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Monroe, and would be forced to decide whether the confrontation clause imposes a constitutional bar to otherwise admissible evidence.

It is submitted that the Louisiana Supreme Court should not require proof of unavailability in situations in which the requirement will not augment the reliability of the evidence. Although the United States Supreme Court has left the area of unavailability in a state of confusion, the Court has not required that unavailability be shown in instances in which such a showing is considered immaterial. By adopting the confrontation clause as its tool for applying these restrictions, the Louisiana Supreme Court cannot hope to find the clause any less confining and unwieldy than the United States Supreme Court has found it.⁶⁰ Should the United States Supreme Court abandon use of the confrontation clause, the Louisiana Supreme Court will be deprived of an important source of guidance in an area already fraught with confusion. The Louisiana Supreme Court can avoid these undesirable results by limiting the application of *Monroe* to coroner's reports.

Gordon L. James

THE DEATH PENALTY FOR RAPE—CRUEL AND UNUSUAL PUNISHMENT?

Defendant raped a woman and stabbed her to death. Eight months later he kidnapped another woman, raped her twice, and abandoned her to die after severely beating her. While serving multiple life terms for these offenses he escaped and kidnapped, raped, and robbed a third woman at knifepoint. He was found guilty of rape and sentenced to death. The United States Supreme Court *held* that the death penalty is a grossly disproportionate and excessive punishment for the rape of an adult woman and therefore violates the eighth amendment's prohibition of cruel and unusual punishment. *Coker v. Georgia*, 97 S. Ct. 2861 (1977).

Throughout its history the Supreme Court has dealt with many cases involving the death penalty, but only quite recently has it directly addressed the constitutionality of the death penalty per se. In the nineteenth and most of the twentieth centuries, the Court's scrutiny was limited to determining whether execution methods were "torturous" or

60. See text at notes 22-37, *supra*.

“barbarous” and thus prohibited.¹ Only in the early 1970’s did the Court consider the constitutionality of certain sentencing procedures.² Finally, in *Gregg v. Georgia*,³ the Court concluded that the death penalty per se is not a cruel and unusual punishment.

In the instant case, the plurality⁴ interpreted *Gregg* as having followed the holdings and dicta of prior cases to the effect that the eighth and fourteenth amendments forbid punishments that are either “barbaric” or “excessive” in relation to the crime.⁵ The Court drew from the three-man plurality opinion in *Gregg* the test that a punishment is “excessive” if it “makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering”⁶ or if it is out of proportion to the crime committed. The Court then looked at the second prong of this test and concluded that the death penalty is always disproportionate for the rape of an adult woman.⁷

1. For example, both hanging and shooting were held to be constitutional modes of execution. *Wilkerson v. Utah*, 99 U.S. 130 (1878). The Court also ruled that electrocution is a constitutional method of inflicting death. *In re Kemmler*, 136 U.S. 436 (1890).

2. In *Furman v. Georgia*, 408 U.S. 238 (1972), the Supreme Court held Georgia’s death penalty statute, which gave juries total and undirected discretion in sentencing a defendant to death, to be an arbitrary application of the penalty in violation of the eighth amendment. In response to the *Furman* decision, various states enacted mandatory death penalty statutes, whereas others required aggravating and mitigating factors to be considered before a defendant was sentenced to death. In *Gregg v. Georgia*, 428 U.S. 153 (1976), the Court held constitutional Florida’s death penalty statute, which required a consideration of aggravating and mitigating circumstances. See Note, 38 LA. L. REV. 226 (1977). In *Roberts v. Louisiana*, 428 U.S. 325 (1976), the Court struck down Louisiana’s mandatory death penalty statute.

3. 428 U.S. 153 (1976).

4. Justice White was joined by Justices Stevens, Stewart, and Blackmun, and by Justice Powell on the points to be discussed.

5. Justices Stewart, Powell and Stevens concluded that the death penalty does not invariably violate the eighth amendment because it does not violate contemporary standards of decency. 428 U.S. at 179. They further concluded that it does not violate the concept of human dignity because it is not so totally without penological justification as to result in the gratuitous infliction of suffering. *Id.* at 182-83, 187. Justice White in *Roberts v. Louisiana*, 428 U.S. 325 (1976), concluded that the penalty is acceptable to the contemporary community (*id.*), and that the Court should defer to the legislative judgment that the death penalty serves the valid social ends of retribution and deterrence. *Id.* at 355. Justices Burger, Blackmun, and Rehnquist in *Furman v. Georgia*, 408 U.S. 238 (1972), concluded that they should abide by state legislative decisions as to the morality and efficacy of the penalty unless it is cruel to such a degree as to be clearly unconstitutional. 408 U.S. 383-85, 410, 468.

6. 97 S. Ct. at 2865.

7. *Id.*

In making this decision the Court looked to what it termed objective factors which suggest that society no longer supports the death penalty for rape.⁸ The Court considered history and precedent, legislative attitudes,⁹ and jury decisions, and noted that "eighth amendment judgments should not be, or appear to be, merely the subjective views of justices."¹⁰ The data revealed that only Georgia provided the death penalty for the rape of an adult woman, and that Georgia juries imposed the penalty in only ten percent of all possible cases. From these facts the Court concluded that the country no longer accepts capital punishment as the penalty for the rape of an adult woman.¹¹

In reaching its conclusion based on so-called objective data, the plurality facetiously ignored most of American history and based its decision on the five years of legislative turmoil following *Furman v. Georgia*.¹² Prior to *Furman* sixteen states and the federal government punished rape with death.¹³ As the dissent pointed out, the failure of state legislatures to

8. *Id.* at 2866-68. One must wonder to what extent unspoken factors also influenced the plurality's decision. Several groups were pressuring the Court to forbid the death penalty for rape. The NAACP Legal Defense Fund had worked for years to end the use of the penalty in rape cases because it alleged that historically the penalty was used selectively against black men who raped white women. Several women's rights organizations including the National Organization for Women filed amicus curiae briefs in support of Coker in the belief that juries often refuse to convict rapists because they feel that the punishment is too extreme and that testimony humiliating to the victim is often required to make absolutely sure that only guilty parties receive such an extreme penalty. Finally, the justices certainly were aware that as Justice Stewart stated, "The rapist . . . may be encouraged to kill because the penalty would be the same." *TIME*, April 11, 1977, at 80.

9. In the last fifty years a majority of the states have never punished rape with death. Immediately prior to *Furman* only 16 states and the federal government still did so. See statutes cited in note 13, *infra*. After *Furman* only three states, Georgia, North Carolina, and Louisiana, punished rape with death. GA. CODE ANN. § 26-2001 (Supp. 1972); N.C. GEN. STAT. § 14-21 (Supp. 1973); LA. R.S. 14:42 (Supp. 1975) (prior to 1977 amendment). However, the procedures used in North Carolina's and Louisiana's statutes were held unconstitutional in *Roberts v. Louisiana*, 428 U.S. 375 (1976), and *Woodson v. North Carolina*, 428 U.S. 280 (1976). When Louisiana and North Carolina responded to those decisions they did not reenact the death penalty for rape. See LA. R.S. 14:42 (Supp. 1977).

Thus at the time of the *Coker* decision only Georgia punished the rape of an adult woman with death. 97 S. Ct. at 2866-67.

10. 97 S. Ct. at 2865-66.

11. *Id.* at 2867-68.

12. 408 U.S. 238 (1972); see 97 S. Ct. at 2866-67.

13. 18 U.S.C. § 2031 (1970); ALA. CODE tit. 14, § 395 (recomp. vol. 1958); ARK. STAT. ANN. § 41-4303 (1964); FLA. STAT. ANN. § 794.01 (West 1965); GA. CODE ANN. § 26-2001 (rev. vol. 1970); KY. REV. STAT. ANN. §§ 435.080.090 (Baldwin 1963); LA. R.S. 14:42 (1950); MD. CRIM. LAW CODE ANN. § 27-461 (1957); MISS. CODE ANN. § 2358 (recomp. vol. 1956); MO. ANN. STAT. § 559.260 (Vernon 1953); NEV. REV. STAT. § 200.363 (1967) (rape with substantial bodily harm); N.C. GEN. STAT. § 14-21 (1953); OKLA. STAT. ANN. tit. 21, § 1115

reenact the death penalty for rape could be a result of the confusion following the nine separate opinions in *Furman* rather than a decision that death is a disproportionate penalty for rape.¹⁴ In the same manner, the reluctance of juries to impose the death penalty may merely indicate that they reserve such an extreme penalty for extreme cases and not that they consider the death penalty disproportionate for all rapes, no matter how aggravated.

The plurality found further support for its position in its own determination that rapists do not deserve capital punishment. After a brief nod to the severity of the crime, the Court expressed the gravamen of its rationale:

The murderer kills; the rapist, if no more than that, does not. Life is over for the victim of the murderers; for the rape victim, life may not be nearly so happy as it was, but it is not over and normally is not beyond repair. . . . [T]he death penalty . . . is an excessive penalty for the rapist who, as such, does not take human life.¹⁵

Thus, the plurality's definition of harm only encompasses physical harm resulting in death.

The plurality's simplistic approach does not reflect contemporary morality. The subjective basis of the decision fails to explain adequately why in all rape cases the death penalty is excessive simply because the rapist has not taken a life. Studies of rape show it to be a violent and brutal crime often involving sexual humiliation, cruel beatings, and the use of dangerous weapons.¹⁶ Most victims experience both physical and psychological trauma, and the victim often continues to be affected during the long-term process of rebuilding her life.¹⁷ After a closer scrutiny of rape the plurality should have weighed psychological and emotional

(West 1958); S.C. CODE §§ 16-72, 16-80 (1962); TENN. CODE ANN. § 39-3702 (1955); TEX. PENAL CODE ANN. § 1189 (Vernon 1961); VA. CODE § 18-144 (repl. vol. 1960).

14. Chief Justice Burger in his dissenting opinion made just this point. "Failure of more states to enact statutes imposing death for rape of an adult woman may thus reflect hasty legislative compromise occasioned by time pressures following *Furman*, a desire to wait on the experience of those states which did enact such statutes, or simply an accurate forecast of today's holding Having in mind the swift changes in positions of some Members of this Court in the short span of five years, can it rationally be considered a relevant indicator of what our society deems 'cruel and unusual' to look solely to what legislatures have *refrained* from doing under conditions of great uncertainty arising from our less than lucid holdings on the Eighth Amendment?" 97 S. Ct. at 2877.

15. 97 S. Ct. at 2869.

16. See Comment, *Rape and Rape Laws: Sexism in Society and Law*, 61 CALIF. L. REV. 919, 923-24 (1973).

17. See E. HILLBERMAN, *THE RAPE VICTIM* 36-39 (1976).

harm as well as physical harm to the victim against the severity of the death penalty.

Coker seems to represent a great departure from past treatments of the death penalty. Before the instant case only Justices Brennan and Marshall, who take the position that capital punishment violates the eighth amendment, had discussed the moral issue of the state's taking a human life.¹⁸ At different times Justices Burger, Blackmun, White and Rehnquist have avoided this moral issue entirely by espousing a theory of deference to legislative judgments regarding the penalty.¹⁹ When Justices Stewart, Stevens, and Powell in *Gregg* did address the societal values at stake, the debate was almost entirely in utilitarian terms—whether the penalty is of practical use to society.²⁰

The *Coker* Court ignored justifications for upholding the death penalty advanced in prior cases. Although Justice Blackmun in *Furman* and Justice White in *Roberts v. Louisiana*²¹ deferred to legislative judgments concerning the death penalty,²² they expressed no hesitancy in interfering with Georgia's decision that death is an acceptable penalty for rape. Although the plurality in *Gregg* considered retribution a valid goal because it prevented anarchy,²³ in *Coker* the justices did not discuss whether a lesser penalty than death can adequately express society's abhorrence of rape. The *Coker* plurality also failed to consider the deter-

18. Justice Brennan had stated, "Although pragmatic arguments for and against the punishment have been frequently advanced, this longstanding and heated controversy cannot be explained solely as the result of differences over the practical wisdom of a particular government policy. At bottom, the battle has been waged on moral grounds. The country has debated whether a society for which the dignity of the individual is the supreme value can, without a fundamental inconsistency, follow the practice of deliberately putting some of its members to death." *Furman v. Georgia*, 408 U.S. 238, 296 (1972) (Brennan, J., concurring). In *Furman* Justice Marshall said, "If the evidence clearly demonstrated that capital punishment served valid legislative purposes, such punishment would, nevertheless, be unconstitutional if citizens found it to be morally unacceptable." *Id.* at 332 (Marshall, J., concurring).

19. Justices Burger, Blackmun, and Rehnquist discussed this need in *Furman*. 408 U.S. at 383-85, 410, 468 (Burger, C.J., dissenting). Justice White discussed this need in *Roberts v. Louisiana*, 428 U.S. 325, 353-54 (1976) (White, J., dissenting).

20. In *Gregg*, Justice Stewart's plurality opinion, in which Powell and Stevens joined, discussed two goals of punishment—retribution and deterrence. Deterrence is obviously a practical rather than a moral goal. However, even in discussing retribution the justices' concern was with its use in preventing self-help in the seeking of vengeance rather than with whether death as a punishment can be an end in itself rightly imposed because the defendant deserves it. 428 U.S. at 183.

21. 428 U.S. 325 (1976).

22. See note 19, *supra*.

23. 428 U.S. at 183.

rence justification articulated in *Gregg*. The plurality's only concern in *Coker* was the "moral depravity"²⁴ of the rapist and whether he is sufficiently culpable to deserve death. Thus the Court, by limiting its consideration to the proportionality prong of the test propounded by only three justices in *Gregg*, deviated entirely from the utilitarian discussion that characterized previous death penalty debates.

The existence of aggravating circumstances did not alter the plurality's determination that a rapist never deserves the death penalty. Under Georgia law, neither a rapist nor a murderer could be sentenced to death absent a showing of aggravating circumstances.²⁵ The Court recognized that this statutory scheme could result in death for a rapist and not for a deliberate killer if the rape was found to be aggravated and the killing was not. This possibility ran counter to the Court's position that a rapist should never be punished more severely than a deliberate killer.²⁶ The dissent, however, reasoned that the eighth amendment does not prohibit a state from taking into consideration a defendant's prior history of vio-

24. 97 S. Ct. at 2869.

25. The following circumstances will aggravate the crime of murder: (1) the commission of the murder while engaged in another capital felony, aggravated battery, or first degree burglary or arson; (2) the murder was committed by a person with a prior record of capital felony or serious assaultive convictions; (3) the defendant's act of murder knowingly created a great risk of death to more than one person in a public place by means of a device or weapon which would normally be hazardous to the lives of more than one person; (4) the commission of the murder for himself or for another for the purpose of receiving money or any other thing of monetary value; (5) the offender directed another to commit murder or committed murder as an agent or employee of another person; (6) the murder was committed in an outrageously or wantonly vile, horrible, or inhuman manner in that it involved torture, depravity of mind, or an aggravated battery to the victim; (7) the victim was a peace officer, corrections employee or fireman while engaged in the performance of his official duties; (8) the murder was committed by an escapee from the lawful custody of a peace officer or place of lawful confinement; or (9) the murder was committed for the purpose of avoiding, interfering with or preventing a lawful arrest, or custody in a place of lawful confinement, of himself or another. Georgia's death penalty statute requires that at least one of three aggravating circumstances be found before a rapist is sentenced to death: prior capital felony convictions, commission of the rape while engaged in another capital felony or aggravated battery, or the commission of the rape in an "outrageously or wantonly vile, horrible, or inhuman manner." GA. CODE ANN. § 26-3102, 27-2534.1 (Supp. 1976). The jury in *Coker*'s case found the aggravating circumstances of the conviction of prior capital felonies (murder, rape and kidnapping) and the commission of the rape while engaged in another capital felony (armed robbery).

26. 97 S. Ct. at 2870. Again, the plurality has limited its definition of harm to physical harm resulting in death. The justices comprising the plurality conclude that a rapist is not as culpable as a deliberate killer because a rapist does not kill. However, aggravating circumstances also indicate culpability and, thus, certain rapists may be more deserving of death than certain killers.

lent crimes in devising punishments.²⁷ The Court would not have so readily excluded a consideration of these factors if it had relied on the utilitarian goals—deterrence and retribution to prevent anarchy—put forth in *Gregg*. Clearly, aggravating factors such as multiple offenses are relevant in determining a sentence designed to deter future crime.²⁸

Not only is *Coker* disturbing because of the opinion's unconvincing combination of subjective and objective factors which result in the decision's indeed "appear[ing] to be merely the subjective views of individual justices,"²⁹ but the *Coker* decision also seems to have ramifications beyond prohibiting the death penalty for rape. The dissenters interpreted the plurality opinion as implying that death cannot be imposed as a penalty for crimes not resulting in the death of the victim,³⁰ and this conclusion is certainly consistent with the plurality's language. Therefore, if the Court adheres to the reasoning employed in *Coker*, it will conclude that present state and federal statutes imposing the death penalty for such crimes as the rape of a child,³¹ armed robbery,³² kidnapping,³³ airplane hijacking³⁴ and treason³⁵ are violations of the eighth amendment.

Constance R. LeSage

RACIAL DISCRIMINATION IN CHURCH SCHOOLS

Plaintiffs, black parents and their two children, brought suit against defendant, a church school operating on church property,¹ seeking damages and an injunction in response to defendant's refusal to admit the

27. 97 S. Ct. at 2874 (Burger, C.J., dissenting).

28. *See id.*; *Gregg v. Georgia*, 428 U.S. 153, 183 n.28 (1976) (Stewart, J., concurring).

29. 97 S. Ct. at 2865-66; see text at note 10, *supra*.

30. 97 S. Ct. at 2880 (Burger, C.J., dissenting).

31. *See, e.g.*, FLA. STAT. ANN. § 794.011(2) (1976); MISS. CODE ANN. § 97-3-65 (Supp. 1974).

32. *See, e.g.*, GA. CODE ANN. § 26-1902 (1968).

33. *See, e.g.*, 18 U.S.C. § 1201 (1970); GA. CODE ANN. § 26-1311 (1968); LA. R.S. 14:44 (1950).

34. 49 U.S.C. § 1472(i)(1)(B) (Supp. V 1975). The statute provides the death penalty in hijacking cases only when a person is killed, but requires no intent to kill.

35. 18 U.S.C. § 2381 (1970).

1. Defendant, Dade Christian Schools, Inc., was founded by the New Testament Baptist Church and both the school and the church use the same building. *Brown v. Dade Christian Schools, Inc.*, 556 F.2d 310, 325-26 (5th Cir. 1977).