The Eighth Amendment, Rape, and Sexual Battery: A Study in Methods of Judicial Review

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interest in the regulation of its corporations and the uniform application of its laws.\textsuperscript{60}

The concurring justices expressed concern over the uncertainty of the International Shoe standard.\textsuperscript{61} While the decision makes more sense than the "patchwork of legal and factual fictions generated from Pennoyer v. Neff,"\textsuperscript{62} disputes over fairness and reasonableness as articulated in International Shoe will prove time consuming and difficult. Questions surrounding the vitality of the Seider line of decisions are evidence of the problems posed. Nevertheless, interests in expediency, simplicity, and uniformity cannot outweigh the constitutional mandate of due process of law.

\textbf{Maria Masinter}

\textbf{The Eighth Amendment, Rape, and Sexual Battery: A Study in Methods of Judicial Review}

A recent United States Supreme Court decision established a new eighth amendment test for the constitutionality of punishment which may be out of proportion with the severity of a crime. After examining the Court's statement and use of this test for the rape of an adult the author concludes that the Court's test is not entirely satisfactory. Finally, the author applies the new test of constitutionality of capital punishment to the crime of sexual battery as defined in the Florida Statutes.

\textbf{I. The Developing Eighth Amendment Standard}

While serving three consecutive life terms and two twenty-year terms for rape and murder convictions, the defendant escaped from a Georgia correctional facility. Several hours later the defendant unlawfully entered the victim's home. Brandishing a board and a knife the defendant forced the victim to bind her husband, raped her and escaped in the family automobile holding the victim as his hostage. The defendant was apprehended shortly thereafter, having caused no further harm to the victim. A jury found the defendant

\textsuperscript{61} 97 S. Ct. at 2587 (Powell, J. and Stevens J., concurring).
\textsuperscript{62} Id. at 2588 (Brennan, J., concurring and dissenting).
guilty, *inter alia*, of rape and armed robbery. During a separate sentencing proceeding, the jury determined that two statutory aggravating factors for rape existed. Defendant was a prior capital felony offender, and the rape was committed during the perpetration of another capital felony, armed robbery. The jury recommended death. The Supreme Court of Georgia affirmed the sentence of death. On certiorari, the United States Supreme Court held, reversed: Capital punishment is grossly disproportionate to the crime of rape of an adult female as defined by the Georgia statutes and is therefore forbidden by the eighth amendment as cruel and unusual punishment. Coker v. Georgia, 433 U.S. 584 (1977).

The standards of review used by members of the Court to re-

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1. Defendant was convicted of rape, armed robbery, kidnapping, motor vehicle theft, and escape. Coker v. State, 234 Ga. 555, 556, 216 S.E.2d 782, 786 (1975). The Georgia rape statute under which defendant was convicted is as follows:

   A person commits rape when he has carnal knowledge of a female, forcibly and against her will. Carnal knowledge in rape occurs when there is any penetration of the female sex organ by the male sex organ. A person convicted of rape shall be punished by death or by imprisonment for life, or by imprisonment for not less than one nor more than 20 years. No conviction shall be had for rape on the unsupported testimony of the female.

   GA. CODE ANN. § 26-2001 (1972). The armed robbery statute under which defendant was convicted reads in pertinent part:

   A person commits armed robbery when, with intent to commit theft, he takes the property of another from the person or the immediate presence of another by use of an offensive weapon. . . . A person convicted of armed robbery shall be punished by death or imprisonment for life, or by imprisonment for not less than one nor more than 20 years.


2. The statute containing descriptions of the aggravating circumstances for rape reads in pertinent part:

   (b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:

   (1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony. . . .

   (2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery. . . .

   (7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or aggravated battery to the victim.


duce the eighth amendment's moralistic term "cruel" to a judicially manageable formula have varied and may presently be in flux. Justices Brennan and Marshall, while using different tests, have maintained that capital punishment per se violates the eighth amendment. Chief Justice Burger and Justice Rehnquist have maintained that the judiciary should not impose its preference on

4. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

5. Justices Brennan and Marshall articulated their separate eighth amendment tests in Furman v. Georgia, 408 U.S. 238 (1972). Justice Brennan concluded capital punishment per se violates the eighth amendment after applying a purported cumulative test. That "test" he stated as follows:

It is a denial of human dignity for the State arbitrarily to subject a person to an unusually severe punishment that society has indicated it does not regard as acceptable, and that cannot be shown to serve any penal purpose more effectively than a significantly less drastic punishment.

408 U.S. at 286.

Justice Brennan used a cumulative test to reach the conclusion that capital punishment is unconstitutional. A potential problem with this method arises because one of the important factors in his purported test supported the constitutionality of capital punishment. That factor was the degree to which society accepted capital punishment. Since history, precedent, and legislation indicated that capital punishment has greater than majority appeal, it would seem that Justice Brennan should add the weight of this factor to a holding of constitutionality. Instead Justice Brennan emphasized the role of a sizeable minority of states that have rejected the death penalty. Rather than finding that the majority of states' approval was a factor contributing to a holding of constitutionality, Justice Brennan regarded the minority's disapproval of capital punishment as a factor indicating the unacceptability of capital punishment. Also included in that index were such considerations as the gross arbitrariness necessarily involved in capital sentencing, and the absence of convincing proof that capital punishment serves penological purposes more effectively than life sentencing. Justice Brennan then concluded that the aggregate of these factors precluded the use of capital punishment.

If Justice Brennan's characterization of his method as a "cumulative" test is accurate, the several factors in this test should be variables. Under such a test situations might exist in which the use of capital punishment would comply with enough of the requirements that the sentence would be constitutional. However, under Justice Brennan's per se rule the factors cannot be variables: no situation will exist in which capital punishment will be permissible. Thus, Justice Brennan has not formulated a test but described his conclusion and legitimized his new per se rule in terms of static concepts. This opinion is, therefore, not helpful in developing an analytical framework for eighth amendment cases.

Justice Marshall's test is composed of four independent lines of inquiry. If any of the questions are resolved against capital punishment, the sanction is per se unconstitutional. If the prisoner experiences pain and suffering the punishment is unconstitutional. The imposition of a new punishment grossly more severe than the one previously imposed is unconstitutional. States are forbidden to impose capital punishment unless it has been proven more effective than life sentencing. The justices, as predictors of the reactions of an informed citizenry, must invalidate death sentencing if information within the justices' purview demonstrates the inappropriateness of capital punishment. Justice Marshall held capital sentencing unconstitutional because the death penalty is disapproved of by society and does not serve valid penological purposes more effectively than life imprisonment. 408 U.S. at 330-33, 342-69. Thus, Justice Marshall did not establish a test to be applied by other courts but a per se rule to be mechanically applied by courts agreeing with his conclusion.
the states' substantive choice of capital punishment and have applied minimum scrutiny to capital sentencing legislation. Other members of the Court have vacillated between minimum scrutiny in cases such as *Gregg v. Georgia* and stricter scrutiny as in *Coker v. Georgia*.

The plurality in *Gregg* held capital punishment constitutional when imposed upon one who has committed an aggravated murder. The Court used a deferential standard of review to arrive at its conclusion. The Court limited the eighth amendment's ban either to punishment which involves "the unnecessary and wanton infliction of pain," or to punishment which is grossly disproportionate to the crime.

Since the *Gregg* Court adopted previous holdings that capital punishment is not cruel in the sense of torture, it limited its inquiry to whether capital punishment is grossly disproportionate to aggravated murder. The test of proportionality turned upon three questions: (1) whether societal standards of decency have evolved to the extent that the public no longer accepts the use of this sanction; (2) whether the use of capital punishment has a valid penal purpose; and (3) whether the states' capital sentencing review procedures prevent the arbitrary use of the penalty, that is, would capital punishment only be imposed for severe criminal acts.

The *Gregg* Court's proportionality test began by considering objective indications of societal acceptance of the death penalty. Legislative history, precedent, popular referendums, and jury behavior demonstrated societal acceptance of capital punishment when imposed for aggravated murder. The plurality, therefore, rejected the notion that societal standards of decency preclude imposition of the death penalty.

The *Gregg* Court also inquired whether capital punishment

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9. See notes 14-17 infra and accompanying text.
serves penal purposes more effectively than imprisonment. The challenger of the legislation bore the burden of persuasion: the defendant was required to show capital punishment had no greater deterrent effect than permanent incarceration. Because empirical studies of capital punishment’s deterrent effect were contradictory, the Court concluded that it was unclear whether capital punishment more effectively serves that penological purpose. Since the defendant could not demonstrate capital punishment was any more or less effective than life sentencing, its use was legitimate. Thus the Court concluded:

[W]e cannot say that the judgment of the Georgia legislature that capital punishment may be necessary in some cases is clearly wrong. Considerations of federalism, as well as respect for the ability of a legislature to evaluate, in terms of its particular state, the moral consensus concerning the death penalty and its social utility as a sanction, require us to conclude, in the absence of more convincing evidence, that the infliction of death as a punishment for murder is not without justification and thus is not unconstitutionally severe.

This language may mean not only that the defendant in Gregg failed to meet the burden of persuasion but that until additional and convincing evidence of capital punishment’s utility becomes available, the party bearing the burden of persuasion under this line of inquiry will be handicapped.

14. In assessing a punishment selected by a democratically elected legislature against the constitutional measure, we presume its validity. We may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved. And a heavy burden rests on those who would attack the judgment of the representatives of the people.

15. Id. at 175. In this passage the Court described the deferential standard of review it utilized in this case. During the Court’s examination of the penological justification for capital punishment the inquiry was stringently restrained to mere rationality, thus, the Court required no more than an argument that capital punishment may be more effective at serving some penal purpose than is life sentencing.


The third prong of the proportionality test, the potential for arbitrary imposition of capital punishment under Georgia law, was also examined in Gregg. While testing Georgia’s procedural safeguards, the plurality dealt peripherally with the question of whether the crime defined in the capital sentencing statute was severe enough to justify capital punishment. Although the plurality noted that the Supreme Court of Georgia narrowly construed the capital sentencing statute, the opinion did not expressly approve or disapprove of any particular aggravating factors. Read most narrowly, Gregg holds that a death sentence is constitutional under the eighth amendment when imposed on one who has murdered for pecuniary gain. Read more broadly, Gregg means the Court cannot interfere with a state’s substantive choice of capital punishment if adequate procedural safeguards prevent the arbitrary imposition of death sentences and society approves of such sentences.

The plurality opinion is problematical regarding several aspects of the emerging test of proportionality which determines whether the punishment is constitutional within the confines of the eighth amendment. First, it is unclear whether the three levels of inquiry in Gregg, which brought the Court to the conclusion that the punishment was proportionate to the crime, are mutually independent. For example, could capital punishment be no more severe than a crime if society disapproves of the sanction or if new empirical data reveal that capital punishment serves no penological purposes? Second, Gregg did not state whether the Court will review a state’s choice of aggravating factors or merely inquire into the state’s mechanism for review of procedural safeguards. If the Court would look beyond state review provisions even though adequate procedural safeguards existed, how would the Court measure the severity of a statutorily defined crime? What characteristics of a crime would be considered when measuring its severity: the particular offense, the offender, or the amount of social harm necessarily involved in the crime’s statutory definition?

Although Coker provides answers for some of these questions, the test used by the Court raises new questions about the eighth amendment. In Coker the plurality more clearly defines the relationship between the three lines of inquiry set forth in Gregg. The

18. Id. at 196-207.
19. Id. at 197.
20. Id. at 202-03.
22. See 52 NOTRE DAME LAW. 261, 287 (1976).
objective indicia of societal approval or disapproval of capital punishment merely serves to classify capital sentencing legislation as suspect or non-suspect when imposed for a particular crime. Even if the objective factors weigh overwhelmingly against capital punishment, the state’s choice will stand if the legislation passes other tests of “excessiveness.” Thus, the Court’s moralistic evaluation of excessiveness, rather than society’s approval, is dispositive of the constitutional question.

The Court outlines its eighth amendment test for excessive punishment as follows:

Under Gregg, a punishment is “excessive” and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime. A punishment might fail the test on either ground.

Thus, the Court subtly changed the Gregg test. Previously, it seemed that under Gregg a punishment would be characterized as excessive only if it either involved a wanton infliction of pain, as would some form of torture, or was grossly out of proportion to a crime. In Coker the Court increases the ban on torture to a ban on all punishments which fail to make measurable contributions to penal purposes. It is therefore possible to conclude that Justice Brennan’s and Marshall’s “least drastic punishment” analysis ultimately prevails over more deferential standards. Such a conclusion, however, must be tentative because the Court did not rely on this ground for finding excessiveness in Coker.

24. Coker v. Georgia, 433 U.S. 584, 597 (1977). While rejecting Justice Marshall’s use of societal disapproval as a per se eighth amendment test of capital punishment, the Court seems to parallel California cases which use the same data for a different purpose. The Supreme Court of California compares California sanctions with those imposed for an identical crime in other jurisdictions in order to classify suspect punishment. See In re Rodriguez, 14 Cal. 3d 639, 537 P.2d 384, 122 Cal. Rptr. 552 (1975); People v. Wingo, 14 Cal. 3d 169, 534 P.2d 1001, 121 Cal. Rptr. 97 (1975); In re Foss, 10 Cal. 3d 910, 519 P.2d 1073, 112 Cal. Rptr. 649 (1974); In re Lynch, 8 Cal. 3d 410, 503 P.2d 921, 105 Cal. Rptr. 217 (1972). Under this authority, a jurisdiction’s use of a penalty more severe than another jurisdiction’s use merely makes the legislation somewhat suspect. Only the proportionality test is dispositive of a punishment’s constitutionality. People v. Wingo, 14 Cal. 3d 169, 534 P.2d 1001, 1009-10, 121 Cal. Rptr. 97, 104-06 (1975). California thus provides standards which check legislative overzealousness but leave sufficient room for local preferences.


27. 97 S. Ct. at 2865.

28. See note 5 supra.
In *Coker* the Court relies on the second test of excessiveness to invalidate Georgia's rape statute. The Court concludes that capital punishment is unconstitutionally severe and disproportionate to the crime of rape of an adult. Because the plurality in *Gregg* glossed over the question of severity, the Court creates a test in *Coker*. To determine the severity of a crime for eighth amendment purposes, three factors are important: the moral depravity of the crime; the injury to the victim; and the injury to society necessarily incident to the crime.

In analyzing whether punishment is out of proportion to the severity of a crime, the Court measures rape against murder, utilizing capital sentencing statutes for murder as approved standards of proportionality. This reliance on the relationship between murder and capital punishment does not indicate that the Court has accepted some simplistic notion of *lex talionis*. To the contrary, the Court's choice of a reference point indicates its attempt to issue principled and consistent decisions in the relatively uncharted

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29. *Id.* at 2866. The Court finds it unnecessary to consider whether capital punishment measurably contributes to penological purposes because the sentence is clearly disproportionate to the crime. However, the Court does observe, "it would be difficult to support a claim that the death penalty for rape is an indispensable part of the States' criminal justice system." *Id.* at n.4. For an illustration of the difficulty which is encountered when trying to reconcile the deferential standard of *Gregg* with the *Coker* test of excessiveness which asks whether a punishment "makes no measurable contribution to acceptable goals of punishment," see Carmona v. Ward, No. 77-2110 at 2668-69 (2d Cir. April 21, 1978).

30. See note 19 *supra* and accompanying text.

31. *But see* Weems v. United States, 217 U.S. 349 (1910) (Where defendant was sentenced to imprisonment at hard labor for falsifying government records for a miniscule sum and was subjected to continuing surveillance after discharge from prison held: The punishment was cruel and unusual because the statute defined a crime that could be consummated by accident and that had actually caused only trivial harm). In *Weems*, the techniques employed by the Court included examination of the harm necessarily and actually incident to violation of the statute, comparison of the punishment for the instant crime with punishment for more severe crimes in the same jurisdiction, and comparison of the instant penalty with the penalties of all other American jurisdictions for similar crimes.

32. 433 U.S. at 593-600.

33. Petitioner argued that an explanation of juries' reluctance to impose capital sentences for rape indicates an intuitive unwillingness to punish by taking an offender's life for a crime not involving the loss of life. Brief for Petitioner at 47, *Coker* v. Georgia, 433 U.S. 584 (1977) (citing Granucci, "Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning, 57 CAL. L. REV. 839, 844 (1969); Packer, Making the Punishment Fit the Crime, 77 HARV. L. REV. 1071, 1078 (1964)). The plurality includes some language in its opinion which sweeps close to the approach suggested by the petitioner: "It is difficult to accept the notion, and we do not, that the rape, with or without aggravating circumstances, should be punished more heavily than the deliberate killer as long as the rapist does not himself take the life of his victim." 97 S. Ct. at 2870. This statement, however, is related to separate analytical considerations. See note 34 infra.

34. By comparing the punishment for a less severe crime (rape of an adult), with the punishment for a more severe crime (murder), the Court is using a technique designed to determine whether statutorily classified punishment is suspect. See, e.g., *In re Lynch*, 8 Cal.
area of constitutional doctrine occupied by the eighth amendment.35

The Court uses an objective method to find the quantum of moral depravity involved in the rape of an adult. Under this method the Court seeks to determine the quantum of depravity involved, by definition, in a violation of the underlying criminal statute. It may be assumed that no unaggravated crime will involve the degree of moral depravity necessary to justify the imposition of capital punishment. The Court then adds to that determination the quantum of moral depravity necessarily involved in the aggravating circumstance(s) found by a jury. If the total depravity required by the capital sentencing statutes and the statute defining the substantive


35. Because federal eighth amendment decisions are sparse, cases such as Coker will have profound consequences for sentencing legislation not necessarily involving capital punishment. See, e.g., Carmona v. Ward, 436 F. Supp. 1153 (S.D.N.Y. 1977). In Carmona, the constitutionality of a statute providing for life sentencing of possessors of certain quantities of cocaine was challenged under the eighth amendment. The court stated the rule controlling the case and the holding as follows:

The Court's recent decision in Coker reaffirmed its previous holding in Gregg that "a punishment is 'excessive' and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime. A punishment might fail the test on either ground." In the instant case this court holds that the punishments inflicted upon petitioners Carmona and Fowler are unconstitutional on the latter ground. Id. at 1164 (citation omitted).

The court proceeded to apply the techniques used by the United States Supreme Court in capital punishment cases. The district court compared the cocaine sentencing legislation with sentencing legislation of the same jurisdiction for more severe crimes, such as arson. The penalties imposed by other jurisdictions for identical crimes were also compared to the New York statute. The disparity revealed by these comparisons led the Southern District to find the statute suspect. The court then determined the statute did not "make some rational gradations of culpability" to insure proportionality. Id. at 1169. Therefore, life sentencing for possession of certain amounts of cocaine was invalidated as violative of the eighth amendment. Id. at 1172.

The Second Circuit agreed with the Southern District that eighth amendment principles apply to non-capital cases. The Second Circuit, however, reversed the Southern District on the basis that extraordinarily disproportionate punishments are necessary to offend the eighth amendment when solely the length of sentence of imprisonment is challenged. The court noted that it was making new law:

While we have no Supreme Court case directly in point, we accept the proposition that in some extraordinary instance a severe sentence imposed for a minor offense could, solely because of its length, be a cruel and unusual punishment. This is not the case at hand. Carmona v. Ward, No. 77-2110 at 2655 (2d Cir. April 21, 1978). See also Rummel v. Estelle, 568 F.2d 1193 (5th Cir. 1978).

Whether a prisoner may offensively use an eighth amendment claim in an action pursuant to section 1983 of title 48 of the United States Code is an open question. Cf. Wycoff v. Brewer, No. 77-1586 (8th Cir. March 23, 1978) (although extended confinement in strip cells for post-incarceration misbehavior may have violated the eighth amendment, officials are not liable in damages for policy formulation and implementation of administrative segregation).
crime is not significantly more severe than that always involved in
the underlying crime, the death penalty is unconstitutionally severe
and disproportionate to the crime. 36

This methodology is applied in Coker in the following manner.
The moral depravity necessarily involved in the underlying crime
was the depravity incident to rape. 37 The quantum of depravity
inherent in the aggravating circumstances found by the jury is then
added to find the total quantum of moral depravity involved. Thus,
the quantum of moral depravity necessarily involved in Coker is
that depravity incident to any rape by a prior capital felony offender
while the offender was committing another capital felony. 38

The plurality concludes that the moral depravity necessarily
involved in crimes defined by the Georgia rape and sentencing stat-
utes are not sufficiently heinous to justify the imposition of capital
punishment. The plurality reasoned that capital rape as defined by
the Georgia statutes is not necessarily more heinous than any other
rape. 39 That the defendant previously demonstrated moral deprav-
ity or was demonstrating moral depravity in a collateral act does not
make the rape more heinous than otherwise. 40 The Court concludes
that a separate term of years constitutes adequate punishment for
any collateral act without transforming an otherwise noncapital
crime into a capital offense. 41

Read most narrowly, the Court’s conclusion demonstrates intol-
erance to imprecisely drafted capital sentencing statutes which fail
to differentiate between varying degrees of heinousness. 42 An eighth
amendment vagueness doctrine may have been generated in this
decision. Coker, read in conjunction with Roberts v. Louisiana, 43

36. 433 U.S. at 598-600.
37. See Georgia’s statutory definition of rape, note 1 supra.
38. See note 2 supra.
39. 433 U.S. at 599.
40. The Court seems to draw a bright line between capital sentencing and sentencing
for terms of years. While it may be appropriate to impose somewhat greater sentences on
previous offenders, jumping from a prison term to execution is not a difference of degree, it
is a difference in kind. Id. Coker is not authority for the proposition that harsher sentences
may never be dispensed solely on the basis of prior convictions. Coker does not purport to
establish a new rule governing circumstances where multiple bases for imposing imprison-
ment are presented by a single offense. The rule of Coker only applies to capital sentencing
legislation.
41. The Court indicates that multiple sentences would be preferable to capital sentences
where more than one crime was involved. Id. The expedience of aggregating terms of impris-
onment at one sentencing hearing is an inappropriate consideration where capital sentencing
is involved. The Court prefers to separately punish criminal acts to avoid the imposition of a
death sentence where rape is the more serious crime. However, the Court uses dubious
methods to separate the underlying crime from the collateral criminal acts.
42. But see the concurring and dissenting opinion of Justice Powell. Id. at 601.
43. 431 U.S. 633 (1977). In Roberts, the Louisiana mandatory death sentence provision
which was decided the same term, indicates the Court will place substantive limits on capital sentencing by requiring legislatures to include certain elements in their statutes. As the Court in *Roberts* refused to allow the legislature to balance aggravating and mitigating factors in advance by mandating sentencing requirements, the Court also refuses Georgia the arbitrary choice of factors comprising the balance. Under this view of *Coker*, a capital rape statute which successfully isolates the more heinous circumstances might be constitutional; however, the broad language of *Coker* leaves the impression that no imaginable aggravating factors could make the rape of an adult as heinous a crime as aggravated murder. Under this view of *Coker*, *Gregg* probably sets a minimum level of constitutionality: capital punishment is only marginally acceptable for aggravated murder and entirely unacceptable for "lesser" crimes.

The main point of contention between the plurality opinion and the views expressed in the concurring and dissenting opinion of Justice Powell is the plurality's choice of a statute-by-statute rather than a case-by-case method of review. Justice Powell emphasizes that an extreme variation in the culpability of rapists warrants consideration of the moral depravity actually involved in each case. Accordingly, his examination focuses on the relationship of capital punishment to the instant crime and defendant.

for the murder of a policeman in the course of his duties was held unconstitutionally cruel and unusual. The majority apparently rejected the state's argument that it had balanced the aggravating factor against all possible mitigating factors and concluded that murdering society's footsoldier is so heinous that death is the only appropriate response. Justice Rehnquist, dissenting, thus stated that argument:

If the State would be constitutionally entitled, due to the nature of the offense, to sentence the murderer to death after going through such a limited version of the plurality's "balancing" approach, I see no constitutional reason why the 'Cruel and Unusual Punishment' Clause precludes the State from doing so without engaging in that process.

431 U.S. at 646. The majority, however, did not allow the state to make that moral judgment, but required the state to allow juries, acting as representatives of community conscience, to decide whether capital punishment was appropriate in that instance.

44. "It is difficult to accept the notion, and we do not, that the rape, with or without aggravating circumstances, should be punished more heavily than the deliberate killer as long as the rapist does not himself take the life of his victim." 431 U.S. at 600.

45. The plurality might respond to Justice Powell that *Furman* established higher standards for capital sentencing statutes than for other statutes. Since the history of these statutes is replete with examples of juries' arbitrary application of the death penalty (*Furman* v. Georgia, 408 U.S. 238, 310 (1972) (Stewart, J., concurring); Brief for Petitioner at apps. A & B, *Coker* v. Georgia, 433 U.S. 584 (1977)) legislatures must draft extremely narrow statutes. The reversal of improper sentencing decisions does not diminish the "moral suffering more terrible than death" which is inflicted upon those who languish on death row. See Stotzky, *supra* note 21, at 853 n.46 (citing A. CAMUS, Reflections on the Guillotine, in RESISTANCE, REBELLION AND DEATH 131, 151-52 (1960)). Each statute must be perfectly drafted so that no defendant needlessly experiences such suffering.

46. 433 U.S. at 601.
For Justice Powell, the Court’s imposition on a state’s substantive choices should be no more burdensome than requiring legislatures to define aggravating circumstances which compel juries to determine the degree of heinousness involved in a rape.\textsuperscript{47} Legislatures need not precisely codify the universe of factual situations which justify the imposition of capital punishment. Not only will such a requirement present insurmountable difficulty, but it will evidence distrust in the jury as fact-finder.\textsuperscript{48} For example, Justice Powell suggests that a statute which requires jurors to isolate “deliberate viciousness of the rapist . . . greater than that of [a] murderer,”\textsuperscript{49} will withstand eighth amendment attack. The moral depravity found by that process would also be sufficiently severe to justify capital punishment under \textit{Gregg}.

The question arises whether Justice Powell is using a different test or whether he merely observes a different normative judgment than the plurality. The crucial distinction between his opinion and the plurality’s is Justice Powell’s assumption that rape can be as heinous as murder and can conceivably involve such horror that the state is justified in imposing its most horrifying sanction. The plurality expressly denies that premise.\textsuperscript{50}

The distinction between the plurality’s and Justice Powell’s method becomes clear when comparing the treatment of the second component of the severity test: injury to the victim. The plurality’s discussion of an adult victim’s injury necessarily incident to rape is limited to the following: “Life is over for the victim of the murderer; for the raped victim life may not be nearly so happy as it was, 47. \textit{Id.} at 602 n.1. Justice Powell prefers to review capital sentencing statutes in a manner that narrows the statute if an unconstitutional application has been found. This method of review ameliorates the flaws present in a sentencing statute, while allowing states the greatest leeway to make substantive choices. Under this approach, perpetrators of heinous crimes might, in subsequent cases, be sentenced under statutes unconstitutionally applied to less severe criminal acts in prior cases. \textit{Compare} Ralph v. Warden, 438 F.2d 786, 793 (4th Cir. 1970), \textit{cert. denied}, 408 U.S. 942 (1972) with Snider v. Peyton, 356 F.2d 626 (4th Cir. 1966). By construing capital sentencing statutes in this manner, a plurality of the Court disposed of a challenge to Georgia’s capital sentencing statute in \textit{Gregg}. Thus the aggravating circumstance of heinous, wanton or cruel behavior was held sufficiently precise to withstand “void for vagueness” arguments: the statute required juries to impose the penalty only under appropriate circumstances. \textit{See} \textit{Gregg v. Georgia}, 428 U.S. 153, 202-03 (1976) (construing \textit{Ga. Code Ann. § 27-2534.1(b)(7)} (1973))). Florida’s statutory aggravating factor most closely resembling the instant factor has also been interpreted narrowly in order to pass the Court’s scrutiny. \textit{Fla. Stat. § 921.141(5)(h)} (Supp. 1976) \textit{upheld in Proffitt v. Florida}, 428 U.S. 242, 255-60 (1976).

48. \textit{Id.} at 602 n.1.

49. \textit{Id.} at 603.

50. \textit{See note 18 supra.}

51. \textit{See note 44 supra.}
but it is not over and normally is not beyond repair.” If the plurality's test is satisfied by this somewhat impressionistic generalization of the “normal" aftermath of rape, the test is open to the charge that its value is no greater than the subjective predelictions of the justices. By using such methods, consideration of the victim's injury has no utility in determining the constitutionality of capital sentencing statutes.

In contrast, Justice Powell's test is flexible enough to differentiate between degrees of victims' injuries. "Some victims are so grievously injured physically or psychologically that life is beyond repair." Although there is no evidence of extreme physical or psychological damage in the instant case, such evidence might appear in future cases. But until a record appears containing such facts, the Court should not prejudice the issue.

Both the plurality's and Justice Powell's analysis of the third part of the severity test, the public injury incident to the crime, is truncated. The plurality merely observes that the public is injured because the community's sense of security is undermined. The plurality's observation is a tautology: it observes that social harm is socially harmful. Perhaps the more important question, concerning the degree of social harm, is not addressed because public injury resulting from the rape of an adult is the most difficult of the three items to quantify. Because of this omission, Coker might be distinguished in cases involving crimes with a great deal of social harm, such as treason.

52. 433 U.S. at 598.
53. The medical evidence of extensive postrape traumatization indicates that the plurality's observation is both impressionistic and an overly broad generalization. See, e.g., Shainess, Psychological Significance of Rape, 76 N.Y.S.J. MED. 2044 (1976); Peters, Social, Legal and Psychological Effects of Rape on the Victim, 78 PA. MED. 34, 36 (Feb. 1975).
54. 433 U.S. at 603 (emphasis in original).
55. Id. at 598.

This portion of the Coker test of severity was central to the majority opinion in Carmona v. Ward, No. 77-2110 (2d Cir. April 21, 1978). The Second Circuit viewed the New York legislature's assessment of the dangerousness of the crime of selling and possessing cocaine as the crucial issue bearing on the constitutionality of the statute. The court greatly expanded the concept of social harm incident to a crime:

In assessing the gravity of a criminal offense, the primary consideration is the harm it causes society. The legislature in making the assessment, could probably view criminal narcotics sales not as a series of isolated transactions, but as symptoms of the widespread and pernicious phenomenon of drug distribution. Social harm in drug distribution is great indeed. The drug seller, at every level of distribution, is at the root of the pervasive cycle of destructive drug abuse.

Id. at 2659-60 (quoting People v. Broadie, 37 N.Y.2d 100, 112, 332 N.E.2d 338, 342, 371 N.Y. S.2d 471, 476-77 (1975)).
The plurality opinion in *Coker* illustrates the problems with current eighth amendment standards of judicial review. First, the primacy of the Court’s principled judgment is undermined by the manner in which the Court discusses the penological purpose of punishment. Although not made the grounds of decision, in *Coker* the penological purposes test is declared to be an independent basis for holding capital sentencing legislation unconstitutional. If the test can be used to hold capital sentencing legislation unconstitutional even though the Court finds the punishment proportionate to the crime, the Court’s moralistic evaluation of the crime and the punishment is not truly dispositive of eighth amendment claims. Since the Court’s scrutiny of the state’s penological justification for the use of capital punishment will vary inversely with objective indicia of societal acceptance of capital punishment, quantitative analysis may replace qualitative analysis in cases following *Coker*. Since insurmountable difficulties prevent the objective measurement of punishment’s effects, this quantitative analysis may be concerned solely with the percentage of jurisdictions which authorize capital punishment. Thus, it will no longer be the judgment of the Court that is important, but rather the judgment of many other groups who may be unaware of the ramifications which their decisions will have on the substantive choice of sanctions by foreign states. Rather than use the data from different legislatures to classify sentencing statutes as suspect or non-suspect, courts attempting to apply this prong of the *Coker* test will perhaps be led to truncate other analysis of the excessiveness of the punishment to the crime.

The penological purposes test is also suspect because it is an exotic gloss on an uncertainly worded amendment. By relying on that gloss, the Court may have either enacted Mr. Herbert Packer’s theories of punishment as a constitutional norm or buttressed its

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57. See note 16 & accompanying text supra.
58. See notes 24-26 & accompanying text supra.
59. It is ironic that Mr. Packer is an eminent critic of judicial intervention based on the social or philosophical writings of other scholars. See Packer, supra note 33, at 1079-80.
results against charges of judicial overreaching by appeal to an accepted theory of the limits of the criminal sanction. If the plurality has done either by including the dictum concerning measurable contributions to valid penological purposes, it has muddied a test that might otherwise have a textual basis in the Constitution.

A second problem with the Coker plurality’s eighth amendment standard is the Court’s failure to coherently explain its moralistic evaluation of the crime and its punishment. The Court’s assessment of the injury to the adult rape victim does not reflect the presumption that the legislature was not arbitrary in its substantive definition of capital crimes. Even if the choice of capital punishment is suspect under other parts of the analysis, the state’s perception of the harm attending a crime is entitled to thoughtful examination. The Court should posit more than a questionable generalization when rejecting the state’s perception of its citizens’ injuries and its affirmative obligations to minimize those injuries.

Courts presented with eighth amendment challenges should not be convinced that a sentencing statute is unconstitutional merely because most jurisdictions impose less severe penalties on perpetrators of similar crimes. Rather, they should analyze the degree of harm caused by a crime in relation to the punishment imposed. If the moral depravity incident to the crime when added to the injury to the victim and the injury to the public is in proportion to the penalty imposed, then the statute is constitutional. Although such analysis of crime and punishment should be grounded in available objective data, courts must season such judgments with moral considerations. In this way the “cruel and unusual punishments” clause will be subject to explicit and principled interpretation.

II. THE AGGRAVATED RAPE OF A MINOR

Florida’s Sexual Battery statute may define a crime sufficiently more heinous than ordinary rape such that capital punishment may constitutionally be imposed upon offenders. A subsection of that statute reads in pertinent part:

60. These charges have been consistently made by Chief Justice Burger and Justice Rehnquist in both Furman and Coker.

61. See, e.g., Stotzky, supra note 21, at 850 n.37 (citing as “an excellent analysis of the theories and justification for criminal punishment” H. Packer, The Limits of the Criminal Sanction (1968)).


(2) A person 18 years of age or older who commits sexual battery upon, or injures the sexual organs of, a person of 11 years of age or younger in an attempt to commit sexual battery upon said person commits a capital felony as provided in §§ 775.082 and 921.141. 64

Thus, in most cases, 65 the quantum of depravity and injury necessarily incident to violations of this subsection is that quantum necessarily incident to the rape of a minor under aggravated circumstances. Since the issues raised by an eighth amendment challenge

64. Sexual battery is defined by section 794.011(1)(f) as follows: "Sexual battery means oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object; however, sexual battery shall not include acts done for bona fide medical purposes." The capital sentencing statute to which section 794.011 refers contains the following aggravating and mitigating factors:

(5) AGGRAVATING CIRCUMSTANCES—Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.
(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.
(c) The defendant knowingly created a great risk of death to many persons.
(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempt to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.
(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.
(f) The capital felony was committed for pecuniary gain.
(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.
(h) The capital felony was especially heinous, atrocious, or cruel.

(6) MITIGATING CIRCUMSTANCES—Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.
(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.
(c) The victim was a participant in the defendant's conduct or consented to the act.
(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.
(e) The defendant acted under extreme duress or under the substantial domination of another person.
(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.
(g) The age of the defendant at the time of the crime.


65. A literal application of the Florida sexual battery statute would encompass a case involving the offender's manual penetration of the victim's sex organ or anus. Such a crime would involve less heinousness than that present in Coker. Thus, Florida must either narrowly construe the statute or find it unconstitutionally severe.
to the imposition of capital punishment for this crime are expressly reserved in Coker.\textsuperscript{66} It is conceivable that the statute would be constitutional under the test of Coker.\textsuperscript{67}

The Supreme Court of Florida has reviewed cases in which two of the eight enumerated aggravating factors were present and opined that those factors could define a sexual battery constitutionally punishable by death.\textsuperscript{68} Those aggravating factors are the knowing creation of a great risk of death to many persons\textsuperscript{69} and the commission of an especially heinous, atrocious, or cruel sexual battery.\textsuperscript{70}

One could commit a sexual battery while knowingly creating a great risk of harm to many persons by coercing one's children to submit to sexual battery by beating them.\textsuperscript{71} In Huckaby v. State\textsuperscript{72} the defendant forced his daughters to submit to sexual intercourse on many occasions during a fourteen year period. At the beginning of this period the youngest victim was six years of age. The supreme court agreed with the trial court's finding that by beating his wife and nine children in order to violate his three daughters, defendant had caused a great risk of death to many persons.\textsuperscript{73}

Thus, where the trial court might have punished the defendant with terms of years in addition to life terms for the sexual batteries, the court imposed a death sentence. Separately punishable behavior, independent of the underlying crime, transformed a noncapital crime into a capital offense. The United States Supreme Court's disapproval of such treatment of collateral criminal acts in Coker may require Florida to eliminate this factor from its capital sentencing statute for sexual battery.

An alternative basis for imposing capital punishment for sexual battery, tacitly approved by the court in Huckaby, was the commission of an especially heinous, atrocious, or cruel crime.\textsuperscript{74} Huckaby

\textsuperscript{66} 433 U.S. at 592.
\textsuperscript{67} It is difficult to predict how the Court will decide such reserved questions. Compare 1976 Detr. C.L. Rev. 645, 661 with 433 U.S. at 592.
\textsuperscript{68} Huckaby v. State, 343 So. 2d 29 (Fla. 1977) (vacating the death sentence on the statutory grounds that the mitigating circumstance of mental disorder outweighed the aggravating circumstances). The death penalty has also been imposed by a trial court when a sexual battery was committed during an attempt to commit rape. Burch v. State, 343 So. 2d 831 (Fla. 1977) (reversing the capital sentence imposed by the judge when jury's life sentence recommendation had a basis in the evidence). If section 921.141(5)(d) is applied in cases such as Burch, the statute takes on the resemblance of an unconstitutional mandatory capital sentencing statute.
\textsuperscript{69} FLA. STAT. § 921.141(5)(c) (1975).
\textsuperscript{70} FLA. STAT. § 921.141(5)(h) (1975).
\textsuperscript{71} Huckaby v. State, 343 So. 2d 29 (Fla. 1977).
\textsuperscript{72} Id.
\textsuperscript{73} Id. at 33.
\textsuperscript{74} Id.
does not outline the circumstances where this factor might arise, since only the court's conclusions and not the underlying facts are reported. Physical beatings to compel sexual submission may be an instance where the crime is so cruel that, a court could find the presence of aggravating heinousness.

The mere presence of tissue damage, necessarily incident to the sexual penetration of a child victim, will not support the finding of heinousness as an aggravating factor.\textsuperscript{75} In \textit{Purdy v. State},\textsuperscript{76} the evidence supporting a finding of heinousness consisted of medical testimony. The seven-year-old victim had experienced pain and discomfort occasioned by laceration and infection of her vaginal and anal tissues. This discomfort had been caused by sexual batteries committed by the defendant. The supreme court, while admitting the heinous nature of the crime, found an absence of the aggravating factor because the physical injury was that which is necessarily involved in any sexual battery of a child less than twelve years old.\textsuperscript{77} A contrary holding, the court opined, would change the discretionary capital sentencing statute into a mandatory one.\textsuperscript{78}

Therefore, under \textit{Huckaby} and \textit{Purdy}, the introduction of sufficient evidence of physical, or perhaps even psychological\textsuperscript{79} injury could result in a finding of heinousness or cruelty. The consequence of that finding would be the court's recommendation of a death sentence if no mitigating factors were present.\textsuperscript{80} \textit{Coker}, however, may prevent such an occurrence because "it would seem that the defendant could very likely be convicted and tried, and appropriately punished for this additional [heinous] conduct."\textsuperscript{81}

Other aggravating factors potentially applicable to sexual battery under the Florida statute are the status of the offender as a person under sentence of imprisonment, the status of the offender as a prior capital felony offender, the commission of the crime during the commission of other capital crimes, and the commission of sexual battery for pecuniary gain.\textsuperscript{82} Under \textit{Coker} the status of the offender is not significant enough to transform a noncapital crime into a capital offense.\textsuperscript{83} Escape or violation of probation or parole

\textsuperscript{75} Purdy v. State, 343 So. 2d 4 (Fla. 1977).
\textsuperscript{76} Id.
\textsuperscript{77} Id. at 6.
\textsuperscript{78} Id.
\textsuperscript{79} Rape victims under the age of 12 will complain less of physical discomfort but will manifest symptoms of deeper psychological disturbance than adult rape victims. Peters, \textit{supra} note 53, at 36.
\textsuperscript{80} See \textit{ Fla. Stat.} § 921.141(3) (1975).
\textsuperscript{81} 433 U.S. at 599 n.16.
\textsuperscript{82} See \textit{ Fla. Stat.} § 921.141(5), \textit{supra} note 64.
\textsuperscript{83} 433 U.S. at 598-600.
can be adequately punished by imprisonment. The prior wrongs of a defendant do not make a particular act more heinous than otherwise. Similarly, collateral crimes may be adequately punished by incarceration if they do not involve the taking of a life.

Thus, the question of whether the aggravating factors for sexual battery are constitutionally significant turns on the standards of review used by the Court. The Court’s moralistic evaluation of capital punishment for rape of a minor controls the Court’s choice of standards of review. If the Court perceives the rape of a minor as being closer in severity to murder than is the rape of an adult, it should apply the deferential standard of *Gregg*. If the moral depravity necessarily incident to sexual battery, when combined with the social and individual injury, is not significantly greater than that incident to the crime involved in *Coker*, strict scrutiny must be applied.

There are no guidelines other than the principled judgment of the Court to determine the constitutionality of capital punishment imposed for the aggravated sexual battery of a minor. The language of the eighth amendment places a duty on the Court to make a moral judgment. Nevertheless, because the Court constitutes a political body and coordinate branch of government, the methods it adopts may have broader ramifications for the structure of American government. The dilemma thus created has been recently expressed in this way:

I authored the original opinion in this case imposing the death penalty and join in this denial of a stay of execution only to comply with requirements of law.

My experience on this Court for almost nine years has convinced me that capital punishment will do little or nothing to reduce crime. Only by returning to fundamentals of religion, ethics and morality can we prevent the destruction of society.84

Seth Parker Joseph

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84. Spenkelink v. State, 350 So. 2d 85, 86 (Fla. 1977) (Boyd, J., concurring specially).