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**Juvenile* Capital Punishment: A Spectacle of a Child’s Injustice**

*June 16, 1944: George Stinney Jr. (14) is executed in South Carolina's electric chair. He was only 5'1" tall and weighed 95 pounds. A local paper reported that the guards had difficulties strapping him onto the chair and attaching the electrodes.**

I. INTRODUCTION

In *State v. Conyers*¹ the South Carolina Supreme Court ruled that the Eighth Amendment's prohibition of cruel and unusual punishment² did not bar application of the death penalty to a defendant who was a juvenile at the time he committed a capital offense.³ This Note places that ruling in context and analyzes the precedent on which it is based. Part II will provide the factual background of the case as well as a historical background of juvenile capital punishment in South Carolina and of United States Supreme Court decisions on the constitutionality of imposing the death penalty on juveniles. Part III will analyze the Eighth Amendment’s principles by which the courts have adjudged the validity of the juvenile death penalty. The Note will demonstrate that the precedent underlying *Conyers* erroneously relies on state capital punishment statutes as the sole indicator of society’s standard of decency. The Note will also show that the inherent vulnerability of juveniles, which the law recognizes as an important distinction between minors and adults, renders the death penalty an excessive form of punishment when applied to children. Furthermore, the Note will emphasize that the states’ failure to protect juveniles by allowing them to be channeled through an adult criminal system violates their duty as *pares patriae*. Finally, Part IV will conclude that capital punishment, as applied to Robert Conyers, violates the Eighth Amendment’s prohibition of cruel and unusual punishment. In a decent, civilized society, a child’s fate should be decided by focusing less on the fluctuating national consensus and more on the

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¹ For the purpose of this article, the terms “juvenile” and “children” refer to an individual who has not reached the age of eighteen.


2. The Eighth Amendment provides that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. Const. amend. VIII.

proportionality of the punishment to the blameworthiness of the minor's criminal actions.

II. BACKGROUND

A. State v. Conyers

The Conyers case arose from an incident that occurred on the night of November 24, 1991, when Robert Conyers broke into the home of Donna Sue Sims through a bathroom window. Once inside Sims's dwelling, he repeatedly beat her with a long metal rod, breaking almost every bone in her face and blinding her. The defendant also sexually assaulted the victim by forcing the metal rod into her vagina, causing a six-inch tear. During the attack, the defendant also hit the victim's children with a blunt object. The defendant beat Kimberly, Sims's two-year-old daughter, to death. He then went to the bedroom where Sims's five-year-old son was sleeping and beat him on the head, fracturing the child's skull. At the time of the incident, Robert Conyers was sixteen years old.

On October 22, 1993, Robert Conyers pled guilty to charges of burglary in the first degree, criminal sexual conduct in the first degree, two counts of assault and battery with intent to kill, and murder. At the sentencing hearing, the prosecution introduced testimony about the juvenile's delinquent record. After considering both the aggravating circumstances presented by the State and the mitigating circumstances presented by the defense, the trial judge sentenced Robert Conyers to life for the burglary charge, thirty years for the criminal sexual conduct on Mrs. Sims, two consecutive twenty-year sentences for the two counts of assault and

4. Id. at 264, 487 S.E.2d at 182.
5. Id.
6. Id.
7. Id.
8. Id.
11. Id. at 264, 487 S.E.2d at 182.
12. Conyers had an extensive juvenile record. On June 8, 1992, Conyers pled guilty to two counts of burglary in the first degree, assault and battery with intent to kill, and attempted criminal sexual conduct. On September 29, 1992, Conyers pled guilty to separate counts of criminal sexual conduct in the first degree, assault and battery with intent to kill, and burglary in the first degree. On February 22, 1993, he pled guilty to murder, criminal sexual conduct, armed robbery, and possession of a weapon. Conyers was fourteen when he began committing these crimes. Brief of Respondent at 2-4.
13. The State presented three aggravating circumstances: (1) the murder took place while in the commission of burglary in the first degree, (2) the murder was committed during a criminal sexual assault, and (3) the murder was committed on a child younger than eleven. Final Brief of Respondent at 4.
14. Judge M. Duane Shuler considered the age of Robert Conyers at the time of the murder of Kimberly Sims a mitigating circumstance. Final Brief of Respondent at 4.
battery with intent to kill, and to death for the murder of Kimberly Sims. The death sentence was imposed pursuant to South Carolina’s statute permitting juveniles charged with murder to be tried as adults and authorizing the death penalty for the offense of murder.

On appeal to the South Carolina Supreme Court, Conyers raised the issue of the constitutionality of the death penalty as applied to juveniles. Conyers relied on the United States Supreme Court decision of Thompson v. Oklahoma, which held that the Eighth and Fourteenth Amendments to the United States Constitution prohibited the execution of offenders younger than sixteen years old at the time they committed the crime. In support of his argument, the defendant also offered the decision of the Washington Supreme Court in State v. Furman, in which the court reversed a death sentence imposed on a seventeen-year-old on the ground that Washington’s statute was unconstitutional because it allowed minors under the age of sixteen to be executed for capital crimes. The Furman court, in turn, had relied on Justice O’Connor’s concurring opinion in Thompson in which she concluded that defendants under sixteen years of age “may not be executed under the authority of a capital punishment statute that specifies no minimum age at which the commission of a capital crime can lead to the offender’s execution.”

The South Carolina Supreme Court in Conyers first turned to the issue of appellate review and concluded that by failing to raise the constitutionality issue of the juvenile death penalty in the court below, the argument was precluded from review by the South Carolina Supreme Court. Nonetheless, the court, relying on

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15. Final Brief of Respondent at 4-5.
16. S.C. CODE ANN. § 20-7-7605(6) (Law. Co-op. Supp. 1997). This statute mandates that within thirty days after the filing of a petition in the family court alleging the child has committed the offense of murder or criminal sexual conduct, the person executing the petition may request in writing that the case be transferred to the court of general sessions with a view to proceeding against the child as a criminal rather than as a child coming within the purview of this article.

Id.

17. S.C. CODE ANN. § 16-3-20(A) (Law. Co-op. Supp. 1997). Section 16-3-20(A) of the code provides that “[a] person who is convicted of or pleads guilty to murder must be punished by death, by imprisonment for life, or by a mandatory minimum term of imprisonment for thirty years.” Id.
18. See Final Brief of Appellant at 7. Appellant argued that “[o]n its face, S.C. Code § 16-3-20 is unconstitutional as applied to juveniles. Because the statute does not explicitly set a minimum age under which capital punishment may not be imposed, it permits the execution of even those below the age of sixteen, the minimum age set by the United States Supreme Court.” Id.
20. Thompson, 487 U.S. at 838.
21. 858 P.2d 1092 (Wash. 1993); see Final Brief of Appellant at 8.
22. Id. at 1103. The court in Furman reached its holding by reasoning that “if these statutes authorize imposition of all adult penalties against juveniles transferred to adult court, a child as young as 8 could theoretically be tried as an adult and sentenced to death or life without parole for aggravated murder.” Id. at 1102.
23. Id. at 1102 (quoting Thompson, 487 U.S. at 857-58 (O’Connor, J., concurring)).
Stanford v. Kentucky,\textsuperscript{25} went on to hold that capital punishment passes constitutional muster when it is applied to a person who was at least sixteen years old at the time of the offense.\textsuperscript{26} Because Conyers was sixteen when he murdered Kimberly Sims, the court reasoned that the imposition of the death penalty was constitutionally permissible in his case, and he was thus precluded from raising the issue.\textsuperscript{27} Finally, after reviewing the record and the sentence imposed on Conyers, the court concluded that the death sentence was neither excessive nor disproportionate to penalties imposed in similar cases.\textsuperscript{28} Thus, the supreme court affirmed the judgment of the trial court and Conyers remains on death row awaiting execution of "justice."

B. Juvenile Capital Punishment in South Carolina

In South Carolina the death penalty has been viewed as a legitimate and necessary punishment since the arrival of the first colonists.\textsuperscript{29} Even though the state's acceptance of this form of punishment does not render South Carolina different from many other jurisdictions, "there are indications that South Carolina has been more fervent than other states in imposing and carrying out death sentences."\textsuperscript{30} South Carolina holds the record for legally executing the youngest person in the history of the United States, George Junius Stinney, Jr., a black child found guilty for the murder of an eleven-year-old white girl in Clarendon County.\textsuperscript{31} Stinney was executed on June 16, 1944, at the age of fourteen.\textsuperscript{32}

Sentencing minors to death did not cease after the Stinney execution. On January 10, 1986, James Terry Roach was executed in South Carolina's electric chair\textsuperscript{33} after having pled guilty "to two counts of murder, criminal sexual conduct, armed robbery, and kidnapping."\textsuperscript{34} Roach was under eighteen when he committed these offenses.\textsuperscript{25} On appeal to the Fourth Circuit, James Terry Roach, seeking

\textsuperscript{25} 492 U.S. 361 (1989).
\textsuperscript{26} Conyers, 326 S.C. at 266, 487 S.E.2d at 183.
\textsuperscript{27} Id. Specifically, the Court stated that "[i]t is well-settled that the constitutionality of a statute may not be questioned by one whose rights are not invaded and injuriously affected thereby." Id.
\textsuperscript{28} Id. at 267, 487 S.E.2d 183. Section 16-3-25 of the South Carolina Code mandates that the Supreme Court of South Carolina review cases involving imposition of the death penalty. S.C. CODE ANN. § 16-3-25(A) (Law. Co-op. 1976). Among the factors to be considered by the court is "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." Id. § 16-3-25(C).
\textsuperscript{29} Bruce L. Pearson, Why the Death Penalty is an Issue, in THE DEATH PENALTY IN SOUTH CAROLINA 9, 9 (Bruce L. Pearson ed., 1981).
\textsuperscript{30} Id.
\textsuperscript{31} Id. at 9-10.
\textsuperscript{32} Id. This Note's opening quotation describes Stinney's execution.
\textsuperscript{33} Abolition Now, Children Sentenced to Death (last modified Mar. 12, 1998) <http://www.abolition-now.com/minors.html>.
\textsuperscript{34} Roach v. Martin, 757 F.2d 1463, 1467 (4th Cir. 1985).
\textsuperscript{35} Id. at 1469.
federal habeas corpus relief, argued that the South Carolina Supreme Court failed to satisfy the comparative proportionality review set forth in section 16-3-25(C) of the South Carolina Code.\(^{36}\) Roach challenged the South Carolina Supreme Court's review on the ground that the court was unable to compare defendant's sentence with similar cases because Roach was the first to be tried under the new death sentence statute.\(^{37}\) However, the Fourth Circuit Court of Appeals held that the sentence imposed on Roach for the crimes committed as a juvenile was appropriate because the Supreme Court of South Carolina had followed the review mandated in the statute.\(^{38}\)

In his last appeal to the Supreme Court, Roach requested a writ of certiorari on "the important question whether an accused may, consistent with the Eighth and Fourteenth Amendments, be sentenced to death for a capital offense he committed while a juvenile."\(^{39}\) At the time Roach was executed, the United States Supreme Court had yet to establish minimum age requirements for capital punishment. Furthermore, South Carolina statutes allowed the transfer of a juvenile accused of murder or criminal sexual conduct to the general sessions court\(^{40}\) and provided for the imposition of the death penalty without regard to the offender's age.\(^{41}\) Roach's petition for a writ of certiorari was denied by the United States Supreme Court, and South Carolina subsequently carried out the execution.\(^{42}\) The issue of the constitutionality of juvenile capital punishment was not raised again in South Carolina until Conyers.

C. The United States Supreme Court's Bright-Line Rule\(^{43}\)

In the United States, the death penalty was an accepted form of punishment

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36. Id. at 1481-82; see also S.C. CODE ANN. § 16-3-25(C) (Law. Co-op. 1976) (outlining the South Carolina Supreme Court's review in death penalty cases).

37. Roach, 757 F.2d at 1482.

38. Id. Additionally, in State v. Shaw, 273 S.C. 194, 255 S.E.2d 799 (1979), the South Carolina Supreme Court relied on a United States Supreme Court case which established that in order to prevent the imposition of the death penalty in an arbitrary and capricious manner, a statute had to be drafted to provide "for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information." Id. at 202, 255 S.E.2d at 803 (quoting Gregg v. Georgia, 428 U.S. 153, 195 (1976)). In South Carolina, the requirements of a bifurcated proceeding were incorporated into the Code. See S.C. CODE ANN. § 16-3-25(C) (Law. Co-op. 1976).


43. As a practical matter, the Court's decisions in Thompson v. Oklahoma, 487 U.S. 815 (1988), and Stanford v. Kentucky, 492 U.S. 361 (1989), were bright-line rules setting minimum ages for juvenile capital punishment. However, the rationale behind those rules is more fragile than the term "bright-line" would tend to suggest.
long before the adoption of the Constitution.\textsuperscript{44} However, as applied to juveniles, the death penalty has generated much heated discussion throughout the years. The controversy has led to closely divided decisions on the subject by the United States Supreme Court.\textsuperscript{45} Although the Court did not directly confront the issue until \textit{Thompson v. Oklahoma},\textsuperscript{46} the Court had earlier expressed concern over the imposition of juvenile capital punishment.\textsuperscript{47}

In 1988 the Supreme Court held in \textit{Thompson} that the execution of criminals younger than sixteen at the time of the offense violates the Eighth Amendment's prohibition of cruel and unusual punishment.\textsuperscript{48} William Wayne Thompson was convicted of first-degree murder and sentenced to death for participating in the shooting of his former brother-in-law, which took place when the defendant was only fifteen years old.\textsuperscript{49} In a 4-1-3 split decision, the Court "merely agreed that it could not agree."\textsuperscript{50} To determine whether the imposition of the death penalty violated the Eighth Amendment when a defendant was fifteen at the time the crime was committed, the \textit{Thompson} plurality applied the \textit{Trop v. Dulles}\textsuperscript{51} test, which relies on "the 'evolving standards of decency that mark the progress of a maturing society'"\textsuperscript{52} to provide meaning to ambiguous statutes. The plurality considered the relevant state statutes, the behavior of juries, and the views of various organizations and countries on the acceptability of juvenile capital punishment before concluding that sentencing a child under the age of sixteen would offend civilized standards of decency.\textsuperscript{53} The plurality noted that such organizations as the American Bar

\textsuperscript{44} Hanging was a very common form of punishment at the time the Constitution was ratified. \textit{See} Norris, \textit{supra} note 42, at 3 & n.18.

\textsuperscript{45} \textit{See infra} notes 50 & 70 and accompanying text.

\textsuperscript{46} 487 U.S. 815 (1988).

\textsuperscript{47} In \textit{Gregg v. Georgia}, 428 U.S. 153 (1976), the Court held that the death penalty did not violate the Eighth Amendment; however, it recognized that capital punishment cannot be imposed in an arbitrary or capricious manner. \textit{Id.} at 195. The Court noted that for capital punishment to pass constitutional muster, the jury had to evaluate the criminal and the circumstances of the crime prior to making a sentence recommendation. \textit{Id.} at 197. The jury was to consider "any special facts about this defendant that mitigate against imposing capital punishment (e.g., his youth, the extent of his cooperation with the police, his emotional state at the time of the crime)." \textit{Id.} (emphasis added); \textit{see also} Lockett v. Ohio, 438 U.S. 586, 604 (1978) (recognizing the importance of the jury's consideration of mitigating factors when deciding whether to sentence a defendant to death).

In \textit{Eddings v. Oklahoma}, 455 U.S. 104 (1982), the Supreme Court overturned the death sentence imposed on a sixteen-year-old criminal because the trial court failed to consider mitigating circumstances. \textit{Id.} at 117. The Court reasoned that "when the defendant was 16 years old at the time of the offense there can be no doubt that evidence of a turbulent family history, of beatings by a harsh father, and of severe emotional disturbance is particularly relevant." \textit{Id.} at 115.

\textsuperscript{48} \textit{Thompson}, 487 U.S. at 838.

\textsuperscript{49} \textit{Id.} at 818-19.


\textsuperscript{51} 356 U.S. 86 (1958).

\textsuperscript{52} \textit{Thompson}, 487 U.S. at 821 (quoting \textit{Trop}, 356 U.S. at 101).

\textsuperscript{53} \textit{Thompson}, 487 U.S. at 823-38.
Association and the American Law Institute oppose juvenile capital punishment.\footnote{54}

In addition to applying the "standard of decency" test, the plurality also recognized its previous endorsement of the proposition that less culpability is attributed to a crime committed by a juvenile than to one carried out by an adult.\footnote{55} As a result, the Court recognized that executing juveniles would not further the retributive goals of capital punishment.\footnote{56} Because juveniles often act out of impulse and seldom contemplate and evaluate the consequences of their actions, the plurality also emphasized that the deterrent purpose of the death penalty was not furthered by the execution of juveniles for capital crimes.\footnote{57}

In her concurring opinion, Justice O'Connor agreed with the plurality that Thompson's death sentence violated the Eighth Amendment and should thus be reversed.\footnote{58} Furthermore, she perceived the national standard of decency as prohibiting the imposition of a death sentence on a fifteen-year-old defendant under a statute that specified no minimum age for the imposition of capital punishment.\footnote{59} Justice O'Connor implied that such statutes were unconstitutional by noting "that petitioner and others who were below the age of 16 at the time of their offense may not be executed under the authority of a capital punishment statute that specifies no minimum age at which the commission of a capital crime can lead to the offender's execution."\footnote{60}

In Stanford v. Kentucky\footnote{61} the Supreme Court answered the question that was left unanswered in Thompson: Does the imposition of capital punishment for a crime committed at the age of sixteen or seventeen constitute cruel and unusual punishment under the Eighth Amendment? In Stanford the Court consolidated the cases of Kevin Stanford, sentenced in Kentucky for rape and murder, and Heath Wilkins, sentenced in Missouri for stabbing a cashier to death while committing a robbery.\footnote{62} The defendants were seventeen and sixteen years old, respectively, at the time they committed the crimes.\footnote{63} The majority opinion began its analysis of the constitutionality of juvenile capital punishment by noting that this form of sanction existed at the time the Eighth Amendment was adopted.\footnote{64} The majority agreed with
the Thompson plurality that it should consider objective indications reflecting the evolving standard of decency in determining whether the sentencing of sixteen and seventeen year old offenders violates the Eighth Amendment. However, unlike the plurality in Thompson, the majority disregarded the statements by the various professional organizations and determined the standards of decency by looking solely to the conceptions "of modern American society as a whole." The Court concluded that no national consensus classifies the juvenile death penalty as cruel and unusual punishment. The majority also dismissed the reasoning in Thompson that the reluctance of juries to impose the death penalty on individuals yet to reach the age of eighteen establishes a national consensus against juvenile capital punishment. Finally, a plurality of justices completely disregarded the use of "socioscientific" evidence such as the juvenile's moral responsibility that had been presented by the Thompson plurality in support of the idea that juvenile capital punishment does not further the death penalty's retributive and deterrent purposes.

Although Justice O'Connor concurred in the judgment, she refused to join a plurality of justices who rejected the application of a proportionality analysis. Justice O'Connor revised her opinion in Thompson in which she had implied that a state statute was unconstitutional when it specified no minimum age for the imposition of the death penalty. Justice O'Connor's concurrence in Stanford has been interpreted as saying that "such specificity [of age in death penalty statutes] is not required if it is clear that no national consensus prohibits the juvenile death penalty."

With the holdings of Thompson and Stanford, the Supreme Court established that it was cruel and unusual punishment if the criminal sentenced to death was under the age of sixteen at the time of the capital offense. Many states have followed this bright-line rule set by the United States Supreme Court; as a result,

punishment to be imposed on anyone over the age of 7." Stanford, 492 U.S. at 368.

65. Stanford, 492 U.S. at 369.
66. Id.
67. Id. at 373.
68. Id. at 374.
69. Id. at 378.
70. Id. at 382 (O'Connor, J., concurring in part & concurring in judgment).
73. See, e.g., State v. Jackson, 918 P.2d 1038, 1042-43 (Ariz. 1996) (holding that imposing the death penalty upon a sixteen-year-old defendant was not cruel and unusual punishment, even though Arizona's death penalty statute did not specify a minimum age for execution); Allen v. State, 636 So. 2d 494, 497 (Fla. 1994) (overturning a death penalty sentence on a fifteen year old); State v. Richardson, 923 S.W.2d 301, 329 (Mo. 1996) (holding that sentencing a sixteen-year-old defendant to death was not cruel and unusual punishment); Wright v. Commonwealth, 427 S.E.2d 379, 383 (Va. 1993) (concluding that imposing the death penalty on a seventeen-year-old defendant did not constitute cruel and unusual punishment because it did not violate society's evolving standards of decency); cf. State v. Furman, 858 P.2d 1092 (Wash. 1993) (relying on Thompson in holding that Washington's death penalty statute could not be construed to authorize imposition of the death penalty for a crime
the number of criminals on death row awaiting punishment for crimes committed under the age of eighteen is steadily increasing. In Conyers the Supreme Court of South Carolina, like other states, adopted the reasoning in Stanford and held that sentencing a sixteen-year-old juvenile offender did not violate the Eighth Amendment.

III. ANALYSIS

The constantly changing interpretation of legislation governing juvenile capital punishment cannot be dispositive of society’s standards of decency. Because of the uncertainty embedded in the way officials calculate modern decency standards, state perspectives on the death penalty as applied to minors cannot alone be indicative of a national consensus. Furthermore, the inherent difference in blameworthiness between adults and juveniles makes capital punishment an excessive form of punishment when applied to minors. Yet, the majority in Stanford refused to take into account the latter factor and considered only the states’ statutes in determining what constitutes society’s standard of decency.

A. Juvenile Capital Punishment and Society’s Evolving Standards of Decency

Even though a state has the power to punish its citizens for wrongs committed, the punishment inflicted must pass constitutional muster. While the Eighth Amendment provides that cruel and unusual punishment cannot be imposed, the constitutional clause “is not susceptible of precise definition.” In Trop v. Dulles the Court attempted to set a standard of what constitutes cruel and unusual punishment by holding that “[t]he [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.” While Trop provides a guide for courts to follow in establishing a constitutional standard.

74. At the close of 1983, 33 individuals were on death rows for crimes committed as juveniles. By August 18, 1997, 58 juvenile offenders were waiting to be put to death. Victor L. Streib, Current Death Row Inmates Under Juvenile Death Sentences (visited Jan. 21, 1998) <http://prince.essential.org/dpjc/juvchar.html>.


76. U.S. CONST. amend. VIII.

77. Furman v. Georgia, 408 U.S. 238, 258 (1972) (Brennan, J., concurring). The Supreme Court has expressed the difficulties in defining what constitutes cruel and unusual punishment in several cases. In Wilkerson v. Utah, 99 U.S. 130 (1879), the Court stated that “[d]ifficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted.” Id. at 135-36. Subsequently, in Trop v. Dulles, 356 U.S. 86 (1958), the Court once again observed that “[t]he exact scope of the constitutional phrase ‘cruel and unusual’ has not been detailed by this Court.” Id. at 99.


79. Id. at 101.
minimum, it failed to specifically set forth how to determine the modern standards of decency. Thus, the application of the test was left open to different interpretations.

Courts have considered various indicators that reflect contemporary societal values in determining the constitutionality of a form of punishment. Among these are legislative response, sentencing recommendations by juries, and international opinion. While the United States Supreme Court has considered all three attributes when deciding on the constitutionality of the death penalty in various cases, the Stanford majority, on which the South Carolina Supreme Court relied in Conyers, refrained from considering the opinions of organizations and other countries on the decency of juvenile capital punishment. Rather, the majority in Stanford relied solely on legislative judgments as the basis of society's general acceptance of imposing the death penalty on juveniles.

Relying on "statutes passed by society’s elected representatives," the Court concluded that the national consensus favors allowing juvenile capital punishment. However, the Stanford approach presents two major problems. First, the analysis errs by relying exclusively on state death penalty statutes to measure society’s standard of decency. Second, by ignoring other countries’ and entities’ views on juvenile capital punishment, the Court did not get a complete view of the modern standard of decency.

1. Inadequacy of Determining the Standard of Decency by Sole Reliance on Legislative Attitudes

When considering whether imposing the death penalty on juveniles is in harmony with modern standards of decency, reliance on states’ death penalty


81. See Stanford v. Kentucky, 492 U.S. 361, 384 (1989) (Brennan, J., dissenting) ("The views of organizations with expertise in relevant fields and the choices of governments elsewhere in the world also merit our attention as indicators whether a punishment is acceptable in a civilized society."); Thompson v. Oklahoma, 487 U.S. 815, 830 (1988) ("The conclusion that it would offend civilized standards of decency to execute a person who was less than 16 years old at the time of his or her offense is consistent with the views that have been expressed by . . . other nations that share our Anglo-American heritage . . . ."); Enmund v. Florida, 458 U.S. 782, 801 (1982) (holding that the death penalty as imposed on defendant was precluded by the Eighth Amendment because only eight jurisdictions in the nation authorized imposition of capital punishment in such a case); Gregg v. Georgia, 428 U.S. 153, 179, 181 (1976) (noting that "[t]he most marked indication of society's endorsement of the death penalty for murder is the legislative response to Furman" but also noting that "[t]he jury also is a significant and reliable objective index of contemporary values because it is so directly involved").

82. Stanford, 492 U.S. at 369 n.1 ("We emphasize that it is American conceptions of decency that are dispositive, rejecting the contention of petitioners and their various amici . . . that the sentencing practices of other countries are relevant.").

83. Id. at 370-71.

84. Id. at 370.

85. Id. at 380.
statutes can lead to error. The split decisions in *Thompson* and *Stanford* emphasized that calculating whether the majority of states allow juveniles below the age of eighteen to be sentenced to death can lead to subjective and inconsistent results that do not necessarily reflect reality. At the time *Thompson* was decided, fourteen states did not authorize capital punishment regardless of the criminal's age, and nineteen states authorized it but stated no minimum age requirements. 86 However, the eighteen states that included a minimum age in their capital punishment statutes mandated that the offender be at least sixteen years old when the offense was committed. 87 Looking at those figures, the *Thompson* plurality concluded that imposing the death sentence on a juvenile under sixteen was against the national consensus. 88

Of the thirty-seven states that permitted capital punishment at the time *Stanford* was decided, fifteen of them precluded it for offenders younger than seventeen, and twelve declined to impose the punishment on offenders younger than eighteen. 89 In reaching this conclusion, the majority failed to take into consideration the fifteen states in which capital punishment was not authorized at all. 90 Instead, the plurality focused on the ratio of the number of states permitting the imposition of capital punishment to the number of states setting different age minimums. 91 The dissenting Justices in *Stanford* reached the opposite conclusion by considering the states that prohibited the death penalty. 92 From the discrepancies of those decisions, it becomes

86. *Thompson*, 487 U.S. at 826-27. At the time *Thompson* was decided, the following thirteen states, as well as the District of Columbia, did not authorize capital punishment: Alaska, District of Columbia, Hawaii, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, New York, North Dakota, Rhode Island, West Virginia, and Wisconsin. Id. at 826-28 n.25. Furthermore, of the thirty-seven states allowing imposition of the death penalty, the following nineteen set no minimum age requirement in their statutes: Alabama, Arizona, Arkansas, Delaware, Florida, Idaho, Louisiana, Mississippi, Missouri, Montana, Oklahoma, Pennsylvania, South Carolina, South Dakota, Utah, Vermont, Virginia, Washington, and Wyoming. Id. at 828 n.26.

87. Id. at 829.

88. In reaching its conclusion, the plurality relied on the thirty-two states that either did not allow juvenile capital punishment or allowed the punishment only for individuals that were at least sixteen years of age. Id.


90. By the time *Stanford* was decided, Vermont, which had previously allowed the death penalty and set no minimum age for its imposition, had rejected the punishment altogether. Id. at 384 n.1 (Brennan, J., dissenting).

91. Id. at 370-74.

92. Id. at 384 (Brennan, J., dissenting). The dissenting Justices reasoned that when the 12 states with statutes setting a minimum age at which an individual could be sentenced to death were added to the 15 states that did not permit the imposition of the death penalty, a total of 27 states had concluded that an individual under the age of eighteen should not be sentenced to die. Id. Moreover, the dissenting Justices noted that "[a] further three States explicitly refuse to authorize sentences of death for those who committed their offense when under 17, making a total of 30 states that would not tolerate the execution of petitioner Wilkins." Id. (citation omitted).

The dissent's calculation was criticized by the majority as follows: "The dissent again works its statistical magic by refusing to count among the States that authorize capital punishment of 16- and 17-year-old offenders those 19 States that set no minimum age in their death penalty statute, and
evident that the issue of national consensus depends on the numbers applied to the ratios. Both the majority and the dissent in *Stanford* applied the calculation that validated their decision. However, by doing so, they unknowingly illustrated the difficulties in establishing modern standards of decency, particularly when the Court solely relies on legislative judgments to determine what constitutes "decenty."93

When the justices solely rely on legislative judgments to analyze the constitutionality of imposing the death penalty on juveniles, the resulting standard is uncertain. As one commentator concluded, "Apparently, such punishment will always pass Eighth Amendment analysis if the powerful political blocs in a slight majority of the states can persuade the legislature to enact juvenile death penalty statutes."94 Since the *Stanford* decision, several state statutes have changed. Today, twelve states and the District of Columbia prohibit the death penalty completely,95 thirteen states and Congress prohibit the imposition of capital punishment on offenders younger than eighteen,96 three states have set the age minimum for capital punishment at seventeen,97 fifteen states have set no minimum age,98 and the specifically permit 16- and 17-year-olds to be sentenced as adults." *Id.* at 371 n.3.

93. The regional disparities in legislative judgments further reflect a lack of national consensus on the issue of the juvenile death penalty. In *Thompson* "not one Justice recognized that the states that still permit juvenile executions are generally concentrated in two large regions of the country, the South and the West." Dominic J. Ricotta, *Eighth Amendment—The Death Penalty for Juveniles: A State's Right or a Child's Injustice?,* 79 J. CRIM. L. & CRIMINOLOGY 921, 942 (1988). The southern states that may allow the imposition of death sentences on persons younger than 17 are Alabama, Arkansas, Florida, Louisiana, Mississippi, Oklahoma, South Carolina, and Virginia. *See infra* notes 96-99. North Carolina, Georgia, and Texas have set the minimum age for capital punishment at 17. *See infra* note 97. In the West, Arizona, Idaho, Montana, South Dakota, Utah, Washington, and Wyoming may allow individuals as young as 16 years of age to be executed. *See infra* notes 98-99. Such a regional concentration in favor of juvenile capital punishment is more evidence of the lack of a national consensus.

94. Lanier, *supra* note 72, at 1107-08.


remaining seven states have set the minimum age at sixteen.\textsuperscript{99}

If the Court were to follow the approach employed by the dissent in \textit{Stanford}, a national consensus in favor of executing juveniles would not be reached. Indeed, the majority of states, when taking into account those that have banned capital punishment completely, prohibit the death penalty for offenders younger than seventeen years of age.\textsuperscript{100} However, following the Court's approach, the changes that the death penalty statutes have undergone since \textit{Stanford} reflect a slightly different national consensus. At the time \textit{Stanford} was decided, approximately forty states precluded capital punishment on offenders younger than seventeen,\textsuperscript{101} but only approximately a third of the states declined to impose it on seventeen-year-old defendants.\textsuperscript{102} Today, out of the thirty-eight states that permit the death penalty, sixteen states and Congress have enacted statutes that prohibit the imposition of a death sentence on any offender under the age of seventeen.\textsuperscript{103} Thus, almost half the states that permit death sentences would view the sentencing of Robert Conyers as impermissible. Even though this number does not establish the national consensus the \textit{Stanford} court requires, it is clear that the national consensus standard has become "a battle of the interpretation of legislation and statistics."\textsuperscript{104} In short, only a couple more state legislatures would have to enact legislation so that a national consensus of states would then prohibit the sentence of Robert Conyers. The approach endorsed by a plurality of justices in \textit{Stanford} results in too much uncertainty because it is strictly limited to the changing views of the state legislatures and overlooks the important views of other countries and legal entities.

\textsuperscript{99} ALA. CODE § 12-15-34.1 (Supp. 1997); IND. CODE ANN. § 35-50-2-3(b) (Michie 1998); KY. REV. STAT. ANN. § 640.040 (Michie Supp. 1996); LA. CHILDREN'S CODE ANN. art. 305 (West Supp. 1997); LA. CODE CRIM. PROC. ANN. art. 905.3 (West 1997); MO. CODE ANN. § 565.020 (West Supp. 1998); NEV. REV. STAT. ANN. § 176.025 (Michie 1997); WYO. STAT. ANN. § 6-2-101(b) (Michie 1997); see also State v. Stone, 355 So. 2d 362 (La. 1988) (finding that the statutory scheme, which allowed defendants under the age of 16 to be tried as adults, did not evidence a deliberate attempt to allow death sentence for those under 16 years old).

\textsuperscript{100} A total of 16 states do not permit capital punishment of 16 year olds. See \textit{supra} notes 96-97 and accompanying text. If that figure is added to the 12 states and the District of Columbia that prohibit the death penalty, it becomes evident that almost 55% of the states would not allow offenders like Robert Conyers to be executed.

\textsuperscript{101} Out of the 37 states that permitted the imposition of the death penalty, 15 of them declined to impose it on 16 year olds. \textit{Stanford} v. Kentucky, 492 U.S. 361, 370 (1989).

\textsuperscript{102} See id.

\textsuperscript{103} See \textit{supra} notes 96-97.

\textsuperscript{104} Ricotta, \textit{supra} note 93, at 941.
2. Modern Standard of Decency Should Be Based on Universal Conceptions of What Constitutes Cruel and Unusual Punishment

In concluding that the attitudes of the states toward the juvenile death penalty did not establish a sufficient degree of national consensus to label the practice cruel and unusual, the South Carolina Supreme Court followed the plurality’s analysis in Stanford that overlooked the opinions of other countries and professional entities in the United States.

a. International Opinion

The Stanford decision breaks with precedent by ignoring international opinion and strongly undermines the conclusion that the plurality reached in Thompson. In Enmund v. Florida105 the Court relied on Coker v. Georgia106 in accepting international opinion as a relevant factor when determining the constitutionality of the death penalty.107 Looking at its previous decision in Coker, the Court noted that its “judgment ‘should be informed by objective factors to the maximum possible extent.’” Accordingly, the Court looked to the historical development of the punishment at issue, legislative judgments, international opinion, and the sentencing decisions juries have made before bringing its own judgment to bear on the matter.”108 In Thompson the plurality similarly established the importance of international opinion in the context of juvenile capital punishment.109 The plurality emphasized that of the countries still permitting the imposition of capital punishment, most do not allow it to be imposed on juveniles; even for adults, these countries seldom permit capital punishment.110

The vast international concern about the subject is reflected in the latest adoption of the United Nations Convention on the Rights of the Child on November 20, 1989.111 The convention provided that the imposition of capital punishment and life imprisonment without the possibility of parole should not be allowed for

108. Id. at 788-89 (quoting Coker, 433 U.S. at 592) (emphasis added) (citation omitted). The Court emphasized the importance of other countries’ opinions by noting that “[t]he climate of international opinion concerning the acceptability of a particular punishment’ is an additional consideration which is ‘not irrelevant.’” Id. at 796 n.22 (quoting Coker, 433 U.S. at 596 n.10). Thus, the Court decided that it was worth considering that the felony murder doctrine had been abolished in several countries and restricted in others. Id.
109. The plurality noted that the death penalty had been abolished entirely in Australia, West Germany, France, Portugal, the Netherlands, and in all Scandinavian countries. Thompson v. Oklahoma, 487 U.S. 815, 830-31 (1988).
110. Id.

https://scholarcommons.sc.edu/sclr/vol49/iss5/8
offenders under eighteen years of age.\textsuperscript{112} Even though almost every country ratified the convention, the United States refused and decided to "retain the flexibility and authority to impose sentences in accordance with the tenets of its citizens and elected officials."\textsuperscript{113} The 1989 United Nations Convention was not the first source of international law on the issue of juvenile capital punishment. In 1976 the International Covenant on Civil and Political Rights\textsuperscript{114} (ICCPR) became binding on the nations that ratified it.\textsuperscript{115} The covenant contained "a prohibition against the execution of persons who committed crimes below the age of eighteen."\textsuperscript{116} Although the United States signed the Covenant in 1977, it refused to ratify the Covenant; as a result, "the United States is not bound to enforce the provisions of the treaty domestically."\textsuperscript{117}

Currently, most nations have completely outlawed capital punishment for ordinary crimes, and the countries that continue to impose the death penalty do not execute juveniles.\textsuperscript{118} "As of 1989, thirty-four countries [had] abolished the death penalty for all crimes,"\textsuperscript{119} eighty-four limit the punishment to individuals over the age of eighteen by their own laws or by their ratification of the ICCPR,\textsuperscript{120} and nine retain capital punishment in their statutes but have abolished it in practice.\textsuperscript{121} If international conceptions were included in determining what constitutes decency, it becomes evident that juvenile capital punishment is not an accepted practice for punishing offenders.

In \textit{Trop v. Dulles} \textsuperscript{122} the Supreme Court defined cruel and unusual punishment as one that is contrary to the "standards of decency that mark the progress of a maturing society."\textsuperscript{123} However, the Court did not limit the definition of "society" to \textit{American} society.\textsuperscript{124} A plurality of justices in \textit{Stanford}, faced with the liberty to define the boundaries of society, overlooked previous interpretations that

\begin{enumerate}
\item \textsuperscript{112} \textit{Id.}
\item \textsuperscript{113} \textit{Id.} at 700.
\item \textsuperscript{114} This covenant, along with other international covenants on Economics and Social and Cultural Rights, constitute the International Bill of Human Rights. The articles of the ICCPR were intended to address fundamental human rights such as the right to be free from torture and slavery. David Heffeman, Comment, \textit{America the Cruel and Unusual? An Analysis of the Eighth Amendment Under International Law}, 45 CATH. U. L. REV. 481, 482 n.4 (1995).
\item \textsuperscript{115} Norris, \textit{supra} note 42, at 11.
\item \textsuperscript{116} \textit{Id.} at 12.
\item \textsuperscript{117} \textit{Id.} at 11.
\item \textsuperscript{118} \textit{Id.} at 9-10.
\item \textsuperscript{120} \textit{Id.} at 423-24. For a listing of these 84 countries, see \textit{id.} at 423-24 n.146.
\item \textsuperscript{121} \textit{Id.} at 424. For the countries that, as of 1989, had not executed anyone in the previous ten or more years, see \textit{id.} at 424 n.148.
\item \textsuperscript{122} 356 U.S. 86 (1958).
\item \textsuperscript{123} \textit{Id.} at 101.
\item \textsuperscript{124} \textit{Id.} at 102.
\end{enumerate}
encompassed international opinions. However, because juvenile capital punishment and the death penalty in general are issues that concern every country in the world, international opinion should be considered when analyzing what constitutes decency in today’s society. Furthermore, because of the uncertainty created when only state legislative judgment is considered in determining whether juvenile capital punishment meets the modern standard of decency test, international opinion should be consulted by the courts. Considering the views of other countries would certainly indicate that the juvenile death penalty is not an accepted form of punishment in civilized nations.

b. Domestic Professional Organizations

The standards of decency of today’s society are also reflected in the views of professional organizations. The plurality in Thompson apparently afforded these opinions great weight. For example, the plurality took note that the American Bar Association and the American Law Institute have both “formally expressed their opposition to the death penalty for juveniles.” The American Law Institute has stated that

there is at least one class of murder for which the death sentence should never be imposed. This situation is murder by juveniles. The Institute believes that civilized societies will not tolerate the spectacle of execution of children, and this opinion is confirmed by the American experience in punishing youthful offenders. . . . The Institute debated a motion to lower the age of exclusion to 14 but rejected that proposition on the ground that, however dangerous some children may be, the death penalty should be reserved for mature adults.

While the plurality in Thompson greatly relied on both the practices of other countries and the views of professional organizations, the Stanford majority disregarded these views when deciding the constitutionality of the juvenile death penalty for offenders over sixteen years old. By following the Stanford plurality and refusing to consider the views of organizations and other countries, the South Carolina Supreme Court in Conyers was “unable to accurately gauge ‘evolving standards of decency.’” Because societal norms of decency are constantly changing, courts should look beyond merely counting the shifting number of states in favor of executing juveniles when determining a national consensus. Divining a societal standard of decency is difficult enough without disregarding the opinions

127. Id.
128. MODEL PENAL CODE § 210.6 commentary at 133 (1980).
of professional organizations and the international community.

B. Proportionality Test as Applied to Juvenile Capital Punishment

Although the judgments of legislatures have always been taken into account when courts consider the constitutionality of juvenile capital punishment, "it is for [the Court] ultimately to judge whether the Eighth Amendment permits imposition of the death penalty." 130 When deciding the constitutionality of the death penalty as a form of punishment, the Court in Gregg v. Georgia 131 concluded that "public perceptions of standards of decency with respect to criminal sanctions are not conclusive." 132 Instead, the Court required that the penalty had to be in accord with "the dignity of man," 133 which meant that the punishment could not be excessively unproportional to the severity of the crime committed. In Thompson the plurality retained the proportionality test and emphasized that

[i]n making that judgment, we first ask whether the juvenile’s culpability should be measured by the same standard as that of an adult, and then consider whether the application of the death penalty to this class of offenders ‘measurably contributes’ to the social purposes that are served by the death penalty. 134

Because of the problems embedded in solely relying on the standard of decency test, the proportionality test should be employed by courts to weigh the harshness of the penalty against the culpability of the offender. By failing to apply this test, the Stanford plurality placed too much emphasis on offenders’ adult-like acts and overlooked both the lack of contribution that the sentencing has on the retributive and deterrent goals of the death penalty 135 and the protection that those juvenile offenders are owed by the judicial system. Courts have wrongly assumed that juveniles, like Robert Conyers, have undergone a premature "rite of passage" and become adults simply because they committed an "adult" crime.

130. Thompson, 487 U.S. at 833 (quoting Enmund v. Florida, 458 U.S. 782, 797 (1982)).
132. Id. at 173 (emphasis added).
133. Id. (quoting Trop v. Dulles, 356 U.S. 86, 100 (1958)).
134. Thompson, 487 U.S. at 833.
135. The death penalty serves "two principal social purposes: retribution and deterrence." Gregg v. Georgia, 428 U.S. 153, 183 (1976). The retributive purpose of capital punishment is tailored to the idea that society needs to express its outrage toward the offender and vindicate the wrongs committed by sentencing the offender to die. Id. The deterrent value of the death penalty, on the other hand, "is part of the nature of man" in that it is the instinct embedded in each individual that guides us to promote "the stability of a society governed by law." Id. (quoting Furman v. Georgia, 408 U.S. 238, 308 (1972) (Stewart, J., concurring)).
1. Culpability of Juveniles

Even though juveniles may commit otherwise capital offenses, they deserve less punishment because juveniles do not have the same degree of culpability as adult offenders. Until the Stanford decision, the Court had recognized this reality. In Eddings v. Oklahoma,136 for example, the Court remarked that "[o]ur history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults."137 However, a plurality of justices in Stanford rejected the proportionality test and refused to consider whether juvenile capital punishment furthered the goals of the death penalty because it held that "[t]he battle must be fought . . . on the field of the Eighth Amendment; and in that struggle socioscientific, ethicoscientific, or even purely scientific evidence is not an available weapon."138 The plurality justified its rejection of the proportionality test by noting that employing the test is tantamount to replacing "judges of the law with a committee of philosopher-kings."139 However, by making such an argument, the plurality overlooked at least one important factor that would lead the court to conclude juvenile offenders should not be held to the same level of responsibility for their crimes as adults. Juvenile crime is not exclusively the offender's fault. Studies of homicidal adolescents have shown that these juveniles are the product of the unstable and violent environment in which they are raised.140 To sentence them to death means punishing them for the collective wrongs of society.

Although a plurality of justices in Stanford recognized that some individualized consideration is necessary for juvenile capital punishment to meet constitutional muster, they refused to employ the proportionality test.141 Instead, the plurality concluded that the criminal justice system provides such individualized testing when age is considered as a mitigating factor during the sentencing phase.142 However, consideration of youthfulness during the sentencing phase is insufficient to protect juveniles from the unconstitutional imposition of the death penalty. Indeed, the jury may not even consider the defendant's age particularly important. First, the juvenile may have reached the age of majority by the time of trial. Furthermore, the jury might mistakenly conclude that because the defendant is in an adult court rather than a juvenile court, the judge has already taken youth into consideration. The plurality in Stanford was aware of the importance of

137. Id. at 115-16; see also Maria M. Homan, The Juvenile Death Penalty: Counsel's Role in the Development of a Mitigation Defense, 53 BROOK. L. REV. 767, 782 (1987) ("A minor is simply less responsible than an adult and therefore a punishment imposed on a juvenile must recognize this diminished responsibility.").
139. Id. at 379.
140. Homan, supra note 137, at 769.
141. Stanford, 492 U.S. at 375.
142. Id.
individualized consideration when applying the death penalty, and yet it disregarded the proportionality test previously adopted by the plurality in Thompson. If the proportionality test had been applied in Stanford, the death penalty for juveniles like Robert Conyers would be deemed disproportionate because minors are generally less culpable for their crimes than adults.

2. **Juveniles and the Retributive and Deterrent Goals of Capital Punishment**

Juvenile capital punishment lacks the penological justification embedded in the death penalty. The death penalty is carried out for the purpose of retribution and deterrence; however, those purposes are not furthered when capital punishment is imposed on minors. Even though retribution is a constitutionally permissible purpose for the imposition of the death penalty, this justification is less palatable when directed toward a child. Retribution serves the purpose of restoring "balance on an imaginary tote board of social rights and wrongs." Because society is in part to blame for the wrongs committed by juveniles, sentencing those minors to death "does less to redress the social imbalance created by their crimes." The retributive justification for capital punishment thus lacks appeal when a child is the subject of the ultimate punishment.

The death penalty's goal of general deterrence relies on the notion that executions of criminal offenders will deter other potential offenders from committing similar crimes. Deterrence has been the subject of debate because its impact remains unverified. Capital punishment serves as a deterrent only when wrongful acts are the result of "premeditation and deliberation." In other words, for the death penalty to be an effective deterrent, potential offenders must understand the threat of being executed and change their actions accordingly. However, children's inexperience and lack of education make them less able to evaluate the consequences of their conduct. Juveniles usually "live for the moment" and thus have less inclination to consider long-term consequences.

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145. *Id.*
147. *Id.*
150. Vanore, *supra* note 80, at 788 (quoting Fisher v. United States, 328 U.S. 463, 484 (1946)).
151. Thompson v. Oklahoma, 487 U.S. 815, 837 (1988) ("The likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent.").
152. Homan, *supra* note 137, at 780.
Moreover, because most juveniles consider death a remote possibility, they are more willing than adults to engage in "death defying behavior."153 Furthermore, rates of recidivism among juvenile murderers are comparatively low,154 and evidence has shown that juveniles can be rehabilitated and that their propensity for crime decreases as they grow older.155

Not only is the execution of minors an ineffective deterrent for potential juvenile offenders, it may also not be effective in deterring adult offenders.156 Because the deterrent effect is likely to influence only those individuals who can identify with the person being executed,157 adults may not be deterred unless they can identify with the juvenile offender. In short, because juvenile capital punishment makes no significant contribution to the two goals of the death penalty, long-term imprisonment would be a sufficient punishment for such young criminals.

C. Juvenile Offenders in an Adult Judicial System

The Supreme Court has recognized that "juvenile offenders constitutionally may be treated different from adults."158 Such different treatment manifests itself through limitations on a minor's right to vote, contract, purchase alcoholic beverages, dispose of property by will, and drive a vehicle.159 The distinctive treatment of juveniles is perhaps most evident in the separate juvenile justice system that emerged at the beginning of this century.160 These laws reflect a judgment that juveniles need the protection of states, not their punishment. In In re Gault161 the Court noted that the juvenile justice system emerged as a result of the harshness present in the correctional facilities of the adult criminal justice system.162 The Court emphasized that the idea of crime and punishment was to be absent from the juvenile justice system, and the child "was to be made 'to feel that he is the object of [the state's] care and solicitude.'"163 Juvenile courts were established to treat

153. Vanore, supra note 80, at 789.
154. Streib, supra note 148, at 395.
155. Id. ("[T]ncorrugibility is inconsistent with youth; that it is impossible to make a judgment that a fourteen-year-old youth, no matter how bad, will remain incorrigible for the rest of his life." (alteration in original) (quoting Workman v. Commonwealth, 429 S.W.2d 374, 378 (1968))).
156. Vanore, supra note 80, at 788.
157. Id.
159. See Thompson v. Oklahoma, 487 U.S. 815, 823 (1988). The plurality in Thompson emphasized the importance of "recognizing that there are differences which must be accommodated in determining the rights and duties of children as compared with those of adults." Id. (quoting Goss v. Lopez, 419 U.S. 565, 590-91 (1975) (Powell, J., dissenting)).
160. See Streib, supra note 144, at 616. In 1899 Illinois led the movement toward separate juvenile justice systems. By 1925 almost all the states had enacted legislation that modified the criminal system for juveniles. Id.
162. Id. at 15.
163. Id. (alteration in original) (quoting Julian W. Mack, The Juvenile Court, 23 HARV. L. REV.
child offenders differently from adult offenders by "provid[ing] measures of guidance and rehabilitation for the child and protection for society, not to fix criminal responsibility."\textsuperscript{164} 

Due to the recognized immaturity and vulnerability of juveniles, states have assumed parental responsibilities in many areas of juvenile law and have recognized their duty as \textit{parens patriae} toward minors.\textsuperscript{165} However, in response to an increase in juvenile crimes, state legislatures have enacted laws that allow juveniles to be tried and sentenced as adults.\textsuperscript{166} Now the most serious juvenile offenders are treated as adults because of the crimes that they are alleged to have committed. By providing a separate justice system for juvenile offenders, states have expressed their concern for minors and yet "seek to exclude those who most challenge the system's rehabilitative and beneficial aspects."\textsuperscript{167} As one commentator noted, "If the juvenile court will not handle the most serious offenses and offenders, it is difficult to see what is advantageous about a separate juvenile justice system."\textsuperscript{168} Judges are supposed to act as protectors toward juveniles under the doctrine of \textit{parens patriae}; however, by sentencing Robert Conyers to death under South Carolina's statute allowing juveniles to be sentenced as adults, the trial judge acted more like an

\begin{itemize}
\item 104, 120 (1909).
\item 165. See Suzanne D. Strater, The Juvenile Death Penalty: In the Best Interests of the Child?, 26 Loy. U. Chi. L.J. 147, 160 (1995). The term \textit{parens patriae} "refers to a state's traditional role as the guardian of persons under legal disability, such as juveniles, under which it allows to promote their welfare." \textit{Id}. at 149 n.23.
\item 166. See \textit{e.g.}, S.C. CODE ANN. \$ 20-7-7605 (Law. Co-op. Supp. 1997). A juvenile may be subjected to the jurisdiction of criminal courts in two ways: through judicial waivers or legislative waivers. Under a legislative waiver, the minor may be prosecuted directly in the criminal court based on the seriousness of the crimes committed. Vanore, supra note 80, at 758 n.5. Under a judicial waiver, the juvenile court may decide to transfer the case to a criminal court after determining that the juvenile cannot be treated in a juvenile system because the child poses a threat to either the public safety or to other juvenile offenders. \textit{Id}.
\item 168. \textit{Id}. at 487.
\end{itemize}
IV. CONCLUSION

In *State v. Conyers* the South Carolina Supreme Court held that it was not unconstitutional under the Eighth Amendment to execute a juvenile. This Note has examined several flaws with that holding. Both the South Carolina Supreme Court and the United States Supreme Court should have taken into account many factors such as international opinion and the views of respected organizations when determining society’s standards of decency. The United States may be the only civilized country that still imposes juvenile capital punishment. In a nation that is economically, militarily, technologically, and culturally a superpower, it is indecent that we still allow such an unjust, cruel and unusual punishment to be inflicted on our children. Despite the seriousness of the crimes committed by juveniles such as Robert Conyers, capital punishment is not the answer. The execution of juveniles probably does not further the twin purposes of capital punishment—deterrence and retribution. Moreover, an inherent conflict exists between the state’s dual roles as *parens patriae* and as juvenile executioner. In *Conyers* the South Carolina Supreme Court decided that the state could play both roles. When, and if, Robert Conyers goes to the electric chair, it will not be the execution of justice—it will be a spectacle of a child’s injustice.

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169. See Strater, *supra* note 165, at 170 ("It is this contradiction, a state on the one hand protecting the child, and on the other hand sentencing a child to death, that makes the juvenile death penalty inconsistent with a state’s duty toward children.").
I. INTRODUCTION

Though surrounded by controversy, defendants in South Carolina continue to be found guilty but mentally ill (GBMI). Over the past six years, approximately 161 persons have been convicted and sentenced under South Carolina’s GBMI statute. One of these statistics is Brent Hornsby. In State v. Hornsby the South Carolina Supreme Court upheld the constitutionality of the GBMI verdict on due process grounds. Despite this decision and similar decisions across the country, GBMI statutes continue to raise serious due process and equal protection concerns. With the adoption of GBMI statutes, legislatures appear to be codifying their collective lack of confidence in a jury’s willingness or ability to abide by the statutory definition of insanity and acquit only those who are legally insane.

After briefly summarizing the Hornsby case and other relevant South Carolina case law in Part II, this Note analyzes the different constitutional issues raised by the Hornsby decision. Part III specifically discusses how this verdict interacts with, and in some cases infringes upon, a defendant’s due process, equal protection, and Eighth Amendment rights. Additionally, Part III considers South Carolina’s treatment of each of these issues, referencing similar laws and decisions of other states for comparison, as well as discussing less questionable alternatives.

1. Guilty but mentally ill statutes have caught the attention of the public and practitioners alike. In a recent editorial, the GMBI verdict was castigating as “serv[ing] neither justice nor compassion.” Editorial, State Should Review Verdict of Guilty but Mentally Ill, THE HERALD (Roch Hill, S.C.), Sept. 28, 1997, at 2E.


3. As of January 1998, South Carolina Department of Corrections records indicate that the following numbers of inmates were convicted in South Carolina under the GBMI statute: in 1992—24 persons; 1993—26 persons; 1994—22 persons; 1995—31 persons; 1996—27 persons; and 1997—31 persons. Telephone Interview with Carolyn Hudson, Offender Information Management Branch, Division of Resource and Information Management, South Carolina Department of Corrections (Jan. 12, 1998). If an inmate was convicted under the GBMI statute in both 1992 and 1994, the inmate is only counted once. Id.


5. Id. at 130, 484 S.E.2d at 874.

6. See, e.g., State v. Neely, 819 P.2d 249 (N.M. 1991) (“We conclude that the legislature pursued legitimate goals in enacting the statute allowing the guilty-but-mentally-ill verdict and that the statute is reasonably designed to achieve that goal.”).

II. HISTORY AND BACKGROUND

A. The Law

South Carolina enacted its GBMI statute in 1984. The statute provides:

A defendant is guilty but mentally ill if, at the time of the commission of the act constituting the offense, he had the capacity to distinguish right from wrong or to recognize his act as being wrong as defined in Section 17-24-10(A), but because of mental disease or defect he lacked sufficient capacity to conform his conduct to the requirements of the law.

The GBMI statute embodies a form of “irresistible impulse” test, or an inability to behave within the confines of the law, which some states incorporate into their definition of insanity. South Carolina defines insanity using the English

8. Act of May 16, 1984, No. 396, § 2, 1984 S.C. Acts 1785, 1786 (codified as amended at S.C. CODE ANN. § 17-24-20 (Law. Co-op. Supp. 1997)). When South Carolina enacted the GBMI statute, many states and the federal government were abolishing such volitional tests in the wake of the controversy surrounding the insanity acquittal of John Hinkley, Jr., the would-be assassin of President Reagan. See, e.g., Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 1984 U.S.C.C.A.N. (98 Stat.) 3182, 3407 (detailing the elimination of the volitional prong from the federal insanity test); UTAH CODE ANN. § 76-2-305 (1995) (repealing former law that provided both cognitive and volitional prongs for insanity test and providing current law allowing mental illness or insanity to be used only when attacking the “mental state” element of the charged offense); Randy G. LaGrone & Don C. Combs, Alternatives to the Insanity Defense, 12 J. PSYCHIATRY & L. 93 (1984) (discussing the controversy surrounding the insanity defense and the need for a better method). Although the South Carolina GBMI statute embodies the irresistible impulse test, see infra notes 10-11 and accompanying text, the statute does not enlarge the definition of insanity beyond the cognitive, knowing right from wrong, test. Indeed, the statute appears to exist merely to emphasize that South Carolina’s definition of insanity does not include any volitional aspect.


10. The irresistible impulse test is a common-law legacy that began with the case of Parsons v. State, 2 So. 854 (Ala. 1887). The Alabama Supreme Court criticized the exclusive use of the M’Naghten test, see infra notes 12-13 and accompanying text, to determine insanity because that test considered only cognitive factors. The court reasoned that in light of the then current scientific studies on diseases of the brain, a person could be “so far under the duress of such [mental] disease as to destroy the power to choose between right and wrong.” Id. at 859. Hence, the volitional or irresistible impulse test was born and has remained substantially unchanged. Under this test, defendants may be found not guilty by reason of insanity if they can prove that they were unable to conform their behavior to within the requirements of the law. See, e.g., ARK. CODE ANN. § 5-2-312(a) (Michie 1997) (defining insanity to include an inability to conform behavior to the law). Some states include this test in their definition of insanity; others completely reject any form of irresistible impulse test as a part of an insanity defense. See generally 21 AM. JUR. 2D Criminal Law § 60 (1981) (detailing the requirements of the irresistible impulse test); 22 C.J.S. Criminal Law § 99 (1989) (discussing the common law irresistible impulse test).

11. See, e.g., ARK. CODE ANN. § 5-2-312(a) (Michie 1997) (defining insanity as including an inability to conform behavior to law); CONN. GEN. STAT. ANN. § 53a-13(a) (West 1994) (excluding
M'Naghten test.\textsuperscript{12} The M'Naghten test declares that a person is legally insane if at the time of the alleged act and "as a result of mental disease or defect, [the defendant] lacked the capacity to distinguish moral or legal right from moral or legal wrong or to recognize the particular act charged as morally or legally wrong."\textsuperscript{13} In light of this definition, the South Carolina General Assembly makes clear that a person who is guilty but mentally ill does not qualify as insane.

The South Carolina Supreme Court stated that the GBMI statute seeks "(1) to reduce the number of defendants being completely relieved of criminal responsibility and (2) to insure mentally ill inmates receive treatment for their benefit as well as society's benefit while incarcerated."\textsuperscript{14} South Carolina sentences defendants convicted under the GBMI statute as if they had received straight guilty verdicts; indeed, South Carolina will sentence GBMI defendants to death.\textsuperscript{15} However, GBMI inmates are supposed to receive mental health treatment before incarceration with the general prison population.\textsuperscript{16} Additionally, when a defendant raises an insanity defense, the court must instruct the jury on—and the jury must be allowed to find the defendant—guilty but mentally ill.\textsuperscript{17} Despite the superficial guise that a GBMI verdict is a less harsh form of verdict, Hornsby would probably agree with the conclusion that GBMI verdicts are not necessarily a blessing to defendants.

criminal conduct when the defendant was unable "to control his conduct within the requirements of the law"; \textit{see also} Model Penal Code § 4.01 (1962) (including inability to conform behavior to law within definition of mental disease or defect excluding responsibility).

12. \textit{See} M'Naghten's Case, 8 Eng. Rep. 718 (H.L. 1843). South Carolina has persisted in maintaining this test as evidenced by the supreme court's decision in \textit{State v. Cannon}, 260 S.C. 537, 197 S.E.2d 678 (1973). In \textit{Cannon} the court adhered to the M'Naghten test, essentially stating that the particular test recited to laypersons was not critical as the jury would first determine guilt, then decide whether the defendant's mental condition should excuse the conduct based on their own common sense. \textit{Id.} at 547-48, 197 S.E.2d at 682.

13. S.C. Code Ann. § 17-24-10(A) (Law. Co-op. Supp. 1997). South Carolina is not alone in adopting this definition. For example, the Illinois insanity statute provides that "[a] person is not criminally responsible for conduct if at the time of such conduct, as a result of mental disease or mental defect, he lacks substantial capacity to appreciate the criminality of his conduct." 720 ILL. COMP. STAT. ANN. 5/6-2(a) (West Supp. 1997). Additionally, the federal insanity statute defines insanity as one's inability "to appreciate the nature and quality or the wrongfulness of his acts." 18 U.S.C. § 17 (1994).

14. \textit{State v. Hornsby}, 326 S.C. 121, 126, 484 S.E.2d 869, 872 (1997); \textit{see also} \textit{State v. Wilson}, 306 S.C. 498, 503, 413 S.E.2d 19, 22 (1992) (stating that these objectives are "well established" as "the purposes for the enactment of GBMI statutes nationwide").


17. S.C. Code Ann. § 17-24-30 (Law. Co-op. Supp. 1997); \textit{see also} \textit{State v. Rimert}, 315 S.C. 527, 531, 446 S.E.2d 400, 402 (1994) (holding that the defendant "cannot waive a GBMI verdict form once he has raised the issue of sanity"). The rule requiring that a jury must be allowed to find a defendant GBMI contradicts the principle that a jury may only be instructed on a defense if evidence of that defense has been presented. \textit{See} 1 HON. EDWARD J. DEVITT ET AL., \textit{FEDERAL JURY PRACTICE AND INSTRUCTIONS} § 7.02, at 210-11 (4th ed. 1992). Although this issue merits acknowledgment, it is beyond the scope of this Note.
B. The Case: State v. Hornsby

In State v. Hornsby the jury found the defendant guilty but mentally ill of murder and first degree burglary.\(^\text{18}\) Prior to trial, Hornsby moved the court to declare the GBMI statute unconstitutional under the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution.\(^\text{19}\) The defense introduced evidence that GBMI inmates sentenced under the GMBI statute received no advantage over guilty defendants; therefore, the statute failed its purpose and was unconstitutional.\(^\text{20}\) Hornsby further argued that the GBMI verdict was a form of cruel and unusual punishment under the Eighth Amendment as it created a "stigma" on GBMI inmates and resulted in longer overall sentences.\(^\text{21}\) The trial court rejected these arguments and Hornsby was found guilty but mentally ill and sentenced to two consecutive life terms.\(^\text{22}\) The defendant appealed his conviction and renewed his arguments that the guilty but mentally ill statute was unconstitutional.\(^\text{23}\) In his appellate brief, Hornsby argued for the first time\(^\text{24}\) that the GBMI verdict was a compromise verdict that allowed reasonable jurors to believe that it "stands somewhere between an insanity verdict and a guilty verdict,"\(^\text{25}\) thus distracting the jury from the only two true verdicts: guilty or not guilty.\(^\text{26}\) The defendant maintained that this "pseudo-verdict"\(^\text{27}\) interfered with his due process rights and Sixth Amendment right to a jury trial.\(^\text{28}\)

The State responded with several counter arguments. First, the prosecution contended that the defendant's pseudo verdict and compromise verdict arguments had not been brought before the lower court and thus were not preserved for appeal.\(^\text{29}\) The State also claimed that the defendant had apparently abandoned the constitutional arguments made in both his pre-trial motion and during trial because they were not set forth in Appellant's Final Brief.\(^\text{30}\) Regardless, the State contended that the allegations were meritless because GBMI inmates receive the benefit of mental health treatment before being placed into the general prison population and because the issues raised by the defendant were "not questions of constitutionality."\(^\text{31}\) The prosecution further argued that the statute was rationally

\(^{19}\) See Record at 869.
\(^{20}\) Hornsby, 326 S.C. at 124-25, 484 S.E.2d at 871.
\(^{21}\) Id. at 125 & n.1, 484 S.E.2d at 871 & n.1.
\(^{22}\) Id. at 124-25, 484 S.E.2d at 871.
\(^{23}\) See Final Brief of Appellant at 5.
\(^{24}\) Id. at 7-9.
\(^{25}\) Id. at 8.
\(^{26}\) Id. at 9-10.
\(^{27}\) Id. at 9.
\(^{28}\) Id.
\(^{29}\) Final Brief of Respondent at 6.
\(^{30}\) Id. at 14.
\(^{31}\) Id. at 15.
designed by the South Carolina General Assembly to meet legitimate state purposes.32

The Supreme Court of South Carolina accepted the prosecution’s arguments and held the GBMI statute constitutional under the Due Process Clause of the Fourteenth Amendment.33 However, the supreme court did not determine whether the statute violated the defendant’s equal protection rights or constituted cruel and unusual punishment because these issues were not properly preserved for on appeal.34 The supreme court further noted that Hornsby had not requested a jury instruction explaining the differences or similarities between the sentencing consequences of a GBMI verdict and a straight guilty verdict.35 The court concluded that the GBMI statute was rationally designed to meet the General Assembly’s purposes.36 In so ruling, the supreme court determined that “[t]he GBMI statute simply recognizes the continuum in the law regarding mental illness and provides a guide for a jury when considering whether a defendant is not guilty; not guilty by reason of insanity . . . ; guilty but mentally ill . . . ; or guilty.”37

III. ANALYSIS

A. The Constitutional Issues: Due Process Under the Fourteenth Amendment

The South Carolina Supreme Court addressed only whether the GBMI statute was constitutional under the Due Process Clause.38 Due process challenges are generally analyzed under either a rational basis or strict scrutiny standard.39 Relying on precedent, the South Carolina Supreme Court quickly determined that the rational basis standard was the appropriate test.40 The rational basis standard requires only that the statute in question “be reasonably designed to accomplish its purposes.”41 The rational basis test accords great deference to the legislature; indeed, courts normally interpret the law in a manner necessary to save the statute.42 However, if the court determines that a challenged statute infringes upon a fundamental constitutional right, the court will use strict scrutiny in its analysis.43

32. Id. at 15-20.
34. Id. at 125 n.1, 484 S.E.2d at 871 n.1.
35. Id. at 129, 484 S.E.2d at 873.
36. Id. at 126, 484 S.E.2d at 872.
37. Id. at 126-27, 484 S.E.2d at 872.
38. Id. at 125 & n.1, 484 S.E.2d at 871 & n.1.
40. Hornsby, 326 S.C. at 125-26, 484 S.E.2d at 872.
41. Id. at 125, 484 S.E.2d at 872.
42. University of South Carolina v. Mehlman, 245 S.C. 180, 185, 139 S.E.2d 771, 774 (1964) (“[A] statute will, if possible, be construed so as to render it valid.”).
43. See, e.g., Reno v. Flores, 507 U.S. 292, 301-02 (1993) (noting that the violation of a fundamental liberty interest will only be upheld if the infringement “is narrowly tailored to serve a
Because the supreme court employed the rational basis test in *Hornsby*, its application to South Carolina’s GBMI statute will be addressed first, followed by a strict scrutiny analysis.

1. The Rational Basis Test

Under the rational basis test, the GBMI statute passes muster in light of the deference given to legislative enactments. Assuming *arguendo* that a fundamental constitutional right is not being infringed upon, the General Assembly can claim a legitimate state interest not only in protecting society from dangerous persons released under insanity acquittals but also in providing help for mentally ill persons. However, the GBMI statute may not be reasonably related to achieve these goals.

a. Legislative Purpose: Decreasing the Number Relieved of Criminal Responsibility

In enacting the GBMI statute, the South Carolina General Assembly sought first to lower the number of persons “being completely relieved of criminal responsibility.” How does the GBMI statute achieve this goal when the definition of insanity has not changed? If a jury determines that a defendant is legally insane, then the defendant is not criminally responsible. Thus, this legislative purpose implies that juries disregard the statutory definition of insanity and acquit persons that should be found guilty. Perhaps, however, by enacting this law the General Assembly hoped to *lead* a jury into rendering a GBMI verdict, which is, in the end, a guilty verdict.

The GBMI verdict purportedly “clarifies for the jury” the different levels of mental illness and, thus, results in more accurate convictions and, in some cases, acquittals. In *Hornsby* the State advanced this argument, relying on the case of compelling state interest”).

44. *Hornsby*, 326 S.C. at 125-26, 484 S.E.2d at 872.
45. *Id.* at 126, 484 S.E.2d at 872. However, little information is available which indicates that South Carolina ever had a problem with persons that were relieved of criminal responsibility.
47. In *State v. McWilliams*, 352 S.E.2d 120 (W. Va. 1986), the West Virginia Supreme Court indicated its displeasure that a mentally ill defendant would be acquitted as a result of its decision. *Id.* at 130. The court noted that it was “troubled by this prospect, but no alternative exists under West Virginia law.” *Id.* The court also examined how other states dealt with this problem and noted that “[o]ther states have developed the compromise verdict of ‘guilty but mentally ill.’ We believe this only muddies the water. The accused was either criminally responsible or not criminally responsible by reason of insanity.” *Id.* n.16 (citations omitted).
48. *Hornsby*, 326 S.C. at 126, 484 S.E.2d at 872.
50. See Final Brief of Respondent at 17-19.
State v. Neely.51 In Neely the New Mexico Supreme Court upheld its GBMI statute52 under the rational basis test53 when the defendant challenged the statute on essentially three due process grounds.54 First, the defendant alleged that the GBMI statute satisfied no legitimate state purpose; second, it created jury confusion; and third, it created the risk of a jury compromise verdict.55 The New Mexico court suggested that the state’s legislative purpose in enacting the GBMI statute was “to reduce the number of improper or inaccurate insanity acquittals and to give jurors an alternative to acquittal when mental illness is believed to play a part in an offense.”56 The court concluded that the statute increased the jury’s chances of returning a more accurate verdict, which is a legitimate state interest.57 In conclusion, the Neely court quickly dispensed with the defendant’s remaining arguments, stating that the GBMI verdict created neither jury confusion nor compromise.58

Neely is distinguishable. The Neely court found that the GBMI verdict assisted the jury in understanding the gradations of legal culpability.59 New Mexico’s statutory definition of insanity includes the inability of defendants to conform their behavior to the law.60 Because this definition is very broad and could easily produce the acquittal of defendants under an insanity plea, additional jury guidance might be warranted. South Carolina’s definition of insanity,61 however, is narrow and so no gradations of culpability could be provided by South Carolina’s GBMI statute. In South Carolina a defendant found either guilty or guilty but mentally ill is deemed to possess the same degree of mens rea or culpability.62 Apparently, the South Carolina General Assembly is expanding the definition of guilt, not mental illness. In light of this, the relationship between the GBMI statute and the General

52. Id. at 256. The New Mexico statute provides in pertinent part:
   A person who at the time of the commission of a criminal offense was not insane but was suffering from a mental illness is not relieved of criminal responsibility for his conduct and may be found guilty but mentally ill. As used in this section, “mentally ill” means a substantial disorder of thought, mood or behavior which afflicted a person at the time of the commission of the offense and which impaired that person’s judgment, but not to the extent that he did not know what he was doing or understand the consequences of his act or did not know that his act was wrong or could not prevent himself from committing the act.

N.M. STAT. ANN. § 31-9-3(A) (Michie 1984).
53. As in Hornsby, the defendant in Neely did not argue that heightened scrutiny was appropriate.

Neely, 819 P.2d at 252 n.5.
54. Id. at 251.
55. Id.
56. Id. at 252.
57. Id.
58. Id. at 253-54.
60. See N.M. STAT. ANN. § 31-9-3(A) (Michie 1984).
Assembly's goal of reducing the number of defendants relieved of criminal responsibility does not appear completely reasonable.

b. Legislative Purpose: Providing Mental Health Care

The second stated goal of the statute is to provide mental health care for GBMI inmates. Although this goal may be legitimate, the GBMI statute once again is not entirely reasonably or rationally related to achieve it. The provision advancing mental health care is found in a GBMI companion sentencing statute, which requires that GBMI inmates receive mental health evaluations and treatment before entering the inmate general population.

In reality, the GBMI statute has very little impact on the treatment of mentally ill inmates because the South Carolina Department of Corrections provides a tiered system of mental health care treatment for all inmates. An initial battery of tests is administered to every inmate to determine whether the inmate needs any form of physical or mental health care and where the inmate should be placed within the correctional system. After this initial phase, those in need move on to secondary counseling or, in acute cases, the male inmates are sent to the South Carolina Department of Correction's mental health hospital and the female inmates to the Department of Mental Health. Upon arriving at one of these mental health institutions, the inmates are further evaluated, assessed, and given any needed treatment for the necessary amount of time. The only difference in treatment between mentally ill inmates and GBMI inmates is the GBMI inmates' mandatory evaluation; they are evaluated at the South Carolina Department of Correction's mental health hospital even if this is unnecessary. The Hornsby court noted, however, that the "statute is not rendered a nullity" just because guilty but not mentally ill inmates are provided treatment if needed.

Despite these potential issues, the GBMI statute undoubtedly passes muster because the traditional rational basis analysis requires such a low level of scrutiny. Under rational basis, the legislature need not actually achieve the desired purposes; instead, the legislature need only provide some reasonable link between the statute and the purpose. However, these issues may create a problem for the GBMI

63. Id. at 126, 484 S.E.2d at 872.
65. Interview with Wanda D. Tarpley, Director, and Steve Woodward, Associate Director, Division of Behavioral Medicine for the South Carolina Department of Corrections, in Columbia, S.C. (Feb. 25, 1998).
66. Id.
67. Id. The South Carolina Department of Corrections mental health hospital is located at Kirkland Correctional Facility. Id.
68. Id.
69. Id.
71. See, e.g., NOWAK & ROTUNDA, supra note 39, at 347 ("If the law can arguably be said to
statute if it were subject to a more stringent level of scrutiny. Because the GBMI statute appears to infringe upon a defendant's liberty interest and fundamental right to a fair jury trial in a criminal proceeding, the application of a strict scrutiny analysis may be more appropriate.

2. **The Strict Scrutiny Test**

The *Hornsby* court noted that "[a]ppellant properly does not claim [that] a suspect class or fundamental right are implicated by the GBMI statute." Fundamental rights are defined as those rights which are "'implicit in the concept of ordered liberty'" to the extent that "'neither liberty nor justice would exist if [they] were sacrificed.'" Fundamental rights can also be defined as those "liberties that are 'deeply rooted in this Nation's history and tradition.'" Because Hornsby did not raise a fundamental rights argument, the court applied a rational basis test and upheld the statute. When legislation infringes upon a fundamental right, such as the Sixth Amendment right to a jury trial, the reviewing court strictly scrutinizes the legislation. Strict scrutiny requires that the challenged governmental action be necessary and narrowly tailored to achieve a compelling governmental objective. Hornsby could have made a persuasive argument that the GBMI verdict infringed upon his liberty interest and his Sixth Amendment right to a fair jury trial.

   a. **Interference With the Fundamental Right to a Fair Trial**

The GBMI verdict appears to infringe upon a defendant's fundamental right to a fair trial in a criminal proceeding. The United States Supreme Court uses the fundamental rights approach to determine which amendments are selectively incorporated and applicable to the states under the Fourteenth Amendment. The rationally relate to a legitimate goal of government, the Court will uphold the law even though the Justices might disagree with the wisdom of its provisions.

72. *Hornsby*, 326 S.C. at 126 n.2, 484 S.E.2d at 872 n.2.
74. Id. at 192 (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (Powell, J.)).
75. *Hornsby*, 326 S.C. at 126 n.2, 484 S.E.2d at 872 n.2.
76. Walker v. South Carolina Dep't of Highways & Pub. Transp., 320 S.C. 496, 500, 466 S.E.2d 346, 348 (1995) ("This Court is not entitled to scrutinize reasonable measures unless some fundamental right is implicated.").
77. *Hornsby*, 326 S.C. at 130, 484 S.E.2d at 874.
78. *See, e.g., Reno v. Flores*, 507 U.S. 292, 301-02 (1993) (noting that the violation of a fundamental liberty interest will only be upheld if the infringement "is narrowly tailored to serve a compelling state interest"); *see also Nowak & Rotunda, supra* note 39, § 11.7 (stating that the Court will apply strict scrutiny to governmental action involving a fundamental right).
Court has determined that the right to a jury trial in a criminal proceeding is a fundamental right and as such is protected from state infringement. The South Carolina GBMI statute infringes on this right by creating a compromise verdict, which is ripe for jury misperception and misunderstanding in two critical areas: (1) the degree of culpability, or mens rea, necessary for a GBMI verdict and (2) the eventual disposition of the defendant receiving a GBMI verdict.

i. Jury Misperception: Mens Rea and Culpability

Because the jury is given four choices—guilty, guilty but mentally ill, not guilty by reason of insanity, or not guilty—the jury may believe that the GBMI verdict lies somewhere between guilty and not guilty. Recently, this reasoning compelled the Illinois Court of Appeals in People v. Robles to disregard a long line of state case law and hold the state’s GBMI statute unconstitutional. In the past, Illinois courts repeatedly ruled that the GBMI statute did not threaten a fundamental right; therefore, they refused to apply heightened scrutiny. In Robles the defendant appealed his GBMI conviction, alleging that the GBMI statute resulted in compromise verdicts that violated his Fourteenth Amendment right to due process. The court agreed, finding that GBMI verdicts do not “reflect diminished culpability or criminal responsibility.” The Robles court began its analysis by citing Sandstrom v. Montana for the proposition that “a statute [which] encourages compromise verdicts based upon jurors’ misperceptions and misunderstandings is a violation of due process.” In Sandstrom the Court reasoned that “whether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable juror could have interpreted the instruction.” While the facts of Sandstrom distinguish it from GBMI cases, Sandstrom’s principle is on point. The Supreme Court has apparently endorsed the idea that a defendant’s fundamental rights are violated when the jury could have been misled or a jury instruction could have been misperceived.

Jury misinterpretation appeared to be at issue in Hornsby. Because a defendant
is sentenced as though receiving a straight guilty verdict;\(^{93}\) any distinction between a GBMI verdict and a guilty verdict is essentially illusory.\(^{94}\) South Carolina refuses to allow jury instructions comparing the disposition of the GBMI verdict and the straight guilty verdict.\(^{95}\) As a result, the jury may labor under a misperception that different levels of culpability exist. This misperception prevents a jury from rendering a true verdict and thus interferes with a defendant's Sixth Amendment rights. The mens rea or culpability aspect of the GBMI statute is not the only area that is ripe for jury misperception. Concerns over the defendant's eventual disposition may encourage a jury to render a GBMI verdict believing that it provides a less harsh sentence and offers a defendant special treatment.

ii. Jury Misperception: Disposition of the Defendant

GBMI statutes may also mislead the jury concerning the disposition of the defendant. The *Robles* court noted that the "GBMI verdict is identical to a 'guilty' verdict in terms of potential punishment and/or psychiatric treatment";\(^{96}\) indeed, GBMI inmates receive the same treatment as other inmates.\(^{97}\) Based upon these observations, the court determined that the GBMI verdict had "no practical effect."\(^{98}\) Summing up, the court opined:

> We have little doubt that conscientious jurors who are confronted with this continuum of verdicts assume that the GBMI verdict represents a distinct and separate position on this continuum. In all probability, they further assume that the GBMI verdict indicates that some sort of ameliorative disposition will be afforded the defendant. We find that these misconceptions and misunderstandings encourage a compromise verdict

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94. Rimert v. Mortell, 680 N.E.2d 867, 875-76 (Ind. Ct. App. 1997). *Rimert*, a medical malpractice case, arose out of the same underlying facts as the South Carolina decision in *State v. Rimert*, 315 S.C. 527, 446 S.E.2d 400 (1994). The Indiana Court of Appeals, interpreting South Carolina law for purposes of determining the merits of the case before it, noted that the South Carolina GBMI verdict contemplated the same degree of culpability as a straight guilty verdict and opined that "[o]ne might validly argue that a verdict of guilty but mentally ill is an illusory recognition of one's diminished capacity, rendering the actual degree of culpability meaningless." *Rimert*, 680 N.E.2d at 875-76. The South Carolina case of *State v. Wilson*, 306 S.C. 498, 413 S.E.2d 19 (1992), further illustrates this point. In *Wilson* the South Carolina Supreme Court determined that a GBMI defendant could be sentenced to death. *Id.* at 508-09, 413 S.E.2d at 25.
97. *Id.*
98. *Id.*
of GBMI, which is devoid of any substance.

... Moreover, the very title of the GBMI statute encourages jurors to draw natural inferences from it.\(^99\)

This same reasoning applies to the South Carolina GBMI statute. Consequently, South Carolina juries may also be misled. The South Carolina Supreme Court has held that jurors do not need to know the sentencing consequences of different verdicts\(^100\) because it is not the jury's concern.\(^101\) In most cases, the jury may not need dispositional information unless it is involved in the sentencing phase of the trial. However, cases involving GBMI verdicts raise special concerns and should be treated differently. Apparently, the function of the GBMI verdict is to appeal to the jury's compassion concerning the eventual disposition of the defendant, and yet GBMI defendants are sentenced as though they are simply guilty.\(^102\) Ideally, a jury should not consider the disposition of the defendant when determining guilt. As a result, no clarifying instructions would be necessary. Yet, by providing the jury with a verdict that alludes to an alternative disposition, the GBMI statute seems to cause the jury to take the defendant's disposition into account. Perhaps the General Assembly had no confidence that a jury would find truly culpable defendants guilty. The legislative solution, however, treads on a defendant's fundamental rights. Therefore, as a practical matter, courts should instruct juries concerning the differences between guilty and GBMI, or juries should not be given a GBMI option.

At least one state has recognized these misleading aspects of a GBMI statute and has enacted a rule of criminal procedure so that in cases in which the defendant's sanity is at issue, the jury may receive instruction concerning the different dispositional possibilities of insanity and GBMI verdicts.\(^103\) Such instruction may help eliminate jury confusion and jury speculation about the different verdicts, provided the instruction explains that guilty and GBMI verdicts evoke essentially the same penalty and require the same degree of guilt. Without such an instruction, the existence of the GBMI verdict diverts the jury from its true function of determining guilt or innocence by offering what appears as both a third

\(^99\) Id. at 205. However, not all of the judges agreed with this conclusion. In his dissent, Judge Thomas exhumed the weighty list of Illinois state precedent that had consistently rejected the very arguments made by the defendant. Id. at 206-07 (Thomas, J., dissenting). Clearly, Judge Thomas would uphold the GBMI statute under a rational basis test. See id. at 208 The Illinois Supreme Court has granted certiorari; thus, the fate of the Illinois GBMI statute remains uncertain.

\(^100\) See, e.g., State v. Hornsby, 326 S.C. 121, 129, 484 S.E.2d 869, 873 (1997) ("[T]he function of a jury is to determine whether the defendant is guilty or not guilty and the consequences of a conviction are of no aid in determining whether the defendant committed the offense.").

\(^101\) Id.

\(^102\) Id. at 126, 484 S.E.2d at 872.

\(^103\) See KY. REV. STAT. ANN. R. 9.55 (Michie 1998) ("[T]he court shall instruct the jury at the guilt/innocent phase as to the dispositional provisions applicable to the defendant if the jury returns a verdict of not criminally responsible by reason of mental illness or retardation, or guilty but mentally ill.").
level of culpability and a dispositional option. The American Bar Association, which opposes the enactment of GBMI statutes, criticizes the legislation on similar grounds. The Illinois Appellate Court quoted the ABA:

[The GBMI verdict is not a proper verdict at all. Rather it is a dispositional mechanism transferred to the guilt determination phase of the criminal process. The hybrid nature of the verdict is demonstrated by the fact that a jury determination of mental illness at the time of a charged offense is relevant not to criminal responsibility or culpability but to whether the accused persons might receive treatment after they have been sentenced . . . .]

Although never properly faced with an overt fundamental rights argument, the South Carolina Supreme Court has probably already rejected any such attempt. In a footnote in Hornsby, the court reasoned that a defendant’s liberty interest is not implicated because the defendant’s liberty has already been “curtailed” by the jury when it found guilt beyond a reasonable doubt. However, this begs the question. If juries are being misled and distracted from a true determination of guilt or innocence, then it is questionable whether juries, when rendering GBMI verdicts, actually determine guilt beyond a reasonable doubt. If a court agrees that the GBMI verdict does infringe upon a defendant’s fundamental rights, it is doubtful that the statute could survive a court’s ensuing strict scrutiny analysis, which requires a statute to be narrowly tailored to achieve a compelling governmental purpose.

b. Compelling Government Purpose and Narrowly Tailored Requirements

The GBMI statute appears to be neither necessary nor narrowly tailored to achieve a compelling governmental interest. Furthermore, the State would have the burden of establishing that its interests were “compelling,” which may prove difficult. To preserve its goal of reducing the number of individuals relieved of criminal responsibility, the State would undoubtedly argue that the government has a compelling interest in protecting society from dangerous, mentally ill defendants that are improperly acquitted as insane. However, the State may be required to prove that persons acquitted as insane had previously been a problem.

105. Hornsby, 326 S.C. at 126 n.2, 484 S.E.2d at 872 n.2.
107. Id.
108. Hornsby, 326 S.C. at 126, 484 S.E.2d at 872. The Illinois legislature enacted its GBMI statute for substantially the same purposes as South Carolina. Robles, 682 N.E.2d at 202.
Specifically, the State would have to provide statistics showing a number of inappropriate insanity acquittals as well as showing how the involuntary commitment statute for these acquitted individuals was inadequate. Additionally, the State would likely argue that providing treatment for the mentally ill is a compelling governmental interest. Although arguably compelling, the State may still have to show how this mental health interest is compelling in light of the existing system for treating the mentally ill in the state correctional system. Whether the State could sufficiently convince a court of the compelling nature of these two purposes is uncertain.

The means chosen by the government to achieve its compelling purpose must be narrowly tailored to pass a strict scrutiny test. Assuming that the reduction in the number of defendants being relieved of criminal responsibility is a compelling governmental purpose, a reduction can still be achieved via less restrictive means. In its present form, the GBMI verdict serves only to increase jury confusion concerning mentally ill defendants by providing a jury with the options of guilty, guilty but mentally ill, not guilty by reason of insanity, and not guilty. Possible solutions exist that may help tailor the GBMI statute and provide mentally ill defendants with fairer treatment.

i. Alternative Methods: Jury Instructions Regarding Disposition

The General Assembly could achieve its goals with less infringement on the rights of defendants by amending the GBMI statute to include a mandatory jury instruction about the defendant’s possible dispositions under a guilty verdict and under a GBMI verdict. The jury instruction should specifically state that under each possible verdict, guilt must still be proven beyond a reasonable doubt. Such an instruction would help eliminate jury confusion and speculation on what makes a GBMI verdict distinct from a straight guilty verdict.

ii. Alternative Methods: Redefine Insanity

Redefining insanity may also provide a more narrowly tailored alternative. A new definition, provided to the jury in an instruction, should make it clear that defendants that know right from wrong, but cannot conform their conduct to the requirements of the law, are simply guilty. Any form of mental illness not rising to the level of insanity is not a defense to guilt. Because defendants that receive GBMI verdicts are sentenced as if they had received a straight guilty verdict, the instruction should also inform the jury that in most cases a judge may take many factors, including mental illness that does not rise to the level of insanity, into account when

determining the defendant’s sentence. This instruction informs the jury that it may encounter a defendant who is obviously mentally ill, but that it is the jury’s duty to find a defendant guilty if the defendant’s mental state does not meet the statutory definition of insanity. The judge may then consider the defendant’s mental state as a mitigating factor. This potential solution would further the General Assembly’s goal of providing GBMI inmates with mental health care because judges have, in the past, recommended or ordered mental health treatment for particular defendants. These orders or recommendations have the same effect on an inmate’s treatment within the Department of Corrections as labels such as GBMI.

iii. Alternative Methods: Automatic Commitment Statutes

Finally, the General Assembly could repeal the GBMI statute and apply the existing automatic commitment statute that currently only applies to defendants acquitted as insane. However, this alternative does not achieve the General Assembly’s purpose of preventing individuals from being relieved of criminal responsibility. However, if the ultimate goal was simply to reduce the number of dangerous, mentally ill persons released under the insanity defense, then the automatic commitment statute would appear sufficient.

While these suggestions may be less than clear solutions to the due process concerns raised by the GBMI statute, defendants have cause for alarm when they are faced with a jury that could misperceive the true nature of a GBMI verdict.

B. The Constitutional Issues: Equal Protection Under the Fourteenth Amendment

Hornsby alleged in his pre-trial motion and at trial that the GBMI statute violated his equal protection rights under the Fourteenth Amendment. On appeal, he appeared to abandon completely his equal protection challenge. Consequently,

111. State v. Green, 220 S.C. 315, 322, 67 S.E.2d 509, 512 (1951) ("[T]he court, before imposing sentence, [should] hear evidence with reference to any relevant facts in aggravation or mitigation of punishment.").
112. Interview with Wanda D. Tarpley and Steve Woodward, supra note 65.
113. Id. Both Ms. Tarpley and Mr. Woodward mentioned that simple things, such as mental health records or records of behavior during prior incarceration, would likely produce the same sort of "flag" and trigger the appropriate treatment. Id.
114. Section 17-24-40 of the South Carolina Code provides that a defendant acquitted under an insanity verdict must be committed to a mental health institution for no more than 120 days. Confinement beyond that time can be achieved through subsequent judicial evaluations to determine if further hospitalization is necessary. S.C. CODE ANN. § 17-24-40 (Law. Co-op. 1976). Automatic commitment statutes have been upheld by the Supreme Court in Jones v. United States, 463 U.S. 354, 370 (1983).
116. Id. at 125 n.1, 484 S.E.2d at 871 n.1; Record at 869.
117. Id.
the supreme court did not address the issue.\textsuperscript{118}

Although Hornsby did not pursue the equal protection issue, he probably should have because South Carolina's system of classifying the mentally ill may be impermissible under the Constitution. The Equal Protection Clause of the Fourteenth Amendment\textsuperscript{119} generally ensures that "persons similarly situated should be treated alike."\textsuperscript{120} Under equal protection, three levels of review are applicable: strict scrutiny,\textsuperscript{121} middle level scrutiny,\textsuperscript{122} and rational basis scrutiny.\textsuperscript{123} Strict scrutiny is triggered when the government bases a classification on a suspect class or creates a classification that infringes upon a fundamental right.\textsuperscript{124} Middle level review is used in cases involving quasi-suspect classifications.\textsuperscript{125} Absent these triggering characteristics, the challenged law or governmental action is analyzed using a rational basis test.\textsuperscript{126}

Had the South Carolina Supreme Court addressed the equal protection issue, it probably would have relied on the United States Supreme Court case of City of Cleburne v. Cleburne Living Center, Inc.\textsuperscript{127} and applied a form of rational basis analysis. In City of Cleburne the Supreme Court refused to treat legislation that targeted the mentally retarded as impermissibly classifying a suspect or quasi suspect class.\textsuperscript{128} Despite this conclusion, the Court actually applied what appeared to be a heightened form of rational basis scrutiny, invalidating the statute in question.\textsuperscript{129} In light of City of Cleburne, the most appropriate level of scrutiny for Hornsby appears to be a form of heightened rational basis.

The rational basis standard normally requires that a law be reasonably or rationally related to a legitimate governmental interest.\textsuperscript{130} Traditionally, courts do nothing more than determine "whether a classification is wholly arbitrary,"\textsuperscript{131} thereby placing a nearly insurmountable task upon those challenging the law. However, the Supreme Court has occasionally affixed a label of rational basis on its analysis and then actually applied a somewhat more stringent standard.\textsuperscript{132}

\begin{footnotesize}
\begin{enumerate}
\item[118.] Id.
\item[119.] U.S. CONST. amend. XIV, § 1.
\item[121.] Id. at 440.
\item[122.] Id. at 441.
\item[123.] Id. at 440.
\item[124.] Id. at 440.
\item[125.] Id. at 441.
\item[126.] NOWAK & ROTUNDA, supra note 39, § 14.3.
\item[127.] 473 U.S. 432 (1985).
\item[128.] Id. at 442.
\item[129.] Id. at 448. \textit{But see} Heller v. Doe, 509 U.S. 312, 319-21 (1993) (using a rational basis test to uphold the constitutionality of a Kentucky statute that dealt with the commitment of the mentally retarded after noting that no argument for a higher level of scrutiny was properly before it and stating that the Court had applied a mere rational basis test in City of Cleburne).
\item[130.] City of Cleburne, 473 U.S. at 440.
\item[131.] NOWAK & ROTUNDA, supra note 39, § 14.3, at 608.
\item[132.] See City of Cleburne, 473 U.S. at 448-50.
\end{enumerate}
\end{footnotesize}
In *City of Cleburne* a Texas city denied a special use permit for the establishment of a home for mentally retarded persons in an area where the city allowed such permits for fraternities, nursing homes, and other specialty housing.\(^{133}\) The Supreme Court invalidated the ordinance under the rational basis analysis.\(^{134}\) The Court recognized that states could have a legitimate interest in treating the mentally retarded differently and that legislators were better suited than the courts to evaluate and provide for the special needs of this diverse group.\(^{135}\) However, the Court also noted that "there have been and there will continue to be instances of discrimination against the retarded that are in fact invidious, and that are properly subject to judicial correction under constitutional norms."\(^{136}\) The Texas ordinance fell into the latter category. The Court invalidated the law when it determined that the city had not proven that the proposed home for the mentally retarded posed "any special threat to the city’s legitimate interests."\(^{137}\) With this conclusion, the Court appeared to shift the burden of proof from the group attacking the ordinance to its defenders, thus requiring the government to prove how its legitimate interests were furthered by this law.

The city’s alleged legitimate interests included the concerns of the would-be neighbors of the home and concern for the well-being of the proposed-home’s occupants.\(^{138}\) The Court rejected these alleged interests, reasoning that the home could not be denied a permit based upon such "vague, undifferentiated fears."\(^{139}\) In short, the ordinance did not bear a rational relationship to the city’s concerns.\(^{140}\) The Court concluded instead that the permit requirement rested on "an irrational prejudice against the mentally retarded,"\(^{141}\) and accordingly it struck down the ordinance.\(^{142}\)

The Supreme Court has also held that "a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."\(^{143}\) The same principle was reiterated more recently in *Romer v. Evans*,\(^ {144}\) in which the Court invalidated an amendment to Colorado’s state constitution\(^ {145}\) because the

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133. *Id.* at 435, 449.
134. *Id.* at 448.
135. *Id.* at 442-43. The Court named several laws aimed at the protection, education, and, in some cases, the restriction of the mentally retarded, stating that "[s]uch legislation thus singling out the retarded for special treatment reflects the real and undeniable differences between the retarded and others." *Id.* at 444.
136. *Id.* at 446.
137. *Id.* at 448.
139. *Id.* at 449.
140. *Id.* at 148.
141. *Id.* at 450.
142. *Id.*
143. United States Dep't of Agriculture v. Moreno, 413 U.S. 528, 534 (1973).
145. *Id.* at 635. The amendment provided:

"No Protected Status Based on Homosexual, Lesbian or Bisexual Orientation."
amendment prohibited governmental protection of gays and lesbians. In Romer the Court noted that "[i]n the ordinary case, a law will be sustained if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous." The Court determined that the Colorado amendment did not meet even this low standard and that it reflected nothing but discriminatory animus towards gays and lesbians. In conclusion, the Court found that the amendment did nothing more than make gays and lesbians "unequal to everyone else"—and this could not be a legitimate government interest.

The reasoning of these cases may make it difficult for South Carolina’s GBMI statute to pass a heightened rational basis test. Under this test, the purposes set forth by the South Carolina General Assembly may fall short of legitimacy, leaning closer to expressing animosity towards mentally ill defendants. Similar to the amendment in Romer, the GBMI statute prevents the mentally ill from standing equally with others. With the GBMI statute, the inequality is with respect to a fair jury trial. The purposes underlying this statute were to reduce the number of insanity acquittals and provide mental health care for GBMI inmates. Without proof that the GBMI statute could accomplish these goals, the law may rest on the same "vague and undifferentiated fears" that led to the Court’s invalidation of the Texas ordinance in City of Cleburne.

Defendants in other states have challenged GBMI statutes on equal protection grounds, and many state courts have upheld their respective GBMI statutes under a mere rational basis test. State v. Neely is illustrative. In Neely the defendant raised an equal protection claim, arguing that defendants acquitted under the

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Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.”

Id. at 624 (quoting COLO. CONST. art. II, § 30b).

146. Id. at 623-24.
147. Id. at 632.
148. Id. at 634.
149. Id. at 635.
152. Id. at 450.
153. See, e.g., Gambill v. State, 675 N.E.2d 668, 677 (Ind. 1997) (determining that the state’s GBMI statute did not violate the equal protection clause); State v. Neely, 819 P.2d 249, 255 (N.M. 1991) (upholding state’s GBMI law under the rational basis test); Commonwealth v. Zewe, 663 A.2d 195, 200-01 (Pa. 1995) (holding that the state’s GBMI statute bore a rational relationship to the state’s legitimate purpose of holding the mentally ill, yet not insane, responsible for their crimes).
insanity defense and GBMI defendants were similarly situated because they were all mentally ill.\textsuperscript{155} The defendant contended that the government had established an impermissible classification—one in which some defendants are sent to prison and others are not.\textsuperscript{156} In addressing this argument, the New Mexico Supreme Court upheld the statute under a rational basis test, specifically noting that

\begin{quote}
[t]he classification is rationally related to a legitimate interest—it allows only those mentally ill who did not have the capacity to form the appropriate criminal intent to avoid criminal liability while providing for criminal liability for those guilty because they possessed the criminal intent, yet who are nonetheless mentally ill. Although the classification admittedly creates two classes of mentally-ill defendants, those classes are not similarly situated and their legislative creation is not arbitrary.\textsuperscript{157}
\end{quote}

The court described the traditional rational basis test as so low a level of scrutiny that "[o]nly when a statutory classification is so devoid of rational support or serves no valid governmental interest, so that it amounts to mere caprice, will it be struck down under the rational basis test."\textsuperscript{158} However, such a characterization is accurate only when a traditional rational basis test is applied. If the South Carolina Supreme Court had addressed the equal protection issue, it undoubtedly would have used the rational basis standard and found that the government’s purpose was not capricious.

\textbf{C. The Constitutional Issues: Cruel and Unusual Punishment Under the Eighth Amendment}

In his pre-trial motion, Hornsby claimed that the GBMI verdict violated the Eighth Amendment.\textsuperscript{159} He failed, however, to renew this argument in his final appellate brief, and so the supreme court did not address the issue.\textsuperscript{160} If Hornsby had preserved this issue, he could have argued that inmates sentenced under the GBMI statute are stigmatized and thus treated differently. Moreover, he could have argued that GBMI inmates actually serve more time than inmates receiving guilty verdicts.\textsuperscript{161}

Even if the Eighth Amendment challenge had been preserved, it is unlikely that
Hornsby would have prevailed in light of *State v. Wilson.* The *Wilson* court was asked to determine if a death sentence given to a GBMI inmate violated the Eighth Amendment ban on cruel and unusual punishment. The defendant in *Wilson* plead GBMI to two counts of murder and multiple counts of assault and battery with intent to kill after he shot teachers and children at an elementary school. The court sentenced Wilson to death for the murder convictions. The defendant appealed his death sentence, arguing that it violated the Eighth Amendment because he was mentally ill and thus less culpable than a normal inmate. The court disagreed, holding that it was not cruel and unusual punishment for the GBMI defendant to receive the death sentence as he was "completely culpable and responsible for his crimes." In light of this ruling, Hornsby would not have prevailed under an Eighth Amendment argument.

IV. CONCLUSION

Contrary to the holding of the South Carolina Supreme Court, the GBMI statute may be unconstitutional. First, the GBMI verdict violates due process because it creates a compromise option that misleads the jury on both mens rea and dispositional issues. Second, under a heightened rational basis scrutiny, the statute may also violate equal protection because the State would bear the burden of proving that the statute had legitimate purposes and was not the product of animosity toward mentally ill defendants. The Eighth Amendment would not justify invalidating the GBMI statute. Although it is laudable that the General Assembly tried to protect the public from dangerous, mentally ill defendants that may be improperly acquitted as insane, this goal cannot be accomplished at the expense of constitutional rights.

René J. LeBlanc-Allman

163. Id. at 500, 413 S.E.2d at 20.
164. Id. at 500-01, 413 S.E.2d at 20-21.
165. Id. at 501, 413 S.E.2d at 21.
166. Id. at 508, 413 S.E.2d at 25.
167. Id. at 509; 413 S.E.2d at 25.
I. INTRODUCTION

In City of Easley v. Portman\(^1\) the South Carolina Court of Appeals revisited an issue that it had dealt with seventeen months before in State v. Osborne\(^2\) and examined South Carolina’s corpus delicti rule as it applies to driving under the influence of intoxicating liquors (DUI) cases. In Portman the court purported to reaffirm the long-standing “corroboration rule” that an extrajudicial confession by a criminal defendant is not admissible until the State has established the corpus delicti, or the body of the crime.\(^3\) However, by affirming a conviction based solely on circumstantial evidence and the defendant’s extrajudicial statements,\(^4\) the court, in effect, demonstrated that adherence to the corpus delicti rule is a mere formality in DUI cases.

Traditionally, courts in DUI cases have recited the corpus delicti rule, but then applied the rule to the facts in only the most cursory manner.\(^5\) Because Osborne had strictly applied the corpus delicti rule to a DUI case,\(^6\) however, the Portman court faced a dilemma. Essentially, the court had to decide whether it would continue to apply Osborne’s stricter standard to corpus delicti determinations in DUI cases. Interestingly, the court could not reach a clear consensus on this issue, and produced three separate opinions, each offering its own solution. Writing for the court, Judge C. Tolbert Goolsby distinguished Osborne and, in effect, returned the court to the “mere formality” standard.\(^7\) In a concurring opinion, Judge Ralph King Anderson argued for an “admissions against interest” exception that would allow for a stricter application of the rule, but would give the State a way to maneuver around it.\(^8\) In dissent, Chief Judge William T. Howell advocated Osborne’s strict application standard.\(^9\) Therefore, the Portman opinions outlined three options for corpus delicti in DUI cases: (1) theoretically retain the corpus delicti rule, but ignore it in reality; (2) retain the rule, but adopt a broad “admissions” exception; or (3) retain and rigorously apply the rule.

This Note argues that South Carolina should continue to apply the mere

\(^{1}\) 327 S.C. 593, 490 S.E.2d 613 (Ct. App. 1997).
\(^{3}\) Portman, 327 S.C. at 595, 490 S.E.2d at 614.
\(^{4}\) Id. at 598-99, 490 S.E.2d at 616.
\(^{6}\) Osborne, 321 S.C. at 199-201, 467 S.E.2d at 456-57.
\(^{7}\) Portman, 327 S.C. at 598-99, 490 S.E.2d at 616.
\(^{8}\) Id. at 599-614, 490 S.E.2d at 616-25 (Anderson, J., concurring in judgment).
\(^{9}\) Id. at 614-16, 490 S.E.2d at 625-26 (Howell, C.J., dissenting).
formality standard to the *corpus delicti* rule in DUI cases because it is familiar, flexible, and enjoys widespread support in other jurisdictions. As a basis for this discussion, Part II describes the factual and procedural background of *Portman* and also examines the three *Portman* opinions. Parts III and IV, respectively, examine the "admissions against interest" exception and the *Osborne* standard and argue against the adoption of these standards in South Carolina. Finally, Part V demonstrates that *Portman* follows familiar South Carolina case law, is in line with the current treatment of similar DUI cases across the United States, and permits the effective administration of justice.

II. BACKGROUND

**A. Facts and Procedure**

Although the facts of *Portman* are fairly typical of the "one-car accident" DUI case, *Portman* contained one twist that required the court's scrutiny. Responding to a call, Officer Ron Winegard arrived at the scene of a one-car accident and discovered that a Ford Bronco had collided with a tree. Because the car was still "warm to his touch and [Winegard] could still smell the tires," he determined that the car ran into the tree a few minutes before "his arrival at the scene." Cynthia Gilstrap, the Bronco's registered owner, was at the scene as well as the defendant, Steven Dale Portman. Portman stood behind the wrecked vehicle, smelled of alcohol, and slurred his speech. Winegard suspected that an impaired driver had caused the accident because of "the manner in which the Bronco had left the road." When Winegard asked Portman what happened, Portman answered, "I was driving the vehicle. I'm drunk, take me to jail." Winegard then charged Portman with driving under the influence.

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10. See, e.g., State v. DesLaurier, 630 A.2d 119, 128-29 (Conn. App. Ct. 1993) (establishing *corpus delicti* when circumstantial evidence included the defendant driving a car earlier in the night and being intoxicated when arrested); Burks v. State, 613 So. 2d 441, 443 (Fla. 1993) (establishing *corpus delicti* when the police found defendant at scene, defendant was intoxicated, and his truck illegally blocked the highway); Regan v. State, 590 N.E.2d 640, 644 (Ind. Ct. App. 1992) (establishing *corpus delicti* when defendant was found alone at scene of accident and alcohol discovered in the car); State v. Gould, 704 P.2d 20, 30-31 (Mont. 1985) (establishing *corpus delicti* primarily on the basis of bartender's testimony); Commonwealth v. Zelosko, 686 A.2d 825, 827 (Pa. Super. Ct. 1996) (establishing *corpus delicti* when circumstantial evidence included the defendant's intoxication and a witness first spotting the car 2000 feet from site where police later found it).


13. Id.
14. Id.
15. Id.
16. Id.
17. Id.
with DUI. At the jail, Portman refused to take a breathalyzer test.

The trial judge admitted Portman’s statements into evidence, and the jury convicted Portman of DUI. On appeal, Portman argued that the prosecution had failed to establish the corpus delicti of DUI; that his confession should thus not have been admitted, and that, without this confession, the evidence was insufficient to sustain the jury’s verdict. The court of appeals, in a three opinion decision, disagreed and affirmed the conviction.

B. The Judges’ Opinions

Writing for the court, Judge Goolsby recited the well-established rule that the prosecution must establish the corpus delicti before it can offer the defendant’s extrajudicial statements as evidence. Judge Goolsby cited State v. Speights for the proposition that circumstantial evidence can establish the corpus delicti. Referring to the two most recent decisions on the subject, Judge Goolsby repeated that “the corpus delicti of the offense of DUI consists of the following three elements: (1) driving a vehicle; (2) within this State; and (3) while under the influence of intoxicating liquors, drugs, or any other substance of like character.”

Relying solely on out-of-state authorities, Judge Goolsby added that this first element requires only a showing that someone, but not necessarily the defendant, operated a vehicle while intoxicated. Turning to the case at hand, the court found the following circumstantial evidence sufficient to establish the corpus delicti: the vehicle had crashed into a tree; the arresting officer smelled alcohol on Portman’s breath and heard Portman slurring his speech; and the arresting officer suspected that impaired driving caused the crash. Having determined that the facts in the record sufficiently established the corpus delicti of DUI, the court concluded that

19. Id.
20. Id.
21. Id.
22. Id.
23. See id.
28. Id.; see also S.C. CODE ANN. § 56-5-2930 (Law. Co-op. 1976) (defining the offense of driving under the influence).
29. Portman, 327 S.C. at 596, 490 S.E.2d at 615 (citing State v. Stimmel, 800 S.W.2d 156 (Mo. Ct. App. 1990); State v. Knoefler, 563 P.2d 175 (Utah 1977)).
30. Id.
31. Id. at 596-97, 490 S.E.2d at 615.
the admission of Portman’s statements did not constitute error and so Portman’s conviction should therefore be affirmed.

Judge Goolsby rejected Portman’s reliance on State v. Osborne, a case in which the corpus delicti rule had barred an extrajudicial confession, and found Osborne’s facts distinguishable. In Osborne the arresting officer did not find the defendant at the scene and had no specific reason to suspect that impaired driving caused the accident he discovered. Over two hours later, the police found Osborne at a bar. Judge Goolsby agreed that this evidence in Osborne had been insufficient to establish the corpus delicti. In Portman, however, Officer Winegard found the defendant intoxicated at the scene and believed an impaired operator caused the wreck. Judge Goolsby believed that these facts effectively distinguished the case from Osborne, thus allowing the jury verdict to stand.

In a lengthy concurring opinion, Judge Anderson agreed that the prosecution adequately established the corpus delicti through the circumstantial evidence presented. He further agreed that the connection of the accused with the offense is not an element of the corpus delicti of a crime. However, Judge Anderson also argued that South Carolina should apply an “admissions against interest” exception to the corpus delicti rule, allowing “admissions” to be used as prima facie evidence of the corpus delicti. Despite different reasoning, though, Judge Anderson agreed with Judge Goolsby that the evidence supported Portman’s conviction.

In dissent, Chief Judge Howell agreed with the rest of the panel that the corpus delicti rule applied, but he believed that the other judges were too lenient in its application to the facts. Pointing out that “[s]ingle-car accidents can occur for many different reasons,” Chief Judge Howell asserted that, absent Portman’s statements, the only evidence of DUI in the record consisted of the Bronco leaving the road and crashing into a tree, the appearance of an intoxicated Portman in a

32. Id. at 597, 490 S.E.2d at 615.
33. Id. at 599, 490 S.E.2d at 616.
35. Id. at 201, 467 S.E.2d at 457.
36. Portman, 327 S.C. at 598, 490 S.E.2d at 616.
38. See id.
39. Id.
40. Portman, 327 S.C. at 598, 490 S.E.2d at 616.
41. Id. at 595, 490 S.E.2d at 614.
42. Id. at 598-99, 490 S.E.2d at 616.
43. Id. at 599-614, 490 S.E.2d 616-25 (Anderson, J., concurring in judgment).
44. Id. at 613-14, 490 S.E.2d at 624.
45. Id. at 603, 490 S.E.2d at 618 (citing 23 C.J.S. Criminal Law § 1110 (1989)).
47. Id. at 613-14, 490 S.E.2d at 624.
48. Id. at 615, 490 S.E.2d at 625 (Howell, C.J., dissenting).
49. Id. at 616, 490 S.E.2d at 625.
group at the scene, and Officer Winegard's conclusion that the driver was impaired.\textsuperscript{50} Charging that to find evidence of DUI in "the 'manner in which the Bronco had left the road'"\textsuperscript{51} required "an impermissible assumption [that] wrecks are caused by drunk drivers,"\textsuperscript{52} Chief Judge Howell argued that Officer Winegard offered no evidence to support his "bare conclusion that the accident was caused by impaired driving."\textsuperscript{53} Thus, the dissent concluded that the evidence presented was insufficient to establish the \textit{corpus delicti} of DUI.\textsuperscript{54}

### III. The "Admissions" Exception to the \textit{Corpus Delicti} Rule

Although Judge Anderson's concurring opinion in \textit{Portman} endorses the \textit{corpus delicti} rule, it presents an idea that carves a great hole in the rule: the "admissions against interest exception."\textsuperscript{55} Under this exception, admissions against interest, unlike confessions, would be admissible as \textit{prima facie} evidence of the \textit{corpus delicti}.\textsuperscript{56} In other words, whereas confessions would not be allowed into evidence until the State had established some proof of the \textit{corpus delicti}, the State could use admissions against interest \textit{as proof of the corpus delicti}.\textsuperscript{57} Obviously, this exception, if adopted in South Carolina, would provide the State with a formidable way to maneuver around the rule in DUI prosecutions. Thus, at first glance, the exception seems desirable on policy grounds alone. Add to these policy benefits the idea that courts will no longer need to wrestle with \textit{corpus delicti} challenges to extrajudicial admissions, and the admissions exception seems even more attractive. However, a closer examination suggests that the exception may not be as useful or pragmatic as it first appears.

First, and most significantly, the admissions exception does not necessarily ease the court's job. The exception would, in some cases, eliminate the court's debate about whether the State has established proof of the \textit{corpus delicti} sufficient to admit a confession. However, this elimination would not necessarily make the court's task easier; indeed, the admissions exception would only replace the \textit{corpus delicti} decision with a tougher one: whether the extrajudicial statement was a confession or an admission against interest.

Judge Anderson cited many authorities that have examined the differences between confessions and admissions.\textsuperscript{58} His discussion of their definitions in \textit{Black's Law Dictionary} is particularly persuasive:

\begin{itemize}
  \item 50. \textit{Id.} at 615-16, 490 S.E.2d at 625-26.
  \item 51. \textit{Id.} at 616, 490 S.E.2d at 625-26 (quoting \textit{id.} at 595, 490 S.E.2d at 614).
  \item 52. \textit{Portman}, 327 S.C. at 616, 490 S.E.2d at 625-26.
  \item 53. \textit{Id.} at 616 n.1, 490 S.E.2d at 626 n.1 (Howell, C.J., dissenting).
  \item 54. \textit{Id.} at 616, 490 S.E.2d at 626.
  \item 55. \textit{Id.} at 606-10, 490 S.E.2d at 620-22 (Anderson, J., concurring in judgment).
  \item 56. \textit{Id.} at 610, 490 S.E.2d at 622.
  \item 57. \textit{Id.} at 606, 490 S.E.2d at 620.
  \item 58. \textit{Portman}, 327 S.C. at 606-10, 490 S.E.2d at 620-22.
\end{itemize}
Black’s distinguishes a "confession" from an "admission": "A confession is a statement admitting or acknowledging all facts necessary for conviction of the crime. An admission, on the other hand, is an acknowledgment of a fact or facts tending to prove guilt which falls short of an acknowledgment of all essential elements of the crime."59

This distinction is not difficult to understand,60 but its simplicity is deceptive. Differentiating confessions and admissions is an easy task "on paper" or in the most straight-forward cases. However, in more complex cases, drawing the line becomes significantly more difficult. Ultimately, this determination may be as subjective as deciding whether the State has established the corpus delicti without an extrajudicial statement.

An examination of the Portman facts reveals this dilemma. Upon questioning by the arresting officer at the scene of the accident, Portman replied, "I was driving the vehicle. I'm drunk, take me to jail."61 Judge Anderson determined that "the statements emanating from Portman were quintessential 'admissions' rather than 'an extrajudicial confession.'"62 However, this conclusory assertion ignores the complexity of the issue. Certainly, Portman’s statement was not a confession in the traditional sense. Portman never said, "I am guilty of driving under the influence of alcohol." Additionally, Portman made his statements before being charged with DUI.63

Nevertheless, a plausible argument exists that Portman’s statement was indeed a confession. As Judge Anderson noted, South Carolina cases have restricted confessions to acknowledgments of guilt;64 Portman’s statement arguably fits this mold. The offense of DUI involves a person driving a vehicle under the influence

59. Id. at 607, 490 S.E.2d at 621 (Anderson, J., concurring in judgment) (quoting BLACK'S LAW DICTIONARY 297 (6th ed. 1990)).

60. Suppose, for example, that a suspect arrested in connection with the shooting death of "Mr. X" tells the police, "I'm the one you're looking for; I murdered X." This statement would obviously be a confession. Yet, if the same suspect said only, "I was at the scene, and my gun was used to shoot X," this statement would be an admission because the suspect would not necessarily be acknowledging guilt.


62. Id. at 614, 490 S.E.2d at 625 (Anderson, J., concurring in judgment).

63. Judge Anderson points out that Black's Law Dictionary "defines 'confession' as a 'voluntary statement made by a person charged with the commission of a crime ... wherein he acknowledges himself to be guilty of the offense charged.'" Id. at 607, 490 S.E.2d at 621 (quoting BLACK'S LAW DICTIONARY 296 (6th ed. 1990)) (emphasis added). Although this language suggests that a confession can only be made after a person has been charged with a particular crime, the complete dictionary definition never makes such a requirement. See BLACK'S LAW DICTIONARY 296-97 (6th ed. 1990). Indeed, such a temporal requirement would mean that the murder suspect from the earlier hypothetical could not confess to an unrelated robbery unless the suspect had also been charged with that offense. See supra note 60.

of drugs or alcohol within the State. By saying, "I was driving the vehicle. I'm drunk, take me to jail," Portman essentially "confessed" to DUI: he admitted to all of the elements of DUI, and he acknowledged his guilt when he told the officer to take him to jail. However, Portman's statement may or may not have been a confession. The argument that it might have been a confession reveals the difficulty in employing the admissions exception. Reasonable minds could differ about whether a statement was a confession or an admission as easily as they have differed about whether the State has established the corpus delicti under the current rule. Because the admissions exception would likely result in one judicial conundrum replacing another, abandoning the current scheme in favor of the admissions exception is difficult to justify.

Moreover, the admissions exception has neither strong nor wide-spread support in other jurisdictions or in South Carolina. A few scattered cases support the admissions exception to the corpus delicti rule, but these cases do not form a convincing argument for the exception. Indeed, some courts have expressly rejected the notion that admissions and confessions should be treated differently in corpus delicti situations. Arguing for the admissions exception, Judge Anderson relied primarily on two Florida cases that discuss and apply the exception. Despite the analysis in these two cases, they offer little support for the admissions exception

67. Discussing the South Carolina case law defining "confession," Judge Anderson cited State v. Morgan, 282 S.C. 409, 319 S.E.2d 335 (1984). In Morgan the supreme court found that the defendant's statement that he had been driving and had been using alcohol and marijuana was not a confession to DUI because the defendant did not admit to being under the influence. Id. at 411-12, 319 S.E.2d at 336-37. Portman can be distinguished from Morgan, though, because Portman admitted to being under the influence when he said, "I'm drunk." Portman, 327 S.C. at 595, 490 S.E.2d at 614.
68. See, e.g., Stephens v. State, 898 S.W.2d 435, 437 (Ark. 1995) (holding corpus delicti rule inapplicable to admissions against interest); Stowers v. State, 422 S.E.2d 870, 872 (Ga. 1992) (finding no independent showing of corpus delicti was necessary to admit defendant's admission against interest).
69. Judge Goolsby cited State v. Edwards, 173 S.C. 161, 175 S.E. 277 (1934), for the proposition that the corpus delicti rule does not bar admissions against interest. Portman, 327 S.C. at 595, 490 S.E.2d at 614-15. However, the language in Edwards is not as broad as the Portman court's citation suggests, and the Edwards court appears to limit its holding directly to arson cases. Edwards, 173 S.C. at 164, 175 S.E. at 278. Indeed, Judge Anderson did not even cite Edwards in his concurrence.
70. See cases cited supra note 68.
71. See, e.g., Fulmer v. State, 230 N.E.2d 307, 308 (Ind. 1967) (applying corpus delicti rule to all extrajudicial statements); State v. McPhee, 115 A.2d 498, 501 (Me. 1955) (refusing to admit confession or admission against interest until sufficient proof of corpus delicti); State v. Paris, 414 P.2d 512, 514 (N.M. 1966) ("It is clear that, unless the corpus delicti of the offense charged has been otherwise established, a conviction cannot be sustained solely on extrajudicial confessions or admissions of the accused.").
because Florida no longer applies the exception.74 The Florida Supreme Court, while affirming the decision of the court of appeals in Burks, expressly disapproved of its reasoning, stating that the distinction between confessions and admissions was not dispositive in situations involving the application of the corpus delicti rule and so the corroboration standard still applied.75 Judge Anderson relied on the Florida District Court of Appeal’s decision in Burks even though the Florida Supreme Court had expressly disapproved of the confession versus admission distinction the lower appellate court had made. Since Burks, Florida has abandoned the admissions exception to the corpus delicti rule.76

Obviously, South Carolina need not base the adoption or rejection of its judicial doctrines on the fate of those doctrines in other jurisdictions. However, the lack of widespread support for the admissions exception and a low probability that it would ease judicial decision-making caution South Carolina against the adoption of the admissions exception to the corpus delicti rule.

IV. The Osborne Strict Application Standard

The strict application of the corpus delicti rule advocated by Chief Judge Howell77 would unduly burden DUI prosecutions by limiting the instances in which a defendant’s extrajudicial statements could be admitted into evidence. Examining the dissent’s analysis of the Portman facts illustrates this point. The dissent implies that Portman was a clear example of the State’s failure to establish corpus delicti.78 In reaching this conclusion, the dissent focused on two crucial facts: (1) Portman was not alone at the scene; and (2) Portman was not the vehicle’s registered owner.79 The dissent argued that these facts made it “just as likely, if not more likely, that the registered owner of the car” was driving.80

Although these facts suggest that the registered owner might have been the driver, Portman, not the registered owner, admitted he was driving the car.81 The dissent argues that no evidence indicated that anyone else at the scene was intoxicated.82 However, had the registered owner been sober, she quite possibly

74. See J.B. v. State, 705 So. 2d 1376, 1378 (Fla. 1998) (“[W]e reaffirm the requirement that an independent corpus delicti must be established when offering an admission against interest into evidence.”); R.L.B. v. State, 703 So. 2d 1245, 1246 (Fla. Dist. Ct. App. 1998) (“Under the corpus delicti rule, the state has the burden of proving, by substantial evidence, that a crime was committed, as a prerequisite to offering in evidence an admission against interest.”).

75. Burks v. State, 613 So. 2d 441, 443-44 (Fla. 1993).

76. See cases cited supra note 74.


78. Id. at 614, 490 S.E.2d at 625 (“If the requirement that the State must establish the corpus delicti in a DUI case has any meaning at all, then this case should be reversed.”).

79. Id. at 615, 490 S.E.2d at 625.

80. Id. at 615-16, 490 S.E.2d at 625.

81. Id. at 595, 490 S.E.2d at 614 (Goolsby, J.).

82. Id. at 615, 490 S.E.2d at 625 (Howell, C.J., dissenting).
would have claimed to have driven the car. Following this line of reasoning, if the registered owner was intoxicated and either she or Portman were operating the car, then someone clearly was operating a vehicle while under the influence.\(^3\) Thus, Portman presents a situation in which a DUI offense most likely occurred. Yet, under the strict application standard as applied in Osborne, the court would not have admitted any extrajudicial statements and would not have convicted the defendant.

As this discussion of the Portman facts demonstrates, the strict application standard would hamper DUI prosecutions by preventing judges from basing reasonable inferences on the totality of circumstances presented by the State in its proof of corpus delicti. Although the corpus delicti rule is designed to protect defendants,\(^4\) rejecting a strict application standard does not unduly threaten this protection because even the mere formality approach will bar the admission of an extrajudicial statement when no evidence of a crime exists.\(^5\) As a result, refusing to strictly apply the corpus delicti rule presents only a de minimis intrusion into the protection offered by the rule; in contrast, the State has a significant interest in obtaining DUI convictions. Consequently, South Carolina should not strictly apply the corpus delicti rule.

V. THE MERE FORMALITY STANDARD

Portman, in effect, returns South Carolina DUI law to its pre-Osborne status by retreating from the latter case’s strict application of the corpus delicti rule and reaffirming the mere formality standard. In so doing, South Carolina’s DUI law falls back in line with that of other jurisdictions.\(^6\) This weight of authority, coupled with a public policy concern for effective enforcement of DUI laws, strongly suggests that South Carolina should continue to apply the standard used by Judge Goolsby in Portman.

A. South Carolina Case Law Supports the Mere Formality Standard

An examination of South Carolina case law reveals that most courts have used the lenient mere formality standard to which Portman returns.\(^7\) Typically, courts

\(^3\) See State v. Smith, 328 S.C. 622, 625, 493 S.E.2d 506, 508 (Ct. App. 1997) ("[T]o sustain a DUI conviction, there must be evidence other than the defendant’s extrajudicial statements that someone (but not necessarily the defendant) was driving while impaired.").

\(^4\) The corpus delicti rule protects defendants from conviction based upon a confession to a crime that was never committed. Portman, 327 S.C. at 602-03, 490 S.E.2d at 618 (Anderson, J., concurring in judgment).

\(^5\) For example, not even the most conservative court would uphold a conviction based upon an individual simply wandering into a police station and confessing to driving under the influence when the police fail to locate a car or anyone that could corroborate the individual’s statement.

\(^6\) See cases cited supra note 10.

have upheld DUI convictions that have been challenged on corpus delicti grounds, and the courts’ applications of the underlying corpus delicti rule have been less than strenuous.88 The basic corpus delicti rule is well established,89 and courts have generally professed to follow it. However, courts have usually experienced little difficulty in finding the State’s evidence sufficient to prove the corpus delicti, often issuing a simple conclusory statement to that effect.90 Portman fits into this pattern. Indeed, as illustrated by a brief overview of these decisions, it is Osborne, as distinguished in Portman, that departs from precedent.

In State v. Townsend,91 decided shortly before Osborne, the court of appeals found that the State had produced adequate evidence of the corpus delicti.92 The State relied on the following facts to establish the corpus delicti: the police discovered the defendant at the scene of a one-car accident; the defendant smelled of alcohol, failed field sobriety tests, and had a blood alcohol level of 0.21; and firefighters at the scene indicated that the defendant had been driving the vehicle.93 Although the court found that this circumstantial evidence was strong enough to send the case to the jury,94 it gave little discussion to support the conclusory observation that the corpus delicti had been established.95

In State v. Gilliam96 the defendant was found alone inside an automobile at the scene of a single car accident.97 An open bottle of alcohol was also discovered in the vehicle.98 A tow truck operator, arriving at the scene shortly after the wreck occurred, testified that he smelled alcohol on the defendant and that the defendant appeared to be drunk.99 At the hospital, the defendant “rambled” when he tried to speak.100 The court found this evidence sufficient to send the case to the jury.101

88. See, e.g., Smith, 328 S.C. at 623-26, 493 S.E.2d 507-09 (establishing corpus delicti when defendant was found intoxicated at the scene, but was not alone and was not in the driver’s seat of the vehicle); Townsend, 321 S.C. at 57-58, 467 S.E.2d at 140-41 (establishing corpus delicti when defendant was found intoxicated at the scene, but was standing some distance away from the vehicle).
89. See Portman, 327 S.C. at 602, 490 S.E.2d at 618 (Anderson, J., concurring in judgment) (citing Carolyn K. MacWilliam, Annotation, Sufficiency of Corroboration of Confession for Purpose of Establishing Corpus Delicti as Question of Law or Fact, 33 A.L.R.5th 571 (1995)).
90. See, e.g., Smith, 328 S.C. at 626, 493 S.E.2d at 509 (“[T]he State presented sufficient evidence other than [Defendant’s] own statements establishing the corpus delicti of the crime of DUI.”); Townsend, 321 S.C. at 58, 467 S.E.2d at 140 (“This is enough evidence, albeit circumstantial evidence, to submit the case to the jury.”).
92. Id. at 57-58, 467 S.E.2d at 140-41.
93. Id. at 57-58, 467 S.E.2d at 140.
94. Id. at 58, 467 S.E.2d at 140.
95. See id. at 57-59, 467 S.E.2d at 140-41.
97. Id. at 347, 242 S.E.2d at 411.
98. Id.
99. Id.
100. Id.
101. Id. Gilliam seems to represent the “ideal” case for prosecutors facing a corpus delicti challenge because the defendant was alone at the scene of the accident when he was discovered. Even
In *State v. Smith*, the most recent South Carolina case that considers this issue, the court of appeals affirmed the defendant's conviction over a *corpus delicti* rule challenge. The essential facts included the following: (1) the defendant's car left the road and landed in a ditch; (2) the police chief arrived and saw the defendant leaning on his car; (3) the defendant smelled of alcohol and failed field sobriety tests; and (4) the two other people present at the scene both identified the defendant as the driver. Ironically, Chief Judge Howell, writing for a unanimous court, held that the State's evidence established the *corpus delicti* of the crime of DUI. Thus, *Smith* suggests that the court of appeals continues to follow *Portman*’s more lenient *corpus delicti* standard in DUI cases.

As Townsend, Gilliam, and Smith illustrate, Osborne was the departure from prior South Carolina jurisprudence to which *Portman* returned. The *Osborne* court’s departure from a traditional approach to DUI cases was not radical. However, Osborne did strictly evaluate the State’s *corpus delicti* proof. Under the facts of that case, the more stringent approach was justified. In *Osborne* the police did not discover the defendant at the scene, and the State’s evidence was insufficient to establish that the accident resulted from drunk driving. Although the facts in *Osborne* might allow a fact-finder to speculate that a DUI offense had occurred, speculation about facts not in existence is impermissible. The court’s reasoning is sound; and consequently, labeling Osborne a “bad” decision is difficult, even though it appeared to “raise the bar” for the State’s requisite showing of *corpus delicti*.

Thus, the *Portman* court did not need to repudiate Osborne; the court merely needed to limit its scope. By distinguishing Osborne, Portman limits a more strict application of the *corpus delicti* rule in DUI cases to Osborne’s particular facts (i.e., defendant not found at the scene, no evidence of impaired driving). In *Portman* the court essentially announced that Osborne did not spell the end of South Carolina’s mere formality standard for the *corpus delicti* rule in DUI cases. Rather, Osborne simply created a limited exception to this leniency.

Chief Judge Howell in his *Portman* dissent conceded, “Had Portman been the only person at the scene, ... the case might properly have been submitted to the jury.” City of Easley v Portman, 327 S.C. 593, 616, 490 S.E.2d at 613, 626 (Ct. App. 1997) (Howell, C.J., dissenting). Indeed, the presence of other people at the scene in *Portman* appears to be very troublesome for Chief Judge Howell. He observed that “the circumstantial evidence makes it just as likely, if not more likely, that the registered owner of the car, who was present at the scene, was driving the car at the time of the accident.” Id. at 615-16, 490 S.E.2d at 625.

103. Id. at 624-25, 493 S.E.2d at 508.
104. Id. at 623-24, 493 S.E.2d at 507-08.
105. Id. at 626, 493 S.E.2d at 509.
107. Id. at 200-01, 467 S.E.2d at 457.
108. Id. at 201, 467 S.E.2d at 457.
109. The South Carolina Supreme Court may soon decide whether the lenient standard reaffirmed in *Portman* and followed in *Smith* will remain viable. On April 2, 1997, the supreme court granted.
B. Other Jurisdictions

Because Portman limits Osborne, South Carolina's application of the corpus delicti rule to DUI cases remains in accord with the law of most other jurisdictions.\(^{110}\) Indeed, establishing the corpus delicti of DUI so that a defendant's extrajudicial statement may be admitted does not seem to be a difficult task, regardless of the jurisdiction. The cases demonstrating this nationwide trend are too numerous to discuss in any significant detail in this Note; however, a few of the cases, with facts similar to those in Portman, merit a brief examination.

The Portman court cited State v. Douglas\(^{111}\) and State v. Stimmel\(^{112}\) as cases with "very similar fact patterns [that] support [the court's] holding."\(^{113}\) In Douglas the arresting officer discovered the defendant at the scene of a one-car accident.\(^{114}\) The defendant was intoxicated and admitted that he had been driving the car.\(^{115}\) Although several other people were also at the scene and nothing other than the defendant's statements identified him as the driver, the court concluded that the circumstantial evidence was sufficient to establish the corpus delicti and so the case, including the defendant's statements, was properly sent to the jury.\(^{116}\)

In Stimmel the arresting officer found the defendant standing next to a vehicle at the scene of a one-car accident.\(^{117}\) The defendant exhibited signs of intoxication and admitted to driving the car.\(^{118}\) Two other men were at the scene, but they left in their own vehicles shortly after the officer arrived.\(^{119}\) The court found the corpus delicti sufficiently established and upheld the defendant's conviction for DUI.\(^{120}\) Thus, New Hampshire and Missouri\(^{121}\) share South Carolina's approach to the corpus delicti rule in DUI cases.

As these cases illustrate, South Carolina's lenient standard is not unique.

certiori to decide State v. Osborne, 321 S.C. 196, 467 S.E.2d 454 (Ct. App. 1996). At publication, the supreme court has yet to decide the case.

110. See cases cited supra note 10.
112. 800 S.W.2d 156 (Mo. Ct. App. 1990).
114. Douglas, 162 A.2d at 159.
115. Id.
116. Id. at 159-60.
117. Stimmel, 800 S.W.2d at 157.
118. Id.
119. Id.
120. Id. at 159.
121. For a brief, but interesting, examination of the status of admissions and the corpus delicti rule in Missouri DWI cases, see Sandy Craig, Comment, DWI Law in Missouri, 52 Mo. L. Rev. 867, 873-76 (1987). Craig reveals that Missouri courts do not require proof of the defendant's connection with the DWI offense as an element of the corpus delicti. Id. at 874. According to Craig, Missouri courts require only that a DWI defendant's extrajudicial statements be corroborated by direct or circumstantial evidence before they may be admitted into evidence, and "the courts are not particularly strict in this area." Id. at 875.
Indeed, this state’s application of the \textit{corpus delicti} rule appears to be in line with that of other states.\footnote{122} As Judge Anderson explained in \textit{Portman}, “In light of the plethora of procedural protections granted defendants in modern criminal practice, the \textit{corpus delicti} rule is supported by few practical or social policy considerations. Therefore, the rule of \textit{corpus delicti} should be applied with circumspection.”\footnote{123} Clearly the \textit{Portman} decision and the decisions of other jurisdictions follow this reasoning.\footnote{124}

\textbf{C. The Mere Formality Standard Allows for the Effective Administration of Justice}

Obviously, single car DUI accident cases create special prosecutorial problems because proving that a defendant was driving the car without the defendant’s admission may be impossible. A strict application of the \textit{corpus delicti} rule compounds the State’s problems because such an interpretation excludes these statements if no independent corroboration of DUI exists. Thus, because the State might not be able to place a defendant behind the wheel beyond a reasonable doubt without the defendant’s extrajudicial statements, a strict judicial application of the rule would likely result in fewer DUI convictions. Clearly, the public’s desire for tougher enforcement of DUI laws makes this result intolerable.

The mere formality standard addresses this concern, but it does so without sacrificing the protections of the underlying rule.\footnote{125} Under the mere formality standard, courts still require the State to produce \textit{some} evidence of the \textit{corpus delicti} before the State can admit an extrajudicial statement.\footnote{126} However, courts are lenient in deciding when the State has met this threshold.\footnote{127} Courts can still refuse to admit confessions when clearly no DUI offense was committed,\footnote{128} but defendants will not

\begin{itemize}
\item \textbf{122.} \textit{See} cases cited \textit{supra} note 10; \textit{see also} Commonwealth v. Manning, 668 N.E.2d 850 (Mass. App. Ct. 1996) (establishing \textit{corpus delicti} when police found the defendant intoxicated at the scene of a single car accident, even though others were with the defendant at the scene); Turner v. State, 877 S.W.2d 513 (Tex. Ct. App. 1994) (establishing \textit{corpus delicti} when police found the defendant alone at the scene of single-car accident, the defendant was intoxicated, skid marks suggested that the accident was caused by impaired driving, and the defendant made an extrajudicial admission).
\item \textbf{124.} Of course, no matter how widespread this lenient approach becomes, some facts are simply insufficient to establish the \textit{corpus delicti}. \textit{See}, \textit{e.g.}, State v. Friesen, 725 S.W.2d 638 (Mo. Ct. App. 1987) (finding that the \textit{corpus delicti} was not established when police discovered two people at the scene of an accident and the only evidence that one or the other was the driver consisted of the vehicle being registered to the defendant and the defendant’s extrajudicial statements).
\item \textbf{125.} \textit{See} supra note 84 and accompanying text.
\item \textbf{126.} \textit{Portman}, 327 S.C. at 595, 490 S.E.2d at 614.
\item \textbf{128.} \textit{Cf.} supra note 60 (illustrating by hypothetical the distinction between an admission and a
\end{itemize}
be able to use the rule as a "technicality" with which to avoid conviction.

Some states have merely modified the corpus delicti rule, and other states have essentially abandoned the corpus delicti rule altogether and replaced it with a so-called "trustworthiness rule." Under this standard, the prosecution must produce "independent proof of facts and circumstances which strengthen or bolster the confession and tend to generate a belief in its trustworthiness." This rule has a common sense appeal, and perhaps South Carolina will one day expressly renounce the corpus delicti rule in favor of the trustworthiness rule. At present, however, South Carolina need not adopt the trustworthiness test for DUI cases because the mere formality standard achieves essentially the same result. Although nominally still cast in terms of corpus delicti and the elements of the offense, South Carolina's corroboration inquiry in DUI cases attempts to answer the same question as the trustworthiness test: Does some credible evidence exist that supports the defendant's confession? An affirmative answer to this question allows the State to build its case on the extrajudicial statement without concern that the defendant has, for some reason, confessed to a crime that never occurred—the very situation the corpus delicti rule was designed to prevent.

VI. CONCLUSION

By returning to the mere formality standard, the Portman court chose the most appropriate application of the corpus delicti rule in DUI cases. Portman's retreat from the strict application standard of Osborne is in harmony with prior South Carolina case law. Furthermore, South Carolina's corpus delicti rule is now once again in line with the majority of jurisdictions, reflecting society's desire to enforce DUI laws rigorously. However, this judicial viewpoint does not unduly burden DUI defendants, and it still allows the corpus delicti rule to serve its intended function. Thus, the mere formality standard balances the competing interests in DUI cases more effectively than the Osborne strict application standard, which unnecessarily hampers DUI prosecutions.

129. See, e.g., State v. Parker, 337 S.E.2d 487, 494 (N.C. 1985) (asserting that a strict rule is no longer useful because it focuses on the elements of the crime rather than the reliability of the confession).

130. See, e.g., State v. Yoshida, 354 P.2d 986, 990 (Haw. 1960) (finding statements admissible if trustworthiness of confession is bolstered by State's other evidence); State v. Lucas, 152 A.2d 50, 60 (N.J. 1959) (opining that extrinsic proof to corroborate an extrajudicial statement is sufficient if the proof creates a belief in the trustworthiness of the statement).

131. Lucas, 152 A.2d at 60.

132. As Judge Anderson wrote in his concurring opinion, "The requirement that the corpus delicti be sufficiently corroborated by independent evidence is rooted in the premise that the examination of this additional evidence will avert the danger that a crime was confessed when in fact no such crime was committed." City of Easley v. Portman, 327 S.C. 593, 602-03, 490 S.E.2d 613, 618 (Ct. App. 1997) (Anderson, J., concurring in judgment).
Judge Anderson’s argument in favor of an admissions exception adds another interesting dimension to Portman because the exception is enticing at first glance. However, a closer examination reveals that the exception does not necessarily offer a fool-proof solution to the problem of extrajudicial statements. Moreover, the exception lacks the widespread support enjoyed by the mere formality approach to the corpus delicti rule. For these reasons, South Carolina should not adopt this exception. When the South Carolina Supreme Court decides Osborne, it should reaffirm the application of a mere formality standard for the corpus delicti rule in DUI cases.

R. Hawthorne Barrett
I. INTRODUCTION

The creation of a duty to warn of the release or presence in a community of a sex offender may have widespread social and legal ramifications. This Note describes and analyzes the relationship between the state’s common-law duty to warn the public of the dangerous propensities of certain individuals and the South Carolina sex offender registration and notice requirements imposed by the Sex Offender Registry. Because the sex offender registration law might impose a duty to warn the general public or a specified individual, this Note will first discuss the common-law duty to warn specific individuals of the dangerous propensities of third persons. The Note will then review the presence or absence of common-law duties in this area. Finally, the Note will explain and compare federal and South Carolina sex offender registration and notice requirements.

II. THE COMMON LAW: WARNING SPECIFIED INDIVIDUALS

Establishing liability in negligence actions requires a duty to act or to refrain from acting. Without an affirmative legal duty, courts often dismiss cases on summary judgment. Warnings of the dangerous propensities of others, whether to foreseeable individuals or to the general public, are rarely legally required. As the South Carolina Court of Appeals summarized:

Ordinarily, the common law imposes no duty on a person to act. An affirmative legal duty exists only if created by statute, contract, relationship, status, property interest, or some other special circumstance. It follows that a person usually incurs no liability for failure to take steps to benefit others or to protect them from harm not created by his own wrongful act.

3. Rayfield v. South Carolina Dep’t of Corrections, 297 S.C. 95, 100, 374 S.E.2d 910, 913 (Ct. App. 1988); accord Sharpe v. South Carolina Dep’t of Mental Health, 292 S.C. 11, 18, 354 S.E.2d 778, 782 (Ct. App. 1987) (Bell, J., concurring) (refusing to impose on a physician a general duty to warn of a patient’s potential danger to the public). In Sharpe Judge Bell acknowledged that unlike South Carolina, some states, particularly California, recognize the existence of a duty to warn third persons when a danger exists as to a specific person based on a therapist-patient relationship. Id. at 18-19, 354 S.E.2d at 782 (citing Tarasoff v. Regents of Univ. of Cal., 551 P.2d 334 (Cal. 1976)).
Generally, a common-law duty to warn exists only under circumstances that create affirmative legal duties.

In Rogers v. South Carolina Department of Parole and Community Corrections⁴ the South Carolina Supreme Court decided whether a duty exists to notify past and potential victims of a convicted offender’s pending release. In Rogers the court affirmed a trial court’s grant of summary judgment for the defendant because no duty to warn arises without “a specific threat of harm directed at a specific individual.”⁵ [W]hen a defendant has the ability to monitor, supervise, and control an individual’s conduct, a special relationship exists between the defendant and the individual, and the defendant may have a common law duty to warn potential victims of the individual’s dangerous conduct.⁶ The court applied this rule to the release of a convicted burglar on furlough who subsequently killed a woman. Even though the released convict had burglarized the woman’s house three times,⁷ the court found no affirmative duty to warn because the convict made no specific threat against the victim during his incarceration.⁸ The court thus confirmed the absence of a general duty to warn of the dangerous propensities of others without knowledge of a specific threat of harm to the potential victim.⁹

Justice Jean H. Toal wrote a scathing dissent in Rogers. She concurred with the majority that a common-law duty to warn potential victims with a special relationship is created by virtue of two factors: (1) the defendant’s ability to monitor, supervise, or control the individual; and (2) the defendant’s knowledge that the perpetrator posed a threat to a specific victim.¹⁰ However, she stated that something less than a specific, verbalized, or written threat should give the defendant sufficient knowledge that the individual poses an identifiable threat to a particular individual.¹¹ Justice Toal would hold that a duty to warn exists “when the individual has made a specific threat of harm directed at the potential victim or when the individual’s conduct indicates an intent to harm the potential victim.”¹² If the majority had adopted that argument, the result would have been very different because the convict had admitted burglarizing the victim three times previously and law enforcement personnel were aware he lived less than five hundred yards from the victim.¹³ Justice Toal considered this conduct sufficient to indicate an intent to

⁵ Id. at 256, 464 S.E.2d at 332 (citing Sheerin v. State, 434 N.W.2d 633 (Iowa 1989)).
⁶ Id.
⁷ Id. at 257, 464 S.E.2d at 333 (Toal, J., dissenting).
⁸ Id. at 256, 464 S.E.2d at 332.
⁹ Id.
11. Id. at 257, 464 S.E.2d at 333.
12. Id.
harm the victim once again.\textsuperscript{14}

Two relatively recent cases decided by the court of appeals have cemented South Carolina’s jurisprudence in this area. In \textit{Bishop v. South Carolina Department of Mental Health}\textsuperscript{15} the court reaffirmed the absence of a common-law duty to warn of the dangerous propensities of others.\textsuperscript{16} In \textit{Bishop} the plaintiff obtained involuntary commitment of her adult daughter, Tammie.\textsuperscript{17} Tammie had allegedly been reading about Satanic rituals, including child sacrifice, and had threatened to harm her minor child, of whom the plaintiff was legal guardian.\textsuperscript{18}

After Tammie’s release, the plaintiff allowed Tammie to be alone with the child and later noticed some ink markings on the child’s arms and body, including the abdominal and vaginal area.\textsuperscript{19} Although no medical evidence of injury was found, the plaintiff sought to hold the Department of Mental Health liable for failing to warn her of potential harm to the child.\textsuperscript{20} Applying the \textit{Rogers} standard, the court of appeals concluded that the Department had no duty to warn the plaintiff\textsuperscript{21} about Tammie’s release because Tammie made no specific threat of harm to the child while in the Department’s custody.\textsuperscript{22}

In \textit{Gilmer v. Martin}\textsuperscript{23} a doctor’s patient killed a nursing home resident while the patient was employed as a nurse’s aide at the nursing home.\textsuperscript{24} The victim’s family sued the doctor for failing to warn the nursing home of his patient’s mental problems.\textsuperscript{25} However, while in the care of the doctor, the patient never made any specific threat directed at any individual other than herself.\textsuperscript{26} Accordingly, the court refused to recognize the existence of a duty to warn all foreseeable victims.\textsuperscript{27}

Many states, including South Carolina, generally follow the Second Restatement of Torts, which directly addresses the existence of an affirmative duty

\textsuperscript{14} Rogers, 320 S.C. at 258, 464 S.E.2d at 333 (Toal, J., dissenting).
\textsuperscript{16} Id. at 161, 473 S.E.2d at 816.
\textsuperscript{17} Id. at 160, 473 S.E.2d at 815.
\textsuperscript{18} Id. at 161, 473 S.E.2d at 816.
\textsuperscript{19} Id. at 160, 473 S.E.2d at 815.
\textsuperscript{20} Id. at 159, 473 S.E.2d at 815.
\textsuperscript{21} The court noted that the plaintiff was well aware of Tammie’s threats concerning the minor child because the threats were the reason the plaintiff sought Tammie’s commitment. Moreover, despite her concerns, the plaintiff allowed Tammie to remove the child from her supervision after Tammie’s release. \textit{Bishop}, 323 S.C. at 162, 473 S.E.2d at 816.
\textsuperscript{22} Id.
\textsuperscript{23} 323 S.C. 154, 473 S.E.2d 812 (Ct. App. 1996).
\textsuperscript{24} Id. at 156, 473 S.E.2d at 813.
\textsuperscript{25} Id. at 157, 473 S.E.2d at 813.
\textsuperscript{26} Id. at 156, 473 S.E.2d at 813.
\textsuperscript{27} Id. at 157-58, 473 S.E.2d at 814.
to control or warn of the dangerous propensities of others. For example, North Carolina, Virginia, and Alabama require no general duty to warn or prevent harm to another based on mere conduct of a third person. As a result, a duty to warn is infrequently imposed. However, knowledge of a person’s propensity for violence and specific threats to an identifiable victim may reach the level of foreseeability necessary to impose a duty to warn or control conduct. Otherwise, unforeseeability and general policy considerations against liability for the actions of third parties limit the duty to warn. Even the celebrated Tarasoff v. Regents of University of California holding has since been narrowed to a duty to warn only when a specific victim is identified. In comparison, Alaska has held that “[a] victim may be ‘foreseeable’ without being specifically identifiable.” However, no such rule exists in South Carolina.

28. See Restatement (Second) of Torts §§ 315, 319 (1965). Section 315 states that [t]here is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless

(a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person’s conduct, or

(b) a special relation exists between the actor and the other which gives to the other a right to protection.

Id. § 315. Section 319 states that “[o]ne who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm.” Id. § 319. 29. See Morton v. Prescott, 564 So. 2d 913, 915 (Ala. 1990) (“Absent special relationships or circumstances, a person has no duty to protect another from the criminal acts of a third person.”); Donahoo v. State, 479 So. 2d 1188, 1190 (Ala. 1985) (finding no duty to warn or protect unless the parole agency or officers knew or should have known that the aggressor might be a danger to a specific person); Hedrick v. Rains, 466 S.E.2d 281, 283-84 (N.C. Ct. App. 1996) (finding no duty to prevent harm by a third person unless the defendant has a special relationship with the plaintiff and knows of the person’s propensity for violence); Nasser v. Parker, 455 S.E.2d 502, 506 (Va. 1995) (holding that a psychiatrist/patient relationship involved an insufficient level of “take charge” or control within the meaning of sections 315(a) and 319 in the Second Restatement of Torts); Fox v. Custis, 372 S.E.2d 373, 376 (Va. 1988) (holding that the requisite degree of control in the parolee/parole officer relationship did not justify a duty to warn).


31. See, e.g., Thompson v. County of Alameda, 614 P.2d 728, 735 (Cal. 1980) (declining to impose blanket liability for failing to warn based on public policy and foreseeability). But see Tarasoff v. Regents of Univ. of Cal., 551 P.2d 334, 345 (Cal. 1976) (“[O]nce a therapist . . . determine[s] . . . that a patient poses a serious danger of violence to others, he bears a duty to exercise reasonable care to protect the foreseeable victim of that danger.”).

32. 551 P.2d 334 (Cal. 1976)

33. Thompson, 614 P.2d at 736.

34. Division of Corrections, Dep’t of Health & Soc. Servs. v. Neakok, 721 P.2d 1121, 1129 (Alaska 1986). The Alaska Supreme Court found a special relationship between a parolee and a parole officer. Id. at 1126. The court held that the victims were within a “zone of foreseeable hazards” because they were residents of an isolated community of approximately 100 people. As a result, the Parole Board could be held to owe a duty to warn of the release of a parolee. Id. at 1129.
III. THE COMMON LAW: WARNING THE GENERAL UNIDENTIFIED PUBLIC

Parties in South Carolina have rarely advanced the argument that a general public warning should be issued on the release of convicted offenders or mental patients because the supreme court has imposed a duty to warn a potential victim only in the presence of a specified, express threat of harm to that individual. In Sharpe v. South Carolina Department of Mental Health\(^{35}\) the court of appeals rejected the plaintiff's argument that the court should issue a public warning when a mental patient is released.\(^{36}\) In an interesting concurring opinion, Judge Randall Bell explored the practical and policy issues involved in requiring a duty to warn the general public of the release of mental patients.\(^{37}\) He concluded that the dissemination and issuance of warnings is inherently problematic. For example, "it would create new grounds for legal liability based on the content of the warnings."\(^{38}\)

Moreover, because warnings must be meaningful, hospitals and doctors may overwarn and thus dilute the effect of a warning simply to protect themselves from liability.\(^{39}\)

Judge Bell listed a number of significant policy reasons against requiring public warnings of the release of potentially unstable patients:

[I]t would intrude on the patient’s privacy; it would often be therapeutically counterproductive; it would publicly stigmatize mental patients and most probably deter them from seeking treatment; it would undermine the policy favoring voluntary rather than involuntary treatment for mental disorders; it would undermine the policy favoring release and reintegration of mental patients into the community; and rather than making the law more simple and more certain, it would create a maze of complex legal questions where none presently exists.\(^{40}\)

Judge Bell metaphorically related such a public warning to "cry[ing] 'Wolf.'"\(^{41}\) He added that such a "Big Brother" approach "would have no meaningful effect on public awareness or safety."\(^{42}\) Such policy reasons weigh heavily against imposing a duty to warn the general public and probably have a role in limiting the duty to warn specific individuals.

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36. Id. at 15, 354 S.E.2d at 780.
37. Id. at 19-20, 354 S.E.2d at 783 (Bell, J., concurring).
38. Id. at 20, 354 S.E.2d at 783.
39. Id.
40. Id.
41. Sharpe, 292 S.C. at 20, 354 S.E.2d at 783 (Bell, J., concurring).
42. Id.
IV. AN INTRODUCTION TO SEX OFFENDER REGISTRATION AND NOTIFICATION LEGISLATION

Increasing concern over the recidivism rates of sex offenders has led many citizens to ask their lawmakers to better protect and inform them when convicted offenders are released from custody and re-enter society. The resulting legislation has taken numerous forms. A growing number of states allow for public dissemination of the offender’s presence in the community, and some require public notification of a sex offender’s presence, identity, and address within the community.

In 1996 the South Carolina General Assembly substantially amended the Sex Offender Registry. South Carolina Law Enforcement Division (SLED) operates the Sex Offender Registry, which is similar to legislation in many other states. These amendments were enacted to keep track of convicted sex offenders after their release from custody and to enable law enforcement to protect the public and guard against repeat offenses. Moreover, the 1996 South Carolina amendments changed the statute to allow public inspection of information collected for the registry and notification of the release of convicted sex offenders.

43. This Note is not a comparative survey of the various sex offender registration statutes enacted by state legislatures. For such a comparison, see Michele L. Earl-Hubbard, The Child Sex Offender Registration Laws: The Punishment, Liberty Deprivation, and Unintended Results Associated with the Scarlet Letter Laws of the 1990s, 90 NW. U. L. REV. 788 (1996).

44. See, e.g., Thousands Mourn Death, Rally for "Megan's Law," THE REC. (N. N.J.), Aug. 3, 1994, at A3 ("The [victim's] family is calling for legislation . . . that would require neighborhood notification when sex offenders move to a community.").

45. See Earl-Hubbard, supra note 43, at 794-96 (describing the origins of state and federal registration schemes).

46. See, e.g., ARIZ. REV. STAT. ANN. § 13-3825(C) (West Supp. 1997) ("[T]he local law enforcement agency shall notify the community of the offender's presence in the community pursuant to the guidelines established by the community notification guidelines committee."); CAL. PENAL CODE § 290.4 (West Supp. 1998) (authorizing operation of a "900" telephone number for the public to call and inquire whether a specific individual is on the sex offender list); KAN. STAT. ANN. § 22-4909 (1995) (requiring sex offender information be open to public inspection).

47. See, e.g., 730 ILL. COMP. STAT. ANN 152/120 (West 1997) (requiring this information be open to public inspection); N.Y. CORRECT. LAW § 168-I (McKinney Supp. 1997-98) (permitting law enforcement dissemination of such information).


V. The South Carolina Sex Offender Registry

Sex offender registration is intended to provide law enforcement officials with information about convicted sex offenders.\(^54\) Although the Sex Offender Registry promotes the "public health, welfare, and safety of [the state's] citizens,"\(^55\) the registration "provisions are not intended to violate the guaranteed constitutional rights of those who have violated our nation's laws" and served their sentence.\(^56\)

The Sex Offender Registry requires registration for a wide range of criminal activity.\(^57\) The emphasis on sexual offenses involving children reveals the General Assembly's strong interest in protecting the welfare and safety of children. Convicted sex offenders must register for life and update their registration annually.\(^58\) Any time the offender moves within the state, the offender must contact the county sheriff with new registration information.\(^59\)

Either the Department of Corrections or the Department of Probation, Parole, and Pardon Services must notify SLED and the county sheriff when an offender will be released or placed on probation.\(^60\) The Department of Corrections must also instruct the offender orally and in writing to register with the local sheriff within twenty-four hours of release.\(^61\) The releasing department shall also provide SLED

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55. Id.
56. Id.
57. Under the Act, a resident, regardless of age, is considered a sex offender for registration purposes if the person has been convicted in any recognized federal or state court in the United States of any of the following offenses:
   (1) criminal sexual conduct in the first degree;
   (2) criminal sexual conduct in the second degree;
   (3) criminal sexual conduct in the third degree;
   (4) criminal sexual conduct with minors, first degree;
   (5) criminal sexual conduct with minors, second degree . . . ;
   (6) engaging a child for sexual performance;
   (7) producing, directing, or promoting sexual performance by a child;
   (8) criminal sexual conduct: assaults with intent to commit;
   (9) incest;
   (10) buggery;
   (11) committing or attempting lewd act upon child under fourteen;
   (12) eavesdropping or peeping; [and]
   (13) [felony violations under Obscenity, Material Harmful to Minors, Child Exploitation, and Child Prostitution]
61. Id. § 23-3-440(1).
with the offender’s current address, descriptive information, and a current photograph to aid in locating offenders if they fail to register.\(^{62}\)

The original Sex Offender Registry provided that “[i]nformation collected for the offender registry shall not be open to inspection by the public.”\(^{63}\) This confidentiality requirement disregarded the public’s desire to know about and protect themselves from persons with potentially dangerous propensities. As a result, the General Assembly amended the Sex Offender Registry in 1996.\(^{64}\) Most significantly, the information in the Registry is now available to the general public.\(^{65}\) Upon written request, the sheriff must now release the offender’s full name, aliases, date of birth, current home address, offense that required the registration, date and location of conviction, and a photocopy of a current photograph.\(^{66}\) However, the sheriff is prohibited from releasing this information to anyone other than the person making the request.\(^{67}\)

Because the individual citizen is required to act affirmatively, the new law may not appear to mandate extensive public disclosure. However, the amendment also states that the Sex Offender Registry does not prohibit “a sheriff from disseminating information . . . if the sheriff or another law enforcement officer is presented with facts giving rise to a reasonable suspicion of criminal activity and has reason to believe the release of this information will deter the criminal activity.”\(^{68}\) This language gives a county sheriff discretion to publicly disseminate the information and warn the public under certain circumstances. Although the legislation does not extend so far as to require public notification, it does not restrict those who may receive the information.\(^{69}\) Notwithstanding the individual request provision, the discretionary dissemination amendment may ultimately result in widespread public notification.

The statute provides little guidance about the parameters of a South Carolina sheriff’s discretionary authority to disseminate or distribute the information contained within the registry.\(^{70}\) Some states have attempted to define precise notification conditions.\(^{71}\) For example, unlike South Carolina’s amendments, New Jersey’s classification and notification provisions provide law enforcement

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62. Id. § 23-3-440(4).
66. Id. § 23-3-490(A).
67. Id.
68. Id. § 23-3-490(B).
69. However, information regarding juveniles is still strictly prohibited from public disclosure. Id. § 23-3-490(C).
70. Id. § 23-3-490(B). Moreover, the Sex Offender Registry fails to address the liability or immunity of government and law enforcement officials for public disclosure of Registry information.
71. See, e.g., N.J. STAT. ANN. § 2C:7-8 (West 1995) (providing categories of notification pursuant to factors relevant to risk of additional offenses).
personnel with useful guidelines.\textsuperscript{72} New Jersey places sex offenders into three categories according to certain risk factors.\textsuperscript{73} Depending on the risk of recidivism, notification may be given to (1) law enforcement personnel, (2) community organizations such as schools and religious organizations, or (3) the public, in accordance with the New Jersey Attorney General's guidelines.\textsuperscript{74} Although this scheme may increase the ability to identify recidivists, no statute can accurately pinpoint potential victims of uncommitted crimes.

VI. FEDERAL SEX OFFENDER LEGISLATION AND CONSTITUTIONAL CHALLENGES

In September 1994 and by amendment in October 1996, the federal government established guidelines for federal and state sex offender registration programs.\textsuperscript{75} These guidelines require a minimum state sex offender registry,\textsuperscript{76} create a national sex offender database operated by the Federal Bureau of Investigation,\textsuperscript{77} and allow for public dissemination and notification of registry contents in accordance with state laws or upon a determination of necessity to protect the public.\textsuperscript{78} The federal statutes expressly grant good faith immunity to law enforcement agencies, employees of law enforcement agencies, and state and federal officials.\textsuperscript{79} States had to establish a minimum sex offender registry within three years of the effective date of the legislation.\textsuperscript{80} South Carolina's sex offender registration legislation became effective July 1, 1994.\textsuperscript{81}

Three important provisions of the federal sex offender registration program are inconsistent with, or absent from, the South Carolina Sex Offender Registry. First, the federal guidelines require released offenders to comply with state registration requirements for ten years.\textsuperscript{82} However, offenders must register for life if they have one or more prior sex offense convictions, have been convicted of an aggravated

\textsuperscript{72} Id. The Third Circuit recently upheld the requirements for public notification for classified sex offenders against challenges based on the Ex Post Facto and Double Jeopardy Clauses of the United States Constitution. See E.B. v. Verniero, 119 F.3d 1077, 1111 (3d Cir. 1997).
\textsuperscript{73} N.J. STAT. ANN. § 2C:7-8c(1)-(3) (West 1995). These factors include criminal history, the length of the prison term served, the nature of the offense, and the relationship between the offender and the victim. Id. § 2C:7-8b(1)-(8).
\textsuperscript{74} Id. § 2C:7-8c(1)-(3).
\textsuperscript{76} Id. § 14071(a)(1).
\textsuperscript{77} 42 U.S.C.A. § 14072(b) (West Supp. 1997).
\textsuperscript{78} 42 U.S.C.A. § 14071(d) (West Supp. 1997).
offense as defined, or have been deemed a sexually violent predator pursuant to the federal act.\textsuperscript{83} In contrast, the South Carolina Sex Offender Registry requires lifetime registration for all who qualify.\textsuperscript{84} Second, under the federal guidelines, states must also have a verification procedure to annually verify offenders’ addresses and information.\textsuperscript{85} South Carolina has no such procedure. Finally, the federal guidelines exclude a perpetrator who is eighteen years of age or younger from the registration requirements if the offense is only criminal because of the age of the victim.\textsuperscript{86} In comparison, the South Carolina Sex Offender Registry requires registration of any sex offender regardless of age,\textsuperscript{87} with one narrow exception. South Carolina does not require registration for those under sixteen years of age that are convicted of an offense arising out of consensual sexual conduct with another person under sixteen years of age.\textsuperscript{88}

The constitutionality of sex offender registration and notification has been challenged in only a handful of states.\textsuperscript{89} The registration provisions have generally withstood challenges based on due process,\textsuperscript{90} ex post facto,\textsuperscript{91} equal protection,\textsuperscript{92} and double jeopardy.\textsuperscript{93} The most recurring problem is the retroactive application of these statutes to individuals convicted of offenses before the statutes took effect. The ex post facto clause forbids the imposition by law of a punishment for an act if, when the act was committed, no such punishment existed.\textsuperscript{94} However, to violate the ex post facto clause, the law must be punitive in nature.\textsuperscript{95} To determine whether

\begin{itemize}
\item \textsuperscript{84} S.C. CODE ANN. § 23-3-460 (Law. Co-op. Supp. 1997). For a listing of qualifying offenses, see supra note 57.
\item \textsuperscript{86} 42 U.S.C.A. § 14071(a)(3)(A) (West 1995).
\item \textsuperscript{87} S.C. CODE ANN. § 23-3-460 (Law. Co-op. Supp. 1997).
\item \textsuperscript{90} Verniero, 119 F.3d at 1105-11; Artway, 81 F.3d at 1268-69.
\item \textsuperscript{91} Pataki, 120 F.3d at 1285; Verniero, 119 F.3d at 1092-1105; Artway, 81 F.3d at 1267.
\item \textsuperscript{92} Artway, 81 F.3d at 1267-68.
\item \textsuperscript{93} Verniero, 119 F.3d at 1092-1105.
\item \textsuperscript{94} Weaver v. Graham, 450 U.S. 24, 28 (1981); see also U.S. CONST. art. I, § 9 (“No bill of attainder or \textit{ex post facto} law shall be passed.”).
\item \textsuperscript{95} See Pataki, 120 F.3d at 1272-76; Artway, 81 F.3d at 1253-63.
\end{itemize}
a law is an additional punishment and a violation of the ex post facto clause requires courts to consider the legislative intent and the actual effect of the law.\textsuperscript{96} Courts have found that requiring registration is remedial, not punitive in nature, and thus have upheld the constitutionality of these provisions.\textsuperscript{97} Only one state court has struck down notification provisions for violating the ex post facto clause.\textsuperscript{98}

VII. CONCLUSION

The threat and risk of recidivism by prior sex offenders is so serious that the state and federal governments have acted legislatively to protect the potential victims of sex crimes. Congress and the states have enacted sex offender registries that maintain up-to-date information on some of society’s potentially most dangerous members. Moreover, some sovereigns have permitted public notification of the presence of sex offenders in the community. South Carolina’s provisions differ from those enforced in other states because South Carolina allows law enforcement personnel the discretion to disseminate sex offender information. As a result, future challenges to this state’s Sex Offender Registry and public notification provisions may differ in form to those already played out in other jurisdictions.

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\begin{itemize}
\item \textsuperscript{96} See Artway, 81 F.3d at 1263 (synthesizing an analytical framework for ex post facto determination).
\item \textsuperscript{97} See, e.g., Verniero, 119 F.3d at 1105 ("[T]he notification required by Megan's Law does not constitute punishment for purposes of the Ex Post Facto [Clause]").
\item \textsuperscript{98} See State v. Babin, 637 So. 2d 814, 824 (La. Ct. App. 1994).
\end{itemize}
SOUTH CAROLINA ADOPTS A HARMLESS ERROR RULE FOR CASES INVOLVING GOVERNMENT INTIMIDATION OF A WITNESS

I. INTRODUCTION

In *State v. Williams* the South Carolina Supreme Court reversed a defendant's conviction by applying a harmless error analysis because of the government's intimidation of a defense witness. The court believed that had the witness testified, the witness's testimony might have exculpated the defendant. In cases involving government intimidation of witnesses different jurisdictions have employed either a harmless error rule or a per se reversal rule. This Note discusses the development and use of these two rules. In particular, the Note analyzes the Fourth Circuit case law concerning intimidation of witnesses, because South Carolina used the Fourth Circuit's rule as a guide in developing its rule. Finally, this Note concludes with an analysis and comparison of the South Carolina harmless error rule and the Fourth Circuit's rule.

II. BACKGROUND

A. Facts

In *Williams* the defendant appealed his murder conviction, arguing that the State violated his due process rights by intimidating a possibly exculpatory witness. He was convicted of a drive-by shooting that killed one person. At trial, the State argued that the fatal shot was fired from the driver's side of the van driven by Williams. Marion Lindsey, one of four passengers in the van, informed police that someone outside the van fired shots simultaneously with someone inside the van. Because Lindsey's testimony was possibly exculpatory, Williams's attorney contacted Lindsey's attorney to arrange an interview with Lindsey.
attorney agreed to the interview, but insisted on notifying the solicitor’s office. As a result, Lindsey refused to testify at Williams’s trial fearing that he might jeopardize his plea bargain with the solicitor’s office. Williams alleged that the State had intimidated Lindsey and consequently violated Williams’s right to present a defense. The trial court ruled that Lindsey himself ultimately made the decision not to testify. Williams was convicted of murder and appealed.

The supreme court found that the trial court failed to address whether Lindsey was improperly intimidated. Although the State admitted improper conduct, it argued harmless error. The supreme court disagreed, believing that Lindsey’s testimony would have produced information that no other witness could have provided. Holding that a defendant must prove both substantial interference and prejudice to obtain relief for the government’s intimidation of a witness, the court found that Williams had satisfied both requirements. The court further opined that “[t]he remedy to be afforded a defendant in this situation is determined by the facts and circumstances of each case, depending on the prejudice suffered by the defendant.” The supreme court reversed Williams’s conviction and granted him a new trial.

B. Per Se and Harmless Error Rules

The Fifth, Sixth, and Fourteenth Amendments of the United States Constitution provide an accused with the constitutional right to present a defense. “This right is a fundamental element of due process of law.” When the accused’s right to present a defense has been violated by the government’s intimidation of a defense

10. Id.
12. Id.
13. Id. at 133, 485 S.E.2d at 101.
14. Id. at 134-35, 485 S.E.2d at 102.
15. Id. at 133, 485 S.E.2d at 101.
16. Id. at 135, 485 S.E.2d at 102.
17. Williams, 326 S.C. at 136, 485 S.E.2d at 102.
18. Id. at 136, 485 S.E.2d at 102-03.
19. Id. at 135, 485 S.E.2d at 102.
20. Id. at 136, 485 S.E.2d at 102-03.
21. Id. at 136, 485 S.E.2d at 103.
22. Id. at 137, 485 S.E.2d at 103.
23. Goldbatt, supra note 4, at 1247. The Fifth Amendment prohibits a person from being deprived “of life, liberty, or property, without due process of law.” U.S. CONST. amend. V. The Sixth Amendment provides the accused in a criminal prosecution with the right “to have compulsory process for obtaining witnesses in his favor.” U.S. CONST. amend. VI. The Fourteenth Amendment provides that no State shall “deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1.
witness, courts have employed two rules to remedy the due process violation: a per se reversal rule and a harmless error rule.25 Per se reversal requires a court to overturn the defendant’s conviction and remand the case for retrial “without regard to prejudice to the defendants.”26 Harmless error, on the other hand, requires a conviction to be overturned only when the outcome of the trial was influenced by the error.27 The United States Supreme Court has not yet definitively ruled on which standard should apply, and lower courts remain split.28 The Second, Fifth, Seventh, and Eighth Circuits have applied a harmless error analysis to governmental intimidation of witness cases.29 The Third, Sixth, and Eleventh Circuits apply a per se reversal rule.30 As this Note discusses, the Fourth Circuit employs a harmless error rule if a witness testifies in spite of governmental intimidation.31

The lower courts employing a per se reversal rule assert that the United States Supreme Court case of Webb v. Texas32 requires such a rule.33 In Webb the Court reversed the defendant’s conviction because the trial judge gave a “lengthy and intimidating warning” to the defense’s sole witness, after which, the witness refused to testify.34 The Supreme Court ruled that “the unnecessarily strong terms used by the judge could well have exerted such duress on the witness’[s] mind as to

25. Goldbatt, supra note 4, at 1251.
27. Goldbatt, supra note 4, at 1239.
28. Compare, e.g., United States v. Pinto, 850 F.2d 927, 933 (2d Cir. 1988) (harmless error), with Damps v. Wainwright, 805 F.2d 1426, 1433 (11th Cir. 1986) (per se reversal).
29. Diggs v. Richards, No. 90-1720, 1992 WL 46689, at *2 (7th Cir. Mar. 13, 1992) (unpublished opinion); *2 (7th Cir. 1992) (unpublished opinion); Pinto, 850 F.2d at 933; United States v. Weddell, 800 F.2d 1404, 1410 (5th Cir. 1986); Peeler v. Wyrick, 734 F.2d 378, 382 (8th Cir. 1984).
32. 409 U.S. 95 (1972) (per curiam).
33. Goldblatt, supra note 4, at 1240.
34. Webb, 409 U.S. at 97. The trial judge warned:

“Now you have been called down as a witness in this case by the Defendant. It is the Court’s duty to admonish you that you don’t have to testify, that anything you say can and will be used against you. If you take the witness stand and lie under oath, the Court will personally see that your case goes to the grand jury and you will be indicted for perjury and the likelihood [sic] is that you would get convicted of perjury and that it would be stacked onto what you have already got, so that is the matter you have got to make up your mind on. If you get on the witness stand and lie, it is probably going to mean several years and at least more time that you are going to have to serve. It will also be held against you in the penitentiary when you’re up for parole and the Court wants you to thoroughly understand the chances you’re taking by getting on that witness stand under oath. You may tell the truth and if you do, that is all right, but if you lie you can get into real trouble. The court wants you to know that. You don’t owe anybody anything to testify and it must be done freely and voluntarily and with the thorough understanding that you know the hazard you are taking.”

Id. at 95-96 (quoting the trial judge).
preclude him from making a free and voluntary choice whether or not to testify."  

Lower courts have read the Supreme Court’s decision to overturn Webb’s conviction in spite of “apparently overwhelming evidence of guilt” as requiring per se reversal when a witness has been intimidated by the government.  

In contrast, lower courts employing a harmless error rule base their analyses on a different line of United States Supreme Court decisions. In 1946 the Supreme Court first articulated a harmless error rule for nonconstitutional errors in federal criminal proceedings. In 1963 the Court extended the harmless error rule to constitutional errors. Four years later, the Supreme Court further opined that for a constitutional error to be harmless, it must be harmless beyond a reasonable doubt. Many courts interpret the harmless error rule as requiring that a conviction be upheld “when it appears from the record that the defendant is guilty.” In *Fahy v. Connecticut* the Court articulated the harmless error rule by explaining that “[w]e are not concerned here with whether there was sufficient evidence on which the petitioner could have been convicted without the evidence complained of. The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction.”  

Although the Supreme Court has utilized a harmless error analysis, the Court has yet to apply the analysis in cases involving the intimidation of a witness. However, some lower courts have applied the harmless error rule in such a situation. For example, the Fifth Circuit in *United States v. Weddell* refused to use a per se reversal rule to overturn defendant Hammond’s conviction, choosing instead to apply a harmless error analysis. In *Weddell* Hammond’s wife allegedly planned to testify on her husband’s behalf. To ensure Mrs. Hammond testified as a prosecution witness, the government had the FBI “kidnap” Mrs. Hammond. As a result, Mrs. Hammond did not testify on her husband’s behalf. The court refused to apply a per se reversal rule to overturn Hammond’s conviction, and remanded the case for the lower court to determine whether Mrs. Hammond would have testified  

35. *Id.* at 98.  
36. *Id.* at 99 (Blackmun, J., dissenting).  
42. 375 U.S. 85 (1963).  
43. *Id.* at 86-87.  
44. See *Chapman*, 386 U.S. at 24; *Fahy*, 375 U.S. at 86-87.  
45. 800 F.2d 1404 (5th Cir. 1986).  
46. *Id.* at 1410.  
47. *Id.* at 1409.  
48. *Id.* The FBI “escorted” Mrs. Hammond to a motel and eventually took her to the federal courthouse; Mrs. Hammond believed that she was in FBI custody and had to accompany the agents. *Id.*  
49. *Id.* at 1411.
for her husband had the government not interfered.\textsuperscript{50}

III. A COMPARISON OF SOUTH CAROLINA’S RULE AND THE FOURTH CIRCUIT’S RULE

In \textit{State v. Williams}\textsuperscript{51} the South Carolina Supreme Court used the Fourth Circuit’s rule as a guide in developing its own rule governing the State’s intimidation of a defense witness.\textsuperscript{52} In \textit{Williams} the South Carolina court noted that “\textit{t}he rule in the Fourth Circuit appears to be that governmental intimidation can be deemed harmless error where the witness nonetheless testifies.”\textsuperscript{53} The South Carolina Supreme Court cited two Fourth Circuit cases in formulating its interpretation of the Fourth Circuit rule.\textsuperscript{54} In \textit{United States v. MacCloskey} the defendant was charged with conspiracy to obstruct the administration of justice and conspiracy to murder a federal agent.\textsuperscript{55} In a voir dire hearing prior to the trial, defendant’s witness, Edwards, provided exculpatory testimony concerning the conspiracy charges against the defendant.\textsuperscript{56} However, because the United States Attorney reminded Edwards that “she could be reindicted if she incriminated herself during” the trial, Edwards decided to plead the Fifth Amendment at the trial on the advice of counsel.\textsuperscript{57} The government conceded to the charges of improper conduct, but argued that the error was harmless.\textsuperscript{58} The Fourth Circuit did not believe that the error was harmless and so found “\textit{t}he unnecessary to determine whether the harmless error rule applie[d] to this type of constitutional violation.”\textsuperscript{59} The Fourth Circuit granted the defendant a new trial because he “\textit{w}as improperly denied the complete testimony of his major defense witness”\textsuperscript{60} even though “\textit{t}he evidence was sufficient to sustain a jury finding” of MacCloskey’s guilt.\textsuperscript{61}

In \textit{United States v. Teague},\textsuperscript{62} decided two years after \textit{MacCloskey}, the witness testified in spite of an “advisory” call to the witness’s lawyer by the assistant United

\textsuperscript{50} Id. at 1412.
\textsuperscript{51} 326 S.C. 130, 485 S.E.2d 99 (1997).
\textsuperscript{52} Id. at 135, 485 S.E.2d at 102.
\textsuperscript{53} Id. The court implied that the inverse is true as well: governmental intimidation may not be harmless when the witness fails to testify, and such intimidation requires an automatic reversal of the defendant’s conviction. This implication arises from the court’s statement that the intimidation in \textit{Williams} “could not be deemed harmless” if the court followed the Fourth Circuit’s rule because the witness failed to testify in \textit{Williams}. The court, however, rejected “such an automatic reversal rule.” \textit{Id.}
\textsuperscript{54} United States v. Teague, 737 F.2d 378 (4th Cir. 1984); United States v. MacCloskey, 682 F.2d 468 (4th Cir. 1982).
\textsuperscript{55} MacCloskey, 682 F.2d at 469-70.
\textsuperscript{56} Id. at 475.
\textsuperscript{57} Id. at 475-76.
\textsuperscript{58} Id. at 479.
\textsuperscript{59} Id.
\textsuperscript{60} Id. at 475.
\textsuperscript{61} MacCloskey, 682 F.2d at 474.
\textsuperscript{62} 737 F.2d 378 (4th Cir. 1984).
States attorney.63 The defendant appealed his conviction on the grounds that his due process rights were violated by the government’s intimidation of his main witness.64 The Fourth Circuit refused to overturn the defendant’s conviction because “Teague was not deprived of his witness’[s] testimony and the transcript reflects that the witness ... gave all of the favorable testimony that the defendant could have expected.”65 Although in MacCloskey the Fourth Circuit left open the question of harmless error analysis for the constitutional violation involved,66 the court in Teague found that the government’s intimidation of the defense witness did not result in prejudice and therefore was harmless.67

Teague illustrates the Fourth Circuit’s rule that when a witness fully testifies after governmental intimidation, the court employs a harmless error rule. The South Carolina court in Williams was faced with the opposite situation—a witness that failed to testify following governmental intimidation. The South Carolina Supreme Court cited Teague and MacCloskey and implied that the Fourth Circuit’s rule requires per se reversal when a witness fails to testify.68 The South Carolina Supreme Court refused “to adopt such an automatic reversal rule.”69 Although the Fourth Circuit has never decided a case on point, the Teague court’s discussion of previous case law supports this per se reversal rule.70 The Teague court stated: “In each of the cases requiring reversal, the defendant was denied either all of the testimony of the intimidated witness or all of the helpful testimony from the witness.”71 Distinguishing this line of precedent, the Fourth Circuit noted that the defendant in Teague received “all of the helpful testimony” from the witness.72 Therefore, although the Fourth Circuit has yet to explicitly hold that a defendant will be granted a new trial if a witness fails to testify following governmental intimidation, the court’s precedent leads to this conclusion.

In Williams the South Carolina Supreme Court faced the converse of the situation in Teague. Because the witness in Williams failed to testify, the intimidation “could not be deemed harmless” under the Teague rationale.73 As a

63. Id. at 380. The assistant U.S. attorney advised the witness’s attorney that if the witness “perjured himself he would be hearing from the United States Attorney’s office and [the witness’s] pretrial diversion agreement would be revoked.” Id.
64. Id. at 381.
65. Id. at 384.
66. United States v. MacCloskey, 682 F.2d 468, 479 (4th Cir. 1982).
67. Teague, 737 F.2d at 382.
69. Id.
71. Id. at 384 (emphasis added).
72. Id.
result, the court faced the decision whether to adopt the logical converse of the Fourth Circuit’s rule. The court refused. Instead, the court held “that in order to obtain relief, a defendant must demonstrate both substantial interference and prejudice.” Such is the language of harmless error analysis.

Comparing the Fourth Circuit’s rule and the South Carolina rule established in Williams, South Carolina’s rule is less protective of the criminal defendant because the defendant must prove “both substantial interference and prejudice.” The prejudice must be more than the witness’s refusal to testify; the court will look to see if the defendant would have been convicted even if the witness had testified. Furthermore, even if substantial interference and prejudice are proven, the defendant is not guaranteed a new trial. Rather, the appropriate remedy will be determined according to “the facts and circumstances of each case.” With such a case-by-case analysis, the court has offered little normative guidance for the court of appeals.

Although South Carolina established a less protective rule, the court made the rule easier to satisfy by clarifying what testimony would be deemed harmless. In Williams the State argued that the intimidation of Lindsey, which resulted in his refusal to testify, was harmless because Lindsey’s testimony was “merely cumulative to that of other witnesses.” To broaden the definition of harmless error, the court could have agreed with the government’s argument that because Lindsey’s testimony was essentially the same as other witnesses’ testimony, his failure to testify was harmless. Instead, the court looked beyond the mere substance of Lindsey’s testimony. The court determined that Lindsey’s failure to testify could not be harmless because, even though he would have testified to essentially the same facts, his credibility could have swayed the jury.

IV. CONCLUSION

Although the Fourth Circuit is traditionally conservative, its governmental intimidation rule is relatively liberal in that the rule provides greater protection for the criminal defendant. In contrast, the South Carolina court has unanimously established a more restrictive rule. By applying a harmless error rule and

74. Williams, 326 S.C. at 135, 485 S.E.2d. at 102.
75. Id.
76. Id. at 136, 485 S.E.2d at 103.
77. Id. at 136, 485 S.E.2d at 102.
78. Id. at 136, 485 S.E.2d at 102-03.
simultaneously limiting what testimony can be deemed harmless, the South Carolina Supreme Court has developed a rule that balances practicality and fairness. For this, the supreme court should be commended. In the days of an over-burdened judicial system, the use of a harmless error rule may be the only efficient way to deal with governmental intimidation of witnesses. As Chief Justice Rehnquist aptly stated:

The reversal of a conviction entails substantial social costs: it forces jurors, witnesses, courts, the prosecution, and the defendants to expend further time, energy, and other resources to repeat a trial that has already once taken place; victims may be asked to relive their disturbing experiences. . . . These societal costs of reversal and retrial are an acceptable and often necessary consequence when an error in the first proceeding has deprived a defendant of a fair determination of the issue of guilt or innocence. But the balance of interest tips decidedly the other way when an error has had no effect on the outcome of the trial.  

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