The question is whether the death penalty is a constitutionally permissible punishment for the crime of rape. The question may be viewed more narrowly, since the facts of this case call for decision only with respect to non-aggravated rape. There was no brutalizing of the victim here, beyond the act of rape itself.

Identified somewhat Gregg v. Georgia/unnecessary three/overlapping inquiries for answering the Eighth Amendment question: Does the punishment comport with evolving standards of decency? Is it compatible with human dignity? Is it disproportionate to the offense?

I don't find the second factor useful here. The third seems to call for a somewhat less historical, more a priori inquiry than the first. Petr has a solid argument against the death penalty based on disproportion. Gregg, Roberts and the other cases emphasized several times the uniqueness of the death penalty. By the same token, imposing death on one's victim is a unique kind of crime. There are some kinds of brutalizing assaults that offend us, perhaps, as much as murder, but may be largely because they demonstrate that the offender was indifferent to the life of the victim--he might as well have killed the victim. In
any event, there is a clear dividing line between murder and assault that does not result in death, and there is certainly some disproportion when the state takes the life of an offender who himself has taken no life. The biblical maxim "an eye for an eye" capital punishment is in such circumstances disproportionate.

Moreover, this case does not present the difficult question of comparing the death penalty to grossly brutal assaults. Rape is always an awful offense, but petr's action here --this time--was not brutal.

It seems to me, however, that the most important inquiry for this case is the first one specified in Gregg: evolving community standards. There are two primary objective indicators: legislative judgments and jury determinations. Petr has set forth the statistics in his brief, and there seems to be little quarrel over the statistics; the fight is over their significance. Roughly 20 states imposed death for rape in the early 20th century. This declined--but insignificantly, in my view--to 17 by the time Furman was decided. After Furman only three states reenacted the death penalty for rape of adults while three others had some such provision for sexual battery of children. After Woodson only one adult-rape provision survives--Georgia's. And the Louisiana legislature, acting in response to Roberts, did not revive its penalty for rape, nor have any of the other legislatures acting since Woodson and Roberts seen fit to impose the death penalty for rape.

Resp replies--and this seems to me the heart of the issue
here—that these post-Furman statistics cannot be counted for too much. This Court in Woodson in fact counted certain post-Furman statistics for little (the fact that 10 jurisdictions had opted for mandatory death penalty schemes), and resp says the Court should do the same here. Resp argues that the failure to reimpose the penalty for rape was not a considered legislative judgment excessive, but rather merely the result of some confusion over Furman's reach. Most importantly, resp argues that the states that chose mandatory death penalty schemes may have left rape off only because of the mandatory nature of the penalty—they might do differently under a Georgia-type statute.

In my opinion, the statistics are very strong support for petr. I cannot accept most of resp's argument. Furman provided an occasion for

Petr also invokes the statistics showing jury determinations. They generally show that death is imposed as a punishment for rape only in a small number of cases. Perhaps most significant are the data from Georgia alone. Since Furman appellate there have been 42 reported/cases where the defendant was convicted of rape. In only four did the jury impose the death penalty. (Petr's supplemental brief updates the statistics: the rate is now 4 out of 63.) Resp does not dispute these data.

In my opinion, these figures amount to a strong/showing that evolving societal standards reject capital punishment as an acceptable penalty for the crime of rape.
Particularly important are the actions of the legislatures. I do not agree with resp that the dramatic attrition after Furman can be attributed solely to confusion about the import of that case. Thirty-five states completely revamped their death penalty laws after that decision, necessarily giving careful attention to what the Members of this Court said in Furman. I know of nothing that would have prompted them to think death for rape would not be permissible, if they concluded that some sorts of capital punishment were still constitutional. Instead, I think this reaction to Furman points strongly in petr's favor. That case was the occasion for careful rethinking of capital punishment statutes. Although only 3 states had abandoned this punishment for rape in the preceding 50 years, 14 other states gave it up when finally presented with an occasion for thoroughgoing revision. After Roberts, a 15th state joined this list--Louisiana.

There is one other factor to note. This evolving standard has not generally distinguished between aggravated rapes and non-brutal rapes. The death penalty in the overwhelming majority of states is not available for any rape. In part this may be the product of the difficulty in defining aggravated rape in a way that meaningfully differentiates it from "ordinary" rape, a difficulty you noted in Furman. 408 U.S., at 460. If this trend is to be read as rejection of the death penalty for any rape, then it might make sense to write the opinion to make that clear, even though the issue is not technically presented by the facts of this case.
Finally, I do not think your vote here is foreordained one way or the other by your position in *Furman*. There you explicitly rejected the contention that capital punishment is unconstitutional when the crime is rape. 408 U.S., at 456-461. But much has happened since then. Your decision in *Gregg*, etc., accepted the result in *Furman* as authoritative precedent, and your position in last term's capital cases bespeaks a different stance from that assumed in *Furman*—rightly so, in view of the rule of *stare decisis*.

D.M.
COKER v. GEORGIA

Capitol Case - Rape

Argued 3/28/77
Circumstances were aggravated - 3 prior convictions for rape, & 1 for murder.

Set aside conviction.

Gregg settled validity of Ga. statute. Only 9 in one of jurisdiction.

Would not foreclose different decision in treason, etc., etc. Ga. as almost unique. Contemporary norms are incompatible with Ga.'s statute. Would not leave open aggravated rape.
Mr. Justice White

Distinguishably have a more than
relationship as to appear; also the
benefits to society are negligible.

Mr. Justice Marshall

Mr. Justice Blackmun

Rape is different.
Usually a man's word vs a woman's.
In most rape cases, the woman —
not the A — is tried. (True)
Go stand virtually alone.
Few statutes on to rape since Furman.

Set aside treason, etc.
We are talking only about rape of adult
women.
Mr. Justice Powell

Agreed with Stewart, Blackmun and White.

I'd leave open treason, military
offense, etc.

I'd also leave open aggravated rape, airplane hijacking.

---

Mr. Justice Rehnquist

Would not draw line line.

---

Mr. Justice Stevens

Leave open other situations.
March 31, 1977

MEMORANDUM TO THE CONFERENCE

Re: No. 75-5444, Coker v. Georgia
    No. 76-5206, Roberts v. Louisiana

I was asked to assign the opinions in these two cases. Byron has agreed to undertake an opinion in Coker, and John Stevens has agreed to undertake the Per Curiam opinion in Roberts.

P.S.
Arguing About Death for Rape

As the nine black-robed Justices walked purposefully to their places at the ornate courtroom bench last week, the ornate courtroom seemed even more somber than usual. Nine months before, the court had allowed the imposition of the death penalty for murder. Now it was being asked to permit capital punishment for crimes which no life has been taken. The state of Georgia was seeking permission to electrocute Ehrlich Anthony Coker for the rape of a 16-year-old housewife.

Coker’s attorney, Civil Rights Lawyer David E. Kendall, candidly recited the ugly facts of the crime.

Late on a balmy summer night in 1974, the kitchen door of Allen and Eliza Carver’s two-room house was suddenly thrown open. In stepped Coker, 24, a convicted rapist and murderer who had just escaped from a nearby prison. Brandishing a three-foot board, Coker forced Mrs. Carver, who was still recovering from the birth of a son three weeks earlier, to tie up her husband in the bathroom. Then, as he fled in the car, Sheriff’s deputies captured him on a dead-end road a few hours later.

Georgia is the only state with a law providing for execution for rape of an adult woman (Florida and Mississippi provide for execution for the rape of children). A local jury, after noting Coker’s previous convictions for rape-murder and rape-kidnapping, ordered him to be electrocuted.

Although both Coker and his victim were white, Kendall marshaled historical and statistical data to show that execution for rape was based on race.

Before the Civil War, Georgia law was typical of Southern statutes in specifying that a man raping a black woman could draw a fine or imprisonment “at the discretion of the court,” while a slave or “free person of color” even attempting to rape a white woman could be put to death. Supposedly color-blind postwar laws were selectively enforced: since 1930, when accurate record-keeping was started, 89% of the 455 rapists, executed in the U.S. have been black.

At one point, Justice Lewis F. Powell Jr. of Virginia frostily asked Kendall: “What would be an appropriate punishment for a convicted rapist serving life who escapes and commits another rape?” Incarceration, Kendall replied. Powell drove the point home: “The same punishment he had before.”

Ironically, Coker received solid legal backing in a friend-of-court brief filed by seven organizations promoting women’s rights, including the National Organization for Women. These groups demanded effective punishment for rapists, but they charged that the death penalty is ineffective because the severity of the punishment supports demands for elaboration and often humiliating testing of the victim’s testimony. Even so, the feminists argued, juries sometimes acquit an accused rapist because they feel that the punishment might be too extreme.

Badly Split. When Georgia Assis­tant Attorney General E. Dean Grin­dle warned the court that elimination of capital punishment for non-death crimes might have unforeseeable consequences, he found Justice Harry A. Blackmun already alarmed. A vote for Coker, said Blackmun, would have “an adverse effect on federal efforts” to impose death for treason, espionage and terrorism. But Justice Potter Stewart hinted that some crime victims might suffer if capital punishment were extended: “The rapist, for example, might be encouraged to kill since the penalty would be the same.”

Although the main battle on restoring the death penalty was fought in 1976, last week’s hour-long arguments and questions were an important skirmish over the extension of capital punishment. The court is badly split, and while some expansion of the death penalty is probable, there is no way of knowing Coker’s fate until the Justices announce it, probably this June.

The Last Word

When William O. Douglas reluctantly retired from the U.S. Supreme Court 17 months ago at the age of 77, he was partly paralyzed from a stroke, in almost constant pain and seemingly unable to continue the mental exertion required on the high bench. Friends feared that the Justice, deprived of official duties, might soon die. Instead, Douglas is still working away in his court chambers, and the old conservationist has promised friends that he will make his first public reappearance next month at the official dedication of the Chesapeake & Ohio Canal National Historical Park as a memorial to him. He has also passed along word that he will send the final manuscript of his 43rd work, the second half of his autobiography, to his publisher this spring. The volume will cover his spirited court years, and once again Douglas will enjoy the last word on many of his critics.

Douglas’ fellow Justices, fearing damage to the court’s work and unseemly publicity about his impaired mental abilities, had prodded him to retire. They quietly denied him the authority
Genecology of the Weakest Chi

Daughter: Mom, can I go out?
Mother: Sure, go enjoy yourself.

Don’t worry about me sitting here alone all night.

Mother has just created a classic double bind, saying yes and no to her daughter at the same time. Most parents use such paradoxical commands occasionally because they are unable to resolve their conflicting feelings. That familiar behavior may seem harmless. But according to a branch of psychiatry known as family therapy, repeated double binding is ordinarily found in families that produce schizophrenics.

Unlike most psychiatrists, who believe that schizophrenia is the result of parental weakness or a chemical imbalance, family therapists tend to believe that schizophrenia is a product of ways certain families choose to get along. But according to a branch of psychiatry known as family therapy, repeated double binding is ordinarily found in families that produce schizophrenics.

In any family, according to Bowen, one child usually grows up to be stronger than the parents, most of the others remain about as immature as the mother and father, and one child does not function as well as anyone else in the family. Because most people select mates with levels of emotional maturity roughly equal to their own, he says, “weakest child” will grow up to mate with a similarly impaired adult and start the cycle over again at a more disturbed level.

Says Bowen: “If we follow the lineage of the weakest child of the weakest child through multiple generations, we eventually emerge with a child so weak it collapses into schizophrenia on emotional or physical separation from the parents.”

“Genealogy of the Weakest Chi” by John C. Bowen, M.D., Copyright 1966, 1978 by John C. Bowen, M.D.

No matter how worthless you Marvin, you’ll always be especial dealing with a psychotic so tided his bread, cut his meat; his milk, all the while urging learn to do more for himself. By the last generation, child can no longer function beyond cure. Says Bowen: “An awful lot of schizophrenia the product of these multiple g The best we’re going to do is to relieve the symptoms. ttle hope “if the goal is to take and make him as normal as he was five or six generations a think nature will put up with
Ehrlich Anthony Coker, Petitioner,  
On Writ of Certiorari to the Supreme Court of Georgia.  
State of Georgia.  

[May —, 1977]  

Mr. Justice WHITE delivered the opinion of the Court. 

Georgia Code Ann. § 26-2001 (1972) provides that "a person convicted of rape shall be punished by death or by imprisonment for life, or by imprisonment for not less than 20 years." 1  

Punishment is determined by a jury in a separate sentencing proceeding in which at least one of the statutory aggravating circumstances must be found before the death penalty may be imposed. 2 Petitioner Coker was convicted of rape and sentenced to death. Both conviction and sentence were affirmed by the Georgia Supreme Court. Coker was granted a writ of certiorari, — U. S. —, limited to the single claim, rejected by the Georgia court, that the punishment of death for rape violates the Eighth Amendment, which proscribes "cruel and unusual punishments" and which must be observed by the States as well as the Federal Government. Robinson v. California, 370 U. S. 660 (1962). 

I  

While serving various sentences for murder, rape, kidnapping and aggravated assault, petitioner escaped from the Ware

---

1 The section defines rape as having "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."

2 See n. 3, infra.
Correctional Institution near Waycross, Ga., on September 2, 1974. At approximately 11 p.m. that night, petitioner entered the house of Allen and Elnita Carver through an unlocked kitchen door. Threatening the couple with a "board," he tied up Mr. Carver in the bathroom, obtained a knife from the kitchen and took Mr. Carver's money and the keys to the family car. Brandishing the knife and saying "you know what's going to happen to you if you try anything, don't you," Coker then raped Mrs. Carver. Soon thereafter, petitioner drove away in the Carver car, taking Mrs. Carver with him. Mr. Carver, freeing himself, notified the police; and not long thereafter petitioner was apprehended. Mrs. Carver was unharmed.

Petitioner was charged with escape, armed robbery, motor vehicle theft, kidnapping, and rape. Counsel was appointed to represent him. Having been found competent to stand trial, he was tried. The jury returned a verdict of guilty, rejecting his general plea of insanity. A sentencing hearing was then conducted in accordance with the procedures dealt with at length in Gregg v. Georgia, 428 U.S. 153 (1976), where this Court sustained the death penalty for murder when imposed pursuant to the statutory procedures. The jury was

"Capital offenses; jury verdict and sentence.—Where, upon a trial by jury, a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed unless the jury includes a finding of at least one statutory aggravating circumstance and a recommendation that such sentence be imposed. Where a statutory aggravating circumstance is found and a recommendation of death is made, the court shall sentence the defendant to death. Where a sentence of death is not recommended by the jury, the court shall sentence the defendant to imprisonment as provided by law. Unless the jury trying the case makes a finding of at least one statutory aggravating circumstance and recommends the death sentence in its verdict, the court shall not sentence the defendant to death, provided that no such finding of statutory aggravating circumstances shall be necessary in offenses of treason or aircraft hijacking."
instructed that it could consider as aggravating circumstances whether the rape had been committed by a person with a prior record of conviction for a capital felony and whether the rape

The provisions of this section shall not affect a sentence when the case is tried without a jury or when the judge accepts a plea of guilty.


"Recommending the death penalty;—In all capital cases, other than those of homicide, when the verdict is guilty, with a recommendation to mercy, it shall be legal and shall be a recommendation to the judge of imprisonment for life. Such recommendation shall be binding upon the judge.


"Mitigating and aggravating circumstances; death penalty.—(a) the death penalty may be imposed for the offenses of aircraft hijacking or treason, in any case.

"(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, or the offense of murder was committed by a person who has a substantial history of serious assaulting criminal convictions.

(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, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.

(3) The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.

(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.

(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duty.

[Footnote 3 is continued on p. 4]
had been committed in the course of committing another capital felony, namely, the armed robbery of Allen Carver. The court also instructed, pursuant to statute, that even if

"(8) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

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

"(8) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.

"(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.

"(10) 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.

"(c) The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation.

"The jury, if its verdict be a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In non-jury cases the judge shall make such designation. Except in cases of treason or aircraft hijacking, unless at least one of the statutory aggravating circumstances enumerated in Code Section 27-2534.1 (b) is so found, the death penalty shall not be imposed.


"Review of death sentences.—(a) Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Supreme Court of Georgia. The clerk of the trial court, within ten days after receiving the transcript, shall transmit the entire record and transcript to the Supreme Court of Georgia together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form
aggravating circumstances were present, the death penalty need not be imposed if the jury found mitigating circumstances to predominate, that is, circumstances constituting

of a standard questionnaire prepared and supplied by the Supreme Court of Georgia.

"(b) The Supreme Court of Georgia shall consider the punishment as well as any errors enumerated by way of appeal.

"(c) With regard to the sentence, the court shall determine:

"(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and

"(2) Whether, in cases other than treason or aircraft hijacking, the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in Code section 27-2534.1 (b), and

"(e) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

"(d) Both the defendant and the State shall have the right to submit briefs within the time provided by the court, and to present oral argument to the court.

"(e) The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

"(1) Affirm the sentence of death; or

"(2) Set the sentence aside and remand the case for resentencing by the trial judge based on the record and argument of counsel. The records of those similar cases referred to by the Supreme Court of Georgia in its decision, and the extracts prepared as hereinafter provided for, shall be provided to the resentencing judge for his consideration.

"(f) There shall be an Assistant to the Supreme Court, who shall be an attorney appointed by the Chief Justice of Georgia and who shall serve at the pleasure of the court. The court shall accumulate the records of all capital felony cases in which sentence was imposed after January 1, 1970, or such earlier date as the court may deem appropriate. The Assistant shall provide the court with whatever extracted information it desires with respect thereto, including but not limited to a synopsis or brief of the facts in the record concerning the crime and the defendant.

"(g) The court shall be authorized to employ an appropriate staff and such methods to compile such data as are deemed by the Chief Justice to
justification or excuse for the offense in question, "but which, in fairness and mercy, may be considered as extenuating or reducing the degree" of moral culpability or punishment. R. 300. The jury's verdict on the rape count was death by electrocution. Both aggravating circumstances on which the court instructed were found to be present by the jury.

II

Furman v. Georgia, 408 U. S. 238 (1972), and the Court's decisions last Term in Gregg v. Georgia, supra; Proffitt v. Florida, 428 U. S. 242 (1976); Jurek v. Texas, 428 U. S. 262 (1976); Woodson v. North Carolina, 428 U. S. 280 (1976); and Roberts v. Louisiana, 428 U. S. 325 (1976), make unnecessary the recanvassing of certain critical aspects of the controversy about the constitutionality of capital punishment. It is now settled that the death penalty is not invariably cruel and unusual punishment within the meaning of the Eighth Amendment; it is not inherently barbaric or an unacceptable mode of punishment for crime; neither is it always disproportionate to the crime for which it is imposed. It is also established that imposing capital punishment, at least for murder, in accordance with the procedures provided under the Georgia statutes saves the sentence from the infirmities which led the Court to invalidate the prior Georgia capital punishment statute in Furman v. Georgia, supra.

In sustaining the imposition of the death penalty in Gregg, however, the Court firmly embraced the holdings and dicta be appropriate and relevant to the statutory questions concerning the validity of the sentence.

"(b) The office of the Assistant shall be attached to the office of the Clerk of the Supreme Court of Georgia for administrative purposes.

"(i) The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence."
from prior cases, Furman v. Georgia, supra; Robinson v. California, 370 U. S. 661 (1962); Trop v. Dulles, 356 U. S. 86 (1958); and Weems v. United States, 217 U. S. 349 (1910), to the effect that the Eighth Amendment bars not only those punishments that are "barbaric" but also those that are "excessive" in relation to the crime committed. 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. Furthermore, these Eighth Amendment judgments should not be, or appear to be, merely the subjective views of individual Justices; judgment should be informed by objective factors to the maximum possible extent. To this end, attention must be given to the public attitudes concerning a particular sentence—history and precedent, legislative attitudes and the response of juries reflected in their sentencing decisions are to be consulted. In Gregg, after giving due regard to such sources, the Court's judgment was that the death penalty for deliberate murder was neither the purposeless imposition of severe punishment nor a punishment grossly disproportionate to the crime. But there was reserved the question of the constitutionality of the death penalty when imposed for other crimes. 428 U. S., at 187 n. 35.

III

That question, with respect to rape of an adult woman, is now before us. We have concluded that a sentence of death is grossly disproportionate punishment for the crime of rape, is excessive and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment. 4

4 Because the death sentence is a disproportionate punishment for rape, it is cruel and unusual punishment within the meaning of the Eighth Amendment even though it may measurably serve the legitimate end.
As advised by recent cases, we seek guidance in history and from the objective evidence of the country's present judgment concerning the acceptability of death as a penalty for rape of an adult woman. At no time in the last 50 years has a majority of the States authorized death as a punishment for rape. In 1926, 18 States, the District of Columbia, and the Federal Government authorized capital punishment for the rape of an adult female. That number had declined, but not substantially, by 1971 just prior to the decision in Furman v. Georgia—16 States plus the Federal Government. Furman then invalidated most of the capital punishment statutes in this country, including the rape statutes, because, among other reasons, of the manner in which the death penalty was imposed and utilized under those laws.

With their death penalty statutes for the most part invalidated, the States were faced with the choice of enacting modified capital punishment laws in an attempt to satisfy the requirements of Furman or of being satisfied with life imprisonment as the ultimate punishment for any offense. Thirty-three States have decided on death for rape and therefore is not invalid for its failure to do so. We observe that in the light of the legislative decisions in almost all of the States and in most of the countries around the world, it would be difficult to support a claim that the death penalty for rape is an indispensable part of the States' criminal justice system.


five States immediately reinstituted the death penalty for at least limited kinds of crime. *Gregg v. Georgia*, *supra*, at 176 n. 23. This public judgment as to the acceptability of capital punishment, evidenced by the immediate, post-*Furman* legislative reaction in a large majority of the States, heavily influenced the Court to sustain the death penalty for murder in *Gregg v. Georgia*. 428 U. S., at 179-182.

But if the "most marked indication of a society's endorsement of the death penalty for murder is the legislative response to *Furman*," *Gregg v. Georgia*, *supra*, at 179, it should also be a telling datum that the public judgment with respect to rape, as reflected in the statutes providing the punishment for that crime, has been dramatically different. In reviving death penalty laws to satisfy *Furman*'s mandate, none of the States that had not previously authorized death for rape chose to include rape among capital felonies. Of the 16 States in which rape had been a capital offense, only three provided the death penalty for rape of an adult woman in their revised statutes—Georgia, North Carolina, and Louisiana. In the latter two States, the death penalty was mandatory for those found guilty, and those laws were invalidated by *Woodson* and *Roberts*. When Louisiana, responding to the latter decisions, again revised its capital punishment laws, rape was not among the crimes for which it sought to retain the death penalty. None of the six other States that have amended or replaced their death penalty statutes since July 2, 1976, including four States (in addition to Louisiana) that had authorized the death sentence for rape prior to 1972 and had reacted to *Furman* with mandatory statutes, included rape

among the crimes for which death was an authorized punishment.

Georgia argues that 11 of the 16 States that authorized death for rape in 1972 attempted to comply with Furman by enacting arguably mandatory death penalty legislation and that it is very likely that aside from Louisiana and North Carolina, these States simply chose to eliminate rape as a capital offense rather than to require death for each and every instance of rape. The argument is not without force; but five of the 16 States did not take the mandatory course and also did not continue rape as a capital offense. Further, as we have indicated, Louisiana and the legislatures of four other of the 11 arguably mandatory States have revised their death penalty laws since Woodson and Roberts; rape is not among the capital offenses contained in these new laws. And this is to say nothing of the 19 other States that enacted nonmandatory, post-Furman statutes and chose not to sentence rapists to death.

It should be noted that Florida, Mississippi, and Tennessee also authorized the death penalty in some rape cases, but only where the victim was a child and the rapist an adult. The Tennessee statute has since been invalidated because the death sentence was mandatory. Collins v. State, — U. S. — (1977). The upshot is that Georgia is the sole jurisdiction in the United States at the present time that authorizes a

---

8 The 11 States which respondent places in this category are as follows:


sentence of death when the rape victim is an adult woman, and only two other jurisdictions provide capital punishment when the victim is a child.

The current judgment with respect to the death penalty for rape is not wholly unanimous among state legislatures, but it obviously weighs very heavily on the side of rejecting capital punishment as a suitable penalty for raping an adult woman. 10

B

It was also observed in Gregg that "the jury . . . is a significant and reliable index of contemporary values because it is so directly involved," Gregg v. Georgia, supra, at 181, and that it is thus important to look to the sentencing decisions that juries have made in the course of assessing whether capital punishment is an appropriate penalty for the crime being tried. Of course, the jury's judgment is meaningful only where the jury has an appropriate measure of choice as to whether the death penalty is to be imposed. As far as execution for rape is concerned, this is now true only in Georgia and in Florida; and in the latter State, capital punishment is authorized only for the rape of children.

According to the factual submissions in this Court, out of all rape convictions in Georgia since 1973—and that total number has not been tendered—63 cases had been reviewed by the Georgia Supreme Court as of the time of oral argument; and of these, six involved a death sentence, one of which was set aside, leaving five convicted rapists now under sentence of death in the State of Georgia. Georgia juries have

10 In Trop v. Dulles, 356 U. S. 86, 102 (1958), the Court took pains to note the climate of international opinion concerning the acceptability of a particular punishment. It is thus not irrelevant here that out of 60 major nations in the world surveyed in 1965, only three retained the death penalty for rape where death did not ensue. United Nations, Department of Economic and Social Affairs, Capital Punishment (1968) 40, 56.
thus sentenced rapists to death six times since 1973. This obviously is not a negligible number; and the State argues that as a practical matter juries simply reserve the extreme sanction for extreme cases of rape and that recent experience surely does not prove that jurors consider the death penalty to be a disproportionate punishment for every conceivable instance of rape, no matter how aggravated. Nevertheless, it is true that in the vast majority of cases, at least nine out of 10, juries have not imposed the death sentence.

IV

These recent events evidencing the attitude of state legislatures and sentencing juries do not wholly determine this controversy, for the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment. Nevertheless, the legislative rejection of capital punishment for rape strongly confirms our own judgment, which is that death is indeed a disproportionate penalty for the crime of raping an adult woman.

We do not discount the seriousness of rape as a crime. It is highly reprehensible, both in a moral sense and in its almost total contempt for the personal integrity and autonomy of the female victim and for the latter's privilege of choosing those with whom intimate relationships are to be established. Short of homicide, it is the “ultimate violation of self.” It is also a violent crime because it normally involves force, or the threat of force or intimidation, to overcome the will and the capacity of the victim to resist. Rape is very often accompanied by physical injury to the female and can also inflict

---

mental damage. Because it undermines the community's sense of security, there is public injury as well.

Rape is without doubt deserving of serious punishment, but in terms of moral depravity and of the injury to the person and to the public, it does not compare with murder, which does involve the unjustified taking of human life. Although it may be accompanied by another crime, rape by definition does not include the death or even the serious injury to another person." 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. We have the abiding conviction that the death penalty, which "is unique in its severity and revocability," 428 U.S. 187, is an excessive penalty for the rapist who, as such, does not take human life.

This does not end the matter; for under Georgia law, death may not be imposed for any capital offense, including rape, unless the jury or judge finds one of the statutory aggravating circumstances and then elects to impose that sentence. Section 24-3102 (supp.) 1975; Gregg v. Georgia, supra, at 165-166. For the rapist to be executed in Georgia, it must therefore be found not only that he committed rape but also that one or more of the following aggravating circumstances were present: (1) that the rape was committed by a person with a prior record of conviction for a capital felony; (2) that the rape was committed while the offender was engaged in the commission of another capital felony, or aggravated battery; or (3) the rape "was outrageous or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or

---


14See n. 1, supra, for the Georgia definition of rape.
aggravated battery to the victim." 14 Here, the first two of these aggravating circumstances were alleged and found by the jury.

Neither of these circumstances, nor both of them together, change our conclusion that the death sentence imposed on Coker is a disproportionate punishment for rape. Coker had prior convictions for capital felonies—rape, murder and kidnapping—but obviously none of them had been deemed by the sentencing jury to warrant the death penalty; and these prior convictions do not change the fact that the instant crime being punished is a rape not involving the taking of life.

It is also true that the present rape occurred while Coker was committing armed robbery, a felony for which the Georgia statutes authorize the death penalty. 15 But Coker was tried for the robbery offense as well as for rape and received a separate life sentence for this crime; the jury did not deem the robbery itself deserving of the death penalty, even though accompanied by the aggravating circumstance, which was stipulated, that Coker had been convicted of a prior capital crime. 16

14 There are other aggravating circumstances provided in the statute, see n. 3, supra, but they are not applicable to rape.
15 In Gregg v. Georgia, the Georgia Supreme Court refused to sustain a death sentence for armed robbery because, for one reason, death had been so seldom imposed for this crime in other cases that such a sentence was excessive and could not be sustained under the statute. As it did in this case, however, the Georgia Supreme Court apparently continues to recognize armed robbery as a capital offense for the purpose of applying the aggravating circumstances provisions of the Georgia Code.
16 Where the accompanying capital crime is murder, it is most likely that the defendant would be tried for murder, rather than rape; and it is perhaps academic to deal with the death sentence for rape in such a circumstance. It is likewise unnecessary to consider the rape-felony murder—a rape accompanied by the death of the victim which was unlawfully but nonmaliciously caused by the defendant.

Where the third aggravating circumstance mentioned in the text is present—that the rape is particularly vile or involves torture or aggravated
We note finally that in Georgia a person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being. He also commits that crime when in the commission of a felony he causes the death of another human being, irrespective of malice. But even where the killing is deliberate, it is not punishable by death absent proof of aggravating circumstances. It is difficult to accept the notion, and we do not, that the rapist, 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. The judgment of the Georgia Supreme Court is reversed and the case is remanded to that court for further proceedings not inconsistent with this opinion.

So ordered.

[Handwritten note: battery—it would seem that the defendant could very likely be convicted, tried and appropriately punished for this additional conduct.]
May 6, 1977

Re: 75-5444 - Coker v. Georgia

Dear Byron:

Please join me.

Respectfully,

Mr. Justice White

Copies to the Conference
May 6, 1977

Re: 75-5444 - Coker v. Georgia

Dear Byron:

Please join me.

Respectfully,

Mr. Justice White

Copies to the Conference
May 9, 1977

No. 73-5444 Coker v. Georgia

Dear Byron:

Although I will join the judgment and most of your excellent opinion, I will probably say something — as I did at Conference — about aggravated rape. In some circumstances, the effect is considerably worse than death itself.

Sincerely,

Mr. Justice White

lfp/ss

cc: The Conference
Dear Byron,

I am glad to join your opinion for the Court in this case.

Sincerely yours,

Mr. Justice White

Copies to the Conference
Re: No. 75-5444 - Coker v. Georgia

Dear Byron:

Please join me.

Sincerely,


Mr. Justice White

cc: The Conference