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South Carolina's Evolving Standards of Decency: Capital Child Rape Statute Provides a Reminder that Societal Progression Continues Through Action, Not Idleness

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SOUTH CAROLINA'S EVOLVING STANDARDS OF DECENCY: CAPITAL CHILD RAPE STATUTE PROVIDES A REMINDER THAT SOCIETAL PROGRESSION CONTINUES THROUGH ACTION, NOT IDLENESS

I. INTRODUCTION

Imagine a small child, perhaps a girl around the age of five. Assume this child has two friends, ages seven and nine. These girls could be neighbors, schoolmates, or even members of the same church. How the children met is immaterial—the important observation to make is that they are close friends and play together frequently. Now imagine that the girl's father comes home from work one day. He is tired and moody, yet instead of retreating alone to his room, he shows a special interest in his daughter and her friends. At first the attention seems normal—there is nothing suspicious about a game outside followed by dinner. Then, however, the four sit down in the living room to watch a movie, and the mood changes. The daughter watches as her father takes her friends out of the room separately. She notices that her friends seem fine as they leave, but upon their return, both are noticeably upset and have been crying. Now the father summons his own daughter. He takes her out of the room and does something that she cannot quite describe—cannot quite understand—but she finds herself crying like her friends.

After the movie, none of the children speak to one another because each is confused. Each girl thinks that what the adult did had to be okay, but at the same time, each hopes never to have such an experience again. But somehow, the experience does happen again, over and over, until finally one of the girls can keep silent no longer. Subsequently, each of the girls finds herself being questioned by complete strangers. Each girl finds herself in a courtroom, trying to explain what happened but not knowing why an explanation is needed. The youngest girl suddenly finds herself without a father, yet she does not want him ever to return. Years later, each discovers that she is HIV positive. The victims live with their memories, and each has a daily reminder of the horrific events in the form of a physical disease.

Now the question becomes what should happen to this man who has consciously stolen such innocence? In Louisiana, such a man may be sentenced to death.[1] What would happen in South Carolina? Possibly the same result, as South Carolina recently chose to follow Louisiana and permit the imposition of the death penalty against child rapists.[2] If a South Carolina jury imposed the death penalty

1. *See* State v. Wilson, 685 So. 2d 1063, 1064 (La. 1996). The aforementioned scenario, while fictional, is based on criminal charges against Patrick Dewayne Bethley. The following facts are consistent with Bethley's conduct: Bethley was charged with raping three girls, including his daughter; the behavior began December 1, 1995 and continued until January 10, 1996; and at the time of the crimes, Bethley knew that he was HIV positive. *Id.* at 1065.

2. *See* S.C. CODE ANN. § 16-3-655(C)(1) (Supp. 2006).

against a child rapist, South Carolina and Louisiana would be the only two states to impose such a sentence.[3] But is such a law constitutional, or is it a violation of the Eighth Amendment guarantee against cruel and unusual punishment?

This Note analyzes the constitutionality of South Carolina's Sex Offender Accountability and Protection of Minors Act of 2006.[4] The statute provides, under certain circumstances, for the imposition of the death penalty against persons previously engaging in criminal sexual conduct with a minor.[5] Specifically, this Note focuses on the provision that permits the death penalty for an actor who engages in sexual battery with a victim who is less than eleven years of age.[6]

There are myriad cases that would lend merit to an examination of South Carolina's capital child rape statute. However, three United States Supreme Court cases are the most relevant to an analysis of the statute. Perhaps the most obvious case to examine is *Coker v. Georgia*,[7] as the issue in front of the Court was the constitutionality of the death penalty for rape.[8] While *Coker* is not precisely on point for an analysis of a child rape statute,[9] the case lends an understanding of possible standards that a court might reference today. Additionally, *Atkins v. Virginia*[10] and *Roper v. Simmons*[11] are pertinent because they are the most recent death penalty decisions issued by the Supreme Court. Accordingly, in reference to a punishment for which the Supreme Court has mandated "evolving standards of decency,"[12] a court should certainly consider the most recent standards that reflect societal norms. In order to fully understand the implications of these cases, it is imperative to dissect the Court's analysis in each instance.

Part II outlines the Supreme Court's analysis in *Coker v. Georgia*. Similarly, Part III discusses the Supreme Court's analyses in *Roper v. Simmons* and *Atkins v. Virginia*. Part IV subjects South Carolina's statute to a modern day reading under *Coker* standards. Finally, Part V analyzes the South Carolina statute under the *Roper-Atkins* line of reasoning. Ultimately, this Note concludes that in light of the

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3. Georgia and Montana have rape laws not specifically drafted for child rape, but the statutes ostensibly could support the death penalty for a conviction of child rape. *See infra* note 119. Florida, Louisiana, Oklahoma, and South Carolina have statutes specifically alllowing the death penalty for a conviction of child rape. *See infra* note 116. However, Louisiana is the only state that has sentenced a child rapist to death.

4. Act No. 346, 2006 Leg., 116th Sess. (S.C. 2006). The difficulty in writing about any subject related to the death penalty arises not from a lack of information, but from the knowledge that those reading this Note likely read with pre-conceived notions, foregone conclusions, and personal prejudices. This Note, however, is not intended to judge the morality of the death penalty. Instead, the assertions discussed here rest on the notion that the United States Supreme Court has already declared the death penalty to be one form of acceptable punishment in certain cases; the death penalty itself is not cruel and unusual punishment when property instituted. *See* Coker v. Georgia, 433 U.S. 584, 591 (1977).

5. *See* S.C. CODE ANN. § 16-3-655(C)(1) (Supp. 2006).

6. § 16-3-665(A)(1), (C)(1).

7. 433 U.S. 584 (1977).

8. *See id.* at 592.

9. *Id.* (noting that the issue before the Court in *Coker* involved the rape of an adult woman).

10. 536 U.S. 304 (2002).

11. 125 S. Ct. 1183 (2005).

12. Trop v. Dulles, 356 U.S. 86, 101 (1958).

most relevant precedents and current standards of decency, a reviewing court should uphold South Carolina's new statute as constitutional.

II. *COKER V. GEORGIA*

The first case that is particularly on point in terms of the crime at issue is *Coker v. Georgia*.[13] In *Coker*, the defendant escaped from prison while serving "sentences for murder, rape, kidnapping, and aggravated assault."[14] During the course of his escape, the defendant committed armed robbery and other offenses, including the rape of an adult woman.[15] Coker was convicted on a number of offenses and sentenced to death on the rape charge.[16] Coker asserted an Eighth Amendment claim that the death penalty as punishment for rape was cruel and unusual punishment.[17] Agreeing with the defendant, the Court held that a sentence of death for the rape of an adult woman was grossly disproportionate and excessive punishment forbidden by the Eighth Amendment.[18]

In reaching its decision, the Court followed two lines of reasoning. The first was that Eighth Amendment judgments should be informed primarily by objective factors.[19] Objective factors are those measurable factors that are not based on the subjective opinions of individual Justices and include public attitudes, "legislative attitudes, and the response of juries reflected in their sentencing decisions."[20] From the history of rape statutes, the Court inferred that both public and legislative attitudes tended to indicate that the death penalty for rape was not considered an acceptable punishment.[21] As the Court stated, "At no time in the last 50 years have a majority of the States authorized death as a punishment for rape."[22] Additionally, the response to *Furman v. Georgia*,[23] which invalidated the majority of capital punishment statutes throughout the United States,[24] suggested a public willingness

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13. *See Coker*, 433 U.S. at 586.
14. *Id.* at 587.
15. *Id.*
16. *Id.* at 591.
17. *See id.* at 592. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.
18. *Coker*, 433 U.S. at 592.
19. *Id.*
20. *Id.*
21. *See id.* at 593–96.
22. *Id.* at 593.
23. 408 U.S. 238 (1972) (per curiam).
24. *Coker*, 433 U.S. at 593. In *Furman*, the defendants, who were convicted and sentenced to death on charges of murder and rape, challenged Georgia's method of imposing capital sentences. *See Furman*, 408 U.S. at 240 (Douglas, J., concurring). The issue before the Court was an Eighth Amendment challenge to Georgia's sentencing procedures, which provided no guidelines and wide discretion for both the judge and juries during the sentencing phase. *See id.* at 253. The Court held that the sentences were a violation of the Eighth Amendment's prohibition against cruel and unusual punishment. *Id.* at 239–40 (per curiam). Georgia's statute led to arbitrary and capricious sentencing by allowing the judge or jury too much discretion in determining the sentence. *See id.* at 255–57 (Douglas, J., concurring). This holding led to a nationwide legislative effort to rewrite capital sentencing statutes

to accept the death penalty as a punishment for murder, but not as a punishment for rape.[25]

The *Coker* Court considered jury decisions as an indicator of public opinion because "[t]he jury . . . is a significant and reliable objective index of contemporary values because it is so directly involved."[26] As only Georgia and Florida allowed execution for rape at the time of *Coker*, the Court focused the jury analysis on Georgia's statistics.[27] According to factual submissions of sixty-three cases, Georgia juries had sentenced rapists to death on six occasions in three years.[28] The Court found that a majority of juries (nine out of ten) did not impose a death sentence on convicted rapists—a sufficient indicator of disapproval.[29]

In addition to objective factors like measurable public opinion, *Coker* also relied on a second line of reasoning which stemmed from an Eighth Amendment interpretation.[30] "[T]he Eighth Amendment bars not only those punishments that are 'barbaric' but also those that are 'excessive' in relation to the crime committed."[31] The Court subscribed to the idea, proposed in *Gregg v. Georgia*,[32] that "excessive" punishment is that which is purposeless and "makes no measurable contribution to acceptable goals of punishment," or "is grossly out of proportion to the severity of the crime."[33] In focusing on the disproportionate element, the Court found that the death penalty was an excessive penalty for a rapist who, as opposed to a murderer, does not unjustifiably take a human life.[34] The Court elaborated on the distinction between murder and rape:

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to satisfy the standards established in *Furman*. *Coker*, 433 U.S. at 593–94 (citing Gregg v. Georgia, 428 U.S. 153, 179–82 (1976)).

25. *See Coker*, 433 U.S. at 594. After *Furman*, thirty-five states reinstituted the death penalty for limited types of crimes. *Id.* at 593–94 (citing *Gregg*, 428 U.S. at 179 n.23). No state that previously lacked a death penalty rape statute chose to include one. *Id.* at 594. "Of the [sixteen] States in which rape had been a capital offense [before *Furman*], only. . .Georgia, North Carolina, and Louisiana" provided the death penalty for rape of an adult woman "in their revised statutes." *Id.*

26. *Id.* at 596 (quoting Gregg v. Georgia, 428 U.S. 153, 181 (1976)).

27. *Id.* (noting that Georgia's figures were more relevant because in Florida, capital punishment was "authorized only for the rape of children").

28. *Id.* at 597.

29. *Id.* Despite its finding that most juries disapprove of the death penalty for rapists, the Court did admit that the six capital sentences were not negligible. *Id.*

30. *See id.* at 592.

31. *Id.* (noting that such an interpretation was found in the holdings and dicta in cases such as *Furman v. Georgia*, 408 U.S. 238, 242–45 (1972) (Douglas, J., concurring); *Trop v. Dulles*, 356 U.S. 86, 100 (1958); and *Weems v. United States*, 217 U.S. 349, 377–82 (1910)).

32. 428 U.S. at 153. Petitioner and a companion were convicted of armed robbery and murder and sentenced to death. *Id.* at 158. The victims offered a ride to Gregg and his companion, who were hitchhiking. *Id.* at 158–59. After reaching a rest stop, Gregg shot and robbed the victims, leaving their bodies in a ditch along the highway. *Id.* at 158–60. The Court upheld the death sentence imposed by the jury, claiming that the Court "may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved." *Id.* at 175, 207.

33. *Coker*, 433 U.S. at 592 (citing *Gregg*, 428 U.S. at 173).

34. *Id.* at 598.

> [I]n terms of moral depravity and of the injury to the person and to the public, [rape] does not compare with murder, which does involve the unjustified taking of human life. Although it may be accompanied by another crime, rape by definition does not include the death of or even the serious injury to another person. The murderer kills; the rapist, if no more than that, does not. Life is over for the victim of the murderer; for the rape victim, life may not be nearly so happy as it was, but it is not over and normally is not beyond repair.[35]

The Court looked more to the result of the crime, rather than the criminal himself, in forming its opinion.[36]

III. *ROPER V. SIMMONS & ATKINS V. VIRGINIA*

Roper v. Simmons[37] and *Atkins v. Virginia*[38] mark the two most recent Supreme Court decisions further defining the constitutional scope of the death penalty. *Atkins* preceded *Roper* by three years, and the Court referenced the former case throughout the latter case.[39] *Roper* overturned *Stanford v. Kentucky*[40] in the same manner that *Atkins* overturned *Penry v. Lynaugh*.[41] In effect, the Court both established and reaffirmed a more modern viewpoint via *Roper* and *Atkins*.[42] As the two cases mirror one another both in subject matter and in standards implemented by the Court, this Part will consider them together, as parallel lines of reasoning.

In *Atkins*, the issue before the Court was the constitutionality of executing individuals who are classified as mentally retarded.[43] The defendant who brought the challenge "was convicted of abduction, armed robbery, and capital murder and [was] sentenced to death."[44] Atkins and his companion, Jones, abducted the victim, robbed him, and shot him eight times, leaving his body in an isolated area.[45] The

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35. *Id.* (footnote omitted).

36. *See id.*

37. 125 S. Ct. 1183, 1200 (2005) (abolishing the death penalty as punishment for juveniles under the age of eighteen when the crime was committed).

38. 536 U.S. 304, 321 (2002) (abolishing the death penalty as punishment for the mentally retarded).

39. *E.g.*, *Roper*, 125 S. Ct. at 1189, 1191–98 (discussing the progression of death penalty jurisprudence).

40. 492 U.S. 361, 380 (1989) (rejecting the proposition that the Constitution bars capital punishment for juvenile offenders younger than eighteen).

41. 492 U.S. 302, 340 (1989) (holding that the Eighth Amendment did not mandate a categorical exemption from the death penalty for mentally retarded persons). Further, "[j]ust as the *Atkins* Court reconsidered the issue decided in *Penry*, we now reconsider the issue decided in *Stanford*." *Roper*, 125 S. Ct. at 1192.

42. *See Roper*, 125 S. Ct. at 1194 (noting that the objective analysis used in *Roper* mirrored that of *Atkins*).

43. *Atkins*, 536 U.S. at 306–07.

44. *Id.* at 307.

45. *Id.*

only disputed fact was the shooter's identity.[46] The jury apparently found Jones's testimony more credible and found it "sufficient to establish Atkins's guilt."[47] Atkins made no proportionality argument before but contended "that he [was] mentally retarded and thus [could not] be sentenced to death."[48] Ultimately, the Supreme Court agreed with Atkins and held that the execution of mentally retarded individuals is prohibited by the Eighth Amendment.[49]

In *Roper*, the Court again considered the constitutionality of executing a class of individuals—juveniles.[50] The facts that led to the defendant's conviction remain quite disturbing. Seventeen-year-old Christopher Simmons committed murder by breaking and entering the victim's home, tying the victim, and throwing the victim off of a bridge.[51] Prior to executing the plan, Simmons discussed it with two friends, assuring them that "they could 'get away with it' because they were minors."[52] Nine months after the murder and after Simmons turned eighteen, he was tried and sentenced to death.[53] Simmons brought his postconviction relief claim to the Supreme Court after the *Atkins* ruling, claiming that the Court's reasoning in *Atkins* established that it was unconstitutional to execute individuals who were under the age of eighteen when the crime was committed.[54] The Court agreed and held that the execution of individuals who were under eighteen years of age at the time of their capital crimes is prohibited by the Eighth and Fourteenth Amendments.[55]

The Court's first consideration in both *Atkins* and *Roper* was to review objective indicia of a consensus on the scope of the death penalty, as evidenced by legislative enactments.[56] The Court determined that a national consensus had developed against the execution of the mentally retarded and juveniles.[57] In *Atkins*,

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46. *See id.* (noting that each defendant stated that the other defendant had actually shot and killed the victim).

47. *Id.* "Highly damaging to the credibility of Atkins' testimony was its substantial inconsistency with the statement he gave to the police upon his arrest. Jones, in contrast, had declined to make an initial statement to the authorities." *Id.* at 307 n.2.

48. *Id.* at 310 (quoting Atkins v. Commonwealth, 534 S.E.2d 312, 318 (Va. 2000)).

49. *Id.* at 321. The Court's "independent evaluation . . . reveal[ed] no reason to disagree" with legislatures that have found death to be a disproportionate "punishment for a mentally retarded criminal." *Id.* The execution of such criminals would not "advance the deterrent or retributive purpose[s] of such punishment. *Id.* Such punishment is excessive under the Eighth Amendment in light of "evolving standards of decency." *Id.* (citing Ford v. Wainwright, 477 U.S. 399, 406 (1986)).

50. Roper v. Simmons, 125 S. Ct. 1183, 1187 (2005).

51. *Id.* at 1187–88. The victim was a woman whom the defendant previously resolved to harm after their involvement in a car accident. *Id.* at 1188. Simmons and his friend "tied her hands and feet together with electrical wire, wrapped her whole face in duct tape and threw her from the bridge, drowning her in the waters below." *Id.*

52. *Id.* at 1187.

53. *Id.* "As aggravating factors, the State submitted that the murder was committed for the purpose of receiving money; was committed for the purpose of avoiding, interfering with, or preventing lawful arrest of the defendant; and involved depravity of mind and was outrageously and wantonly vile, horrible, and inhuman." *Id.* at 1188.

54. *See id.* at 1189.

55. *Id.* at 1200.

56. *Id.* at 1192.

57. *See id.* at 1192–94.

the Court found unequivocal evidence that a trend against executing the mentally retarded had developed since the Court upheld execution of such individuals in *Penry*.[58] Similarly, in *Roper*, the Court found the existence of a trend against executing juveniles since the *Stanford* decision sixteen years earlier.[59] The Court recognized that the abolition rate for the death penalty for the mentally retarded was far more rapid than the concomitant rate concerning juveniles.[60] Although the rate of change was less dramatic, the Court still found this relatively minor change to be significant: "[I]t is not so much the number of these States that is significant, but the consistency of the direction of change."[61] Aside from the trend, the Court also noted that the majority of states rejected the juvenile death penalty, and even where the penalty remained on the books, its use was infrequent.[62]

In a departure from complete objectivity, *Atkins* and *Roper* also returned to a more subjective analysis by allowing the Court to exercise its independent judgment.[63] This analysis, first alluded to in *Coker*,[64] is traceable to the idea that "the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment."[65] In *Atkins* and *Roper*, the Court established several broad standards under which the subjective analysis would occur. First, the Eighth Amendment guarantees that no individual may be subjected to excessive sanctions.[66] In other words, justice requires "that punishment for crime should be graduated and proportioned to [the] offense."[67] Second, in evaluating the prohibition against cruel and unusual punishment, the Court subscribed to "the evolving standards of decency that mark the progress of a maturing society."[68] Finally, because the death penalty is the most severe form of punishment, the Court noted that it "must be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'"[69]

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58. *Atkins v. Virginia*, 536 U.S. 304, 313–17 (2002). As the *Roper* Court observed, during the thirteen-year interim between *Penry* and *Atkins*, sixteen states that previously permitted the execution of mentally retarded persons subsequently prohibited the practice. *Roper*, 125 S. Ct. at 1193.

59. *Roper*, 125 S. Ct. at 1192–94. Five states that allowed the juvenile death penalty at the time of *Stanford* had abandoned the practice by the time *Roper* came before the Court. *Id.* at 1193.

60. *See id.* at 1193.

61. *Id.* (quoting *Atkins*, 536 U.S. at 315).

62. *Id.* at 1192, 1194.

63. *See id.* at 1192.

64. *See* Coker v. Georgia, 433 U.S. 584, 597 (1977).

65. *Roper*, 125 S. Ct. at 1191–92 (quoting *Atkins*, 536 U.S. at 312). Both *Atkins* and *Roper* took this language verbatim from *Coker*, thus further cementing the relationship between the three cases and their analytical approach to death penalty issues. *See Coker*, 433 U.S. at 597. A completely subjective analysis was not meant to override objective factors such as legislative attitudes and jury consensus. *See id.* at 592. Rather, the subjective analysis was implemented to further substantiate objective factors. *Id.*

66. U.S. CONST. amend. VIII; *Atkins*, 536 U.S. at 311.

67. *Roper*, 125 S. Ct. at 1190 (quoting *Atkins*, 536 U.S. at 311).

68. *Id.* (quoting Trop v. Dulles, 356 U.S. 86, 100–01 (1958)).

69. *Id.* at 1194 (quoting *Atkins*, 536 U.S. at 319).

At issue in both cases was the culpability of the defendant in light of certain inherent characteristics: age and mental capacity. The Court differentiated mentally retarded persons and juveniles from the standard adult defendant. In *Atkins*, the Court noted a number of distinctions between the mentally retarded and adults with normal mental capacity.[70] By definition, the mentally retarded "have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others."[71] Although the mentally retarded may still receive criminal sanctions, the aforementioned deficiencies diminish their personal culpability as compared to other criminals.[72]

In *Roper*, the Court announced three differences between juveniles under eighteen and adults. First, juveniles' susceptibility to immature and irresponsible behavior indicates that their "irresponsible conduct is not as morally reprehensible as that of an adult."[73] Second, juveniles are vulnerable, susceptible to pressure, and lack control over their immediate surroundings.[74] Third, the character of a juvenile is still forming.[75] Because of the lack of control and vulnerability, there is more cause for forgiveness.[76] Additionally, as a juvenile's character is still evolving, there is less evidence of an "irretrievably depraved character" and greater possibilities that any deficiencies may be reformed.[77]

While the distinguishing characteristics were vital in both cases to establish the level of moral culpability, the Court also found these characteristics relevant to analyzing retribution and deterrence. The Court has qualified retribution and deterrence as the social purposes served by the death penalty.[78] As it relates to the

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70. *Atkins*, 536 U.S. at 318.

71. *Id.*

> The American Association on Mental Retardation (AAMR) defines mental retardation as follows: "*Mental retardation* refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18."

Id. at 308 n.3 (quoting AM. ASS'N ON MENTAL RETARDATION, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 5 (9th ed. 1992)).

72. *See id.* at 318.

73. *Roper*, 125 S. Ct. at 1195 (quoting Thompson v. Oklahoma, 487 U.S. 815, 835 (1988)). "[A] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions." *Id.* (quoting Johnson v. Texas, 509 U.S. 350, 367 (1993)).

74. *See id.* ("[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage." (quoting Eddings v. Oklahoma, 455 U.S. 104, 115 (1982))).

75. *See id.*

76. *See id.*

77. *See id.*

78. Gregg v. Georgia, 428 U.S. 153, 183 (1976). "Unless the imposition of the death penalty on a mentally retarded person 'measurably contributes to one or both of these goals, it "is nothing more than the purposeless and needless imposition of pain and suffering," and hence an unconstitutional

death penalty, retribution serves as "an expression of society's moral outrage at particularly offensive conduct."[79] "Indeed, the decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death."[80] Likewise, the theory behind capital punishment as a deterrent is that "the increased severity of the punishment will inhibit" the criminal from carrying out the premeditated conduct.[81] The deterrent effect of the death penalty, however, is extremely difficult to evaluate and often inconclusive.[82] For example, any statistical analysis on murder would undoubtedly have to assume that some murders result from acts of passion, for which the preventative threat would have a minimal deterrent effect.[83] Thus, the deterrent effect of the death penalty is often a consideration, but it is usually not conclusive.

In reference to retribution, *Atkins* proclaimed that the severity and propriety of the punishment is directly linked to the culpability of the criminal.[84] In gauging the effect of retribution in the grand scheme of crime and punishment, the Court remarked that "[i]f the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution."[85] In *Roper*, the Court followed the same line of reasoning and arrived at the same conclusion in reference to juvenile offenders: "Retribution is not proportional" if the most severe punishment is imposed on a person whose culpability is diminished because of inherent qualities.[86]

In *Atkins*, the Court found the deterrence argument to be an ineffective justification, as the same cognitive disabilities that make the mentally retarded less morally culpable also diminish the potential to process the possibility of execution and, consequently, to control their conduct.[87] As for juveniles, the *Roper* Court came to a less determinative conclusion, finding it unclear whether the death penalty has a significant or even measurable deterrent effect.[88] Again, certain characteristics inherent in age make "[t]he 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."[89]

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punishment.'" Atkins v. Virginia, 536 U.S. 304, 319 (2002) (quoting Enmund v. Florida, 458 U.S. 782, 798 (1982)).

79. *Gregg*, 428 U.S. at 183.

80. *Id.* at 184.

81. *Atkins*, 536 U.S. at 320.

82. *See Gregg*, 428 U.S. at 184–85.

83. *See Gregg*, 428 U.S. at 185.

84. *See Atkins*, 536 U.S. at 319.

85. *Id.*

86. *See* Roper v. Simmons, 125 S. Ct. 1183, 1196 (2005).

87. *See* 536 U.S. 304, 320 (2002).

88. *See Roper*, 125 S. Ct. at 1196.

89. *Id.* (quoting Thompson v. Oklahoma, 487 U.S. 815, 837 (1988)).

IV. SOUTH CAROLINA STATUTE UNDER *COKER*

As set out in Part II, the *Coker* line of reasoning consisted of objective factors and the Court's subjective judgment that the death penalty for rape was an excessive punishment.[90] If a constitutional challenge was brought against South Carolina's statute and the analysis in *Coker* was strictly followed, a court would likely find the statute violated the constitutional prohibition of cruel and unusual punishment. This part, however, argues that such a conclusion is problematic because the analysis would have to rest solely on subjective factors, as the objective factors are currently indeterminable.

A. Objective Analysis as Set Forth in Coker

A current analysis of South Carolina's statute is certainly more difficult, if not impossible, under the objective factors. First, consider an investigation into state and legislative attitudes. In *Coker*, the Court focused its objective conclusion on the failure of the majority of states to immediately reinstate the death penalty for rape following *Furman v. Georgia*, which essentially wiped out all existing death penalty statutes.[91] Such a statistical analysis is not feasible today, however, because the Supreme Court has not since made a decision that, in effect, would invalidate all death penalty statutes. In other words, since *Furman* the Court has not rendered a holding that would redefine the parameters of capital punishment statutes.

Arguably, *Coker v. Georgia* redefined those parameters in terms of death penalty rape statutes. Certainly, *Coker* may be interpreted as invalidating all capital rape statutes.[92] Additionally, the reenactment of rape statutes after *Coker* was minimal at best.[93] Thus, the lack of immediate action by state legislatures objectively indicates that the overall consensus rejects the death penalty as a punishment for rape.[94]

However, this argument is not so simple. *Furman* voided death penalty statutes insofar as those statutes did not meet certain requirements that would ensure that the punishment was not cruel and unusual.[95] In *Furman,* the Court clearly intended not to place a ban on the death penalty but rather to force the state legislatures to

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90. Coker v. Georgia, 433 U.S. 584, 592 (1977).

91. *See supra* notes 23–25 and accompanying text.

92. *See, e.g.*, Colin Garrett, *Death Watch*, CHAMPION, June 2006, at 46, 47 (noting that while the *Coker* decision repeatedly referred to "adult rape," the Court frequently wrote "rape" without qualification).

93. *See id.* at 47 ("The trend that the Louisiana Court anticipated has not materialized in the ten years since *Wilson*, and in the almost [thirty] years since *Coker*, legislative attitudes have not changed significantly or in a consistent direction."); *see also* James H. S. Levine, Note, *Creole and Unusual Punishment—A Tenth Anniversary Examination of Louisiana's Capital Rape Statute*, 51 VILL. L. REV. 417, 450–51 (2006) ("Ample time has passed for a trend to develop . . . . As such, the only possible conclusion is that the national consensus is in favor of sparing the life of the child rapist . . . .").

94. *See* Levine, *supra* note 93, at 450–57.

95. *See* Furman v. Georgia, 408 U.S. 238, 256–57 (1972) (Douglas, J., concurring) (invalidating those capital punishment statutes found to impose punishment arbitrarily and capriciously).

rewrite death penalty statutes to ensure constitutional treatment.[96] *Coker*, on the other hand, placed a strict ban on the death penalty for rape and left no room for states to carry out the death penalty for the rape of an adult woman.[97] Notably, while *Coker* appeared to be narrow, it left much need for interpretation—namely the importance of the phrase "rape of an adult woman."[98]

The Court's repeated inclusion of the phrase "rape of an adult woman" in *Coker* has led to two distinct interpretations which, in turn, have led to confusion as to what action the states may constitutionally take. One interpretation is that the Court intended to prohibit any statute that would allow the death penalty as a punishment for rape.[99] Consequently, rape simply "does not compare with murder, which does involve the unjustified taking of human life."[100] Conversely, because the Court specifically referred to "adult rape," it may have intended to limit its holding. The Louisiana Supreme Court has applied this interpretation as a justification for the constitutionality of a state law that permits the death penalty for the rape of a child under the age of twelve.[101] In examining a claim that the death penalty for rape was excessive in light of the *Coker* decision, the court noted that "[t]he plurality took great pains in referring only to the rape of *adult women* throughout their opinion, leaving open the question of the rape of a child."[102]

These different interpretations of the holding in *Coker* left confusion as to the validity of capital child rape statutes. Consequently, an analysis of state action since *Coker* seems futile. Perhaps legislatures are still opposed to the death penalty for child rape. Equally as likely is that ambiguity has left the states perplexed as to whether the enactment of such a penalty is constitutional.[103] Regardless of the actual motivation, such ambiguity cannot lead to an objective finding of legislative and state attitudes.

Moreover, an objective analysis of jury decisions is equally impossible under *Coker*. Prior to the enactment of South Carolina's new law, Louisiana was the only state actively implementing a death penalty punishment for child rape.[104] Louisiana's statute was passed in 1995, and by 2003, juries had sentenced only one

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96. *See id.* at 241 (affirming that the death penalty is not inherently cruel).

97. *See* 433 U.S. 584, 592 (1977).

98. *Id.* at 593.

99. *See supra* notes 92–94 and accompanying text.

100. *Coker*, 433 U.S. at 598.

101. *See* State v. Wilson, 685 So. 2d 1063, 1066 (La. 1996). The Louisiana statute upheld in *Wilson* states the following: "Whoever commits the crime of aggravated rape shall be punished by life imprisonment . . . . However, if the victim was under the age of twelve years, . . . the offender shall be punished by death or life imprisonment . . . ." LA. REV. STAT. ANN. § 14:42(C) (1997).

102. *Wilson*, 685 So. 2d at 1066 (emphasis in original in bold); *see also id.* at 1066 n.2 (citing fourteen instances of the use of the phrase "adult woman" in the *Coker* decision).

103. *See id.* at 1068 (quoting *Coker*, 433 U.S. at 614 (Powell, J., dissenting)). A Tennessee capital child rape statute "was invalidated in 1977 because the death sentence was mandatory." *Id.* Further, both Florida and Mississippi judicially invalidated their capital child rape statutes during the 1980s, but only the Florida Supreme Court found *Coker* to be controlling. *Id.*

104. *Id.* at 1064; LA. REV. STAT. ANN. § 14:42 (Supp. 2006).

defendant to death for the rape of a child under twelve.[105] The scarcity of convictions under Louisiana's child rape statute is possibly a sign that the people are opposed to death as a punishment for child rape. Or perhaps "the reluctance of the juries to impose the death penalty may reflect the humane feeling that this most irrevocable of sanctions should be reserved for extreme cases."[106] Again, an objective determination at this point, without more statistical information, would appear to be premature.

B. Subjective Analysis According to Coker

In turning to a court's subjective excessive punishment analysis, the South Carolina statute would likely fail. The crux of the Court's reasoning in *Coker* was that rape does not result in the victim's death; therefore, the death penalty is excessive punishment for such a crime.[107] Following such logic, there is little or no room to argue that a court, following *Coker*, would allow the death penalty for the rape of a child. However, the problem with such an analysis is twofold. First, the death penalty is not statutorily limited to punishment for murder.[108] In 1997, of the states that retained the death penalty, fourteen allowed the death penalty as punishment for crimes other than murder.[109] Thus, while the Court's reliance on the absence of death as a justification for invalidating the death penalty statute in *Coker* seems logical, one must question the justification of such logic when a relatively large number of crimes that do not result in death may be punished by death. While this disparity seems illogical, in light of the language in *Coker*, an increase in non-homicide capital statutes may indicate that some states may wish to increase the

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105. *See* Chris Adams, *Death Watch*, CHAMPION, Nov. 2003, at 8, 8 (noting that Patrick Kennedy received the first death sentence in the nation since 1977 for any crime other than murder).

106. *Wilson*, 685 So. 2d at 1067 n.6 (citing Furman v. Georgia, 408 U.S. 238, 388 (1972) (Burger, C.J., dissenting)).

107. *See* Coker v. Georgia, 433 U.S. 584, 598 (1977).

108. *See* Melissa Meister, Note, *Murdering Innocence: The Constitutionality of Capital Child Rape Statutes*, 45 ARIZ. L. REV. 197, 210–12 (2003) (discussing the post-1993 revival of non-homicide capital statutes).

109. *Id.* at 211–12; *see also* ARK. CODE ANN. § 5-51-201(c) (2005) (Arkansas: treason); CAL. PENAL CODE § 37(a) (West 1999) (California: treason); COLO. REV. STAT. ANN. §§ 18-1.3-401, -3-301(2), -11-101(2) (2006) (Colorado: kidnapping where the victim is harmed, treason); FLA. STAT. ANN. § 921.142 (West Supp. 2007) (Florida: drug trafficking); GA. CODE ANN. §§ 16-5-44(c), -6-1(b), -11-1(2003) (Georgia: aircraft hijacking, rape, treason); IDAHO CODE ANN. § 18-4504 (2004) (Idaho: kidnapping in the first degree); 720 ILL. COMP. STAT. ANN. § 5/30-1(c) (2003) (Illinois: treason); LA. REV. STAT. ANN. §§ 14:42, 14:113 (2004 & Supp. 2006) (Louisiana: rape of child under twelve, treason); MISS. CODE ANN. §§ 97-7-67, -25-55(1) (2006) (Mississippi: treason, aircraft piracy); MO. ANN. STAT. §§ 557.021(3)(1)(a), 565.110(2), 576.070(5), 578.310(1) (West 2006) (Missouri: treason, kidnapping, placing bombs near bus terminals); MONT. CODE ANN. §§ 45-5-303(2), -503(3)(c)(i), 46-18-220 (2005) (Montana: aggravated assault or kidnapping while incarcerated in state prison for murder or persistent felonies, aggravated kidnapping, rape by a repeat offender causing serious bodily injury); N.M. STAT. ANN. § 20-12-42(D) (LexisNexis 2004) (New Mexico: espionage); UTAH CODE ANN. § 76-5-103.5 note (2003) (Utah: noting that a 2001 amendment deleted Utah's provision allowing the death penalty for aggravated assault while imprisoned for a first-degree felony conviction); WASH. REV. CODE ANN. § 9.82.010 (West 2007) (Washington: treason).

reach of the death penalty.[110] If the Supreme Court today examined a child rape statute amidst the numerous non-homicide death penalty statues, the result, or at least the reasoning, could differ from *Coker*.[111]

Additionally, the problem of limiting the analysis of South Carolina's statute to *Coker* is that the Court has firmly established, since *Trop v. Dulles*[112] in 1958, that death penalty cases must be evaluated according to "evolving standards of decency."[113] While the possibility exists that societal standards of decency are the same today as they were when *Coker* was decided in 1977, such an assumption is illogical without support. The phrase itself indicates that standards of decency are dynamic and change along with society.[114] Thus, to examine South Carolina's statute solely in terms of *Coker v. Georgia* without a consideration of more recent implications would be an injustice to the people and legislature whose standards are reflected in the statute.

V. SOUTH CAROLINA'S STATUTE UNDER *ATKINS & ROPER*

In contrast to the *Coker* analysis, if a constitutional challenge was brought under the reasoning outlined in *Atkins* and *Roper*, there is great potential for a court to find South Carolina's statute constitutional. Again, the line of reasoning set out in these two cases initially focused on objective determinations based on evidence of a national consensus. Additionally, the Court employed a subjective analysis of juveniles and mentally retarded persons and evaluated implications stemming from the retributive and deterrent effects of imposing the death penalty.

A. Objective Analysis as Set Forth in Atkins *and* Roper

An evaluation of South Carolina's statute under the objective standard, while not determinative, lends support to the idea of a movement toward a national consensus. There is evidence that a trend, or at least the beginning of a trend, has

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110. *See* Meister, *supra* note 108, at 210–12 (noting that the number of jurisdictions allowing the death penalty for a non-homicide crime more than doubled between 1993 and 1997); *see also* Michael Mello, *Executing Rapists: A Reluctant Essay on the Ethics of Legal Scholarship*, 4 WM. & MARY J. WOMEN & L. 129, 160–61 (1997) (noting that in 1993, at least six states authorized death for non-homicide crimes, and by 1997, that number had grown to fourteen).

111. Matthew Silversten, *Sentencing* Coker v. Georgia *to Death: Capital Child Rape Statutes Provide the Supreme Court an Opportunity to Return Meaning to the Eighth Amendment*, 37 GONZ. L. REV. 121, 164 (2002).

112. 356 U.S. 86 (1958).

113. *Id.* at 101. The petitioner in *Trop* brought a claim under the Eighth Amendment, asserting cruel and unusual punishment, after he was declared to have lost his citizenship for wartime desertion. *Id.* at 87. The Court broadened its analysis in order to invoke a more general Eighth Amendment standard. *Id.* at 100–01. Since the decision in 1958, *Trop* has stood for the proposition that the Eighth Amendment is not static and must draw its meaning from "evolving standards of decency that mark the progress of a maturing society." *Id.* at 101; *see, e.g.*, *Atkins v. Virginia*, 536 U.S. 304, 311–12 (2002) (using *Trop* as a foundational standard for Eighth Amendment standards).

114. *See Trop*, 356 U.S. at 100–01.

been developing toward imposing the death penalty for child rapists.[115] On its face, statistical evidence does not lend much support to this proposition; only four states have laws specific to child rape in effect.[116] However, other states have passed or considered similar legislation. Since Louisiana's statute took effect in 1995, California, Mississippi, Maryland, and Virginia have all considered bills to apply the death penalty to people who commit sex crimes against children.[117] In 2006, the Tennessee legislature introduced a bill to extend the death penalty to rapists of a child younger than thirteen.[118] Additionally, Georgia and Montana also have capital rape statutes, which may apply to child rapists.[119]

Based on the description of legislative efforts, one might conclude that the defeat of legislation is indicative of opposition. However, one might also look to the language in *Roper* that "[i]t is not so much the number of . . . States that is significant, but the consistency of the direction of change."[120] Arguably, though only a few states have passed the death penalty for child rapists into law, the showing of states that have recently brought such legislation to the table is telling. Moreover, in upholding the constitutionality of a death sentence for a child rapist, the Louisiana Supreme Court noted that though one state may compose a minority, its judgment is no "less worthy of deference."[121] "The needs and standards of society change, and these changes are a result of experience and knowledge. If no state could pass a law without other states passing the same or similar law, new laws could never be passed."[122] Thus, in reviewing South Carolina's statute and other similar statutes, it seems premature to conclude that there is no national consensus. To invalidate such a law—enacted by a legislature that is elected to convey society's attitudes—without having convincing evidence that there is an objective standard to follow is an overextension of judicial power. However, if evidence emerges of clear opposition to such legislation, then a court would have firmer ground on which to base a holding invalidating the legislation.

Turning to the next line of reasoning, both *Atkins* and *Roper* went to great lengths to distinguish the mentally retarded and juveniles from other adult criminal

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115. *See* Silversten, *supra* note 111, at 164.

116. *See* FLA. STAT. ANN. § 794.011(2)(a) (West Supp. 2007); LA. REV. STAT. ANN. § 14:42 (Supp. 2006); OKLA. STAT. ANN. tit. 10, § 7115.I (West Supp. 2007); S.C. CODE ANN. § 16-3-655 (Supp. 2006); *see also supra* note 3.

117. *See* Assem. B. 35, 1999 Leg., Reg. Sess. (Cal. 1999) (bill died pursuant to Article IV of the state constitution); S.B. 271, 1998 Leg., Reg. Sess. (Va. 1998) (bill not carried over after session adjournment); H.B. 543, 1997 Leg., Reg. Sess. (Miss. 1997) (bill died in committee); S.B. 127, 1996 Leg., Reg. Sess. (Md. 1996) (bill reported unfavorably by committee).

118. *See* H.B. 2924, 104th Gen. Assem., Reg. Sess. (Tenn. 2006) (committee failed to recommend passage of the bill).

119. GA. CODE. ANN. § 16-6-1(b) (2003); MONT. CODE ANN. § 45-5-503(3)(c) (2005). Neither Georgia nor Montana, however, necessarily distinguish between adult and child rape in their statutory language. However, presumably rape in these states would include child rape.

120. Roper v. Simmons, 125 S. Ct. 1183, 1193 (2005) (quoting Atkins v. Virginia, 536 U.S. 304, 315 (2002)).

121. *See* State v. Wilson, 685 So. 2d 1063, 1069 (La. 1996) (quoting Coker v. Georgia, 433 U.S. 584, 616 (1977) (Burger, C.J., dissenting)).

122. *Id.*

offenders.[123] Logically, the Court noted, "A central feature of death penalty sentencing is a particular assessment of . . . the characteristics of the offender."[124] The Court and criminal system place a certain class of criminals—those who are found to demonstrate the greatest moral culpability—in a category potentially deserving of the death penalty.[125] As noted, the Court found the mentally retarded and juveniles to be less morally culpable and, therefore, less deserving of the harshest penalty.[126]

Why, then, should the same analysis not follow by placing the child rapist in his own distinct category? In *Coker*, the Court did not focus on the character of the accused but on the result of the crime.[127] Consequently, the *Coker* opinion categorized those deserving the death penalty as murderers and consolidated all other criminals into a broad category of criminals whose only commonality was the absence of the act of taking a human life.[128] But what if the Court had, instead, based the *Coker* decision more on the moral depravity of the rapist and less on the actual result of the crime? Under such an analysis, it is quite possible that the outcome, or at least the reasoning, would not have been the same. Now that capital child rape statutes are emerging as a constitutional issue, a court should evaluate the child rapist according to the more modern *Atkins-Roper* classification scheme.

Suppose the child rapist is placed in his own category and evaluated according to the modern line of reasoning presented in *Atkins* and *Roper*. Interestingly, none of the characteristics that exonerate the mentally retarded person or juveniles would apply to absolve the child rapist of guilt.[129] Unlike the mentally retarded person, whose culpability is diminished due to the lack of cognitive skills used to receive and process information, the child rapist possesses no such quality to render him less culpable. In fact, sex offenders who target children are unlikely to stop after one incident.[130] The rate of recidivism for child molesters may reach as high as 40%, while the rate of recidivism for rapists may reach 35%.[131] *Atkins* does not apply to the child rapist; the bottom line is that addiction does not fall within the definition of mental retardation and therefore cannot render the defendant less culpable.[132]

In a comparative analysis under *Roper*, the child rapist possesses none of the inherent characteristics that would diminish his moral culpability. The child rapist is an adult and, as such, cannot assert vulnerability, lack of control, or developing

123. *See supra* notes 70–77 and accompanying text.

124. *Roper*, 125 S. Ct. at 1197.

125. *See supra* note 69 and accompanying text.

126. *See supra* notes 71–72, 76–77 and accompanying text.

127. *See* Coker v. Georgia, 433 U.S. 584, 598 (1977).

128. *See id.*

129. *See supra* notes 71–75 and accompanying text.

130. *See* Robert Teir & Kevin Coy, *Approaches to Sexual Predators: Community Notification and Civil Commitment*, 23 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 405, 407 (1997).

131. Michael L. AtLee, Note, Kansas v. Hendricks*: Fighting for Children on the Slippery Slope*, 49 MERCER L. REV. 835, 842–43 (1998).

132. *See supra* note 71.

character or personal identity as an excuse.[133] Juveniles lack control over their immediate surroundings, and thus the government has a special interest in protecting them.[134] The child rapist, however, is not subject to such lack of control. "Rape of a child is an intentional crime in and of itself. One does not 'accidentally' rape a child."[135] Thus, in terms of moral culpability, there are no characteristics considered in *Atkins* or *Roper* that would reduce the child rapist's blameworthiness and justify the absolute prohibition of the death penalty.

The final objective analysis, as proposed in *Atkins* and *Roper*, is of the effects of retribution and deterrence on the child rapist. In both *Atkins* and *Roper*, the very characteristics that diminished moral culpability simultaneously lessened retribution as a justification.[136] In reference to the child rapist, however, there are no such innate cognitive qualities that excuse the criminal behavior. While some oppose the retributive argument in general, the criminal system is built on the notion that retribution is essential to maintain a moral balance: "In part, capital punishment . . . is essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs."[137]

Insofar as deterrence is concerned, the analysis is not as clear. Opponents of the death penalty for rapists argue that the threat will not deter the child rapist but instead will deter the victim himself from reporting the crime.[138] As "most child abusers are family members," concern exists that victims will not come forward for fear they might subject the family member to the punishment of death.[139] The response to this argument, as articulated by the Louisiana Supreme Court, is that the rapist must account for his actions, and the legislature determines the punishment.[140] Undoubtedly, it is difficult to gauge whether the possibility of the death penalty will deter the child rapist. But proponents assert that the state must protect children because they cannot protect themselves.[141] Thus, the state should be proactive in taking measures that may ultimately reduce the number of child rape cases.[142] For the state to be proactive, however, the legislature must have sufficient latitude to test and implement measures that it deems necessary.[143]

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133. *See supra* note 73–75 and accompanying text.

134. *See* State v. Wilson, 685 So. 2d 1063, 1067 (La. 1996).

135. *Id.* at 1072–73.

136. *See supra* notes 75–86 and accompanying text.

137. Gregg v. Georgia, 428 U.S. 153, 183 (1976).

138. *See, e.g.*, *Wilson*, 685 So. 2d at 1073 (detailing and rejecting the defendant's arguments that deterrence cannot be accomplished with a capital child rape statute).

139. *Id.*

140. *Id.*

141. *Id.* at 1067.

142. *Id.* at 1073.

143. *See id.* ("We cannot know which among this range of possibilities is correct, but today's holding (finding the death penalty for rape of an adult woman to be unconstitutional) forecloses the very exploration we have said federalism was intended to offer." (quoting Coker v. Georgia, 433 U.S. 584, 617–18 (1977) (Burger, C.J., dissenting))).

B. Subjective Analysis as Set Forth in Atkins *and* Roper

As noted in recent Supreme Court decisions about the death penalty, the Court has stated that the subject matter of those cases may warrant its own subjective analysis.[144] The ordinary role of any court is to render a decision completely void of the judge's personal opinion, and instead consider factors such as history, precedent, statutory interpretation, and intent.[145] Such an analysis is almost impossible, however, when the death penalty is at issue. The death penalty is notoriously labeled as a "different kind of punishment" due to its irreversible nature.[146] Consequently, the death penalty also demands a different kind of review. The problem with a completely objective analysis stems from the phrase previously mentioned: "evolving standards of decency." While the penalty itself has been both accepted and rejected during the course of years since its implementation, the notion of "evolving standards of decency" has remained a cornerstone in all judgments.[147] On its face, the phrase suggests that society's standards are constantly changing. The fact that such a phrase has been historically linked to the death penalty suggests that the Court never intended for any judgment about the penalty to remain static. In fact, the phrase appears to suggest that the Court invites periodic review of the punishment.

Whether the constitutionality of the death penalty can change solely with the passage of time is subject to debate. A proponent of strict stare decisis[148] would argue that the constitutionality of the death penalty is static. Because the death

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144. *See supra* notes 63–69 and accompanying text.

145. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 11-12 (2d ed. 2005).

146. *See* Furman v. Georgia, 408 U.S. 238, 306 (1972) (Stewart, J., concurring) ("The penalty of death differs from all other forms of criminal punishment, not in degree but in kind."). *But see* Daniel Suleiman, Note, *The Capital Punishment Exception: A Case for Constitutionalizing the Substantive Criminal Law*, 104 COLUM. L. REV. 426, 448 (2004) ("Everything that is past is irrevocable. If I kill you in error, I have indeed done you an irrevocable injury. But so too if I imprison you falsely for five years." (quoting JEFFRIE G. MURPHY, RETRIBUTION, JUSTICE, AND THERAPY 240 (1979))).

147. *See, e.g.*, Roper v. Simmons, 125 S. Ct. 1183, 1190 (2005) (tracing the use of "evolving standards of decency" in death penalty jurisprudence); Atkins v. Virginia, 536 U.S. 304, 312 (2002) (noting that "evolving standards of decency" is a foundation for Eighth Amendment interpretation); *Coker*, 433 U.S. at 603 (discussing "evolving standards of decency" as proclaimed by state legislatures); Gregg v. Georgia, 428 U.S. 153, 173 (1976) (stating that "evolving standards of decency" is "oft-quoted"); *Furman*, 408 U.S. at 242 (Douglas, J., concurring) (discussing "evolving standards of decency"); Trop v. Dulles, 356 U.S. 86, 101 (1958) (using the benchmark of "evolving standards of decency" for the first time).

148. BLACK'S LAW DICTIONARY 1443 (8th ed. 2004).

> The rule of adherence to judicial precedents finds its expression in the doctrine of stare decisis. This doctrine is simply that, when a point or principle of law has been once officially decided or settled by the ruling of a competent court in a case in which it is directly and necessarily involved, it will no longer be considered as open to examination or to a new ruling by the same tribunal, or by those which are bound to follow its adjudications, unless it be for urgent reasons and in exceptional cases.

Id. (quoting WILLIAM M. LILE ET AL., BRIEF MAKING AND THE USE OF LAW BOOKS 321 (Roger W. Cooley & Charles Lesley Ames eds., 3d ed. 1914)).

penalty itself is an irreversible punishment, a great deal of injustice could occur from constant re-evaluation and alteration of the penalty. For example, if the punishment is someday held to be cruel and unusual and thus prohibited by the Constitution, those who have already been executed clearly have no room for appeal or alternate punishment.

On the other side are some who hold what may be termed a non-originalist viewpoint and who believe in a living Constitution that should change with society.[149] This ideology is based on the belief that the Framers could not have written any document comprehensive enough to guide the United States throughout its existence.[150] The Court's approach to the death penalty applies the non-originalist viewpoint. "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. . . . The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[151]

In both *Atkins* and *Roper*, the Court used its subjective judgment in reference to "evolving standards of decency" to significantly narrow the reach of the punishment. In other words, the Court categorically removed two classes of criminals—mentally retarded persons and juveniles—from the reach of the death penalty. Though never explicitly stated, the implication follows that perhaps a more sophisticated society finds the punishment less acceptable, thereby reducing its applicability. This argument indicates what most death penalty opponents already advocate—that an evolved society should eventually eradicate such a barbaric punishment completely.[152]

While this reasoning seems logical, there is an equally persuasive argument that "evolving standards" may also support an expansion of the punishment as society learns more about the nature of crime. While the majority of states have taken no action in reference to child rape and the death penalty, there is a faction of states for which this topic is clearly an issue.[153] As the Louisiana Supreme Court recognized, "While the rape of an adult female is in itself reprehensible, the legislature has concluded that rape becomes much more detestable when the victim is a child."[154] In *Coker*, the Court repeatedly asserted that rape of an adult woman is not punishable by death because the crime does not result in the loss of a human life.[155] Admittedly, the rape of a child does not result in physical death, but does it not result in what may be termed a "psychological death" that is equally deserving of punishment?[156] The justice system seeks to punish the criminal in proportion to the

149. CHEMERINSKY, *supra* note 145, at 11–12.

150. *See id.*

151. *See Trop*, 356 U.S. at 100–01.

152. *See* Amnesty International, http://www.amnestyusa.org/abolish/index.do (last visited Mar. 5, 2007).

153. *See supra* notes 116–19 and accompanying text.

154. State v. Wilson, 685 So. 2d 1063, 1066 (La. 1996).

155. *See* Coker v. Georgia, 433 U.S. 584, 598 (1977).

156. *See id.* at 603 (Powell. J., concurring in the judgment in part and dissenting in part) ("Some victims are so grievously injured physically or psychologically that life *is* beyond repair.").

act.[157] While the rape victim may survive, "[t]he contention that the harm caused by a rapist is less serious than that caused by a murderer is apparently not subscribed to by all rape victims. In some cases women have preferred death to being raped or have preferred not to continue living after being raped."[158] Thus, as psychologists and other professionals have published their research on the effects of rape on a child,[159] perhaps society has become more aware of the prolonged effects that the victim will in all likelihood suffer. Consequently, the expansion of the death penalty to the child rapist does not necessarily indicate a regression in societal standards, but rather a progression in the recognition of the detestability that marks child rape.

C. Alternative Subjective Factors

The result of a subjective decision by a court is undoubtedly difficult to predict. There are, however, other considerations not mentioned in *Atkins* or *Roper* that are specifically relevant to this issue. A court would examine South Carolina's statute on its face to ensure constitutional compliance.[160] Additionally, a court might consider the statute in conjunction with Louisiana's statute, noting any similarities and differences in the grand scheme of such punishment.

A court should examine South Carolina's statute in detail in order to make a decision on the merits of its constitutionality. In *Furman v. Georgia*, the Supreme Court held that all existing death penalty statutes were unconstitutional because they were arbitrary and discriminatory.[161] As the Court explained, "we deal with a system of law and of justice that leaves to the uncontrolled discretion of judges or juries the determination whether defendants committing these crimes should die or be imprisoned. Under these laws no standards govern the selection of the

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157. *See* Weems v. United States, 217 U.S. 349, 367 (1910) ("[I]t is a precept of justice that punishment for crime should be graduated and proportioned to offense.").

158. State v. Wilson, 685 So. 2d 1063, 1066 n.3 (La. 1996) (citing David J. Karp, Comment, Coker v. Georgia*: Disproportionate Punishment and the Death Penalty for Rape*, 78 COLUM. L. REV. 1714, 1720 (1978)).

159. *See* Meister, *supra* note 108, at 208–09 (discussing psychological effects of child rape victims). Long-term studies indicate that "childhood sexual abuse is 'grossly intrusive in the lives of children and is harmful to their normal psychological, emotional, and sexual development in ways which no just or humane society can tolerate.'" *Id.* at 208 (quoting CHRISTOPHER BAGLEY & KATHLEEN KING, CHILD SEXUAL ABUSE: THE SEARCH FOR HEALING 2 (1990)). Aside from physical side effects, "[p]sychological problems stemming from child rape include depression, insomnia, sleep disturbances, nightmares, compulsive masturbation, loss of toilet training, sudden school failure, and unprovoked crying." *Id.* at 209. "[F]eelings of guilt, poor self-esteem, [and] feelings of inferiority" may surface, and there is an increased likelihood of "destructive behavior, . . . drug and alcohol addict[ion], and . . . suicide attempts." *Id.* Truly problematic is evidence suggesting that "these disturbances follow the child into adulthood." *Id.*

160. *See* Shealy v. Doe, 370 S.C. 194, 199, 634 S.E.2d 45, 48 (Ct. App. 2006) ("The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature. The first question of statutory interpretation is whether the statute's meaning is clear on its face." (citations omitted)).

161. Furman v. Georgia, 408 U.S. 238, 256–57 (1972) (Douglas, J., concurring).

penalty."[162] Although the Court did not set out a specific list of requirements for death penalty statutes, it made very clear that any statute lacking specific guidance would be declared unconstitutional.[163] South Carolina's statute appears to adhere to the guidance given in *Furman*.[164]

First and foremost, the statute calls for a bifurcated procedure so the question of sentence is not considered until after the determination of guilt.[165] The Supreme Court recommended this requirement to ensure that the evidence not allowed at trial would not confuse the jury when the determination of life is at stake.[166] Thus, the rules of evidence will be followed during the first part of the trial; during the sentencing phase, other relevant information will be admitted before a sentencing decision.[167] Additionally, the statute provides a list of aggravating and mitigating circumstances as further guidance for the jury.[168] A comprehensive list of

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162. *Id.* at 253.

163. *See supra* note 24.

164. *See* S.C. CODE ANN. § 16-3-655(C)–(F) (Supp. 2006) (outlining circumstances and procedures for implementing the death penalty for child rape).

165. *Id.* § 16-3-655(D)(1).

166. *See* Gregg v. Georgia, 428 U.S. 153, 190–92 (1976).

> Jury sentencing has been considered desirable in capital cases in order "to maintain a link between contemporary community values and the penal system—a link without which the determination of punishment could hardly reflect 'the evolving standards of decency that mark the progress of a maturing society.'" But it creates special problems. Much of the information that is relevant to the sentencing decision may have no relevance to the question of guilt, or may even be extremely prejudicial to a fair determination of that question.

Id. at 190 (quoting Witherspoon v. Illinois, 391 U.S. 510, 519 n.15 (1968)).

167. *See id.* at 190–91 (quoting MODEL PENAL CODE § 201.6 cmt. 5 (Tentative Draft No. 9, 1959)).

168. *See* S.C. CODE ANN. § 16-3-655(D)(2)(a)–(b) (Supp. 2006).

> (a) Statutory aggravating circumstances: (i) The victim's resistance was overcome by force. (ii) The victim was prevented from resisting the act because the actor was armed with a dangerous weapon. (iii) The victim was prevented from resisting the act by threats of great and immediate bodily harm, accompanied by an apparent power to inflict bodily harm. (iv) The victim is prevented from resisting the act because the victim suffers from a physical or mental infirmity preventing his resistance. (v) The crime was committed by a person with a prior conviction for murder. (vi) The offender committed the crime for himself or another for the purpose of receiving money or a thing of monetary value. (vii) The offender caused or directed another to commit the crime or committed the crime as an agent or employee of another person. (vii) The crime was committed against two or more persons by the defendant by one act, or pursuant to one scheme, or course of conduct. (ix) The crime was committed during the commission of burglary in any degree or kidnapping.
>
> (b) Mitigating circumstances: (i) The defendant has no significant history of prior criminal convictions involving the use of violence against another person. (ii) The crime was committed while the defendant was under the influence of mental or emotional disturbance. (iii) The defendant was an accomplice in the crime committed by another person and his participation was relatively minor. (iv) The defendant acted under duress or under the domination of another person. (v) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. (vi)

circumstances is another safeguard to ensure that only those criminals who are the most deserving of the most severe form of punishment will receive a death sentence. The jury must find an aggravating circumstance before recommending the death penalty.[169] Furthermore, the statute requires that "[t]he jury, if its verdict is a recommendation of death, shall designate in writing, and signed by all members of the jury, the statutory aggravating circumstance or circumstances, which it found beyond a reasonable doubt."[170] This writing requirement may also contribute to meaningful appellate review, as the reviewing court should have no doubt as to sthe factors the jury relied upon in reaching its decision.[171]

Moreover, other portions of South Carolina's statute protect the defendant from arbitrary and capricious punishment. For example, the amendment relating to criminal sexual conduct with a minor provides for the imposition of the death penalty only for repeat offenders.[172] Thus, the criminal will not receive the death penalty for a first offense. Furthermore, the death penalty is only one option of punishment. Whoever sentences the defendant, either the judge or jury, also has the option of sentencing the defendant to life imprisonment.[173] Thus, the statute in no way employs the death penalty as a mandatory punishment, but rather gives the death penalty as an option for only the most reprehensible crimes. If there is a jury trial and a recommendation of death, the judge has the authority to review the proceedings before imposing the death penalty.[174] Only after the judge finds "as an affirmative fact that the death penalty was warranted under the evidence of the case and was not a result of prejudice, passion, or any other arbitrary factor," may he impose the death penalty.[175] Finally, all sentences imposed pursuant to the statute must be reviewed on the record by the Supreme Court of South Carolina.[176] The

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> The age or mentality of the defendant at the time of the crime. (vii) The defendant was below the age of eighteen at the time of the crime.

Id.

169. *Id.* § 16-3-655(D)(2).

170. *Id.*

171. *See Gregg*, 428 U.S. at 195.

172. S.C. CODE ANN. § 16-3-655(C)(1).

> If the person has previously been convicted of, pled guilty or nolo contendere to, or adjudicated delinquent for first degree criminal sexual conduct with a minor who is less than eleven years of age or a federal or out-of-state offense that would constitute first degree criminal sexual conduct with a minor who is less than eleven years of age, he must be punished by death or by imprisonment for life, as provided by this section.

Id.

173. *See id.*

174. *See id.* § 16-3-655(D)(2).

175. *Id.*

176. *Id.* § 16-3-655(F)(1). In regard to the sentence, the supreme court must determine "[w]hether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor." *Id.* § 16-3-655(F)(3)(a). Additionally, the court must conclude that "the evidence supports the jury's or judge's finding of a statutory aggravating circumstance." *Id.* § 16-3-655(F)(3)(b). Finally, the court must consider "[w]hether the sentence of death is excessive or disproportionate . . . considering both the crime and the defendant." *Id.* § 16-3-655(F)(3)(c). The court is authorized to affirm the death sentence or set it aside and remand the case for resentencing. *Id.* § 16-3-655(F)(5)(a)–(b). "The court

supreme court may affirm the sentence or "set the sentence aside and remand" to "the trial judge based on the record and argument of counsel."[177] Thus, South Carolina's statute has built-in measures to protect against arbitrary and capricious execution—a factor that should weigh on the side of constitutionality.[178]

In addition to examining the statute on its face, a court should consider a comparison of South Carolina's statute to Louisiana's statute. Notably, Louisiana's statute is far more succinct and offers fewer explicit protections for the defendant.[179] While Louisiana's statute offers reference to general capital punishment provisions, the statute is not tailored specifically for those offenders who commit child rape.[180] There is no specific mention of a bifurcated trial process in Lousiana's statute.[181] Nor is there a list of aggravating and mitigating factors that the legislature considers pertinent to the child sex offender.[182] Unlike South Carolina, Louisiana permits a death sentence for first offenses.[183] Furthermore, Louisiana's statute contains no provision mandating review by the trial judge or the Louisiana Supreme Court.[184] While Louisiana's Criminal Code offers guidance so the child rape statute is not wholly arbitrary, one must notice that the South Carolina legislature has gone to great lengths to ensure that its statute is tailored specifically to the child rapist defendant. The comparison of the two statutes alone, of course, in no way determines the constitutionality of either statute; however, it is another factor for

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shall render its decision on all legal errors, the factual substantiation of the verdict, and the validity of the sentence." *Id.* § 16-3-655(F)(6).

177. *See id.* § 16-3-655(F)(5)(a)–(b).

178. *See supra* note 161 and accompanying text (noting that the problem with Georgia's death penalty statute, and many others, was a lack of specificity and instruction for sentencing).

179. *See* LA. REV. STAT. ANN. § 14:42(D) (Supp. 2006).

> D. (1) Whoever commits the crime of aggravated rape shall be punished by life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence.
>
> (2) However, if the victim was under the age of twelve years, as provided by Paragraph A(4) of this Section:
>
> (a) And if the district attorney seeks a capital verdict, the offender shall be punished by death or life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence, in accordance with the determination of the jury. The provisions of C.Cr.P. Art. 782 relative to cases in which punishment may be capital shall apply.
>
> (b) And if the district attorney does not seek a capital verdict, the offender shall be punished by life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. The provisions of C.Cr.P. Art. 782 relative to cases in which punishment is necessarily confinement at hard labor shall apply.

Id.

180. *See* LA. CODE CRIM. PROC. ANN. art. 782 (1998) (applying a jury trial provision to sentencing for all capital crimes). "A. Cases in which punishment may be capital shall be tried by a jury of twelve jurors, all of whom must concur to render a verdict. . . . B. Trial by jury may be knowingly and intelligently waived by the defendant except in capital cases." *Id.*

181. *See* LA. REV. STAT. ANN. § 14:42 (Supp. 2006).

182. *See id.*

183. *See id.*

184. *See id.*

a court to take into consideration when forming an opinion about South Carolina's statute.

VII. CONCLUSION

In all likelihood, the United States Supreme Court will one day face a decision concerning the constitutionality of a statute permitting the death penalty as a punishment for a child rapist. Whether such a challenge originates in Louisiana, South Carolina, or some other state that has adopted a similar statute, the challenge will come. In deciding the validity of such a challenge, the arguments on both sides are well supported. At this point, and in light of recent Supreme Court decisions, however, the conclusion that South Carolina's statute is unconstitutional seems premature. Society looks to the courts to provide guidance and, above all else, a cornerstone for justice. At the same time, the Court, in all of its wisdom, does not operate independently of society. If, in reference to the issue at hand, a court should find no intimation that society is pushing for a change, then surely it may employ its power of judicial review. On the other hand, if there is any indication that society's "evolving standards of decency" are calling for a change, then a court should afford the people's determination the weight and consideration it deserves before rendering a decision.

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