

## BETTER DEAD THAN R(AP)ED?: THE PATRIARCHAL RHETORIC DRIVING CAPITAL RAPE STATUTES

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*“It is true rape is a most detestable crime, and therefore ought severely and impartially to be punished with death; but it must be remembered, that it is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent.”*<sup>1</sup>

*Sir Matthew Hale, 1676*

*“Our society has the feminist movement to thank for all of these structural reforms. But the most important change brought about by the women’s movement is abandonment of the antediluvian notion that rape is ‘a fate worse than death.’ Nothing is worse than death . . . .”*<sup>2</sup>

*Susan Jacoby, 2002*

### INTRODUCTION

Hale’s oft-cited words are more famous for their bearing on the procedural aspects of rape law,<sup>3</sup> but it is the first part of the quote that relates to this article. While little has changed since Hale’s time in how a rape trial proceeds,<sup>4</sup> the application of the death penalty to rapists that he

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<sup>1</sup> 1 MATTHEW HALE, *THE HISTORY OF THE PLEAS OF THE CROWN* 634 (Philadelphia, Robert H. Small 1847) (1736).

<sup>2</sup> Susan Jacoby, *Thank Feminists for Rape Reforms*, *BALTIMORE SUN*, Aug. 13, 2002, at 11A.

<sup>3</sup> Beverly J. Ross, *Does Diversity in Legal Scholarship Make a Difference?: A Look at the Law of Rape*, 100 *DICK. L. REV.* 795, 806–07 (1996).

<sup>4</sup> See Anne M. Coughlin, *Sex and Guilt*, 84 *VA. L. REV.* 1, 12–13 (1998) (explaining that during Hale’s time only serious forms of physical violence were regarded as rape). This is not to say that rape trials have not been significantly reformed in the last four hundred years, but that the actual proceedings still involve the same notions of consent and womyn still must prove much more than victims of other crimes. *Id.* For an account of the reforms implemented by states

so vehemently supported fell into disfavor during the 1970's in America and abroad. The last time a person in the United States was executed for rape was forty years ago in Mississippi.<sup>5</sup> The movement in the United States against the death penalty for rape culminated in 1978 with the Supreme Court's decision in *Coker v. Georgia*.<sup>6</sup> After the Court held that executions for rape were cruel and unusual punishment in violation of the Eighth Amendment of the Constitution,<sup>7</sup> there was little left to be debated about the issue.

Or so we thought. Efforts to revive the death penalty for the crime of rape in the United States gained a foothold in Louisiana in 1995. On June 17 of that year, Governor Edwin Edwards signed into law provisions that allowed capital punishment for those convicted of raping a child.<sup>8</sup> The passage of a child rape death penalty statute in Louisiana set off a series of debates in state legislatures throughout America.<sup>9</sup> Those deliberations coincided with similar reviews of criminal penalties for rape around the world.<sup>10</sup> The fervor that has erupted regarding child molestation is not new, but the desire to apply the death penalty to these crimes has gained momentum in recent years. Calls for law and order and the salient belief that child molesters cannot be rehabilitated have made the death penalty an attractive solution to a "tough on crime" public in the United States.<sup>11</sup> That these laws may conflict with the Court's holding in *Coker* is not generally a consideration for those seeking swift "justice."<sup>12</sup> Then again, that is not the concern of this article either.

While it is certainly important to speculate on what the Supreme Court would decide in a hypothetical case concerning the death penalty as applied to child rape,<sup>13</sup> it is also critical to examine the legal effects these

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over the last thirty years, see David P. Bryden & Sonja Lengnick, *Rape in the Criminal Justice System*, 87 J. CRIM. L. & CRIMINOLOGY 1194, 1198-1200 (1997).

<sup>5</sup> *Rape executions in USA, 1800-1964*, at <http://sun.soci.niu.edu/~critcrim/dp/faq/rapeexec.html> (last visited Oct. 16, 2004).

<sup>6</sup> 433 U.S. 584 (1977).

<sup>7</sup> *Id.* at 592.

<sup>8</sup> LA. REV. STAT. ANN. § 14.42(c) (1997); *State v. Wilson*, 685 So. 2d 1063, 1067 n.5 (La. 1996).

<sup>9</sup> See *infra* notes 162-88 and accompanying text.

<sup>10</sup> See *infra* notes 194-216 and accompanying text.

<sup>11</sup> See *infra* notes 162-88 and accompanying text.

<sup>12</sup> A notable exception to the absence of any mention of *Coker* in legislative debates in various states regarding the application of the death penalty for child rape took place in Virginia. By all accounts, the failure to pass a child rape capital punishment statute was due in large part to the belief that such a law would be unconstitutional. See Michael Hardy, *Committee Kills Death Penalty Bill*, RICHMOND TIMES-DISPATCH, Jan. 29, 1998, at A-8.

<sup>13</sup> Evaluating the constitutionality of the Louisiana statute has been the primary focus of legal scholarship on the death penalty for child rape. A series of notes and articles has been

policies will have on womyn,<sup>14</sup> children, and rapists.<sup>15</sup> Primarily, careful

published with the sole focus aimed at resolving the conflict between *Coker* and the new statutes. From a purely numerical perspective, a slight majority of legal commentators believe the new statutes would be held unconstitutional. See J. 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, 1371–72 (1998); Meryl P. Diamond, Note, *Assessing the Constitutionality of Capital Child Rape Statutes*, 73 ST. JOHN'S L. REV. 1159, 1160–61 (1999); Annaliese Flynn Fleming, Comment, *Louisiana's Newest Capital Crime: The Death Penalty for Child Rape*, 89 J. CRIM. L. & CRIMINOLOGY 717, 718, 748 (1999); Pamela J. Lormand, *Proportionate Sentencing for Rape of a Minor: The Death Penalty Dilemma*, 73 TUL. L. REV. 981, 1014 (1999); Lisa White Shirley, *State v. Wilson: The Louisiana Supreme Court Sanctions the Death Penalty for Child Rape*, 72 TUL. L. REV. 1913, 1921–24 (1998); Pallie Zambrano, *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, 1268 (1998). There is also a sizable minority that believes a child rape statute would survive a constitutional challenge. See J. Richard Broughton, "On Horror's Head Horrors Accumulate": *A Reflective Comment on Capital Child Rape Legislation*, 39 DUQ. L. REV. 1, 7 (2000); Yale Glazer, *Child Rapists Beware! The Death Penalty and Louisiana's Amended Aggravated Rape Statute*, 25 AM. J. CRIM. L. 79, 82 (1997); Elizabeth Gray, *Death Penalty and Child Rape: An Eighth Amendment Analysis*, 42 ST. LOUIS U. L.J. 1443, 1446 (1998); Bridgette M. Palmer, Note, *Death as a Proportionate Penalty for Rape of a Child: Considering One State's Current Law*, 15 GA. ST. U. L. REV. 843, 845 (1999); 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, 123 (2001); Melissa Meister, *Murdering Innocence: The Constitutionality of Capital Child Rape Statutes*, 45 ARIZ. L. REV. 197 (2003). Professor Michael Mello also offered a wonderful reconstruction of *Coker* that attempted to account for race and gender, applying some of his conclusions to the Louisiana statute. See Michael Mello, *Executing Rapists: A Reluctant Essay on the Ethics of Legal Scholarship*, 4 WM. & MARY J. WOMEN & L. 129, 177–201 (1997).

<sup>14</sup> I choose to adopt the gender-neutral term "womyn" to refer to the people more commonly called "women." The etymology of "woman" was from the Old English term "wif-man" whereas "man" was "wer-man." Over time, the "wer" was dropped as "man" was recognized as the significant and "normal" sex. Removing "women" and instead using "womyn" is not just a way to break from patriarchal linguistic patterns. It also problematizes social constructions of womyn because language is an important vehicle for deconstructing cultural norms and exposing gender hierarchies. See Onilley McNoan, *We like Women, what about Womyn?*, IMPRINT ONLINE, Mar. 26, 1999, at <http://imprint.uwaterloo.ca/issues/032699/4Human/features01.shtml>; see also ROSALIE MAGGIO, *THE DICTIONARY OF BIAS-FREE USAGE: A GUIDE TO NONDISCRIMINATORY LANGUAGE* 285 (1991); Corey Rayburn, *Why are YOU taking Gender and the Law?: Deconstructing the Norms that Keep Men out of the Law School's "Pink Ghetto"*, 14 HASTINGS WOMEN'S L.J. 71, 84, 88 (2003). Some French feminists have similarly rejected the derivation of "women" because "attempts to define a feminine subjectivity as a contrast to the phallogocentric view of women will founder on masculine/feminine oppositions and cannot move beyond them." See MAGGIE HUMM, *THE DICTIONARY OF FEMINIST THEORY* 238 (1989). While the issue of womyn/women may seem trivial to some, it is an integral part of reshaping English away from its patriarchal roots. See MARY DALY, *WEBSTER'S FIRST INTERGALACTIC WICKEDARY OF THE ENGLISH LANGUAGE* 200 (1987). The issue of male domination of language is a matter for a larger work, but Dale Spender's analysis of the basic issue is notable:

He/man makes males linguistically visible and females linguistically invisible. It promotes male imagery in everyday life at the expense of female imagery so that it seems reasonable to assume the world is male until proven otherwise. It reinforces the belief of the dominant group, that they, males, are the universal, the central, important

scrutiny must be applied to the proposition offered by some observers that “death sentences under the new statutes would not be vulnerable to arguments . . . that they are vestiges of viewing rape victims as male property.”<sup>16</sup> Many believe that because the new laws target child molesters, the issue of gender is irrelevant to the discussion. Despite the abundance of material connecting feminist criticism to rape, some commentators act as though the Louisiana statute—and others like it—can escape these critiques by merely changing the “protected” group<sup>17</sup> targeted by the law from womyn to children.

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category so that even those who are not members of the dominant group learn to accept this reality.

DALE SPENDER, *MAN MADE LANGUAGE* 157 (1980). “Womyn” has also been accepted by at least two major “mainstream” dictionaries as a gender-neutral replacement for “women.” See *THE NEW OXFORD AMERICAN DICTIONARY* 1940 (2001); *RANDOM HOUSE WEBSTER'S COLLEGE DICTIONARY* 1478 (2d ed. 1997). However, I do not change exact quotes within the article out of respect for those who may intentionally use the term “women.”

<sup>15</sup> This article focuses on male to female rape and adult male to child male or female rape. This is not meant to imply that these categories define the extent of rape in America. Male-to-male rape is a well-documented and prevalent problem in the United States. See Rape Crisis Center of Catawaha County, *Male Rape Information Sheet*, at <http://www.rapecrisiscenter.com/Male%20Rape%20Info%20Sheet.html> (last visited Aug. 9, 2004). A less documented and overall less significant issue is female-to-male rape. See *id.* Another underreported phenomenon, female-to-female rape, has received recent attention. See generally LORI B. GIRSHICK, *WOMAN-TO-WOMAN SEXUAL VIOLENCE* (2002). Nonetheless, the statistical reality of rape in America is such that 99% of rapists are men and 91% of those raped are womyn. See LAWRENCE A. GREENFELD, U.S. DEP'T OF JUSTICE, *SEX OFFENSES AND OFFENDERS* 2 (1997).

<sup>16</sup> John Q. Barrett, *Death for Child Rapists May Not Save Children*, NAT'L L.J., Aug. 18, 1997, at A21.

<sup>17</sup> As this article is significantly focused on the rhetoric surrounding rape, it is important to consider the “labels” used to identify those who have been raped. The central axis of conflict on the naming issue surrounds the transition from calling someone a “rape victim” to using “rape survivor.” See David Mills, *Semantics of Rape: Language vs. What's 'Politically Correct,'* THE WASHINGTON POST, Nov. 22, 1991, at B5. This linguistic transition has largely been driven by academics who believe that “victim” rhetoric is disempowering for womyn. See EDWARD GONDOLF & ELLEN FISHER, *BATTERED WOMEN AS SURVIVORS: AN ALTERNATIVE TO TREATING LEARNED HELPLESSNESS* 77–78 (1988); Evelyn Mary Aswad, *Torture by Means of Rape*, 84 GEO. L.J. 1913, 1916 n.11 (1996); Metin Basoglu, *Prevention of Torture and Care of Survivors: An Integrated Approach*, 270 JAMA 606, 606 (1993); International Human Rights Law Group, *No Justice, No Peace: Accountability for Rape and Gender-Based Violence in the Former Yugoslavia*, 5 HASTINGS WOMEN'S L.J. 89, 110 (1994); Martha R. Mahoney, *EXIT: Power and the Idea of Leaving in Love, Work, and the Confirmation Hearings*, 65 S. CAL. L. REV. 1283, 1310–11 & n.115 (1992); Toni M. Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?*, 87 MICH. L. REV. 2099, 2112 (1989); Aviva Orenstein, *“MY GOD!”: A Feminist Critique of the Excited Utterance Exception to the Hearsay Rule*, 85 CAL. L. REV. 159, 164 n.5 (1997). Some writers have gone as far as saying the “victim” label is abusive to womyn who have been raped. See Julie Hosking, *When It Comes to Rape Victim is a Dirty Word*, SUNDAY TELEGRAPH MAGAZINE (Sydney), Mar. 24, 2002, at 20. “Survivor” became a preferred term because it was used by womyn to move past their trauma. See Rhona Dowdeswell, *Why I Must Forgive to Get Over My Rape*, WESTERN DAILY PRESS (Bristol), Jan.

While there has been significant scholarship examining the constitutional implications of these new penalties,<sup>18</sup> there has been nothing in the way of critical analysis of these laws. Also missing has been a scholarly investigation of the systemic effects of permitting the death penalty for rape—of an adult or a child. Unfortunately, this gap coincides with a dearth of feminist scholarship on the substantive aspects of punishment and sentencing in rape cases.<sup>19</sup> This omission by feminist legal scholars should not be terribly surprising given that *Coker* seemingly eliminated the need for discussion about the death penalty for rape and arguments over the length of sentences are not the usual function of academic work. Nonetheless, this absence of academic debate and attention has allowed a variety of forces to push a series of laws premised on a bankrupt belief system that is almost as old as the crime of rape.

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25, 2002, at 8. Despite this “popular” movement among rape scholars to use “survivor” rhetoric, Andrea Dworkin presented powerful arguments for using “victim” when she wrote:

It’s a true word. If you were raped, you were victimized. You damned well were. You were a victim. It doesn’t mean that you are a victim in the metaphysical sense, in your state of being, as an intrinsic part of your essence and existence. It means somebody hurt you. They injured you.

. . . .

And if it happens to you systematically because you are born a woman, it means that you live in a political system that uses pain and humiliation to control and to hurt you.

Andrea Dworkin, *Woman-Hating Right and Left*, in *THE SEXUAL LIBERALS AND THE ATTACK ON FEMINISM* 38 (Dorchen Leidholdt & Janice G. Raymond eds., 1990). There have also been numerous persons who have been raped that prefer to be called “victims.” See, e.g., Kate E. Bloch, *A Rape Law Pedagogy*, 7 *YALE J.L. & FEMINISM* 307, 308 n.6 (1995). There is no easy answer to the dilemma of rape identity rhetoric as such language is caught in an array of definitional and interpretive axes that both obfuscate and over-determine meaning. See SABINE SIELKE, *READING RAPE: THE RHETORIC OF SEXUAL VIOLENCE IN AMERICAN LITERATURE AND CULTURE 1790-1990*, at 12–14 (2002). Further, there is an oversimplified belief among some who believe that a positive sounding word like “survivor” creates a positive effect. See *id.* at 13. I do not pretend to have any solution to the rhetorical impacts of “victim” and “survivor” and if I did, it would be the subject of a separate paper unto itself. Instead, out of respect for those who would like to be called “victims,” but not “survivors,” and those who would prefer “survivors” to “victims,” I use neither term. Rather, this article uses phrases like “womyn who have been raped” in recognition of the diversity of opinions on this sensitive issue.

<sup>18</sup> See *supra* note 13 and accompanying text.

<sup>19</sup> The little scholarship that exists has usually expressed division about what is a proper sentence for rape. As one article explained:

Penalty is one area in which there has been no consensus among women’s groups as to the proper solution. During the first attack on the traditional common law, however, “[c]urrent feminist thinking on sexual assault legislation favor[ed] a system of sentencing that range[d] from six months to twenty years, depending on the severity of the crime.”

Stacy Futter & Walter R. Mebane, Jr., *The Effects of Rape Law Reform on Rape Case Processing*, 16 *BERKELEY WOMEN’S L.J.* 72, 75 n.27 (2001) (quoting SUSAN BROWN MILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE*, 380 (1975)) (alterations in original).

A survey of the rhetoric used in judicial opinions, legislative debates, mass media accounts, and well-meaning—but misguided—scholarly opinions shows a common element driving these new death penalty statutes in the United States and elsewhere: the growing belief that rape is indeed *a fate worse than death*. Susan Jacoby's quotation at the beginning of this article optimistically believed that America had abandoned the Victorian notion that an adult or child is better dead than suffering the indignities of rape.<sup>20</sup> However, recent evidence shows a significant public revival of the belief<sup>21</sup> and this antediluvian perspective is fueling policy shifts in America toward the death penalty for child rape. Other countries have mirrored the growing trend in the United States by implementing capital punishment for rape and, for countries with preexisting capital statutes, by continuing to execute rapists.<sup>22</sup>

In the names of justice, deterrence, and retribution, governments are seeking to kill rapists through state-sponsored means. That these policies could actually increase murder rates, reduce rape reporting, and decrease convictions has barely been mentioned in legislatures, courthouses, and media debates. The policy and legal consequences of these statutes have barely been examined and, even in rape-conscious corners, the appeal of a quick-fix death penalty solution has taken hold.

Worse still, policies premised on the notion that death is a lesser concern than rape send a series of pernicious signals that degrade womyn and children. The very heart of feminist critiques of rape law are denigrated by the disempowering rhetorical moves made to garner support for this new wave of legislation. When womyn's lives are leveraged into a utilitarian calculus that values chastity over survival, the Victorian shackles that feminism has sought to break reassert themselves in insidious fashion. Womyn's choices to live or die are then judged by cultural norms derived from patriarchy.

Section I of this article will examine the history of the death penalty's application in rape cases with emphasis on Western legal systems. Section II will speak to the rhetoric underlying the legislative and judicial moves toward reviving the death penalty for rape. Section III will analyze the policy and legal effects caused by the new statutes and the language supporting them. Section IV will offer some conclusions and a few observations about the direction rape law is taking under these new statutory regimes.

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<sup>20</sup> See Jacoby, *supra* note 2.

<sup>21</sup> Glazer, *supra* note 13, at 80, 84.

<sup>22</sup> See *infra* notes 198–203 and accompanying text.

## I. THE HISTORY OF APPLYING THE DEATH PENALTY TO RAPE

It is estimated that one out of every six womyn in the United States will be raped during her lifetime.<sup>23</sup> In any given year in America, it is estimated that 250,000<sup>24</sup> to nearly 900,000<sup>25</sup> attempted or completed rapes occur. Adult womyn who have been raped often suffer extreme emotional and physical trauma.<sup>26</sup> Children, male and female, often have their development stunted by rape trauma and the scars of abuse can carry into future generations.<sup>27</sup> The National Center on Child Abuse estimates that there are 100,000 cases of sexual abuse against children in a given year.<sup>28</sup> Almost two-thirds of all rapes are against persons in childhood or adolescence.<sup>29</sup>

These overwhelming numbers only begin to describe the harm and nature of rape. Personal accounts and stories of those who have lived through the experience paint an even more disturbing picture.<sup>30</sup> Power also figures prominently in understanding rape in a legal setting because the traditional pattern of a rape trial is that a member of the dominant group is the accused and a member of a subordinate group is the accuser.<sup>31</sup> Ultimately, though, for those who have never experienced the act of being raped, understanding the impact of rape is an epistemological impossibility. Attempts to generalize one's own experience to that of being raped is a hopeless exercise as demonstrated by the endless frustration of those who have given accounts of being raped.<sup>32</sup> Despite this

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<sup>23</sup> Gerard Mantese et al., *Medical and Legal Aspects of Rape and Resistance*, 12 J. LEGAL MED. 59, 60 (1991).

<sup>24</sup> See GREENFELD, *supra* note 15, at v (noting that “[i]n 1995 persons age 12 or older reported experiencing an estimated 260,300 attempted or completed rapes and nearly 95,000 threatened or completed sexual assaults other than rape”).

<sup>25</sup> Charles Laurence, *I'll Never Hide My Rape Ordeal*, SUN HERALD (Sydney), Mar. 7, 1999, at 69.

<sup>26</sup> Brande Stelling, *The Public Harm of Private Violence: Rape, Sex Discrimination and Citizenship*, 28 HARV. C.R.-C.L. L. REV. 185, 185 (1993).

<sup>27</sup> CHRISTOPHER BAGLEY & KATHLEEN KING, CHILD SEXUAL ABUSE: THE SEARCH FOR HEALING 2 (1990).

<sup>28</sup> HANDBOOK ON SEXUAL ABUSE OF CHILDREN 4 (Lenore E. Auerbach Walker ed., 1988).

<sup>29</sup> Deborah W. Denno, *Why Rape is Different*, 63 FORDHAM L. REV. 125, 136 (1994).

<sup>30</sup> While no single account of rape is the same, womyn often have found commonality in their experiences. A story from “Rebecca” is not unusual. She said, “I didn’t realize it was going to be so terrifying. You cannot explain the smell of terror unless it’s happened to you. It was the worst thing that’s ever happened in my life.” See Cheryl Laird, *Raped; A Woman Can Survive Attack, Though Life Won’t be the Same*, HOUSTON CHRONICLE, Oct. 27, 1991, at Lifestyle 1.

<sup>31</sup> Ross, *supra* note 3, at 802–03.

<sup>32</sup> Laird, *supra* note 30. Often the frustration of womyn extends into the courtroom. The traditional definitions of rape have not changed much since the decision in *Mills v. United States*: [Y]et in the ordinary case where the woman is awake, of mature years, of sound mind and not in fear, a failure to *oppose* the carnal act is consent; and though she object

inherent gap in understanding by most of the men in power throughout history, they have implemented laws as though they understood rape. Not surprisingly, vestiges of patriarchy and misogyny have shaped these statutory regimes from early times to the present.<sup>33</sup> The imposition of masculine norms and a complete inability to comprehend the nature of rape have led men to apply the death penalty to the crime of rape for quite a long time.

*A. Early Death Penalty Rules in the West*

The earliest accounts of death penalties for the crime of rape can be traced to ancient Babylonia.<sup>34</sup> When a married female was raped by someone other than her husband, she and her attacker were bound and thrown into a river.<sup>35</sup> This system gave no allowance for a womyn's lack of consent and treated the rapist and person raped in the same manner.<sup>36</sup> Early Jewish and Saxon law treated rape as an offense punishable by death, but did not punish womyn who were raped.<sup>37</sup> The rationale behind these early laws was that rape was a property crime against a man's interest in preserving his wife's chastity.<sup>38</sup> The patriarchal structure of these laws rested on the belief that preserving the "purity" of womyn was a proper function of criminal justice.<sup>39</sup> Death was an appropriate punishment because a husband's exclusive sexual access to his wife was threatened by rapists.<sup>40</sup> Thus, the only way to guarantee exclusive control of womyn by husbands was to threaten the ultimate punishment: death.<sup>41</sup>

This attitude of misogyny in early rape statutes "carried over into Western law."<sup>42</sup> Early common law treated rape as a crime "against nature" and allowed for capital punishment in such cases.<sup>43</sup> The "against

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verbally, if she make no outcry and no resistance, she by her conduct consents, and the act is not rape . . . .

164 U.S. 644, 648 (1897); *see also* Coughlin, *supra* note 4, at 16. The result of the burden being placed on womyn to resist makes the process of retelling that much harder and the experience of womyn who have been raped that much more difficult. *See* Futter & Mebane, *supra* note 19, at 75–76.

<sup>33</sup> SUSAN BROWN MILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* 16–30 (1975).

<sup>34</sup> Mello, *supra* note 13, at 166.

<sup>35</sup> 2 THE BABYLONIAN LAWS 1, 51–53 (G.R. Driver & John C. Miles trans., 1955).

<sup>36</sup> *Id.*

<sup>37</sup> 4 WILLIAM BLACKSTONE, *COMMENTARIES* \*210–11.

<sup>38</sup> BROWN MILLER, *supra* note 33, at 18.

<sup>39</sup> Mello, *supra* note 13, at 167.

<sup>40</sup> BROWN MILLER, *supra* note 33, 18.

<sup>41</sup> Mello, *supra* note 13, at 166.

<sup>42</sup> *Id.*

<sup>43</sup> DANIEL J. BOORSTIN, *THE MYSTERIOUS SCIENCE OF THE LAW* 143–44 (1941) (describing William Blackstone's account of the death penalty and rape under early English law).

nature” belief was again premised on the “natural” order of having a husband own his wife.<sup>44</sup> Blackstone noted that the overriding historical trend in Saxon, old Gothic, and Scandinavian law was toward executing rapists.<sup>45</sup> When criminal statutes were implemented in the Americas, the common law conception of rape was imported into the legal codes.<sup>46</sup>

### B. Early American History

The first documented use of the death penalty for any crime in the American colonies was in 1622 when the Virginia colony executed a man for stealing a calf and other chattels.<sup>47</sup> The first written code of death penalty offenses in the Americas was in the Massachusetts Bay Colony.<sup>48</sup> The list of death penalty punishable offenses derived from the Old Testament and included the crimes of idolatry, adultery, blasphemy, and witchcraft.<sup>49</sup> Under this system, rape was punished as a crime of adultery and notions of consent were notably absent from the legal structure.<sup>50</sup> Other American colonies were not so indirect in punishing rape. The list of crimes allowing for the death penalty included murder, arson, rape, robbery, and counterfeiting.<sup>51</sup> The original “Capitall Lawes of New-England” listed rape and statutory rape as capital offenses.<sup>52</sup> Rape and other non-homicide crimes were included in many early colonial death penalty laws.<sup>53</sup> Nonetheless, not all of the legal regimes in early America considered rape a capital crime.<sup>54</sup>

Just as the colonies had different death penalty laws, they varied in their willingness to apply the death penalty. Pennsylvania had a reputation for being less likely to execute criminals, whereas North Carolina put most of the convicted to death because it did not have a prison until 1837.<sup>55</sup> There was also a North/South split regarding the application of the death penalty for rape.

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<sup>44</sup> *Id.* at 177.

<sup>45</sup> 4 BLACKSTONE, *supra* note 37, at \*211.

<sup>46</sup> LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 42 (1993) (arguing that while the death penalty was not used frequently in the early colonies, rape was an offense for which it was invoked).

<sup>47</sup> Norman Krivosha et al., *A Historical and Philosophical Look at the Death Penalty—Does it Serve Society's Needs?*, 16 CREIGHTON L. REV. 1, 22 (1982-1983).

<sup>48</sup> *Furman v. Georgia*, 408 U.S. 238, 335 (1972) (Marshall, J., concurring).

<sup>49</sup> THE DEATH PENALTY IN AMERICA 7 (Hugo Adam Bedau ed., 1997).

<sup>50</sup> *Id.*

<sup>51</sup> 49 THE REFERENCE SHELF, NO. 2, THE DEATH PENALTY 29 (Irwin Isenberg ed., 1977).

<sup>52</sup> *Id.* at 28–29.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 29.

<sup>55</sup> *Id.* at 29–31.

States which had authorized the death penalty for rape, justified the sanction by claiming it was for the protection of women. A review of the impact of the death penalty for rape reveals that instead, capital punishment served as a symbol of white man's outrage over the defilement of their property. This property tradition was especially evident in Southern death penalty states.<sup>56</sup>

The difference between Northern and Southern states also reflected differences in race relations.<sup>57</sup> The fear of black men raping white women was a common justification for rape executions in early America.<sup>58</sup> As a result, early capital rape statutes became vehicles to further subjugate free and enslaved black Americans.<sup>59</sup>

In the early nineteenth century, a prominent counter-movement slowed the momentum toward executing people for non-homicide crimes. Between 1810 and 1850, a coalition of groups formed to abolish the death penalty and had remarkable success.<sup>60</sup> As a result, a few states limited the death penalty to the crimes of treason and murder,<sup>61</sup> while others, including Maine and Iowa, adopted total bans on capital punishment.<sup>62</sup> Some states maintained their preexisting statutes, while a few states continued to expand the list of death penalty crimes.<sup>63</sup> By 1897, there were only three federal capital offenses: treason, murder, and rape.<sup>64</sup>

Interestingly, President Abraham Lincoln pushed military capital punishment in contrast to the overall trend against the death penalty. He commissioned Francis Lieber to create a set of wartime rules for armies during the Civil War.<sup>65</sup> The Lieber Code became the first legal provision to acknowledge gender crimes as illegal under the laws of war.<sup>66</sup> Lieber's

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<sup>56</sup> Mello, *supra* note 13, at 166.

<sup>57</sup> *Id.* at 166–67.

<sup>58</sup> It is virtually impossible to discuss capital rape statutes without addressing the issue of race in sentencing. There is substantial evidence that the driving force behind the statutes was to prevent black men from raping white women. Further, there is evidence to suggest the use of the death penalty for rape was derived from lynch mobs in the South. The application of capital punishment for rape has also fallen disproportionately on blacks. *See Gray, supra* note 13, at 1448–51; *see also* Mello, *supra* note 13, at 166–67; *see generally* Stephen B. Bright, *Challenging Racial Discrimination in Capital Cases*, 21 CHAMPION 19 (1997); Carol S. Steiker, *Remembering Race, Rape, and Capital Punishment*, 83 VA. L. REV. 693 (1997). While this article does not tackle the sticky issue of race in the context of capital rape statutes, it is an omnipresent backdrop to some of the issues discussed herein.

<sup>59</sup> Mello, *supra* note 13, at 166–67.

<sup>60</sup> *See Krivosha et al., supra* note 47, at 26–27.

<sup>61</sup> *See id.* at 27.

<sup>62</sup> *See Furman v. Georgia*, 408 U.S. 238, 339 (1972) (Marshall, J., concurring).

<sup>63</sup> *See id.* at 338.

<sup>64</sup> *See id.* at 339.

<sup>65</sup> Peter Landesman, *A Woman's Work*, N.Y. TIMES, Sept. 15, 2002, 6 (Magazine), at 82.

<sup>66</sup> *See id.*

system also allowed the death penalty to be used against soldiers who raped womyn.<sup>67</sup> While this was seen at the time to be quite a victory for womyn's rights, the long-term effects of the code have made that conclusion more tenuous.<sup>68</sup>

The early twentieth century saw the overall trend toward abolition reversed as state legislatures began adopting new death penalty statutes that expanded the list of capital offenses.<sup>69</sup> In 1925, capital punishment was authorized for rapists in much of the United States.<sup>70</sup> In addition, Alabama allowed for capital punishment for statutory rape<sup>71</sup> and South Carolina and Virginia permitted executions for attempted rape.<sup>72</sup> In all, between the years of 1800 and 1964, a total of 1,004 men were executed in twenty-five states for the crimes of rape and attempted rape.<sup>73</sup> Ultimately, the movement to abolish the death penalty did almost nothing to slow the number of executions for rape during the nineteenth and early twentieth centuries.<sup>74</sup>

### C. Proportionality and the Road to Coker

In 1910, the Supreme Court held, in *Weems v. United States*,<sup>75</sup> that the Cruel and Unusual Punishment Clause of the Eighth Amendment required that a punishment be proportionate to the crime charged. The Court wrote, “[I]t is a precept of justice that punishment for crime should be graduated and proportioned to offense.”<sup>76</sup> In 1958, the Court, in *Trop v. Dulles*,<sup>77</sup> expanded upon the finding in *Weems* and held that even though jurisdictions had the authority to apply the death penalty, they were not free “to devise any punishment short of death within the limit of [that]

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<sup>67</sup> *See id.*

<sup>68</sup> It was not until 1995 that the International Criminal Tribunal prosecuted rape as a crime equivalent to torture. *See id.*

<sup>69</sup> *See Furman*, 408 U.S. at 339–40 (Marshall, J., concurring).

<sup>70</sup> At the time, rape was a capital offense in the states of Alabama, Arkansas, Delaware, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Nevada, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, and West Virginia. *Coker v. Georgia*, 433 U.S. 584, 593 n.6 (1977) (plurality opinion). The federal government and the District of Columbia also authorized capital punishment for rape. *Id.* at 593.

<sup>71</sup> Gray, *supra* note 13, at 1447–48 & n.34 (citing ALA. CODE § 395 (1958) (repealed 1973)).

<sup>72</sup> Raymond T. Bye, *Recent History and Present Status of Capital Punishment in the United States*, 17 J. AM. INST. CRIM. L. & CRIMINOLOGY 234, 242 (1926).

<sup>73</sup> *Rape Executions in USA, 1800-1964*, *supra* note 5.

<sup>74</sup> *See id.*

<sup>75</sup> 217 U.S. 349 (1910).

<sup>76</sup> *Id.* at 367.

<sup>77</sup> 356 U.S. 86 (1958) (plurality opinion).

imagination.”<sup>78</sup> The Court then added the phrase that would shape death penalty jurisprudence for some time<sup>79</sup> when it concluded that the Eighth Amendment must be defined “from the evolving standards of decency that mark the progress of a maturing society.”<sup>80</sup>

To this end, in *Furman v. Georgia*,<sup>81</sup> the Supreme Court reversed several death penalty convictions in a decision prohibiting arbitrary and capricious applications of the death penalty.<sup>82</sup> This rule in *Furman* was in contrast to the method of allowing an undirected juror to reach a decision as to whether death was a proper punishment.<sup>83</sup> Because the statutes at issue in *Furman* were similar to almost every other state law, the decision effectively invalidated every death penalty provision in existence.<sup>84</sup> Further, the sentences of all 629 persons on death row at the time were vacated.<sup>85</sup> The *Furman* decision was composed of five separate concurring opinions, but each one established the “arbitrary and capricious” rule for death penalty sentences.<sup>86</sup>

In response to *Furman*, a number of state legislatures quickly passed new capital punishment statutes in an attempt to comply with the decision.<sup>87</sup> The Supreme Court reviewed these hastily drafted new laws in *Gregg v. Georgia*<sup>88</sup> and four companion decisions.<sup>89</sup> In three of the five cases, the Court upheld the new death penalty statutes because they met the *Furman* test by providing for a narrowing of the class of defendants subject to capital punishment that required consideration of each individual defendant in sentencing.<sup>90</sup> In general, this meant that a death penalty

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<sup>78</sup> *Id.* at 99.

<sup>79</sup> *See, e.g.*, *Atkins v. Virginia*, 536 U.S. 304, 311–12 (2002); *Enmund v. Florida*, 458 U.S. 782, 813 (1982); *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (plurality opinion).

<sup>80</sup> *Trop*, 356 U.S. at 101 (plurality opinion).

<sup>81</sup> 408 U.S. 238 (1972).

<sup>82</sup> *See Godfrey v. Georgia*, 446 U.S. 420, 427 (1980) (plurality opinion) (construing the multiple opinions in *Furman* as together establishing this rule).

<sup>83</sup> *See Furman*, 408 U.S. at 295 (Brennan, J., concurring).

<sup>84</sup> *Diamond*, *supra* note 13, at 1164–65.

<sup>85</sup> *Mello*, *supra* note 13, at 141.

<sup>86</sup> *See Furman*, 408 U.S. at 248 n.11, 249 (Douglas, J., concurring) (quoting Arthur J. Goldberg & Alan M. Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1790 (1970)); *id.* at 274, 291, 294–95 (Brennan, J., concurring); *id.* at 309–10 (Stewart, J., concurring); *id.* at 313 (White, J., concurring); *id.* at 364–65 (Marshall, J., concurring).

<sup>87</sup> RAYMOND PATERNOSTER, *CAPITAL PUNISHMENT IN AMERICA* 19–20, 58 (1991).

<sup>88</sup> 428 U.S. 153, 162–63 (1976).

<sup>89</sup> *Proffitt v. Florida*, 428 U.S. 242, 247 (1976) (plurality opinion); *Jurek v. Texas*, 428 U.S. 262, 268–69 (1976) (plurality opinion); *Woodson v. North Carolina*, 428 U.S. 280, 286 (1976) (plurality opinion); *Roberts v. Louisiana*, 428 U.S. 325, 328 (1976) (plurality opinion).

<sup>90</sup> *Gregg*, 428 U.S. at 162–64 (plurality opinion), 207 (White, J., concurring); *Proffitt*, 428 U.S. at 248, 253 (plurality opinion); *Jurek*, 428 U.S. at 267, 276 (plurality opinion).

statute that provided for bifurcated proceedings, where the sentencing authority received all relevant information and standards to review that information, would meet the *Furman* “arbitrary and capricious” rule.<sup>91</sup> The Court also established a proportionality test that required courts to “look to objective indicia that reflect the public attitude toward a given sanction,” to determine if it was unconstitutional.<sup>92</sup> To determine the “public attitude,” the Court looked at many factors in *Gregg*, including history and precedent, legislative judgments, jury decisions, basic human dignity, and whether the statute was consistent with the goals of deterrence or retribution.<sup>93</sup>

When the Court reached its decision in *Furman*, sixteen states and the federal government allowed the death penalty for the rape of an adult female.<sup>94</sup> After *Furman*, three states—North Carolina, Louisiana, and Georgia—reenacted the death penalty for the rape of an adult female.<sup>95</sup> Of those three states, both North Carolina and Louisiana had their statutes invalidated because the Supreme Court found that the laws were mandatory in application in violation of the Eighth and Fourteenth Amendments.<sup>96</sup> At the time the Court heard *Coker*, Georgia’s capital rape statute was the only law in effect that applied when the victim was an adult female.<sup>97</sup> In the post-*Furman* era, three other states—Tennessee, Mississippi, and Florida—allowed the death penalty for the rape of a child.<sup>98</sup> Tennessee’s law was later invalidated because of its mandatory application provisions.<sup>99</sup> Thus, a total of three states had statutes that authorized capital punishment for rape of a child or an adult at the time of *Coker*.

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<sup>91</sup> *Gregg*, 428 U.S. at 195 (plurality opinion).

<sup>92</sup> *Id.* at 173 (plurality opinion).

<sup>93</sup> *Id.* at 173–86 (plurality opinion); see also *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion).

<sup>94</sup> See *Coker*, 433 U.S. at 593 (citing 18 U.S.C. § 2031; ALA. CODE § 395 (1958); ARK. CODE ANN. § 41-3403 (1964); FLA. STAT. ANN. § 794.01 (1965); GA. CODE ANN. § 26-2001 (1970); KY. REV. STAT. ANN. §§ 435.080–435.090 (1962); LA. REV. STAT. ANN. § 14:42 (1950); MD. CODE ANN., ART. 27, § 461 (1957); MISS. CODE ANN. § 2358 (1957); MO. REV. STAT. § 559.260 (1969); NEV. REV. STAT. 200.360 (1963); N.C. GEN. STAT. § 14-21 (1969); OKL. STAT. tit. 21, § 1115 (1958); S.C. CODE ANN. §§ 16–72, 16-80 (1962); TENN. CODE ANN. § 39-3702 (1955); TEX. PENAL CODE § 1189 (1961); VA. CODE ANN. § 18.1-44 (1960)).

<sup>95</sup> *Id.* at 594.

<sup>96</sup> See *Roberts v. Louisiana*, 431 U.S. 633, 637–38 (1977) (per curiam) (holding that Louisiana’s death penalty statute was unconstitutional); *Woodson v. North Carolina*, 428 U.S. 280, 304–05 (1976) (plurality opinion) (Brennan, J., concurring) (holding that North Carolina’s death penalty statute was unconstitutional).

<sup>97</sup> See *Coker*, 433 U.S. at 594 (plurality opinion).

<sup>98</sup> See *id.* at 595 (plurality opinion).

<sup>99</sup> *Collins v. State*, 550 S.W.2d 643, 646 (Tenn. 1977).

*D. Coker v. Georgia*

In December of 1971, Ehrlich Anthony Coker raped a female and then stabbed her to death.<sup>100</sup> Several months later, he kidnapped a sixteen-year-old female, raped her twice, beat her, and abandoned her.<sup>101</sup> Coker was arrested for his crimes and pled guilty to all charges against him.<sup>102</sup> He was sentenced to three life terms, two twenty-year terms, and an eight-year term, to run consecutively, for the crimes of murder, rape, kidnapping, and aggravated assault.<sup>103</sup> Eighteen months after being incarcerated, on September 2, 1974, Coker escaped from the Ware Correctional Institution in Georgia.<sup>104</sup> During his escape, Coker broke into the Carver household and committed acts similar to those for which he had been incarcerated.<sup>105</sup> He tied up Mr. Carver and raped Mrs. Carver, threatening them both with a knife he found in the kitchen.<sup>106</sup> Coker took Mrs. Carver as a hostage and told police he would kill her if they tried to stop him.<sup>107</sup> When Coker was eventually apprehended, the state decided to seek the death penalty against him.<sup>108</sup> In compliance with the *Gregg* and *Furman* decisions, Coker's trial was bifurcated into separate guilt and punishment phases.<sup>109</sup> The jury found Coker guilty of armed robbery, escape, motor vehicle theft, kidnapping, and rape.<sup>110</sup> He was then sentenced to death by electrocution.<sup>111</sup> Subsequently, the Supreme Court of Georgia affirmed Coker's conviction and sentence.<sup>112</sup> He appealed the Georgia Court's decision to the Supreme Court.<sup>113</sup>

The Supreme Court heard Coker's appeal of his sentence and, in a plurality opinion, decided that the death penalty for the rape of an adult female was "grossly disproportionate and excessive punishment" in violation of the Eighth Amendment.<sup>114</sup> Although the Court's reasoning in *Coker* was premised on the analysis developed in *Gregg*, the opinion

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<sup>100</sup> *Coker*, 433 U.S. at 605 (Burger, C.J., dissenting).

<sup>101</sup> *Id.* (Burger, C.J., dissenting).

<sup>102</sup> *Id.* (Burger, C.J., dissenting).

<sup>103</sup> *Id.* at 605, 605 n.1 (Burger, C.J., dissenting).

<sup>104</sup> *Id.* at 605 (Burger, C.J., dissenting).

<sup>105</sup> *Id.* at 587 (plurality opinion).

<sup>106</sup> *Id.* (plurality opinion).

<sup>107</sup> *Id.* at 609 n.4 (Burger, C.J., dissenting).

<sup>108</sup> *Id.* at 587 (plurality opinion).

<sup>109</sup> *See id.* at 587-92 (plurality opinion); *see also* *Gregg v. Georgia*, 428 U.S. 153, 195 (1976) (plurality opinion).

<sup>110</sup> *Coker*, 433 U.S. at 587 (plurality opinion).

<sup>111</sup> *Id.* at 591 (plurality opinion).

<sup>112</sup> *See Coker v. State*, 216 S.E.2d 782, 797 (Ga. 1975), *rev'd by* 433 U.S. 584 (1977).

<sup>113</sup> *See Coker*, 433 U.S. at 586 (plurality opinion).

<sup>114</sup> *Id.* at 592 (plurality opinion).

differed significantly from other *Gregg* cases because the Court was not concerned with the sentencing procedures used in applying the death penalty.<sup>115</sup> Rather, the Court found the death penalty excessive for the crime of rape regardless of the procedures used to reach that determination.<sup>116</sup>

In applying the objective test, the plurality decision evaluated five factors that they felt indicated a social trend against capital punishment for rape.<sup>117</sup> First, that only three of the sixty major nations applied the death penalty for rape was indicative of a global stand against capital punishment for rape.<sup>118</sup> Second, that only sixteen states provided for the death penalty for rape in the pre-*Furman* era was viewed as a trend in America against allowing executions in such cases.<sup>119</sup> Third, the Court considered the fact that, post-*Furman*, only three of those sixteen states revised their statutes to include rape as a capital offense as evidence of changing social standards.<sup>120</sup> Fourth, the Court noted that because only three other states post-*Furman* passed laws making rape of a child a capital offense, those statutes were not indicative of a larger trend.<sup>121</sup> Fifth, the fact that nine of the ten Georgia juries that had considered whether to apply the death penalty under the rape statute did not do so was further evidence of limited societal support for the death penalty in these cases.<sup>122</sup>

The plurality considered the above factors as indicative of a legislative and public intolerance of the death penalty for rape cases.<sup>123</sup> One of the oddities exhibited in *Coker* is that the Court had engaged in a form of legislative “bean counting” as a proxy for determining social consensus regarding cruelty in punishment.<sup>124</sup> It is unclear whether such a method truly reflects consensus or instead is actually related to the Court’s vacillation on the issue of the death penalty prior to *Coker*. Given the narrow time frame in which the post-*Furman* statutes were written, the legislatures were probably more concerned with making sure their new laws were not struck down rather than with which crimes to include.<sup>125</sup>

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<sup>115</sup> Compare *id.* at 591–92 (plurality opinion), with *Gregg v. Georgia*, 428 U.S. 153, 206–07 (1976) (plurality opinion).

<sup>116</sup> See *Coker*, 433 U.S. at 592 (plurality opinion).

<sup>117</sup> Lormand, *supra* note 13, at 996–97.

<sup>118</sup> *Coker*, 433 U.S. at 596 n.10 (plurality opinion) (citing UNITED NATIONS, DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS, CAPITAL PUNISHMENT 40, 86 (1968)).

<sup>119</sup> *Id.* at 593–94 (plurality opinion).

<sup>120</sup> *Id.* at 594 (plurality opinion).

<sup>121</sup> *Id.* at 595–96 (plurality opinion).

<sup>122</sup> *Id.* at 596–97 (plurality opinion).

<sup>123</sup> See *id.* (plurality opinion).

<sup>124</sup> Mello, *supra* note 13, at 153, 155.

<sup>125</sup> *Id.* at 157–58.

Without a more sophisticated understanding of the reason for the omissions of rape from state statutes, the indicators used by the Court in *Coker* were hardly clear signals of a burgeoning trend against applying the death penalty to rape.<sup>126</sup>

Until *Coker*, the Court had never heard a case concerning the constitutionality of applying the death penalty to the crime of rape. In 1953, in *Rudolph v. Alabama*,<sup>127</sup> the Supreme Court denied a writ of certiorari to a man sentenced to death for raping a female.<sup>128</sup> Three Justices dissented from the decision to deny certiorari because they felt there was a substantial constitutional question as to whether it was cruel and unusual to execute a person convicted solely of rape.<sup>129</sup> In 1970, the Fourth Circuit, in *Ralph v. Warden*,<sup>130</sup> applied the *Weems* proportionality test and found that the death penalty for rape was cruel and unusual in violation of the Eighth Amendment.<sup>131</sup> Still, the *Ralph* holding was limited to rape where no life was endangered and did not set a national precedent regarding the use of capital punishment in rape cases.<sup>132</sup> Thus, *Coker* was a case of first impression for the Supreme Court.

In an amicus brief for *Coker*, on behalf of the National Organization for Women, the American Civil Liberties Union, and other womyn's groups, Ruth Bader Ginsburg argued that applying the death penalty for rape was premised on an ancient, patriarchal view that treated womyn as property who needed chivalric protection.<sup>133</sup> Although the Court reached the outcome advocated by the brief, it effectively ignored the arguments

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About all that can be said about the legislatures that enacted these statutes is that they apparently read *Furman* as requiring mandatory sentencing; given a choice between executing all rapists and executing none, or almost none, the legislatures opted for executing none. The choice says little in terms of society suddenly rejecting the death penalty for rape . . . . For similar reasons, those legislatures enacting discretionary statutes, but eliminating rape as a capital crime, likely perceived that *Furman* required a narrowing of the overall process whereby some offenders are sentenced to death and others, convicted of similarly defined crimes, are not.

*Id.*

<sup>126</sup> See *id.* at 146–55.

<sup>127</sup> 375 U.S. 889 (1963).

<sup>128</sup> *Id.* at 889 (Goldberg, J., dissenting).

<sup>129</sup> *Id.* (Goldberg, J., dissenting).

<sup>130</sup> 438 F.2d 786 (4th Cir. 1970).

<sup>131</sup> See *id.* at 789–90, 793 (noting that society's "evolving standards of decency" were reflected in legislative enactments curtailing the use of the death penalty and that its infrequent use suggested that it was excessive and arbitrary to impose the death penalty for the crime of rape).

<sup>132</sup> See *id.* at 793 ("[W]e do not hold . . . that death is an unconstitutional punishment for all rapes."); see also Diamond, *supra* note 13, at 1169–70.

<sup>133</sup> See Brief Amici Curiae of the American Civil Liberties Union et. al at 11, 12, 19, *Coker v. Georgia*, 433 U.S. 584 (1977) (No. 75-5444) [hereinafter *Ginsburg Brief*].

about the nature of rape and the role of patriarchy.<sup>134</sup> While the Court seemed willing to listen to the feminist arguments against the death penalty for rape, they were not willing to put such reasoning into law. The Court thus treated the case as a “normal” death penalty decision and in doing so, “exposed its own sexism.”<sup>135</sup>

#### *E. The Aftermath of Coker*

After *Coker*, Tennessee, Florida, and Mississippi maintained laws that allowed for the death penalty for the crime of raping a child.<sup>136</sup> It remained unclear whether these statutes were at odds with the decision in *Coker* because the holding did not clearly extend beyond the rape of an adult to the rape of a child.<sup>137</sup> Of those three states, only Florida’s statute was invalidated because of an Eighth Amendment challenge before its supreme court.<sup>138</sup> Tennessee’s statute was found unconstitutional because the application of the death penalty was mandatory, in violation of the *Furman* test.<sup>139</sup> The Mississippi law was struck down because the state’s sentencing guidelines for death penalty crimes required an attempt to kill, an intention to kill, that someone be killed, or that lethal force be contemplated—none of which were elements for the conviction of rape.<sup>140</sup>

During the same time period, extending the reasoning in *Coker* to other crimes, the Supreme Court applied the proportionality test and found the death penalty to be unconstitutional for the crimes of aggravated robbery<sup>141</sup> and kidnapping.<sup>142</sup> The Court has also continued to use the methods of *Coker* in evaluating other cruel and unusual punishment cases.<sup>143</sup> Chiefly, the Court has evaluated “the evolving standards of decency that mark the progress of a maturing society”<sup>144</sup> by looking to historical developments, international opinion, legislative changes,

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<sup>134</sup> See Mello, *supra* note 13, at 162 (noting that in *Coker*, the Supreme Court did not take into account the reality of rape and, instead, elected to treat the case before it as “just another” death penalty case).

<sup>135</sup> See *id.*

<sup>136</sup> See Michael Higgins, *Is Capital Punishment for Killers Only?*, 83 A.B.A. J. 30 (1997).

<sup>137</sup> Palmer, *supra* note 13, at 857 (arguing that the *Coker* precedent is not controlling for a case that addresses the constitutionality of the death penalty for a child rapist).

<sup>138</sup> See *Buford v. State*, 403 So. 2d 943, 951 (Fla. 1981) (stating that *Coker* concluded that imposing the death penalty for sexual assault was a grossly disproportionate and excessive punishment).

<sup>139</sup> See *Collins v. State*, 550 S.W.2d 643, 646 (Tenn. 1977).

<sup>140</sup> See *Leatherwood v. State*, 548 So. 2d 389, 403 (Miss. 1989).

<sup>141</sup> See *Enmund v. Florida*, 458 U.S. 782, 797 (1982).

<sup>142</sup> See *Eberheart v. Georgia*, 433 U.S. 917, 917 (1977); *Eberheart v. State*, 232 Ga. 247, 247 (1974).

<sup>143</sup> See Gray, *supra* note 13, at 1461.

<sup>144</sup> *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion).

sentencing jury decisions, and legislative history.<sup>145</sup> As of this writing, the holding in *Coker* still describes the method the Supreme Court would use to evaluate whether a particular crime may be punished by death without violating the Eighth Amendment.<sup>146</sup> This would include a potential future challenge to a capital child rape statute.

*F. Revival of the Death Penalty for Rape in Louisiana*

From 1989 to 1995, no jurisdiction in the United States allowed for the death penalty for the crime of rape.<sup>147</sup> In 1995, Louisiana ended this short historical break from applying the death penalty in cases of rape when it passed legislation that allowed capital punishment for aggravated rape when the victim was under the age of twelve.<sup>148</sup> The relevant part of the statute passed was:

- (1) Whoever commits the crime of aggravated rape shall be punished by life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence.
- (2) However, if the victim was under the age of twelve years . . . the offender shall be punished by death or life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence, in accordance with the determination of the jury.<sup>149</sup>

The statute passed the Louisiana House of Representatives seventy-nine to twenty-two.<sup>150</sup> The Senate did not debate the bill and approved it by a thirty-four to one margin.<sup>151</sup> Governor Edwards signed the bill into law on June 17, 1995, and it went into effect in August of 1995.<sup>152</sup>

Prosecutors did not immediately seek the death penalty in child rape cases, but it was not long before they found candidates for execution. Before the trials had even begun, the capital child rape statute was tested before the Louisiana Supreme Court in *State v. Wilson*.<sup>153</sup> The test case was the result of a consolidation of two separate cases before the court.<sup>154</sup> One defendant, Patrick Dewayne Bethley, was charged with the

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<sup>145</sup> Gray, *supra* note 13, at 1461.

<sup>146</sup> See, e.g., *Tuilaepa v. California*, 512 U.S. 967, 971–72 (1994).

<sup>147</sup> See Lormand, *supra* note 13, at 1002.

<sup>148</sup> LA. REV. STAT. ANN. 14:42(D)(2) (West Supp. 2004).

<sup>149</sup> *Id.* § 14:42(D)(2)(a).

<sup>150</sup> Marsha Shuler, *House Passes Death Penalty for Child Rape*, THE ADVOCATE (Baton Rouge), April 27, 1995, at 1B.

<sup>151</sup> See Jack Wardlaw, *Death Penalty for Child Rape Gets Final OK*, TIMES-PICAYUNE (New Orleans), June 6, 1995, at A4.

<sup>152</sup> See *Wilson*, 685 So. 2d at 1067 n.5.

<sup>153</sup> *Id.* at 1064.

<sup>154</sup> *Id.* at 1064–65.

aggravated rape of three girls ages five, seven, and nine.<sup>155</sup> The other defendant, Anthony Wilson, was charged with aggravated rape of a five year-old girl.<sup>156</sup> It was also alleged that Bethley was HIV-positive at the time of the rapes and that he was aware of his HIV status.<sup>157</sup> Both defendants moved to quash their indictments and their motions were granted.<sup>158</sup> Upon appeal, the Louisiana Supreme Court consolidated the two cases and reversed the lower court decision, holding the death penalty was constitutional for those convicted of raping a child under the age of twelve.<sup>159</sup> Bethley petitioned the United States Supreme Court for a writ of certiorari, but was denied on jurisdictional grounds because he had not yet been convicted or sentenced.<sup>160</sup> At the time of this writing, no one has been executed under Louisiana's capital rape statute,<sup>161</sup> but it is probably just a matter of time.

#### G. Other States Following Louisiana's Lead

Since Louisiana adopted its child rape statute in 1995, many states have debated similar bills making the rape of a minor a capital crime. In 1997 and 1999, the Georgia legislature considered bills that would have applied capital punishment to crimes of rape where the victim was under age twelve.<sup>162</sup> California lawmakers debated providing for the death penalty when a second time offender committed a "lewd and lascivious act on a child under the age of [fourteen] years" in 1999, but the effort ultimately failed.<sup>163</sup> Pennsylvania legislators proposed a statute that would "impose the death penalty for repeated sexual assaults on children."<sup>164</sup> Massachusetts also recently considered a bill to make child rape a capital crime.<sup>165</sup> Alabama's legislators have repeatedly pushed a bill that would allow executions of child molesters, but have yet to pass it into law.<sup>166</sup> Virginia also debated a bill to apply the death penalty to repeat sexual

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<sup>155</sup> *Id.* at 1065.

<sup>156</sup> *Id.* at 1064.

<sup>157</sup> *Id.* at 1065.

<sup>158</sup> *Id.* at 1064–65.

<sup>159</sup> *Id.* at 1064.

<sup>160</sup> *Bethley v. Louisiana*, 520 U.S. 1259, 1259 (1997).

<sup>161</sup> See Mary Swerczek, *Man Gets Deal in Attempted Rapes*, TIMES-PICAYUNE (New Orleans), Aug. 9, 2002, at 1.

<sup>162</sup> H.B. 116, 145th Gen. Assem., Reg. Sess. (Ga. 1999); H.B. 801, 144th Gen. Assem., Reg. Sess. (Ga. 1997).

<sup>163</sup> A.B. 35, 1999 Leg., Reg. Sess. (Cal. 1999).

<sup>164</sup> See Palmer, *supra* note 13, at 869–70.

<sup>165</sup> See Maggie Mulvihill, *Grieving Families Spare No Energy in Campaign for Capital Punishment*, BOSTON HERALD, Oct. 26, 1997, at 17.

<sup>166</sup> See Alexander Cockburn, *Extreme Solutions; Capital Punishment for Child Molesters*, THE NATION, May 20, 2002, at 8.

violence offenders.<sup>167</sup> Additionally, Mississippi lawmakers recently considered a bill to impose the death penalty upon conviction for rape of a child under the age of fourteen years.<sup>168</sup>

These legislative actions have been strongly supported by a public that seems to overwhelmingly favor the use of the death penalty for sex crimes against children. According to one poll, sixty-five percent of those surveyed supported the death penalty for child molesters.<sup>169</sup> Americans have come to believe that rape is the most heinous crime “worthy of the most serious punishment.”<sup>170</sup> Politicians have sensed the growing public fervor and placed the death penalty for the rape of a child at the center of their law and order platforms.<sup>171</sup> “The death penalty [has been] vigorously touted as the best way to deal with child molesters.”<sup>172</sup> Society and many of its leaders have made clear that they favor applying the death penalty for aggravated sex crimes against children.<sup>173</sup> The *Wilson* court argued that although Louisiana was the first to revive the death penalty for child rape, the law in the state would be the beginning of a trend.<sup>174</sup> The realization of the *Wilson* court’s forecast has been observed by several commentators watching legislative debates across the country.<sup>175</sup> Although most of the legislative efforts meant to follow Louisiana’s lead have failed, that has been due, in large part, to “strong doubts” that such measures would survive appellate review.<sup>176</sup> This fear has led many state legislatures debating the issue to conclude that they will simply “wait[ ] to see how the Supreme Court rules on the issue.”<sup>177</sup> The continued legal

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<sup>167</sup> See Hardy, *supra* note 12.

<sup>168</sup> H.B. 1331, 2004 Reg. Sess. (Miss. 2004). The bill died in committee. H.B. 1331, 2004 Reg. Sess. (Miss. 2004); see also Mississippi Legislature, History of Actions, at <http://billstatus.ls.state.ms.us/2004/pdf/history/HB/HB1331.htm> (last visited Jul. 24, 2004). Mississippi had previously enacted a law that allowed for the death penalty to be imposed for the rape of a child under the age of fourteen, but the law was repealed in 1998. MISS. CODE ANN. § 97-3-65 (1998); H.B. 834, 1998 Reg. Sess. (Miss. 1998).

<sup>169</sup> See Barrett, *supra* note 16. This majority exists in contrast to a public that is split on whether to apply the death penalty for rape of an adult. *Id.*

<sup>170</sup> See GARY D. LAFREE, RAPE AND CRIMINAL JUSTICE 62 (1989).

<sup>171</sup> See Zambrano, *supra* note 13, at 1268.

<sup>172</sup> Cockburn, *supra* note 166.

<sup>173</sup> See Broughton, *supra* note 13, at 24; Gray, *supra* note 13, at 1467; Palmer, *supra* note 13, at 870. *But see* State v. Gardner, 947 P.2d 630, 650 n.11 (Utah 1997) (discussing but declining to follow Louisiana’s *State v. Wilson*); Fleming *supra* note 13, at 747 (arguing that the Louisiana statute is exceptional and that the trend in the United States is toward abolishing the death penalty for rape crimes).

<sup>174</sup> *Wilson*, 685 So. 2d at 1068.

<sup>175</sup> See Higgins, *supra* note 136.

<sup>176</sup> Michael Hardy, *Committee Kills Death Penalty Bill: Measure Labeled Constitutional Loser*, RICHMOND TIMES DISPATCH, Jan. 29, 1998, at A-8.

<sup>177</sup> Jeffrey C. Matura, *When Will It Stop? The Use of the Death Penalty for Non-Homicide*

authority of Louisiana's statute remains a "harbinger" of new efforts that appeal to a public caught up in a frenzy regarding the dangers of child molesters.<sup>178</sup>

While the trend toward capital punishment for child molestation is in its relative infancy, efforts to apply the death penalty for other non-homicide crimes have been very successful. In 1993, thirty-six states authorized the death penalty.<sup>179</sup> Of those thirty-six, only six allowed for capital punishment for non-homicide crimes.<sup>180</sup> By 1997, fourteen states and the federal government allowed the death penalty for crimes that did not result in death.<sup>181</sup> Currently, nine states—Arkansas, California, Colorado, Georgia, Illinois, Louisiana, Mississippi, Missouri, and Washington—and the federal government provide the death penalty for treason.<sup>182</sup> Five states—Colorado, Idaho, Illinois, Missouri, and Montana—consider aggravated kidnapping a capital crime.<sup>183</sup> Two states, Florida and Missouri, and the federal government permit the death penalty for drug trafficking.<sup>184</sup> Two states, Georgia and Mississippi, allow executions for aircraft hijacking.<sup>185</sup> Missouri considers placing a bomb near a bus terminal to be a capital crime.<sup>186</sup> New Mexico permits a death sentence for espionage.<sup>187</sup> Montana provides the death penalty for aggravated assault by incarcerated, persistent felons or murderers.<sup>188</sup> Even beyond the case of child rape, the trend in America is to expand the use of the death penalty to an array of crimes other than murder.<sup>189</sup> That such expansions of capital punishment have been so successful even when the crimes lack the same political salience as child molestation virtually

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*Crimes*, 24 J. LEGIS. 249, 256 (1998).

<sup>178</sup> See Barrett, *supra* note 16.

<sup>179</sup> See Mello, *supra* note 13, at 160.

<sup>180</sup> See *id.*; see also THE DEATH PENALTY IN AMERICA, *supra* note 49, at 36–37 tbl. 2-1.

<sup>181</sup> See Mello, *supra* note 13, at 160–61.

<sup>182</sup> 18 U.S.C. § 794 (2000); ARK. CODE ANN. § 5-51-201 (Michie 1997); CAL. PENAL CODE § 37 (Deering Supp. 2004); COLO. REV. STAT. § 18-11-101 (2003); COLO. REV. STAT. § 18-1.4-102 (2003); GA. CODE ANN. § 16-11-1 (2003); 720 ILL. COMP. STAT. ANN. § 5/30-1 (West 2003); LA. REV. STAT. ANN. § 14:113 (West 1986); MISS. CODE ANN. § 97-7-67 (2000); MO. ANN. STAT. § 576.070 (West 2003); MO. REV. STAT. 557.021 (West 2001); WASH. REV. CODE ANN. § 9.82.010 (West Supp. 2004).

<sup>183</sup> COLO. REV. STAT. § 18-3-301 (2003); IDAHO CODE § 18-4505 (Michie 1997); MO. ANN. STAT. § 565.110 (West 1999); MONT. CODE ANN. § 45-5-303 (2003); MO. REV. STAT. 557.021 (West 2001).

<sup>184</sup> 18 U.S.C. §§ 3591, 3592 (2000); FLA. STAT. ANN. § 921.142 (West Supp. 2004); MO. ANN. STAT. § 195.214 (West 2004).

<sup>185</sup> GA. CODE ANN. § 16-5-44 (2003); MISS. CODE ANN. § 97-25-55 (2000).

<sup>186</sup> MO. ANN. STAT. § 578.310 (West 2003); MO. REV. STAT. 557.021 (West 2001).

<sup>187</sup> N.M. STAT. ANN. § 20-12-42 (Michie 2003).

<sup>188</sup> MONT. CODE ANN. § 46-18-303 (2003); MONT. CODE ANN. 46-18-220 (2001).

<sup>189</sup> See Mello, *supra* note 13, at 160.

ensures that child rape will eventually be punished by death in an increasing number of states.

Outside of state efforts, there are also relics of the older system that treat the rape of adult womyn as a capital crime. Article 120 of the United Code of Military Justice holds that:

Any person subject to [the code] who commits an act of sexual intercourse, by force or without consent, is guilty of rape and shall be punished by death or such other punishment as a court-martial may direct.<sup>190</sup>

The military has maintained this provision despite *Coker* because of its unique status under American law.<sup>191</sup> Further, in Georgia, the Senate never actually removed the death penalty language applied to the rape of an adult female from the statute at issue in *Coker*, and it remains “on the books” over twenty years later.<sup>192</sup> At least one scholar has noted that Georgia’s intransigence on this issue reflects the legislature’s belief that, for the crime of rape, the death penalty is still the appropriate punishment.<sup>193</sup> With the American public so firmly committed to executing child molesters, it is reasonable to assume politicians will follow the trend, and a new wave of capital rape statutes is all but inevitable.

#### H. The Death Penalty Outside of the United States

Internationally, there is a trend toward the abolition of the death penalty.<sup>194</sup> Over 100 countries have outlawed the death penalty in all cases.<sup>195</sup> Nonetheless, the United States has not been alone in its public debate regarding capital rape laws. Around the globe, many countries have had public outcries demanding the death penalty for rapists, while others have continued to execute rapists, and a few have decided to forgo

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<sup>190</sup> 10 U.S.C. § 920, Art. 120 (2000).

<sup>191</sup> Martha Chamallas, *The New Gender Panic: Reflections on Sex Scandals and the Military*, 83 MINN. L. REV. 305, 307 (1998) (describing the military as “atypical of the larger society” and noting that the military’s unique status is “complete with its own justice system”).

<sup>192</sup> GA. CODE ANN. § 16-6-1 (2003); see Karen L. Dayton, *Sexual Offenses: Change the Provisions Relating to the Offense of Rape; Change Penalty Provisions to Require Life in Prison Without Parole*, 16 GA. ST. U. L. REV. 99, 103–04 (1999).

<sup>193</sup> Silversten, *supra* note 13, at 158.

<sup>194</sup> Catherine Elton, *With Papal Prodding, Guatemala May End Executions*, CHRISTIAN SCIENCE MONITOR, Aug. 2, 2002, at 7 (noting that “[e]xecutions in the region are extremely rare . . . and the worldwide trend is definitely moving towards eliminating [the death penalty]. During the 1990s an average of three countries abolished it each year . . . .”) (second and third alterations in original) (quoting Piers Bannister of Amnesty International).

<sup>195</sup> See The Herald, *Debate on Death Penalty Revived*, AFR. NEWS, Jun. 20, 2003 [hereinafter *Death Penalty Debate*].

the use of the death penalty in cases of rape.<sup>196</sup> A year's sampling, from July 2002 to June 2003, of death penalty actions around the world shows an increasing global debate regarding its application to the crime of rape.<sup>197</sup>

During that time, several countries have maintained capital punishment for rapists and executed people based on those laws. Saudi Arabia<sup>198</sup> and Iran<sup>199</sup> continue to use capital punishment for rape under a strict form of Islamic law. Pakistan applies similar codes, and prosecutors have sought the death penalty in rape cases.<sup>200</sup> Similarly, the Philippines has sought to execute rapists as allowed under its restored death penalty law.<sup>201</sup> Nonetheless, as the number of executions for rapists has continued to rise in the Philippines, a decrease in the number of reported rapes has not occurred.<sup>202</sup> In Armenia, the parliament, in an odd form of government doublespeak, "abolished" the death penalty while allowing it to continue for the rape of a child, among other crimes.<sup>203</sup>

Other nations have had heated political and public debates driven by public desire to execute rapists. In Zimbabwe, the public has continued to show support for state-sanctioned executions and there has been a growing desire among the people to apply the death penalty to the rape and sexual abuse of children.<sup>204</sup> In Mexico, the central state recently held a mock referendum to reinstate the death penalty in response to increasing levels of rape, kidnapping, murder, and other violent crimes.<sup>205</sup> The results of the

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<sup>196</sup> See *infra* notes 198–217 and accompanying text.

<sup>197</sup> See *infra* notes 198–209 and accompanying text; see also The East African, *Death Penalty: Ugandans Want it Abolished*, AFR. NEWS, Nov. 11, 2002; Rahul Mahajani & Neil Pate, *Can We Tackle Child Sexual Abuse?*, TIMES OF INDIA, May 6, 2004; *Tougher Penalties for Rapists Welcomed, With Reservations*, NEW STRAITS TIMES (MALAY.), Jan. 11, 2003.

<sup>198</sup> E.g., *Saudi Beheaded for Murdering Compatriot*, AGENCE FRANCE-PRESSE, July 3, 2003, available at 2003 WL 69218008 (noting that "the conservative kingdom . . . applies a strict form of . . . Islamic law, imposing the death penalty for murder, rape, apostasy, armed robbery, drug trafficking, and repeated drug use"); see also This Day, *Teenager Jailed, Gets 240 Lashes of Cane in Saudi*, AFR. NEWS, Aug. 5, 2002.

<sup>199</sup> E.g., *Five More Hanged in Iran*, AGENCE FRANCE-PRESSE, Oct. 17, 2002, available at 2002 WL 23627363 (noting that "Iran imposes the death penalty for murder, armed robbery, rape, blasphemy, and serious drug trafficking").

<sup>200</sup> See Dera Ghazi Khan, *Pakistani Gang-Rape Victim Set to Testify*, AGENCE FRANCE-PRESSE, July 31, 2002, available at 2002 WL 23569939.

<sup>201</sup> Jerome Aning, *VACC Chooses Top Officers from Victims*, PHIL. DAILY INQUIRER, Feb. 11, 2003.

<sup>202</sup> *7 Rape Victims a Day*, MANILA STANDARD, Nov. 15, 2002.

<sup>203</sup> National Coalition to Abolish the Death Penalty, *Armenia Abolishes the Death Penalty*, Apr. 21, 2003, at <http://www.ncadp.org/html/armenia.html> ("[T]he abolition of the death penalty [does not] apply to hitherto perpetuated terrorist attacks, murders in aggravated circumstances, or the rape of minors.").

<sup>204</sup> See *Death Penalty Debate*, *supra* note 195.

<sup>205</sup> *Hypocritical Situation Brewing in Mexico; While the Government is Against the Death Penalty, a Growing Number of People See it as a Crime Deterrent*, SAN ANTONIO EXPRESS-

non-binding vote were overwhelmingly in favor of capital punishment.<sup>206</sup> Malaysia also responded to growing reports of child rape by considering legislation to apply the death penalty in such cases.<sup>207</sup> While Prime Minister Mahathir Mohamad and his ministers supported the effort, nothing has been codified as of yet.<sup>208</sup> Interestingly, a very powerful political push to execute rapists in India was ultimately defeated because people believed the incentives for murdering women would be increased under such a scheme.<sup>209</sup> Unfortunately, a similarly reasoned discussion in the public sphere has been notably absent from the various legislative discussions in the United States.

The experience in South Africa has been more extreme, but there are parallels to what has happened in the United States. South Africa abolished its death penalty in 1995 when its Supreme Court held it to be a human rights abuse.<sup>210</sup> Due to a variety of factors, levels of violent crime have since risen in the country.<sup>211</sup> As part of this growing trend, the incidence of rape has grown to the highest in the world.<sup>212</sup> The reaction to the frequent incidence of rape and other crimes has been violent and severe. In June of 2003, in the settlement of Braamfischerville, west of

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NEWS, Mar. 2, 2003, at 2H (noting that “[a]lthough the vote is nonbinding . . . it reflects a public fed up with kidnapping, murder, rape, and other violent crimes”).

<sup>206</sup> *Id.*

<sup>207</sup> Sofianni Subki, *Breast is Best for Baby*, NEW STRAITS TIMES, Dec. 23, 2002, available at 2002 WL 102307659.

<sup>208</sup> See Brendan Pereira, *'Death for Rapists' Rule Set to Clear*, STRAITS TIMES (SING.), Nov. 15, 2002.

<sup>209</sup> See J. Venkatesan, *Special Courts to Try Rape Cases?*, THE HINDU, Jan. 19, 2003, at <http://www.hinduonnet.com/thehindu/2003/01/19/stories/2003011902351100.htm> (noting that “it was felt that the offenders might as well kill the girl after the rape if they faced the death penalty”); see also *Delhi Police Seeks Special Courts to Try Rape Cases*, ECON. TIMES, Dec. 20, 2002 (“Women’s organisations have fears that [the death penalty] could prompt rapists to kill their victims.”). The effort in India was especially notable because it was led by high ranking government officials. See *Indian Defence Minister Joins Death-for-Rapist Chorus*, AGENCE FRANCE-PRESSE, Nov. 29, 2002, available at 2002 WL 23660935 (“Defence Minister George Fernandes Friday joined a rising call to apply the death penalty to rapists . . .”). The political debate took an especially odd turn when one official suggested that the death penalty only apply in cases where the person raped could not fight back. See *Legal Experts Split Over Death Rap for Rapists*, ECON. TIMES, Nov. 29, 2002 (“District government pleader D D Shinde said capital punishment for rape should be awarded only if the victim is not in a position to fight back and defend herself.”). The placing of the burden on women to fight back has long been criticized by feminists when used at trial, but the application of the same burden to the punishment aspect of criminal justice is highly unusual.

<sup>210</sup> *Death Penalty Debate*, *supra* note 195.

<sup>211</sup> *Mixed Emotions as S. African “Necklace” Murders Make a Comeback*, DEUTSCHE PRESSE-AGENTUR, June 6, 2003 [hereinafter *Necklace Murders*] (stating that “[w]ith the advent of democracy following the country’s first all-race elections in 1994 crime began to soar”).

<sup>212</sup> Ann M. Simmons, *Rapes of Children Rise in South Africa*, CHICAGO TRIBUNE, Nov. 11, 2001, at C18.

Johannesburg, a crowd of fifty people watched as men suspected of a series of crimes were stripped naked, flogged, and then had gasoline-soaked tires placed around their necks and set on fire.<sup>213</sup> These so-called “necklace” killings were common under apartheid for suspected government informers, but have reemerged as a means of vigilante justice in parts of South Africa.<sup>214</sup> These violent attacks have received praise in the local newspapers and have become part of a larger effort to reinstitute the death penalty.<sup>215</sup> One writer went on to say, “Either we should bring back the death penalty for police killing, rape (of minors), premeditated murder and treason, or adopt the Braamfischerville system.”<sup>216</sup> While the reaction in South Africa is of a much more violent nature, the hysteria surrounding the death penalty and child molesters is not substantially different than in the United States.<sup>217</sup>

## II. THE RHETORIC BEHIND THE REALITY

The language we use to describe rape and its consequences in a large way dictates our understanding of the experience. In America, “rape” is a word with incredible rhetorical force and is legally and linguistically differentiated from, among other terms, “sexual assault,” “lewd conduct,” and “inappropriate behavior.”<sup>218</sup> The United States is not unusual in this regard since calling a crime “rape” has a powerful and unique force in cultures throughout the world.<sup>219</sup> It should not be surprising, then, that the rhetoric in America surrounding rape is often turbocharged with emotion and over-determined in meaning. Further, language is what mediates our understanding of rape and sexual assault in a courtroom setting. Because oral testimony is the only means for a jury to understand the crime of rape during a trial, language plays a pivotal role.<sup>220</sup> A jury’s impression of the case is often shaped and normalized by cultural understandings of the

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<sup>213</sup> *Necklace Murders*, *supra* note 211.

<sup>214</sup> *Id.*

<sup>215</sup> *See id.*

<sup>216</sup> *Id.* The Braamfischerville system refers to the actions of “apartheid-era ‘freedom fighters’” in Braamfischerville, South Africa. Those fighters would tie up their enemies, put gasoline-filled tires around their necks, and set them on fire. *See* Necklacings, Posting of Kim to stormfront.org (June 14, 2003, 04:46 CST), at <http://www.stormfront.org/forum/showthread.php?t=74285> (last visited Sept. 23, 2004).

<sup>217</sup> *See* Simmons, *supra* note 212. Of course, this is not to suggest that vigilante executions and lynchings are likely to occur in the United States, but the environment of panic and limited debate is all too reminiscent of America’s growing mood regarding child molestation.

<sup>218</sup> *See, e.g.*, Community Abuse and Prevention Service Agency, *Rape and Sexual Assault*, at <http://www.capsa.org> (last visited Sept. 7, 2004).

<sup>219</sup> *Cf.* Kahn, *supra* note 200 (noting that a gang rape in Pakistan “shamed the country”).

<sup>220</sup> SUSAN EHRLICH, REPRESENTING RAPE: LANGUAGE AND SEXUAL CONSENT 38 (2001).

language surrounding rape.<sup>221</sup> As a result, in order to shape the underlying linguistic structure of rape, politically interested parties have used an array of terms and phrases to quantify the harm done by rape and to label those who have endured the experience.<sup>222</sup>

When legislatures debate rape policy in the United States, a variety of linguistic choices are made by policymakers and, subsequently, by the courts when interpreting the resultant laws. Media accounts report these government happenings with linguistic moves of their own. Academic and scholarly opinion often reflects on the statutory outcomes of these hearings and accounts and add another layer to the rape rhetoric. Public reaction to the words of the media and congresspersons form another level of discourse. Behind all these rhetorical twists and turns stands a patriarchal American culture that informs language and shapes attitudes regarding rape.<sup>223</sup>

In the context of all of the different child rape death penalty debates, a phrase that has been repeatedly bantered about is that "rape is 'a fate worse than death.'"<sup>224</sup> Such rhetoric has become an essential linchpin in supporting capital punishment for rape.<sup>225</sup> When the crime is worse than murder and murder justifies the death penalty, then, of course, rape should be punishable by death. If rape is not at least equivalent to murder, then the argument for capital punishment becomes more attenuated. What has been surprising in the discussions surrounding the child rape statutes is that it has been virtually uncontroverted among the various parties on all sides of the debate that rape is a heinous crime that is indeed worse than death.<sup>226</sup>

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<sup>221</sup> *Id.*

<sup>222</sup> *Cf.* Palmer, *supra* note 13, at 855.

<sup>223</sup> *See generally* CATHERINE MACKINNON, TOWARD A THEORY OF A FEMINIST STATE (1991).

<sup>224</sup> Anthony Walsh, *Differential Sentencing Patterns Among Felony Sex Offenders and Non-Sex Offenders*, 75 J. CRIM. L. & CRIMINOLOGY 443, 449 (1984); *see also* Wilson, 685 So. 2d at 1066 n.3.

<sup>225</sup> *See, e.g.*, Wilson, 685 So. 2d at 1063, 1066 n.3 (upholding the state's death penalty statute after noting that some rape victims feel that rape is worse than death).

<sup>226</sup> Not one of the articles or notes examining child rape in law reviews has denied this fundamental argument as advanced by proponents of the new death penalty. *See infra* Part II.A. Other media accounts and academic discussions have been almost universal in supporting comparisons to death and murder. *See, e.g.*, Walsh, *supra* note 224, at 448-49; Joe Darby, *Hung Jury Means Child Rapist Will Avoid Execution*, TIMES-PICAYUNE (New Orleans), Feb. 18, 2000, at B2. (noting that a child who has been raped may suffer her whole life, while a murder victim suffers for only a moment).

*A. From Government Officials*

While debates on the capital child rape statutes have often been brief and without significant record, the accounts that do exist show a strong belief in the notion that rape is worse than death. In support of Georgia's attempt to apply the death penalty for child rape, State Representative Warren Massey said, "When a child is raped or sodomized, then their life is basically destroyed . . . . The punishment fits the crime."<sup>227</sup> Massey's quote is typical and shows how neatly the invocation of rape-death equivalency fits within an overall argument in favor of the death penalty. Virginia State Senator Russell Potts similarly argued that violent sexual offenses like rape are "every bit as bad and violent as murder itself."<sup>228</sup> Government officials have also used a variety of techniques to obfuscate their rhetoric. When Don Sundquist was governor of Tennessee, he delivered his speech in favor of applying the death penalty for child rape from the site where eight-year-old Cary Ann Medlin was killed.<sup>229</sup> Invoking a symbol of such local salience allowed him to direct the crowd away from the tenuous and strained argument he was making.

In upholding its state's death penalty statute in *Wilson*, the Louisiana Supreme Court premised their finding on the notion that rape is sometimes worse than death.

The contention that the harm caused by a rapist is less serious than that caused by a murderer is apparently not subscribed to by all rape victims. In some cases women have preferred death to being raped or have preferred not to continue living after being raped.<sup>230</sup>

It should not be terribly surprising that the *Wilson* court held such opinions when the state prosecutors have repeatedly pushed the view that it is worse for a child to be brutalized by rape than to die.<sup>231</sup> Jerry Jones, who prosecuted the *Bethley* case in Louisiana, dismissed the decision in *Coker* "because appellate judges—like academics—don't see the crushed lives left behind after rape and sexual abuse. . . . 'Who's to say that it's more traumatic to die than it is to live with being brutalized?'"<sup>232</sup> Another Louisiana prosecutor, Vince Paciera, similarly argued:

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<sup>227</sup> Doug Nurse, *1999 Georgia Legislature: Death for Child Rapists, Drug Dealers Proposed*, ATLANTA J. & CONST., Jan. 11, 1999, at 01JJ.

<sup>228</sup> Hardy, *supra* note 12.

<sup>229</sup> John Shiffman, *Dismissal Could Hand Bredesen Clemency Case*, THE TENNESSEAN, Dec. 11, 2002, at 13A.

<sup>230</sup> *Wilson*, 685 So. 2d at 1066 n.3 (citing David J. Karp, *Coker v. Georgia: Disproportionate Punishment and the Death Penalty for Rape*, 78 COLUM. L. REV. 1714, 1720 (1978)).

<sup>231</sup> Higgins, *supra* note 136.

<sup>232</sup> *Id.* (quoting District Attorney Jerry Jones).

“You might say the rape of a child is a more heinous crime than the murder of a junkie . . . . A murder victim suffers for a moment, but that little girl will probably suffer the indignities caused by [a rapist] for the rest of her life.”<sup>233</sup>

American officials are not alone in using “death” rhetoric to inform criminal justice policy in recent years. Rwandan war tribunal prosecutor Silvana Arbia argued that rape represented an attempt to “kill without killing.”<sup>234</sup> As a result, Rwanda’s Legislature ordered “that rapes committed during the genocide were the highest category of crime; those convicted are sentenced to death.”<sup>235</sup> An Australian judge, Michael Finnane, defended a long sentence for a rapist by writing that “[m]ultiple rape can be and in this case in my judgment is worse than murder.”<sup>236</sup> In India, the Deputy Prime Minister premised his public arguments supporting hanging for rape on the notion that “rape [is] worse than murder.”<sup>237</sup>

Governments have parroted the rhetoric comparing rape to death for centuries, but the recent trend has served to supercharge the movement for a new death penalty applied to rape. When judges, legislators, members of the executive branches, and prosecutors invoke the buried Victorian conception of rape, they do so with the weight of patriarchal history on their side. That they do so for political gain should only be a surprise to the least cynical among us. That the media and academics effectively repeat the government arguments and rhetoric without criticism is certainly more astonishing.

#### *B. The Media, Academia, and Activists Have Echoed the Governments*

Famed U.K. child doctor Miriam Stoppard boldly asserted that “[t]he vast majority of women regard rape as a fate worse than death . . . .”<sup>238</sup> How she reached this conclusion and what empirical data supported it remain only known to Dr. Stoppard. Stoppard’s claim was bold in its universality, but it has been echoed by a variety of other prominent international writers and scholars.<sup>239</sup> It is also interesting to note that the

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<sup>233</sup> Darby, *supra* note 226 (quoting prosecutor Vince Paciera).

<sup>234</sup> Landesman, *supra* note 65.

<sup>235</sup> *Id.*

<sup>236</sup> Richard Ackland, *Chewing over the Leftovers . . . Scraps and Scrapes from a Year at the Bar*, SYDNEY MORNING HERALD, Dec. 27, 2002, at 13.

<sup>237</sup> *Deterrent Laws No Guarantee to Prevent Crimes*, THE PRESS TRUST OF INDIA, Dec. 23, 2002.

<sup>238</sup> Miriam Stoppard, *Dr. Miriam Stoppard's Problem Page: I Crave Revenge for My Girl's Rape*, THE MIRROR (London), Dec. 29, 1998, at 25.

<sup>239</sup> See *infra* notes 239–49 and accompanying text.

accounts of those in the media spotlight who seem least inclined to argue that rape is worse than death are those who have actually experienced it.<sup>240</sup>

Some members of the popular press have sought to raise awareness about rape by using catchphrases equating rape with death.<sup>241</sup> Joan Burnie, a noted columnist for the *Daily Record* has repeatedly used “worse than death” rhetoric to raise consciousness about Scotland’s failure to take rape seriously.<sup>242</sup> Her July 2002 column was typical of a well-meaning deployment of mortality rhetoric when she wrote, “When Victorians called rape the fate worse than death they weren’t too wrong because for many of its victims, it is a living death.”<sup>243</sup> Similarly, in May 2003 she wrote, “Maybe the Victorians were right when they called it the fate worse than death.”<sup>244</sup>

Rape-conscious scholarly opinion has mirrored this trend in the media and endorsed the Victorian notion that rape is a “fate worse than death.”<sup>245</sup> Noted genocide scholar Robert Jay Lifton deployed death rhetoric in talking about the suffering of raped womyn in Rwanda, stating: “A woman is seen as a symbol of purity. The family revolves around that symbol. Then there is a brutal attack on that symbol, stigmatising them all. In this way, rape is worse than death.”<sup>246</sup> Lifton’s account is especially notable because it is premised upon a conception of a proper role for womyn within a given culture.<sup>247</sup> The debate amongst legal academics regarding the Louisiana capital rape statute has also resulted in supporters analogizing death to rape. One author argued that American opinion had reached the point of equivalency for punishing rape and murder when she wrote, “Our society has evolved to find the death penalty proportional to the crime of rape against a child.”<sup>248</sup> In a truly Orwellian twist of rape and

<sup>240</sup> See, e.g., Jacoby, *supra* note 2.

<sup>241</sup> Joan Burnie, *Rape is a Living Death for Too Many Victims*, DAILY RECORD (Scotland), Jul. 19, 2002, at 7; Charles Crawford, *Rape Pornography a Sickening Trend in Adult Theater*, UNIVERSITY WIRE, Feb. 12, 2002.

<sup>242</sup> Even in instances where she is not using the analogy to support her argument, she invokes the “worse than death” rhetoric. See Joan Burnie, *Pity the Victims: Rape Girls - They Can't All Be Liars*, DAILY RECORD (Scotland), Feb. 15, 2002, at 15 (“Because while in the olden days rape was referred to it [sic] as the fate worse than death, most women would prefer to survive which means they might well submit instead of risking severe violence.”).

<sup>243</sup> Burnie, *supra* note 241.

<sup>244</sup> Joan Burnie, *Rape is not a Sex Crime; It's a Vicious Assault*, DAILY RECORD (Scotland), May 30, 2003, at 21.

<sup>245</sup> Susan H. Klemmack & David L. Klemmack, *The Social Definition of Rape*, in SEXUAL ASSAULT 135 (Marcia J. Walker & Stanley L. Brodsky, eds., 1976).

<sup>246</sup> Deirdre Mullan, *What Happens When a Woman Becomes a Killer?*, IRISH NEWS, Nov. 28, 2002, at 20.

<sup>247</sup> See *id.* (discussing womyn’s symbolic role in the family).

<sup>248</sup> Gray, *supra* note 13, at 1468.

death rhetoric, another scholar justified capital rape statutes by arguing that “[o]ne who takes another’s life is a murderer; one who rapes a child under the age of twelve murders innocence.”<sup>249</sup>

Members of international non-governmental organizations (“NGOs”) have also supported the death penalty for rape on the premise of its similarity to murder. Narayan Swamy, project manager of the NGO I THINK, said, “Just like murder, child rape is a horrific crime and anyone who is a parent would go to great lengths to ensure their children are not violated.”<sup>250</sup> Swamy’s statement was appropriated by the Malaysian media to substantiate arguments for the death penalty as a possible solution to child rape.<sup>251</sup> Similarly, a doctor in South Africa charged with treating refugees from Zimbabwe who had been raped by government-orchestrated rape squads said that “in [Zimbabwe’s] culture, rape is worse than death.”<sup>252</sup> And there can be no doubt that international caregivers, members of the media, and some scholars only have the best of intentions regarding raising awareness about rape, but when their words are shaped by cultures grounded in patriarchy, the words take on other, unintended meanings.

### C. *The Culture Behind the Words*<sup>253</sup>

American culture continues to propagate attitudes that isolate and degrade womyn who have been raped or assaulted. These cultural artifacts surface in a variety of forms, but the result is often the same. Those who make allegations of sexual assault are all too often met with isolation, humiliation, and vilification.<sup>254</sup> Womyn and children who are raped have become a class of outcasts who are separated by experiential difference in modern America.<sup>255</sup>

“The [woman in the news] was hidden in shadows of anonymity and often vilified, as if self-proclaimed rape victims earned their scarlet

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<sup>249</sup> Meister, *supra* note 13, at 224.

<sup>250</sup> Subki, *supra* note 207.

<sup>251</sup> See *id.* (arguing that the death penalty should be available to judges when sentencing child rapists).

<sup>252</sup> Geoff Hill, *Male Rape, the Latest Weapon for Mugabe’s Men*, NEW STATESMAN, Jun. 9, 2003 (discussing the use of rape and torture of young men to suppress political opposition).

<sup>253</sup> While this article has generally considered the role of capital punishment in rape cases in countries around the world, a cultural examination of all relevant countries is beyond the scope here. As a result, this section is limited to some illustrative examples from American culture.

<sup>254</sup> See Lynne Henderson, *Rape and Responsibility*, in 11 LAW AND PHILOSOPHY 127, 177; see also Burnie, *supra* note 241.

<sup>255</sup> Howard Rosenberg, *A Media Circus with Two Rings*, LOS ANGELES TIMES, July 25, 2003, at E-1.

letters.”<sup>256</sup> That quote was taken from an article about the media coverage of the sexual assault charges against Kobe Bryant. While Bryant has continued to receive cheers from an adoring public,<sup>257</sup> the person who was allegedly attacked by Bryant has become an outcast in society.<sup>258</sup> The process of a rape trial, even one shaped by beneficial policies like rape shield laws, can reinforce the isolation and stigma of rape.<sup>259</sup> As one person explained, “Rape victims are always given a secret identity. If there is nothing to be ashamed of, why should we hide?”<sup>260</sup> Although the practice of attaching a scarlet letter to womyn’s clothes when they commit adultery has long since disappeared, the use of other markings seems to have made an ominous return.

The recent attention given to an adoption law in Florida is illustrative. That legislation passed in 2001, required all mothers who wanted to put a child up for adoption to publish an ad in every newspaper in every county where they had sex that listed the age, race, weight, and hair color of all their sexual partners for the last year.<sup>261</sup> The stated rationale of the policymakers behind the statute was to eliminate suits by fathers after the child was adopted.<sup>262</sup> According to many commentators, however, the law was similar to the infamous “scarlet letter” given to adulterers as womyn were subject to public humiliation for their sexual history.<sup>263</sup> While this statute is not the subject of this article, it demonstrates a cultural process by which womyn and children who have been raped must continue to bear public scorn and scrutiny long after they have been attacked.

In 1995, in another sad revival of stigmatizing those who have been raped, a California judge complained that testimony by a rape crisis team in a trial was useless and that the best way to determine whether a rape had occurred was to use “Nathaniel Hawthorne’s scarlet letter.”<sup>264</sup> The judge was not afraid to vocalize his belief that those who have been raped are in part responsible for the crime and that using the notion of sin to adjudicate

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<sup>256</sup> *Id.*

<sup>257</sup> Bill Johnson, *Gutsy Women Speak of Horror of Being Assaulted*, ROCKY MOUNTAIN NEWS (Denver), Aug. 13, 2003, at 7A.

<sup>258</sup> Rosenberg, *supra* note 255.

<sup>259</sup> Charles Laurence, *Words Heal Rape Victim*, CHICAGO SUN-TIMES, Jan. 31, 1999, at 33.

<sup>260</sup> *Id.* Of course, this is not to devalue the necessity of rape shield laws, but rather to point out that one negative side effect of having them in place is that the laws can buttress norms of shame and guilt after the rape. *Id.*

<sup>261</sup> Christopher Swope, *The Scarlet Ad*, GOVERNING, Jan. 2003, at 17.

<sup>262</sup> *Id.*

<sup>263</sup> *Id.*

<sup>264</sup> *CA Ct. Reverses Verdict for Defense in Harassment Suit; Finds Judge Biased*, EMPLOYMENT LITIGATION REPORTER, Jul. 25, 1995, at 18877.

criminal law was appropriate.<sup>265</sup> That this particular judge was willing to make his views public made him an easy target, but his views are surely present in a large sector of America. As a result, those who have been raped have often felt that they must bear the burden of the crime committed against them.<sup>266</sup>

Another aspect of patriarchy in the United States comes from its religious heritage. American culture is informed by a range of Judeo-Christian ethics that shape the way the concepts of sex and rape are constructed.<sup>267</sup> A variety of beliefs, rituals, and edicts have permanently altered the way rape and sex are differentiated in the United States.<sup>268</sup> While Catholicism does not have the same omnipresence as Christianity in general, a particular story inspirational to Catholics has been especially notable in constituting the belief that death is a preferable option to being raped.

In 1902, Alessandro Serenelli, an Italian farmhand, tried to rape his neighbor Maria Goretti.<sup>269</sup> She refused his attempts and he responded by stabbing her fourteen times with a knife.<sup>270</sup> On her way to the hospital, before she died, Goretti forgave her attacker.<sup>271</sup> Because she died rather than allow her chastity to be violated by a rapist and she forgave her assailant, the Roman Catholic Church canonized St. Maria Goretti.<sup>272</sup> Even as a relatively "modern" saint, Goretti has already had a lasting effect.

Because St. Maria Goretti has been held in such high regard for her sacrifice and piety, many Catholics have felt unworthy in light of Goretti's saintliness.<sup>273</sup> Nonetheless, some believe her effect has been so strong that womyn today have made the choice to die rather than be raped because of Goretti's lasting influence.<sup>274</sup> A particularly gruesome incident where a Canadian couple kidnapped, raped, and tortured teenage womyn has been linked to Goretti.<sup>275</sup> Because the couple videotaped their abuse of the womyn, authorities could see fifteen-year-old Kirsten French's response to a demand for a particular sex act when she said, "Some things are worth

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<sup>265</sup> *Id.*

<sup>266</sup> See Henderson, *supra* note 254, at 129.

<sup>267</sup> See generally *id.* at 134–36, 143–44.

<sup>268</sup> See *id.* at 156–68.

<sup>269</sup> Rod Dreher, *Let There be no Profit in Prison Penance*, N.Y. POST, Oct. 12, 2000, at 9.

<sup>270</sup> *Id.*

<sup>271</sup> *Id.*

<sup>272</sup> Laurence, *supra* note 259.

<sup>273</sup> See *id.*

<sup>274</sup> *Spirituality Café*, U.S. CATHOLIC, July 2002, at 18.

<sup>275</sup> *Id.*

dying for.”<sup>276</sup> While no one can deny the pain and suffering French suffered, her dying words echo the Victorian beliefs surrounding rape.<sup>277</sup>

Maria Goretti lives on in other ways as well. In 1994, when the Pennsylvania Supreme Court upheld the traditional standard that womyn must show physical signs of resistance in order to prove a rape occurred,<sup>278</sup> it was termed the “St. Maria Goretti Law” by some commentators.<sup>279</sup> That womyn still must risk their safety in order to prove non-consent in rape cases in some jurisdictions in America is a sad fact, and it also shows how the piety of Goretti has become a sword to revive ancient patriarchy against womyn who have been raped. Some members of the Catholic Church have thus tried to argue that womyn must be willing to martyr themselves by making the same choice Maria Goretti did over one hundred years ago.<sup>280</sup>

The myth of St. Maria Goretti has also created a greater complex surrounding rape because the Catholic Church has linked resistance to rape with resistance to sexual enjoyment. “The church’s linking of the murder of Maria Goretti in resisting a rapist with women resisting carnal pleasure shows how rape is both eroticized and normalized in patriarchy.”<sup>281</sup> When womyn are taught to resist rape until the point of death, it is destructive. When that potentially fatal resistance is used to support abstinence by the Catholic Church, patriarchal conceptions about sex and rape reemerge. This complex of control exacerbates and magnifies the already present notions that death is preferable to rape and creates a more potent and severe societal message.

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<sup>276</sup> *Id.*

<sup>277</sup> Another similar account of Goretti’s memory living on occurred outside of the United States, in South Africa. There, a person who was raped testified on the stand that she would have been far better off if she had been murdered instead of raped. See *More Child Witnesses Say Khumalo Raped Them*, SOUTH AFRICAN PRESS ASSOCIATION, Mar. 4, 2003, available at 2003 WL 4462860.

<sup>278</sup> *Commonwealth v. Berkowitz*, 641 A.2d 1161, 1164 (Pa. 1994).

<sup>279</sup> Joan Chittister, *One, Two, Three Strikes, You’re Out in the Ol’ Boys’ Game*, NATIONAL CATHOLIC REPORTER, Jun. 17, 1994, at 12.

<sup>280</sup> Kathleen Sands, *Holiness and Hunger: Women in the Catholic Worker Movement*, SOJOURNER: THE WOMEN’S FORUM, Sept. 30, 1991. The author notes the frustration feminists face in encouraging non-violence by giving this account:

“You say you want non-violence,” he frothed, “but you don’t want to be raped, you don’t want to be killed, you’re afraid to go to jail.” He said women should emulate St. Maria Goretti, who rather than be raped allowed herself to be stabbed to death, praying all the while for her attacker.

*Id.* at 22.

<sup>281</sup> Pauline B. Bart & Eileen G. Moran, *Violence Against Women: The Bloody Footprints*, CANADIAN J. OF SOC., Aug. 1994, at 391.

Taken as outlying cultural artifacts, the story of Saint Gorette and the reoccurrences of scarlet letters in modern rape discussions do not conclusively prove the persistence of patriarchal culture shaping the rape and death penalty debate. However, when added to other systemic critiques of American perspectives on rape and the reemergence of “worse than death” rhetoric, the pattern is more disconcerting. At the very least, the stories of Kirsten French and the speeches offered by various government figures have made the death rhetoric surrounding rape seep further into America’s conventional wisdom.

### III. THE IMPACT OF LANGUAGE AND POLICIES

That the rhetoric underlying policy shapes culture and creates norms is not a new idea. The text, subtext, and context all control the interpretation and meaning of statutes, court decisions, and administrative actions.<sup>282</sup> In the legal setting, this is most obvious when a court looks to legislative intent behind a bill or tries to determine the definition of a word in a contract. The imprecision and power of language is the basis for a great many lawsuits. In a broader cultural context, rhetorical choices can have a more profound, yet subtle effect. Often racist, sexist, colonial, or heterosexist cultural artifacts or apocrypha find a way to resurface through linguistic choices and devices deployed in an entirely modern setting.<sup>283</sup> It is absolutely critical from a feminist perspective that the text and subtext of these loaded messages be unpacked and examined.<sup>284</sup>

When the death penalty is applied for the crime of rape, the justifications and intent behind that decision serve to alter not just court interpretations, but also societal understanding about child molestation and rape. The messages conveyed by laws like those adopted in Louisiana are mixed, but the negative signals implied with the rhetoric and statutes used are potentially very destructive for womyn, children, and society as a whole. The underlying cultural norms and linguistic systems shape the preconceptions of potential juries in criminal rape trials. The previous section identified the core rhetorical device being used to shape debates about capital child rape statutes. Now, we turn to the effects of this rhetoric and the policies themselves.

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<sup>282</sup> See David Mills, *Semantics of Rape*, WASH. POST, Nov. 22, 1991, at B5.

<sup>283</sup> Robert A. Williams, Jr., *Taking Rights Aggressively: The Perils and Promise of Critical Legal Theory for Peoples of Color*, 5 LAW & INEQ. 103, 103–09 (1987).

<sup>284</sup> See *id.*

*A. Messages to Those Who Have Been Raped*

It is amazing that the discussions of these new capital child rape statutes do not thoroughly address the effects that these policies will have on children.<sup>285</sup> It is taken for granted that “bringing justice” to child rapists will be better for the children who are targets of molesters.<sup>286</sup> Similarly, debates about capital punishment for the rape of an adult have rarely considered the consequences for womyn. Given this absence of substantive discussion concerning the group these statutes are designed to protect, it should be expected that policymakers do not even begin to consider the effects of their rhetoric on womyn and children. Nonetheless, the language judges, legislators, and commentators have used in the name of protecting womyn and children from rape risks an array of unintended consequences for those being “protected.”

*1. Why Live?*

Adult womyn who have been raped are four times more likely to contemplate suicide<sup>287</sup> and thirteen times more likely to attempt to kill themselves.<sup>288</sup> Although there has not been exacting quantification for suicide rates among those sexually molested as children, a connection has long been observed between the two.<sup>289</sup> It has been estimated that one-third of those who have been raped become permanently traumatized by the incident.<sup>290</sup> Even after years of professional therapy, many who have suffered the pains of being raped have taken their own lives.<sup>291</sup> The evidence is clear and is echoed by those who support the death penalty for rape: being raped increases the rates of suicide for children and adults.<sup>292</sup>

Why then, against what these advocates “know,” do they invoke rhetoric that makes death a preferred option for those who have been raped? The most pernicious and insidious message conveyed by comparisons to death is that those who have been raped have no reason to live. If it is true that those who have had to experience the ordeal of being

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<sup>285</sup> The various records and accounts of legislative debate for these statutes show regard for sending messages and the sake of children, but there was no significant consideration of what would happen to children once the statutes were in effect. A presumption that children would be better off was presumed and a debate about the policy effects in the United States was notably absent. *See supra* notes 224–33 and accompanying text.

<sup>286</sup> *See supra* notes 224–52 and accompanying text.

<sup>287</sup> Rape Crisis Volunteers of Cumberland County, *Rape and Sexual Assault Statistics*, at <http://www.rapecrisisonline.com/statistics.htm> (last visited Sept. 7, 2004).

<sup>288</sup> *Id*

<sup>289</sup> BAGLEY & KING, *supra* note 27, at 141.

<sup>290</sup> Laurence, *supra* note 25.

<sup>291</sup> BAGLEY & KING, *supra* note 27, at 94–95.

<sup>292</sup> Glazer, *supra* note 13, at 88.

raped have suffered a “fate worse than death” that will haunt them for the rest of their lives, then what reason do they have to continue living? If death is truly the lesser of two evils, why would someone hesitate to embrace it as an escape from the horrific experience of rape? Such rational-choice type evaluation may seem out of place in discussing the impact of rape and the decision to commit suicide, but given that those invoking it are wedded to deterrence theories that rely on the same premises, it seems a horrific oversight not to consider the signals sent to womyn and children.

This is not to say that a person who has been raped would decide to commit suicide because a Louisiana judge said that being raped is worse than death. Rather, the rhetoric comparing death to rape contributes to a cultural norm built upon Victorian artifacts that elevates womyn’s chastity to the very essence of their identity. Arguing that a person would commit suicide based on the words of policymakers is the type of strawperson that those espousing executions as a solution would surely invoke, but it misses the structure at play in these cases. When death becomes a lesser fate than being raped, patriarchal norms of childhood “innocence” and womyn’s virginity become the crucial elements of personhood. Attempts to recover from rape become fruitless before they start because those who have been raped are already the “living dead.”

The experience of being alive and dead after being raped is a common phenomenon for womyn in America and around the world. “Women disassociate themselves from rape because the vast majority of people still believe that a woman who has been raped is filthy, better off dead, irrational, or got what she was looking for.”<sup>293</sup> Outside of the United States, in communities where rape is seen as a fate worse than death, people who have been raped often become social outcasts.<sup>294</sup> Rape is a badge of shame for these womyn as no one in society wants to deal with the “living dead.”<sup>295</sup> When policymakers and judges in America use comparisons to death to justify their decisions, cultural norms that isolate womyn in other countries gain a foothold here. Such a risk should not be taken lightly as a revival of Victorian sexual norms and conceptions regarding rape would represent a grave threat to American womyn and children.

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<sup>293</sup> Alice Sebold, *Speaking of the Unspeakable*, N.Y. TIMES, Feb. 26, 1989, 6 (Magazine), at 16.

<sup>294</sup> Teddie Weyr, *Children of Hate Face Uncertain Future*, PRESS ASSOCIATION OF SOUTH AFRICA, Jan. 26, 1993.

<sup>295</sup> *Id.*

In response to the above contention, one could argue that those invoking comparisons to death are only speaking of the experience itself, but not the aftereffects. That is, womyn are not being told that there is no reason to continue to live, but instead that they have experienced a “living death” and can now recover from that trauma. While there may be some merit to this interpretation of rape/death rhetoric, it is not supported by those who are invoking these Victorian bromides in today’s political debates. In fact, supporters of the death penalty belabor the notion that rape devastates the rest of a person’s life, and they go so far as to argue that the effects extend into future generations.<sup>296</sup> Some even cite suicide statistics<sup>297</sup> to justify heavy punishment with no regard to the fact that their rhetoric makes suicide a preferable option. Attempting to backpedal after the fact seems disingenuous. Further, what judges, commentators, and policymakers may intend is hardly the issue when the effects of their rhetoric become reality for womyn and children in America.

Even beyond the implicit rational choice to commit suicide underlying rape/death rhetoric, there is an explicit devaluing of womyn’s lives in arguing that rape is worse than death.

As someone who was raped explained:

[T]o concur with the view that rape is the single worst thing that can happen to a woman is to do disservice to women. . . . [I]t raises the status of the penis to an unproductive level. It is to say that all of women’s powers, all that we can stand in the face of pain and hardship, are reduced to naught because we will fall to pieces should an unwelcome lump of male flesh be forced upon us. Victims all.<sup>298</sup>

Giving a penis-with-intent the ability to permanently destroy any person it touches is to deny any chance for recovery and a meaningful life. None of this is to blame those who do not recover, but rhetoric that traps womyn and children into a corner of isolation and reliving agony should not be supported. That rape is a horror that most of us cannot comprehend is not a reason to inflict our inherent ignorance upon those who have already suffered. Using someone else’s suffering for political gain is sad, but probably inevitable. Using the suffering and then framing it in a way that causes people to re-experience it and ultimately question their reason for living is horrific.

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<sup>296</sup> Glazer, *supra* note 13, at 88.

<sup>297</sup> *Id.* at 87–88.

<sup>298</sup> Carol Sarler, *Forgetting the “Bad Man” Who Tried to Rape Me*, SUNDAY TIMES, Jul. 5, 1998.

## 2. Fight Until Your Last Breath

A second “rational” conclusion to the belief that rape is worse than death is that “any decent woman should resist to her last breath.”<sup>299</sup> If you are being raped and you recognize death as better than experiencing rape, you have no option but to fight even if it spurs a violent reaction from the rapist. For some time, it has been conventional wisdom that fighting back is a mistake for womyn because it increases their risk of death.<sup>300</sup> New studies in America have cast doubt on that piece of advice, as fighting back has often allowed womyn to escape their attackers with only a limited increase in retaliation.<sup>301</sup> However, it remains clear, even with the new studies, that in cases where the rapist is a stranger, fighting back significantly increases the risk of death and severe injury to womyn.<sup>302</sup> In instances where the perpetrator is unknown to the person being attacked and violated, the rhetoric of death tells womyn to engage in conduct that is detrimental to their chances of surviving. Just as saying that rape is worse than death encourages suicide by those who have lived through it, it also demands that womyn die in the process of the rape itself. Womyn and children are told to reenact the painful conclusion to St. Maria Goretti’s life not for piety’s sake, but for their own.

There is another, added effect to this rhetorical element. Womyn who ignore the social message to avoid being raped at all costs and who decide not to fight back with all their might suffer the pain of guilt for not trying harder.<sup>303</sup> Womyn who, for whatever reason, do not fight back to the point of being knocked unconscious are viewed as “cowards” under the rubric of death rhetoric. Again, womyn are blamed for the crimes committed against them. The old mantra that it is her fault for not fighting him off has been revived by activist attempts to raise awareness about rape.<sup>304</sup> Thus, the traditional legal conception of rape typified in *Mills v. United States*<sup>305</sup> has returned as womyn are forced to put their lives in jeopardy to prove they were actually raped.<sup>306</sup> Given that America continues to

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<sup>299</sup> Editorial, *Frightening Logic in Rape Case Sentencing*, TORONTO STAR, Oct. 10, 1997, at A28.

<sup>300</sup> Sue Lees, *Women: What Should You Do if a Man is About to Rape You?*, THE GUARDIAN (London), Aug. 17, 2000, at 8.

<sup>301</sup> *Id.*

<sup>302</sup> Jane E. Brody, *Personal Health*, N.Y. TIMES, Apr. 29, 1992, at C13.

<sup>303</sup> David Ward, *Advice to Resist Sex Attackers May Make it Worse, Rape Charity Warns*, THE GUARDIAN (London), Aug. 16, 2000, at 5.

<sup>304</sup> See Catherine Redfern, *Why Irma Kurtz is Wrong About Rape*, at <http://www.thefword.org.uk/fearutes/irma.live?skin=print> (quoting Irma Kurtz in June 2001 *Cosmopolitan*).

<sup>305</sup> 164 U.S. 644 (1896).

<sup>306</sup> *Id.* at 648.

enforce rape statutes that put womyn on the defensive in proving non-consent, rhetoric that furthers the survivor's guilt can be devastating.

Further, the effect of adding shame and guilt to womyn who have been raped is contrary to the stated goals of applying the death penalty for rape.<sup>307</sup> Many womyn and children who have been raped do not report the attacks and try to hide evidence of the horrific events out of guilt.<sup>308</sup> Adding a "survivor's" complex on top of the existing societal pressure can only serve to exacerbate the reluctance to report. Given systemic underreporting now,<sup>309</sup> creating further disincentives to report ensures that a death penalty regime will only decrease any deterrent effect.<sup>310</sup> And when the jury expects someone who has been raped to fight until their last breath, they are not likely to find the defendant guilty.<sup>311</sup> The net result is that whatever modicum of deterrence is achieved by imposing capital punishment is more than offset by the decreased probability of being caught and convicted.

### 3. The Ordeal of the Trial and Sentencing

There are also extra trial considerations in the context of a capital crime. Because a death penalty trial is usually very long and must be bifurcated into guilt and sentencing phases, children or womyn who have been raped would almost certainly have two long periods on the witness stand.<sup>312</sup> This is of significant consequence to a child who has been raped. Children who testify at rape trials are usually attacked by defense attorneys who allege that the children have fabricated their stories.<sup>313</sup> Studies show that the emotional effects on children who testify in rape trials are severe.<sup>314</sup> The healing process that children must go through is delayed during the trial and trauma from the long process will inevitably cause more psychological damage to the child.<sup>315</sup> "As important as it is to

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<sup>307</sup> See Wilson, 685 So. 2d at 1073 (stating that the goals of punishment are retribution and deterrence).

<sup>308</sup> Lori Montgomery, *Rape Appears to Have Been Random Act of War in Kosovo*, KNIGHT RIDDER WASH. BUREAU, June 26, 1999.

<sup>309</sup> GREENFELD, *supra* note 15, at v (noting that "[i]n 1994 and 1995 a third of the victims said that the rape/sexual assault victimization was reported to a law enforcement agency").

<sup>310</sup> Palmer, *supra* note 13, at 865.

<sup>311</sup> Alice Vachss, *The Charge of Rape, The Force of Myth*, WASH. POST, Nov. 2, 1993, at B02.

<sup>312</sup> Paternoster, *supra* note 87, at 212.

<sup>313</sup> See JOHN E.B. MYERS, LEGAL ISSUES IN CHILD ABUSE AND NEGLECT 30-31 (1992).

<sup>314</sup> Diamond, *supra* note 13, at 1187-88 (discussing the enduring psychological effects caused by lengthy trials and attacks by defense attorneys).

<sup>315</sup> *Id.*

protect children from child rapists, it is equally important to protect them from any further emotional trauma.”<sup>316</sup>

In addition to the psychological damage itself, the threat of a long trial and the guilt associated with testifying to put someone to death may discourage reporting of the crime—similar to the “survivor’s” guilt effect described above.<sup>317</sup> A review of convicted child rapists provides substantial evidence that the majority of rapists are known to the child before the crime.<sup>318</sup> When the offender is a friend of the family or actually a member of the family, reporting rates for the crime are significantly lower.<sup>319</sup> Adding the death penalty to the family’s decision on whether to report will further discourage them from coming forward. Thus, “authorizing [the death penalty] for the rape of a child will diminish the willingness to report the rape and, therefore, allow the child rapist to walk free and rape again.”<sup>320</sup>

Since most child rapists are family members, permitting the death penalty for the crime will decrease the already low levels of reporting because children normally do not want to be responsible for the death of someone in their family.<sup>321</sup> If reporting decreases for aggravated child rapes, the deterrence and retribution goals of applying the death penalty will be completely undermined.<sup>322</sup> The *Wilson* court’s reply to this concern was simply to note that the child is an innocent victim and the offender is responsible and should be punished accordingly.<sup>323</sup> This non-reply does a disservice to the debate over the death penalty and ensures that shortsighted, retribution-oriented politics will blind policymakers to the insidious effects of the statutes they support.

The effect on adult womyn can also be severe. American history is filled with periods of time when womyn who have been raped were ostracized and their stories denied.<sup>324</sup> In between these times, those who had been raped were often called “sick” and being raped was a psychiatric disorder that warranted “treatment.”<sup>325</sup> Being raped was a badge of shame and those who had to endure the pain of sexual violence have often been

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<sup>316</sup> *Id.* at 1188.

<sup>317</sup> *Id.* at 1188–89.

<sup>318</sup> GREENFELD, *supra* note 15, at 2.

<sup>319</sup> Diamond, *supra* note 13, at 1189.

<sup>320</sup> *Id.*

<sup>321</sup> Fleming, *supra* note 13, at 741.

<sup>322</sup> Palmer, *supra* note 13, at 865.

<sup>323</sup> Wilson, 658 So. 2d at 1073.

<sup>324</sup> Susan Stefan, *The Protection Racket: Rape Trauma Syndrome, Psychiatric Labeling, and Law*, 88 NW. U. L. REV. 1271, 1272 (1994).

<sup>325</sup> *Id.* at 1272–73.

abused by the legal system and society.<sup>326</sup> Adding a long, bifurcated trial to the ordeal of rape recovery almost guarantees that womyn will feel the extra strain of attacks from aggressive defense attorneys and the doubt of a jury drawn from a public already dubious of rape claims.

*B. Messages to Rapists*

It may seem odd to consider the messages of a statute upon would-be rapists, but the consideration is not fundamentally different from standard deterrence theory. In the case of applying the death penalty, a policymaker hopes the ultimate penalty, death, would create a high disincentive toward committing rape even when the probability of being punished is low.<sup>327</sup> Such an optimistic view misses the other incentives created by a system that treats murder and rape the same in regards to punishment. The Louisiana statute, and others like it, creates powerful motives for an increase in violent crime, not a decrease.

When death is the penalty for rape and murder, a rapist has an increased incentive to kill the person he has raped. Under a statutory system where the death penalty is applied to the aggravated rape of a child, the rapist has every incentive to kill the child victim because the child is likely to be the only witness.<sup>328</sup> Similarly, most rapes of adult womyn are prosecuted with the person raped being the key witness against the rapist.<sup>329</sup> If murder does not incur additional punishment, then the motivation to kill the primary witness to the crime is strong.

The notion of a “freebie” in crimes is not unique to the crime of rape. Similar debates were had for statutes that applied capital punishment to the crime of kidnapping.<sup>330</sup> In that context, the application of the death penalty was viewed as an “invitation to the criminal to kill the victim.”<sup>331</sup> The pervasive view regarding capital punishment and kidnapping thus turned to disfavoring death as a penalty.<sup>332</sup> A similar effect should dissuade those who seek to execute convicted rapists. Kidnapping does not have the same social resonance as rape, but the incentives created by applying the death

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<sup>326</sup> *Id.* at 1272.

<sup>327</sup> Daniel Y. Jun, *Bribery Among the Korean Elite: Putting an End to a Cultural Ritual and Restoring Honor*, 29 *VAND. J. TRANSNAT'L L.* 1071, 1099–1100 (1996) (discussing a cost-benefit analysis of crime and punishment).

<sup>328</sup> Fleming, *supra* note 13, at 742–43.

<sup>329</sup> Amanda Konradi, *Too Little, Too Late: Prosecutors' Pre-court Preparation of Rape Survivors*, 22 *LAW & SOC. INQUIRY* 1, 3 (1997) (“Typically, in a rape case, the account of the victimized woman—the primary witness to the assault—is the basis of proof of forcible sexual contact and the identity of the assailant.”).

<sup>330</sup> ALA. CODE § 13A-6-44 cmt. (Michie Supp. 1994).

<sup>331</sup> *Id.*

<sup>332</sup> Diamond, *supra* note 13, at 1186–87.

penalty in either case are remarkably similar. Both are crimes with generally only one witness that have a low probability of successful prosecution when the person kidnapped or raped is also murdered.<sup>333</sup>

The risk of a rapist taking a “freebie” is especially high when the person being attacked is a minor. Sexual abuse cases are already among the most difficult for prosecutors to try.<sup>334</sup> The “[c]hild victims are usually the key witnesses . . . [and] their testimony is likely to be indispensable to the conviction of the person who committed the crime.”<sup>335</sup> Given that the rapist of a child does not incur an extra penalty when he or she is already eligible for execution, the incentive to kill the sole witness to the crime is a low risk, high reward scenario. This equation is fundamentally depraved, but it is the notion that underlies deterrence. That is, a would-be criminal assesses consequences and risk versus “reward” before engaging in criminal behavior.<sup>336</sup> Thus, whatever deterrent effect the death penalty would have for would-be rapists, it would be more than offset by the number of murdered children that would result from the incentive to kill the only witness.

Proponents of death penalty statutes for child rape have advanced three major arguments against the “freebie” theory.<sup>337</sup> First, they argue that the theory “assumes that the rapist is contemplating the consequences of his act at the time of its commission.”<sup>338</sup> This argument allows death penalty proponents to play both sides of the deterrence debate. For the death penalty to have a deterrent effect, a criminal *must* consider his or her actions in light of the consequences or deterrence fails to work. To then argue that the “freebie” theory is bankrupt because it assumes the criminal is thinking about those same consequences is contradictory nonsense. If a potential child rapist does not perceive the death penalty as a deterrent, then the primary argument in support of it is lost.

Second, proponents argue that murder of a child is unlikely because most rapists in these cases are friends or family who would be reluctant to kill the boy or girl.<sup>339</sup> Of course, one would probably have to ask how a friend or family member would rape a child they know in the first place. It hardly seems unreasonable to argue that someone willing to torment,

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<sup>333</sup> *Id.*

<sup>334</sup> *Id.* at 1187.

<sup>335</sup> G. Russell Nuce, Comment, *Child Sexual Abuse: A New Decade for the Protection of Our Children?*, 39 EMORY L.J. 581, 607 (1990).

<sup>336</sup> JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 2.03[B][1], at 14–15 (3d ed. 2001).

<sup>337</sup> See Glazer, *supra* note 13, at 106–07.

<sup>338</sup> *Id.* at 106.

<sup>339</sup> *Id.*

abuse, and rape a known child would also be willing to kill them to avoid a death sentence. Further, the argument that offenders would not murder or seriously injure a child is in contrast to evidence of a higher rate of murder among child rapes<sup>340</sup> and the fact that one-quarter of rapes where the attacker is the parent of a child cause “major injury.”<sup>341</sup> It seems that a lot of rapists have no qualms about killing their victim in the present environment. Adding the threat of execution will increase the incentives to do so.

A final argument used by supporters of child rape death penalty statutes is that there is a lack of statistical evidence to support the “freebie” theory and it is “impossible to substantiate.”<sup>342</sup> This argument has obvious truth to it because there has not been a substantial time frame to analyze the effects of capital child rape statutes on the level of rape. Issues of deterrence are hard enough to examine in a meaningful way because of serious control problems in any study,<sup>343</sup> but a statistical analysis over such a narrow time frame is even more difficult. Rape underreporting adds another layer of difficulty, since even if the death penalty decreased the number of reported rapes, it would be impossible to determine if the decrease in reports was due to a decrease in rapes or to a decrease in reports because of the added incentives created not to report.

Nonetheless, a crude statistical analysis can be done for death penalty statutes applied in the case of adult womyn. It is unclear whether this basic examination of the relevant data would apply equally well to children, but at this time it is the only available option with data to study. The U.S. Department of Justice (“DOJ”) accumulates nationwide crime statistics with basic analysis for rape and other sex crimes.<sup>344</sup> Part of that report derives data from the Supplemental Homicide Reporting (“SHR”) program of the Federal Bureau of Investigation (“FBI”).<sup>345</sup> As part of the SHR, local law enforcement reports an array of information about homicides in their jurisdictions, including whether thirty-two different categories of accompanying circumstances, including rape and sexual assault, are also present in the crime report.<sup>346</sup>

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<sup>340</sup> GREENFELD, *supra* note 15, at 29 (noting that “[m]ore than 25% of sexual assault murder victims were under age 18, compared to about 15% of all murder victims”). According to the DOJ, the rate of murder is even higher when the person raped is age twelve or younger than for the age group ages thirteen to seventeen (14.8% compared to 9.7%). *Id.*

<sup>341</sup> *Id.* at 12.

<sup>342</sup> Glazer, *supra* note 13, at 106–07.

<sup>343</sup> See Michael H. Marcus & David S. Weissbrodt, *The Death Penalty Cases*, 56 CAL. L. REV. 1268, 1278 (1968).

<sup>344</sup> See generally GREENFELD, *supra* note 15..

<sup>345</sup> GREENFELD, *supra* note 15, at 27.

<sup>346</sup> *Id.* at 27–28.

The 1995 DOJ summary of the SHR report found that between 1976 and 1994, the rate of rape-murders as a percentage of all murders was in steady decline from the previous period.<sup>347</sup> 1994 marked the lowest rate of rape-murders at only 0.7%.<sup>348</sup> As 1978 was the year *Coker* was decided and 1972 was the year of the *Furman* decision, the 1976 time-point marking a decrease coincides with the time frame that the death penalty for rape was eliminated. While this evidence is not statistically controlled, the trend seems clear: the more time that elapsed after the removal of the death penalty as a punishment for rape, the fewer rape-murders occurred in the United States. Such an analysis cannot survive scientific scrutiny, but it should at least shift the burden to advocates who casually dismiss the notion that capital punishment increases the risk that the person being raped will also be murdered. The incentives for murder are "rational" in a world of capital rape statutes and the limited statistical evidence that exists supports that proposition.

### C. Other Messages and Other Audiences

While the signals and messages sent to the rapists and the people being raped are most prominent, other audiences figure into the effectiveness of rape death penalty laws. As discussed above, every death penalty trial is bifurcated into guilt and sentencing phases. These proceedings give juries two opportunities to inject prejudices and cultural notions of rape into their decision-making process. As Alice Vachss, the former chief of the special victims bureau in the district attorney's office in Queens remarked, "The danger in every sexual-assault prosecution is that the result has been determined before the jury is seated."<sup>349</sup> The evidence has shown that applying the death penalty to rape can make a jury reluctant to agree on the guilty plea.<sup>350</sup> While the jury is not supposed to consider the punishment at the guilt stage, such a separation is grounded more in a normative conception of a trial than in reality.<sup>351</sup> When juries become reluctant to find rapists guilty, deterrence is further undermined and the fundamental purpose of capital statutes is eviscerated.

A secondary consideration that has not been addressed in the rhetorical analysis above is the danger of the subtextual and hidden

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<sup>347</sup> *Id.* at 28.

<sup>348</sup> *Id.*

<sup>349</sup> Vachss, *supra* note 311.

<sup>350</sup> See THE DEATH PENALTY IN AMERICA, *supra* note 49, at 211.

<sup>351</sup> See generally William J. Bowers et. al, *Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-Trial Experience, and Premature Decision Making*, 83 CORNELL L. REV. 1476 (1998) (discussing jurors' predisposition against impartiality in a capital case).

meanings of applying the death penalty to rape. That is, whether or not policymakers and judges support capital punishment using a worse-than-death analysis, the application of the death penalty to non-homicide crimes sends important signals about the crime itself. If one were to execute jaywalkers, there would be an important message conveyed about the seriousness and heinousness of walking outside of a crosswalk. Still, other messages would be implicit in such a policy. Chiefly, there is an equivocation with death implied when the sentence applied is execution. Inherent in the idea of retribution and within Supreme Court jurisprudence surrounding the death penalty, the notion of proportionality all but equates the penalty with the crime.<sup>352</sup> While deterrence allows for a punishment in excess of the crime in order to prevent greater social harm,<sup>353</sup> retribution and Eighth Amendment analysis warrants that death be roughly equivalent to the crime punished.

The results of this subtextual message are twofold. First, it makes the “worse than death” rhetoric meaningful, but also partially irrelevant. The fact that policymakers create an equation where rape is worse than death is probably an inevitable premise in the decision to execute rapists. That the words are verbalized in a way that resuscitates Victorian notions of personhood is unfortunate, but even absent such an explicit message, the application of the death penalty by itself already creates the same idea on an implicit level. Second, the rhetoric becomes heavily bound to the substantive aspects of the punishment. As the dissent pointed out in *Gregg v. Georgia*,<sup>354</sup> a punishment is excessive if it does not further the goals of retribution or deterrence.<sup>355</sup> The deterrence argument in any death penalty debate is always troublesome and becomes a battle of statistics and studies that cannot possibly control for all relevant variables. As a result, retribution becomes an essential justification for the deployment of any capital punishment regime.<sup>356</sup> Since the equivocation with death is the basic relay for justifying state executions, words like “rape is a fate worse than death” are an inevitability.

#### CONCLUSIONS

Is rape a fate worse than death? That is not a question that anyone has a frame of reference from which to answer. Nonetheless, policymakers, members of the media, judges, activists, and authors have

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<sup>352</sup> DRESSLER, *supra* note 336, § 6.05[B], at 57.

<sup>353</sup> *See id.* § 6.02[A], at 50.

<sup>354</sup> 428 U.S. 153 (1976).

<sup>355</sup> *Id.* at 241 (Marshall, J., dissenting).

<sup>356</sup> Marcus & Weissbrodt, *supra* note 343, at 1297–98.

made the analogy without evidence to support their respective agendas. The new wave of death penalty legislation for child rape stands at the center of these ideology-informed policy goals. Louisiana was the first to act in the United States, but it will not be the last. Countries around the world have mirrored Louisiana's move by carving out special capital punishment provisions for rape of adult womyn and children of either sex. That these policies will receive continued support from populations frenzied over child molestation and rapists going unpunished is a virtual certainty. With politicians capitalizing on this furor, it is only a matter of time before a new wave of capital rape laws goes into effect.

These policies should be opposed and resisted because of the devastating and pernicious effects they will have on justice, womyn, and children. The statutes will not achieve the goal of deterrence because they will decrease reporting, decrease convictions, and increase the incentives to murder those who are raped. Whatever retributive function may be served by executions will be similarly undermined as the death penalty will likely decrease the number of rapists caught and convicted. Thus, the best available evidence shows that these statutes are counterproductive to their stated aims.

Nonetheless, it is important to move beyond simple policy opposition on this issue. There is a new, but very old, rhetoric buttressing proponents of these death penalty statutes. As long as populations and politicians can make the appeal that rape is an evil worse than death, they can push these laws with a load of Victorian, patriarchal baggage attached. Womyn and children become objects to be owned and controlled and the consequences of the rhetoric can be devastating on their lives. As long as womyn are told that they would be better off dead than raped, we will continue to read stories of womyn emulating Maria Goretti and dying as a consequence. Children will continue to feel that their meaningful life is over and suicides and trauma will become more common. Womyn and children will ultimately bear the insidious consequences of linguistic choices shaped by a patriarchal culture.

That the adult men in power do not see the consequences of their words and do not think before they speak is nothing new. That they do so in order to support state killing adds substantial weight to the language of domination that they deploy. When womyn and children are nothing more than pawns in a game of politics and crime fighting, the result is sure to be negative for those without political power. When they also regurgitate and propagate notions of personhood derived from antediluvian conceptions of what it means to be raped and violated, the epistemological gap in comprehension creates a doubly blinding effect. Men in power rarely have

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any understanding of rape or child molestation on a personal level. Thus, driving policy aims with a lack of understanding ensures effects outside of their narrow conception of the world. Death penalty statutes derived from belief without foundation and rhetoric without understanding will cause consequences unforeseen to those who could not comprehend the problems in the first place.

As a result, the only way to position ourselves against these efforts is to stop them before they gain momentum built on frenzy and hysteria. Allowing capital rape statutes and the notion that "rape is worse than death" to gain a more significant foothold in the legal and cultural realms cannot be easily undone. It must start and stop with Louisiana and efforts to extend other laws around the globe must be similarly opposed. To do otherwise is to replicate and revive Victorian paradigms surrounding rape in a modern society and resubjugate womyn and children under a pernicious patriarchal regime of rhetoric and policy.

Is rape worse than death? One can only hope that in the future fewer of us know the answer to that question. Unfortunately, the approach of Louisiana and other sovereigns seems to ensure that more people will experience and come to understand both rape and death.