England, the Colonies at the time of the Revolution imposed death sentences on all persons convicted of any of a considerable number of crimes, typically including at a minimum, murder, treason, piracy, arson, rape, robbery, burglary, and sodomy”).

2. 1 MATTHEW HALE, *HISTORY OF THE PLEAS OF THE CROWN* 634 (Philadelphia, Robert H. Small 1847).

than three centuries ago, rape appropriately had earned its status as a capital offense. Despite this historical tradition, however, the United States Supreme Court in *Coker v. Georgia*<sup>3</sup> declared that death sentences for this crime violate the Eighth Amendment's prohibition on cruel and unusual punishments.<sup>4</sup> In doing so, the plurality turned a blind eye to the unbroken history of capital punishment for rape in the United States and simultaneously minimized the gravity of this crime. More importantly, however, the *Coker* plurality failed to apprehend the reality that tides of social opinion regarding the nature and extent of justified punishment may fluctuate over time, but that such fluctuation does not automatically convert a historically accepted punishment practice to one that violates the prohibition on cruel and unusual punishments. That is, just because the death penalty for rape may have fallen out of favor in some states, as it did in England in the nineteenth century, does not mean that this penalty offends the Constitution. The *Coker* Court thus erroneously equated unpopular punishments at a given point in history with outright constitutional violations. It therefore improperly reset and raised the constitutional floor of the Cruel and Unusual Punishment Clause to a new, more stringent level, thereby foreclosing to state and federal lawmakers the historically enjoyed option of permitting capital sentences for this most reprehensible crime.

## II. HISTORY OF RAPE AND ITS PUNISHMENT

### A. England

In his *Commentaries on the Laws of England*, William Blackstone defined rape as “the carnal knowledge of a woman forcibly and against her will.”<sup>5</sup> Other ancient legal scholars likewise so defined it,<sup>6</sup> and at least one notable and historical jurist, Lord Matthew Hale, regarded it as “a most detestable crime, [that]

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3. 433 U.S. 584 (1977).

4. *Id.* at 600.

5. 4 WILLIAM BLACKSTONE, COMMENTARIES OF THE LAWS OF ENGLAND 212 (London, John Murray 1876).

6. *See e.g.*, 4 RICHARD BURN, THE JUSTICE OF THE PEACE 74 (London, T. Cadell 1793) (“Rape is when a man hath carnal knowledge of a woman, by force, and against her will”); 1 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 108 (Garland Publishing 1978) (1721) (defining rape as “an offence in having unlawful and carnal knowledge of a woman by force and against her will”); 18 CHARLES VINER, A GENERAL ABRIDGEMENT OF LAW AND EQUITY 153 (London, G.G. & J. Robinson 1793).

therefore ought severely and impartially to be punished with death.”<sup>7</sup>

While Lord Hale expressed a strong sentiment about the proper punishment for rape during his time, death had not always existed as the legal sanction for this offense in England.<sup>8</sup> Indeed, punishment for rape fluctuated over the course of that nation's history, thus reflecting a measure of historical indecision regarding the appropriate sanction for this crime. As observed by Burn:

Of old time rape was felony, for which the offender was to suffer death: afterwards the offence was made lesser, and the punishment changed from death to the loss of those members whereby they offended; that is to say, it was charged to castration and loss of his eyes . . . . Then, by statute of 3 Ed. I. c. 13 it was made a trespass, subjecting the offender to two years imprisonment and a fine, at the king's will; and it was again made felony, by the 13 Ed. I. c. 34 and at last by 18 El. c. 7. was excluded from the benefit of the clergy.<sup>9</sup>

Thus, while the common law had allowed the imposition of death on a convicted rapist as a felon,<sup>10</sup> the 1275 Rape Act pulled back from that severe sanction, and punished rape only as a trespass sanctioned by a short prison term and a fine.<sup>11</sup> Accordingly, at that time, “for him that doth ravish a Woman,” the statute provided as

7. HALE, *supra* note 2, at 634.

8. 4 BURN, *supra* note 6, at 79; *accord* 1 HAWKINS, *supra* note 6, at 109 (“It is said, that of old time [rape] was a felony, and consequently punishable by death, especially if the party ravished were a virgin . . . . But afterwards it was looked upon as a great misdemeanor only, but not felony; and the offender was punished with the loss of his eyes and testicles: And by the statute of Westminster I. c. 13. it was reduced to a trespass, subjecting the offender to two years imprisonment, and a fine at the king's will. But the smallness of punishment providing a great encouragement to the offence, it was made a felony again, by the statute of Westminster 2. c. 34 and by 18 Eliz. C. 7. it is excluded from the benefit of clergy”); W. NELSON, *THE OFFICE AND AUTHORITY OF A JUSTICE OF PEACE* 265 (London, Charles Harper 1714) (noting that “[t]his was a felony at Common Law; but by the Statute of W. I. cap. 13. made a Misdemeanor only, punishable by Fine and Imprisonment; But 10 years afterwards, by the Statute of W. 2 cap. 34, it was made a Felony again”); 18 VINER, *supra* note 6, at 153 (noting that “[r]ape was felony at common law for which the offender was to suffer death, but before this act [of 3 Ed. I. cap. 13.] the offence was made less, and the punishment changed, viz. from death to the loss of his members, whereby he offended, viz. his eyes and his testicles; so that at the making of this act, it was not felony. . . and the said punishment of loss of members continued ill the making of this act, which was on purpose o make it punishable by fine and imprisonment at the suit of the king”).

9. 4 BURN, *supra* note 6, at 79; *accord* 1 HAWKINS, *supra* note 6, at 109; NELSON, *supra* note 8, at 265; 18 VINER, *supra* note 6, at 153.

10. NELSON, *supra* note 8, at 471 (recognizing that rape “is Felony at Common Law”).

11. The Rape Act, 1275, 3 Edw. 1 (Eng.), *reprinted in* 1 OWEN RUFFHEAD, *THE STATUTES AT LARGE* 45 (London, Mark Baskett 1770).

follows:

[T]he King prohibiteth that none do ravish, nor take away by Force, any Maiden within Age (neither by her own Consent, not without) not any Wife or Maiden of full age; nor any other Woman against her Will . . . and if any do, at his Suit that will sue within forty Days . . . and if none commence his Suit within forty Days, the King shall sue . . . and such as be found culpable, shall have two Years Imprisonment, and after shall fine at the King's Pleasure . . . and if they have not whereof, they shall be punished by longer Imprisonment, according as the Trespass requireth.<sup>12</sup>

A decade later in 1285, however, the sentence for rape was increased to a term of life imprisonment and loss of the eyes and male sex organs.<sup>13</sup>

I[t] is provided, That if a Man from henceforth do ravish a Woman married, Maid, or other, where she did not consent, neither before nor after, he shall have Judgement of Life and of Member. (2) And likewise where a Man ravisheth a Woman married, Lady, Damosel, or other, with Force, although she consent after, he shall have such Judgement as before is said, if he be attainted at the King's Suit . . . .<sup>14</sup>

Subsequently, by 1547, the social and legal tide had turned yet again such that capital punishment for rape was reinstated.<sup>15</sup>

And be it ordained and enacted by the Authority aforesaid, That in all Cases where any Person or Persons heretofore have been, or hereafter shall be, found guilty of any manner of Treason, Murder,

12. *Id.*; accord 2 JOHN CAY, AN ABRIDGEMENT OF THE PUBLICK STATUTES IN FORCE AND USE (London, Majesty's Printer 1739); 4 BLACKSTONE, *supra* note 5, at 213 (noting that "In the 3 Edw. I., but the statute Westm. 1, c. 13, the punishment of rape was much mitigated; the offence itself of ravishing . . . of any . . . woman against her will, being reduced to a trespass . . . and subjecting the offender only to two years' imprisonment, and a fine at the king's will"); 1 RUFFHEAD, *supra* note 11, at 45 (setting forth the rape law of King Edward); 18 VINER, *supra* note 6, at 153 (same).

13. The Forfeiture of Dower Act, 1285, 13 Edw. 1 (Eng.), reprinted in 1 RUFFHEAD, *supra* note 11, at 101; accord 4 BLACKSTONE, *supra* note 5, at 212-13 (noting that "[r]ape was punished by the Saxon laws . . . with death . . . . But this was afterwards thought too hard, and in its stead another severe, but not capital punishment, was inflicted by William the Conqueror, viz., castration and loss of eyes, which continued till . . . the reign of Henry the Third[,] and that previous "lenity being productive of the most terrible consequences . . . [subsequently it was] necessary to make the offence of forcible rape felony by statute . . .").

14. The Forfeiture of Dower Act, *supra* note 13; accord 2 CAY, *supra* note 12; 1 RUFFHEAD, *supra* note 11, at 101 (setting forth provisions of the act); 18 VINER, *supra* note 6, at 154 (same).

15. Justice of the Peace Act, 1547, 1 Edw. 6 (Eng.), reprinted in 2 OWEN RUFFHEAD, THE STATUTES AT LARGE 389-90 (London, Mark Baskett 1770).

Manslaughter, Rape or other Felony whatsoever, for the which Judgment of Death should or may ensue, and shall be reprieved to Prison without Judgment at that Time given against him, her or them so found guilty, that those Persons that at any Time hereafter shall by the King's Letters Patents be assigned Justices to deliver the Gaol where any such Person or Persons found guilty shall remain, shall have full Power and Authority to give Judgment of Death against such Person so found guilty and reprieved, as the same Justices (before whom such Person or Persons was or were found guilty) might have done, if their Commission of Gaol-delivery had remained and continued in full Force and Strength.<sup>16</sup>

With the sixteenth-century revival of the death penalty as a sanction for rape, it will come as no surprise that in those cases where a jury found a defendant guilty of this offense, the punishment imposed almost universally was death.<sup>17</sup> Of 392 rape trials at the Old Bailey between 1674 and 1834,<sup>18</sup> 316 resulted in not guilty verdicts or pardons.<sup>19</sup> Of the 67 cases where a jury found the defendant guilty of rape, however, all but four convictions resulted in a capital sentence.<sup>20</sup>

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16. *Id.*

17. See The Proceedings of the Old Bailey, available at <http://www.oldbaileyonline.org/search/crime> (select "Sexual Offenses" from the "Crime Category" drop-down menu, "Rape" from the "Specific Criminal Act" drop-down menu, "Guilty" from the "General Verdict" drop-down menu, and "Death <All Types>" from the "Punishment" drop-down menu; press "Search") (last visited Oct. 5, 2006) (listing sixty-three cases where conviction resulted in death).

18. Despite the statutory enactments criminalizing rape, actual rape prosecutions in historical England existed as the exception rather than the rule. J. M. BEATTIE, CRIME AND THE COURTS IN ENGLAND 1660-1800 126 (1986) (noting that "only a few women brought rape charges to court"). Indeed, "over the period of 1660 to 1800 a case came before the Surrey assizes on average once every year and a half and before the Sussex courts only once every four years." *Id.* Often times, in those cases where a woman reported a rape, she did so because she "had been so seriously injured that this . . . provided evidence of the attack [and] also brought it to the attention of others who might have encouraged her to report and prosecute," or because "the rape had actually been interrupted by witnesses who not only encouraged the prosecution but also provided evidence." *Id.* at 127. When a woman elected to pursue prosecution, she found that securing a conviction posed a great challenge. As noted above, the statistics paint a bleak picture: in one hundred and fifty years, only 67 reported rape cases resulted in guilty verdicts, and usually the prosecuting female victim had been a child. See The Proceedings of the Old Bailey, *supra* note 17.

19. See The Proceedings of the Old Bailey, *supra* note 17.

20. *Id.* As indicated in The Proceedings of the Old Bailey:

Thomas Padget . . . was indicted, for that he did, on the 18th of Feb. last commit a Rape on the Body of Catherine Burchet (a Child of 5 Years of Age) at the same Time beating, wounding and abusing the said Catherine Burchet in a barbarous Manner: The Fact was proved on him by the Evidence of the Father, and Nurse of the Child. Mr. Francis Horton depos'd. That he was sent for to search the Child, and found that her Body was lacerated, bruised and inflamed, and that the Parts had

Rape remained a capital crime in England for nearly three centuries, but ceased to be so in 1841.<sup>21</sup> In that year, Parliament enacted the Substitute of Punishment for Death Act, which provided:

And whereas it is expedient that the said several Offences herein-before last specified should no longer be punishable with Death; be it therefore enacted, That from and after the Commencement of this Act, if any Person shall be convicted of any of the said Offences herein-before last specified, such Person shall not be subject to any Sentence, Judgment, or Punishment of Death, but shall, instead of the Sentence or Judgment in and by the said Act herein-before last recited ordered to be given or awarded against Persons convicted of the said last-mentioned Offences, or any of them respectively, be liable to be transported beyond the Seas for the Term of his natural Life.<sup>22</sup>

Thus, by 1861, and continuing to this day,<sup>23</sup> the act governing “Offences Against the Person” provided that a convicted rapist “shall be liable, at the Discretion of the Court, to be kept in Penal Servitude for Life or for any Term not less than Three Years, or to be imprisoned for any Term not exceeding Two Years, with or without Hard Labour.”<sup>24</sup> In electing to abandon capital punishment for rape at

received Infection; that the Child had not suffer'd, a Penetration, but an Injection had been made on the Orifice: The Jury considering the Barbarity of the Crime, brought him in guilty.

See The Proceedings of the Old Bailey, available at <http://www.oldbaileyonline.org/search/> (select “Keyword Search” hyperlink; enter “Burchet” in the “Search For” field; select the eighth result entitled “Thomas Padget, Sexual Offences: rape, 22 Feb. 1727”) (last visited Oct. 5, 2006).

“For this crime, he was” fined 20 Nobles, and 6 Months Imprisonment.” See The Proceedings of the Old Bailey, available at [http://www.oldbaileyonline.org/html\\_units/1720s/s17270222-1.html](http://www.oldbaileyonline.org/html_units/1720s/s17270222-1.html) (last visited Oct 5, 2006).

21. See Substitutes of Punishment for Death Act, 1841, 4 & 5 Vict. (Eng.), reprinted in A COLLECTION OF THE PUBLIC GENERAL STATUTES PASSED IN THE FOURTH AND FIFTH YEAR OF THE REIGN OF HER MAJESTY QUEEN VICTORIA 317, 380-81 (London, John Richards & Co. 1841) (repeals punishment of death for crime of rape and substitutes life term of imprisonment); Offences Against the Person Act, 9 Geo. 4 (1828) (Eng.), reprinted in THE STATUTES OF THE UNITED KINGDOM OF GREAT BRITAIN AND IRELAND, 9 GEORGE IV 105 (London, His Majesty’s Statute and Law Printers 1828) (“And be it enacted, That every Person convicted of the Crime of Rape shall suffer Death as a Felon”).

22. Substitutes of Punishment for Death Act, *supra* note 21.

23. Sexual Offences Act, 2003, c. 42, § (1), (4) (Eng.), reprinted in THE PUBLIC GENERAL ACTS AND GENERAL SYNOD MEASURES 3239 (2003) (defining the crime of rape and providing that “A person guilty of an offence under this section is liable, on conviction on indictment, to imprisonment for life”).

24. Offences Against the Person Act, 1861, 24 & 25 Vict. (Eng.), reprinted in A COLLECTION OF THE PUBLIC GENERAL STATUTES PASSED IN THE TWENTY FOURTH & TWENTY FIFTH YEARS OF THE REIGN OF HER MAJESTY QUEEN VICTORIA 564, 574-75

that time, and instead modifying the penalty to a lesser term of imprisonment, English lawmakers demonstrated, as they had in previous eras, the continual vacillation of belief about the proper scope of punishment for this crime.

*B. United States*

In the United States, prior to the Court's *Coker* decision, the crime of rape always had been a death-penalty eligible offense at the federal level. This penalty had carried over to an early America with the common law, and by 1825 the United States Congress had enacted a criminal statute, which expressly provided for capital punishment for rape.<sup>25</sup>

That, if any person or persons, upon the high seas, or in any arm of the sea, or in any river, haven, creek, basin, or bay, within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular state, shall commit the crime of willful murder, or rape, or shall willfully and maliciously, strike, stab, wound, poison, or shoot at, any other person, of which such striking, stabbing, wounding, poisoning, or shooting, such person shall afterwards die, upon land, within or without the United States, every person so offending, his or her counselors, aiders, or abettors, shall be deemed guilty of felony, and shall, upon conviction thereof, suffer death.<sup>26</sup>

By 1897, while Congress had altered and reduced the number of federal capital offenses, the crime of rape, as well as that of murder and treason, remained a death-eligible offense.<sup>27</sup>

Apart from the federal system, many states and the District of Columbia also retained the death penalty for rape prior to the Court's 1977 decision. Although not universally adopted as punishment for this crime, approximately one-third of the states plus the District of Columbia allowed capital punishment for rape in the early decades of

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(London, The Queen's Printing Office 1861).

25. 4 Stat.115 (1825). See also Matthew Silversten, *Sentencing Coker v. Georgia to Death: Capital Child Rape Statutes Provide the Supreme Court An Opportunity to Return Meaning to the Eighth Amendment*, 37 GONZ. L. REV. 121, 125 (2002) (noting that the early American Congress "enacted laws that authorized the death penalty for the crimes of murder . . . robbery, and rape").

26. 4 Stat.115 (1825).

27. JOSEPH A. MELUSKY & KEITH A. PESTO, *CRUEL AND UNUSUAL PUNISHMENT* 52 (2003) (stating that "[i]t was not until 1897 that Congress . . . passed a statute that drastically reduced the number of offenses subject to the death penalty, reserving it for treason, murder, and rape").

the twentieth century.<sup>28</sup> As of 1972, this number had decreased only slightly; sixteen states permitted death-penalty eligibility for rape, and in the year before *Coker*, three states retained the death penalty for this crime.<sup>29</sup>

### III. THE CONCEPT OF “CRUEL AND UNUSUAL” PUNISHMENT EMBODIED IN THE EIGHTH AMENDMENT

#### A. *Origins*

In addition to the historical treatment of the punishment for rape, the United States also has a tradition of banning cruel and unusual punishments. This concept has origins reaching as far back as the 1215 Magna Charta.<sup>30</sup> Specifically, Chapter Fourteen of the Magna Charta explicitly provided for proportionality in punishments and advocated for protection against excessive punishments:

A freeman shall not be amerced for a slight offense, except in accordance with the degree of the offense; and for a grave offense he shall be amerced in accordance with the gravity of the offense, yet saving always his “contentment”; and a merchant in the same way, saving his “merchandise”; and a villein shall be amerced in the same way, saving his “wainage” if they have fallen into our mercy: and none of the aforesaid ameracements shall be imposed except by the oath of honest men of the neighborhood.<sup>31</sup>

The idea of proportionality expressed in the Magna Charta endured in England in subsequent centuries. As observed by one historian, by 1400 there existed a “longstanding principle of English law that the punishment should fit the crime. That is, the punishment should not be, by reason of its excessive length or severity, greatly

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28. *Coker*, 433 U.S. at 593.

29. See, e.g., Ala. Code, Tit. 14, § 395 (1958); Ark. Stat. Ann. § 41-3403 (1964); Fla. Stat. Ann. § 794.01 (1965); Ga. Code § 26-2001 (1977); Ky. Rev. Stat. Ann. §§ 435.080-435.090 (1962); La. Rev. Stat. Ann. § 14:42 (1950); Md. Ann. Code, Art. 27, § 461 (1957); Miss. Code Ann. § 2358 (1957); Mo. Rev. Stat. § 559.260 (1969); Nev. Rev. Stat. § 200.360 (1963) (rape with substantial bodily harm); N.C. Gen. Stat. § 14-21 (1969); Okla. Stat. Ann., Tit. 21, § 1115 (1958); S.C. Code Ann. §§ 16-72, 16-18 (1962); Tenn. Code Ann. § 39-3702 (1955); Tex. Penal Code § 1189 (1961); Va. Code Ann. § 18.1-44 (1960).

30. See MAGNA CHARTA OF 1215, available at [www.britannia.com/history/magna2.html](http://www.britannia.com/history/magna2.html) (last visited Sept. 20, 2006); accord Anthony F. Granucci, “Nor Cruel and Unusual Punishments Inflicted:” *The Original Meaning*, 57 CAL. L. REV. 839, 845 (1969) (noting that “[t]he problem of excessive ameracements became so prevalent that three chapters of the Magna Charta were devoted to their regulation”).

31. MAGNA CHARTA, *supra* note 30.

disproportionate to the offense charged.”<sup>32</sup> Courts invoked the principles contained in the Magna Charta, and in a 1615 case, the King’s Bench applied the provisions of Chapter Fourteen to invalidate a disproportionate term of imprisonment.<sup>33</sup> As explicated by the court in *Hodges v. Humkin, Mayor of Liskerret*:

Here the speeches used by Hodges are very unseemly speeches, and unfit to be used by him to anyone. . . . [B]ut yet, for such words thus used, the ma[y]or ought not to use a malicious kind of Imprisonment, in regard to the time of it, when the same was, being so long time after the offence as in August for an offense in June before; and also in regard of the manner of this Imprisonment, and of the place where, he being thrown into a Dungeon, and so to be there kept, without any Bed to lie on, or any bread or meat to eat, and for all these Causes, the Imprisonment was unlawful; Imprisonment ought always to be according to the quality of the offense, and so is the Statute of Magna Charta cap. 14. . . . [T]he punishment ought to be, and correspondent to the same, that which is not here in this Case.<sup>34</sup>

As the *Hodges* decision demonstrates, the traditional English concept of “unlawful” punishments encompassed notions of fairness and proportionality.

The 1689 English Declaration of Rights built upon the ideas captured in the Magna Charta and refined these concepts into a clearly defined principle of prohibiting “cruel and unusual” punishments.<sup>35</sup> Often credited with prompting the enactment of the Declaration of Rights, the conviction and appeal of Titus Oates, and the judicial opinions surrounding the case, reveal the nature of the concept as understood by contemporaries of the Declaration.<sup>36</sup> Titus

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32. Granucci, *supra* note 30, at 846 (internal quotation marks omitted).

33. *Id.* at 847.

34. *Id.* (internal quotation marks omitted).

35. English Declaration of Rights, 1689, 1 W. & M., c. 2; *accord* *In re Kemmler*, 136 U.S. 436, 446 (1890) (recognizing that “[t]he provision in reference to cruel and unusual punishments was taken from the well-known act of parliament of 1688, entitled ‘An act for declaring the rights and liberties of the subject, and settling the succession of the crown’”); Chris Baniszewski, *Supreme Court Review of Excessive Prison Sentences: The Eighth Amendment’s Proportionality Requirement*, 25 ARIZ. ST. L.J. 929, 930 (1993) (“Because the Eighth Amendment originated from the English Declaration of Rights of 1689, determining the meaning of the Declaration of Rights lends understanding to the context in which the Eighth Amendment was written”). *See also* *Harmelin v. Michigan*, 501 U.S. 957, 967 (1991) (asserting that “the principle of proportionality was familiar to English law at the time the Declaration of Rights was drafted”).

36. Granucci, *supra* note 30, at 858.

Oates, a minister of the Church of England, claimed to have learned of the plot of two Jesuit priests to assassinate the King of England.<sup>37</sup> In September 1678, Oates had given sworn testimony to this effect before a magistrate, but later, when evidence surfaced that Oates was out of town on the evening that he claimed to have overheard of the assassination plot in London, it became apparent that he had perjured himself.<sup>38</sup> For this, the Crown charged him with two counts of perjury, for which the King's Bench tried and convicted him.<sup>39</sup>

Oates received numerous penalties for his crimes. The King's Bench sentenced Oates to a fine of two thousand marks, life imprisonment, whippings, and the pillory four times per year.<sup>40</sup> In addition, Oates would be defrocked.<sup>41</sup> Claiming that these punishments qualified as "inhumane and unparalleled," Oates appealed his sentence to Parliament.<sup>42</sup> While the majority in the House of Lords rejected Oates's appeal, a minority agreed with his claims, and issued a dissent expressing this sentiment.<sup>43</sup> They maintained that "[f]or [his crimes] the said judgments are barbarous, inhuman, and unchristian; and there is no precedent to warrant the punishments of whipping and committing to prison for life, for the crime of perjury; which yet were but part of the punishments inflicted upon him."<sup>44</sup> The dissenters also feared that upholding Oates's sentence would validate the propriety of such penalties.<sup>45</sup> They noted "that this will be an encouragement and allowance for giving the like cruel, barbarous, and illegal judgments hereafter, unless this judgment be reversed."<sup>46</sup>

It was against this backdrop that the 1689 Declaration of Rights came into existence.<sup>47</sup> It acknowledged prior English practices of

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37. *Id.* at 857.

38. *Id.*

39. *Id.*

40. *Id.* at 858.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *See id.* at 856-59 ("For positive evidence of what the framers of the Declaration of Rights intended to prohibit, we must look to Titus Oates . . ."); Steven T. Parr, *Symmetric Proportionality: A New Perspective on the Cruel and Unusual Punishment Clause*, 68 TENN. L. REV. 41, 43 (2000) (asserting that "[t]he English provision was motivated by the Titus Oates affair"); *accord Harmelin*, 501 U.S. at 968 (noting that "historians have argued, and the

imposing excessive fines and disproportionate and torturous punishments,<sup>48</sup> and sought to redress and eliminate these procedures. In doing so, it pronounced that “excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”<sup>49</sup>

The idea of banning cruel and unusual punishments successfully crossed the Atlantic, as pre-revolutionary war colonies and early American states adopted similar provisions.<sup>50</sup> In 1641, for example, the Massachusetts Bay Colony enacted its Body of Liberties, which provided that “[f]or bodily punishments we allow amongst us none that are inhumane, barbarous, or cruel.”<sup>51</sup> Later on, other states, including Delaware, Virginia, North Carolina, Maryland, New Hampshire and Pennsylvania, similarly enacted provisions proscribing such cruel and unusual punishments.<sup>52</sup>

With this historical background in mind, it was inevitable that the drafters of the United States Constitution and Bill of Rights likewise would create a constitutional provision barring such

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best historical evidence suggests, that it was not Jeffreys' management of the Bloody Assizes that led to the Declaration of Rights provision, but rather the arbitrary sentencing power he had exercised in administering justice from the King's Bench, particularly when punishing a notorious perjurer”).

48. English Declaration of Rights, 1 W. & M., c. 2 (“An act for declaring the rights and liberties of the subject, and settling the succession of the crown . . . excessive bail hath been required of persons committed in criminal cases, to elude the benefit of the laws made for the liberty of the subjects, and excessive fines have been imposed, and illegal and cruel punishments inflicted”).

49. *Id.* A century later, the American drafters of the Eighth Amendment would borrow this language for the Constitution of the United States. *Harmelin*, 501 U.S. at 966 (asserting that “[t]here is no doubt that the Declaration of Rights is the antecedent of our constitutional text”).

50. LARRY CHARLES BERKSON, *THE CONCEPT OF CRUEL AND UNUSUAL PUNISHMENT* 5 (1975) (noting that Delaware, Virginia, North Carolina, Massachusetts, Maryland and New Hampshire adopted provisions in their constitutions that prohibited cruel and unusual punishments).

51. The Massachusetts Body of Liberties, 1641, c. 46 *available at* <http://www.winthropsociety.org/liberties.php> (last visited Sept. 20, 2006); *accord* Alfredo Garcia, *Toward an Integrated Vision of Criminal Procedural Rights: A Counter to Judicial and Academic Nihilism*, 77 MARQ. L. REV. 1, 5 (1993) (noting that “[t]he Massachusetts Body of Liberties included protections against cruel and unusual punishments”). *See* BERKSON, *supra* note 50, at 4 (asserting that “[t]he first detailed enactment by a colonial legislature on the subject of human rights was the Massachusetts Body of Liberties. The concern of its drafters and ratifiers about torture, brutality, and punishment is reflected in the no less than six articles dealing with the subject”).

52. BERKSON, *supra* note 50, at 5, 6.

punishments.<sup>53</sup> During the congressional debates about the Cruel and Unusual Punishment Clause during the first Congress, one Representative described the prohibition as an “express[ion] [of] a great deal of humanity.”<sup>54</sup> Although some of the new American Congressmen expressed concern that the Clause was “too indefinite,” and worried that “it seems to have no meaning in it,” the Framers were cognizant of the importance of such a proscription.<sup>55</sup> As one scholar has noted, “there is little doubt that the concept was considered essential and fundamental.”<sup>56</sup> Accordingly, with the ratification of the Bill of Rights in 1791,<sup>57</sup> the Founders ensured that in the federal system, “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”<sup>58</sup>

*B. United States Supreme Court Jurisprudence: What Constitutes “Cruel and Unusual” Punishment?*

Although the plain text of the Eighth Amendment, and the historical context in which it was drafted, indicates the prohibition on barbarous and inhumane methods of punishment, the United States Supreme Court has not confined itself to such a limited interpretation. Indeed, the Court’s Eighth Amendment jurisprudence has undergone significant transformation from the early days of America to modern times. Its interpretation of the Cruel and Unusual Punishment Clause has shifted from an understanding that the provision bars merely torturous modes or methods of punishment to a more expansive interpretation that the Clause prohibits punishments that the Court assesses as disproportionate to the offense.<sup>59</sup> As discussed below, it

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53. See U.S. CONST. amend. VIII; BERKSON, *supra* note 50, at 5 (asserting that “[t]here is no doubt whatsoever that in borrowing the language of the English Bill of Rights and including it in the Eighth Amendment, our founding fathers intended to prohibit torture and other cruel punishments”).

54. Granucci, *supra* note 30, at 842.

55. *Id.*

56. BERKSON, *supra* note 50, at 5, 6.

57. MELUSKY & PESTO, *supra* note 27, at 9 (noting that “the Bill of Rights was added in 1791”).

58. U.S. CONST. amend. VIII; BERKSON, *supra* note 50, at 7 (recognizing that the Framers lifted most language from the English Declaration of Rights, but notably substituted the imperative phrase “shall not” for the more permissive “ought not”). In *Robinson v. California*, the United States Supreme Court applied this provision to the states through the Fourteenth Amendment. 370 U.S. 660, 666-667 (1962).

59. Stephen E. Meltzer, Harmelin v. Michigan: *Contemporary Morality and*

was this shift in thought that allowed the *Coker* Court to invalidate capital punishment for rape.

*i. Mode of Punishment as Cruel and Unusual*

Until 1910, the Supreme Court consistently interpreted the Eighth Amendment's ban on cruel and unusual punishments as applying to the method of punishment imposed.<sup>60</sup> In *Wilkerson v. Utah*,<sup>61</sup> the first case addressing such an Eighth Amendment challenge, the Court confronted a claim by the defendant that a sentence of death by firing squad constituted cruel and unusual punishment.<sup>62</sup> The *Wilkerson* Court noted that although "[d]ifficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted,"<sup>63</sup> the Eighth Amendment undoubtedly prohibited "punishments of torture, such as [being drawn or dragged to the place of execution . . . embowelled alive, beheaded, and quartered . . . public dissection . . . burning alive], and all others in the same line of unnecessary cruelty."<sup>64</sup> With this observation in mind, the Court rejected the defendant's claim and determined that:

Cruel and unusual punishments are forbidden by the Constitution, but the authorities referred to are quite sufficient to show that the punishment of shooting as a mode of executing the death penalty for the crime of murder in the first degree is not included in that

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*Constitutional Objectivity*, 27 NEW ENG. L. REV. 749, 766-68 (1993) ("The Supreme Court has shown nothing but confusion on the meaning of the Eighth Amendment"); Silversten, *supra* note 25, at 126 ("[T]he Supreme Court . . . [has] 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").

60. Silversten, *supra* note 25, at 122 ("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"). See *Weems v. United States*, 217 U.S. 349, 368, 373 (1910) ("What constitutes cruel and unusual punishment has not been exactly decided. It has been said that ordinarily the terms imply something inhuman and barbarous, torture and the like . . . . Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes."); *Kemmler*, 136 U.S. at 446, 447 (1890) (death by electrocution not cruel and unusual); *Wilkerson v. Utah*, 99 U.S. 130, 135 (1878) (death by firing squad not cruel and unusual).

61. 99 U.S. 130 (1878).

62. *Id.* at 134-35.

63. *Id.* at 135-36.

64. *Id.*

category, within the meaning of the [E]ighth [A]mendment.<sup>65</sup>

Twelve years later, in *In re Kemmler*,<sup>66</sup> the Court again confronted an Eighth Amendment challenge to a method of capital punishment.<sup>67</sup> The defendant, who had been convicted of murder and sentenced to death by electrocution, claimed that this mode of execution constituted cruel and unusual punishment.<sup>68</sup> In rejecting the defendant's claim, the *Kemmler* Court described what methods of punishment it perceived to fall within the meaning of "cruel and unusual," namely, "burning at the stake, crucifixion, breaking on the wheel, or the like."<sup>69</sup> In deferring to the state legislature's choice of capital punishment method and recognizing the traditional state prerogative to make such judgments, the Court determined that "[p]unishments are cruel when they involve torture or a lingering death . . . . [The Eighth Amendment] implies there something inhuman and barbarous, something more than the mere extinguishing of life."<sup>70</sup>

*ii. Disproportional Punishment as Cruel and Unusual*

The Supreme Court's 1910 decision in *Weems v. United States*<sup>71</sup> marks a turning point in the Court's interpretation of the scope of the Eighth Amendment's prohibition on cruel and unusual punishment.<sup>72</sup> The *Weems* majority, and subsequent Courts, departed from previous interpretations and expanded the concept of cruel and unusual punishment beyond the narrow question regarding the method of punishment. This decision signaled the beginning of a looser understanding of the Clause, which included nebulous concepts of proportionality and "evolving standards of decency."<sup>73</sup>

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65. *Id.* at 134-35.

66. 136 U.S. 436 (1890).

67. *Id.* at 441-42.

68. *Id.*

69. *Id.* at 446-47.

70. *Id.* at 447, 448-49.

71. 217 U.S. 349 (1910).

72. Silversten, *supra* note 25, at 122 (noting that prior consistency in Eighth Amendment jurisprudence "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").

73. *Trop v. Dulles*, 356 U.S. 86, 101 (1958); Silversten, *supra* note 25, at 122, 127 ("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 . . . . [T]he Court

In *Weems*, the defendant, an officer of the United States Bureau of Coast Guard and Transportation in the Philippine Islands, had been convicted of falsifying documents and committing fraud.<sup>74</sup> Having received for these crimes a sentence of fifteen years imprisonment, which included painful and hard physical labor, mandatory wearing of an ankle and wrist chain, the inability to receive assistance outside the penal institution and a fine, the defendant appealed to the Supreme Court, arguing that this sentence constituted cruel and unusual punishment in violation of the Eighth Amendment.<sup>75</sup>

In considering the defendant's challenge, the Court conceded that "[w]hat constitutes cruel and unusual punishment has not been exactly decided. It has been said that ordinarily the terms imply something inhuman and barbarous—torture and the like."<sup>76</sup> It considered and rejected a narrow construction of the Clause; that the Framers "adopted [the Eighth Amendment] as an admonition to all departments of the national government, to warn them against such violent proceedings, as had taken place in England in the arbitrary reigns of some of the Stuarts."<sup>77</sup> Instead, the *Weems* Court gave "cruel and unusual" a broader meaning, reasoning that:

[The Framers] were men of action, practical and sagacious, not beset with vain imagining, and it must have come to them that there could be exercises of cruelty by laws other than those which inflicted bodily pain or mutilation. With power in a legislature great, if not unlimited, to give criminal character to the actions of men, with power unlimited to fix terms of imprisonment with what accompaniments they might, what more potent instrument of cruelty could be put into the hands of power? And it was believed that power might be tempted to cruelty. This was the motive of the clause, and if we are to attribute an intelligent providence to its advocates we cannot think that it was intended to prohibit only practices like the Stuarts [sic], or to prevent only an exact repetition of history. We cannot think that the possibility of a coercive cruelty being exercised through other forms of punishment was overlooked.<sup>78</sup>

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began to read the concepts of proportionality and evolving standards of decency into the Eighth Amendment").

74. *Weems*, 217 U.S. at 357-58.

75. *Id.* at 358, 359, 381.

76. *Id.* at 368 (citing *McDonald v. Commonwealth*, 173 Mass. 322 (1899)).

77. *Id.* at 371 (quoting 2 JUSTICE STORY, COMMENTARIES ON THE CONSTITUTION § 1903).

78. *Id.* at 372-73.

The Court in *Weems* thus redefined the contours of the Eighth Amendment's Cruel and Unusual Punishment Clause. In doing so, the Court maintained that "[l]egislation, both statutory and constitutional, is enacted, it is true, from an experience of evils, but its general language should not . . . be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes."<sup>79</sup> Accordingly, in order for this and any constitutional provision to remain relevant through time, the Court declared that "a principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions."<sup>80</sup> The *Weems* majority thus advocated the importance of allowing the Constitution to adapt to unforeseen circumstances, stating that:

[Constitutions] are not ephemeral enactments, designed to meet passing occasions. They are . . . "designed to approach immortality as nearly as human institutions can approach it." The future is their care and provision for events of good and bad tendencies of which no prophecy can be made. In the application of a constitution, therefore, our contemplation cannot be only of what has been, but of what may be.<sup>81</sup>

The Court cautioned that "[u]nder any other rule a constitution would . . . be as easy of application as it would be deficient in efficacy and power."<sup>82</sup> Indeed, it maintained, "[i]ts general principles would have little value, and be converted by precedent into lifeless formulas. Rights declared in words might be lost in reality."<sup>83</sup>

In its analysis, the *Weems* majority found significant a comparison of the level of punishment for other crimes against that received by the defendant.<sup>84</sup> It noted that "[t]here are degrees of homicide that are not punished so severely, nor are . . . misprision of treason, inciting rebellion, conspiracy to destroy the Government by force, recruiting soldiers in the United States to fight against the United States . . . robbery, larceny, and other crimes."<sup>85</sup> Moreover, the Court observed that the United States Code, in contrast to the Philippine law, penalized a comparable crime by way of a fine and

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79. *Id.* at 373.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at 380.

85. *Id.*

imprisonment for no more than two years.<sup>86</sup> Accordingly, the *Weems* Court held that the defendant's punishment was "repugnant to the [B]ill of [R]ights," and therefore reversed the judgment of the Supreme Court of the Philippine Islands,<sup>87</sup> which had affirmed the defendant's sentence.<sup>88</sup>

*Trop v. Dulles*<sup>89</sup> followed four decades later and further solidified the *Weems* Court's expansive interpretation of the Eighth Amendment's Cruel and Unusual Punishment Clause.<sup>90</sup> In *Trop*, the defendant, a private in the United States Army,<sup>91</sup> had been convicted by court-martial of wartime desertion and sentenced to "three years at hard labor, forfeiture of all pay and allowances and a dishonorable discharge."<sup>92</sup> In addition, as a result of his conviction and dishonorable discharge, the defendant was stripped of his United States citizenship.<sup>93</sup> In considering whether the denationalization of an American citizen constituted cruel and unusual punishment, the Court asked "whether this penalty subjects the individual to a fate forbidden by the principle of civilized treatment guaranteed by the Eighth Amendment."<sup>94</sup>

At the outset, the *Trop* Court highlighted the constitutional strictures on the legislature to craft certain punishments, noting that "the existence of the death penalty is not a license to the Government to devise any punishment short of death within the limit of its imagination."<sup>95</sup> While recognizing, as had previous Courts, that "[t]he exact scope of the constitutional phrase 'cruel and unusual' has not been detailed by this Court,"<sup>96</sup> the *Trop* majority maintained that "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man."<sup>97</sup> That is, "[w]hile the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards. . . . The Amendment

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86. *Id.*

87. *Id.* at 357.

88. *Id.* at 381, 382.

89. 356 U.S. 86 (1958).

90. *See id.* at 99.

91. *Id.* at 87.

92. *Id.* at 88.

93. *Id.* at 87, 88.

94. *Id.* at 99.

95. *Id.*

96. *Id.*

97. *Id.* at 100.

must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”<sup>98</sup>

With this expansive principle in mind, the *Trop* Court determined “that use of denationalization as a punishment is barred by the Eighth Amendment.”<sup>99</sup> Although the Court recognized that this penalty does not impose any physical injury or “primitive torture,” the majority maintained that “[t]here is instead the total destruction of the individual’s status in organized society . . . [which] is a form of punishment more primitive than torture. . . . [T]he expatriate has lost the right to have rights.”<sup>100</sup> In addition to this concern, the Court gave weight to the fact that “[t]he civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime.”<sup>101</sup> Accordingly, echoing the sentiments of the *Weems* majority, the *Trop* Court concluded that “[t]he 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.”<sup>102</sup>

### iii. *Coker v. Georgia*

The first Eighth Amendment challenge to capital punishment for rape occurred in *Coker v. Georgia*.<sup>103</sup> The defendant in this case had been in prison as a result of prior convictions for murder, kidnapping, aggravated assault and rape.<sup>104</sup> While serving time for these offenses, he escaped from his Georgia prison and, as a fugitive, broke into the home of the new victim,<sup>105</sup> a sixteen-year-old wife,<sup>106</sup> tied up her husband, and raped and kidnapped her.<sup>107</sup> The police subsequently apprehended Coker, and he was tried and convicted for rape, among

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98. *Id.* at 100-01. The Court also injected a proportionality requirement into the Clause, stating: “Fines, imprisonment and even execution may be imposed *depending upon the enormity of the crime*, but any technique outside the bounds of these traditional penalties is constitutionally suspect.” *Id.* at 100 (emphasis added).

99. *Id.* at 101.

100. *Id.* at 101-02.

101. *Id.* at 102.

102. *Id.* at 104-03.

103. Silversten, *supra* note 25, at 140 (recognizing that the *Coker* case marked the first time the Court considered the constitutionality of capital punishment for rape).

104. *Coker*, 433 U.S. at 587.

105. *Id.* at 587.

106. *Id.* at 605 (Burger, J., dissenting).

107. *Id.*

the other crimes that he had committed in the course of his escape.<sup>108</sup> The jury sentenced the defendant to death by electrocution,<sup>109</sup> and he appealed his conviction to the United States Supreme Court.<sup>110</sup>

In considering the defendant's Eighth Amendment challenge, the *Coker* Court first outlined its understanding of the two veins of the Eighth Amendment's prohibition on cruel and unusual punishment: the "inherently barbaric or . . . unacceptable mode of punishment" strain discussed in *Wilkinson* and *Kemmler*, and the "disproportionate to the crime for which it is imposed" variety espoused in *Weems* and *Trop*.<sup>111</sup> Having concluded that the death penalty *per se* did not qualify as an inherently barbaric mode of punishment, the Court then examined whether such a penalty qualifies as disproportionate to the offense of rape.<sup>112</sup>

The Court set out the two-pronged test that it had announced previously in *Gregg v. Georgia*<sup>113</sup> to answer this question.<sup>114</sup> It considered whether the punishment "makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering," and whether the penalty "is grossly out of proportion to the severity of the crime."<sup>115</sup> If either question yielded an affirmative answer, the punishment would fail the proportionality requirement and therefore would violate the Eighth Amendment.<sup>116</sup>

In attempting to explain how it would determine the presence or absence of "gross disproportionality," the Court professed that "these Eighth Amendment judgments should not be, or appear to be, merely the subjective views of individual Justices; judgment should be

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108. *Id.*

109. *Id.* at 591.

110. *Id.* at 586. During the punishment phase of *Coker's* trial, the jury considered whether he should receive a death sentence, life imprisonment or a lesser term of incarceration. *Id.* at 586. In order for the jury to have been able to impose the death penalty, the Georgia rape statute required it to find present at least one aggravating factor, such as the existence of a prior record of conviction for another capital felony; that the offender committed the rape in the course of his commission of another capital felony; or that the rape "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." *Id.* at 587-89 n.3.

111. *Id.* at 591-92.

112. *Id.* at 592.

113. 428 U.S. 153 (1976).

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

115. *Id.*

116. *Id.*

informed by objective factors to the maximum possible extent.”<sup>117</sup> Instead, the Court asserted that “attention must be given to the public attitudes concerning a particular sentence history and precedent, legislative attitudes, and the response of juries reflected in their sentencing decisions are to be consulted.”<sup>118</sup>

Turning first to an examination of “history and . . . objective evidence of the country’s present judgment concerning the acceptability of death as a penalty for rape of an adult woman,” the Court surveyed state rape laws.<sup>119</sup> Confining its examination of state statutes to the previous half century, it noted that:

At no time in the last 50 years have a majority of the States authorized death as punishment for rape. In 1925, 18 States, the District of Columbia, and the Federal Government authorized capital punishment for the rape of an adult female. By 1971 just prior to our decision in *Furman v. Georgia*, that number had declined, but not substantially, to 16 States plus the Federal Government.<sup>120</sup>

The *Coker* plurality also found significant the fact that, after *Furman v. Georgia*,<sup>121</sup> wherein the Court had invalidated the death penalty as applied in particular cases, many states were forced to reform their capital punishment statutes, and having done so, “none of the States that had not previously authorized death for rape chose to include rape among capital felonies.”<sup>122</sup> Moreover, the Court observed, “[o]f the 16 States in which rape had been a capital offense, only three provided the death penalty for rape of an adult woman in their [post-*Furman*] revised statutes.”<sup>123</sup> Accordingly, the plurality asserted that while “[t]he current judgment with respect to the death penalty for rape is not wholly unanimous among state legislatures . . . it obviously weighs very heavily on the side of rejecting capital punishment as a suitable penalty for raping an adult woman.”<sup>124</sup>

The *Coker* plurality also maintained that the sentencing practices of juries provided a “significant and reliable objective index of contemporary values because it is so directly involved,” and therefore

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117. *Id.*

118. *Id.*

119. *Id.* at 593.

120. *Id.*

121. 408 U.S. 238 (1972).

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

123. *Id.*

124. *Id.* at 596.

should be examined to assess “whether capital punishment is an appropriate penalty for the crime being tried.”<sup>125</sup> The Court took note of the fact that of the sixty-three Georgia rape convictions in the previous four years, six defendants had received death sentences.<sup>126</sup> While acknowledging the argument that this statistic may demonstrate that “juries simply reserve the extreme sanction for extreme cases of rape and that recent experience surely does not prove that jurors consider the death penalty to be a disproportionate punishment for every conceivable instance of rape, no matter how aggravated,” the Court dismissed this proposition without much explanation.<sup>127</sup> It noted simply that “in the vast majority of cases, at least 9 out of 10, juries have not imposed the death sentence.”<sup>128</sup>

For the *Coker* plurality, the sum total of the actions of juries and state legislatures, coupled with its own judgment, amounted to a constitutional rejection of the death penalty for rape: while “[t]hese recent events evidencing the attitude of state legislatures and sentencing juries do not wholly determine this controversy . . . . Nevertheless, 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.”<sup>129</sup> In discussing its assessment of the severity of the crime of rape, the Court acknowledged:

[It] is highly reprehensible, both in a moral sense and in its almost total contempt for the personal integrity and autonomy of the female victim and for the latter’s privilege of choosing those with whom intimate relationships are to be established. Short of homicide, it is the ‘ultimate violation of self.’ It is also a violent crime because it normally involves force, or the threat of force or intimidation, to overcome the will and the capacity of the victim to resist. Rape is very often accompanied by physical injury to the female and can also inflict mental and psychological damage. Because it undermines the community’s sense of security, there is public injury as well.<sup>130</sup>

Despite these acknowledgments, however, the plurality turned away from the brutal nature of this offense and, instead, diverted its

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125. *Id.* at 596 (quoting *Gregg*, 428 U.S. at 181).

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

127. *Id.* at 597.

128. *Id.*

129. *Id.*

130. *Id.* at 597-98.

attention to a comparison between the seriousness of rape and that of murder to support its proportionality assessment.<sup>131</sup> Thus, it determined that although “[r]ape is without doubt deserving of serious punishment . . . in terms of moral depravity and of the injury to the person and to the public, it does not compare to murder, which does involve the unjustified taking of human life.”<sup>132</sup> Implying that the constitutionally-mandated proportionality test requires the taking of a human life in order to justify capital sentencing, the Court asserted that:

[R]ape by definition does not include the death of or even the serious injury to another person . . . . The murderer kills; the rapist . . . does not. Life is over for the victim of the murderer; for the rape victim, life may not be nearly so happy as it was, but it is not over and normally is not beyond repair.<sup>133</sup>

The *Coker* Court concluded therefore that, “[w]e have the abiding conviction that the death penalty, which ‘is unique in its severity and irrevocability’ . . . is an excessive penalty for the rapist who, as such, does not take human life.”<sup>134</sup>

The *Coker* plurality provoked strong dissent by Chief Justice Berger and then Justice Rehnquist.<sup>135</sup> The dissent chastised the plurality for stepping outside its proper objective judicial function and into a realm where it gave effect to its subjective policy preferences, stating:

In a case such as this, confusion often arises as to the Court’s proper role in reaching a decision. Our task is not to give effect to our individual views on capital punishment; rather, we must determine what the Constitution permits a State to do under its reserved powers. 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. . . . [T]he Cruel and Unusual Punishments Clause does not give the Members of this Court license to engraft their conceptions of proper public policy onto the considered legislative judgments of the States.<sup>136</sup>

The dissent also objected to the plurality’s minimization of the

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131. *Id.* at 598.

132. *Id.*

133. *Id.*

134. *Id.* at 598.

135. *Id.* at 604-22.

136. *Id.* at 604.

severity of rape, noting that while the Eighth Amendment prohibits “the death penalty for minor crimes . . . rape is not a minor crime . . . . [R]ape is inherently one of the most egregiously brutal acts one human can inflict upon another.”<sup>137</sup>

In dissecting each of the plurality’s main points, namely, its “objective” analysis of current state statutes and jury practices and its “subjective” determination of the seriousness of rape, the dissent highlighted the defects of these assessments.<sup>138</sup> It recognized that “[t]he plurality opinion bases its analysis, in part, on the fact that ‘Georgia is the sole jurisdiction in the United States at the present time that authorizes a sentence of death when the rape victim is an adult woman.’”<sup>139</sup> However, in revealing the plurality’s selective deference to certain facts, and acknowledging the possibility of a swinging punishment pendulum in the United States, the dissent asserted:

Surely . . . this statistic cannot be deemed determinative, or even particularly relevant. As the [plurality] opinion concedes . . . two other States, Louisiana and North Carolina have enacted death penalty statutes for adult rape *since this Court’s 1972 decision in *Furman v. Georgia** . . . . If the Court is to rely on some “public opinion” process, does this not suggest the beginning of a “trend”?<sup>140</sup>

Moreover, the dissent scolded the plurality for employing a narrow timeline in its examination of state capital rape statutes, declaring that “it is myopic to base sweeping constitutional principles upon the narrow experience of the past five years.”<sup>141</sup> The dissent pointed to the “considerable uncertainty” that the Court’s pre-*Coker* death penalty jurisprudence had caused in the arena of capital sentencing as a probable explanation for the “[f]ailure of more States to enact statutes imposing death for rape of an adult woman” after *Furman*.<sup>142</sup> Further, referencing the historical treatment of rape by the states, and ascribing to the plurality opinion insincere motives, the dissent pointed out that:

[W]hen considered in light of the experience since the turn of this century, where more than one-third of American jurisdictions have

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137. *Id.* at 604, 607-08.

138. *Id.* at 613-22.

139. *Id.* at 613.

140. *Id.* (emphasis added).

141. *Id.* at 614.

142. *Id.*

consistently provided the death penalty for rape, the plurality's focus on the experience of the immediate past must be viewed as truly disingenuous. Having in mind the swift changes in positions of some Members of this Court in the short span of five years, can it rationally be considered a relevant indicator of what our society deems "cruel and unusual" to look solely to what legislatures have refrained from doing under conditions of great uncertainty arising from our less than lucid holdings on the Eighth Amendment?<sup>143</sup>

Contrary to the plurality's approach, the dissent urged that "[f]ar more representative of societal mores of the 20th century is the accepted practice in a substantial number of jurisdictions preceding the *Furman* decision."<sup>144</sup> Indeed, the dissent maintained that "[t]he problem . . . is the suddenness of the Court's perception of progress in the human attitude since decisions of only a short while ago."<sup>145</sup>

Additionally, turning to the nature of the offense of rape, the dissent noted the plurality's concession that "the crime of rape is second perhaps only to murder in its gravity."<sup>146</sup> Accordingly, while acknowledging that the Eighth Amendment imposes constitutional limitations on the states with respect to the level of punishments imposed, it maintained that Georgia's capital rape statute "did not approach such substantive constraints by enacting the statute here in question."<sup>147</sup> Deference, the dissent urged, must be accorded state lawmakers in rendering determinations with respect to crime and punishment, even to those jurisdictions comprising the popular minority. It noted:

Three state legislatures have, in the past five years, determined that the taking of human life and the devastating consequences of rape will be minimized if rapists may, in a limited class of cases, be executed for their offenses. That these states are presently [in the] minority does not, in my view, make their judgment less worthy of deference. . . . In this area the choices for legislatures are at best painful and difficult and deserve a high degree of deference."<sup>148</sup>

Perhaps the most fundamental point of the dissenting opinion in *Coker*, however, was its observation that "[t]he question of whether

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143. *Id.*

144. *Id.* at 614-15.

145. *Id.* (quoting *Furman*, 408 U.S. at 410 (Blackmun, J., dissenting)).

146. *Coker*, 433 U.S. at 615.

147. *Id.* at 615-16.

148. *Id.* at 616.

the death penalty is an appropriate punishment for rape is surely an open one.”<sup>149</sup> Noting that the current climate of rape punishment was unsettled and non-uniform, the dissent acknowledged that “[w]e cannot know which among th[e] range of possibilities is correct.”<sup>150</sup> Moreover, the dissent opined that had the Court upheld the Georgia statute, and had the possibility of capital sentencing for rape continued, “[i]t is difficult to believe that Georgia would long remain alone in punishing rape by death if the next decade demonstrated a drastic reduction in its incidence of rape.”<sup>151</sup> In recognizing that “[s]ocial change on great issues generally reveals itself in small increments,” the dissent hypothesized that “the ‘current judgment’ of many States [not to allow the death penalty for rape] could well be altered on the basis of Georgia’s experience, were we to allow its statute to stand.”<sup>152</sup> Given all of the unknowns surrounding the propriety and influence of capital punishment for rape, the dissent noted the unfortunate finality of the plurality’s opinion: “[T]oday’s holding forecloses the very exploration we have said federalism was intended to foster.”<sup>153</sup>

In discussing the plurality’s “subjective” assessments of the proportionality of capital punishment to the crime of rape, the dissent expressed that the plurality’s conclusion was no less than “disturbing.”<sup>154</sup> It noted and discounted as constitutionally irrelevant the plurality’s emphasis “upon the bare fact that murder necessarily results in the physical death of the victim, while rape does not.”<sup>155</sup> Indeed,

[N]o Member of the Court explains why this distinction has relevance, much less constitutional significance. It is, after all, not irrational – nor constitutionally impermissible – for a legislature to make the penalty more severe than the criminal act it punishes in the hope it would deter wrongdoing.”<sup>156</sup>

In conclusion, the *Coker* dissent noted that “[r]ape is not a crime ‘light years’ removed from murder in the degree of its heinousness; it certainly poses a serious potential danger to the life and safety of

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149. *Id.* at 617.

150. *Id.* at 617-18.

151. *Id.*

152. *Id.* at 618-19.

153. *Id.* at 618.

154. *Id.* at 619.

155. *Id.*

156. *Id.*

innocent victims apart from the devastating psychic consequences.”<sup>157</sup> As such, it asserted that “affording the States proper leeway under the broad standard of the Eighth Amendment, if murder is properly punishable by death, rape should be also, if that is the considered judgment of the legislators.”<sup>158</sup>

#### IV. ANALYSIS

From the earliest days of America, the individual states, the federal government, and the District of Columbia had enjoyed the option of sanctioning rape with the death penalty. That the federal government, the states, and the District chose to do so from this country’s inception through the twentieth century reflects the societal judgment that this crime may warrant this punishment. The English tradition of treating rape as a death-penalty eligible crime similarly bolsters this observation. Even more importantly, however, the Framers of the Constitution and Bill of Rights certainly were aware of this traditional practice in creating the prohibition on cruel and unusual punishments, yet the common law practice persisted without interruption from colonial times through the enactment of the first federal criminal statute codifying capital punishment for rape and up until the latter part of the twentieth century. Consistent historical tradition, therefore, would counsel in favor of the constitutional propriety of permitting capital sentencing for the crime of rape.

Past American and English tradition, however, while clearly sanctioning capital punishment for rape, may not alone answer the question of whether the Eighth Amendment today permits such a punishment under the Supreme Court’s twentieth-century proportionality doctrine. The concept of proportionality derives from the Enlightenment, which advocated symmetry between crimes and their punishments. As articulated by one proponent of this doctrine, Baron de Montesquieu:

It is an essential point that there should be a certain proportion in punishments . . . . It is a great abuse amongst us to condemn to the same punishment a person that only robs on the highway and another who robs and murders. Surely, for the public security, some difference should be made in the punishment.<sup>159</sup>

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157. *Id.* at 620.

158. *Id.* at 621.

159. 1 BARON DE MONTESQUIEU, *THE SPIRIT OF LAWS* 89, 90 (Prometheus Books 2002) (1900).

Other thinkers of the eighteenth century also echoed this sentiment. John Locke suggested that “[e]ach transgression may be punished to that degree and with so much severity as will suffice to make it an ill bargain to the offender, give him cause to repent, and terrify others from doing the like.”<sup>160</sup>

Similarly, Cesare Beccaria maintained that “a proportion must be established between crimes and punishments.”<sup>161</sup> Reasoning that proportionality would serve as the strongest defense against crime, Beccaria proposed that “[i]f equal punishment is decreed for two crimes which do not cause equal offence to society, there will be no stronger obstacle to prevent the committing of the more serious crime when it brings the greater advantage.”<sup>162</sup> He accepted the reality that crime exists as part of human nature and societal conditions, but observed that:

The force, like the force of gravity, which compels us to our own well-being, can be checked only by the measure of the obstacles opposed to it . . . [T]he lawmaker acts the part of the skilful [sic] architect, whose business it is to counteract the ruining course of gravity and cause the interaction of all that contributes to the strength of his building.”<sup>163</sup>

Beccaria appeared to remain optimistic that legislators could find the proper balance of proportion and crime, and urged that “the wise legislator will be content to indicate the chief divisions on the scale [of crimes and their punishments] without upsetting its order and inflicting punishments of the lowest degree for crimes of the first degree.”<sup>164</sup>

Enlightenment philosophy and the concept of proportionality profoundly influenced the Founding Fathers.<sup>165</sup> As one historian has noted, “the principle of just deserts and proportionality between crimes and punishments was fundamental to the early American

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160. JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT* 9 (Thomas P. Peardon ed., The Liberal Arts Press, Inc. 1952) (1690).

161. CESARE BECCARIA, *ON CRIMES & PUNISHMENT* 74 (1996).

162. *Id.*

163. *Id.* at 75.

164. *Id.* at 76.

165. Joshua E. Kastenberg, *An Enlightened Addition to the Original Meaning: Voltaire and the Eighth Amendment's Prohibition Against Cruel and Unusual Punishment*, 5 TEMP. POL. & CIV. RTS. L. REV. 49, 50, 69 (1996) (noting that “[t]he influence of Enlightenment-era philosophy had a tremendous impact in early American law . . . [The Founders] were influenced by the philosophy behind the Enlightenment”).

politics of punishment.”<sup>166</sup> Traces of this ideology have persisted to contemporary times, as reflected in the language and holdings of the Supreme Court majorities in *Weems*, *Trop*, and *Coker*. As expressed by the *Weems* Court, “the clause of the Constitution . . . may be . . . progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice.”<sup>167</sup>

For all of its optimism in the progress of humankind, the Enlightenment and the Supreme Court’s proportionality test contain a common flaw: they grossly limit the analysis of societal circumstances, tunnel-visioning the assessment to a “one-way” view of social mores. Stated another way, these doctrines deny the reality, reflected in English legal history, that societal attitudes vacillate and change back and forth over time. What is believed today might not be assumed tomorrow, and given this circumstance, before invalidating a lengthy historical practice as a violation of the Constitution, due consideration must be given to these tides of change.

At worst, in the context of capital rape statutes, as noted by the *Coker* dissent, British and American legal history demonstrates grave uncertainty and lack of unanimity on the question of the appropriateness of this sentence for this offense. More than a dozen states, the federal government and the District of Columbia had continued to allow the death penalty for rape in the years preceding *Coker*, and at the time of the *Coker* decision, while this number had decreased, a handful of states and the federal government continued to impose capital sentences for rape. Accordingly, although at the time of *Coker*, capital rape statutes did not qualify as the “popular” penalty in the sense that a majority of lawmakers did not provide for this punishment, the propriety of such a sanction remained open to different interpretations.

Thus, the most significant error committed by the *Coker* majority lay in its assumption that when a punishment falls out of favor, it necessarily means that the punishment violates the Constitution. In this way, the Court viewed the existence of capital rape statutes in less than a majority of states as an indicator of American society’s permanent abandonment of this punishment, rather than representing the possibility that social mores in some states dictated abstention from this sanction at this particular time in history. In doing so, the

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166. RONALD J. PESTRITTO, FOUNDING THE CRIMINAL LAW 140 (2000).

167. *Weems*, 217 U.S. at 378.

*Coker* Court improperly raised the constitutional floor of what constitutes cruel and unusual punishment and foreclosed the possibility of retaining this historically prevalent and accepted option of punishment for rape.

#### V. CONCLUSION

By fixing its focus overwhelmingly on the majority of states' contemporary attitudes towards the death penalty for the crime of rape, rather than on the lengthy and consistent history of this punishment for this crime, as well as the idea of ever-present vacillating tides of social and legal change, the *Coker* Court reduced the Cruel and Unusual Punishment Clause to nothing more than a perceived popularity test at any given point in American history. That a particular punishment may not be popular or frequently imposed at a certain point in time, as seen in the British legal history of rape, does not automatically convert it to a form of unconstitutional cruel and unusual punishment. Instead, given the historical acceptance of capital punishment for rape, it demonstrates a likely temporary change in judgment. Whether social attitudes shift back to embracing capital punishment for rape remains to be seen, but because of the *Coker* decision, lawmakers will be helpless to heed the call for change.

