

THE SUPREME COURT'S EVOLVING DEATH PENALTY JURISPRUDENCE: SEVERE MENTAL ILLNESS AS THE NEXT FRONTIER

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Abstract: The U.S. Supreme Court's recent death penalty jurisprudence displays the Court's willingness to invalidate the death penalty for certain offenses or classes of offenders, including those with mental retardation and those who were under eighteen at the time of the offense. The Court has noted that the death penalty in these cases constitutes a disproportionate punishment because it fails to adequately serve the two primary goals of the Cruel and Unusual Punishments Clause: retribution and deterrence. Because the cognitive and volitional impairments caused by severe mental illness result in a parallel diminution in culpability and deterability, severe mental illness is an appropriate next frontier at which to apply the Court's emerging concept of proportionality. Social attitudes have only recently begun to shift toward opposing the death penalty for those with severe mental illness at the time of the offense. Nonetheless, the Court's recent death penalty cases teach that the Court may independently determine that execution of these offenders is a disproportionate punishment if it concludes that executing such offenders does not adequately serve the goals of retribution and deterrence.

INTRODUCTION

The U.S. Supreme Court began a significant new chapter in its death penalty jurisprudence in 2002, when the Court in *Atkins v. Virginia* held that the Eighth Amendment prohibits the imposition of capital punishment on those with mental retardation.¹ The Court, in effect, announced that the Constitution requires a per se finding of diminished

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¹ See 536 U.S. 304, 321 (2002).

responsibility.² All people with mental retardation, the Court held, are constitutionally exempt from capital punishment based upon their diagnosis alone.³ The Court did not require any individualized showing of diminished responsibility or other functional impairment.⁴ After concluding that those with mental retardation are significantly less culpable and deterrable than others who commit capital murder, the Court prohibited capital punishment for this entire class of offenders.⁵ The Court highlighted the fact that people with mental retardation "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."⁶ Reasoning that their execution does not "measurably contribute[] to one or both of [the] goals"⁷ of "retribution and deterrence of capital crimes by prospective offenders,"⁸ the Court held that "the imposition of the death penalty on a mentally retarded person . . . 'is nothing more than the purposeless and needless imposition of pain and suffering,' and hence an unconstitutional punishment."⁹

In 2005, in *Roper v. Simmons*, the Court reached the same conclusion with regard to juveniles who were under the age of eighteen at the time of the offense.¹⁰ In *Roper*, the Court held that juveniles similarly lack sufficient culpability and deterrability to permit execution consistent with the Eighth Amendment.¹¹ Once again, the Court's rule was categorical.¹² Like those with mental retardation, all juveniles under age eighteen are presumed to be insufficiently culpable and deterrable.¹³ The Court again did not require individualized findings of functional inability.¹⁴

² See *id.* at 318, 320-21; see also *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2650 (2008) ("[The Court] held in [*Roper v. Simmons*, 543 U.S. 551 (2005)] and *Atkins* that the execution of juveniles and mentally retarded persons are punishments violative of the Eighth Amendment because the offender had a diminished personal responsibility for the crime."), *modified*, 129 S. Ct. 1 (2008) (mem.).

³ See *Atkins*, 536 U.S. at 318.

⁴ See *id.*

⁵ See *id.* at 306, 318-21.

⁶ *Id.* at 318.

⁷ *Id.* at 319 (quoting *Enmund v. Florida*, 458 U.S. 782, 798 (1982)).

⁸ *Atkins*, 536 U.S. at 319 (quoting *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (3-3-1-2 decision) (Stewart, Powell & Stevens, JJ., announcing the judgment of the Court)).

⁹ *Id.* (quoting *Enmund*, 458 U.S. at 798).

¹⁰ See 543 U.S. at 578.

¹¹ *Id.* at 569-72.

¹² See *id.* at 578.

¹³ See *id.* at 569-72; see also *supra* note 2.

¹⁴ See *Roper*, 543 U.S. at 569-72.

The *Roper* Court concluded that the death penalty is a disproportionate punishment for juveniles, and hence cruel and unusual, because of several significant differences between juveniles and adults.¹⁵ First, juveniles are more susceptible to immature and irresponsible behavior, so their conduct is not as morally reprehensible as that of adults.¹⁶ Second, they are considerably more vulnerable to the influence of others and lack control over their immediate surroundings.¹⁷ Consequently, their inability to escape negative influences in their environments can be forgiven more easily.¹⁸ Third, a juvenile's personality and sense of identity are still developing, which makes the commission of even heinous crimes insufficient evidence of an "irretrievably depraved character."¹⁹ The reduced culpability of juveniles, in the Court's view, renders them less deserving of retribution, and their immaturity, lack of future perspective, and reduced impulse control make them less subject to deterrence.²⁰ These deficiencies, comparable to those experienced by offenders with mental retardation,²¹ supported the Court's conclusion that the juvenile death penalty lacks a sufficient relationship to the purposes of capital punishment to allow its imposition consistent with the Eighth Amendment.²²

Kennedy v. Louisiana, decided in 2008, is the most recent case in the Supreme Court's evolving death penalty jurisprudence.²³ In it, the Court imposed a categorical limitation not on a class of offenders subject to capital punishment, but on the types of crimes for which it may be imposed.²⁴ The Court held that the Eighth Amendment prohibited the death penalty for the rape of a child where the crime "did not result, and was not intended to result, in death of the victim."²⁵ The Court reiterated previous statements that the Eighth Amendment requires punishment to be "graduated and proportioned" to the crime,²⁶ and that capital punishment "be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme

¹⁵ See *id.*

¹⁶ See *id.* at 569–70.

¹⁷ See *id.*

¹⁸ See *id.*

¹⁹ See *Roper*, 543 U.S. at 570.

²⁰ *Id.* at 570–71.

²¹ See *supra* note 6 and accompanying text.

²² See *Roper*, 543 U.S. at 571.

²³ See 128 S. Ct. 2641 (holding the death penalty unconstitutional for the rape of a child where the victim does not die).

²⁴ See *id.* at 2646.

²⁵ *Id.* at 2646, 2650–51.

²⁶ *Id.* at 2649 (quoting *Weems v. United States*, 217 U.S. 349, 367 (1910)).

culpability makes them 'the most deserving of execution.'²⁷ The first of these conditions is not satisfied, the Court held, when the offense does not, or is not intended to, produce the death of the victim.²⁸ After noting the paucity of statutes authorizing capital punishment for child rape and extensively analyzing the history of its imposition, the Court found the existence of a national consensus against capital punishment for this offense.²⁹ In terms of moral depravity and injury to the victim and the public, the Court distinguished between intentional first-degree murder and non-homicide crimes against individuals, even those crimes as devastating in their harm as child rape.³⁰ The Court concluded that capital punishment for this offense would not sufficiently satisfy the aims of retribution and deterrence that justify capital punishment.³¹ Speaking broadly, the Court stated that the proportionality principle of the Eighth Amendment requires that capital punishment be limited to the "worst of crimes," which in the case of offenses against individuals result in the death of the victim.³²

These three cases give new meaning to the proportionality requirement imposed by the Eighth Amendment.³³ They reveal an emerging conception of the proportionality requirement that the Court could extend to other capital punishment contexts.³⁴ Severe mental illness is a compelling next frontier at which to apply the Court's evolving death penalty jurisprudence. Certain mental illnesses bear some striking similarities to both mental retardation and juvenile status.³⁵ Severe mental

²⁷ *Id.* at 2650 (quoting *Roper*, 543 U.S. at 568).

²⁸ See *Kennedy*, 128 S. Ct. at 2662 ("The incongruity between the crime of child rape and the harshness of the death penalty poses risks of overpunishment and counsels against a constitutional ruling that the death penalty can be expanded to include this offense.").

²⁹ See *id.* at 2651-58.

³⁰ See *id.* at 2660.

³¹ *Id.* at 2662-64.

³² See *id.* at 2661 ("[T]he resulting imprecision and the tension between evaluating the individual circumstances and consistency of [death penalty] treatment have been tolerated where the victim dies. It should not be introduced into our justice system, though, where death has not occurred."); *id.* at 2665. The Court's broad statement would exclude the death penalty for crimes such as kidnapping for ransom, torture, repeated acts of domestic violence, and first-degree felonies with a hate crime component. See *id.* at 2661, 2665.

³³ See *Kennedy*, 128 S. Ct. at 2649-51; *Roper*, 543 U.S. at 569-72; *Atkins*, 536 U.S. at 318-21.

³⁴ See *Kennedy*, 128 S. Ct. at 2649-51; *Roper*, 543 U.S. at 569-72; *Atkins*, 536 U.S. at 318-21.

³⁵ See *infra* notes 322-374 and accompanying text. Although some similarities exist between mental illness and mental retardation, the two are not identical. "The essential feature of Mental Retardation is significantly subaverage general intellectual functioning . . ." AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 41 (4th ed. text rev. 2000) [hereinafter DSM-IV-TR]. By contrast, a diagnosis of men-

illness at the time of the offense may significantly diminish the offender's blameworthiness and amenability to deterrence in ways not unlike mental retardation and juvenile status.³⁶ This Article analyzes this evolving death penalty jurisprudence and examines whether the Court could apply it to limit the application of capital punishment to defendants with severe mental illness.

At least five leading professional associations—the American Bar Association (“ABA”), the American Psychiatric Association (“APsYA”), the American Psychological Association (“APA”), the National Alliance on Mental Illness (“NAMI”), and Mental Health America (“MHA”) (formerly known as the National Mental Health Association)—have adopted policy statements that recommend prohibiting the execution of those with severe mental illness.³⁷ These organizations recommend a

tal illness does not involve a determination of intelligence. See, e.g., *id.* at 297–317 (discussing diagnosis of schizophrenia). Mental retardation occurs prenatally, at birth, or in early childhood, is caused by an incurable defect in the central nervous system, and is a permanent developmental disability. *Id.* at 45–46. In contrast, the age of onset for schizophrenia, the most serious thought disorder, is in the twenties, *id.* at 308, and the condition is treatable, even if not curable. See generally Jack A. Grebb, *Biological Therapies: Introduction and Overview*, in 2 COMPREHENSIVE TEXTBOOK OF PSYCHIATRY 1574 (Harold I. Kaplan & Benjamin J. Sadock eds., 5th ed. 1989) (providing an overview of organic treatment techniques used for major mental illnesses). Whereas the cognitive impairments associated with mental retardation are permanent, the effects of the major mental illnesses, such as schizophrenia, are intermittent, variable, and fluctuating. See, e.g., CHARLES W. LIDZ ET AL., INFORMED CONSENT: A STUDY OF DECISIONMAKING IN PSYCHIATRY 198–99 (1984) (empirical study of psychiatric hospital). Although not identical, mental illness and mental retardation are also not mutually exclusive, as many people with mental retardation also have a diagnosable mental illness. See generally Sally-Ann Cooper et al., *Mental Ill-Health in Adults with Intellectual Disabilities: Prevalence and Associated Factors*, 190 BRIT. J. PSYCHIATRY 27 (2007) (study of mental illness among individuals with mental retardation); Elaine C. Wright, *The Presentation of Mental Illness in Mentally Retarded Adults*, 141 BRIT. J. PSYCHIATRY 496 (1982) (same).

³⁶ See *infra* notes 322–374 and accompanying text. As this Article explains in greater detail, however, the categorical approach invoked by the Court in both *Atkins* and *Roper* would not be appropriate in the context of severe mental illness. See *infra* notes 267–271, 282–290 and accompanying text. Because mental illness varies considerably in its effects on those who experience it, a categorical exemption is not warranted. See *infra* notes 267–271, 282–290 and accompanying text. Mental illness at the time of the offense will produce significantly diminished culpability and deterrability in some, but far from all, offenders suffering from mental illness at the time of the offense. See *infra* notes 267–271, 282–290 and accompanying text. A case-by-case determination is more reasonable in light of the differing mental illnesses involved and their varied effects on the offenders in question. See *infra* notes 267–271, 282–290 and accompanying text.

³⁷ This recommendation is articulated in a report by the American Bar Association's Task Force on Mental Disability and the Death Penalty. See ABA Task Force on Mental Disability and the Death Penalty, *Recommendation and Report on the Death Penalty and Persons with Mental Disabilities*, 30 MENTAL & PHYSICAL DISABILITY L. REP. 668 (2006) (hereinafter Task Force Report). The Task Force Report recommends exempting those with severe mental illness

non-categorical, case-by-case determination of whether the severity of a defendant's mental illness at the time of the crime should bar the prosecution from seeking the death penalty.³⁸ Although this joint recommendation might prompt future legislative change, it has not yet succeeded in doing so.

Another important difference exists between severe mental illness and the death penalty contexts addressed in *Atkins*, *Roper*, and *Kennedy*. In the three cases in which the Court applied its emerging conception of proportionality, it relied in part upon the objective indicia of "evolving standards of decency" reflected in legislative practices.³⁹ As the Court recently reiterated in *Kennedy*, the "existence of objective indicia of consensus against making a crime punishable by death was a relevant concern in *Roper*, *Atkins*," and prior cases.⁴⁰ In both *Atkins* and *Roper*, the Court stressed the trend of statutory change in the direction of abolishing the death penalty for those with mental retardation or who were juveniles at the time of the offense.⁴¹ This echoed the Court's similar reliance on legislative action in its earlier determinations that the death penalty could not be imposed for such offenses as the rape of an adult woman where death of the victim did not result,⁴² or felony murder where the defendant himself neither took the life of the victim

from capital punishment in limited circumstances. See *id.* at 688. In addition to representatives of the ABA, the Task Force included representatives from the APsYA and APA. See *id.* at 669. Additionally, the APsYA and APA, as well as the NAMI and MHA, have independently approved those Task Force Report recommendations pertaining to the exemption of those with severe mental illness from capital punishment. See NAT'L ALLIANCE ON MENTAL ILLNESS, PUBLIC POLICY PLATFORM OF THE NATIONAL ALLIANCE ON MENTAL ILLNESS § 10.9.1.2, at 56-57 (8th ed. 2008); Am. Psychiatric Ass'n, Position Statement: Diminished Responsibility in Capital Sentencing, Dec. 2004, <http://www.psych.org/Departments/EDU/Library/APAOfficialDocumentsandRelated/PositionStatements/200406.aspx>; Am. Psychological Ass'n, Council Policy Manual: Public Interest, Feb. 2006, <http://www.apa.org/about/division/cpm/pubint2.html>; Mental Health Am., Position Statement 54: Death Penalty and People with Mental Illnesses, June 11, 2006, <http://www.nmha.org/go/position-statements/54>.

³⁸ See *supra* note 37.

³⁹ See *Kennedy*, 128 S. Ct. at 2651-58; *Roper*, 543 U.S. at 563-67; *Atkins*, 536 U.S. at 312-16.

⁴⁰ 128 S. Ct. at 2651.

⁴¹ See *Roper*, 543 U.S. at 566 ("[I]t is not so much the number of these States [banning imposition of the death penalty on defendants with mental retardation] that is significant, but the consistency of the direction of change." (quoting *Atkins*, 536 U.S. at 315)); see also *infra* notes 58-59.

⁴² See *Coker v. Georgia*, 433 U.S. 584, 596-97 (1977) (plurality opinion) ("The current judgment with respect to the death penalty for rape is not wholly unanimous among state legislatures, but it obviously weighs very heavily on the side of rejecting capital punishment as a suitable penalty for raping an adult woman.").

nor intended that a homicide occur.⁴³ And the Court followed this approach in its recent decision in *Kennedy*, concluding that the death penalty could not be available for the rape of a child whose death did not occur, noting that forty-four of the fifty states do not impose capital punishment for this offense.⁴⁴ There simply is no comparable legislative trend toward abolishing the death penalty for those with severe mental illness.⁴⁵ Indeed, many prisoners on death row, and many who have been executed, have suffered from demonstrable mental illness.⁴⁶ This Article accordingly examines the Supreme Court's evolving death penalty jurisprudence to analyze whether, in the absence of legislative action indicating a consensus against applying the death penalty for those with severe mental illness, or of other objective indicia of evolving social norms on this issue, the Court could nonetheless employ its independent judgment to determine that capital punishment for those with severe mental illness is a disproportionate penalty, and hence cruel and unusual, in violation of the Eighth Amendment.

Scholars who have examined this issue have concluded that in the absence of a legislative trend toward abolishing the death penalty for severe mental illness, the Court could not hold that the application of the death penalty in this context violates the Eighth Amendment.⁴⁷ I

⁴³ See *Enmund*, 458 U.S. at 792–93 (“While the current legislative judgment . . . [is not] as compelling as the legislative judgments considered in *Coker*, it nevertheless weighs on the side of rejecting capital punishment for the crime at issue.”).

⁴⁴ See 128 S. Ct. at 2652.

⁴⁵ See *infra* note 47.

⁴⁶ See AMNESTY INT'L, UNITED STATES OF AMERICA: THE EXECUTION OF MENTALLY ILL OFFENDERS 170 (2006), available at <http://www.amnesty.org/en/library/info/AMR51/003/2006> (naming and describing the conditions of one hundred prisoners with mental illness executed in the United States between 1984 and 2005); Richard J. Bonnie, *Mentally Ill Prisoners on Death Row: Unsolved Puzzles for Courts and Legislatures*, 54 CATH. U. L. REV. 1169, 1192 (2005) (“Although firm estimates are not available, the prevalence of serious mental illness on death row is likely higher than most readers imagine—perhaps as high as five to ten percent at any point in time.”); Liliana Lyra Jubilut, *Death Penalty and Mental Illness: The Challenge of Reconciling Human Rights, Criminal Law, and Psychiatric Standards*, 6 SEATTLE J. FOR SOC. JUST. 353, 367 (2007) (“The more conservative studies find that up to 10 percent of inmates on death row suffer from serious mental illness. However, other studies suggest that the proportion of prisoners on death row who have been treated for some kind of psychiatric disorder can be as high as one-third.”); Christopher Slobogin, *Mental Illness and the Death Penalty*, 1 CAL. CRIM. L. REV. 3, ¶ 2 (2000), <http://www.boalt.org/bjcl/v1/v1slobogin.htm> (“[A] significant proportion of death row inmates are mentally ill . . . even when mental illness is defined in the narrow sense”); Am. Civil Liberties Union, *Mental Illness and the Death Penalty in the United States*, Jan. 31, 2005, <http://www.aclu.org/capital/mentalillness/10617pub20050131.html> (“While precise statistics are not available, it is estimated that 5 to 10 percent of people on death row have a serious mental illness.”).

⁴⁷ See, e.g., RISDON N. SLATE & W. WESLEY JOHNSON, *THE CRIMINALIZATION OF MENTAL ILLNESS* 342 (2008) (“The Supreme Court will undoubtedly be reticent to exempt people

disagree. This Article argues that, although severe mental illness in itself should not categorically disqualify an offender from capital punishment, in cases in which it produces functional impairments at the time of the offense that significantly reduce culpability and deterrability, Eighth Amendment principles should preclude the death penalty.

Part I of this Article examines the U.S. Supreme Court's emerging conception of proportionality under the Eighth Amendment.⁴⁸ It argues that the absence of a record of legislative action toward abolishing the death penalty for those with severe mental illness need not preclude the Court from concluding that executing these offenders violates the proportionality principle.⁴⁹ Instead, as previous cases overwhelmingly demonstrate, the Court may reach such a conclusion in the exercise of its own independent judgment.⁵⁰ Part II probes the analogies between severe mental illness and mental retardation and juvenile status, and concludes that the Court's proportionality approach should bar the death penalty for offenders whose mental illness at the time of the crime produced functional impairment that likewise significantly diminished their culpability and deterrability.⁵¹ Part III begins by analyzing the standard that should apply in making the Eighth Amendment determination and by discussing those mental illnesses that in principle could satisfy the standard.⁵² It then addresses the procedural question of how the issue should be determined and argues that it should be resolved by the trial judge on a pretrial motion, rather than by a special jury convened for this purpose or by a jury determination made at the penalty phase.⁵³

with mental illnesses from the death penalty until it sees a similar trend in legislation enacted in a majority of states."); Jubilut, *supra* note 46, at 376 ("[P]eople who suffer from mental illness are currently subject to the death penalty and likely will be for the foreseeable future . . ."); Christopher Slobogin, *What Atkins Could Mean for People with Mental Illness*, 33 N.M. L. REV. 293, 297 (2003) ("[A] determination that evolving standards of decency have been abridged still requires some evidence of statutory evolution, and that evidence simply does not exist with respect to the execution of people with mental illness."); Helen Shin, Note, *Is the Death of the Death Penalty Near? The Impact of Atkins and Roper on the Future of Capital Punishment for Mentally Ill Defendants*, 76 FORDHAM. L. REV. 465, 496, 514-15 (2007).

⁴⁸ See *infra* notes 54-209 and accompanying text.

⁴⁹ See *infra* notes 97-209 and accompanying text.

⁵⁰ See *infra* notes 97-209 and accompanying text.

⁵¹ See *infra* notes 210-271 and accompanying text.

⁵² See *infra* notes 272-431 and accompanying text.

⁵³ See *infra* notes 432-478 and accompanying text.

I. WHEN IS CAPITAL PUNISHMENT DISPROPORTIONATE WITHIN THE MEANING OF THE EIGHTH AMENDMENT?

As previously noted, clear similarities exist between mental illness (at least severe mental illness) and mental retardation and juvenile status.⁵⁴ All can be seen as reducing culpability and deterrability.⁵⁵ Yet the effects of mental illness vary so considerably that the categorical approach adopted by the U.S. Supreme Court in 2002, in *Atkins v. Virginia*, and in 2005, in *Roper v. Simmons*, seems inappropriate.⁵⁶ Moreover, though it may be argued that a social consensus has emerged condemning capital punishment for those with mental retardation or who were juveniles at the time of the offense, no such consensus exists with regard to capital punishment and mental illness.⁵⁷

The Supreme Court's application of Eighth Amendment principles in *Atkins*, *Roper*, and its 2008 decision in *Kennedy v. Louisiana* was supported by the majority's conclusion that an emerging national consensus rejected imposition of the death penalty on those with mental retardation,⁵⁸ on those who were juveniles at the time of the offense,⁵⁹ and

⁵⁴ See *supra* note 35 and accompanying text.

⁵⁵ See *infra* notes 249–271 and accompanying text.

⁵⁶ See *Roper v. Simmons*, 543 U.S. 551, 575 (2005); *Atkins v. Virginia*, 536 U.S. 304, 321 (2002); see also *Indiana v. Edwards*, 128 S. Ct. 2379, 2386 (2008) ("Mental illness itself is not a unitary concept. It varies in degree. It can vary over time. It interferes with an individual's functioning at different times in different ways."); DSM-IV-TR, *supra* note 35, at xxxiii (noting that impairments vary widely within diagnostic categories).

⁵⁷ See *supra* note 47.

⁵⁸ See *Atkins*, 536 U.S. at 315–16. The *Atkins* majority noted that "the large number of States prohibiting the execution of mentally retarded persons (and the complete absence of States passing legislation reinstating the power to conduct such executions) provides powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal." *Id.* The majority opinion extensively details the evolution of federal and state legislation forbidding the imposition of death on individuals with mental retardation since the Court originally held, in *Penry v. Lynaugh*, 492 U.S. 302 (1989), that such executions were not unconstitutional. See *Atkins*, 536 U.S. at 314–16. The Court concluded that the practice of executing mentally retarded persons "has become truly unusual, and it is fair to say that a national consensus has developed against it." *Id.* at 316. *Atkins* also relied upon public polling data and the amicus briefs of "several organizations with germane expertise" that "have adopted official positions opposing the imposition of the death penalty upon a mentally retarded offender," including the APA, the United States Catholic Conference, and the European Union. See *id.* at 316–17 n.21.

⁵⁹ See *Roper*, 543 U.S. at 564–67. In *Roper*, the Court found "evidence of national consensus against the death penalty for juveniles [to be] similar, and in some respects parallel, to the evidence *Atkins* held sufficient to demonstrate a national consensus against the death penalty for the mentally retarded." *Id.* at 564. The Court recognized the slower "rate of change in reducing the incidence of the juvenile death penalty, or in taking specific steps to abolish it." *Id.* at 565. This trend the majority attributed to the fact that in 1989, when the Court rejected an Eighth Amendment challenge to the juvenile death penalty in

for the offense of rape not involving the death of the victim.⁶⁰ These cases demonstrate that the Court takes a dynamic approach to measuring what constitutes cruel and unusual punishment under the Eighth Amendment.⁶¹

Stanford v. Kentucky, 492 U.S. 361 (1989), the number of states already outlawing juvenile capital punishment was so much greater than that of states outlawing the imposition of capital punishment on persons with mental retardation. See *Roper*, 543 U.S. at 566–67. In 1989, twenty-seven states prohibited death sentences for those under seventeen (twelve of which also prohibited death sentences for those under eighteen), but only two prohibited imposing capital punishment on those with mental retardation. See *id.* at 566. The *Roper* majority also found the infrequent sentencing of juvenile offenders to death in states allowing for it, coupled with the trend toward legislative abolition of juvenile capital punishment, to be “sufficient evidence that today our society views juveniles, in the words *Atkins* used respecting the mentally retarded, as ‘categorically less culpable than the average criminal.’” *Id.* at 567 (quoting *Atkins*, 536 U.S. at 316).

⁶⁰ See *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2650–53 (2008), modified, 129 S. Ct. 1 (2008) (mem.). Although *Kennedy* acknowledged that 455 defendants in the United States were executed between 1930 and 1964 for the crime of child rape, it also highlighted the fact that no one had been executed for it since 1964. See *id.* at 2651. Although, post-*Furman*, a few state legislatures have instituted or reinstituted the death penalty as a possible punishment for child rape, the overwhelming majority of states have not. See *id.* The Court did recognize one major difference between this case and *Atkins* and *Roper*. See *id.* at 2656. Whereas prior to those decisions, state legislatures were already moving in the direction of abolishing the death penalty for persons with mental retardation and those who were not yet eighteen years of age when they committed their crimes, states prior to *Kennedy* were moving, albeit very slowly and sporadically, toward adding rape of a child as a capital offense. See *id.* Yet the majority found it more “significant[t] that, in 45 jurisdictions, petitioner could not be executed for child rape of any kind. That number surpasses the 30 States in *Atkins* and *Roper* . . . that prohibited the death penalty under the circumstances those cases considered.” See *id.* at 2653. In addition, the Court noted that the number is also greater than the 42 states that, prior to its decision in *Enmund v. Florida*, 458 U.S. 782 (1982), already barred application of the death penalty for felony murder when the defendant does not himself kill the victim, attempt to do so, or intend that it occur. See *Kennedy*, 128 S. Ct. at 2653.

⁶¹ The Court’s classic formulation of this dynamic approach to Eighth Amendment jurisprudence was first articulated in *Trop v. Dulles*, which declared that “[t]he [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.” See 356 U.S. 86, 101 (1958) (plurality opinion); see also *Kennedy*, 128 S. Ct. at 2649 (“Evolving standards of decency must embrace and express respect for the dignity of the person, and the punishment of criminals must conform to that rule.”). As expressed by Justice Stevens in his concurring opinion in *Roper*:

Perhaps even more important than our specific holding today is our reaffirmation of the basic principle that informs the Court’s interpretation of the Eighth Amendment. If the meaning of that Amendment had been frozen when it was originally drafted, it would impose no impediment to the execution of 7-year-old children today. . . . [T]hat our understanding of the Constitution does change from time to time has been settled since John Marshall breathed life into its text.

543 U.S. at 587 (Stevens, J., concurring).

A. Historic Background: The Dynamic Nature of Proportionality Analysis

The history underlying the Eighth Amendment suggests that it was designed to outlaw only barbarous forms of punishment.⁶² Capital punishment was a common criminal penalty in 1791 when the amendment was adopted, and the penalty applied to a wide variety of offenses and offenders.⁶³ Yet, as in other areas of constitutional interpretation, originalism has not carried the day in the Supreme Court's construction of its meaning.⁶⁴ The Court has repeatedly acknowledged that what the Eighth Amendment prohibits as "cruel and unusual punishment" may change over time.⁶⁵ As such, "the Court has not confined

⁶² See *Gregg v. Georgia*, 428 U.S. 153, 170 (1976) (3-3-1-2 decision) (Stewart, Powell & Stevens, JJ., announcing the judgment of the Court).

⁶³ See *id.* at 176-77. In their joint opinion in *Gregg*, Justices Stewart, Powell, and Stevens noted:

In the earliest cases raising Eighth Amendment claims, the Court focused on particular methods of execution to determine whether they were too cruel to pass constitutional muster. The constitutionality of the sentence of death itself was not at issue, and the criterion used to evaluate the mode of execution was its similarity to "torture" and other "barbarous" methods.

Id. at 170; see also Anthony F. Granucci, "Nor Cruel and Unusual Punishments Inflicted": The Original Meaning, 57 CAL. L. REV. 839, 842 (1969) ("Following adoption [of the Eighth Amendment], state and federal jurists accepted the view that the clause prohibited certain methods of punishments. . . . Attempts to extend the meaning of the clause to cover any punishment disproportionate to the crime were rebuffed throughout the nineteenth century. . . .").

⁶⁴ See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 847 (1992) (rejecting the argument that the "Due Process Clause protects only those practices, defined at the most specific level, that were protected against government interference by other rules of law when the Fourteenth Amendment was ratified" as "inconsistent with our law"); *id.* at 848 ("Neither the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects."); *Brown v. Bd. of Educ.*, 347 U.S. 483, 492 (1954) ("[W]e cannot turn the clock back to 1868 when the [Fourteenth] Amendment was adopted. . . ."); *Rochin v. California*, 342 U.S. 165, 171 (1952) ("To believe that this judicial exercise of judgment could be avoided by freezing 'due process of law' at some fixed stage of time or thought is to suggest that the most important aspect of constitutional adjudication is a function for inanimate machines and not for judges. . . .").

⁶⁵ See, e.g., *Kennedy*, 128 S. Ct. at 2649 (holding that whether the Eighth Amendment proscription against cruel and unusual punishments applies "is determined not by the standards that prevailed when the Eighth Amendment was adopted in 1791 but by the norms that currently prevail" (internal quotations omitted)); *Furman v. Georgia*, 408 U.S. 238, 382 (1972) (Burger, C.J., dissenting) ("The Eighth Amendment prohibition cannot fairly be limited to those punishments thought excessively cruel and barbarous at the time of the adoption of the Eighth Amendment. . . . The standard itself remains the same, but its applicability must change as the basic mores of society change."); see also Granucci, *supra* note 63, at 842-43 (discussing the history of the expansion of the Court's initially constricted view of the Eighth Amendment).

the prohibition embodied in the Eighth Amendment to [just those] 'barbarous' methods that were generally outlawed in the 18th century."⁶⁶ As early as 1910, the Court noted that the Eighth Amendment is "progressive," and that it "may acquire meaning as public opinion becomes enlightened by a humane justice."⁶⁷ Because the language of the prohibition is not "precise" and its "scope is not static," the Court held that "[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."⁶⁸ The Court regards the Eighth Amendment's proscription of cruel and unusual punishments as "an evolving constitutional norm which changes over time to reflect society's changing moral judgments concerning the limits of appropriate punishment."⁶⁹ As the Court recently stated in *Kennedy*, the standard of cruelty "is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change."⁷⁰

The Supreme Court's 1910 decision in *Weems v. United States* demonstrates its early approach to determining proportionality under the Eighth Amendment.⁷¹ In *Weems*, the Court held a punishment of twelve to twenty years in irons and at hard labor for the offense of falsifying official records to be excessive.⁷² The penalty infringed the "precept of justice that punishment for crime should be graduated and proportioned to offense."⁷³

In its modern death penalty jurisprudence, the Court has frequently invoked this "proportionality principle," which dictates that criminal punishment be proportionate to the offense.⁷⁴ This principle limits both the offenses for which capital punishment (and other harsh punishments) may be imposed⁷⁵ and the class of offenders to which it

⁶⁶ *Gregg*, 428 U.S. at 171 (Stewart, Powell & Stevens, JJ., announcing the judgment of the Court).

⁶⁷ See *Weems v. United States*, 217 U.S. 349, 378 (1910).

⁶⁸ *Trop*, 356 U.S. at 100-01 (plurality opinion).

⁶⁹ See Bruce J. Winick, *Prosecutorial Peremptory Challenge Practices in Capital Cases: An Empirical Study and a Constitutional Analysis*, 81 MICH. L. REV. 1, 80 (1982).

⁷⁰ 128 S. Ct. at 2649 (quoting *Furman*, 408 U.S. at 382 (Burger, C.J., dissenting)).

⁷¹ See 217 U.S. at 366-67.

⁷² See *id.* at 382.

⁷³ *Id.* at 366-67; accord *Kennedy*, 128 S. Ct. at 2661.

⁷⁴ See *Kennedy*, 128 S. Ct. at 2661; *Roper*, 543 U.S. at 560; *Atkins*, 536 U.S. at 311.

⁷⁵ See, e.g., *Kennedy*, 128 S. Ct. at 2664 ("[T]he death penalty is not a proportional punishment for the rape of a child."); *Solem v. Helm*, 463 U.S. 277, 303 (1983) (holding a sentence of life without the possibility of parole for a convicted nonviolent felon issuing a worthless check for \$100 to be "significantly disproportionate to [the] crime, and ...

may be applied.⁷⁶ What constitutes "disproportionality" in any given instance is based, in part, on the Court's objective determination of society's "evolving standards of decency."⁷⁷ At the same time, the proportionality principle also requires the Court ultimately to make its own independent determination of the degree to which the criminal penalty fits the crime and the offender.⁷⁸ The Court has acknowledged this responsibility in *Kennedy*, *Roper*, and *Atkins*, all of which reflect the dynamic quality of the Court's approach to proportionality analysis.⁷⁹

B. *The Role of "National Consensus": Legislative Action and Other Objective Criteria*

The U.S. Supreme Court has frequently relied on objective evidence of social norms in determining whether imposition of the death penalty is consistent with the Eighth Amendment proportionality principle.⁸⁰ This approach is reflected in its evolving positions on whether

therefore prohibited by the Eighth Amendment"); *Enmund*, 458 U.S. at 801 (holding a death sentence for felony murder, where the offender does not himself commit the homicide, attempt to do so, or intend that it occur, to be cruel and unusual punishment); *Eberheart v. Georgia*, 433 U.S. 917, 917 (1977) (mem.) (holding a death sentence for the rape and kidnapping of an adult woman to be cruel and unusual punishment); *Coker v. Georgia*, 433 U.S. 584, 600 (1977) (plurality opinion) (holding a death sentence for the rape of an adult woman to be cruel and unusual punishment); *Robinson v. California*, 370 U.S. 660, 667 (1962) (holding ninety days imprisonment for narcotics addiction to be cruel and unusual punishment); *Weems*, 217 U.S. at 382 (holding a sentence of fifteen years hard labor for falsifying an official, public document "repugnant to the bill of rights").

⁷⁶ See, e.g., *Roper*, 543 U.S. at 564, 578 (finding that "the death penalty is a disproportionate punishment for juveniles"); *Atkins*, 536 U.S. at 321 (finding a sentence of death "excessive" punishment for mentally retarded offenders).

⁷⁷ See *Trop*, 356 U.S. at 101 (plurality opinion).

⁷⁸ See *Kennedy*, 128 S. Ct. at 2650; *Roper*, 543 U.S. at 564; *Atkins*, 536 U.S. at 312.

⁷⁹ See *Kennedy*, 128 S. Ct. at 2650 ("[T]he Court has been guided by objective indicia of society's standards The inquiry does not end there, however. Consensus is not dispositive. Whether the death penalty is disproportionate to the crime committed depends as well upon the standards elaborated . . . by the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose." (internal quotations omitted) (emphasis added)); *Roper*, 543 U.S. at 564 ("We then must determine, in the exercise of our own independent judgment, whether the death penalty is a disproportionate punishment for juveniles." (emphasis added)); *Atkins*, 536 U.S. at 312 ("[O]bjective evidence, though of great importance, did not 'wholly determine' the controversy, 'for the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.'" (quoting *Coker*, 433 U.S. at 597 (plurality opinion)) (emphasis added)).

⁸⁰ See, e.g., *Roper*, 543 U.S. at 564-67; *Coker*, 433 U.S. at 593-97.

the Eighth Amendment bars capital punishment for juveniles⁸¹ and for those with mental retardation.⁸² In 1989, the Court in *Stanford v. Kentucky* rejected the contention that the Eighth Amendment bars capital punishment for those who were under eighteen at the time of the offense.⁸³ The same day that it decided *Stanford*, the Court also held, in *Penry v. Lynaugh*, that the Eighth Amendment does not bar the death penalty for those with mental retardation.⁸⁴ Yet within sixteen years, in *Atkins* and then in *Roper*, the Court concluded that social attitudes concerning the propriety of imposing punishment for these two classes of offenders had changed.⁸⁵ The majority in both latter cases concluded that in the intervening years, state legislative action barring the death penalty for these two categories of offenders and state practices in the administration of the death penalty indicated that execution of individuals in these two classes had become so unusual that a national consensus had emerged rejecting capital punishment in these contexts.⁸⁶

There have been no comparable state statutory changes relating to capital punishment for those with mental illness.⁸⁷ At this time, only one state provides a statutory exemption from the death penalty for serious mental illness.⁸⁸ Other states' death penalty statutes consistently recog-

⁸¹ Compare *Stanford*, 492 U.S. at 370-73 (finding no national consensus against capital punishment for juveniles), with *Roper*, 543 U.S. 564-67 (finding evidence of national consensus against death penalty for juveniles had emerged in sixteen years since *Stanford*).

⁸² Compare *Penry*, 492 U.S. at 330-35 (finding no national consensus against execution of the mentally retarded), with *Atkins*, 536 U.S. at 313-17 (finding emergence of national consensus against death penalty for the mentally retarded in the thirteen years since *Penry*).

⁸³ 492 U.S. at 380.

⁸⁴ 492 U.S. at 340 (opinion of O'Connor, J.).

⁸⁵ See *supra* notes 81-82.

⁸⁶ See *Roper*, 543 U.S. at 564-67; *Atkins*, 536 U.S. at 313-17; see also *supra* notes 58-59.

⁸⁷ See SLATE & JOHNSON, *supra* note 47, at 342; Slobogin, *supra* note 47, at 297. Some statutes use alternate terminology to describe mental illness. See Ellen Fels Berkman, Note, *Mental Illness as an Aggravating Circumstance in Capital Sentencing*, 89 COLUM. L. REV. 291, 297 n.46 (1989) (listing state statutes that include extreme mental or emotional disturbance as a mitigating factor); see also Slobogin, *supra* note 46, ¶ 18 ("Roughly two-thirds of state capital sentencing statutes explicitly incorporate one or more of the mitigating factors found in the Model Penal Code, which lists, inter alia: (1) whether the defendant was suffering from 'extreme mental or emotional disturbance' at the time of the offense . . .").

⁸⁸ See CONN. GEN. STAT. § 53a-46a(h) (West 2007). The Connecticut statute recognizes that mental illness, even when it does not merit an acquittal by reason of insanity, may produce such significant impairments that the death penalty should not be imposed. See *id.* It prohibits capital punishment when the jury or judge finds, by special verdict, that "the defendant's mental capacity was significantly impaired or the defendant's ability to conform the defendant's conduct to the requirements of law was significantly impaired but not so impaired in either case as to constitute a defense to prosecution." *Id.* Additionally, the legislatures of at least two other states are currently considering bills that would pro-

nize mental illness at the time of the offense as a possible mitigating circumstance.⁸⁹ Statutory inclusion of mental illness as a mitigator, however, does not reflect a social consensus that mental illness, even when serious or severe, should disqualify an offender from capital punishment outright. Death penalty statutes, although listing mitigating and aggravating factors, allow the capital jury, with little or no guidance, to balance them in determining whether a death sentence is warranted.⁹⁰

Legislative action, of course, is not the only evidence of evolving social norms. The U.S. Supreme Court has used statistics concerning the frequency of jury-imposed death sentences as at least a partial basis for declaring some death penalty statutes constitutional⁹¹ and others unconstitutional.⁹² The Court has also demonstrated a willingness to

hibit imposing the death penalty on a defendant with a severe mental illness. See S.B. 310, 115th Gen. Assemb., 2d Reg. Sess. (Ind. 2008); H.B. 553, 2007 Gen. Assemb., 2007–2008 Sess. (N.C. 2007); S.B. 1075, 2007 Gen. Assemb., 2007–2008 Sess. (N.C. 2007); Dan Kane, *Death Penalty Curb Debated*, NEWS & OBSERVER (Raleigh, N.C.), Jan. 14, 2009, at B3. In addition, thirty-four states recognize that mental illness, in appropriate cases, may negate the mens rea element of the offense. See Brief of Appellant at 21 apps. 1–5, *Jackson v. State*, 160 S.W.3d 568 (Tex. Crim. App. 2005) (No. PD-1655-03) (providing a statutory compilation). This Article addresses the question of whether those who suffered from serious mental illness at the time of the offense and were convicted of capital murder should be exempted from the death penalty under the Eighth Amendment. That states allow mental illness as a defense to the charge when it negates mens rea does not reflect a legislative consensus concerning whether those with mental illness who are convicted of capital murder should be given capital punishment.

⁸⁹ See Slobogin, *supra* note 46, ¶ 2.

⁹⁰ For instance, the Capital Jury Project ("CJP"), which researches capital jury decision making based on interviews with former capital jurors, has noted:

[F]undamental to the post-*Furman* [capital punishment] experiment is the premise that jurors [sic] sentencing decisions be guided by understandings and procedures that will make the punishment a reasoned moral choice. The CJP interviews reveal that many jurors misunderstand sentencing guidelines, . . . wrongly apply the fact finding decision rules for guilt to the punishment decisions, and consequently approach the punishment decision with a "tilt" toward death.

William J. Bowers et al., *The Capital Sentencing Decision: Guided Discretion, Reasoned Moral Judgment, or Legal Fiction, in AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF THE ULTIMATE PENAL SANCTION* 413, 462 (James R. Acker et al. eds., 2d ed. 2003) [hereinafter *CAPITAL PUNISHMENT*].

⁹¹ See, e.g., *Gregg*, 428 U.S. at 182 (Stewart, Powell & Stevens, JJ., announcing the judgment of the Court) ("[T]he actions of juries in many States . . . are fully compatible with the legislative judgments, reflected in the new statutes, as to the continued utility and necessity of capital punishment in appropriate cases.").

⁹² See, e.g., *Kennedy*, 128 S. Ct. at 2657 ("Statistics about the number of executions . . . confirm our determination . . . that there is a social consensus against the death penalty for the crime of child rape."); *Enmund*, 458 U.S. at 794–96 (detailing the "overwhelming" statistical evidence "that American juries have repudiated imposition of the death penalty

consider the actions of prosecutors in charging capital offenses as an indication of social norms.⁹³ Moreover, because trial judges typically are elected, the determinations of sentencing judges in capital cases in the seven states in which the judge plays a role in sentencing may also reflect evolving social norms.⁹⁴

Do the actions of capital juries, prosecutors, or capital sentencing judges concerning the imposition of the death penalty for those with mental illness reflect an emerging pattern rejecting the death penalty in such cases? This is an interesting empirical question, yet data is scant or non-existent in this area. For now, the legislative action and jury behavior that led the Court in *Atkins* and *Roper* to conclude that offenders with mental retardation and juveniles should be exempted from capital punishment under the Eighth Amendment are not present in the context of mental illness.⁹⁵

Nonetheless, to the extent that severe mental illness imposes functional impairments that significantly diminish culpability and deterrability, a strong analogy exists to mental retardation and juvenile status that may in the future lead the U.S. Supreme Court to bar execution in this context as well. The Court based its decisions in *Atkins* and *Roper* both on its determination that a national consensus had emerged rejecting capital punishment for these two categories of offenders and on its own independent conclusion that members of these categories were significantly less culpable and deterrable than the average murderer.⁹⁶ It is this latter ground that may permit the Court to hold that capital punishment for some seriously mentally ill offenders is a disproportionate penalty, even in the absence of evidence of evolving social norms.

for crimes such as petitioner's"); *Coker*, 433 U.S. at 596-97 (plurality opinion) (pointing out that in Georgia, the only state in 1977 allowing a death sentence upon conviction of rape of an adult woman, only six such defendants were sentenced to death in the years 1973 to 1977 and, thus, that "in the vast majority of cases, at least 9 out of 10, juries have not imposed the death sentence"); *Woodson v. North Carolina*, 428 U.S. 280, 295-96 & n.31 (1976) (Stewart, Powell & Stevens, JJ., announcing the judgment of the Court) (stating that the fact that capital juries hand down death sentences in "less than 20%" of capital cases "suggest[s] that under contemporary standards of decency death is viewed as an inappropriate punishment for a substantial portion of convicted first-degree murderers").

⁹³ See *Enmund*, 458 U.S. at 795-96.

⁹⁴ Seven states permit a judge to play a role in capital sentencing: Alabama, California, Florida, Kansas, Ohio, South Carolina, and Virginia. Bowers et al., *supra* note 90, at 413 n.1. In Virginia and South Carolina, the state legislature appoints trial judges, so there are five states in which popularly elected judges play a role in capital sentencing. See S.C. CONST. art. V, § 13; VA. CONST. art. VI, § 7.

⁹⁵ See SLATE & JOHNSON, *supra* note 47, at 342; Slobogin, *supra* note 47, at 297.

⁹⁶ See *Roper*, 543 U.S. at 564-75; *Atkins*, 536 U.S. at 313-21.

C. The Supreme Court's Exercise of Independent Judgment

The Court inevitably will face a future Eighth Amendment challenge to the imposition of the death penalty on those with severe mental illness. In recent cases, the Court has always been able to point to objective indicators of a national consensus that the death penalty is a disproportionate punishment for certain classes of offenders or categories of crime.⁹⁷ If, however, the Court independently concluded that severe mental illness imposed cognitive and behavioral deficits comparable to those associated with mental retardation and juvenile status, could it hold that the Eighth Amendment was violated, even in the absence of a legislative trend or other objective indicia of changed social attitudes demonstrating a consensus against imposition of the death penalty for this population? Could the Court independently find capital punishment disproportionate for those whose culpability and deterability are significantly compromised by mental illness, even if objective evidence, such as a record of capital punishment legislation exempting such offenders, failed to emerge? Although *Kennedy*, *Roper*, and *Atkins* do not clearly answer this question, they provide considerable guidance.⁹⁸ All involved legislative data that provided a basis for the Court to detect social norms.⁹⁹ But in all three cases, the Court also made an independent judgment that capital punishment would be a disproportionate penalty in view of the culpability and deterrability of the offender.¹⁰⁰ In particular, in *Roper* and *Atkins*, the Court noted the cognitive and behavioral defects that make juvenile offenders and those with mental retardation categorically less culpable and deterrable than the typical capital offender.¹⁰¹ Because these three cases all involved both the Court's independent judgment concerning proportionality and objective evidence of social norms, the cases leave unanswered the question of whether, on its own, the Court's independent judgment of disproportionality would suffice to ban the execution of those with severe mental illness.¹⁰² Although the Court might decline to extend its precedents to cover mental illness in the absence of a legislative trend, considerable language in *Kennedy*, *Roper*, *Atkins*, and other cases supports the contention that a finding of disproportionality alone would

⁹⁷ See *Kennedy*, 128 S. Ct. at 2651; *Roper*, 543 U.S. at 564–67; *Atkins*, 536 U.S. at 313–17.

⁹⁸ See *Kennedy*, 128 S. Ct. at 2658–64; *Roper*, 543 U.S. at 568–75; *Atkins*, 536 U.S. at 317–21.

⁹⁹ See *Kennedy*, 128 S. Ct. at 2651–53; *Roper*, 543 U.S. at 564–67; *Atkins*, 536 U.S. at 313–17.

¹⁰⁰ See *Kennedy*, 128 S. Ct. at 2658–64; *Roper*, 543 U.S. at 568–75; *Atkins*, 536 U.S. at 317–21.

¹⁰¹ See *Roper*, 543 U.S. at 569–75; *Atkins*, 536 U.S. at 317–21.

¹⁰² See *Kennedy*, 128 S. Ct. at 2651–64; *Roper*, 543 U.S. at 564–75; *Atkins*, 536 U.S. at 313–21.

suffice to enable a willing Court to extend these decisions to the context of severe mental illness.¹⁰³

Kennedy, *Roper*, and *Atkins* provide the most relevant and recent guideposts for thinking about whether the Eighth Amendment should apply to capital punishment for those with severe mental illness.¹⁰⁴ Before examining the opinions in those cases, however, it is instructive to consider their Eighth Amendment predecessors to place them in proper perspective. In 1962, in *Robinson v. California*, the U.S. Supreme Court invoked the Eighth Amendment to invalidate a statute that made the status of being a narcotics addict a criminal offense.¹⁰⁵ The Court concluded, based exclusively on its own independent analysis, that the Eighth Amendment was violated because narcotics addiction "is apparently an illness . . ."¹⁰⁶ Analogizing the statutory prohibition of addiction to that of other illnesses, a six-to-two majority struck down the California statute.¹⁰⁷ "Even one day in prison," the Court noted, "would be a cruel and unusual punishment for the 'crime' of having a common cold."¹⁰⁸ In arriving at its conclusion, the Court made no attempt to determine whether other statutes or ordinances, in California or elsewhere, imposed criminal punishment for the status of being a narcotics addict.¹⁰⁹ Additionally, the Court made no attempt to ascertain whether any objective indicators of social attitudes concerning the acceptability of such a statute existed.¹¹⁰ Although a plurality of the Court had articulated the "evolving standards of decency" test in *Trop v. Dulles* four years earlier,¹¹¹ the *Robinson* Court did not explicitly invoke this standard or seek to ground its decision in any social consensus.¹¹² Rather,

¹⁰³ See *Kennedy*, 128 S. Ct. at 2650; *Roper*, 543 U.S. at 564; *Atkins*, 536 U.S. at 312.

¹⁰⁴ See *Kennedy*, 128 S. Ct. at 2651-64; *Roper*, 543 U.S. at 564-75; *Atkins*, 536 U.S. at 313-

21.

¹⁰⁵ 370 U.S. at 667.

¹⁰⁶ *Id.*

¹⁰⁷ See *id.* at 666, 668.

¹⁰⁸ *Id.* at 667.

¹⁰⁹ See *id.* at 664-67.

¹¹⁰ See *Robinson*, 370 U.S. at 364-67. The majority noted the unlikelihood "that any State at this moment in history would attempt to make it a criminal offense for a person to be mentally ill, or a leper, or to be afflicted with a venereal disease." *Id.* at 666. The Court, however, provided absolutely no objective support for its determination that "in the light of contemporary human knowledge, a law which made a criminal offense of such a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." See *id.* Moreover, the Court gave no objective basis for its assertion that contemporary standards inform its viewpoint of the California statute's unconstitutionality. See *id.* at 664-67.

¹¹¹ See 356 U.S. at 101 (plurality opinion).

¹¹² See *Robinson*, 370 U.S. at 664-67.

assuming that an individual could suffer the "illness" of narcotics addiction even in the absence of much or any personal responsibility for being in that state, the Court independently concluded that penalizing illness alone would violate the Eighth Amendment.¹¹³

In more recent Eighth Amendment cases involving the death penalty, the U.S. Supreme Court has continued to conduct this independent analysis, even as it noted objective indicia of evolving social standards.¹¹⁴ For example, in 1976, in *Woodson v. North Carolina*, the Court invalidated mandatory death penalty statutes.¹¹⁵ Justice Stewart, in a plurality opinion, concluded that the mandatory statute before the Court "depart[ed] markedly from contemporary standards," noting that "jury determinations and legislative enactments . . . both point conclusively to the repudiation of automatic death sentences."¹¹⁶ At the same time, the plurality also independently concluded that the statute violated "the fundamental respect for humanity underlying the Eighth Amendment"¹¹⁷ by failing to take into account "the character and record of the individual offender and the circumstances of the particular offense."¹¹⁸

Similarly, in 1977 when the Court in *Coker v. Georgia* invalidated a statute that made the death penalty available for rape not involving the death of the victim, Justice White's plurality opinion stressed the legislative consensus rejecting the death penalty for rape alone.¹¹⁹ But the plurality also stated that "the legislative rejection of capital punishment for rape *strongly confirms our own judgment*, which is that death is indeed a disproportionate penalty for the crime of raping an adult woman."¹²⁰ In significant language, the plurality opinion noted that the objective indicia of evolving standards of decency reflected in the actions of state legislatures and sentencing juries "do not wholly determine this controversy, for the Constitution contemplates that in the end *our own judgment will be brought to bear* on the question of the acceptability of the death penalty under the Eighth Amendment."¹²¹ Justice Powell, in a concurring and dissenting opinion in *Coker*, objected to the sweeping

¹¹³ See *id.*

¹¹⁴ See, e.g., *Enmund*, 458 U.S. at 789–801; *Coker*, 433 U.S. at 593–97 (plurality opinion); *Woodson*, 428 U.S. at 289–93, 303–04 (Stewart, Powell & Stevens, JJ., announcing the judgment of the Court).

¹¹⁵ See *Woodson*, 428 U.S. at 305–06.

¹¹⁶ *Id.* at 293, 301.

¹¹⁷ *Id.* at 304.

¹¹⁸ *Id.*

¹¹⁹ 433 U.S. at 593–96 (plurality opinion).

¹²⁰ *Id.* at 597 (emphasis added).

¹²¹ *Id.* (emphasis added).

nature of the Court's holding that all death penalties for rape violate the Eighth Amendment.¹²² Nonetheless, Justice Powell agreed with the plurality's method, noting that, "objective indicators are highly relevant, but the ultimate decision as to the appropriateness of the death penalty under the Eighth Amendment . . . must be decided on the basis of our own judgment in light of the precedents of this Court."¹²³

The Court followed this same approach in 1982 in *Enmund v. Florida*, in which the Court held unconstitutional the imposition of the death penalty for felony murder where the defendant does not himself commit the killing, attempt to do so, or intend that it occur.¹²⁴ Once again, the Court examined legislative action¹²⁵ and jury behavior.¹²⁶ It also demonstrated a willingness to examine the actions of prosecutors.¹²⁷ At the same time, the Court conducted its own independent evaluation of the Eighth Amendment issue, noting that "*it is for us ultimately to judge whether the Eighth Amendment permits imposition of the death penalty*" in this situation.¹²⁸ The Court concluded that the death penalty in this context would be excessive and disproportionate to the offender's culpability and deterrability.¹²⁹

These cases suggest that, even though its judgment is guided by evidence concerning social attitudes, the Supreme Court has a significant independent role to play in ascertaining whether a criminal sanction challenged under the Eighth Amendment fails the proportionality test.¹³⁰ Other opinions, however, have placed greater emphasis on legislative indicia of social norms.¹³¹ In its 1989 decisions in *Stanford v. Kentucky* and *Penry v. Lynaugh*, the Court rejected proportionality chal-

¹²² See *id.* at 601 (Powell, J., concurring in part and dissenting in part).

¹²³ *Id.* at 603 n.2 (emphasis added).

¹²⁴ See 458 U.S. at 789-801.

¹²⁵ *Id.* at 792-93 ("[T]he current legislative judgment with respect to imposition of the death penalty where a defendant did not take life, attempt to take it, or intend to take life . . . weighs on the side of rejecting capital punishment for the crime at issue.").

¹²⁶ *Id.* at 795 ("That juries have rejected the death penalty in cases such as this one . . . is also shown by petitioner's survey of the Nation's death-row population.").

¹²⁷ See *id.* at 796. Although doubting the existence of statistics on the percentage of relevant cases in which prosecutors sought the death penalty, the majority opinion nevertheless acknowledged such data's "relevant[ce] if prosecutors rarely sought the death penalty for accomplice felony murder . . ." *Id.* In this case, the Court said, such statistics "would tend to indicate that prosecutors, who represent society's interest in punishing crime, consider the death penalty excessive for accomplice felony murder." *Id.*

¹²⁸ *Id.* at 797 (emphasis added).

¹²⁹ See *Enmund*, 458 U.S. at 801.

¹³⁰ See *id.* at 789-801; *Coker*, 433 U.S. at 593-97 (plurality opinion); *Woodson*, 428 U.S. at 289-93, 303-04 (Stewart, Powell & Stevens, JJ., announcing the judgment of the Court).

¹³¹ See *Stanford*, 492 U.S. at 370-74; *Penry*, 492 U.S. at 330-35.

lenges to the application of death penalty statutes to juvenile offenders over fifteen but under eighteen, and to those with mental retardation, respectively.¹³² In rejecting both Eighth Amendment challenges, the Court noted that a national consensus on the issue was lacking at the time, suggesting perhaps that absent objective evidence of such a consensus an Eighth Amendment proportionality challenge could not be sustained.¹³³ Yet in neither case did a majority of the Court agree that the inquiry stops at evidence of national social norms.¹³⁴

In the *Stanford* plurality opinion, Justice Scalia, on behalf of himself, Chief Justice Rehnquist, and Justices White and Kennedy, "emphatically" rejected the suggestion that the Court should independently judge the "desirability of permitting the death penalty for crimes by 16- and 17-year-olds."¹³⁵ The plurality explained that it "is not this Court but the citizenry of the United States," speaking through its legislatures, "who must be persuaded" that sentencing seventeen-year-olds to death is cruel and unusual.¹³⁶ In the plurality's view, the Court was powerless "to substitute [its] belief . . . for . . . society's."¹³⁷

¹³² See *Stanford*, 492 U.S. at 380; *Penry*, 492 U.S. at 340 (opinion of O'Connor, J.).

¹³³ In *Stanford*, for example, the Court stated, "First among the objective indicia that reflect the public attitude toward a given sanction are statutes passed by society's elected representatives." 492 U.S. at 370 (internal quotations omitted). The *Stanford* Court noted that, at the time, twenty-five of the thirty-seven death penalty states permitted capital punishment for seventeen-year-olds, and twenty-two of these also permitted it for sixteen-year-olds. *Id.* The Court concluded those numbers did "not establish the degree of national consensus" sufficient to support an Eighth Amendment challenge. *Id.* at 371. Further, a plurality of the Court refused to consider opinion poll data or the position statements of interest groups and professional organizations, declining to "rest constitutional law upon such uncertain foundations." *Id.* at 377 (plurality opinion).

Similarly, the *Penry* majority declared that there was "insufficient evidence of a national consensus against executing mentally retarded people convicted of capital offenses for us to conclude that it is categorically prohibited by the Eighth Amendment." 492 U.S. at 335. The Court found "evidence of the general behavior of juries with respect to sentencing mentally retarded defendants" to be lacking, as was information on the "decisions of prosecutors" in this regard. *Id.* at 334. Additionally the Court noted that, at the time, only two states (Georgia and Maryland) and the federal government barred executions of defendants with mental retardation. *Id.* In making its determination, the *Penry* Court refused to consider opinion poll data showing "strong public opposition" to executing mentally retarded persons as objective evidence of a national consensus independent of state legislative action. *Id.* at 334-35. Musing that "public sentiment expressed in these . . . polls may ultimately find expression in legislation," the *Penry* majority held firm in its declaration that legislation, and not polling, is the "objective indicator of contemporary values upon which we can rely." *Id.* at 335.

¹³⁴ See *Stanford*, 492 U.S. at 378 (plurality opinion); *Penry*, 492 U.S. at 351 (Scalia, J., concurring in part and dissenting in part).

¹³⁵ See 492 U.S. at 378 (plurality opinion).

¹³⁶ See *id.*

¹³⁷ See *id.*

Although Justice O'Connor concurred with the *Stanford* plurality's rejection of the Eighth Amendment challenge,¹³⁸ she criticized the plurality's refusal "to judge whether the 'nexus between the punishment imposed and the defendant's blameworthiness' is proportional."¹³⁹ Significantly, though she agreed with the plurality on the merits of its Eighth Amendment holding, Justice O'Connor pointedly disagreed with its attempt to reshape the method of interpretation for the Eighth Amendment, noting that beyond assessing the actions of legislatures and juries, the Court has a "constitutional obligation to conduct proportionality analysis" to judge for itself whether capital punishment is a proportionate response to the defendant's "blameworthiness."¹⁴⁰ Justice O'Connor was unable to conclude, however, that such punishment was categorically disproportionate in this context.¹⁴¹

The Court in *Penry* likewise refused to hold that executing those with mental retardation violates the Eighth Amendment.¹⁴² As had occurred in *Stanford*, the Court in *Penry* concluded that because a majority of states then permitted capital punishment for those with mental retardation, a national consensus rejecting the death penalty for this category of offenders was lacking.¹⁴³ But only four justices voted to end the inquiry there.¹⁴⁴ Justice O'Connor, writing for herself, agreed that a social consensus was lacking, but reiterated her view that the Court has a responsibility to make its own proportionality determination.¹⁴⁵ She joined with the plurality to uphold the death penalty, but only after independently concluding that the death penalty in this context was not always disproportionate.¹⁴⁶ Justice Brennan, joined by Justice Marshall, and Justice Stevens, joined by Justice Blackmun, disagreed with the latter conclusion, but stood behind Justice O'Connor's view that the

¹³⁸ See *id.* at 382 (O'Connor, J., concurring). Justice O'Connor disagreed with the dissent's assertion that the two death penalty states that, at the time *Stanford* was decided, disallowed the sentencing of juveniles to capital punishment, plus the fourteen that had rejected the death penalty altogether, could constitute sufficient evidence of a national consensus. *Id.* at 381. Justice O'Connor further disagreed with the dissent's willingness to accept the independent argument that the juvenile death penalty was constitutionally disproportionate to the blameworthiness of juveniles. *Id.* at 382.

¹³⁹ *Id.* at 382 (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 853 (1988) (O'Connor, J., concurring)).

¹⁴⁰ See *Stanford*, 492 U.S. at 382 (O'Connor, J., concurring).

¹⁴¹ See *id.*

¹⁴² See 492 U.S. at 340.

¹⁴³ See *id.* at 330-35.

¹⁴⁴ See *id.* at 351 (Scalia, J., concurring in part and dissenting in part).

¹⁴⁵ See *id.* at 335 (opinion of O'Connor, J.).

¹⁴⁶ See *id.* at 335-40.

Court has a responsibility to conduct its own proportionality analysis.¹⁴⁷ Thus in both *Stanford* and *Penry*, five justices shared this view on the Court's duty to independently analyze the proportionality question.¹⁴⁸

In 2002, in *Atkins v. Virginia*, the Court overruled the result in *Penry* and held that the Eighth Amendment bars the imposition of the death penalty on those with mental retardation.¹⁴⁹ The Court noted that since *Penry*, the total number of states rejecting capital punishment for those with mental retardation had risen from two to eighteen,¹⁵⁰ which led the Court to conclude that the number and the "consistency of the direction of change" provided sufficient evidence of a national consensus.¹⁵¹ This consensus confirmed the Court's independent determination that offenders suffering from mental retardation are "categorically less culpable" and deterrable than typical murderers and that capital punishment therefore would constitute a disproportionate penalty in this context.¹⁵²

Justice Stevens's majority opinion in *Atkins* rejected the *Stanford* plurality's suggestion that a national consensus reflected in legislation and jury behavior is the sole basis for the Court to invalidate a capital punishment statute on Eighth Amendment proportionality grounds.¹⁵³ Writing for a six-justice majority, Justice Stevens agreed that a proportionality review should be informed by "objective factors to the maximum possible extent."¹⁵⁴ But, Justice Stevens wrote, the Court "rel[ies] in part on such legislative evidence."¹⁵⁵ According to the *Atkins* majority, "objective evidence, though of great importance, [does] not 'wholly determine' the controversy, 'for the Constitution contemplates that in the end [the Court's] own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.'"¹⁵⁶ This approach requires that the Court "first review the judg-

¹⁴⁷ See *Penry*, 492 U.S. at 343–44 (Brennan, J., concurring in part and dissenting in part); *id.* at 350 (Stevens, J., concurring in part and dissenting in part).

¹⁴⁸ See *supra* notes 134–147 and accompanying text.

¹⁴⁹ See *Atkins*, 536 U.S. at 321.

¹⁵⁰ See *id.* at 314–15. Prior to the *Penry* decision, the U.S. Congress in 1988 also outlawed the death penalty for defendants with mental retardation who were found guilty of capital murder. See Anti-Drug Abuse Act of 1988 ("ADAA"), 21 U.S.C. § 848(1) (2000) (repealed 2006). This proviso, which also prohibited sentencing to death those who commit a capital offense as juveniles, remained in every revision or expansion of the ADAA from 1988 until the provision was repealed in 2006 after *Roper* and *Atkins* were handed down. See *id.*

¹⁵¹ See *Atkins*, 536 U.S. at 315.

¹⁵² *Id.* at 316, 318–20.

¹⁵³ See *id.* at 312–13.

¹⁵⁴ *Id.* at 312.

¹⁵⁵ See *id.* (emphasis added).

¹⁵⁶ See *Atkins*, 536 U.S. at 312 (quoting *Coker*, 433 U.S. at 597 (plurality opinion)).

ment of legislatures that have addressed the suitability of imposing the death penalty" on the category of offenders in question, "and then consider reasons for agreeing or disagreeing with their judgment."¹⁵⁷ Under this view, even if the predominant legislative judgment is to allow the death penalty for a particular offense or class of offenders, the Court, after conducting an independent proportionality review, could in theory disagree with the legislative judgment and invalidate it under the Eighth Amendment.¹⁵⁸

The Court's statements concerning its independent role may, of course, be considered dicta, as the Court in *Atkins* found that the legislative trend in the thirteen years following *Penry* constituted sufficient evidence that a national consensus had rejected the death penalty for those with mental retardation.¹⁵⁹ Although the Court's independent analysis concluded that death is a disproportionate penalty for those with mental retardation, it is unclear whether it would have reached the same result in the absence of what it considered to be an emerging legislative consensus. Two dissenting opinions in *Atkins* help answer that question.¹⁶⁰ Both dissents, each joined by the same three justices, questioned the majority's conclusion that there was a national consensus by pointing out that only eighteen states, constituting 47 percent of the thirty-eight states that permit capital punishment, had statutorily barred execution for those with mental retardation.¹⁶¹ This led Justice Scalia, author of one of the dissents, to label the majority's independent proportionality analysis as "the genuinely operative portion of the opinion."¹⁶² This analysis strongly suggests that the *Atkins* majority's statements about the Court's independent role in proportionality review under the Eighth Amendment are not dicta, but were in fact central to the Court's holding.¹⁶³

The Court's decision in *Roper*, the juvenile death penalty case, provides further support for the proposition that an independent proportionality analysis by the Court can justify invalidation of a capital punishment statute under the Eighth Amendment, even in the absence of a

¹⁵⁷ See *id.* at 313.

¹⁵⁸ See *id.* at 312-13.

¹⁵⁹ See *id.* at 313-17, 321.

¹⁶⁰ See *id.* at 321-22 (Rehnquist, C.J., dissenting); *id.* at 342 (Scalia, J., dissenting).

¹⁶¹ See *Atkins*, 536 U.S. at 321-22 (Rehnquist, C.J., dissenting); *id.* at 342 (Scalia, J., dissenting). These dissenting justices joined one another's dissents, and Justice Thomas joined both. See *id.* at 321 (Rehnquist, C.J., dissenting); *id.* at 337 (Scalia, J., dissenting).

¹⁶² See *id.* at 349 (Scalia, J., dissenting).

¹⁶³ See *id.*; see also Slobogin, *supra* note 47, at 294-96.

national consensus exemplified by legislative action.¹⁶⁴ The *Roper* Court described its prior opinion in *Atkins* as having “neither repeated nor relied upon the statement in *Stanford* that the Court’s independent judgment has no bearing on the acceptability of a particular punishment under the Eighth Amendment.”¹⁶⁵ “Instead,” the Court continued, in *Atkins* “we returned to the rule, established in decisions predating *Stanford*, 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.”¹⁶⁶

Roper went on to overrule *Stanford*, holding the juvenile death penalty unconstitutional under the Eighth Amendment.¹⁶⁷ The “beginning point” of *Roper*’s analysis was its “review of objective indicia of consensus, as expressed in particular by the enactments of legislatures that have addressed the question.”¹⁶⁸ It viewed the “evidence of a national consensus against the death penalty for juveniles” as “similar, and in some respects parallel,” to the evidence *Atkins* had relied on in invalidating the death penalty for those with mental retardation.¹⁶⁹ Just as the Court in *Atkins* determined that sentencing persons with mental retardation to death had become “truly unusual”¹⁷⁰ since *Penry* had been decided thirteen years earlier, the *Roper* Court saw from the objective data that, since the decision in *Stanford* upholding the juvenile death penalty had been handed down sixteen years earlier, “even in the 20 States without a formal prohibition on executing juveniles, the practice [was] infrequent.”¹⁷¹ This led the *Roper* Court to conclude that the “objective indicia of consensus” provided “sufficient evidence” that society had come to “view[] juveniles . . . as ‘categorically less culpable than the average criminal.’”¹⁷²

The *Roper* Court then proceeded to “determine, in the exercise of [its] own independent judgment, whether the death penalty is a disproportionate punishment for juveniles.”¹⁷³ In so doing, the Court repudiated the *Stanford* plurality’s dismissal “of the idea that [the] Court

¹⁶⁴ See 543 U.S. at 563–64, 568–75.

¹⁶⁵ See *id.* at 563.

¹⁶⁶ *Id.* (quoting *Atkins*, 536 U.S. at 312).

¹⁶⁷ See *id.* at 578.

¹⁶⁸ *Id.* at 564.

¹⁶⁹ See *Roper*, 543 U.S. at 564; see also *supra* note 59.

¹⁷⁰ See *Atkins*, 536 U.S. at 316.

¹⁷¹ See *Roper*, 543 U.S. at 564–65 (“Since *Stanford* six States have executed prisoners for crimes committed as juveniles. In the past 10 years, only three have done so . . .”).

¹⁷² See *id.* at 567 (quoting *Atkins*, 536 U.S. at 316).

¹⁷³ See *id.* at 564.

is required to bring its independent judgment to bear on the proportionality of the death penalty for a particular class of crimes or offenders."¹⁷⁴ The *Stanford* plurality's "rejection" was, the Court stated, "inconsistent with prior Eighth Amendment decisions" and "with the premises of . . . *Atkins*."¹⁷⁵ *Stanford* was therefore overruled based on the intervening changes in the objective indicia of consensus on the issue, as well as on the Court's independent conclusion that capital punishment constituted a disproportionate penalty for juvenile offenders.¹⁷⁶

Justice O'Connor dissented in *Roper*, finding no genuine national consensus on the juvenile death penalty issue and disagreeing with the conclusions of the majority's "moral proportionality analysis," the ground that she concluded was the ultimate basis for the Court's decision.¹⁷⁷ Although disagreeing with the majority's conclusions, she explicitly agreed with its method of interpretation of the Eighth Amendment— independently determining whether "the magnitude of the punishment imposed [is] related to the degree of the harm inflicted on the victim, as well as to the degree of the defendant's blameworthiness."¹⁷⁸ Justice O'Connor also used her dissent in *Roper* to illuminate her view of *Atkins* and explain why, in that case, she had joined the six-member majority.¹⁷⁹ In her *Roper* dissent she noted that the "objective evidence of a national consensus" in *Atkins* was "weaker" than it was in prior Eighth Amendment cases, and "standing alone, was insufficient to dictate the Court's holding" in that case.¹⁸⁰ "Rather," she continued, "the compelling moral proportionality argument against capital punishment of mentally retarded offenders played a *decisive* role in persuading the Court"—and Justice O'Connor—"that the practice was inconsistent with the Eighth Amendment."¹⁸¹ Thus, for Justice O'Connor, the Court may, and indeed is constitutionally required to, invoke the Eighth Amendment to invalidate death penalty legislation—even in the absence of objective evidence that a national consensus condemns it in the

¹⁷⁴ See *id.* at 574.

¹⁷⁵ See *id.* at 574–75.

¹⁷⁶ See *Roper*, 543 U.S. at 564–75.

¹⁷⁷ See *id.* at 588 (O'Connor, J., dissenting).

¹⁷⁸ See *id.* at 590 (internal quotations omitted); see also *Enmund*, 458 U.S. at 823 (O'Connor, J., dissenting) ("[T]he Eighth Amendment concept of proportionality involves more than merely a measurement of contemporary standards of decency. It requires in addition that the penalty imposed in a capital case be proportional to the harm caused and the defendant's blameworthiness.").

¹⁷⁹ See *Roper*, 543 U.S. at 597–98 (O'Connor, J., dissenting).

¹⁸⁰ See *id.*

¹⁸¹ *Id.* at 598.

particular context—if its own independent proportionality review leads it to conclude that there is an insufficient nexus between capital punishment and the blameworthiness of the particular offender or category of offenders.¹⁸² In Justice O'Connor's view that the Court must analyze whether such punishment is "consistent with contemporary standards of decency."¹⁸³ In doing so, Justice O'Connor stated, the Court is "*obligated* to weigh both the objective evidence of social values and [its] own judgment as to whether death is an excessive sanction in the context at hand."¹⁸⁴ Although the Court must "weigh" any existing objective evidence of consensus, the lack of such evidence is not "decisive" when the Court independently determines that there is a "compelling proportionality argument against capital punishment" in the context in question.¹⁸⁵

Six of the Justices in *Roper*—the five in the majority and Justice O'Connor in dissent—therefore arguably shared this view of the Court's independent constitutional role in conducting a proportionality review under the Eighth Amendment.¹⁸⁶ Although Justice O'Connor is no longer on the Court, having been replaced by the more conservative Justice Alito, five of these six justices remain. The above analysis suggests that a future Court could extend this approach to the context of those with severe mental illness.¹⁸⁷ To the extent that a future Court were to find that such illness, like mental retardation and juvenile status, diminishes an offender's culpability and deterrability such that there is an insufficient nexus between capital punishment and his or her blameworthiness, it could invoke the Eighth Amendment to exclude capital punishment as a constitutionally acceptable sanction.¹⁸⁸

This conclusion finds further support in the Court's 2008 decision in *Kennedy v. Louisiana*, which barred application of the death penalty for the rape of a child not involving death.¹⁸⁹ As only six states authorized capital punishment for this crime, the Court discerned a national consensus rejecting capital punishment in this context.¹⁹⁰ Yet the Court

¹⁸² See *id.* at 597–98.

¹⁸³ See *id.* at 605.

¹⁸⁴ See *Roper*, 543 U.S. at 605 (O'Connor, J., dissenting) (emphasis added).

¹⁸⁵ *Id.* at 605–06.

¹⁸⁶ See *id.* at 564 (majority opinion); *id.* at 590 (O'Connor, J., dissenting).

¹⁸⁷ See *supra* notes 97–186 and accompanying text.

¹⁸⁸ See *supra* notes 97–186 and accompanying text.

¹⁸⁹ See 128 S. Ct. at 2650, 2658–64.

¹⁹⁰ See *id.* at 2652–53 (stating that "44 states have not made child rape a capital offense"). The *Kennedy* majority opinion acknowledges some ambiguity as to whether Geor-

made clear that "[c]onsensus is not dispositive."¹⁹¹ Whether the death penalty is a disproportionate punishment "depends as well upon the standards elaborated by controlling precedents and the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose."¹⁹² Thus in holding that the death penalty could not apply to the offense of child rape not involving the death of the victim, the *Kennedy* Court relied "both on consensus and [its] own independent judgment."¹⁹³ *Kennedy* was a five-to-four decision, but the five justices in the majority embraced the principle that "[i]t is for [the Court] ultimately to judge whether the Eighth Amendment permits imposition of the death penalty" in particular circumstances.¹⁹⁴

Kennedy offered several considerations to guide an independent proportionality analysis.¹⁹⁵ A penalty is excessive, the Court noted, "when it is grossly out of proportion to the crime or it does not fulfill the two distinct social purposes served by the death penalty: retribution and deterrence of capital crimes."¹⁹⁶ Although the Court conceded that the death penalty for child rape could serve some retributive or deterrent function,¹⁹⁷ it nonetheless did not serve these ends sufficiently to avoid the conclusion that it was disproportionate in the circumstances.¹⁹⁸ Neither retribution nor deterrence, the Court concluded, would justify the harshness of applying the death penalty in this circumstance.¹⁹⁹ Indeed, the majority went further than the context of

gia and Florida should be counted among the states allowing capital punishment for the crime of child rape. *See id.* at 2652.

¹⁹¹ *Id.* at 2650.

¹⁹² *Id.* (citing *Enmund*, 458 U.S. at 788; *Gregg*, 428 U.S. at 182-83 (Stewart, Powell & Stevens, JJ., announcing the judgment of the Court); *Coker*, 433 U.S. at 597-600 (plurality opinion)).

¹⁹³ *See id.* at 2650-51. The Court reiterated 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." *See id.* at 2658 (quoting *Coker*, 433 U.S. at 597 (plurality opinion)).

¹⁹⁴ *See Kennedy*, 128 S. Ct. at 2658 (quoting *Enmund*, 458 U.S. at 797).

¹⁹⁵ *See id.* at 2661.

¹⁹⁶ *See id.* (citing *Gregg*, 428 U.S. at 173, 183, 187 (Stewart, Powell & Stevens, JJ., announcing the judgment of the Court)).

¹⁹⁷ *See id.* The *Kennedy* majority also acknowledged "moral grounds to question a rule barring capital punishment" for the crime of child rape, citing "the victim's fright, the sense of betrayal, and the nature of her injuries" that "caused more prolonged physical and mental suffering than, say, a sudden killing by an unseen assassin." *Id.* at 2658.

¹⁹⁸ *See id.* at 2658 ("It does not follow, though, that capital punishment is a proportionate penalty for the crime.").

¹⁹⁹ *See Kennedy*, 128 S. Ct. at 2662 ("The incongruity between the crime of child rape and the harshness of the death penalty poses risks of overpunishment The goal of retribution . . . does not justify the harshness of the death penalty here.").

child rape to state broadly that the death penalty should be reserved "at this stage of evolving standards and in cases of crimes against individuals, for crimes that take the life of the victim."²⁰⁰ The *Kennedy* majority thus fashioned a new per se rule of proportionality, one derived from its own independent assessment of the history and purposes of the Eighth Amendment.²⁰¹

The four dissenters in *Kennedy* disagreed with this view of the Court's role under the Eighth Amendment.²⁰² They conceded, however, that in the view of the majority, the Court's independent judgment is dispositive, even in the absence of objective indicia of evolving standards of decency.²⁰³ Justice Alito, dissenting on behalf of himself, Chief Justice Roberts, and Justices Scalia and Thomas, lamented that the majority was "willing to block the potential emergence of a national consensus in favor of permitting the death penalty for child rape because, *in the end, what matters is the Court's own judgment regarding the acceptability of the death penalty*."²⁰⁴ Justice Scalia also recognized that the dispositive element in the Court's decision was its own independent judgment.²⁰⁵

A majority of the Court in *Kennedy*, *Roper*, and *Atkins* thus has embraced an independent conception of proportionality that the Court could apply in the context of severe mental illness to conclude, even in the absence of objective legislative, jury, judicial, or prosecutorial indicia of a social consensus, that the death penalty is inappropriate for this population.²⁰⁶ These three cases advance the view that the Court must independently determine whether the death penalty for a particular class of cases satisfies the Eighth Amendment's proportionality requirement.²⁰⁷ They collectively reject the *Stanford* plurality's contrary suggestion that a legislative consensus or similar objective evidence of a trend in this direction is necessary for the Court to invalidate a death

²⁰⁰ See *id.* at 2665.

²⁰¹ See *id.*

²⁰² See *id.* at 2673 (Alito, J., dissenting).

²⁰³ See *id.*

²⁰⁴ See *Kennedy*, 128 S. Ct. at 2673 (Alito, J., dissenting) (emphasis added) (internal quotations omitted).

²⁰⁵ See *Kennedy v. Louisiana*, 129 S. Ct. 1, 2 (2008) (denial of rehearing) (statement of Scalia, J., joined by Roberts, C.J.) (voting against reconsideration because "the views of the American people on the death penalty for child rape were, to tell the truth, irrelevant to the majority's decision in this case" and "there is no reason to believe that absence of a national consensus would provoke second thoughts").

²⁰⁶ See *supra* notes 79, 149–205 and accompanying text.

²⁰⁷ See *supra* notes 79, 149–205 and accompanying text.

sentence as disproportionate.²⁰⁸ In this respect, these three decisions breathe new life into the proportionality requirement.²⁰⁹

II. PROBING THE ANALOGY BETWEEN SEVERE MENTAL ILLNESS AND MENTAL RETARDATION AND JUVENILE STATUS

The U.S. Supreme Court's evolving death penalty jurisprudence would allow the Court to determine independently that the death penalty, for at least some cases of severe mental illness, would be a disproportionate punishment, and hence cruel and unusual, even in the absence of objective evidence of a changed social norm.²¹⁰ Even if the Court's recent proportionality jurisprudence would allow it to reach this conclusion, the question remains whether it should do so. Does severe mental illness impact the offender's blameworthiness and deterrability sufficiently to compel the Court to bar capital punishment, as it has with mental retardation and juvenile status? In some cases the answer is "yes," but such a conclusion must be reached on a case-by-case basis.²¹¹

Mental illness is similar to mental retardation and juvenile status because it may diminish both individual culpability and deterrability. Defendants may suffer from severe mental illness, yet still be able to appreciate the wrongfulness of their conduct, thereby failing to satisfy the standard for the legal insanity defense.²¹² Yet when severe mental illness impairs judgment, rationality, and the ability to foresee consequences and control behavior, similar to mental retardation and juvenile status, it is similarly less justifiable to impose the death penalty as retribution for past crimes or as a deterrent to future ones.²¹³ To the extent that mental illness produces effects that reduce volitional control and blameworthiness to the same degree as mental retardation and juvenile status, the imposition of the death penalty is insufficiently related to the purposes of capital punishment to allow its application consistent with the Eighth Amendment.²¹⁴

Yet, even though the Supreme Court has recently imposed categorical exclusions from capital punishment for certain categories of offenders or offenses, because they lack the culpability and deterrability

²⁰⁸ See *supra* notes 79, 149–205 and accompanying text.

²⁰⁹ See *supra* notes 79, 149–205 and accompanying text.

²¹⁰ See *supra* notes 97–209 and accompanying text.

²¹¹ See *infra* notes 244–271 and accompanying text.

²¹² See Task Force Report, *supra* note 37, at 672.

²¹³ See *Roper v. Simmons*, 543 U.S. 551, 575–78 (2005); *Atkins v. Virginia*, 536 U.S. 304, 317–21 (2002).

²¹⁴ See *Roper*, 543 U.S. at 568–75; *Atkins*, 536 U.S. at 317–21.

necessary for the imposition of capital punishment,²¹⁵ mental illness—even severe mental illness—cannot support such a categorical exclusion. Some offenders would, however, meet this standard, and for those who do, the Eighth Amendment should likewise prevent their execution.²¹⁶ To the extent that severe mental illness imposes effects on judgment and functioning parallel to those caused by mental retardation and juvenile status, the death penalty similarly lacks a sufficient connection with the purposes of capital punishment—retribution and deterrence—to justify its imposition consistent with the Eighth Amendment.²¹⁷

A. *The Absence of Strong Objective Evidence of Evolving Social Consensus*

Objective indicia of a social consensus rejecting execution for those with severe mental illness have not yet emerged.²¹⁸ At this time only Connecticut statutorily provides a process for exempting offenders suffering from severe mental illness from the death penalty.²¹⁹ In assessing whether legislative action reflects a national consensus rejecting the death penalty for a particular offense or class of offenders, the U.S. Supreme Court in both *Roper v. Simmons*, decided in 2005, and *Atkins v. Virginia*, decided in 2002, considered the total number of states explicitly exempting capital punishment for the category in question plus those states that had abolished the death penalty altogether.²²⁰ But adding Connecticut to these states would total only seventeen jurisdictions (sixteen states plus the District of Columbia), compared to the thirty-five, including the federal government, that authorize the death penalty without exempting those with mental illness.²²¹ Death penalty states allow capital juries to consider mental illness as a mitigating factor in weighing whether a death sentence should be imposed in a particular case;²²² the federal government does as well.²²³ This provides some evi-

²¹⁵ See *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2658–64 (2008), *modified*, 129 S. Ct. 1 (2008) (mem.); *Roper*, 543 U.S. at 568–75; *Atkins*, 536 U.S. at 317–21.

²¹⁶ See *infra* notes 244–271 and accompanying text.

²¹⁷ See *infra* notes 244–271 and accompanying text.

²¹⁸ See SLATE & JOHNSON, *supra* note 47, at 342; Slobogin, *supra* note 47, at 297.

²¹⁹ See CONN. GEN. STAT. ANN. § 53a-46a(h) (3) (West 2007); see also *supra* note 88.

²²⁰ See *Roper*, 543 U.S. at 564; *Atkins*, 536 U.S. at 313–15.

²²¹ The jurisdictions that currently prohibit imposition of the death penalty are Alaska, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, New York, North Dakota, Rhode Island, Vermont, West Virginia, Wisconsin, and the District of Columbia. DEATH PENALTY INFO. CTR., FACTS ABOUT THE DEATH PENALTY 1 (2009), available at <http://www.deathpenaltyinfo.org/FactSheet.pdf>.

²²² See Slobogin, *supra* note 46, ¶ 2; Berkman, *supra* note 87, at 296–98.

²²³ See 18 U.S.C. § 3592(a) (6) (2006) (“In determining whether a sentence of death is to be imposed on a defendant, the finder of fact shall consider any mitigating factor, in-

dence that legislatures may intend to preclude capital punishment when mental illness is severe, but such evidence is ambiguous inasmuch as juries are instructed to weigh mitigating circumstances against aggravating circumstances with little or no guidance as to how that weighing should occur.²²⁴ Statutes specifying mental illness as a mitigating factor thus may provide some objective evidence that legislatures intend to preclude the death penalty for the most serious cases of mental illness, but that evidence is equivocal and fairly weak. Moreover, unlike in *Atkins* and *Roper*, there is no legislative trend in the direction of exempting those with severe mental illness from the death penalty.²²⁵

Furthermore, no clear record of jury behavior exists that supports the inference that capital juries have rejected the death penalty for those with mental illness. In fact, anecdotal evidence suggests that many defendants on death row suffer from serious mental illness or neurological impairment.²²⁶ When mental illness is raised as a mitigating factor at the penalty phase, it sometimes proves to be a double-edged sword, leading capital juries to assume that the offender is dangerous and that the death penalty is an appropriate means of community protection.²²⁷ Capital juries undoubtedly sentence people with

cluding [whether] . . . [t]he defendant committed the offense under severe mental or emotional disturbance.").

²²⁴ See BOWERS et al., *supra* note 90, at 436–49.

²²⁵ See SLATE & JOHNSON, *supra* note 47, at 342; Slobogin, *supra* note 47, at 297.

²²⁶ See AMNESTY INT'L, *supra* note 46, at 170; Bonnie, *supra* note 46, at 1192; Jubilut, *supra* note 46, at 367; Slobogin, *supra* note 46, ¶ 2; Am. Civil Liberties Union, *supra* note 46.

²²⁷ See GARY B. MELTON ET AL., *PSYCHOLOGICAL EVALUATIONS FOR THE COURTS: A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS AND LAWYERS* 289 (3d ed. 2007).

[I]n many cases an offender's mental illness, although presumptively mitigating, might also be directly connected with an aggravating circumstance. For instance, an offender's risk for violence might be the result of mental illness. Similarly, the "heinousness" of the murder might in some way be related to mental disorder. . . . [There is] voluminous research indicating that jurors often perceive evidence of mental illness as an aggravating circumstance (usually because they believe it correlates with dangerousness), rather than as a mitigating circumstance.

Id.; see also SLATE & JOHNSON, *supra* note 47, at 339 ("[E]vidence has emerged suggesting that mental illness may in fact be construed as an aggravating factor by juries considering the death penalty. In other words, the presence of a serious mental illness may increase the chance that the death penalty will be imposed."); Jubilut, *supra* note 46, at 377 ("Juries pose additional problems . . . First, as much as 75 percent of the public view people with mental illness as violent. . . . There is still pervasive stigma and fear of people who suffer from mental illness due to lack of knowledge about various disorders; this stigma and fear may influence jurors to believe that the behavior of the defendant will lead to future violent behavior."); Michael L. Perlman, *The Sanest Lies of Jurors in Death Penalty Cases: The Puz-*

mental illness to death,²²⁸ but there is little or no data on how frequently this occurs and none that examines mental illness in such cases in terms of the degree of its severity or functional impairment. Prosecutorial action in charging capital offenses also could provide objective indicia of social attitudes, but there appear to be no studies examining how prosecutors view severe mental illness in the exercise of their capital charging discretion. Offenders who are severely mentally ill may succeed in making an insanity defense, of course, and in cases in which the evidence of legal insanity is strong, prosecutors sometimes entertain guilty pleas that avoid the death penalty or may not charge capital murder. There is no data, however, on prosecutorial behavior in this regard. Similarly, capital sentencing by judges in the small number of states in which the judge participates in the death penalty determination²²⁹ might provide evidence of social norms in this area, but once again, studies have not examined how trial judges have made capital sentencing decisions in cases involving mentally ill offenders. The question of whether *Atkins* and *Roper* should be extended to those with severe mental illness may prompt social scientists to conduct future research concerning jury, prosecutorial, and judicial behavior in this area, but such research is lacking at the present time.

The Court in *Atkins* also noted the recommendations and position statements of relevant professional associations in support of its assessment of evolving social norms on the propriety of imposing capital punishment for those with mental retardation.²³⁰ Recent statements by the

zling Role of Mitigating Mental Disability Evidence, 8 NOTRE DAME J.L. ETHICS & PUB. POL'Y 239, 274 (1994) (noting that "mental illness—rather than serving as a mitigating factor—can be seen as an aggravating factor"); Slobogin, *supra* note 46, ¶ 39 ("[M]any death sentences imposed on people with mental illness violate due process because their mental illness is treated by the factfinder as an aggravating factor, either directly or to bolster a separate aggravating circumstance."); Slobogin, *supra* note 47, at 305 ("Apparently, sentencing juries and judges focus more on the perceived dangerousness of such individuals than on their diminished culpability and deterrability."); *id.* at 313 (noting that most people view those with mental illness "to be abnormally dangerous"); Scott E. Sundby, *The Jury as Critic: An Empirical Look at How Capital Juries Perceive Expert and Lay Testimony*, 83 VA. L. REV. 1109, 1165–70 (1997); Berkman, *supra* note 87, at 299–300 (discussing examples of how "mental illness can contribute to the finding of aggravating circumstances").

²²⁸ See Am. Civil Liberties Union, *supra* note 46 ("Over 60 people diagnosed as mentally ill or with mental retardation have been executed in the United States since 1983.").

²²⁹ See Bowers et al., *supra* note 90, at 413 n.1.

²³⁰ See 536 U.S. at 316 n.21. Public opinion polls provide additional evidence of evolving social attitudes on the death penalty. A 2002 Gallup Poll of public attitudes concerning the death penalty showed that 75 percent of those sampled opposed the death penalty for those with mental illness. Gallup, *Death Penalty*, <http://www.gallup.com/poll/1606/Death-Penalty.aspx> (last visited Mar. 17, 2009).

ABA, APsyA, APA, NAMI, and MHA recommend that the states bar execution for those with serious mental illness, reflecting the beginning of an emerging consensus in this area.²³¹ These five professional organizations recommend exempting offenders from the death penalty if at the time of the offense, their mental illness "significantly impaired their capacity (a) to appreciate the nature, consequences or wrongfulness of their conduct, (b) to exercise rational judgment in relation to [the] conduct, or (c) to conform their conduct to the requirements of the law."²³² This joint recommendation of these five important professional associations whose expertise bears most closely on the issue certainly provides some evidence of evolving social norms on this question.²³³

Moreover, both *Roper* and *Atkins* considered, as further evidence of contemporary standards, the general consensus in the law of other countries and of international human rights that rejected imposing capital punishment for juveniles and those with mental retardation.²³⁴ The Court has also looked to such international practices in prior cases involving the death penalty for juveniles under the age of sixteen,²³⁵ felony murder,²³⁶ and rape not involving the death of the victim.²³⁷ In the context of mental illness, most countries have either abolished the death penalty or rarely impose it.²³⁸ "More than two-thirds of the countries in the world have now abolished the death penalty in law or practice."²³⁹ In particular, ninety-three countries have abolished the death penalty for all crimes, nine have abolished it for ordinary crimes only, and an additional thirty-six have abolished it in practice.²⁴⁰ A minority of fifty-nine countries retain capital punishment for at least some offenses.²⁴¹ In addition, international human rights norms condemn the death penalty for

²³¹ See Task Force Report, *supra* note 37, at 668; see also *supra* note 37.

²³² Task Force Report, *supra* note 37, at 668, 670-73. The test endorsed by the professional organizations resembles the one applied in several state statutes defining a guilty but mentally ill verdict. See, e.g., 18 PA. CONS. STAT. ANN. § 314 (West 1998).

²³³ See Task Force Report, *supra* note 37, at 668, 670-73.

²³⁴ See *Roper*, 543 U.S. at 575-78; *Atkins*, 536 U.S. at 316 n.21.

²³⁵ See *Thompson v. Oklahoma*, 487 U.S. 815, 830-31 (1988) (plurality opinion).

²³⁶ See *Enmund v. Florida*, 458 U.S. 782, 796 n.22 (1982).

²³⁷ See *Coker v. Georgia*, 433 U.S. 584, 596 n.10 (1977) (plurality opinion).

²³⁸ Amnesty Int'l, Abolitionist and Retentionist Countries, <http://www.amnesty.org/en/death-penalty/abolitionist-and-retentionist-countries> (last visited Mar. 17, 2009).

²³⁹ *Id.*

²⁴⁰ *Id.* Amnesty International USA defines "ordinary crimes" as the opposite of "exceptional crimes such as crimes under military law or crimes committed in exceptional circumstances." See *id.*

²⁴¹ *Id.*

defendants with severe mental illness.²⁴² The U.N. Commission on Human Rights, for example, has adopted a resolution urging all countries that still maintain capital punishment "[n]ot to impose the death penalty on a person suffering from any form of mental disorder."²⁴³

B. *The Court Should Exercise Its Independent Judgment*

Although imposing the death penalty for those with severe mental illness has not become "truly unusual" in the United States, nor has our society rejected the imposition of capital punishment for those within this class of offenders, the above developments suggest the beginning of movement in this direction.²⁴⁴ Irrespective of these developments, however, the Supreme Court's Eighth Amendment jurisprudence would allow it to invoke the cruel and unusual punishment clause to exempt those with severe mental illness from the death penalty, even in the absence of more developed objective indicia of contemporary values.²⁴⁵ It could do so under the language in *Roper*, *Atkins*, and its 2008 decision in *Kennedy v. Louisiana*—should it independently determine that capital punishment is a disproportionate penalty for this category of offenders or some subset thereof.²⁴⁶

In the absence of further legislative developments or emerging evidence concerning jury, prosecutorial, and judicial behavior in this area, the Court admittedly may be reluctant to impose a constitutional limit on state action, preferring instead to allow the issue to percolate further within the democratic process until a more definitive social consensus emerges.²⁴⁷ Nonetheless, given the compelling similarities between severe and persistent mental illness and mental retardation and juvenile status, the Court should follow the direction of *Kennedy*, *Roper*, and *Atkins* to limit the death penalty for this population.²⁴⁸ This conclusion is compelled by Eighth Amendment principles, which are violated when there is an insufficient relationship between the purposes of capital punishment and an offender's blameworthiness and

²⁴² See, e.g., U.N. Commission on Human Rights Res. 2001/68, ¶ 4(e), U.N. Doc. E/CN.4/RES/2001/68 (Apr. 25, 2001) (urging retentionist countries to ban execution of the mentally ill).

²⁴³ See *id.*

²⁴⁴ See *supra* notes 230–243 and accompanying text.

²⁴⁵ See *supra* notes 97–209 and accompanying text.

²⁴⁶ See *Kennedy*, 128 S. Ct. at 2658–64; *Roper*, 543 U.S. at 568–75; *Atkins*, 536 U.S. at 317–21.

²⁴⁷ See SLATE & JOHNSON, *supra* note 47, at 342.

²⁴⁸ See *Kennedy*, 128 S. Ct. at 2658–64; *Roper*, 543 U.S. at 568–75; *Atkins*, 536 U.S. at 317–21.

deterrability.²⁴⁹ Under the Eighth Amendment, "punishment must be tailored to [the offender's] personal responsibility and moral guilt."²⁵⁰ Capital punishment violates the Eighth Amendment when it is "so totally without penological justification that it results in the gratuitous infliction of suffering."²⁵¹ Unless it "measurably contributes" to the goals of retribution or deterrence,²⁵² a death sentence would be "nothing more than the purposeless and needless imposition of pain and suffering."²⁵³ *Kennedy* demonstrates that even if capital punishment can be said to contribute somewhat to retribution and deterrence, it may nonetheless be a disproportionate punishment under the Court's evolving capital punishment jurisprudence.²⁵⁴ The *Kennedy* Court conceded that capital punishment may deter some instances of child rape, and it certainly would exact retribution on child rapists.²⁵⁵ Yet the Court determined that a disproportionate relationship exists between capital punishment and retribution and deterrence where the rape of a minor does not result in the death of the victim.²⁵⁶ Similarly, although executing those who were juveniles at the time of the crime or those with mental retardation would undoubtedly achieve some degree of retribution and deterrence, the Court in *Roper* and *Atkins* deemed that correlation to be disproportionate.²⁵⁷

In at least some cases of severe mental illness, the requisite relationship between the punishment of death and the goals of retribution and deterrence is similarly lacking.²⁵⁸ Retribution is inappropriate and deterrence would be ineffective for those whose mental illness significantly impairs their ability to understand the nature and consequences of their conduct, to appreciate its wrongfulness, or to exercise control over it.²⁵⁹ The concepts of responsibility and blameworthiness that justify punish-

²⁴⁹ See *Kennedy*, 128 S. Ct. at 2658-64; *Roper*, 543 U.S. 568-75; *Atkins*, 536 U.S. at 317-21.

²⁵⁰ See *Enmund*, 458 U.S. at 801.

²⁵¹ See *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (3-3-1-2 decision) (Stewart, Powell & Stevens, JJ., announcing the judgment of the Court).

²⁵² *Enmund*, 458 U.S. at 798.

²⁵³ *Coker*, 433 U.S. at 592 (plurality opinion).

²⁵⁴ See 128 S. Ct. at 2661-62.

²⁵⁵ See *id.* (citing *Coker*, 433 U.S. at 592 n.4 (plurality opinion)) ("[I]t cannot be said with any certainty that the death penalty for child rape serves no deterrent or retributive function.").

²⁵⁶ See *id.* at 2658 ("It does not follow, though, that capital punishment is a proportionate penalty for the crime."); *id.* at 2662 ("The incongruity between the crime of child rape and the harshness of the death penalty poses risks of overpunishment The goal of retribution . . . does not justify the harshness of the death penalty here.").

²⁵⁷ See *Roper*, 543 U.S. at 572; *Atkins*, 536 U.S. at 318-21.

²⁵⁸ See *infra* notes 259-271 and accompanying text.

²⁵⁹ See Task Force Report, *supra* note 37, at 668, 670-73.

ment require that the individual have been capable of doing other than what was done.²⁶⁰ Punishment for an act prohibited by the criminal law is appropriate only when, at the time of the offense, an individual possesses "the normal capacities, physical and mental, for . . . abstaining from what it forbids, and a fair opportunity to exercise these capacities."²⁶¹ Unless an individual can control his behavior, it is inappropriate for him to receive the moral condemnation and punishment applied in the criminal justice system of social control.²⁶² Punishment is only justified for those who have the capacities of awareness and control needed to be moral agents.²⁶³ When mental illness materially deprives the individual of these capacities, subjecting him to the death penalty does not sufficiently serve the retributive or deterrence goals of capital punishment, and therefore is cruel and unusual punishment under the Eighth Amendment.²⁶⁴ Those with severe mental illness that significantly limit their ability to understand the wrongfulness of their conduct, or to control it, like those with mental retardation or who were juveniles at the

²⁶⁰ See Michael S. Moore, *Choice, Character, and Excuse*, 7 SOC. PHIL. & POL'Y 29, 31–40 (1990).

²⁶¹ See H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 152 (1968).

²⁶² See ROBERT F. SCHOPP, COMPETENCE, CONDEMNATION, AND COMMITMENT: AN INTEGRATED THEORY OF MENTAL HEALTH LAW 148–51 (2001).

²⁶³ See Andrew Eshleman, *Moral Responsibility*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2004), <http://plato.stanford.edu/entries/moral-responsibility>. This conclusion was prominent in Aristotle's work on what experts view as the first "explicit[] . . . theory of moral responsibility." *Id.* Aristotle states

that only a certain kind of agent qualifies as a moral agent and is thus properly subject to ascriptions of responsibility, namely, one who possess [sic] a capacity for decision. For Aristotle, a decision is a particular kind of desire resulting from deliberation, one that expresses the agent's conception of what is good. The remainder of Aristotle's discussion is devoted to spelling out the conditions under which it is appropriate to hold a moral agent blameworthy or praiseworthy for some particular action or trait. His general proposal is that one is an apt candidate for praise or blame if and only if the action and/or disposition is voluntary. According to Aristotle, a voluntary action or trait has two distinctive features. First, there is a control condition: the action or trait must have its origin in the agent. That is, it must be up to the agent whether to perform that action or possess the trait—it cannot be compelled externally. Second, Aristotle proposes an epistemic condition: the agent must be aware of what it is she is doing or bringing about.

Id. (citing ARISTOTLE, NICOMACHEAN ETHICS 1110a–1113b3 (Terence Irwin trans., Hackett Publishing 1985)) (internal citation omitted); see also Peggy Sasso, *Implementing the Death Penalty: The Moral Implications of Recent Advances in Neuropsychology*, 29 CARDOZO L. REV. 765, 774 (2007) (citing ARISTOTLE, NICOMACHEAN ETHICS).

²⁶⁴ See *Roper*, 543 U.S. at 569–75; *Atkins*, 536 U.S. at 317–21.

time of the offense, have diminished responsibility for their actions.²⁶⁵ All warrant punishment, but not the extreme penalty.²⁶⁶

Although the Supreme Court concluded in *Roper* and *Atkins* that juveniles and those with mental retardation should be categorically exempt from capital punishment under the Eighth Amendment,²⁶⁷ such a categorical approach is inappropriate in the context of mental illness, even severe mental illness. It should be noted that mental illness is considerably more varied in its symptomatology and resulting degree of functional impairment than are mental retardation and juvenile status.²⁶⁸ Moreover, mental illness is more difficult to diagnose than mental retardation,²⁶⁹ and easier to feign.²⁷⁰ Evidence of juvenile status is, of

²⁶⁵ See *Roper*, 543 U.S. at 569–75; *Atkins*, 536 U.S. at 317–21.

²⁶⁶ This conclusion also may be required by principles of equal protection. See Slobogin, *supra* note 47, at 298–303; cf. *Skinner v. Oklahoma*, 316 U.S. 535, 541–42 (1942) (invoking the Equal Protection Clause to invalidate the punishment of sterilization applied to those who commit repetitive larceny offenses but not to those who commit repetitive acts of embezzlement). Equal protection requires that like cases be considered alike, see, e.g., *Vacco v. Quill*, 521 U.S. 793, 799 (1997), and to the extent that severe mental illness imposes parallel deficits in culpability and deterrability to mental retardation and juvenile status, offenders suffering these effects also should be exempt from capital punishment. The differences between mental illness and mental retardation and juvenile status, however, may limit the force of an equal protection argument. In *Heller v. Doe*, the Court rejected an equal protection attack on a statute requiring a higher standard of proof for the civil commitment of those with mental illness than those with mental retardation. See 509 U.S. 312, 321–22, 324–25 (1993). The Court found this distinction to be rationally related to important differences between mental illness and mental retardation, notably different times of onset and different treatment methods. See *id.*

²⁶⁷ See *Roper*, 543 U.S. at 575; *Atkins*, 536 U.S. at 321.

²⁶⁸ See *supra* notes 35, 56, and accompanying text (commenting on the variability of mental illness). People with mental retardation display considerable variability in capabilities, thinking styles, and intelligence, but an individual with mental retardation will not vary in these faculties over time. All people within a particular psychiatric diagnostic category will display certain common symptoms (e.g., all people with depression will display depressive symptoms). In contrast to those with mental retardation, however, those with mental illness will exhibit considerable variability in capacities and symptoms from time to time. See, e.g., LIDZ ET AL., *supra* note 35, at 198–99 (noting that effects of mental illness are intermittent, fluctuating, and variable).

²⁶⁹ See *Heller*, 509 U.S. at 321 (noting that the “general proposition” that “mental retardation is easier to diagnose than . . . mental illness” should “cause little surprise”).

²⁷⁰ See RICHARD ROGERS & DANIEL W. SHUMAN, CONDUCTING INSANITY EVALUATIONS 90 (2d ed. 2000) (noting that mental retardation is more difficult to feign than mental illness); *id.* at 105 (noting that mental retardation is more difficult to feign than mental illness in part because the former is typically corroborated by records going back to early childhood, like “school records and past achievement tests”); Richard Rogers, *Introduction to CLINICAL ASSESSMENT OF MALINGERING AND DECEPTION* 1, 1 (Richard Rogers ed., 2d ed. 1997) (noting that diagnosis of mental illness relies “heavily on the honesty, accuracy, and completeness of patients’ self-reporting” and that “[d]istortions, both intentional and unintentional, complicate greatly the assessment process”); cf. *Medina v. California*, 505

course, relatively straightforward and objective, and more difficult to manipulate. These considerations distinguish mental illness, which requires individualized determinations rather than categorical ones, and additional scrutiny of the validity of claims of disproportionality. Whether severe mental illness renders imposition of capital punishment a disproportionate penalty should therefore be determined on a case-by-case basis. Yet to the extent that, following fair procedural hearings, offenders with severe mental illness are determined to have parallel functional impairments, Eighth Amendment principles require their exemption from the death penalty.²⁷¹

III. DETERMINING WHEN SEVERE MENTAL ILLNESS AT THE TIME OF THE OFFENSE SHOULD DISQUALIFY AN OFFENDER FROM CAPITAL PUNISHMENT UNDER THE EIGHTH AMENDMENT

To be exempt from the death penalty on the basis of severe mental illness, the offender's illness at the time of the offense must produce impairments that render him less culpable and deterrable than the average offender.²⁷² The standards for legal insanity and incompetence to stand trial are relevant in this regard, as they both focus on cognitive and volitional impairments caused by mental illness.²⁷³ These same impairments may render a defendant insufficiently culpable and deterrable to allow the imposition of capital punishment.²⁷⁴ Under this standard, only those illnesses that cause severe cognitive and volitional impairments, such as schizophrenia, major depressive disorder, and bipolar disorder, qualify.²⁷⁵ Other conditions that do not produce such impairments, including the personality disorders and the paraphilias, do not qualify.²⁷⁶ Procedurally, Eighth Amendment values, combined with considerations of efficiency, cost, and therapeutic jurisprudence, dictate that the exemption issue be determined by the trial judge in a pretrial motion.²⁷⁷

U.S. 437, 455 (1992) (O'Connor, J., concurring) (noting the problem of defendants attempting to feign incompetence).

²⁷¹ See *Roper*, 543 U.S. at 569–75; *Atkins*, 536 U.S. at 317–21. Moreover, equal protection principles may also require such an exemption. See *supra* note 266.

²⁷² See *infra* notes 278–290 and accompanying text.

²⁷³ See *infra* notes 291–355 and accompanying text.

²⁷⁴ See *infra* notes 356–359 and accompanying text.

²⁷⁵ See *infra* notes 360–376 and accompanying text.

²⁷⁶ See *infra* notes 377–424 and accompanying text.

²⁷⁷ See *infra* notes 432–478 and accompanying text.

A. *The Standards That Should Apply, and Those Mental Illnesses That in Principle Could Satisfy Them*

To be disqualified from capital punishment under the Eighth Amendment, the offender's mental illness must significantly diminish his culpability and ability to respond to the deterrent of criminal punishment.²⁷⁸ Only then will the death penalty constitute disproportionate punishment.²⁷⁹ It is not sufficient that the offender suffered from a severe mental illness at the time of the offense. That illness must produce effects that so interfere with functioning that the offender's responsibility for the crime and susceptibility to deterrence are significantly diminished.²⁸⁰ To put it somewhat differently, there must be a causal connection between the offender's illness and the offense in ways that significantly diminish his blameworthiness and deterrability.²⁸¹

1. Competency to Stand Trial and the Legal Insanity Defense: The Outlines of the Standard

The Task Force Report endorsed by the ABA, APsYA, APA, NAMI, and MHA provides a starting point for the inquiry.²⁸² The Task Force Report sets forth a functional test, not a categorical one.²⁸³ It calls for an individualized determination of whether a defendant charged with a capital crime lacks sufficient culpability and deterrability to allow capital punishment to be imposed consistent with its underlying rationale.²⁸⁴ This requires a value judgment, more than a clinical judgment, and poses a legal rather than a diagnostic question.

In this respect, determining whether the Task Force-endorsed standard applies is like determining competency to stand trial and criminal responsibility, issues the criminal justice system routinely addresses. Typically, the trial judge determines competency to stand trial in a pretrial hearing,²⁸⁵ and the jury determines criminal responsibility at trial when it determines whether the defendant has established an

²⁷⁸ See *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2661–64 (2008), modified, 129 S. Ct. 1 (2008) (mem.); *Roper v. Simmons*, 543 U.S. 551, 569–75 (2005); *Atkins v. Virginia*, 536 U.S. 304, 317–21 (2002).

²⁷⁹ See *Kennedy*, 128 S. Ct. at 2661–64; *Roper*, 543 U.S. at 569–75; *Atkins*, 536 U.S. at 317–21.

²⁸⁰ See *Roper*, 543 U.S. at 569–75; *Atkins*, 536 U.S. at 317–21.

²⁸¹ See *Roper*, 543 U.S. at 569–75; *Atkins*, 536 U.S. at 317–21.

²⁸² See Task Force Report, *supra* note 37, at 670–72.

²⁸³ See *id.*

²⁸⁴ See *id.*

²⁸⁵ MELTON ET AL., *supra* note 227, at 131; BRUCE J. WINICK, *Reforming Incompetency to Stand Trial and Plead Guilty*, in THERAPEUTIC JURISPRUDENCE APPLIED 233, 233 n.1 (1997).

affirmative defense of legal insanity.²⁸⁶ In both instances, although a legal body—the judge or the jury—makes the final judgment, it is informed by a clinical determination. In both cases psychiatrists or psychologists offer opinion testimony concerning the ultimate issue. They base their testimony upon clinical evaluations of the defendant, and provide both a diagnosis and an explanation of whether they believe that the defendant's mental disability impairs functioning to the extent that he qualifies for the status of incompetency to stand trial or legal insanity. These are value judgments.²⁸⁷

Moreover, these value judgments must be made on a case-by-case basis, as not all psychiatric diagnostic categories will produce the same functional impairments, and the existence of such functional impairments will vary within diagnostic categories.²⁸⁸ The key question in any legal context in which mental illness is relevant is the degree of functional impairment presented in a particular case.²⁸⁹ In the Eighth Amendment context, the question must be whether the defendant's mental illness impaired his cognitive or volitional abilities at the time of

²⁸⁶ See DAVID BAZELON, QUESTIONING AUTHORITY 24 (1987).

²⁸⁷ See *id.* at 63 (noting that, in deciding an insanity question, a jury primarily makes a moral inquiry); Richard J. Bonnie & Katherine Gustafson, *The Challenge of Implementing Atkins v. Virginia: How Legislatures and Courts Can Promote Accurate Assessments and Adjudications of Mental Retardation in Death Penalty Cases*, 41 U. RICH. L. REV. 811, 815 (2007) ("In the usual forensic context, it is well understood that adjudications of competence and responsibility rest ultimately upon value judgments and that there is often no right answer."); Bruce J. Winick, *Reforming Incompetency to Stand Trial and Plead Guilty: A Restated Proposal and a Response to Professor Bonnie*, 85 J. CRIM. L. & CRIMINOLOGY 571, 620 (1995) ("Assessing competency . . . involves cultural, social, political, and legal judgments which are more normative in nature than clinical.").

²⁸⁸ See DSM-IV-TR, *supra* note 35, at xxxiii ("It is precisely because impairments, abilities, and disabilities vary widely within each diagnostic category that assignment of a particular diagnosis does not imply a specific level of impairment or disability.").

²⁸⁹ See *id.* ("In determining whether an individual meets a specified legal standard (e.g., for competence, criminal responsibility, or disability), additional information is usually required beyond that contained in the DSM-IV diagnosis. This might include information about the individual's functional impairments and how these impairments affect the particular abilities in question."); RONALD ROESCH & STEPHEN L. GOLDING, COMPETENCY TO STAND TRIAL 82 (1980) (stating that "determination of competency is context-dependent and needs to be decided on a case-by-case basis"); Gerald T. Bennett & Arthur F. Sullwold, *Competence to Proceed: A Functional and Context-Determinative Decision*, 29 J. FORENSIC SCI. 1119, 1121–22 (1984); Bruce J. Winick, *Restructuring Competency to Stand Trial*, 32 UCLA L. REV. 921, 974 (1985) [hereinafter Winick, *Restructuring Competency*] ("Competency to stand trial, like all tests of competency, should focus on the defendant's functional ability to perform a particular task, and its application should depend on the specific case and the skills that will be required of the defendant in that case."). See generally Bruce J. Winick, *Ambiguities in the Legal Meaning and Significance of Mental Illness*, 1 PSYCHOL. PUB. POL'Y & L. 534 (1995) [hereinafter Winick, *Ambiguities*] (analyzing civil commitment standards and the right of patients to refuse treatment).

the crime to such a degree that his legal culpability or deterrability was sufficiently diminished.²⁹⁰

The functional impairments produced by mental illness vary considerably and are well-established in the context of both competency to stand trial and legal insanity.²⁹¹ For example, in competency to stand trial settings some, though not all, defendants with schizophrenia,²⁹² major depressive disorder,²⁹³ and bipolar disorder²⁹⁴ suffer such severe cognitive or communicative impairments as a result of their illness that they are deemed unfit to stand trial.²⁹⁵ In contrast, those diagnosed only with antisocial personality disorder ("ASPD"),²⁹⁶ one of the other

²⁹⁰ See *Roper*, 543 U.S. at 569–75; *Atkins*, 536 U.S. at 317–21.

²⁹¹ See *infra* notes 292–310 and accompanying text.

²⁹² See *infra* note 360.

²⁹³ See *infra* note 361.

²⁹⁴ See *infra* note 362.

²⁹⁵ See MELTON ET AL., *supra* note 227, at 144; see also *United States v. Adams*, 297 F. Supp. 596, 597 (S.D.N.Y. 1969) (holding that a finding of paranoid schizophrenia does not automatically require a finding of incompetency); ROESCH & GOLDING, *supra* note 289, at 18–24; Bennett & Sullwold, *supra* note 289, at 1122; Winick, *Restructuring Competency*, *supra* note 289, at 923 n.4 (stating that "a psychiatric diagnosis of psychosis . . . is not dispositive of the legal question of competency-to-stand-trial").

²⁹⁶ As defined in the DSM-IV-TR, ASPD is exclusively behavioral in nature, involving certain behavioral manifestations and personality traits. See DSM-IV-TR, *supra* note 35, at 706. A diagnosis of ASPD is appropriate when the individual is at least age eighteen and has exhibited evidence of certain conduct before age fifteen as shown by a history of three of fifteen specified behaviors, a pattern of irresponsible behavior since age fifteen as evidenced by three of seven specified behavioral patterns, and antisocial behavior that did not occur during a superimposed schizophrenic or manic episode. See *id.* For further discussion of ASPD, see generally INTERNATIONAL HANDBOOK ON PSYCHOPATHIC DISORDERS AND THE LAW (Alan R. Felthous & Henning Saß eds., 2007); Stephen D. Hart, *Psychopathy, Culpability, and Commitment*, in MENTAL DISORDER AND CRIMINAL LAW: RESPONSIBILITY, PUNISHMENT, AND COMPETENCE 159 (Robert F. Schopp et al. eds., 2009) [hereinafter MENTAL DISORDER AND CRIMINAL LAW]; Winick, *Ambiguities*, *supra* note 289.

ASPD is characterized as a "colorblindness" to the feelings of others. See ROBERT D. HARE, WITHOUT CONSCIENCE: THE DISTURBING WORLD OF THE PSYCHOPATHS AMONG US 27–28 (1993). Those diagnosed with ASPD display a "stunning lack of concern for the devastating effects their actions have on others." *Id.* at 40. They lack the capacity to feel guilt, shame, genuine remorse, or concern for the feelings of others. *Id.* at 40, 44. What is now known as ASPD has been, and continues to be, known by other names, including psychopathy, sociopathy, and dyssocial personality. See DSM-IV-TR, *supra* note 35, at 702; SEYMOUR L. HALLECK, PSYCHIATRY AND THE DILEMMAS OF CRIME 99 (1967); Robert D. Hare et al., *Psychopathy and the DSM-IV Criteria for Antisocial Personality Disorder*, 100 J. ABNORMAL PSYCHOL. 391, 391 (1991); Hart, *supra*, at 160; Norval Morris, *Keynote Address: Predators and Politics*, 15 U. PUGET SOUND L. REV. 517, 519 (1992); Gerald Uelman, *The Psychiatrist, the Sociopath and the Courts: New Lines for an Old Battle*, 14 LOY. L.A. L. REV. 1, 2 (1980). Some distinguish ASPD, referring to a "cluster of criminal and antisocial behavior," from the more general term "psychopathy," which is defined as a "cluster of both personality traits and socially deviant behavior." See HARE, *supra*, at 25; see also John Monahan, *A Jurisprudence of Risk Assessment: Forecasting Harm Among Prisoners, Predators, and*

personality disorders,²⁹⁷ or one of the paraphilias²⁹⁸ generally do not qualify for this status.²⁹⁹

Similarly, in the context of the legal insanity defense, those diagnosed with schizophrenia,³⁰⁰ major depressive disorder,³⁰¹ or bipolar disorder³⁰² sometimes, although far from always, suffer sufficient cognitive impairment to satisfy the test of legal insanity,³⁰³ which in most jurisdictions requires that the defendant be unable to understand the

Patients, 92 VA. L. REV. 391, 421 (2006) (citing Stephen D. Hart et al., *Psychopathy as a Risk Marker for Violence: Development and Validation of a Screening Version of the Revised Psychopathy Checklist*, in *VIOLENCE AND MENTAL DISORDER: DEVELOPMENTS IN RISK ASSESSMENT* 81, 81 (John Monahan & Henry J. Steadman eds., 1994)) (describing psychopathy as a "personality disorder" and a "cluster of personality traits including manipulativeness, lack of empathy, and impulsivity").

²⁹⁷ Each of the personality disorders describes types of pervasive, inflexible, and maladaptive behaviors markedly different from socially accepted norms. See *DSM-IV-TR*, *supra* note 35, at 685. They represent unique impairments in the sufferer's perception of his environment or his ability to relate to it. See *id.* at 686. ASPD is only one of ten specific categories of personality disorder recognized by the *DSM-IV-TR*. See *id.* at 685. The nine other personality disorder types are paranoid personality disorder (obsessive distrust of others as suspicious or malicious); schizoid personality disorder (detachment from others and limited ability to express emotion); schizotypal personality disorder (discomfort in close relationships and eccentric behavior); borderline personality disorder (extreme impulsiveness and inability to maintain stable friendships or other relationships); histrionic personality disorder (excessively emotional and needful of attention); narcissistic personality disorder (feelings of grandeur, desire for attention, and inability to empathize); avoidant personality disorder (socially inadequate and inhibited, and hypersensitive to rejection); dependent personality disorder (overly submissive or "clingy," with an excessive need to be cared for); and obsessive-compulsive personality disorder (overly preoccupied with order, perfection, and control). *Id.*

²⁹⁸ The paraphilias include pedophilia (sexual excitement related to sexual activity with minors age thirteen years or younger), exhibitionism (sexual excitement from the exposure of one's genitals to strangers), sadism (sexual excitement caused by the physical or psychological suffering of others), and frotteurism (sexual urge to touch or rub against unconsenting persons). See *id.* at 566-67. "The essential features of a Paraphilia are recurrent, intense sexually arousing fantasies, sexual urges, or behaviors . . ." *Id.* at 566. The *DSM-IV-TR* contains nothing suggesting that individuals diagnosed with these conditions suffer from cognitive or volitional deficits. See WINICK, *supra* note 285, at 127 & n.49. Paraphiliacs "carr[y] no diagnoses that indicate[] serious impairment of orientation, consciousness, perception, comprehension, reasoning, or reality testing." SCHOPP, *supra* note 262, at 36.

²⁹⁹ See MELTON ET AL., *supra* note 227, at 144 (noting the "prominent association between major mental disorders (mainly schizophrenia and major affective [mood] disorder) and incompetency" to stand trial).

³⁰⁰ See *infra* note 360.

³⁰¹ See *infra* note 361.

³⁰² See *infra* note 362.

³⁰³ MELTON ET AL., *supra* note 227, at 233 (discussing research finding that "schizophrenia, organic disorders, and other psychotic disorders were most commonly the basis for [mental-state-at-offense] opinions favorable to the [insanity] defense"); *id.* at 211.

nature of his conduct or that it was wrong.³⁰⁴ In addition, these defendants may suffer sufficient volitional impairment³⁰⁵ to qualify for the additional legal insanity standard, applied in a minority of jurisdictions, that requires a significant diminution in the ability to "conform [their] conduct to the requirements of the law."³⁰⁶ On the other hand, the personality disorders,³⁰⁷ paraphilias,³⁰⁸ and temporary insanity induced by

³⁰⁴ See *id.* at 206–08; see also *infra* note 327 and accompanying text.

³⁰⁵ See Bruce J. Winick, *Sex Offender Law in the 1990s: A Therapeutic Jurisprudence Analysis*, 4 PSYCHOL. PUB. POL'Y & L. 505, 522–23 (1998) (discussing diagnostic criteria and associated volitional impairments for schizophrenia, major depressive disorder, Tourette's syndrome, and multiple personality disorder).

³⁰⁶ See MELTON ET AL., *supra* note 227, at 207–08; see also *infra* note 332 and accompanying text.

³⁰⁷ See MODEL PENAL CODE § 4.01(2) (1962) ("As used in this Article, the terms 'mental disease or defect' do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct."); MELTON ET AL., *supra* note 227, at 214 (noting that "antisocial personality disorder is rarely an adequate predicate for insanity"); *id.* at 233 (noting that a diagnosis of personality disorder is "least likely to be associated with clinical opinions favoring an insanity finding"); 4 MICHAEL L. PERLIN, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL 162 (2d ed. 2002) (noting that the Model Penal Code definition of mental disease or defect was intended to exclude psychopaths or sociopaths from qualifying from the defense); Emily Campbell, *The Psychopath and the Definition of "Mental Disease or Defect" Under the Model Penal Code Test of Insanity: A Question of Psychology or a Question of Law?*, in LAW AND PSYCHOLOGY: THE BROADENING OF THE DISCIPLINE 139, 143 (James R.P. Ogloff ed., 1992); Stephen J. Morse, *Culpability and Control*, 142 U. PA. L. REV. 1587, 1602 (1994); Winick, *Ambiguities*, *supra* note 289, at 594–95.

³⁰⁸ See, e.g., *People v. Hopper*, No. G033190, 2005 WL 1100422, at *5 (Cal. Ct. App. May 10, 2005); *State v. Armstrong*, 789 N.E.2d 657, 666 (Ohio Ct. App. 2003); see also Stephen J. Morse, *Uncontrollable Urges and Irrational People*, 88 VA. L. REV. 1025, 1027 (2002) (noting that "even if their sexual violence is in part caused by a mental abnormality, they do not meet the usual standards for an insanity defense"). Those diagnosed with one or more of the paraphilias suffer from neither the cognitive nor the volitional impairments that are necessary to satisfy the criteria for the legal insanity defense. See SCHOPP, *supra* note 262, at 38, 141; Winick, *supra* note 305, at 523–24 (explaining that for those diagnosed with paraphilia, "nothing in the diagnostic criteria" implies the existence of a "cognitive impairment" that "renders them irrational in any respect or unable to control their actions").

drug or alcohol consumption³⁰⁹ generally do not qualify for the insanity defense.³¹⁰

The functional impairments relating to culpability and deterrability that are relevant to the Eighth Amendment question differ from those relating to competency to stand trial and legal insanity. For incompetence to stand trial, the question is whether the defendant's mental illness prevents him from understanding the nature of the proceedings or assisting in his own defense.³¹¹ With the legal insanity defense, the question is whether the defendant's mental illness prevented him from understanding the nature of his conduct or that it was wrong, or in a minority of jurisdictions, whether it substantially prevented him from "conform[ing] his conduct to the requirements of the law."³¹² In contrast, the Eighth Amendment inquiry focuses on the extent to which the offender's mental illness diminishes culpability and deterrability.³¹³ Despite these differences, however, it is likely that the same mental disorders that tend to satisfy the incompetency and legal insanity tests will also satisfy Eighth Amendment requirements because the cognitive and volitional defects caused by these illnesses affect an individual's blameworthiness and susceptibility to deterrence.³¹⁴ Similarly, those that fail to satisfy these legal standards also will fail to justify an exclusion from capital punishment.³¹⁵ This conclusion requires further analysis, however, and a better understanding of how, if at all, the vari-

³⁰⁹ See HERBERT FINGARETTE & ANN FINGARETTE HASSE, *MENTAL DISABILITIES AND CRIMINAL RESPONSIBILITY* 112 (1979) (noting that courts usually reject "the insanity defense in relation to the drug-intoxicated offender" because of the lack of a mental illness and because of two policy considerations—public safety and the presumption of a substance user's culpability for choosing to ingest the drug or alcoholic beverage); MELTON ET AL., *supra* note 227, at 230 (noting that "voluntary intoxication seldom supports . . . an insanity . . . defense"); *id.* at 233 (noting that a diagnosis of substance abuse is "least likely to be associated with clinical opinions favoring an insanity finding"); Winick, *Ambiguities*, *supra* note 289, at 594–95.

³¹⁰ MELTON ET AL., *supra* note 227, at 214 (noting that "antisocial personality disorder is rarely an adequate predicate for insanity"); *id.* at 229–30 (noting that intoxication that is "self-induced and temporary . . . is seldom given complete exculpatory effect").

³¹¹ See *Dusky v. United States*, 362 U.S. 402, 402 (1960) (per curiam) ("[T]he test [for competency to stand trial] must be whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him." (internal quotations omitted)); MELTON ET AL., *supra* note 227, at 127–30.

³¹² See MELTON ET AL., *supra* note 227, at 204–18; see also *infra* notes 326–334 and accompanying text.

³¹³ See *Roper*, 543 U.S. at 569–75; *Atkins*, 536 U.S. at 317–21; Task Force Report, *supra* note 37, at 670–72.

³¹⁴ See *infra* notes 360–374 and accompanying text.

³¹⁵ See *infra* notes 375–424 and accompanying text.

ous mental disorders may compromise culpability and deterrability enough to make mental illness sufficiently analogous to mental retardation and juvenile status to justify exclusion from capital punishment.

2. The Need for an Eighth Amendment Phenomenology of Mental Disorder

The APsYA's *Diagnostic and Statistical Manual of Mental Disorders* ("DSM-IV-TR"), although a helpful starting point for this analysis, is designed to aid clinicians in making diagnostic and treatment decisions, and its description of the various mental disorders does not focus on functional impairment for Eighth Amendment or other legal purposes.³¹⁶ The introduction to the *DSM-IV-TR* notes that there is an "imperfect fit" between clinical diagnoses and "the questions of ultimate concern to the law."³¹⁷ In determining satisfaction of a legal standard, additional information "is usually required," including "information about the individual's functional impairments and how these impairments affect the particular abilities in question."³¹⁸ Similarly, legal objectives are not the focus of the Global Assessment of Functioning ("GAF") Scale, a diagnostic rating scale that is used in diagnosis and treatment to rank functioning.³¹⁹ Consequently, although this scale measures functional impairment for certain clinical purposes, it does not seek to measure functional impairment for legal purposes.³²⁰ An individual's GAF score, therefore, will provide little assistance in resolving the Eighth Amendment question.³²¹ As a result, what is needed is a

³¹⁶ See *DSM-IV-TR*, *supra* note 35, at xxxii–xxxiii. As noted in the introduction to the *DSM-IV-TR*:

When the *DSM-IV* categories, criteria, and textual descriptions are employed for forensic purposes, there are significant risks that diagnostic information will be misused or misunderstood. These dangers arise because of the imperfect fit between the questions of ultimate concern to the law and the information contained in a clinical diagnosis. In most situations, the clinical diagnosis of a *DSM-IV* mental disorder is not sufficient to establish the existence for legal purposes of a "mental disorder," "mental disability," "mental disease," or "mental defect." In determining whether an individual meets a specified legal standard (e.g., for competence, criminal responsibility, or disability), additional information is usually required beyond that contained in the *DSM-IV* diagnosis.

Id.

³¹⁷ *Id.* at xxxiii.

³¹⁸ *Id.*

³¹⁹ See *id.* at 34.

³²⁰ See *id.* at 32–34.

³²¹ See *DSM-IV-TR*, *supra* note 35, at 32–34.

new analysis of the degree to which mental disorder impairs functioning in the constitutionally relevant ways: literally, a phenomenology of mental disorder.

What functional impairments must mental illness produce to justify an exemption from the death penalty under the proportionality principle of the Eighth Amendment, and which psychiatric diagnoses are capable of producing these impairments? The U.S. Supreme Court's analysis in 2002, in *Atkins v. Virginia*, of the impairments associated with mental retardation³²² and in 2005, in *Roper v. Simmons*, of those associated with juvenile status³²³ point the way. In these cases, the Court concluded that, because certain categories of offenders were significantly less culpable and deterrable than the average offender, applying the extreme penalty to members of these two groups would insufficiently achieve either of the two principal justifications for capital punishment: retribution³²⁴ and deterrence.³²⁵ For offenders suffering

³²² See 536 U.S. at 317–21. The majority in *Atkins* deferred to the definition of mental retardation given by the American Association on Mental Retardation:

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.

Id. at 308 n.3 (internal quotation omitted). Additionally, the *Atkins* majority noted the "similar" definition given by the APsya:

The essential feature of Mental Retardation is significantly subaverage general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety (Criterion B). . . . Mental Retardation has many different etiologies and may be seen as a final common pathway of various pathological processes that affect the functioning of the central nervous system.

Id. (internal quotation omitted).

³²³ See 543 U.S. at 569–73.

³²⁴ See *id.* at 571 ("Retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity."); *Atkins*, 536 U.S. at 319 ("If 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." (emphasis added)).

³²⁵ See *Roper*, 543 U.S. at 571 ("[T]he same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence."). The Court in *Atkins* also stated:

from severe mental illness at the time of the offense, the question thus becomes whether mental illness causes a parallel diminution of culpability and deterrability. The standards for the legal insanity defense are relevant here, but not dispositive. A majority of American jurisdictions apply a form of the "*M'Naghten* test," originally adopted in England in 1842.³²⁶ This test focuses exclusively on cognitive impairment, asking whether, at the time of the offense the defendant suffered from "such a defect of reason" as a result of mental illness, "as not to know the nature and quality of the act he was doing; or if he did know it, that he did not know he was doing what was wrong."³²⁷ In addition, fourteen jurisdictions apply the Model Penal Code approach, under which an offender is excused from criminal responsibility if mental illness prevented him from appreciating the nature and consequences of his conduct or its wrongfulness.³²⁸ Both the *M'Naghten* and Model Penal Code tests focus on cognitive impairment produced by mental illness that reduces culpability to the extent that the offender is not blameworthy for his conduct.³²⁹ They express the view that moral condemnation

Exempting the mentally retarded from [capital] punishment will not affect the "cold calculus" that precedes the decision of other potential murderers. Indeed that sort of calculus is at the opposite end of the spectrum from behavior of mentally retarded offenders. . . . [I]t is the same cognitive and behavioral impairments that make these defendants less morally culpable . . . that also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information.

536 U.S. at 319–20 (internal citations omitted).

³²⁶ See MELTON ET AL., *supra* note 227, at 208; see also *M'Naghten's Case*, (1843) 8 Eng. Rep. 718, 722 (H.L.). Twenty-eight states apply some variation of the *M'Naghten* test, and an additional three use *M'Naghten* plus an irresistible impulse test. See MELTON ET AL., *supra* note 227, at 208. In addition, the federal standard is similar to the traditional *M'Naghten* test. See Insanity Defense Reform Act of 1984 § 402(a), 28 U.S.C. § 17(a) (2006).

³²⁷ See *M'Naghten*, 8 Eng. Rep. at 722; see also MELTON ET AL., *supra* note 227, at 206–18; 4 PERLIN, *supra* note 307, at 149–54.

³²⁸ See MODEL PENAL CODE § 4.01(1); see also MELTON ET AL., *supra* note 227, at 207–18; CHRISTOPHER SLOBOGIN ET AL., LAW AND THE MENTAL HEALTH SYSTEM: CIVIL AND CRIMINAL ASPECTS 548–49 (5th ed. 2009). The Model Penal Code test is based on *M'Naghten* but broadens it in several respects. 4 PERLIN, *supra* note 307, at 161–62. Its use of the word "substantial" was a rejection of case law construing the *M'Naghten* test to require a showing of total impairment. *Id.* at 161. The use of the word "appreciate" instead of the word "know" reflected a broadening beyond intellectual understanding to encompass emotional awareness of the nature and consequences of the defendant's conduct. *Id.* The test also uses a broader notion of mental impairment, thereby including both cognitive and affective aspects of impairment. *Id.* In addition, it substitutes the word "wrongfulness" for "criminality," thereby encompassing a defendant's impaired moral sense, not merely an impaired sense of legal wrong. *Id.* at 161–62.

³²⁹ See *M'Naghten*, 8 Eng. Rep. at 722; MODEL PENAL CODE § 4.01(1).

and criminal sanctions are inappropriate when the individual, as a result of illness, is unable to understand the nature and consequences of his actions and that they are wrong.³³⁰ Deterrability also is captured by the standard inasmuch as criminal sanctions are unlikely to deter people from actions they do not appreciate are unlawful or whose consequences they do not understand.³³¹ In a small minority of jurisdictions, an offender also can meet the standards for legal insanity if mental illness substantially impairs his ability to "conform his conduct to the requirements of the law."³³² An offender whose mental illness prevents him from controlling his conduct is neither deterrable nor blameworthy for having failed to do so.³³³

Those impairments that should be required to bar the death penalty under Eighth Amendment proportionality principles, though similar, are not identical to those that satisfy the requirements of the legal insanity defense. The Eighth Amendment question arises only for those who have been convicted of a capital offense, which excludes those who are able to raise a successful insanity defense³³⁴ or whose mental illness negates mens rea.³³⁵ Although an offender's serious mental illness may satisfy the insanity defense, not all jurisdictions recognize the defense.³³⁶ Moreover, even in those that do, the defense is an exceedingly narrow one,³³⁷ and juries rarely acquit by reason of insanity.³³⁸ The

³³⁰ See Richard J. Bonnie, *The Moral Basis of the Insanity Defense*, 69 A.B.A. J. 194, 195 (1983) ("[I]t is fundamentally wrong to condemn and punish a person whose rational control over his or her behavior was impaired by the incapacitating effects of mental illness.").

³³¹ See *supra* notes 326–330 and accompanying text.

³³² MODEL PENAL CODE § 4.01(1). This volitional prong of the Model Penal Code test, although it appeared to be gaining acceptance prior to *United States v. Hinckley*, Crim. No. 81–306 (D.D.C. June 21, 1982) (acquitting by reason of insanity the attempted assassin of President Reagan), has since been rejected in many jurisdictions. See Winick, *Ambiguities*, *supra* note 289, at 535 n.4, 599 n.263.

³³³ See Bonnie, *supra* note 330, at 196 (arguing for abolition of the volitional prong of the insanity defense, but conceding that "a person who 'cannot help' doing what he did is not blameworthy").

³³⁴ See *supra* notes 300–310 and accompanying text.

³³⁵ Thirty-four states permit the admission of evidence of mental impairment at trial to negate the mens rea element of the offense. See Brief of Appellant, *supra* note 88, at 21 apps. 1–5.

³³⁶ See MELTON ET AL., *supra* note 227, at 208. Five states—Kansas, Idaho, Montana, North Dakota, and Utah—have abolished the insanity defense. See *id.*

³³⁷ Approximately 60 percent of the states, along with the federal government, apply the narrow *M'Naghten* test of legal insanity. See *supra* note 326 and accompanying text. This test is considerably more narrow than the Model Penal Code test applied in fourteen of the states. See 4 PERLIN, *supra* note 307, at 161–62; see also *supra* note 328.

Eighth Amendment exemption from capital punishment is not the same as an excuse from criminal responsibility; rather, it is a form of diminished responsibility.³³⁹ The question is when the effects of mental illness, although not sufficient to excuse the offender for his offense, make it inappropriate to execute him. Because the Eighth Amendment question concerns a *reduced* culpability—not an absence of culpability—a lesser showing than that required to satisfy the legal insanity standard should be required in the Eighth Amendment context.³⁴⁰ The threshold question for the Eighth Amendment analysis, therefore, is whether the offender's mental illness at the time of the offense produced parallel, although lesser, cognitive and volitional impairments as those required for legal insanity.

The U.S. Supreme Court's 2007 decision in *Panetti v. Quarterman*, which involved a different but related legal test—the standard for competency to be executed—offers further guidance.³⁴¹ The competency to be executed issue arises for defendants sentenced to death who become so mentally ill while awaiting execution that it would constitute cruel and unusual punishment to carry out the death penalty.³⁴² In *Panetti*, the U.S. Court of Appeals for the Fifth Circuit had foreclosed the prisoner from showing that his mental illness "obstructs a rational understanding of the State's reason for his execution."³⁴³ The Supreme Court found the court of appeals' standard for competency for execution—whether the prisoner is aware that he is going to be executed and why—too restrictive.³⁴⁴ The Court remanded the case but declined to specify a rule for governing all competency-for-execution determinations.³⁴⁵ Nonetheless, the Court noted that execution of a severely mentally ill prisoner may violate the Eighth Amendment for several reasons, includ-

³³⁹ See 4 PERLIN, *supra* note 307, at 331–32; O. Carter Snead, *Neuroimaging and the Complexity of Capital Punishment*, 82 N.Y.U. L. REV. 1265, 1312 (2007) (noting "the small percentage of cases in which defendants raise the defense of legal insanity and the even smaller portion of cases in which such a defense succeeds"); Henry J. Steadman et al., *Factors Associated with a Successful Insanity Plea*, 140 AM. J. PSYCHIATRY 401, 401–02 (1983) (noting that the defense is raised in less than 1 percent of criminal cases, and is successful in about 25 percent of these).

³³⁹ See *Roper*, 543 U.S. at 569–71; *Atkins*, 536 U.S. at 318.

³⁴⁰ See *Roper*, 543 U.S. at 569–71; *Atkins*, 536 U.S. at 318.

³⁴¹ See 127 S. Ct. 2842, 2860–62 (2007).

³⁴² See *Ford v. Wainwright*, 477 U.S. 399, 409–10 (1986). See generally BRUCE J. WINICK, *Competency for Execution*, in THERAPEUTIC JURISPRUDENCE APPLIED, *supra* note 285, at 289.

³⁴³ See 127 S. Ct. at 2860.

³⁴⁴ See *id.*

³⁴⁵ See *id.* at 2862.

ing that it "serves no retributive purpose."³⁴⁶ In other words, executing a condemned prisoner whose "mental state is so distorted by a mental illness" that he is prevented from recognizing the severity of his offense "call[s] in question" "the objective of community vindication" because "his awareness of the crime and punishment has little or no relation to the understanding of those concepts shared by the community as a whole."³⁴⁷ Thus, the *Panetti* Court concluded that a prisoner's "awareness of the State's rationale for an execution is not the same as a rational understanding of it," and that it was error for the lower court to have foreclosed inquiry into whether the prisoner suffered from a severe mental illness "that is the source of gross delusions preventing him from comprehending the meaning and purpose of the punishment to which he has been sentenced."³⁴⁸ "Gross delusions stemming from a severe mental disorder," the Court noted, "may put an awareness of a link between a crime and its punishment in a context so far removed from reality that the punishment can serve no proper purpose."³⁴⁹

Panetti sheds some light on when severe mental illness may deprive an offender of sufficient culpability and deterrability to make capital punishment a disproportionate penalty under the Eighth Amendment.³⁵⁰ *Panetti*'s language suggests that when such illness produces gross delusions or other cognitive defects that significantly distort the offender's understanding and appreciation of his conduct and of its wrongfulness, capital punishment will serve no retributive purpose, and therefore is cruel and unusual.³⁵¹ The Court's statements in *Panetti* concerning the impairing effects of mental illness that might render a prisoner incompetent for execution parallel the legal insanity standard in some respects, and both inform the Eighth Amendment inquiry here.³⁵² Both emphasize serious cognitive impairment that substantially

³⁴⁶ See *id.* at 2861 (citing *Ford*, 477 U.S. at 408).

³⁴⁷ See *id.*

³⁴⁸ See *Panetti*, 127 S. Ct. at 2862.

³⁴⁹ *Id.*

³⁵⁰ See *id.* at 2860-62.

³⁵¹ See *id.* at 2861-62.

³⁵² Compare *id.* at 2861 (noting that a severely distorted mental state "call[s] into question" the retributivist objective that the prisoner understand "the severity of the offense and the objective of community vindication" (emphasis added)), and *id.* at 2862, with *M'Naghten*, 8 Eng. Rep. at 722 (holding that a person is not responsible if mental illness prevented him from appreciating the "nature and quality" of his act, or that it was wrong), and MODEL PENAL CODE § 4.01(1) (providing that a person is not responsible if, due to mental illness, he lacked "substantial capacity to appreciate the criminality [wrongfulness] of his conduct").

interferes with the individual's understanding and rationality.³⁵³ By stressing gross delusions that significantly impair comprehension, *Panetti* seemed to limit its standard to the major mental illnesses often labeled "psychoses."³⁵⁴ Likewise, the legal insanity defense typically is limited to the major mental illnesses that significantly impair the individual's understanding of the nature and consequences of his actions or of their wrongfulness, excluding conditions defined exclusively by their behavioral manifestations.³⁵⁵

The ABA, APsyA, APA, NAMI, and MHA, in discussing the mental illnesses and degrees of impairment that should qualify for exemption from capital punishment, propose a standard that is a variant on the legal insanity test.³⁵⁶ The Task Force Report recommends that only those with "severe" disorders or disabilities are to be exempted from the death penalty, and specifically excludes those diagnosed "only with conditions that are primarily manifested by criminal behavior and those whose abuse of psychoactive substances, standing alone, renders them impaired at the time of the offense."³⁵⁷ The recommendations are limited to "severe" mental illnesses—those that are often called "psychoses."³⁵⁸ To qualify, the condition must also substantially impair defendants' ability, at the time of the offense, to "appreciate the nature, consequences, or wrongfulness of their conduct" or "to exercise rational judgment in relation to conduct" or "to conform their conduct to the requirements of the law."³⁵⁹

³⁵³ See *Panetti*, 127 S. Ct. at 2861–62; *M'Naghten*, 8 Eng. Rep. at 722; MODEL PENAL CODE § 4.01(1).

³⁵⁴ See *Panetti*, 127 S. Ct. at 2861–62. The Court pointed out that its foundation ("the beginning of doubt") for calling into question the petitioner's competence was not mere antisocial qualities ("misanthropic personality or an amoral character"), but rather "a psychotic disorder." See *id.* at 2862. Psychosis is

[a] severe mental disorder characterized by gross impairments in reality testing, typically manifested by delusions, hallucinations, disorganized speech, or disorganized or catatonic behavior. . . . Among these illnesses are schizophrenia, delusional disorders, some secondary or symptomatic disorders ("organic psychoses") and some mood disorders.

AMERICAN PSYCHIATRIC GLOSSARY 161 (Nariman C. Shahrokh & Robert E. Hales eds., 8th ed. 2003); see also DSM-IV-TR, *supra* note 35, at 297 (most definitions of psychosis involve "delusions or prominent hallucinations"). This term is no longer used in the DSM-IV-TR as a formal diagnostic category but remains in use among clinicians.

³⁵⁵ See *supra* notes 300–310 and accompanying text.

³⁵⁶ See Task Force Report, *supra* note 37, at 668, 670–73.

³⁵⁷ *Id.* at 670.

³⁵⁸ See *id.* at 670–71; see also *supra* note 354.

³⁵⁹ Task Force Report, *supra* note 37, at 668.

What conditions, in principle, can satisfy these requirements? Plainly, schizophrenia,³⁶⁰ major depressive disorder,³⁶¹ bipolar disorder,³⁶² the dissociative disorders,³⁶³ dementia,³⁶⁴ and delirium³⁶⁵ could

³⁶⁰ Schizophrenia, the most serious of the major mental disorders, is a thought disorder frequently accompanied by hallucinations and delusions that distort reality and prevent or seriously interfere with rational decision making. See DSM-IV-TR, *supra* note 35, at 298. A diagnosis of schizophrenia is appropriate when the condition lasts six months or more and includes at least one month of symptoms such as delusions, hallucinations, disorganized speech, or grossly disorganized or catatonic behavior. See *id.* Two or more of these active symptoms must be found. *Id.* "Behavior is considerably influenced by delusions or hallucinations [or] serious impairment in communication or judgment . . ." *Id.* at 34. Schizophrenia is now thought to have a biochemical etiology. OFFICE OF TECH. ASSESSMENT, U.S. CONG., THE BIOLOGY OF MENTAL DISORDERS: NEW DEVELOPMENTS IN NEUROSCIENCE 77-82 (1992), available at <http://purl.access.gpo.gov/GPO/LPS26815>.

³⁶¹ Major depressive disorder, a mood disorder, may be diagnosed following the occurrence of at least one major depressive episode, requiring a depressed mood for two or more weeks and the existence of at least four other symptoms of depression. DSM-IV-TR, *supra* note 35, at 345. A nonexhaustive list of such symptoms includes a change in weight, appetite, sleep patterns, or psychomotor activity; decrease in energy; feelings of worthlessness or guilt; difficulty with thought, concentration, or decision making; or recurring suicidal thoughts or attempts. *Id.* at 349. There is increasing acceptance of the hypothesis that one or more of the neurotransmitters—the biochemical substances that relay messages throughout the central nervous system—are implicated in the etiology of schizophrenia and the mood disorders. See OFFICE OF TECH. ASSESSMENT, *supra* note 360, at 77-88 (discussing neurotransmitter imbalances and other biological factors hypothesized to play a role in schizophrenia and the mood disorders).

³⁶² Bipolar disorder is a mood disorder classified by the occurrence of one or more manic episodes, characterized by an elevated, expansive, or irritable mood, usually accompanied by one or more major depressive episodes and serious interference in functioning. DSM-IV-TR, *supra* note 35, at 382. As with schizophrenia, see *supra* note 360, and major depressive disorder, see *supra* note 361, it appears that the etiology of bipolar disorder is biochemical. See OFFICE OF TECH. ASSESSMENT, *supra* note 360, at 82-88.

³⁶³ An individual with one of the dissociative disorders—which include dissociative amnesia and dissociative identity disorder (formerly multiple personality disorder)—suffers generally from the disruption of the normal integration of consciousness, memory, identity, or perception. DSM-IV-TR, *supra* note 35, at 519. See generally ELYN R. SAKS WITH STEPHEN H. BEHNKE, Jekyll on Trial: Multiple Personality Disorder and Criminal Law (1997) (analyzing how traditional legal concepts of insanity and competency were not formulated with multiple personality disorder in mind).

³⁶⁴ The central characteristic of dementia is the existence of multiple defects in cognition as a direct result of a medical condition (e.g., Alzheimer's disease, head trauma, HIV, Huntington's disease) or substance abuse. DSM-IV-TR, *supra* note 35, at 147-48. Resultant defects include memory impairment and one or more of the following: aphasia (inability to comprehend or articulate spoken or written words due to a brain injury or disease), apraxia (inability to perform previously learned, purposeful acts), agnosia (inability to recognize persons, sounds, shapes, or smells not attributable to memory loss, even though sensory functioning is normal), or impaired executive functioning (e.g., memory, learning, language, or reasoning). See *id.* at 148; AMERICAN PSYCHIATRIC GLOSSARY, *supra* note 354, at 6, 18-19. A diagnosis of dementia is inappropriate, however, where all cognitive impairments occur while in a state of delirium. DSM-IV-TR, *supra* note 35, at 148; see also *infra* note 365.

qualify. In appropriate circumstances, all provide a predicate for a legal insanity defense inasmuch as they may produce effects that could satisfy the insanity standard.³⁶⁶ Moreover, all produce effects that, in appropriate circumstances, could satisfy the test for incompetence to stand trial.³⁶⁷ Yet, even if the effects caused by a defendant's mental illness are not severe enough to satisfy the legal insanity or incompetency to stand trial standards, they may still render him significantly less culpable and deterrable than the typical offender.³⁶⁸ As the Task Force Report noted, "all of these disorders," at least in their acute state, "are typically associated with delusions (fixed, clearly false beliefs), hallucinations (clearly erroneous perceptions of reality), extremely disorganized thinking, or very significant disruption of consciousness, memory and perception of the environment."³⁶⁹ A person with mental illness may experience distortions of reality that significantly reduce his ability to appreciate the wrongfulness of his conduct or to understand its consequences, such as when psychosis causes a person to mistakenly believe that his victim is attacking him or involves hallucinations commanding him to kill the victim.³⁷⁰ Similarly, an offender's symptomatology may create such gross irrationality that it significantly impairs his judgment at the time of the crime. A mother who kills her children, for example, due to her belief that the devil otherwise would transport them to hell and that by killing them, they will enter heaven, may be less culpable and deterrable even if she understands that her conduct is against the law.³⁷¹ In addition, in

³⁶⁶ Delirium is a disruption in conscious thought processes or perceptions, leading to a diminished awareness of one's surroundings and accompanied by cognitive changes not attributable to dementia. DSM-IV-TR, *supra* note 35, at 136-37; *see also supra* note 364.

³⁶⁷ *See supra* notes 300-310 and accompanying text.

³⁶⁸ *See supra* notes 292-299 and accompanying text.

³⁶⁹ *See* Task Force Report, *supra* note 37, at 670-72.

³⁷⁰ *Id.* at 670. Common symptoms of severe mental illness include "[d]isorganized thinking" and "deficits in sustaining attention and concentration." *Indiana v. Edwards*, 128 S. Ct. 2379, 2387 (2008) (quoting Brief for the Am. Psychiatric Ass'n and Am. Academy of Psychiatry and the Law as Amici Curiae in Support of Neither Party at 26, *Edwards*, 128 S. Ct. 2379 (No. 07-208)).

³⁷¹ *See* Task Force Report, *supra* note 37, at 671.

³⁷¹ *See id.*; cf. Melissa McNamara, *Andrea Yates Not Guilty*, CBS NEWS, July 26, 2006, <http://www.cbsnews.com/stories/2006/07/26/national/main1837248.shtml>.

Andrea Yates was found not guilty by reason of insanity Wednesday in the bathtub drownings of her [five] young children.

....

... [Her attorneys] said she suffered from severe postpartum psychosis and, in a delusional state, believed Satan was inside her and was trying to save [her children] from hell.

....

extreme cases, people suffering from these conditions may experience such cognitive impairment or impairment of mood that, even if they understand the nature and consequences of their acts and appreciate their wrongfulness, their ability to control their conduct is dramatically diminished.³⁷² Other conditions that may produce similar effects include drug- or alcohol-induced psychosis³⁷³ and post-traumatic stress disorder.³⁷⁴

The Task Force Report also recognizes that in rare instances, people suffering not from mental illnesses, but from certain personality disorders,³⁷⁵ experience psychotic-like symptoms at times of stress, which could produce similar impairments at the time of the offense, also reducing the culpability or deterrability of the offender.³⁷⁶ In general,

... [A] forensic psychiatrist ... testified ... that she did not know killing the children was wrong because she was trying to save them from hell.

Id.

³⁷² See Task Force Report, *supra* note 37, at 671.

³⁷³ DSM-IV-TR, *supra* note 35, at 338–39.

³⁷⁴ See *id.* at 463–64. Post-traumatic stress disorder (“PTSD”) develops from the sense of extreme fear, revulsion, or helplessness after facing a highly stressful or traumatic experience, for example military combat, torture, natural or manmade disaster, or being the victim of a disturbing or violent crime. See *id.* Those suffering from this condition deliberately avoid exposure to any stimuli that could cause “flashbacks” of the traumatic experience. See *id.* at 464. PTSD has been accepted as a predicate for the insanity defense. Winick, *Ambiguities*, *supra* note 289, at 596–97. PTSD is viewed as having a psychosocial, rather than a biological, etiology. See *id.* at 596. “Many studies have indicated that a high percentage (up to 80 percent) of patients with PTSD had one or two concurrent psychiatric diagnoses.” J. David Kinzie, *Post-Traumatic Stress Disorder*, in 1 COMPREHENSIVE TEXTBOOK OF PSYCHIATRY, *supra* note 35, at 1000, 1006. An individual with PTSD who commits a criminal act while under the delusion that he is responding appropriately in the context of a prior traumatic situation may be regarded as unable to appreciate the wrongfulness of his conduct. Winick, *Ambiguities*, *supra* note 289, at 597 n.257.

³⁷⁵ See *supra* note 297.

³⁷⁶ See Task Force Report, *supra* note 37, at 671. As stated in the Task Force Report:

Some conditions that are not considered [severe] might also, on rare occasions, become “severe” as that word is used in this Recommendation. For instance, some persons whose predominant diagnosis is a personality disorder ... may at times experience more significant dysfunction. Thus, people with borderline personality disorder can experience “psychotic-like symptoms ... during times of stress.”

Id. “Other ... diagnoses that might produce psychotic-like symptoms include Autistic Disorder and Asperger’s Disorder.” *Id.* at 671 n.22 (internal citations omitted). Both autistic disorder and Asperger’s disorder are types of pervasive developmental disorders. DSM-IV-TR, *supra* note 35, at 40. Identifiable characteristics of autistic disorder include markedly weak social interactive skills and limited personal interests. See *id.* at 70. Those diagnosed with Asperger’s disorder are limited to restricted, repetitive behavioral patterns. *Id.* at 80. Additionally, “people with borderline personality disorder can experience ‘psychotic-like symptoms ... during times of stress.’” *Id.* at 671 (quoting DSM-IV-TR, *supra* note 35, at 708).

however, many of the personality disorders, the paraphilias, and substance abuse will not produce such psychotic-like effects.³⁷⁷ As a result, the Task Force Report exempts from its recommendation offenders whose disorder is "manifested primarily by repeated criminal conduct or attributable solely to the acute effects of voluntary use of alcohol or other drugs."³⁷⁸ This language exempts offenders whose only diagnosis is antisocial personality disorder.³⁷⁹ It also exempts those whose impairment at the time of the offense is due to voluntary intoxication, unless their "substance abuse has caused organic brain disorders" or unless they "have other serious disorders that, in combination with the acute affects of substance abuse, significantly impaired appreciation or control at the time of the offense."³⁸⁰

In light of the foregoing analysis, those suffering from ASPD, the paraphilias, and voluntary intoxication should not qualify, in general, for an exemption from capital punishment under the Eighth Amendment.³⁸¹ ASPD is defined as "a pervasive pattern of disregard for, and violation of, the rights of others that begins in childhood or early adolescence and continues into adulthood."³⁸² The diagnosis is exclusively behavioral, requiring "fail[ure] to conform to social norms with respect to lawful behavior" as indicated by repeatedly performing "acts that are grounds for arrest."³⁸³ Individuals with this diagnosis are indifferent to the interests of others and are unable to empathize with them.³⁸⁴ Many people receiving capital punishment may qualify for this diagnosis. Many serial killers, for example, Ted Bundy, who was executed for murdering and mutilating multiple female college students, carried

³⁷⁷ See FINGARETTE & HASSE, *supra* note 309, at 112 (stating that "in cases of drug intoxication there is, of course, no 'mental disease'"); BRUCE J. WINICK, CIVIL COMMITMENT: A THERAPEUTIC JURISPRUDENCE MODEL 128 (2005) ("Although some people diagnosed with pedophilia . . . will experience serious difficulty in controlling their sexual urges, most will not."); Winick, *Ambiguities*, *supra* note 289, at 568 (ASPD); *id.* at 592 (paraphilias); Winick, *supra* note 305, at 523-24 (paraphilias); Bruce J. Winick et al., *Should Psychopathy Qualify for Preventive Outpatient Commitment?*, in 2 INTERNATIONAL HANDBOOK ON PSYCHOPATHIC DISORDERS AND THE LAW, *supra* note 296, at 61, 64-65 (ASPD).

³⁷⁸ Task Force Report, *supra* note 37, at 672.

³⁷⁹ *Id.*

³⁸⁰ *Id.*

³⁸¹ See *supra* notes 377-380 and accompanying text.

³⁸² DSM-IV-TR, *supra* note 35, at 701.

³⁸³ *Id.* at 702. The DSM-IV-TR cites, as illustrations and not limitations of such unlawful behaviors, "destroying property, harassing others, stealing, or pursuing illegal occupations." See *id.*

³⁸⁴ See *id.*

this diagnosis.³⁸⁵ Many mass murderers, for example Adolf Hitler and Saddam Hussein, also probably can be so diagnosed.³⁸⁶ Whether this "condition" should be considered an illness or a disability has been questioned.³⁸⁷ Regardless, the diagnosis alone does not include symptoms producing cognitive impairment of any kind or inability to control conduct.³⁸⁸ Although some have claimed that this condition is associated with various forms of brain damage, most research fails to confirm this hypothesis.³⁸⁹

Research shows that psychopathy,³⁹⁰ a somewhat wider term, is associated with some degree of cognitive impairment.³⁹¹ These impairments include "problems perceiving and processing abstract and emotional information, especially linguistic information."³⁹² Research also shows that psychopathy may impair volitional functioning.³⁹³ Such impairments include difficulty considering the likely consequence of one's actions, "inhibiting impulses, implementing plans, and learning from

³⁸⁵ See Rebecca Taylor LaBrode, *Etiology of the Psychopathic Serial Killer: An Analysis of Antisocial Personality Disorder, Psychopathy, and Serial Killer Personality and Crime Scene Characteristics*, in 7 BRIEF TREATMENT & CRISIS INTERVENTION 151, 154 (2007) ("[A]lmost all psychopaths have ASPD Serial killers such as Gary Ridgeway, Ed Gein, Ted Bundy, Jeffrey Dahmer, BTK (Dennis Rader), John Wayne Gacy, and Ed Kemper can all be identified as psychopaths.").

³⁸⁶ GARY G. FORREST, *CHEMICAL DEPENDENCY AND ANTISOCIAL PERSONALITY DISORDER: PSYCHOTHERAPY AND ASSESSMENT STRATEGIES* 137 (1994) ("Adolph Hitler and Saddam Hussein are perhaps the 'best' or worst examples of antisocial personality disorder in modern history.").

³⁸⁷ See Campbell, *supra* note 307, at 162–70 (addressing whether psychopathy should be viewed as a mental illness); Lloyd Fields, *Psychopathy, Other-Regarding Moral Beliefs, and Responsibility*, 3 PHIL. PSYCHIATRY & PSYCHOL. 261, 263–64 (1996) (advocating that those with psychopathy not be held legally or morally responsible for their antisocial behavior, but arguing that ASPD should be regarded as a personality disorder and not a mental illness); Winick, *Ambiguities*, *supra* note 289, at 554–70. *But see* Hart, *supra* note 296, at 164 (arguing that "psychopathy meets the legal criteria for mental disorder").

³⁸⁸ See Winick, *Ambiguities*, *supra* note 289, at 568–71; Winick et al., *supra* note 377, at 65.

³⁸⁹ See, e.g., Campbell, *supra* note 307, at 149–50 (discussing brain functioning); *id.* at 150–51 (discussing stimulation seeking); *id.* at 152–53 (discussing anxiety); Robert D. Hare et al., *Performance of Criminal Psychopaths on Selected Neuropsychological Tests*, 99 J. ABNORMAL PSYCHOL. 374, 377–78 (1990) (concluding that studies "offer no support for traditional brain-damage interpretations of psychopathy"); Hart, *supra* note 296, at 162 (noting research showing that ASPD sufferers have neurotransmitter and brain-structure abnormalities, but also acknowledging that "none of these factors is clearly pathognomonic" and "molecular genetic research has not identified genetic markers"); Winick, *Ambiguities*, *supra* note 289, at 560–62.

³⁹⁰ See *supra* note 296 (discussing ASPD as "colorblindness" to the feelings of others).

³⁹¹ Hart, *supra* note 296, at 164–65 (citing studies).

³⁹² *Id.* at 165.

³⁹³ *Id.*

punishment.”³⁹⁴ These cognitive and volitional deficits, however, are “restricted in nature or scope and moderate in severity.”³⁹⁵ ASPD or psychopathy does not impair those diagnosed with these conditions from understanding the potential consequences of their actions and alternatives.³⁹⁶ Moreover, they can “perceive alternative courses of action, make choices, and compensate for or overcome their volitional impairment.”³⁹⁷ Thus, whatever cognitive, behavioral, or volitional deficits those with ASPD or psychopathy may suffer from, it is not clear that those deficits materially contribute, in a way that the law should recognize, to the antisocial conduct these individuals repeatedly display.³⁹⁸ The law requires them to “use their intact cognitive skills and abilities to overcome their impairments” and resist their antisocial urges.³⁹⁹ These deficits should not constitute a basis for considering that their culpability or deterrability has been reduced. People suffering from colorblindness, for example, may have difficulty, when driving, determining the color of traffic signals.⁴⁰⁰ This deficit, even though physiological, however, would not be considered to reduce their culpability should they run a red light and cause an accident.⁴⁰¹ The law would expect them to overcome whatever deficit in color vision they had in this regard.⁴⁰² Similarly, even if there is a physiological basis such as a decrease of

³⁹⁴ *Id.*

³⁹⁵ *Id.* at 166.

³⁹⁶ See Hart, *supra* note 296, at 166.

³⁹⁷ *Id.*

³⁹⁸ See *id.*

³⁹⁹ See *id.*

⁴⁰⁰ See *id.*

⁴⁰¹ See Hart, *supra* note 296, at 166.

⁴⁰² See *id.* As Professor Stephen Morse has observed:

If an agent knows from experience that the urges are recurrent and that on previous occasions the agent has acted on those urges in a state of diminished rationality, the agent also knows during more rational moments that he is at risk for acting in such a state in the future. It is a citizen's duty in such circumstances to take all reasonable steps to prevent oneself from acting wrongly in an irrational state in the future, including drastically limiting one's life activities if such an intrusive step is necessary to prevent serious harm. If the agent does not take such steps, the agent may indeed be responsible, even if at the moment of acting he suffers from substantially compromised capacity for rationality. The situation would be analogous to the case of a person who suffered from a physical disorder that recurrently produced irrational mental states or blackouts during which the person caused harm, but who did not take sufficient steps to prevent such harm in the future. We would surely not excuse such an agent.

autonomic arousal,⁴⁰³ that causes those diagnosed with ASPD or psychopathy to lack empathy for others, this deficiency is not a sufficient ground for reduced culpability or deterrability.⁴⁰⁴ We would expect them to overcome this deficit and conform their conduct to the requirements of the law just as we would expect people with color vision deficits to overcome their difficulties when driving by taking appropriate precautions to prevent accidents.⁴⁰⁵ Those diagnosed with ASPD or psychopathy "may have problems fully appreciating the emotional meaning or consequences of their actions and using their emotions to make choices and plans," but the law considers that "they ought to know better than to commit serious crime and violence."⁴⁰⁶ Those with this diagnosis who commit heinous murders thus are worthy of retribution, and their conduct is sufficiently voluntary that it is subject to deterrence.

A diagnosis of paraphilia⁴⁰⁷ also does not produce diminution of culpability or deterrability sufficient to justify an exclusion from the death penalty under the Eighth Amendment. Certainly the most serious of these conditions is pedophilia, sexual excitement related to sexual activity with young children.⁴⁰⁸ When an individual with this diagnosis sexually assaults a child and then murders the victim, the crime is often viewed by juries as sufficiently heinous, atrocious, and cruel as to

⁴⁰³ See, e.g., J. Reid Meloy, *Antisocial Personality Disorder*, in GABBARD'S TREATMENTS OF PSYCHIATRIC DISORDERS 775, 777–78 (Glen O. Gabbard ed., 4th ed. 2007), available at <http://www.psychiatryonline.com/resourceTOC.aspx?resourceID=31> (postulating that "chronic cortical underarousal" may produce a diminution of anxiety and attachment in those with ASPD); Adrian Raine et al., *Reduced Prefrontal Gray Matter Volume and Reduced Autonomic Activity in Antisocial Personality Disorder*, 57 ARCHIVES GEN. PSYCHIATRY 119, 123–24 (2000) (finding that a subset of those with ASPD have low levels of autonomic arousal—i.e., heart rate, blood pressure, and skin conductance); see also Adrian Raine et al., *Reduced Prefrontal and Increased Subcortical Brain Functioning Assessed Using Positron Emission Tomography in Predatory and Effective Murders*, 16 BEHAV. SCI. & L. 319, 327–30 (1998); Snead, *supra* note 338, at 1294–95 (discussing neuroimaging studies showing diminished activity of the prefrontal cortex, and associating this with reduced impulsivity and aggression); Yaling Yang et al., *Brain Abnormalities in Antisocial Individuals: Implications for the Law*, 26 BEHAV. SCI. & L. 65, 74 (2008) (discussing brain imaging studies of a sample of patients with ASPD finding impaired prefrontal cortex, thereby reducing executive functioning and cognitive control, suggesting lowered impulse control for aggression).

⁴⁰⁴ See Morse, *supra* note 307, at 1602.

⁴⁰⁵ See Hart, *supra* note 296, at 166; Morse, *supra* note 307, at 1602; cf. Candeub, *supra* note 402, at 100–01 (applying a cost-benefit approach to determine when society expects actors to overcome defects in practical reasoning ability).

⁴⁰⁶ Hart, *supra* note 296, at 169.

⁴⁰⁷ See *supra* note 298.

⁴⁰⁸ See DSM-IV-TR, *supra* note 35, at 566.

deserve capital punishment.⁴⁰⁹ "[N]othing in the diagnostic criteria for pedophilia or . . . the other paraphilias suggests that individuals diagnosed with these disorders suffer from any cognitive impairment that affects their ability to understand the wrongfulness of their conduct or that renders them irrational . . . or unable to control their actions."⁴¹⁰ People with these diagnoses may experience strong urges to gratify their aberrant sexual desires, but nothing in the diagnostic criteria suggests that they are unable to avoid acting on their urges.⁴¹¹ The actions of sex offenders are "purposeful, planned, and goal-directed" and are in no way beyond their ability to control.⁴¹² The clinical literature indicates that sex offenders are able to exercise self control, and that teach-

⁴⁰⁹ The rape of a child alone, according to some commentators, "may present an even stronger emotional case for capital punishment than the ordinary murder." Douglas A. Berman & Stephanos Bibas, *Engaging Capital Emotions*, 102 NW. U. L. REV. COLLOQUY 355, 361 (2008), <http://www.law.northwestern.edu/lawreview/colloquy/2008/17/>.

Precisely because children are innocent and defenseless, adults feel special affection and solicitude and responsibility toward them. We are to protect them, so any exploitation—especially sexual violation—outrages that trust. Denouncing and punishing that violation in the strongest possible terms repudiates the breach of trust and tries to repair it.

Id. at 362. See generally Susan A. Bandes, *Child Rape, Moral Outrage, and the Death Penalty*, 103 NW. U. L. REV. COLLOQUY 17 (2008), <http://colloquy.law.northwestern.edu/main/2008/08/child-rape-mora.html> (considering the role of emotion in capital jurisprudence and discussing whether child rape should be a capital crime). It is thus no surprise that, if the child victim is killed subsequently, these strong emotions run even higher. They fan the flames of moral outrage and the human desire for retribution, thereby allowing juries to justify imposition of the ultimate punishment of death.

⁴¹⁰ Winick, *supra* note 305, at 523–24; see also SCHOPP, *supra* note 262, at 38; WINICK, *supra* note 377, at 127. Many pedophiles suffer from cognitive distortions. For example, they may suggest that their child victim seduced them and actually enjoyed the experience. See Gregory P. Ryan et al., *Cognitive Mediation Deficits and the Role of Coping Styles in Pedophile and Ephebophile Roman Catholic Clergy*, 64 J. CLINICAL PSYCHOL. 1, 13 (2008). A cognitive distortion, however, is not a cognitive impairment. The individual may misperceive the situation, but his reality testing remains intact. A psychological defense mechanism cannot be the basis for an excuse from criminal responsibility. See Stephen J. Morse, *Addiction, Genetics, and Criminal Responsibility*, LAW & CONTEMP. PROBS., Winter/Spring 2006, at 165, 206.

⁴¹¹ See DSM-IV-TR, *supra* note 35, at 566–77; Morse, *supra* note 307, at 1624 ("If the [paraphiliac's] motive for satisfying the desire is purely pleasure, then there is no threat and no compulsion, no matter how strong the desire is."); Stephen J. Morse, *Fear of Danger, Flight from Culpability*, 4 PSYCHOL. PUB. POL'Y & L. 250, 263 (1998) ("Sexual urges, including 'abnormal' sexual urges, and strong urges of other types are not irresistible forces that render human beings automatons." Arguments to the contrary are "conceptually and empirically unsupported."); Morse, *supra* note 308, at 1070–71; Winick, *supra* note 305, at 521–22, 524 n.118.

⁴¹² Winick, *supra* note 305, at 524; accord Robert F. Schopp, *Civil Commitment and Sexual Predators: Competence and Condemnation*, 4 PSYCHOL. PUB. POL'Y & L. 323, 341–42 (1998).

ing them to do so is the objective of sex offender treatment.⁴¹³ Their difficulty in controlling their sexual urges may make them appropriate candidates for civil commitment under sexually violent predator laws⁴¹⁴ but does not justify their exclusion from the death penalty under the Eighth Amendment. They are worthy of retribution, and because their actions are voluntary, they are subject to the deterrent effects of capital punishment.

A similar analysis applies to those who engage in criminal conduct while voluntarily intoxicated.⁴¹⁵ Alcohol consumption or substance abuse can reduce impulse control, and a high percentage of heinous murders may be committed under the influence of these intoxicants.⁴¹⁶ Nonetheless, even if an offender's substance abuse results from an addiction or genetic predisposition, and even if intoxication reduced his impulse control in the context of committing a capital crime, this does not reduce his culpability or deterrability sufficiently to exempt him from capital punishment.⁴¹⁷ Even though addiction to alcohol and illegal drugs can be considered an illness, the *abuse* of these substances is voluntary conduct.⁴¹⁸ An individual who commits a crime while intoxicated is therefore responsible for whatever diminution in cognitive or volitional capacity may have contributed to the crime, and thus for the crime itself.⁴¹⁹ Further, capital punishment serves the same deterrent function it does in other capital cases: it discourages a course of action—the abuse of alcohol or drugs—that is within the offender's power to control, even if his illness makes it difficult.⁴²⁰

⁴¹³ See, e.g., MARTIN E.P. SELIGMAN, WHAT YOU CAN CHANGE AND WHAT YOU CAN'T 163 (1993); Judith V. Becker & William D. Murphy, *What We Know and Do Not Know About Assessing and Treating Sex Offenders*, 4 PSYCHOL. PUB. POL'Y & L. 116, 128 (1998); Park Elliott Dietz, *Sex Offenses: Behavioral Aspects*, in 4 ENCYCLOPEDIA OF CRIME AND JUSTICE 1485, 1492 (Sanford H. Kadish ed., 1983); W.L. Marshall et al., *Present Status and Future Directions*, in HANDBOOK OF SEXUAL ASSAULT 389, 391 (W.L. Marshall et al., eds., 1990); William D. Pithers, *Relapse Prevention with Sexual Aggressors: A Method for Maintaining Therapeutic Gain and Enhancing External Supervision*, in HANDBOOK OF SEXUAL ASSAULT, *supra*, at 343, 354–55.

⁴¹⁴ See *Kansas v. Crane*, 534 U.S. 407, 414 (2002); *Kansas v. Hendricks*, 521 U.S. 346, 350–53 (1997). But see Douglas G. Smith, *The Constitutionality of Civil Commitment and the Requirement of Adequate Treatment*, 49 B.C. L. REV. 1383, 1424–28 (2008) (arguing that the practical drawbacks of commitment programs may justify simply increasing criminal penalties for sex offenders).

⁴¹⁵ See Task Force Report, *supra* note 37, at 672; Morse, *supra* note 410, at 185, 193.

⁴¹⁶ See Morse, *supra* note 410, at 165.

⁴¹⁷ See *id.* at 185, 193.

⁴¹⁸ See *id.* at 193.

⁴¹⁹ See *id.* at 193–95; see also *Powell v. Texas*, 392 U.S. 514, 550 (White, J., concurring in the result); Candeub, *supra* note 402, at 91.

⁴²⁰ See Task Force Report, *supra* note 37, at 672.

In the Eighth Amendment context, the key question is whether the individual's condition produces a functional impairment of cognition or volition that significantly reduces his culpability or deterrability.⁴²¹ The major mental illnesses can have these effects, but ASPD, psychopathy, and pedophilia do not, unless those diagnosed with these conditions also are given a co-occurring diagnosis of a major mental illness.⁴²² Although the immediate effects of intoxication may impair cognition and impulse control, if the individual chose voluntarily to become intoxicated, he is generally responsible for conduct taken while under the influence of the substances he has consumed.⁴²³ In essence, he should have known better and could have refrained, and therefore he is blameworthy for his conduct and subject to deterrence.⁴²⁴

Expert clinical testimony may assist in understanding the offender's illness and the degree to which it probably produced certain functional impairments that were related to the crime. Ultimately, however, the concepts of culpability and deterrability have a significant normative content, and the final determination is a legal one. These are essentially value questions, and society tends to believe that people should take precautions to overcome their deficits when it is possible and within their control, and holds them responsible when they fail to do so.⁴²⁵ Based on present knowledge of mental illness, unless the offender is diagnosed with one of the major mental illnesses, he rarely, if at all, should qualify for the Eighth Amendment proportionality exemption from capital punishment.⁴²⁶ When the offender does suffer from one of the major mental illnesses, clinical testimony should assist the trier of fact to determine whether, at the time of the offense, the effects of the offender's illness so diminished his culpability and deterrability as to render the death penalty a disproportionate punishment.

As our understanding of the nature and causes of mental illness advances over time, new knowledge may change the way we view some of the disorders and whether we consider those who suffer from them to have diminished responsibility for their conduct.⁴²⁷ Moreover, social

⁴²¹ See *Roper*, 543 U.S. at 569-75; *Atkins*, 536 U.S. at 317-21.

⁴²² See Task Force Report, *supra* note 37, at 670-72.

⁴²³ See *supra* notes 415-422 and accompanying text.

⁴²⁴ See *supra* notes 415-422 and accompanying text.

⁴²⁵ See *Morse*, *supra* note 307, at 1602.

⁴²⁶ See Task Force Report, *supra* note 37, at 670-72.

⁴²⁷ See generally Sasso, *supra* note 263 (discussing recent neuropsychological research purporting to show a relationship between neurological abnormality and capital crime in certain offenders); Sneed, *supra* note 338 (describing and critiquing neuroimaging studies seeking to discredit retributive theories of criminal punishment).

norms concerning the concepts of culpability and deterrability remain in flux. The question of the extent to which reduced culpability and deterrability would render capital punishment a disproportionate penalty in violation of the Eighth Amendment is an essentially normative question, and social views on this question will inevitably change as our understanding concerning the nature and causes of mental illness changes. Indeed, the Eighth Amendment, informed as it is by the "evolving standards of decency that mark the progress of a maturing society,"⁴²⁸ embraces a dynamic conception of proportionality and of cruel and unusual punishment.

Clear social consensus on which mental illnesses should exempt an offender from capital punishment and in what circumstances is probably lacking at this point in time. Values are largely shaped by often sensational media portrayals of mental illness and by stereotypes and irrational prejudice against those with mental illness, which Michael Perlin has described as "sanism."⁴²⁹ These social attitudes will change over time as we increasingly come to understand many mental illnesses as *medical* illnesses producing effects that are outside the individual's control, rather than being due to moral depravity. What constitutes sufficiently severe mental illness to disqualify an offender from capital punishment may start as a small category, but one that expands over time as social norms in this area change. If the Supreme Court extends *Atkins* and *Roper* to serious mental illness, as argued here, then the process of determining this issue on a case-by-case basis will constitute a form of structural due process,⁴³⁰ allowing us to monitor and measure evolving social norms in this area. In addition, the determination of this issue in individual capital cases will provide a series of morality plays that themselves will shape evolving community standards on the propriety of the death penalty in this context.⁴³¹

⁴²⁸ *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion).

⁴²⁹ See Michael L. Perlin, "Half-Wracked Prejudice Leaped Forth": Sanism, Pretextuality, and Why and How Mental Disability Law Developed as It Did, 10 J. CONTEMP. LEGAL ISSUES 3, 14-18 (1999); Michael L. Perlin, On "Sanism," 46 SMU L. REV. 373, 393-97 (1992) (listing ten commonplace sanist myths, including that the mentally ill are lazy and less than human, that they are presumably too incompetent to make independent decisions regarding their own lives, and that they constitute the most dangerous breed of criminal defendant); *id.* at 400-04 (describing how sanism biases judges against mentally ill defendants).

⁴³⁰ See Laurence H. Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269, 294-96 (1975).

⁴³¹ Cf. *Kennedy*, 128 S. Ct. at 2672-73 (Alito, J., dissenting) (arguing that an evolving concept of cruel and unusual punishment requires that we allow freedom for the standard to evolve).

B. *How Should Disqualification from Capital Punishment for Mental Illness Be Determined Procedurally?*

Assuming that the U.S. Supreme Court extends the Eighth Amendment ban decreed in *Atkins* and *Roper* to at least some offenders with severe mental illness, the Court must also decide how this case-by-case determination should be made.⁴³² Should it be determined by the trial judge at a pretrial hearing, by a special jury convened for purposes of making such a pretrial determination, by the capital jury at the penalty phase, or by some combination of these? In every jurisdiction allowing for death penalty sentences, capital cases are bifurcated trials in which the trial on guilt or innocence is followed, for those who are convicted, by a separate penalty phase at which the same jury hears evidence concerning aggravating and mitigating circumstances and is asked to recommend life or death.⁴³³

In the present context, a pretrial determination of disproportionality would remove the death penalty from consideration, and the case would proceed as a non-capital homicide case.⁴³⁴ In the alternative, the Eighth Amendment issue could be folded into the penalty phase, and the capital jury could be asked to make the determination, either at the outset of the penalty trial or as part of its weighing of aggravating and mitigating circumstances.⁴³⁵

The Supreme Court's recent proportionality jurisprudence does not dictate a preferred procedural method.⁴³⁶ When the Court in *Atkins* declared the death penalty for those with mental retardation unconstitutional, it declined to specify procedures for determining whether a particular offender was mentally retarded, preferring to leave this procedural question to the states.⁴³⁷ In designing the process for making the mental illness death penalty determination, those procedures should be followed that would best effectuate the underlying Eighth Amendment values of accuracy and proportionality.⁴³⁸ In addi-

⁴³² Portions of this subpart originally appeared in Bruce J. Winick, *Determining When Severe Mental Illness Should Disqualify a Defendant from Capital Punishment*, in *MENTAL DISORDER AND CRIMINAL LAW: RESPONSIBILITY, PUNISHMENT, AND COMPETENCE*, *supra* note 296, at 45 (addressing procedural issues in making the capital punishment mental illness exemption determination).

⁴³³ See Bowers et al., *supra* note 90, at 425-26.

⁴³⁴ See Winick, *supra* note 432, at 47.

⁴³⁵ See *id.*

⁴³⁶ See *Atkins*, 536 U.S. at 317.

⁴³⁷ See *id.*

⁴³⁸ See Winick, *supra* note 432, at 47-48.

tion, the process should take into account considerations of efficiency, cost, and therapeutic jurisprudence.⁴³⁹

A pretrial determination by the trial judge best serves these values and has been the general approach adopted by the states in the wake of *Atkins* for determination of the mental retardation exclusion issue.⁴⁴⁰ The Supreme Court has frequently noted that "death is different," requiring heightened procedural protections to minimize the risk of erroneous execution.⁴⁴¹ Accuracy is critical in that regard. For several reasons, having the issue decided pretrial by the trial judge, rather than at the penalty phase by the capital jury, would increase the accuracy of the determination made.⁴⁴² Capital jury selection procedures bias resulting juries in favor of capital punishment,⁴⁴³ and empirical research has

⁴³⁹ See *id.* Therapeutic jurisprudence is an interdisciplinary field of legal research and law reform that focuses attention on the psychological well-being of those affected by law, legal processes, and how the law is applied. See *generally* JUDGING IN A THERAPEUTIC KEY: THERAPEUTIC JURISPRUDENCE AND THE COURTS (Bruce J. Winick & David B. Wexler eds., 2003); LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE (David B. Wexler & Bruce J. Winick eds., 1997); PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION (Dennis P. Stolle, David B. Wexler & Bruce J. Winick eds., 2000); WINICK, *supra* note 377 (offering a therapeutic jurisprudence model for civil commitment).

⁴⁴⁰ See James W. Ellis, *Mental Retardation and the Death Penalty: A Guide to State Legislative Issues*, 27 MENTAL & PHYSICAL DISABILITY L. REP. 11, 15 (2003); see also Death Penalty Info. Ctr., States That Have Changed Their Statutes to Comply with the Supreme Court's Decision in *Atkins v. Virginia*, <http://www.deathpenaltyinfo.org/states-have-changed-their-statutes-comply-supreme-courts-decision-atkins-v-virginia> (last visited Mar. 18, 2009) (showing a table of states that have changed death penalty statutes after *Atkins*).

⁴⁴¹ See, e.g., *California v. Ramos*, 463 U.S. 992, 998–99 (1983); *Eddings v. Oklahoma*, 455 U.S. 104, 111 (1982); *Beck v. Alabama*, 447 U.S. 625, 637–38 (1980); *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (plurality opinion); *Coker v. Georgia*, 433 U.S. 584, 598 (1977) (plurality opinion); *Gardner v. Florida*, 430 U.S. 349, 357–58 (1977) (plurality opinion); *Woodson v. North Carolina*, 428 U.S. 280, 295–96 (1976) (Stewart, Powell & Stevens, JJ., announcing the judgment of the Court); *Gregg v. Georgia*, 428 U.S. 153, 187 (1976) (3-3-1-2 decision) (Stewart, Powell & Stevens, JJ., announcing the judgment of the Court).

⁴⁴² See *infra* notes 443–448 and accompanying text.

⁴⁴³ Capital juries are subjected to an elaborate *voir dire* process that allows prosecutors to exclude all or virtually all venirepersons expressing opposition to capital punishment. See Susan D. Rozelle, *The Principled Executioner: Capital Juries' Bias and the Benefits of True Bifurcation*, 38 ARIZ. ST. L.J. 769, 775–93 (2006); Marla Sandys & Scott McClelland, *Stacking the Deck for Guilt and Death: The Failure of Death Qualification to Ensure Impartiality*, in CAPITAL PUNISHMENT, *supra* note 90, at 385, 385–408; Winick, *supra* note 69, at 21–39. This produces capital juries that are more likely to convict and impose death than juries as a whole. See Mike Allen et al., *Impact of Juror Attitudes About the Death Penalty on Juror Evaluations of Guilt and Punishment: A Meta-Analysis*, 22 L. & HUM. BEHAV. 715, 722–26 (1998); William J. Bowers et al., *The Decision Maker Matters: An Empirical Examination of the Way the Role of the Judge and the Jury Influence Death Penalty Decision-Making*, 63 WASH. & LEE L. REV. 931, 960, 972 (2006); William J. Bowers & Wanda D. Foglia, *Still Singularly Agonizing: Law's Failure to Purge Arbitrariness from Capital Sentencing*, 39 CRIM. L. BULL. 51, 60–66 (2003); Robert Fitzgerald & Phoebe C. Ellsworth, *Due Process vs. Crime Control*, 8 L. & HUM. BEHAV. 31, 41–48

demonstrated that capital juries also are biased by having heard and determined the facts of the heinous murder.⁴⁴⁴ Such juries have been shown to apply a presumption in favor of death⁴⁴⁵ and to misunderstand or disregard their role with regard to mitigating circumstances.⁴⁴⁶ Juries also may misunderstand clinical evidence concerning the offender's mental illness and its impact on his functioning at the time of the offense, may incorrectly equate mental illness with dangerousness, and may incorrectly think that the death penalty is the only way to protect the community from the defendant's future violence.⁴⁴⁷ The trial judge is presumptively less subject to these biases and misconceptions, and better able to understand the clinical testimony and decide the legal issue in question.⁴⁴⁸ As a result, Eighth Amendment values would be furthered by having the issue determined at a pretrial judicial hearing, and frustrated by allowing the issue to be determined by the capital jury.

The Eighth Amendment value of avoiding disproportionate punishment also factors into the question of what procedures should be used to make the mental illness exclusion determination.⁴⁴⁹ The Supreme Court, in assessing the constitutionality of capital punishment, has frequently emphasized the importance of jury behavior in capital

(1984); Craig Haney et al., "Modern" Death Qualification: New Data on Its Biasing Effects, 18 L. & HUM. BEHAV. 619, 631 (1994); Michael L. Neises & Ronald C. Dillehay, *Death Qualification and Conviction Proneness: Witt and Witherspoon Compared*, 5 BEHAV. SCI. & L. 479, 490-91 (1987); Rozelle, *supra*, at 775-93; Winick, *supra* note 69, at 21-39. Moreover, the elaborate *voir dire* inquiry into attitudes on capital punishment and the exercise of challenges themselves bias the capital jury in favor of death and perhaps in favor of guilt. See Craig Haney, *Juries and the Death Penalty: Readdressing the Witherspoon Question*, 26 CRIME & DELINQUENCY 512, 521-25 (1980); Craig Haney, *On the Selection of Capital Juries: The Biasing Effects of the Death-Qualification Process*, 8 L. & HUM. BEHAV. 121, 128-32 (1984).

⁴⁴⁴ See Ursula Bentele & William J. Bowers, *How Jurors Decide on Death: Guilt Is Overwhelming; Aggravation Requires Death; and Mitigation Is No Excuse*, 66 BROOK. L. REV. 1011, 1019-31 (2001); William J. Bowers et al., *Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-Trial Experience, and Premature Decision Making*, 83 CORNELL L. REV. 1476, 1515-29 (1998); Bowers et al., *supra* note 90, at 426-32; Bowers & Foglia, *supra* note 443, at 56-58; Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 CORNELL L. REV. 1, 12 (1993).

⁴⁴⁵ See Bowers et al., *supra* note 90, at 427, 431-32, 440.

⁴⁴⁶ See *id.* at 437-38, 440.

⁴⁴⁷ See Perlin, *supra* note 227, at 274; Slobogin, *supra* note 46, ¶¶ 19-23; Slobogin, *supra* note 47, at 305, 313; see also *supra* note 227 and accompanying text.

⁴⁴⁸ See Winick, *supra* note 432, at 53. Trial judges are much more likely than juries to understand and correctly apply complex legal standards, to be neutral and due-process oriented, to understand expert testimony, and to be free of the biasing effects of the death-qualification process that juries alone are subjected to. See *id.* at 52-53.

⁴⁴⁹ See *id.* at 65-67.

sentencing as an indication of community values, and thus of what constitutes a proportionate punishment.⁴⁵⁰ Although not as significant as legislative behavior in this regard, jury behavior is, and has been treated by the Court as, important evidence of whether evolving standards of decency have rejected capital punishment as an appropriate criminal sanction.⁴⁵¹ At first glance, this consideration may support having the jury decide the mental illness death penalty exemption question because jury behavior could provide evidence of community attitudes on the continued acceptability of capital punishment for this category of offenders.⁴⁵² Because juries reflect the "conscience of the community" more than do judges, one might argue that the jury should determine whether an offender should be exempt from capital punishment.⁴⁵³

Justice Breyer made a similar argument in 2002 when the Supreme Court invalidated judicial fact finding in capital cases in *Ring v. Arizona*.⁴⁵⁴ Although the majority relied on the Sixth Amendment right to jury trial, Justice Breyer, in a concurring opinion, relied instead on the Eighth Amendment's emphasis on the jury's role as the "conscience of the community."⁴⁵⁵ The main purpose of capital punishment is retribution, Justice Breyer asserted, and jury sentencing in such cases is essential because juries have a "comparative advantage" over judges in determining, in a particular case, whether a death sentence would serve that end.⁴⁵⁶ This advantage, according to Justice Breyer, stems from juries' superior ability to "reflect more accurately the composition and experiences of the community as a whole," thereby making them a better barometer of "the community's moral sensibility."⁴⁵⁷

Justice Breyer's argument, however, is vulnerable to the realities of jury behavior, which make leaving the mental illness exclusion determination to the jury less serving of Eighth Amendment values.⁴⁵⁸ First,

⁴⁵⁰ See, e.g., *Enmund v. Florida*, 458 U.S. 782, 794–95 (1982); *Coker*, 433 U.S. at 596–97 (plurality opinion); *Woodson*, 428 U.S. at 293 (Stewart, Powell & Stevens, JJ., announcing the judgment of the Court).

⁴⁵¹ See *Enmund*, 458 U.S. at 794; *Coker*, 433 U.S. at 596–97; *Woodson*, 428 U.S. at 293 (Stewart, Powell & Stevens, JJ., announcing the judgment of the Court).

⁴⁵² See *Enmund*, 458 U.S. at 794; *Coker*, 433 U.S. at 596–97; *Woodson*, 428 U.S. at 293 (Stewart, Powell & Stevens, JJ., announcing the judgment of the Court).

⁴⁵³ See *Enmund*, 458 U.S. at 794; *Coker*, 433 U.S. at 596–97; *Woodson*, 428 U.S. at 293 (Stewart, Powell & Stevens, JJ., announcing the judgment of the Court).

⁴⁵⁴ See 536 U.S. 584, 614–16 (2002) (Breyer, J., concurring).

⁴⁵⁵ See *id.* at 615–16 (quoting *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968)).

⁴⁵⁶ See *id.* at 614.

⁴⁵⁷ See *id.* at 615–16 (quoting *Spaziano v. Florida*, 468 U.S. 447, 481, 486 (1984)).

⁴⁵⁸ See Winick, *supra* note 432, at 65–68; see also *supra* notes 443–448 and accompanying text.

Justice Breyer's analysis is undermined by the biased death penalty qualification process that characterizes American jury selection practices in capital cases.⁴⁵⁹ These practices produce juries more willing to impose death and to favor conviction than juries as a whole.⁴⁶⁰ As a result, these jury selection practices result in juries that do not reflect the conscience of the whole community.⁴⁶¹ Instead, they reflect "community sentiment purged of its reluctance to impose a death sentence."⁴⁶² The systematic exclusion from capital juries of the substantial percentage of citizens who oppose the death penalty "biases jury composition, resulting in a distorted exaggeration of the community's willingness to impose the death penalty."⁴⁶³ Were the capital jury assigned the task of determining whether a defendant's mental illness at the time of the offense should exempt him from capital punishment, its determination would provide only a distorted picture of community attitudes on the appropriateness of the death penalty in this context.⁴⁶⁴

In addition, empirical studies demonstrate that capital juries also are biased by having already heard and determined the heinous facts of the crime,⁴⁶⁵ frequently misunderstand or disregard their role in making death penalty decisions,⁴⁶⁶ reject or diminish the importance of mitigating circumstances,⁴⁶⁷ and misunderstand or ignore the jury instructions they are given.⁴⁶⁸ These tendencies compromise the jury's ability to accurately reflect the "conscience of the community" on capital punishment. Because judges are not subject to the distorting influences of the capital jury selection process or to these other biases or misconceptions, their decision on the mental illness death penalty exclusion question actually may more accurately reflect the moral attitudes of the community.⁴⁶⁹

In any event, under the procedure envisioned here, the trial judge's role in the death penalty exemption question would be limited to pretrial motions.⁴⁷⁰ Should the judge deny such a motion, the capital

⁴⁵⁹ See *supra* note 443 and accompanying text.

⁴⁶⁰ See *supra* note 443 and accompanying text.

⁴⁶¹ See Winick, *supra* note 69, at 80-81.

⁴⁶² *Id.* at 80.

⁴⁶³ *Id.* at 81.

⁴⁶⁴ See Winick, *supra* note 432, at 66.

⁴⁶⁵ See *supra* note 444 and accompanying text.

⁴⁶⁶ See Bowers et al., *supra* note 443, at 962-63.

⁴⁶⁷ See Bowers et al., *supra* note 90, at 437-38, 440.

⁴⁶⁸ See *id.* at 437-40; Eisenberg & Wells, *supra* note 444, at 10-12.

⁴⁶⁹ See Winick, *supra* note 432, at 66-67.

⁴⁷⁰ See *id.* at 67.

jury, at the penalty phase that would follow any verdict of guilt, would also have the opportunity to determine whether the defendant deserved the death penalty. In making this determination, the capital jury would thereby reflect the "conscience of the community" to the extent that it would be able to.

The Eighth Amendment values of accuracy and proportionality coalesce with considerations of efficiency, cost, and therapeutic jurisprudence to support assigning this task to the trial judge at a pretrial hearing.⁴⁷¹ A pretrial judicial determination would be considerably more efficient and less costly than having the issue resolved by the capital jury at the penalty phase. Capital trials are much more expensive than non-capital trials.⁴⁷² Thus, determining the exclusion question early on can avoid much needless trial time and associated cost. Considerations of therapeutic jurisprudence also justify resolving the issue at an early point.⁴⁷³ Because capital trials are significantly more stressful than non-capital trials, determining the issue at an early point would avoid much stress for the trial judge, the attorneys, the jury, and the defendant. Moreover, although victims' families often seek the death penalty, rather than providing closure and enabling them to come to terms with their loss, capital trials and the long delays between capital sentencing and execution may actually prevent their wounds from healing.⁴⁷⁴ Should the death penalty be removed from consideration at an early time based on the defendant's mental illness at the time of the offense, this may better allow family members to come to terms with their loss, perhaps reducing their anger at the offender and permitting them to deal more effectively with their grief and sadness.

⁴⁷¹ See *id.* at 57–65.

⁴⁷² See *United States v. Nelson*, 419 F. Supp. 2d 891, 893 (E.D. La. 2006); *State v. Flores*, 93 P.3d 1264, 1269 (N.M. 2004); Death Penalty Info. Ctr., Costs of the Death Penalty, <http://www.deathpenaltyinfo.org/article.php?did=108> (last visited Mar. 18, 2009).

⁴⁷³ See Winick, *supra* note 432, at 60–65; see also *supra* note 439.

⁴⁷⁴ See James R. Acker & Jeanna Marie Mastrocinque, *Causing Death and Sustaining Life: The Law, Capital Punishment, and Criminal Homicide Victims' Survivors*, in *WOUNDS THAT DO NOT BIND: VICTIM-BASED PERSPECTIVES ON THE DEATH PENALTY* 141, 154 (James R. Acker & David R. Karp eds., 2006); Marilyn P. Armour, *Journey of Family Members of Homicide Victims: A Qualitative Study of Their Posthomicide Experience*, 72 AM. J. ORTHOPSYCHIATRY 372, 376 (2002); Anthony Lewis, *Panel Discussion: The Death of Fairness? Counsel Competency and Due Process in Death Penalty Cases*, 31 HOUS. L. REV. 1105, 1196 (1994); Ronald J. Tabak & J. Mark Lane, *The Execution of Injustice: A Cost and Lack-of-Benefit Analysis of the Death Penalty*, 23 LOY. L.A. L. REV. 59, 132 (1989); Margaret Vandiver, *The Impact of the Death Penalty on the Families of Homicide Victims and of Condemned Prisoners*, in *CAPITAL PUNISHMENT*, *supra* note 90, at 613, 621.

Thus, a variety of considerations favor having the death penalty exclusion issue determined pretrial by the trial judge. The determination involves understanding complex clinical testimony and reaching conclusions that are largely legal and constitutional in nature.⁴⁷⁵ Trial judges are accustomed to making such mixed law and fact determinations in a variety of pretrial hearing contexts.⁴⁷⁶ They presumably would be more neutral decision makers than capital juries and less subject to either the biasing effects of capital jury selection and trial processes or the misunderstandings and irrational prejudice against those with mental illness that many jurors would have.⁴⁷⁷ Because of the high social disutility of erroneous execution, and the economic and psychological value of avoiding inevitably lengthy capital trials and penalty trials that may be unnecessary, the issue should be resolved on pretrial motion by the trial judge.⁴⁷⁸

CONCLUSION

The Eighth Amendment's ban on cruel and unusual punishments, as presently construed, does not prohibit the death penalty outright.⁴⁷⁹ Although the Eighth Amendment is dynamic, and may some day be read to ban capital punishment altogether, the U.S. Supreme Court is not yet ready to conclude that contemporary standards have rejected the extreme penalty, rendering it cruel and unusual.⁴⁸⁰ The Court has acknowledged, however, that death is different; it is "a punishment different from all other sanctions in kind rather than degree."⁴⁸¹ This basic conception of the uniqueness of capital punishment has animated the Court's jurisprudence in this area. For example, the Court has insisted that more in the way of due process is required to impose the death

⁴⁷⁵ See Winick, *supra* note 432, at 48.

⁴⁷⁶ See *id.*

⁴⁷⁷ See *supra* notes 442-448 and accompanying text.

⁴⁷⁸ See Winick, *supra* note 432, at 48-67.

⁴⁷⁹ See *Jurek v. Texas*, 428 U.S. 262, 268 (1976) (Stewart, Powell & Stevens, JJ., announcing the judgment of the Court); *Proffitt v. Florida*, 428 U.S. 242, 247 (1976) (Stewart, Powell & Stevens, JJ., announcing the judgment of the Court); *Gregg v. Georgia*, 428 U.S. 153, 187 (1976) (Stewart, Powell & Stevens, JJ., announcing the judgment of the Court).

⁴⁸⁰ The Supreme Court's Eighth Amendment jurisprudence would permit reconsideration of the constitutional question should society reject capital punishment in the future. See *Gregg*, 428 U.S. at 173 (Stewart, Powell & Stevens, JJ., announcing the judgment of the Court) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

⁴⁸¹ *Woodson v. North Carolina*, 428 U.S. 280, 303-04 (1976) (Stewart, Powell & Stevens, JJ., announcing the judgment of the Court); *accord Walton v. Arizona*, 497 U.S. 639, 682 (1990) (Blackmun, J., dissenting); *Clemons v. Mississippi*, 494 U.S. 738, 750 n.4 (1990); *Furman v. Georgia*, 408 U.S. 238, 306 (1972) (Stewart, J., concurring).

penalty than any other criminal sentence.⁴⁸² In addition, this basic conception of the uniqueness of death has led the Court to invoke the Eighth Amendment to limit the ability of legislatures to impose death for certain offenses where the penalty would be disproportionate to the offense,⁴⁸³ or to require a mandatory death sentence upon conviction of certain crimes.⁴⁸⁴ Thus, the Court's practice since the mid-1970s has been to recognize the basic constitutionality of the death penalty, but to place procedural limits on how the death penalty determination is made and substantive limits on the offenses for which it may be imposed.

The Court's decisions in *Atkins v. Virginia* and in *Roper v. Simmons*, however, set a new course.⁴⁸⁵ The Court now is willing to use the Eighth Amendment to invalidate death sentences when imposed on certain classes of offenders—those with mental retardation and who were juveniles at the time of the offense.⁴⁸⁶ For these two categories of offenders, capital punishment would be cruel and unusual because it would constitute a disproportionate penalty in view of the diminished culpability and deterrability of such offenders.⁴⁸⁷ This Article has analyzed this emerging conception of proportionality under the Eighth Amendment and has argued that it can and should be extended to offenders with severe mental illness at the time of the offense. At least some (although by no means all) offenders suffering from severe mental illness, like those with mental retardation and juveniles, have sufficiently diminished culpability and deterrability at the time of the offense to render capital punishment a disproportionate penalty under the Eighth Amendment. In the context of mental illness, unlike in that of mental retardation and juvenile status, there is no legislative trend in the direction of abol-

⁴⁸² See *supra* note 441 and accompanying text.

⁴⁸³ See *Enmund v. Florida*, 458 U.S. 782, 789–801 (1982) (stating that it is unconstitutional to impose death for conviction for felony murder when defendant neither committed the murder himself, attempted to do so, nor intended to take life); *Coker v. Georgia*, 433 U.S. 584, 599–600 (1977) (plurality opinion) (stating that capital punishment is unconstitutional for crime of rape of adult woman).

⁴⁸⁴ See *Roberts v. Louisiana*, 431 U.S. 633, 636 (1977) (per curiam) (holding it unconstitutional to require the death penalty for the intentional killing of a firefighter or peace officer engaged in performance of duties); *Woodson*, 428 U.S. at 304 (Stewart, Powell & Stevens, JJ., announcing the judgment of the Court) (“[T]he fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.” (citation omitted)).

⁴⁸⁵ See *Roper v. Simmons*, 543 U.S. 551, 578 (2005); *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

⁴⁸⁶ See *Roper*, 543 U.S. at 578; *Atkins*, 536 U.S. at 321.

⁴⁸⁷ See *Roper*, 543 U.S. at 568–75; *Atkins*, 536 U.S. at 317–21.

ishing capital punishment, and there is only the beginning of other objective indicia that contemporary social standards would reject the death penalty. Nonetheless, the Court's Eighth Amendment jurisprudence, properly understood, would allow the Court to reach this conclusion based upon its own independent proportionality analysis, even in the absence of evidence of changed social norms. In at least some cases, severe mental illness diminishes culpability and deterrability in ways that are quite parallel to the effects of mental retardation and juvenile status. Severe mental illness, therefore, is the next frontier for the Court's new Eighth Amendment jurisprudence.

The effects of severe mental illness may negate a defendant's criminal responsibility altogether. In such instances, the overwhelming majority of jurisdictions recognize an insanity defense. Yet when that defense is unavailable or has been unsuccessfully asserted, mental illness may so diminish responsibility that imposition of the death penalty would be inappropriate. All of the most knowledgeable leading organizations and professional associations have recommended that legislatures exempt from capital punishment those with such severe mental illness at the time of the offense. But such a mental illness exemption also should be recognized as a constitutional matter. Imposing capital punishment on those whose mental illness significantly diminished their blameworthiness would insufficiently achieve the goals of retribution and deterrence that underlie the death penalty. In such instances, execution would be a disproportionate penalty. It would constitute an affront to human dignity. It should be banned as cruel and unusual punishment.

Unlike for mental retardation and juvenile status, however, the determination of when the death penalty would be disproportionate to the offender's culpability and deterrability should be made on a case-by-case basis.⁴⁸⁸ The effects of mental illness are quite variable, and not all mental illnesses will diminish responsibility sufficiently to satisfy the Eighth Amendment standard.⁴⁸⁹ The major mental illnesses sometimes will have these effects, but the personality disorders, the paraphilias, and voluntary intoxication should not qualify. Determination of when an offender's mental illness at the time of the offense should prevent capital punishment will require a factual determination based upon clinical testimony. Such a determination should be made pretrial by the trial judge, rather than by the capital jury either before trial or during the penalty phase. Capital jury selection processes would bias the capital

⁴⁸⁸ See Task Force Report, *supra* note 37, at 671.

⁴⁸⁹ See *id.*

jury's ability to determine the mental illness question fairly and impartially, as would the fact that the jury already will have found the defendant guilty of a heinous murder and may harbor prejudice against those with mental illness. Trial judges are less subject to such biases and are better able to make the essentially legal determinations. Moreover, having the trial judge decide the issue pretrial would be considerably less expensive and psychologically damaging to all participants in the capital trial process, including the family of the victim, compared to having the issue determined post-conviction by the capital jury. Having the trial judge determine the issue pretrial also would be more consonant with Eighth Amendment values. It would promote accuracy in the determination of the critical life or death question, and in view of existing capital jury selection practices, would produce decisions that more accurately reflect the conscience of the community on the death penalty question.

If severe mental illness is the next frontier of the Court's evolving Eighth Amendment jurisprudence, what frontiers will follow? As our understanding of the brain and human behavior progresses, we may come to regard other conditions or impairments as justifying a diminished responsibility excuse from capital punishment. Indeed, there may come a day when the Court reaches the conclusion that, compared to life imprisonment without the possibility of parole, capital punishment fails to produce sufficient retribution and deterrence to be justified in a manner consistent with the Eighth Amendment. The Court is likely to look to evolving social norms on the question of whether capital punishment has itself become a disproportionate penalty. Our faith in the accuracy of criminal adjudications has been shaken by DNA exonerations that increasingly have occurred, including for offenders on death row.⁴⁹⁰ New Jersey⁴⁹¹ and New Mexico⁴⁹² have recently repealed their death penalty statutes, and juries are imposing death less frequently.⁴⁹³ Although principles of democracy and federalism may incline the Court to leave to the states the basic question of the death penalty's ac-

⁴⁹⁰ See Adam Liptak, *Consensus on Counting the Innocent: We Can't*, N.Y. TIMES, Mar. 25, 2008, at A14; see also DEATH PENALTY INFO. CTR., *supra* note 221 (showing that there have been 130 death row exonerations in the United States since 1973).

⁴⁹¹ Jeremy W. Peters, *Corzine Signs Bill Ending Executions, Then Commutes Sentences of 8*, N.Y. TIMES, Dec. 18, 2007, at B3.

⁴⁹² Trip Jennings, *Richardson Abolishes N.M. Death Penalty*, NEW MEX. INDEP., Mar. 18, 2009, <http://newmexicoindependent.com/22487/guv-abolishes-death-penalty-in-nm>.

⁴⁹³ Solomon More, *Executions and Death Sentences in United States Dropped in 2008*, N.Y. TIMES, Dec. 11, 2008, at A42 (stating that 111 people were sentenced to death in 2008, the lowest in three decades); *Texas: Death Sentences Drop*, N.Y. TIMES, Dec. 5, 2008, at A24.

ceptability, its emerging conception of proportionality could allow a future Court to respond to evolving values by concluding that it has become *per se* cruel and unusual.