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I. INTRODUCTION

A significant chapter in the Supreme Court's death penalty jurisprudence was begun in 2002, when the Court in *Atkins v. Virginia*¹ held that capital punishment could not be imposed on those with mental retardation consistent with the Eighth Amendment. The Court, in effect, announced a rule of *per se* diminished responsibility required by the Constitution.² All people with mental retardation, the Court held, were constitutionally exempt from capital punishment based upon their diagnosis alone. No individualized showing of diminished responsibility or other functional impairment was required. Capital punishment was prohibited for this entire class as a result of the Court's conclusion that those with mental retardation were significantly less culpable and deterable than others who commit capital murder.³ The Court found 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."⁴ Reasoning that their execution does not "measurably contribute[to one or both of the] goals"⁵ of

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¹ 536 U.S. 304 (2002).

² See *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2649 (2008) ("[T]he Court held in [*Roper v. Simmons*, 543 U.S. 551 (2005)] and *Atkins* that the execution of juveniles and mentally retarded persons violates the Eighth Amendment because the offender has a diminished personal responsibility for the crime.), *reh'g denied*, 2008 WL 4414670 (U.S.) (Oct. 1, 2008).

³ *Atkins*, 536 U.S. at 306.

⁴ *Id.* at 318.

⁵ *Id.* at 319 (quoting *Enmund v. Florida*, 458 U.S. 782, 798 (1982)).

“retribution an deterrence of capital crimes by prospective offenders,”⁶ the Court found 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.”⁷

The Court extended this approach to juveniles under the age of 18 at the time of the offense in *Roper v. Simmons*.⁸ In *Roper*, the Court found that juveniles similarly lack sufficient culpability and deterability to permit execution consistent with the Eighth Amendment.⁹ Once again, the Court’s rule was categorical. Like those with mental retardation, all juveniles less than age eighteen were presumed to be insufficiently culpable and deterable.¹⁰ Individualized findings of functional inability were not required.

The *Roper* Court found the death penalty to be a disproportionate punishment for juveniles, and hence cruel and unusual, because of several significant differences between juveniles and adults. First, juveniles are more susceptible to immature and irresponsible behavior, with the result that their conduct is not as morally reprehensible as that of adults.¹¹ Second, they are considerably more vulnerable to the influence of others and lacking in control over their immediate surroundings. As a consequence their inability to escape negative influences in their environments can more easily be forgiven.¹² Third, a juvenile’s personality and sense of identity are still developing, making the commission of even heinous crimes insufficient evidence of an “irretrievably depraved character.”¹³ The reduced culpability of juveniles, in the Court’s view, renders them less deserving of retribution, and their immaturity,

⁶ *Id.* (quoting *Gregg v. Georgia*, 428 U.S. 153, 183 (1976)).

⁷ *Id.* (quoting *Enmund*, 458 U.S. at 798).

⁸ 543 U.S. 551 (2005).

⁹ *Id.* at 578.

¹⁰ *See supra* note 2.

¹¹ *Roper*, 543 U.S. at 570.

¹² *Id.* at 569.

¹³ *Id.* at 570.

lack of future perspective, and reduced impulse control, make them less subject to deterrence.¹⁴ These deficiencies, comparable to those experienced by offenders with mental retardation,¹⁵ supported the 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.¹⁶

*Kennedy v. Louisiana*¹⁷ is the most recent case in the Supreme Court's emerging death penalty jurisprudence. In this case the Court limited the category of offenses that could be eligible for capital punishment. 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.¹⁸ The Eighth Amendment requires that punishment be "graduated and proportioned" to the crime,¹⁹ and that capital punishment "be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'"²⁰ 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.²¹ As a result of the paucity of statutes authorizing capital punishment for child rape and its extended analysis of the history of its imposition, the Court found a national consensus against capital punishment for this offense.²² In terms of moral depravity and injury to the victim and the public, the Court distinguished intentional first-degree murder and non-homicide crimes

¹⁴ *Id.* at 571.

¹⁵ *See supra* text accompanying note 4.

¹⁶ *Roper*, 543 U.S. at 571.

¹⁷ 128 S. Ct. 2641 (2008).

¹⁸ *Id.* at 2650-51.

¹⁹ *Id.* at 2649 (quoting *Weems v. United States*, 217 U.S. 349, 367 (1910)).

²⁰ *Id.* at 2650 (quoting *Roper*, 543 U.S. at 568 (quoting *Atkins v. Virginia*, 536 U.S. 304, 319 (2002))).

²¹ *Id.* 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.").

²² *Id.* at 2651-58.

against individuals, even including crimes as devastating in their harm as child rape.²³ The Court found that capital punishment for this offense would not sufficiently satisfy the aims of retribution²⁴ and deterrence²⁵ that justify capital punishment. Speaking broadly, the Court’s opinion stated that the proportionality principle of the Eighth Amendment requires that resorting to capital punishment be limited to the “worst of crimes,” which in the case of offenses against individuals result in the death of the victim.²⁶

These three cases give new meaning to the proportionality requirement imposed by the Eighth Amendment. They reveal an emerging conception of the proportionality requirement that could be extended to other capital punishment contexts. Severe mental illness would appear to be the next frontier for the Court’s emerging death penalty jurisprudence. Mental illness bears some striking similarities to both mental retardation and juvenile status.²⁷ Severe mental illness at the time of the offense may significantly diminish the offender’s blameworthiness and

²³ *Id.* at 2660.

²⁴ *Id.* at 2662-63.

²⁵ *Id.* at 2663-64.

²⁶ *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.”). 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.

²⁷ Although there are some similarities between mental illness and mental retardation, they are quite different. “The essential feature of Mental Retardation is significantly subaverage general intellectual functioning” AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 41 (4th ed. text rev. 2000) (hereinafter *DSM-IV-TR*). By contrast, a diagnosis of mental 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. By 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. Jack A. Grebb, *Biological Therapies: Introduction and Overview*, in 2 COMPREHENSIVE TEXTBOOK OF PSYCHIATRY 1574 (Harold I. Kaplan & Benjamin 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); Elaine C. Wright, *The Presentation of Mental Illness in Mentally Retarded Adults*, 141 BRIT. J. PSYCHIATRY 496 (1982).

amenability to deterrence in ways not unlike mental retardation and juvenile status.²⁸ This Article analyses this emerging death penalty jurisprudence and examines whether it could be applied 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 for the Mentally Ill (NAMI), and the National Mental Health Association (NMHA)—have adopted policy statements that recommend prohibiting the execution of those with severe mental illness.²⁹ However, these organizations recommend a 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. Although this joint recommendation might prompt future legislative change, it has not as 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

²⁸ However, as this Article explains in greater detail, the categorical approach invoked by the Court in both *Atkins* and *Roper* would not be appropriate in the context of severe mental illness. Since mental illness varies considerably in its effects on those who experience it, a categorical exemption does not seem indicated. Mental illness at the time of the offense will produce significantly diminished culpability and deterability in some, but far from all, offenders suffering from mental illness at the time of the offense. A case-by-case determination would appear more reasonable in light of the differing mental illnesses involved and their varied effects on the offenders in question. *See infra* Part IV A.

²⁹ This recommendation is articulated in a report by the American Bar Association’s Task Force on Mental Disability and the Death Penalty. *See* American Bar Association 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 from capital punishment in limited circumstances. In addition to representatives of the ABA, the Task Force included representatives from the APsya, APA, NAMI, and NMHA. Each of these organizations has independently approved those Task Force Report recommendations pertaining to the exemption of those with severe mental illness from capital punishment. *See* AMERICAN PSYCHIATRIC ASSOCIATION, POSITION STATEMENT: DIMINISHED RESPONSIBILITY IN CAPITAL SENTENCING (2004), <http://www.psych.org/Departments/EDU/Library/APAOfficialDocumentsandRelated/PositionStatements/200406.aspx>; AMERICAN PSYCHOLOGICAL ASSOCIATION, APA POLICY MANUAL (2007), <http://www.apa.org/about/division/cmpubint2.html>; PUBLIC POLICY COMMITTEE OF THE BOARD OF DIRECTORS AND THE NAMI DEPARTMENT OF PUBLIC POLICY AND RESEARCH, PUBLIC POLICY PLATFORM OF THE NATIONAL ALLIANCE ON MENTAL ILLNESS (NAMI), § 10.9.1.2, http://www.nami.org/Template.cfm?Section=NAMI_Policy_Platform&Template=/ContentManagement/ContentDisplay.cfm&ContentID=41302; NMHI, POSITION STATEMENT 54: DEATH PENALTY AND PEOPLE WITH MENTAL ILLNESSES (June 11, 2006), <http://www.nmha.org/go/position-statements/54>.

its emerging conception of proportionality, it relied upon the objective indicia of “evolving standards of decency” reflected in legislative practices. 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.³⁰ 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.³¹ The Court similarly relied on legislative action in its determination 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 ensue,³² or felony murder where the defendant himself neither took the life of the victim nor intended that a homicide occur.³³ And the Court followed this approach in its recent decision in *Kennedy*, concluding that the death penalty could not be available for 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.³⁴ There simply is no comparable legislative trend in the context of imposition of the death penalty for those with severe mental illness. Indeed, many prisoners on death row, and many who have been executed, have suffered from demonstrable mental illness.³⁵ This Article

³⁰ 128 S.Ct. at 2651(citing *Coker v. Georgia*, 433 U.S. 584 (1977) and *Enmund v. Florida*, 458 U.S. 782, 798 (1982)).

³¹ *Atkins v. Virginia*, 536 U.S. 304, 315 (2002) (“It 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.”) (quoted in *Roper v. Simmons*, 543 U.S. 551, 566 (2005) with regard to state bans on the imposition of the death penalty on defendants who were juveniles under the age of eighteen at the time the crime was committed). *See also infra* notes 39-40.

³² *Coker*, 433 U.S. at 596-97 (“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.”) (plurality opinion).

³³ *Enmund*, 458 U.S. at 792 (“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.”).

³⁴ *Kennedy*, 128 S. Ct. at 2652.

³⁵ AMERICAN CIVIL LIBERTIES UNION (hereinafter ACLU), MENTAL ILLNESS AND THE DEATH PENALTY IN THE UNITED STATES ¶ 3 (January 2005), at <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.”); AMNESTY INT’L USA, UNITED STATES OF AMERICA: THE EXECUTION OF MENTALLY ILL OFFENDERS 170 (January 2006) (naming and describing the conditions of 100 prisoners with mental illness executed

accordingly will examine the Supreme Court’s emerging death penalty jurisprudence to analyze whether 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 societal norms on this issue, the Court could 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 abolishing the death penalty for severe mental illness, the Court could not find application of the death penalty in this context to violate the Eighth Amendment.³⁶ I disagree. I argue 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 deterability, Eighth Amendment principles should preclude the death penalty. In Part II, I argue that the Court can reach this conclusion consistent with its emerging death penalty jurisprudence, even absent a record of legislative

in the United States between 1984 and 2005), *at* <http://www.amnesty.org/en/library/asset/AMR51/003/2006/en/dom-AMR510032006en.pdf>; 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. SOC. ETHICS 353, 367 (“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., art. 3, ¶ 2 (2000) (“a significant proportion of death row inmates are mentally ill [even when mental illness is defined] narrowly”).³⁶ *E.g.*, RISON N. SLATE & W. WESLEY JOHNSON, CRIMINALIZATION OF MENTAL ILLNESS 342 (2008) (“The Supreme Court will undoubtedly be reticent to exempt people with mental illnesses from the death penalty until it sees a similar trend in legislation enacted in a majority of states.”); 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); *see* Liliana Lyra Jubilut, *supra* note 35, at 376 (2007) (“people who suffer from mental illness are currently subject to the death penalty and likely will be for the foreseeable future”).

action (like that detailed in *Atkins* and *Roper*)³⁷ demonstrating an evolving societal consensus that the death penalty is inappropriate for this population. In Part III, I probe the analogies between severe mental illness and mental retardation and juvenile status, and conclude 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 deterability. In Part IV-A, I analyze the standards that should apply in making the Eighth Amendment determination and discuss those mental illnesses that in principle could satisfy the standard. In Part IV-B, I address the procedural question of how the issue should be determined, arguing that it should be resolved by the trial judge on a pretrial motion to preclude the death penalty on this ground, rather than by a special jury convened for this purpose or by a jury determination made at the penalty phase.

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

The Eighth Amendment question is complicated. As previously noted, there are some obvious similarities between mental illness, at least severe mental illness, and mental retardation and juvenile status. All can be seen as reducing culpability and deterability. Yet, the effects of mental illness vary so considerably³⁸ that the categorical approach of *Atkins* and *Roper* seems inappropriate. Moreover, while it may be argued that a social consensus has emerged condemning capital punishment for those with mental retardation or who were juveniles at the

³⁷ See *infra* notes 39-40.

³⁸ *DSM-IV-TR*, *supra* note 27, at xxxiii (noting that impairments vary widely within diagnostic categories); *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.”)

time of the offense, no such consensus exists with regard to capital punishment and mental illness.

The Supreme Court's Eighth Amendment approach in *Atkins*, *Roper*, and *Kennedy* was supported by the majority's conclusion that an emerging national consensus rejected imposition of the death penalty on those with mental retardation (*Atkins*),³⁹ on those who were juveniles at the time of the offense (*Roper*),⁴⁰ and for the offense of rape not involving the death of the victim (*Kennedy*).⁴¹ The Court's Eighth Amendment jurisprudence appears to reflect a dynamic approach to measuring what constitutes cruel and unusual punishment.⁴²

³⁹ 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." 536 U.S. at 315-16. The majority opinion extensively details the history of federal and state legislation forbidding the imposition of death to individuals with mental retardation since the Court decided *Penry v. Lynaugh*, 492 U.S. 302 (1989) (holding that sentencing defendants with mental retardation to death is not categorically prohibited by Eighth Amendment), concluding 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." 536 U.S. at 316. The *Atkins* Court also relied upon public-polling data and the amicus briefs of "several organizations with germane expertise" which "have adopted official positions opposing the imposition of the death penalty upon a mentally retarded offender," including the American Psychological Association, the United States Catholic Conference, and the European Union. *Id.* at n.21.

⁴⁰ 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." 543 U.S. 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 the majority attributed to the fact that in 1989, when the Court rejected an 8th Amendment challenge to the juvenile death penalty in *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. *Id.* at 566-67. In 1989, twenty-seven states prohibited death sentences for those under 17 (fifteen of which also prohibited death sentences for those under 18); only two death penalty states prohibited imposing capital punishment on those with mental retardation at that time. The *Roper* majority also found the infrequent sentencing of juvenile offenders to death in states allowing for it, coupled with the trend towards state-legislative abolition of juvenile capital punishment, "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.

⁴¹ While the *Kennedy* Court 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 has been executed for this crime since 1964. *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2651 (2008). Although post-*Furman* a few state legislatures have instituted or reinstated the death penalty as a possible punishment for child rape, the overwhelming majority of states have not. *See infra* note 129 and accompanying text. The Court did recognize one major difference between this case and *Atkins* and *Roper*. 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 18 years of age when they committed their crimes, states prior to *Kennedy* were moving, albeit very slowly and sporadically, towards adding rape of a child as a capital offense. Yet the majority found it more "significan[t] that, in 45

The history underlying the Eighth Amendment suggests it was designed to outlaw barbarous forms of punishment,⁴³ and capital punishment was a common criminal penalty in 1791 when the amendment was adopted, applicable to a wide variety of offenses and offenders. Yet, as in other areas of constitutional interpretation,⁴⁴ originalism has not carried the day in the Supreme Court's construction of its meaning. The Court has repeatedly acknowledged that what the Eighth Amendment prohibits as "cruel and unusual punishment" may be subject to change over time.⁴⁵ As such, "the Court has not confined the prohibition embodied in the Eighth

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." *Id.* at 2653 (noting also that the number is also greater than the 42 states that, prior to *Enmund*, 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).

⁴² The Court's classic formulation of this dynamic approach to 8th Amendment jurisprudence was first articulated in *Trop v. Dulles*, 356 U.S. 86, 101 (1958) ("The [8th] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."). *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."); *Roper*, 543 U.S. at 587 (Stevens, J., concurring) ("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.").

⁴³ *See Gregg v. Georgia*, 428 U.S. 153, 170 (1976) ("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.") *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 8th 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 . . .").

⁴⁴ *See, e.g., Planned Parenthood of Eastern Pennsylvania 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"), 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" Due Process Clause.); *Brown v. Board of Education of Topeka*, 347 U.S. 483, 492 (1954) ("we cannot turn the clock back to 1868 when the [14th] 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 . . .").

⁴⁵ *See, e.g., Kennedy v. Louisiana*, 128 S. Ct. 2641, 2649 (2008) (Whether the 8th 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 "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*

Amendment to [just those] ‘barbarous’ methods that were generally outlawed in the 18th century.”⁴⁶ 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.”⁴⁷ Since the language of the prohibition is not “precise” and its “scope is not static[, t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”⁴⁸ 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.⁴⁹ As the Court recently put it 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.”⁵⁰

An early example of the Court’s approach to determining proportionality under the Eighth Amendment is found in *Weems v. United States*.⁵¹ 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. The penalty infringed the “precept of justice that punishment for crime should be graduated and proportioned to the offense.”⁵²

In its modern death penalty jurisprudence, the Court has frequently invoked the “proportionality principle.” Under this principle, criminal punishment must be proportionate to the offense. This principle limits both the offenses for which capital punishment (and other

Granucci, *supra* note 43 at 842-43 (discussing the history of the expansion of the Court’s initially constricted view of the Eighth Amendment).

⁴⁶ *Gregg*, 428 U.S. at 171.

⁴⁷ *Weems v. United States*, 217 U.S. 349, 378 (1910).

⁴⁸ *Trop*, 356 U.S. at 100-1.

⁴⁹ 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).

⁵⁰ *Kennedy*, 128 S.Ct. at 2649, (quoting *Furman*, 408 U.S. at 382 (Burger, C.J., dissenting)).

⁵¹ 217 U.S. 349 (1910).

⁵² *Id.* at 366-67. *Accord Kennedy*, 128 S.Ct. at 2662.

harsh punishments) may be imposed⁵³ and the class of offenders⁵⁴ to which it may be applied. What constitutes “disproportionality” in any given instance is based, in part, on the Court’s objective determination of society’s “evolving standards of decency.”⁵⁵ However, the proportionality principle also requires the Court to ultimately make its own independent determination of the degree to which the criminal penalty fits the crime and the offender. That the Court must make its own independent judgment concerning proportionality is reflected in *Atkins*,⁵⁶ *Roper*,⁵⁷ and *Kennedy*,⁵⁸ all of which also reflect the dynamic quality of the Court’s approach.

In 1989, the Court rejected the contention that the Eighth Amendment bars capital punishment for those with mental retardation and for juveniles who were under the age of eighteen at the time of the offense, in *Penry v. Lynaugh*⁵⁹ and *Stanford v. Kentucky*,⁶⁰ respectively.

⁵³ 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) (finding a sentence of life without the possibility of parole for a convicted non-violent felon issuing a worthless check for \$100 to be “significantly disproportionate to [the] crime, and . . . therefore prohibited by the Eighth Amendment”); *Enmund v. Florida*, 458 U.S. 782 (1982) (finding 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 (1977) (finding 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 (1977) (finding a death sentence for the rape of an adult woman to be cruel and unusual punishment) (plurality opinion); *Robinson v. California*, 370 U.S. 660 (1962) (finding 90 days imprisonment for narcotics addiction to be cruel and unusual punishment); *Weems v. United States*, 217 U.S. 349, 382 (1910) (finding a sentence of fifteen years hard labor for falsifying an official, public document “repugnant to the Bill of Rights”).

⁵⁴ See, e.g., *Roper v. Simmons*, 543 U.S. 551, 564 (2005) (finding that “the death penalty is a disproportionate punishment for juveniles”); *Atkins v. Virginia*, 536 U.S. 304, 324 (2002) (finding a sentence of “death a disproportionate punishment for mentally retarded offenders”).

⁵⁵ *Trop v. Dulles*, 356 U.S. 86, 101 (1958)

⁵⁶ *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).

⁵⁷ *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).

⁵⁸ *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 quotes omitted) (emphasis added).

⁵⁹ 492 U.S. 302 (1989).

⁶⁰ 492 U.S. 361 (1989).

Yet, in *Atkins* and *Roper* the Court concluded that societal attitudes concerning the propriety of imposing punishment for these two classes of offenders had changed. The majority in these two 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 relating to them 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.⁶¹

There have been no comparable state statutory changes relating to capital punishment for those with mental illness.⁶² At this time only one state provides a statutory exemption from the death penalty for serious mental illness.⁶³ Other states' death penalty statutes consistently recognize mental illness at the time of the offense as a possible mitigating circumstance.⁶⁴ However, statutory inclusion of mental illness as a mitigator does not reflect a societal consensus that mental illness, even when serious or severe, should disqualify an offender from capital punishment. 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.⁶⁵

⁶¹ See *supra* notes 39-40.

⁶² Some statutes use alternate terminology to describe mental illness. See, e.g., Ellen Fels Berkman, Note, *Mental Illness as an Aggravating Circumstance in Capital Sentencing*, 89 COLUM. L. REV. 291, 297 n.47 (1989) (listing state statutes that include "extreme mental or emotional disturbance as a mitigating factor") (internal quotations omitted). See also Christopher Slobogin, *supra* note 35, at ¶ 18 (2000) ("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. . . .").

⁶³ Conn. Gen. Stat. § 53a-46a(h) (2008). 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. 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 legislature of at least one other state is currently considering a bill that would prohibit imposing the death penalty on a defendant with a severe mental illness. See S. Bill 310, 115th Gen. Assem., Reg. Sess. (Ind. 2008).

⁶⁴ See Slobogin, *supra* note 35.

⁶⁵ For instance, according to the Capital Jury project (hereinafter CJP), which researches capital jury decision-making based on interviews with former capital jurors:

Legislative action, of course, is not the only evidence of evolving societal norms. The Court has used statistics concerning the frequency of jury-imposed death sentences as at least a partial basis for declaring some death penalty statutes constitutional⁶⁶ and others unconstitutional.⁶⁷ The Court has also considered the actions of prosecutors in charging capital offenses as an indication of societal norms.⁶⁸ 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 sentencing⁶⁹ may also be looked to as reflectors of evolving societal norms.

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 open and interesting empirical question, as data is scant or non-existent in this area. 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

[F]undamental to the post-*Furman* [capital punishment] experiment is the premise that jurors 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).

⁶⁶ See, e.g., *Gregg v. Georgia*, 428 U.S. 153, 182 (1976) (“[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.”).

⁶⁷ See, e.g., *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2657 (2008) (“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 v. Florida*, 458 U.S. 782, 794-96 (1982) (detailing the “overwhelming” statistical evidence “that American juries have repudiated imposition of the death penalty for crimes such as petitioner’s”); *Coker v. Georgia*, 433 U.S. 584, 596-97 (1977) (The Court pointed 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 1973-77. Thus, “in the vast majority of cases, at least 9 out of 10, juries have not imposed the death sentence.”) (plurality opinion); *Woodson v. North Carolina*, 428 U.S. 280, 295-96 (1976) (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.”) (plurality opinion).

⁶⁸ See, e.g., *Enmund*, 458 U.S. at 795 n.24.

⁶⁹ Alabama, California, Florida, Kansas, Ohio, South Carolina, and Virginia. Bowers, CAPITAL PUNISHMENT, *supra* note 65, at 413 n.1.

exempted from capital punishment under the Eighth Amendment are not present at this time in the context of mental illness.

Nonetheless, to the extent that, similar to mental retardation and juvenile status, severe mental illness imposes functional impairments that significantly diminish culpability and deterability, a strong analogy exists that may in the future lead the Court to bar execution in this context as well. The Court based its decisions in *Atkins* and *Roper* on both its determination that a national consensus had emerged rejecting capital punishment for these two categories of offenders and its own independent conclusion that members of these categories were significantly less culpable and deterable than the average murderer, let alone the average murderer who deserves the death penalty. As a result, the Court concluded that capital punishment for these two classes of offenders constituted a disproportionate penalty, one that was insufficiently related to their culpability and deterability—and hence cruel and unusual within the meaning of the Eighth Amendment.

The Court inevitably will face a future Eighth Amendment challenge to application of the death penalty for those with severe mental illness. If the Court were to find that severe mental illness imposed cognitive and behavioral deficits comparable to those associated with mental retardation and juvenile status, could it find the Eighth Amendment to be violated 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? *Atkins* and *Roper* do not clearly answer this question, although they provide considerable guidance.

Both involved recent legislative changes that provided a basis for the Court to detect an evolution in societal norms. But in both cases, the Court also made an independent judgment that capital punishment would be a disproportionate penalty in view of the cognitive and behavioral problems that make juvenile offenders and those with mental retardation categorically less culpable and deterable than the typical capital offender. Because *Atkins* and *Roper* each involve both this independent judgment concerning proportionality and the Court's findings concerning a legislative trend reflecting a shift in societal norms, the Court's approach in these two cases leaves unanswered the question of whether disproportionality alone would suffice to support application of the Eighth Amendment to severe mental illness. Although the confluence of these two factors might lead the Court to decline to extend its precedents to cover mental illness in the absence of a legislative trend, there is considerable language in *Atkins* and *Roper* that could be read to support the contention that a finding of disproportionality alone would suffice to enable a willing Court to extend these two decisions to the context of severe mental illness.

Although *Atkins*, *Roper*, and *Kennedy* provide the most relevant and recent guide posts for thinking about whether the Eighth Amendment should apply to capital punishment for those with severe mental illness, before examining the opinions in these cases in greater detail, it is instructive to consider their Eighth Amendment predecessors so that we can place them in proper perspective. In *Robinson v. California*,⁷⁰ the Court invoked the Eighth Amendment to invalidate a statute making the status of being a narcotics addict a criminal offense. The Court concluded, based exclusively on its own independent analysis, that the Eighth Amendment was violated because narcotics addiction “is apparently an illness”⁷¹ Analogizing the statutory

⁷⁰ 370 U.S. 660 (1962).

⁷¹ *Id.* at 667.

prohibition of addiction to that of “other illnesses,” a 6-2 majority⁷² struck down the California statute. “Even one day in prison,” the Court noted, “would be a cruel and unusual punishment for the ‘crime’ of having a common cold.”⁷³ 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. Additionally, no attempt was made to ascertain whether any objective indicators of societal attitudes concerning the acceptability of such a statute existed.⁷⁴ Although the Court had announced an “evolving standards of decency” test in *Trop v. Dulles* four years earlier,⁷⁵ the *Robinson* Court did not explicitly invoke this standard or seek to ground its decision in any societal consensus. Rather, 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.

In more recent Eighth Amendment cases involving the death penalty, the Supreme Court, although examining “the two crucial indicators of evolving standards of decency respecting the imposition of punishment in our society[,] jury determinations and legislative enactments,”⁷⁶ independently analyzed whether a particular penalty was disproportionate to the offense or to the offender’s culpability or otherwise failed to conform to “the fundamental respect for humanity

⁷² Justice Frankfurter took no part in the consideration or decision of this case.

⁷³ *Robinson*, 370 U.S. at 667.

⁷⁴ The majority opinion does note 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. However, the opinion provides 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.” *Id.* Moreover, the Court gave no objective basis for its assertion that contemporary standards inform its viewpoint of the California statute’s unconstitutionality.

⁷⁵ 356 U.S. 86, 101 (1958).

⁷⁶ *Woodson v. North Carolina*, 428 U.S. 280 (1976) (plurality opinion).

underlying the Eighth Amendment.”⁷⁷ For example, in *Woodson v. North Carolina*,⁷⁸ the Court invalidated mandatory death penalty statutes. The Court found that the mandatory statute before it “departs markedly from contemporary standards,” noting that “jury determinations and legislative enactments both point conclusively to the repudiation of automatic death sentences.”⁷⁹ However, the Court also found that the statute violated human dignity by failing to take into account “consideration of the character and record of the individual offender or the circumstances of the particular offense.”⁸⁰

Similarly, in invalidating a statute that made the death penalty available for rape not involving the death of the victim, the Court in *Coker v. Georgia*⁸¹ stressed the legislative consensus rejecting the death penalty for rape alone, but found 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.”⁸² 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 acceptability of the death penalty under the Eighth Amendment.”⁸³ Justice Powell, in a concurring and dissenting opinion in *Coker*, objected to the sweeping nature of the Court’s holding that all death penalties for rape violate the Eighth Amendment. Nonetheless, Justice Powell agreed with the plurality’s methodology, noting that, “objective indicators are highly relevant, but the ultimate decision as to the appropriateness of the death penalty under the Eighth

⁷⁷ *Id.* at 304.

⁷⁸ *See supra* note 76.

⁷⁹ *Woodson*, 428 U.S. at 301, 293 (1976) (plurality opinion).

⁸⁰ *Id.* at 304.

⁸¹ 433 U.S. 584 (1977).

⁸² *Id.* at 597 (emphasis added).

⁸³ *Id.* (emphasis added).

Amendment . . . must be decided on the basis of *our own judgment* in light of the precedents of this Court.”⁸⁴

This same approach was followed in *Enmund v Florida*,⁸⁵ 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. Once again, the Court examined legislative action⁸⁶ and jury behavior⁸⁷ on this issue. It also examined the actions of prosecutors.⁸⁸ Additionally, 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.⁸⁹ The Court concluded that the death penalty in this context would be excessive and disproportionate to the offender’s culpability and deterability.

These cases suggest that, even though its judgment is guided by existing evidence concerning societal attitudes, the Court has a significant independent role to play in ascertaining whether a criminal sanction challenged under the Eighth Amendment fails the proportionality test. However, in its 1989 decisions in *Penry v. Lynaugh*⁹⁰ and *Stanford v. Kentucky*,⁹¹ rejecting proportionality challenges to the application of death penalty statutes to those with mental retardation and juvenile offenders over fifteen but under eighteen, respectively, the Court placed

⁸⁴ *Id.* at 604 n.2 (Powell, J., concurring and dissenting) (emphasis added).

⁸⁵ 458 U.S. 782 (1982).

⁸⁶ *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.”)

⁸⁷ *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.”)

⁸⁸ 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 “relevan[ce,] if prosecutors rarely sought the death penalty for accomplice felony murder.” *Id.* at 796. In this case, the Court said, the statistics “would tend to indicate that prosecutors, who represent society’s interest in punishing crime, consider the death penalty excessive for accomplice felony murder.”

⁸⁹ *Id.* at 797 (emphasis added).

⁹⁰ 492 U.S. 302 (1989).

⁹¹ 492 U.S. 361 (1989).

greater emphasis on legislative indicia of social norms. In both cases the Court rejected Eighth Amendment challenges on the basis that a national consensus on the issue was lacking at the time, and seemed to suggest that absent objective evidence of such a consensus an Eighth Amendment proportionality challenge could not be sustained.⁹² *The Stanford* plurality opinion, authored by 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.”⁹³ 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 17-year olds to death is cruel and unusual.⁹⁴ The Court was, according to the plurality, powerless “to substitute our belief . . . for the society’s”⁹⁵

⁹² In *Stanford*, for example, the Court stated that “[f]irst among the objective indicia that reflect the public attitude toward a given sanction are statutes passed by society’s elected representatives.” *Id.* 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.* A plurality of the Court concluded these numbers do “not establish the degree of national consensus . . . “sufficient to support an Eighth Amendment challenge.” *Id.* at 371. Further, the plurality 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.

Similarly the *Penry* majority found 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” against executing mentally retarded persons as objective evidence of a national consensus independent of state legislative action. *Id.* 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.

⁹³ *Stanford*, 492 U.S. at 378.

⁹⁴ *Id.*

⁹⁵ *Id.*

Justice O'Connor, although concurring with the *Stanford* plurality's rejection of the Eighth Amendment challenge,⁹⁶ criticized the plurality opinion's refusal "to judge whether the 'nexus between the punishment imposed and the defendant's blameworthiness' is proportional."⁹⁷ Significantly, while agreeing with the plurality on the merits of its Eighth Amendment holding, she pointedly disagreed with its attempt to reshape Eighth Amendment methodology, 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."⁹⁸

In *Atkins v. Virginia*, the Court overruled its prior decision in *Penry v. Lynaugh* that had rejected an Eighth Amendment challenge to the imposition of the death penalty on those with mental retardation. As it had done 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 then lacking.⁹⁹ In the intervening years, however, the total number of states rejecting capital punishment for those with mental retardation had risen from two to eighteen,¹⁰⁰ leading the *Atkins* Court to conclude that the number and the "consistency of the direction of change" provided sufficient evidence of a national consensus.¹⁰¹ This consensus confirmed the Court's independent determination that

⁹⁶ 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 (O'Connor, J., concurring). 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 381-82 (O'Connor, J., concurring).

⁹⁷ *Id.* at 382 (O'Connor, J., concurring) (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 853 (1988)).

⁹⁸ *Id.*

⁹⁹ See *supra* note 92 at ¶ 2.

¹⁰⁰ Prior to the *Penry* decision, the United States Congress in 1988 also outlawed sentencing to death defendants with mental retardation who were found guilty of capital murder. Anti-Drug Abuse Act of 1988, 21 U.S.C. § 848(l)(2006) (hereinafter ADAA). This proviso, which also prohibits sentencing to death those who commit a capital offense as juveniles, has remained in every revision or expansion of the ADAA from 1988 to the present.

¹⁰¹ *Atkins*, 536 U.S. at 315.

offenders suffering from mental retardation are “categorically less culpable” and deterable than typical murderers, and that capital punishment therefore would constitute a disproportionate penalty in this context.¹⁰²

The *Atkins* Court seemed to reject the *Stanford* plurality’s suggestion that a national consensus reflected in legislation and jury behavior is a necessary condition to a Court-determined invalidation of a capital punishment statute on Eighth Amendment proportionality grounds. Justice Stevens, writing for a six-justice majority, agreed that a proportionality review should be informed by “objective factors to the maximum possible extent.”¹⁰³ But, Justice Stephens wrote, the Court “rel[ies] *in part* on such legislative evidence. . . .”¹⁰⁴ According to the *Atkins* majority “the objective 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.’”¹⁰⁵ This approach requires that the Court “first review the judgment of legislatures that have addressed the suitability of imposing the death penalty” in the category of offenders in question, “and then consider reasons for agreeing or disagreeing with their judgment.”¹⁰⁶ This statement requires the court to “review” the record of legislative enactments in the area in question, but then to independently “consider” whether to accept the legislative judgment. Presumably this means that even if the predominant legislative judgment is to impose the death penalty for a particular offense or class of offenders, the court, after conducting an independent proportionality review, could disagree with the legislative judgment and invalidate it under the Eighth Amendment.

¹⁰² *Id.* at 316.

¹⁰³ *Id.* at 312 (quoting *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion)).

¹⁰⁴ *Id.* (emphasis added).

¹⁰⁵ *Id.* (quoting *Coker*, 433 U.S. at 597 (plurality opinion)).

¹⁰⁶ *Id.* at 313.

The Court's statements concerning its independent role, of course, may be considered dictum, as the Court found that the legislative trend in the thirteen years since *Penry* was decided constituted sufficient evidence that a national consensus had rejected the death penalty for those with mental retardation. Although the Court's independent analysis concluded that death is a disproportionate penalty for those with mental retardation, would it have reached the same result in the absence of what it considered to be an emerging legislative consensus? Two dissenting opinions in *Atkins*, 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% of the thirty-eight states that permit capital punishment, had statutorily barred execution for those with mental retardation.¹⁰⁷ 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."¹⁰⁸ Similarly, Justice O'Connor, in her dissenting opinion in *Roper*, expressed the view that *Atkins* did not rest upon the Court's "tentative conclusion" concerning an emerging national consensus, but that "the Court's independent moral judgment was dispositive"¹⁰⁹ and "played a decisive role in persuading the Court that the practice was inconsistent with the Eighth Amendment."¹¹⁰ These analyses strongly suggest that the *Atkins* majority's statements about the Court's independent role in proportionality review under the Eighth Amendment are not dictum.¹¹¹

The Court's 2005 decision in *Roper v. Simmons*, the juvenile death penalty case, provides further support for the proposition that an independent proportionality analysis by the Court can

¹⁰⁷ See *id.* at 321-22 (Rehnquist, C.J. dissenting), 342 (Scalia, J. dissenting). These dissenting justices joined one another's dissents, and Justice Thomas joined both.

¹⁰⁸ *Id.* at 349 (Scalia, J. dissenting).

¹⁰⁹ *Roper v. Simmons*, 543 U.S. 551, 592 (2005) (O'Connor, J., dissenting).

¹¹⁰ *Id.* at 598 (O'Connor, J., dissenting).

¹¹¹ Accord Christopher Slobogin, *supra* note 36, at 295-96.

justify invalidation of a capital punishment statute under the Eighth Amendment even in the absence of a national consensus exemplified by legislative action rejecting such death penalty statutes. 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.”¹¹² “Instead,” the Court continued, “we return to the rule, established in decisions pre-dating *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.”¹¹³

Roper went on to overrule *Stanford*, finding the juvenile death penalty unconstitutional under the Eighth Amendment. The “beginning point” of the *Roper* Court’s analysis was its “review of objective indicia of consensus, as expressed in particular by the enactments of legislatures that have addressed the question.”¹¹⁴ It found the “evidence of a national consensus against the death penalty for juveniles” to be “similar, and in some respects parallel,” to the evidence *Atkins* had relied on in invalidating the death penalty for those with mental retardation.¹¹⁵ Just as the Court in *Atkins* found that sentencing persons with mental retardation to death had become “truly unusual”¹¹⁶ since *Penry* was decided thirteen years earlier, the *Roper* Court saw from the objective data that, since the decision in *Stanford* upholding the juvenile death penalty was handed down sixteen years earlier, “even in the 20 States without a formal prohibition on executing juveniles, the practice is infrequent.”¹¹⁷ This led the *Roper* Court to

¹¹² *Roper*, 543 U.S. at 563.

¹¹³ *Id.* (quoting *Coker v. Georgia*, 433 U.S. at 597 (plurality opinion)).

¹¹⁴ *Id.* at 564.

¹¹⁵ *Id.* See also *supra* note 40.

¹¹⁶ *Atkins*, 536 U.S. at 316.

¹¹⁷ *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 . . .”).

find that the “objective indicia of consensus” provided “sufficient evidence” that society had come to “view[] juveniles . . . as ‘categorically less culpable than the average criminal.’”¹¹⁸

The *Roper* Court then proceeded to “determine, in the exercise of our own independent judgment, whether the death penalty is a disproportionate punishment for juveniles.”¹¹⁹ In so doing, the Court held “no longer controlling” the *Stanford* plurality’s dismissal “of the idea that this Court is required to bring its independent judgment to bear on the proportionality of the death penalty for a particular class of crimes or offenders.”¹²⁰ *Stanford*’s “rejection” was, the Court stated, “inconsistent with prior Eighth Amendment decisions” and “with the premises of . . . *Atkins*.”¹²¹ *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.

Justice O’Connor dissented in *Roper*, finding no genuine national consensus on the juvenile death penalty issue and disagreeing with the majority’s “moral proportionality analysis,” a ground which she concluded was the ultimate basis for the Court’s decision.¹²² Nevertheless, although disagreeing with the majority’s conclusions, she explicitly agreed with its Eighth Amendment approach of conducting its own independent determination of 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.”¹²³ This was the approach she applied in *Atkins*, Justice O’Connor explained. In that case, she had joined the six-member

¹¹⁸ *Id.* at 567 (quoting *Atkins*, 536 U.S. at 316).

¹¹⁹ *Id.* at 564.

¹²⁰ *Id.* at 574.

¹²¹ *Id.* at 575.

¹²² *Id.* at 588 (O’Connor, J., dissenting). See also *supra* text accompanying notes 109-10.

¹²³ *Id.* at 590 (O’Connor, J., dissenting) (internal quotations omitted). See also *Enmund v. Florida*, 458 U.S. 782, 823 (1982) (“[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.”) (O’Connor, J., dissenting).

majority opinion without writing separately. In her *Roper* dissent, however, 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.¹²⁴ “Rather,” she continued, “the compelling moral proportionality argument against capital punishment of mentally retarded offenders played a *decisive* role in persuading the Court that the practice was inconsistent with the Eighth Amendment.”¹²⁵ 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 revealed by legislative action or jury behavior that a national consensus condemns it in the 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. In Justice O’Connor’s view, in determining whether the Eighth Amendment prohibits capital punishment of a particular offense or class of offenders, the Court must analyze whether such punishment is consistent with contemporary standards of decency. In doing so, Justice O’Connor stated, the Court is “*obligated* to weigh both the objective evidence of societal values” and its “own judgment as to whether death is an excessive sanction in the context at hand.”¹²⁶ Although the Court must “weigh” any such 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.¹²⁷

Six of the justices in *Roper* – the five joining Justice Kennedy’s majority opinion and Justice O’Connor in dissent – therefore arguably shared this view of the Court’s independent

¹²⁴ *Id.* at 597-98 (O’Connor, J., dissenting).

¹²⁵ *Id.* at 598 (O’Connor, J., dissenting) (emphasis in the original).

¹²⁶ *Id.* at 605 (O’Connor, J., dissenting) (emphasis added).

¹²⁷ *Id.* at 606 (O’Connor, J., dissenting).

constitutional role in conducting a proportionality review under the Eighth Amendment. Although Justice O'Connor is no longer on the Court, having been replaced by the more conservative Justice Alito, this analysis suggests that a future Court could extend this approach to the context of those with severe mental illness. 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 deterability to the extent that there would be 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.

This conclusion finds further support in the Court's recent decision in *Kennedy v. Louisiana*.¹²⁸ As only six states authorize the death penalty for rape of a child not involving death,¹²⁹ the Court found a consensus rejecting capital punishment in this context. However, the Court made clear that "[c]onsensus is not dispositive."¹³⁰ Whether the death penalty is disproportionate to the crime "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."¹³¹ The *Kennedy* Court thus based its holding that the death penalty could not apply to the offense of child rape not involving the death of the victim "both on consensus and our own independent judgment."¹³² *Kennedy* was a five-to-four decision, but the

¹²⁸ 128 S. Ct. 2641 (2008), *reh'g denied*, 2008 WL 4414670 (U.S.) (Oct. 1, 2008).

¹²⁹ *Id.* ("44 states have not made child rape a capital offense). The *Kennedy* majority opinion acknowledges some ambiguity as to whether Georgia and Florida should be counted among the states allowing capital punishment for the crime of child rape. *See id.* at 2652.

¹³⁰ *Id.* at 2650.

¹³¹ *Id.* (citing *Gregg v. Georgia*, 428 U.S. 153 (1976) and *Coker v. Georgia*, 433 U.S. 584 (1977)).

¹³² *Id.* *See also id.* at 2654 (statutory record "confirm[s] the Court's independent judgment"). 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." *Id.* at 2658 (quoting *Coker*, 433 U.S. at 597 (plurality opinion)).

five justices in the majority embraced the principle that “it is for us ultimately to judge whether the Eighth Amendment permits imposition of the death penalty” in particular circumstances.¹³³

The *Kennedy* Court proceeded independently to assess the proportionality of capital punishment for the offense of rape of a child. 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.”¹³⁴ Although the Court conceded that the death penalty for child rape could serve some retributive or deterrent function,¹³⁵ it nonetheless did not serve these ends sufficiently to avoid the conclusion that it was disproportionate in the circumstances.¹³⁶ Neither retribution nor deterrence, the Court concluded, would justify the harshness of applying the death penalty in this circumstance.¹³⁷ Indeed, the majority went further than the context of 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.”¹³⁸ The Court 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.

The four dissenters in *Kennedy* disagreed with this concept of the Court’s role under the Eighth Amendment. 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. Justice Alito, dissenting on behalf of himself, Chief Justice Roberts, and

¹³³ *Id.* at 2658 (quoting *Enmund v. Florida*, 458 U.S. 782, 797 (1982)).

¹³⁴ *Id.* at 2661 (citing *Gregg*, 428 U.S. at 173, 183, 187).

¹³⁵ *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 [which] caused more prolonged physical and mental suffering than, say, a sudden killing by an unseen assassin. *Id.* at 2658.

¹³⁶ *Id.* (“It does not follow, though, that capital punishment is a proportionate penalty for the crime.”).

¹³⁷ *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.”).

¹³⁸ *Id.* at 2665.

Justices Scalia and Thomas, lamented that the majority “is 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.*”¹³⁹ Justice Scalia also recognized that the dispositive element in the Court’s decision was its own independent judgment.¹⁴⁰

A majority of the Court in *Atkins*, *Roper*, and *Kennedy* thus have embraced an independent conception of proportionality that could allow the Court to apply it in the context of severe mental illness 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.¹⁴¹ These three cases embrace 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. They collectively reject the *Stanford* plurality’s contrary suggestion that a legislative concensus or similar objective evidence of a trend in this direction is necessary for the Court to invalidate a death sentence as disproportionate.¹⁴² In this respect, these three decisions breathe new life into the proportionality requirement.

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

The conclusion I reach is that the Supreme Court’s emerging death penalty jurisprudence would allow it to determine independently that the death penalty for at least some cases of severe

¹³⁹ *Id.* at 2673 (Alito, J., dissenting) (emphasis added) (internal quotations omitted)

¹⁴⁰ *Kennedy v. Louisiana*, 2008 WL 4414670 (U.S.) (Oct. 1, 2008) (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.”)

¹⁴¹ See *supra* notes 56-58, 103-140 and accompanying text.

¹⁴² See *supra* notes 93-95 and accompanying text.

mental illness would be a disproportionate punishment, and hence cruel and unusual, even in the absence of legislative action limiting the death penalty in this context, or other objective evidence of a changed social norm. Even if the Court's new proportionality jurisprudence would allow it to reach this conclusion, the question remains whether it should do so. Is severe mental illness sufficiently comparable to mental retardation and juvenile status in terms of its impact on the offender's blameworthiness and deterability to compel the Court to treat these categories of offenders the same in regard to the applicability of capital punishment?

There are both similarities and differences between mental illness and mental retardation and juvenile status. Like mental retardation and juvenile status, severe mental illness may diminish individual culpability even if the defendant can appreciate the wrongfulness of his or her conduct, and therefore fails to satisfy the requirements of the legal insanity defense. When severe mental illness imposes impairments comparable to mental retardation and juvenile status on judgment, rationality, and the ability to foresee consequences and control behavior, it would appear similarly less justifiable to impose the death penalty as retribution for past crimes or as a deterrent to future ones. 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 would seem insufficiently related to the purposes of capital punishment to allow its application consistent with the Eighth Amendment.

However, while people with mental retardation and juveniles are categorically less culpable than the average capital offender, mental illness, even severe mental illness, cannot support such a categorical judgment. Although the Supreme Court in *Atkins* and *Roper* was willing to conclude that all people with mental retardation and all juveniles lack the culpability and deterability necessary for the imposition of capital punishment to meet the requirements of

the Eighth Amendment, not all people with mental illness, even severe mental illness, would. Some would, however, and for those who do, the Eighth Amendment should likewise prevent their execution. To the extent that severe mental illness imposes parallel effects on judgment and functioning as mental retardation and juvenile status, the death penalty would similarly seem to lack a sufficient connection with the purposes of capital punishment—retribution and deterrence—to justify its imposition consistent with the Eighth Amendment.

Objective legislative and jury indicia of a societal consensus rejecting execution for those with severe mental illness have not yet emerged. At this time apparently only the state of Connecticut statutorily provides a process for exempting offenders suffering from severe mental illness from the death penalty.¹⁴³ In assessing whether legislative action reflects a national consensus rejecting the death penalty for a particular offense or class of offenders, the Court in both *Atkins* and *Roper* 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.¹⁴⁴ However, adding Connecticut to these states would total only sixteen jurisdictions (fifteen states plus the District of Columbia),¹⁴⁵ compared to the thirty-five states and the federal government that authorize the death penalty without exempting those with mental illness. Most, if not all, states list mental illness as a mitigating factor to be considered by capital juries in weighing whether a death sentence should be imposed in a particular case;¹⁴⁶ the federal

¹⁴³ See *supra* note 63.

¹⁴⁴ *Atkins v. Virginia*, 536 U.S. 304, 313-15 (2002); *Roper v. Simmons*, 543 U.S. 551, 564 (2005).

¹⁴⁵ The jurisdictions that currently prohibit imposition of the death penalty are Alaska, District of Columbia, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, New Jersey, New York, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin. DEATH PENALTY INFORMATION CENTER, FACTS ABOUT THE DEATH PENALTY (August 2008), at <http://www.deathpenaltyinfo.org/FactSheet.pdf> (hereinafter DPIC).

¹⁴⁶ See Berkman, *supra* note 62, at 296-98; Slobogin, *supra* note 36, at ¶ 2.

government does as well.¹⁴⁷ This reflects some evidence that legislatures may intend to preclude capital punishment when mental illness is severe, but such evidence is ambiguous inasmuch as mitigating circumstances in death penalty statutes are to be weighed against aggravating circumstances by the capital jury with little or no guidance as to how that weighing should occur.¹⁴⁸ 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*, it can not be said that there is a legislative trend in the direction of exempting those with severe mental illness from the death penalty.

Furthermore, no clear record of jury behavior exists supporting the inference that capital juries have rejected the death penalty for those with mental illness. Anecdotal evidence suggests that many defendants on death row suffer from serious mental illness or neurological impairment.¹⁴⁹ 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 as a result and that the death penalty is an appropriate means of community protection.¹⁵⁰ Capital juries undoubtedly sentence people with mental illness to death,¹⁵¹ but

¹⁴⁷ Federal Death Penalty Act, 18 U.S.C.A. § 3592(a)(6) (2008) (“In determining whether a sentence of death is to be imposed on a defendant, the finder of fact shall consider any mitigating factor, including [whether] . . . [t]he defendant committed the offense under severe mental or emotional disturbance.”).

¹⁴⁸ Bowers, CAPITAL PUNISHMENT, *supra* note 65, at 413.

¹⁴⁹ *See supra* note 35.

¹⁵⁰ *See* 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.”); RISON, *supra* note 36, 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.”); Liliانا Lyra Jubilut, *supra* note 35, 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

there is little or no data on how frequently this occurs when mental illness is present, and none that examines mental illness in such cases in terms of the degree of its severity or functional impairment. The actions of prosecutors in charging capital offenses also could provide objective indicia of social attitudes, but there appears 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 makes the death penalty determination¹⁵² might provide evidence of societal 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 societal norms on the propriety

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. Perlin, *The Sanest Lies of Jurors in Death Penalty Cases: The Puzzling Role of Mitigating Mental Disability Evidence*, 8 NOTRE DAME J.L. ETHICS & PUB. POL’Y 239, 274 (1994) (“mental illness—rather than serving as a mitigating factor—can be seen as an aggravating factor”); Slobogin, *supra* note 35, at ¶ 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 36, at 305 (“Apparently, sentencing juries and judges focus more on the perceived dangerousness of such individuals than on their diminished culpability and deterrability.”), 313 (most people view those with mental illness “to be abnormally dangerous”); Berkman, *supra* note 62, at 299-300 (discussing examples of how “mental illness can contribute to the finding of aggravating circumstances”) (emphasis in the original).

¹⁵¹ ACLU, *supra* note 149 (“Over 60 people diagnosed as mentally ill or with mental retardation have been executed in the United States since 1983.”).

¹⁵² See Bowers, CAPITAL PUNISHMENT, *supra* note 65, at 413 n.1.

of imposing capital punishment for those with mental retardation.¹⁵³ The beginning of an emerging consensus in this area is reflected in the recent action by the ABA, APsyA, APA, NAMI and NMHA endorsing a policy recommending that the states bar execution for those with serious mental illness.¹⁵⁴ These five professional organizations recommend that the states adopt legislation exempting offenders from the death penalty if at the time of the offense, their mental illness “significantly impaired their capacity (1) to appreciate the nature, consequences, or wrongfulness of their conduct; (2) to exercise rational judgment in relation to the conduct; or (3) to conform their conduct to the requirements of law.”¹⁵⁵ This joint recommendation of these five important professional associations whose expertise bears most closely on the issue certainly provides some evidence of evolving societal norms on this question.

Moreover, both *Atkins* and *Roper* considered as further evidence of contemporary standards the general consensus in the law of other countries and in international human rights law that rejected imposition of capital punishment for those with mental retardation and who were juveniles at the time of the offense.¹⁵⁶ The Court has looked to such international practices in prior cases involving the death penalty for juveniles,¹⁵⁷ felony murder,¹⁵⁸ and rape not involving the death of the victim.¹⁵⁹ In the context of mental illness and the death penalty, most countries have either abolished the death penalty or rarely impose it on those with mental illness. “More than two-thirds of the countries in the world have now abolished the death penalty in law or practice.”¹⁶⁰ In particular, ninety-one countries have abolished the death penalty for all

¹⁵³ See *supra* note 39.

¹⁵⁴ See Task Force Report, *supra* note 29.

¹⁵⁵ *Id.* (comments to ¶ 2).

¹⁵⁶ See *Atkins v. Virginia*, 536 U.S. 304, 316 n.21(2002); *Roper v. Simmons*, 543 U.S. 551, 575-78 (2005).

¹⁵⁷ *Thomson v. Oklahoma*, 487 U.S. 815, 830-31 (1988) (plurality opinion).

¹⁵⁸ *Enmund v. Florida*, 458 U.S. 782, 796 n.22 (1982).

¹⁵⁹ *Coker v. Georgia*, 433 U.S. 584, 596 n.10 (1977) (plurality opinion).

¹⁶⁰ AMNESTY INT’L USA, DEATH PENALTY: ABOLITIONIST AND RETENTIONIST COUNTRIES (2008), at <http://www.amnesty.org/en/death-penalty/abolitionist-and-retentionist-countries>.

crimes, eleven have abolished it for ordinary crimes only, and an additional thirty-five have abolished it in practice.¹⁶¹ A minority of sixty countries retain capital punishment for at least some offenses.¹⁶² In addition, international human rights norms condemn the death penalty for defendants with severe mental illness. The United Nations 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. . . .”¹⁶³

Although compelling objective evidence has not as yet emerged that the death penalty for those with severe mental illness has become “truly unusual,” or that our society has rejected the imposition of capital punishment for those within this class of offenders, the above developments suggest the beginning of movement in this direction. As suggested earlier, 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. It could do so under the language in *Atkins*, *Roper*, and *Kennedy*, as discussed in Part II, should it independently determine capital punishment to be a disproportionate penalty for this category of offenders or some subset thereof. In the absence of further legislative developments or emerging evidence concerning jury, prosecutorial, and judicial behavior in this area, the Court 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 societal consensus emerges.¹⁶⁴

However, the strong comparability of severe and persistent mental illness with mental retardation and juvenile status suggests that the imposition of Eighth Amendment limits on the

¹⁶¹ *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.” *Id.*

¹⁶² *Id.*

¹⁶³ United Nations Commission on Human Rights Res 2001/68, ¶ 4(e) (April 25, 2001).

¹⁶⁴ *See supra* note 36.

death penalty for this population may and should be a future development. 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 deterability. Under the Eighth Amendment, "punishment must be tailored to [the offender's] personal responsibility and moral guilt."¹⁶⁵ Capital punishment would violate the Eighth Amendment when it is "so totally without penological justification that it results in the gratuitous infliction of suffering."¹⁶⁶ Unless it "measurably contributes to" the goals of retribution or deterrence,¹⁶⁷ a death sentence would be "nothing more than the purposeless and needless imposition of pain and suffering."¹⁶⁸ The Court's recent opinion in *Kennedy* demonstrates that even if capital punishment can be said to contribute somewhat to retribution and deterrence, this may not suffice under the Court's emerging capital punishment jurisprudence. The *Kennedy* Court conceded that capital punishment may deter some instances of child rape, and it certainly would achieve retribution for child rapists.¹⁶⁹ Yet, the *Kennedy* Court found an insufficient relationship between capital punishment and retribution and deterrence where the rape of a minor does not result in the death of the victim.¹⁷⁰ Similarly, although applying the death penalty to those with mental retardation or who were juveniles at the time of the crime would undoubtedly achieve some degree of retribution and deterrence, that degree was found insufficient in *Atkins* and *Roper*.

¹⁶⁵ *Enmund v. Florida*, 458 U.S. 782, 801 (1982).

¹⁶⁶ *Gregg v. Georgia*, 428 U.S. 153, 183 (1976).

¹⁶⁷ *Enmund*, 458 U.S. at 798.

¹⁶⁸ *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion).

¹⁶⁹ *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2661 (2008) ("[I]t cannot be said with any certainty that the death penalty for child rape serves no deterrent or retributive function.") (citing *Coker*, 433 U.S. at 592 n.4 (plurality opinion)).

¹⁷⁰ *Id.* ("It does not follow, though, that capital punishment is a proportionate penalty for the crime."), 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.").

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 lacking. 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. Responsibility or blameworthiness justifying punishment requires that the individual must have been capable of doing other than what he or she did.¹⁷¹ Punishment for an act prohibited by the criminal law is appropriate only when, at the time of the offense, individuals possess “the normal capacities, physical and mental, . . . for abstaining from what it forbids, and the bare opportunity to exercise these capacities.”¹⁷² Unless an individual can control his behavior, it would be inappropriate for him to receive the moral condemnation and punishment applied in the criminal justice system of social control.¹⁷³ Punishment is only justified for those who have the capacities of awareness and control needed to be moral agents.¹⁷⁴ When mental illness materially deprives the individual of these capacities, subjecting him or her to the death penalty would not sufficiently serve the retributive or deterrence goals of capital punishment, and therefore would be cruel and unusual punishment under the Eighth Amendment. Those with severe mental illness that significantly limited their ability to understand the wrongfulness of their conduct, or to control it, like those with mental retardation or who were juveniles at the time of the offense, have diminished responsibility for their actions. All merit punishment, but not the extreme penalty.

¹⁷¹ See Michael Moore, *Choice, Character, and Excuse*, in *SOCIAL PHILOSOPHY AND POLICY*, 7 (1990).

¹⁷² H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW*, 152 (1968).

¹⁷³ ROBERT F. SCHOPP, *COMPETENCE CONDEMNATION, AND COMMITMENT: AN INTEGRATED THEORY OF MENTAL HEALTH LAW* 148-51 (2001).

¹⁷⁴ 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* 1110a-1112b (F.H. Peters trans., 2004) (1893)).

Moreover, this conclusion also may be required by principles of equal protection.¹⁷⁵ Equal protection requires that like cases be considered alike,¹⁷⁶ and to the extent that severe mental illness imposes parallel deficits in culpability and deterability as 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 this area. Mental illness, even severe mental illness, is considerably more varied in its symptomatology and resulting degree of functional impairment than arguably are mental retardation and juvenile status. Although the Supreme Court concluded in *Atkins* and *Roper* that juveniles and those with mental retardation should be categorically exempt from capital punishment under the Eighth Amendment, such a categorical approach would be inappropriate in the context of mental illness, even severe mental illness. Whether severe mental illness renders imposition of capital punishment a disproportionate penalty would need to be determined on an individualized basis, and this alone might distinguish mental illness sufficiently to satisfy the requirements of equal protection.¹⁷⁷ Moreover, mental illness is more difficult to diagnose than mental retardation,¹⁷⁸ and easier to feign.¹⁷⁹ Evidence

¹⁷⁵ See Slobogin, *supra* note 36, at 298-303. Cf. *United States ex rel. Skinner v. Okalahoma* 316 U.S. 535 (1942) (invoking equal protection to invalidate the punishment of sterilization applied to those who commit repetitive larceny offenses but not to those who commit repetitive acts of embezzlement).

¹⁷⁶ See *e.g.*, *Vacco v. Quill*, 521 U.S. 793, 799 (1997).

¹⁷⁷ In *Heller v. Doe*, 509 U.S. 312 (1993), 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. The Court found this distinction to be rationally related to important differences between mental illness and mental retardation, notably different times of onset, *id.* at 321-22, and different treatment methods. *Id.* at 324-25.

¹⁷⁸ See *id.* at 321 (noting that the “general proposition” that “mental retardation is easier to diagnose than . . . mental illness” should “cause little surprise”).

¹⁷⁹ RICHARD ROGERS, *CLINICAL ASSESSMENT OF MALINGERING AND DECEPTION* 1 (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, complicated greatly the assessment process”); RICHARD ROGERS & DANIEL W. SHUMAN, *CONDUCTING INSANITY EVALUATIONS* 90 (2d ed. 2000) (noting that mental retardation is more difficult to feign than mental illness), 105 (noting that mental retardation is more difficult to feign than mental illness because in part the former is typically corroborated by records going back to early childhood, like “school records and achievement tests”). Cf. *Medina v. California*, 505 U.S. 437, 455 (1992) (O’Connor, J., concurring) (noting the problem of defendants attempting to feign incompetence).

of juvenile status is, of course, relatively straightforward and objective, and more difficult to manipulate. These considerations may distinguish mental illness, requiring individualized determinations rather than categorical ones, and additional scrutiny of the validity of claims of disproportionality. However, to the extent that, following fair procedural hearings, offenders with severe mental illness are determined to have parallel functional impairments, both equal protection and Eighth Amendment principles would seem to require their exemption from the death penalty.

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

A. What Standards Should Apply, and Which Mental Illnesses in Principle Could Satisfy Them?

When should mental illness at the time of the offense disqualify a defendant from capital punishment under the Eighth Amendment? To meet the Eighth Amendment standard, the offender's mental illness must significantly diminish his culpability and ability to respond to the deterrent effects of criminal punishment. Only then will the death penalty constitute disproportionate punishment. 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 is significantly diminished. 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.

The Task Force Report of the leading professional associations and organizations provide a starting point for the inquiry. The Task Force Report, endorsed by the ABA, APsya, APA, NAMI, and NMHA, sets forth a functional test, not a categorical one.¹⁸⁰ It contemplates an individualized determination of whether a defendant charged with a capital crime lacks sufficient culpability and deterability to allow capital punishment to be imposed consistent with its underlying rationale. This calls for a value judgment, more than a clinical judgment, and poses a legal rather than a diagnostic question.

In this respect, determination of whether the Task Force-endorsed standard applies is like the determinations of 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,¹⁸¹ and the jury determines criminal responsibility at trial when it determines whether the defendant has established an affirmative defense of legal insanity.¹⁸² 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.¹⁸³

¹⁸⁰ Task Force Report, *supra* note 29, at 670-72.

¹⁸¹ MELTON, *supra* note 150, at 131; BRUCE J. WINICK, THERAPEUTIC JURISPRUDENCE APPLIED: ESSAYS ON MENTAL HEALTH LAW 233-34 n. 1 (1997).

¹⁸² MELTON, *supra* note 150, at 131; WINICK, *supra* note 181, at 233-34 n. 1.

¹⁸³ DAVID BAZELON, QUESTIONING AUTHORITY 63 (1987) (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*

Moreover, these value judgments are 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.¹⁸⁴ The key question in any legal context in which mental illness is relevant is the degree of functional impairment presented in a particular case.¹⁸⁵ In the Eighth Amendment context, the question is whether the defendant's mental illness impaired his cognitive or volitional abilities at the time of the crime to such a degree that his legal culpability or deterability was sufficiently diminished.

Recognition of the variability of functional impairment produced by mental illness is well established in the context of competency to stand trial and legal insanity. For example, some (but far from all) defendants suffering a sufficient cognitive or communicative impairment as a result of schizophrenia,¹⁸⁶ major depressive disorder,¹⁸⁷ and bipolar disorder¹⁸⁸ satisfy the legal requirements for incompetency to stand trial.¹⁸⁹ By contrast, those diagnosed only with

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.”).

¹⁸⁴ *DSM-IV-TR*, *supra* note 27, 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.”).

¹⁸⁵ See *DSM-IV-TR*, *supra* note 27, at xxxiii (“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) (“determination of competency is context-dependent and needs to be decided on a case-by-case basis”), 324, 333 n.2.; Gerald T. Bennett & Arthur F. Sullwold, *Competency to Proceed: A Functional and Context- Determinative Decision*, 29 J. FORENSIC SCI. 1119, 1122 (1984); Bruce J. Winick, *Ambiguities in the Legal meaning and Significance of Mental Illness*, 1 PSYCHOL. PUB. POL'Y & L. 534 (1995) (analyzing civil commitment standards and the right of patients to refuse treatment) (hereinafter *Ambiguities*); Bruce J. Winick, *Restructuring Competency to Stand Trial*, 32 UCLA L. REV. 921, 974 (1985) (“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.”) (hereinafter *Restructuring Competency*).

¹⁸⁶ See *infra* note 231.

¹⁸⁷ See *infra* note 232.

¹⁸⁸ See *infra* note 233.

¹⁸⁹ *United States v. Adams*, 297 F. Supp. 596 (S.D.N.Y. 1969) (finding of paranoid schizophrenia does not automatically require a finding of incompetency); ROESCH & GOLDING, *supra* note 185, at 18-24; Bennett & Sullwold, *supra* note 185, at 1122; Winick, *Restructuring Competency*, *supra* note 185, at 923 (“a psychiatric diagnosis of psychosis . . . is not dispositive of the legal question of competency-to-stand-trial”).

antisocial personality disorder (APD),¹⁹⁰ one of the other personality disorders,¹⁹¹ or one of the paraphilias¹⁹² generally will not qualify for this status.¹⁹³ Similarly, those diagnosed with

¹⁹⁰ As defined in the *DSM-IV-TR*, antisocial personality disorder (APD) is exclusively behavioral in nature, involving certain behavioral manifestations and personality traits. A diagnosis of APD is appropriate when the individual is at least age 18 and has exhibited evidence of certain conduct before age 15 as shown by a history of 3 of 15 specified behaviors, a pattern of irresponsible behavior since age 15 as evidenced by 4 of 10 specified behavioral patterns, and antisocial behavior that did not occur during a superimposed schizophrenic or manic episode. *DSM-IV-TR*, *supra* note 27, at 706. For further discussion of APD, *see generally* INTERNATIONAL HANDBOOK ON PSYCHOPATHIC DISORDERS AND THE LAW (Alan R. Felthous & Henning Saß eds., 2007); Winick, *Ambiguities*, *supra* note 185; Stephen D. Hart, *Psychopathy, Culpability, and Commitment*, in *MENTAL DISORDER AND THE CRIMINAL LAW* (Robert Schopp, et al. eds., vol. 3, forthcoming 2009) (manuscript).

APD is characterized as a “colorblindness” to the feelings of others. ROBERT D. HARE, *WITHOUT CONSCIENCE: THE DISTURBING WORLD OF THE PSYCHOPATHS AMONG US* 27-28 (1993). Those diagnosed with APD 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 APD has been, and continues to be, known by other names, including psychopathy, sociopathy, and dyssocial personality. *DSM-IV-TR*, *supra* note 27, at 702; SEYMOUR L. HALLECK, *PSYCHIATRY AND THE DILEMMAS OF CRIME* 99 (1967); Hart, *supra*, at 2; Robert D. Hare, et al., *Psychopathy and the DSM-IV Criteria for Antisocial Personality Disorder*, 100 J. ABNORMAL PSYCHOL. 391 (1991); 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 (1980). Some distinguish APD, 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.” ROBERT D. HARE, *supra*, at 25. *See also* John Monahan, *A Jurisprudence of Risk Assessment: Forecasting Harm Among Prisoners, Predators, and Patients*, 92 VA. L. REV. 391, 421 (2006) (describing psychopathy as a “personality disorder” and a “cluster of personality traits including manipulateness, lack of empathy, and impulsivity”) (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).

¹⁹¹ Each of the personality disorders describes types of pervasive, inflexible, and maladaptive behaviors markedly different from socially accepted norms. *DSM-IV-TR*, *supra* note 27, at 685. They represent unique impairments in the sufferer’s perception of his environment or his ability to relate to it. *Id.* at 686. APD is only one of ten specific categories of personality disorder recognized by the *DSM-IV-TR*. *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.*

¹⁹² The paraphilias include pedophilia (sexual excitement related to sexual activity with minors age 13 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). “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. BRUCE J. WINICK, *supra* note 181, at 127. Paraphiliacs “carr[y] no diagnoses that indicate[] serious impairment of orientation, consciousness, perception, comprehension, reasoning, or reality testing.” ROBERT F. SCHOPP, *supra* note 173, at 36.

¹⁹³ *See* MELTON, *supra* note 150, at 142 (noting the “prominent association between major mental disorders (mainly schizophrenia and major affective [mood] disorder) and incompetency” to stand trial).

schizophrenia,¹⁹⁴ major depressive disorder,¹⁹⁵ or bipolar disorder¹⁹⁶ sometimes, although far from always, suffer sufficient cognitive impairment to satisfy the test of legal insanity,¹⁹⁷ which in most jurisdictions requires an inability to understand the nature and consequences of one's conduct or to appreciate the wrongfulness of one's actions.¹⁹⁸ In addition, these defendants similarly may suffer sufficient volitional impairment¹⁹⁹ to qualify for the additional legal insanity standard, applied in only a minority of jurisdictions, that requires a significant diminution in the ability to "conform [their] conduct to the requirements of the law."²⁰⁰ However, the personality disorders,²⁰¹ paraphilias,²⁰² and temporary insanity induced by drug or alcohol consumption²⁰³ generally will not qualify for the insanity defense.²⁰⁴

¹⁹⁴ See *infra* note 231.

¹⁹⁵ See *infra* note 232.

¹⁹⁶ See *infra* note 233.

¹⁹⁷ MELTON, *supra* note 150, 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"), 211.

¹⁹⁸ MODEL PENAL CODE § 4.01(1) (2008); MICHAEL L. PERLIN, *THE JURISPRUDENCE OF THE INSANITY DEFENSE* 90 (1993).

¹⁹⁹ Bruce J. Winick, *Sex Offender Law in the 1990s: A Therapeutic Analysis*, 4 *PSYCHOL. PUB. POL'Y & L.* 505, 522-23 (discussing diagnostic criteria for schizophrenia, major depressive disorder, Tourette's syndrome, and multiple personality disorder).

²⁰⁰ MODEL PENAL CODE, *supra* note 198, at § 4.01(1).

²⁰¹ MODEL PENAL CODE, *supra* note 198, at § 14.01(2); MELTON, *supra* note 150, at 214 ("antisocial personality disorder is rarely an adequate predicate for insanity"), 233 (a diagnosis of personality disorder is "least likely to be associated with clinical opinions favoring an insanity finding"); 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 185, at 594-95.

²⁰² *E.g.*, *People v. Hopper*, 2005 WL 1100422 (Cal.App. May 10, 2005), *rev. denied* (Cal. July 20, 2005); *State v. Armstrong*, 152 Ohio App.3d 579, 590, 789 N.E.2d 657, 666 (2003); Stephen J. Morse, *Uncontrollable Urges and Irrational People*, 88 *VA. L. REV.* 1025, 1027 (2002) ("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 volitional impairments that are necessary to satisfy the criteria for the legal insanity defense. See SCHOPP, *supra* note 173, at 38, 141; WINICK, *supra* note 181, at 127; Winick, *supra* note 199, 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").

²⁰³ HERBERT FINGARETTE & ANNE FINGARETTE HASSE, *MENTAL DISABILITIES AND CRIMINAL RESPONSIBILITY* 112 (1979) (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, *supra* note 150, at 230 ("voluntary

The functional impairments relating to culpability and deterability that are relevant to the Eighth Amendment question under consideration differ from those relating to competency to stand trial and legal insanity. The Eighth Amendment inquiry will focus on the extent to which the offender's mental illness diminishes culpability and deterability. 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 defense.²⁰⁵ In the case of the legal insanity defense, the question is whether the defendant's mental illness prevented him from appreciating the nature and consequences of his conduct or its wrongfulness, and in a minority of jurisdictions, whether it substantially prevented him from "conform[ing] his conduct to the requirements of the law."²⁰⁶ However, it is likely that the same mental disorders that, in appropriate cases, may satisfy the incompetency and legal insanity tests also may satisfy Eighth Amendment requirements. Similarly, those which fail to satisfy these legal standards also will fail to justify an exclusion from capital punishment.

This conclusion requires further analysis, however, and a better understanding of how, if at all, the various mental disorders may compromise culpability and deterability enough to make mental illness sufficiently analogous to mental retardation and juvenile status to justify exclusion from capital punishment. The American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders (DSM-IV-TR)* is designed to aid clinicians in making diagnostic and treatment decisions, and its description of the various mental disorders does not focus on

intoxication seldom supports . . . an insanity . . . defense"), 233 (a diagnosis of substance abuse is "least likely to be associated with clinical opinions favoring an insanity finding"); Winick, *Ambiguities*, *supra* note 185, at 594.

²⁰⁴MELTON, *supra* note 150, at 214 ("antisocial personality disorder is rarely an adequate predicate for insanity"), 229-30 (Intoxication that is "self-induced and temporary . . . is seldom given complete exculpatory effect.").

²⁰⁵ See *Dusky v. United States*, 362 U.S. 402 (1960) ("[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, *supra* note 150, at 127-30.

²⁰⁶ MODEL PENAL CODE, *supra* note 198, at § 4.01(1).

functional impairment for Eighth Amendment or other legal purposes.²⁰⁷ 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.”²⁰⁸ 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.”²⁰⁹ Similarly, legal objectives are not the focus of the Global Assessment of Functioning (GAF) Scale, a psychometric instrument that is used in diagnosis and treatment.²¹⁰ Consequently, although this scale measures functional impairment for certain clinical purposes, it does not seek to measure functional impairment for various legal purposes. An individual’s GAF score therefore will provide little assistance in resolving the Eighth Amendment question. As a result, what is needed is a 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 Court’s analysis in *Atkins* of the impairments associated with mental retardation²¹¹ and in *Roper* of those associated

²⁰⁷ 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.

DSM-IV-TR, *supra* note 27, at xxxii-xxxiii.

²⁰⁸ *Id.* at xxxiii.

²⁰⁹ *Id.*

²¹⁰ *Id.* at 34.

²¹¹ 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

with juvenile status²¹² point the way. In light of the significantly reduced culpability and deterability of offenders with mental retardation or who were juveniles at the time of the offense, the Court concluded that applying the extreme penalty to members of these two groups would insufficiently achieve either of the two principal justifications for capital punishment, retribution²¹³ and deterrence.²¹⁴ For offenders suffering from severe mental illness at the time of the offense, the question thus becomes how mental illness affects a parallel diminution of culpability and deterability. The standards for the legal insanity defense are relevant here, but not dispositive. Under the predominant test of legal insanity, an offender is excused from criminal responsibility if mental illness prevents him from appreciating the nature and consequences of his conduct or its wrongfulness.²¹⁵ The focus is on cognitive impairment produced by mental illness that reduces culpability to the extent that the offender is not blameworthy for his conduct. The justification is that moral condemnation and criminal sanctions are inappropriate when the individual, as a result of illness, is unable to understand the

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.” *Atkins v. Virginia*, 536 U.S. 304, 308 n.3 (2002) (emphasis in the original) (internal citations 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.*

²¹² See *supra* text accompanying notes 11-16.

²¹³ *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. . . .”); *Roper*, 543 U.S. 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.”)

²¹⁴ *Atkins*, 536 U.S. at 319 (“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.”); *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.”)

²¹⁵ See MODEL PENAL CODE *supra* note 198, at § 4.01(1); PERLIN *supra* note 198, at 90.

nature and consequences of his actions and that they are wrong.²¹⁶ Deterability 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. In a 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.”²¹⁷ An offender whose mental illness prevents him from controlling his conduct is neither deterable nor blameworthy for failing to have done so.

Impairments produced by mental illness satisfying the requirements of the legal insanity defense, although perhaps similar, are not identical to those that should be required for avoiding the death penalty under Eighth Amendment proportionality principles. The Eighth Amendment question arises only for those who have been convicted of a capital offense, excluding those who are able to raise a successful insanity defense. The Eighth Amendment exemption from capital punishment is not the same as an excuse from criminal responsibility; rather, it is a form of diminished responsibility. The question is when should the effects of mental illness, although not sufficient to excuse the offender for his offense, make it inappropriate to execute him. A lesser showing than that required to satisfy the legal insanity standard thus should be required in the Eighth Amendment context. The starting point for analysis of the Eighth Amendment question, 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.

²¹⁶ Richard J. Bonnie, *The Moral Basis of the Insanity Defense*, 69 A.B.A. J. 194, 196 (1983) (“a person who ‘cannot help’ doing what he did is not blameworthy”).

²¹⁷ MODEL PENAL CODE *supra* note 198, at § 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) (in which the attempted assassin of President Reagan was acquitted by reason of insanity), has since been rejected in many jurisdictions. Winick, *Ambiguities*, *supra* note 185, at 599 nn.263. *See also id.*, at 535 n.4.

Further guidance may be gleaned from the Supreme Court’s recent decision in *Panetti v. Quarterman*,²¹⁸ involving a different but related legal test, the standard for competency to be executed. This 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.²¹⁹ Finding the lower court’s standard for competency for execution—whether the prisoner is aware that he is going to be executed and why—to be too restrictive, the Court remanded, but declined to specify a rule for governing all competency-for-execution determinations. The court below had foreclosed the prisoner from showing that his mental illness “obstructs a rational understanding of the State’s reason for his execution.”²²⁰ Execution of a severely mentally ill prisoner violates the Eighth Amendment, the Court noted, for several reasons, including that it “serves no retributive purpose.”²²¹ In other words, “the objective of community vindication” by execution of a condemned prisoner whose “mental state is so distorted by a mental illness” that he is prevented from recognizing the severity of his offense is “called in question” since “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.”²²² 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.”²²³ “Gross delusions stemming from severe mental

²¹⁸ 127 S. Ct. 2842 (2007).

²¹⁹ *Ford v. Wainwright*, 477 U.S. 399 (1986); WINICK, *supra* note 181, at 289-317.

²²⁰ *Panetti*, 127 S. Ct. at 2860.

²²¹ *Id.* at 2861 (citing *Ford v. Wainwright*, 477 U.S. 399, 408).

²²² *Id.*

²²³ *Id.* at 2862.

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.”²²⁴

The *Panetti* Court’s statements about when severe mental illness may render an individual incompetent for execution shed some light on when severe mental illness may deprive an offender of sufficient culpability and deterability to make capital punishment a disproportionate penalty under the Eighth Amendment. *Panetti*’s language suggests that when such illness produces gross delusions or other cognitive effects, significantly distorting the offender’s understanding and appreciation of his conduct and of its wrongfulness, capital punishment will serve no retributivist purpose, and therefore would be cruel and unusual. 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 point the way for the Eighth Amendment inquiry here. Both emphasize serious cognitive impairment substantially interfering with the individual’s understanding and rationality. By stressing gross delusions that significantly impair comprehension, the *Panetti* Court seemed to limit its standard to major mental illnesses formerly labeled “psychoses.”²²⁵ This standard parallels that of the legal insanity defense,²²⁶ which typically also 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.

²²⁴ *Id.*

²²⁵ “A major mental disorder of organic or emotional origin in which a person’s ability to think, respond emotionally, remember, communicate, interpret reality, and behave appropriately is sufficiently impaired so as to interfere grossly with the capacity to meet the ordinary demands of life. Often characterized by *regressive* behavior, inappropriate *mood*, diminished impulse control, and such abnormal mental content as *delusions* and *hallucinations*.” AM. PSYCHIATRIC ASS’N, AMERICAN PSYCHIATRIC GLOSSARY 161 (8th ed. 2003). *See also DSM-IV-TR*, *supra* note 27, at 297 (most definitions of psychosis involve “delusions or prominent hallucinations”). This term is no longer used as a formal diagnostic category, but remains in use.

²²⁶ *See supra* text accompanying notes 215-17; MODEL PENAL CODE, *supra* note 198, at § 4.01(1).

The five professional associations recommending that legislatures not apply capital punishment to those with severe mental illness at the time of the offense, in discussing the mental illnesses and degrees of impairment that should qualify for the exemption, propose a standard that is a variant on the legal insanity test.²²⁷ The Task Force Report recommendations provide that only those with severe “disorders or disabilities are to be exempted from the death penalty,” and specifically exclude 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.”²²⁸ The recommendations are limited to “severe” mental illnesses, *i.e.*, those that once were called “psychoses.”²²⁹ To qualify, the condition must be “severe,” and must also substantially impair the 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 law.”²³⁰

What conditions, in principle, can satisfy these requirements? Plainly, schizophrenia,²³¹ major depressive disorder,²³² bipolar disorder,²³³ the dissociative disorders,²³⁴ dementia,²³⁵ and

²²⁷ See *supra* text accompanying notes 154-55.

²²⁸ Task Force Report, *supra* note 29, at 670.

²²⁹ See *supra* note 225.

²³⁰ Task Force Report, *supra* note 29, at 668.

²³¹ 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. 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. *DSM-IV-TR*, *supra* note 27, at 298. 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.” U.S. CONG., OFFICE OF TECHNOLOGY ASSESSMENT, THE BIOLOGY OF MENTAL DISORDERS: NEW DEVELOPMENTS IN NEUROSCIENCE 77-82 (No. OTA-BA-538, 1992) (hereafter BIOLOGY OF MENTAL DISORDERS).

²³² 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 124, at 345. A nonexhaustive list of such symptoms include a change in weight, appetite, sleep patterns, or psychomotor activity; decrease in energy; feelings of worthlessness or guilt; difficulty with thought, concentration or decisionmaking; 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

delirium²³⁶ could 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. Moreover, all produce effects that, in appropriate circumstances, could satisfy the test for incompetence to stand trial. As the Task Force 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.”²³⁷ As a result, offenders suffering from these conditions and experiencing these effects at the time of the offense, even if not satisfying the standard for legal insanity, may have significantly diminished responsibility for their conduct. They may experience such distortions of reality that their ability to appreciate the wrongfulness of their conduct or to understand its consequences may be

substances that relay messages throughout the central nervous system--are implicated in the etiology of schizophrenia and the mood disorders. BIOLOGY OF MENTAL DISORDERS, *supra* note 232, at 82-88 (discussing neurotransmitter imbalances and other biological factors hypothesized to play a role in mood disorders).

²³³ Bipolar disorder is a mood disorder classified by the occurrence of one or more manic episodes, characterized by elevated, expansive, or irritable mood, usually accompanied by one or more major depressive episodes and serious interference in functioning. *DSM-IV-TR*, *supra* note 27, at 382. As with schizophrenia, *see supra* note 231, and major depressive disorder, *see supra* note 232, it appears that the etiology of bipolar disorder is biochemical. BIOLOGY OF MENTAL DISORDERS, *supra* note 232, at 82-88 (discussing neurotransmitter imbalances and other biological factors hypothesized to play a role in mood disorders).

²³⁴ 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 her consciousness, memory, identity, or perception. *DSM-IV-TR*, *supra* note 27, at 519. *See generally* ELYN R. SAX & STEPHEN H. BEHNKE, *JEKYLL ON TRIAL: MULTIPLE PERSONALITY DISORDER & CRIMINAL LAW* (1997).

²³⁵ 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 27, at 147-48. Resultant defects include memory impairment and one or more of 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, reasoning). *Id.* at 148. However, a diagnosis of dementia is inappropriate where all cognitive impairments occur while in a state of delirium. *Id.* at 148. *See also infra* note 236.

²³⁶ 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. *Id.* at 136-37. *See also supra* note 235.

²³⁷ Task Force Report, *supra* note 29, 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* the Brief of Amicus Curiae APsyA at 26 (No. 07-208)).

significantly reduced, such as when their psychosis causes them to mistakenly believe that their victims are attacking them or involves hallucinations commanding them to kill them. Similarly, their symptomatology may create such gross irrationality that it significantly impairs their judgment at the time of the crime. A mother who kills her children, for example, due to her belief that the Devil otherwise will transport them to Hell and that by killing them, they will enter heaven, may have reduced culpability and deterability even if she understands that her conduct is against the law.²³⁸ In addition, in 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, they nonetheless are substantially unable to control their conduct. Other conditions that may produce similar effects include drug- or alcohol-induced psychosis²³⁹ and posttraumatic stress disorder.²⁴⁰

The Task Force Report also recognizes that, in rare instances, people suffering not from mental illnesses, but from certain personality disorders,²⁴¹ experience psychotic-like symptoms at times of stress, which could produce similar impairments at the time of the offense, also reducing

²³⁸ See, e.g., Associated Press, *Andrea Yates Not Guilty by Reason of Insanity*, CBS News, July 26, 2006, available at <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. . . . [S]he suffered from severe postpartum psychosis and, in a delusional state, believed Satan was inside her. . . . [S]he did not know killing the children was wrong because she was trying to save them from hell (sic).”)

²³⁹ *DSM-IV-TR*, *supra* note 27, at 338-39.

²⁴⁰ Posttraumatic stress disorder (PTSD) develops from the sense of extreme fear, revulsion, or helplessness after facing a highly stressful or traumatic experience, e.g., military combat, torture, natural or manmade disaster, or being the victim of a disturbing or violent crime. *Id.*, at 463. Those suffering from this condition deliberately avoid exposure to any stimuli which could cause “flashbacks” of the traumatic experience. *Id.* at 464. PTSD has been accepted as a predicate for the insanity defense. Winick, *Ambiguities*, *supra* note 185, at 596-97. PTSD is viewed as having a psychosocial, rather than a biological, etiology. “Many studies have indicated that a high percentage (up to 80 percent) of patients with PTSD have one or two concurrent psychiatric diagnoses.” David Kinzie, *Post-Traumatic Stress Disorder*, in 1 *COMPREHENSIVE TEXTBOOK OF PSYCHIATRY 1000, 1006* (Harold I. Kaplan & Benjamin J. Sadock eds., 5th ed. 1989)). 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 185, at 597 n.257.

²⁴¹ See *supra* note 191.

the culpability or deterability of the offender.²⁴² However, many of the personality disorders, the paraphilias, and substance abuse will not produce such psychotic-like effects.²⁴³ 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.”²⁴⁴ This language exempts offenders whose only diagnosis is antisocial personality disorder.²⁴⁵ 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 effects of substance abuse, significantly impaired appreciation or control at the time of the offense.”²⁴⁶

A categorical exception from the Eighth Amendment exemption of antisocial personality disorder, the paraphilias, and voluntary intoxication seems appropriate. Antisocial personality disorder is defined as “a pervasive pattern of disregard for, and violation of, the rights of others

²⁴² 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.

Task Force Report, *supra* note 29, at 671. “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 27, at 40. Identifiable characteristics of autistic disorder include markedly weak social interactive skills and limited personal interests. *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.’” Task Force Report, *supra* note 29, at 671 (quoting *DSM-IV-TR*, *supra* note 27, at 708).

²⁴³ See FINGARETTE & HASSE, *supra* note 203, at 112 (“in cases of drug intoxication there is, of course, no ‘mental disease’”); WINICK, *supra* note 181, at 128 (“Although some people diagnosed with pedophilia . . . will experience serious difficulty in controlling their sexual urges, most will not.”); Winick, *Ambiguities*, *supra* note 185, at 568 (APD), 592 (paraphilias); Winick, *supra* note 199, at 523-24 (paraphilias); Winick, et. al., *Should Psychopathy Qualify for Preventive Outpatient Commitment?*, in II INTERNATIONAL HANDBOOK ON PSYCHOPATHIC DISORDERS AND THE LAW 61, 64-65 (Alan R. Felthous & Henning Saß eds., 2007) (APD).

²⁴⁴ Task Force Report, *supra* note 29, at 672.

²⁴⁵ *Id.*

²⁴⁶ *Id.*

that begins in childhood or early adolescence and continues into adulthood.”²⁴⁷ 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. . . .”²⁴⁸ Individuals with this diagnosis are indifferent to the interests of others and are unable to empathize with them. 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 this diagnosis. Many mass murderers, for example Saddam Hussein, also probably can be so diagnosed. Whether this “condition” should be considered an illness or a disability has been questioned.²⁴⁹ The diagnosis alone does not include symptoms producing cognitive impairment of any kind or inability to control conduct.²⁵⁰ Although there have been claims that this condition is associated with various forms of brain damage, the research fails to confirm this hypothesis.²⁵¹ Research shows that psychopathy,²⁵² a somewhat wider term, is associated with “some impairment of cognitive functioning.”²⁵³ These include “problems perceiving and processing abstract and emotional information, especially linguistic information.”²⁵⁴ Research also shows that psychopathy also is associated “with

²⁴⁷ *DSM-IV-TR*, *supra* note 27, at 701.

²⁴⁸ *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.”).

²⁴⁹ See Campbell, *supra* note 201, at 162-69 (addressing whether psychopathy should be viewed as a mental illness); Lloyd Fields, *Psychopathy, Other-Regarding Moral Beliefs, and Responsibility*, 3 *PHIL. PSYCHIATRY & PSYCHOL.* 261 (1996) (arguing that APD should be regarded as a personality disorder and not a mental illness); Winick, *Ambiguities*, *supra* note 185, at 554-70. *But see* Hart, *supra* note 190, at 8 (“psychopathy meets the legal criteria for mental disorder”).

²⁵⁰ Winick, *Ambiguities*, *supra* note 185, at 568-71; Winick, *supra* note 243, at 65.

²⁵¹ See, e.g., Campbell, *supra* note 201, at 149-150 (discussing brain functioning), 150-51 (discussing stimulation seeking), 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 190, at 5-6 (noting research showing that APD 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 185 at 560-62.

²⁵² See *supra* note 190, at ¶ 2.

²⁵³ Hart, *supra* note 190, at 9 (citing studies).

²⁵⁴ *Id.*

impairment of volitional functioning.”²⁵⁵ Such impairments include difficulty considering the likely consequence of their actions, “inhibiting impulses, implementing plans, and learning from punishment.”²⁵⁶

However, these cognitive and volitional deficits are “restricted in nature or scope and moderate in severity.”²⁵⁷ APD or psychopathy does not impair the understanding of those diagnosed with these conditions of the potential consequences of their actions and alternatives, and to make choices, and they possess abilities to “compensate for or overcome” their impairments.²⁵⁸ Moreover, they can “perceive alternative courses of action, make choices, and compensate for or overcome their volitional impairment”²⁵⁹ Thus, whatever cognitive, behavioral, or volitional deficits those with APD or psychopathy may suffer from, it is not clear that they materially contribute to the antisocial conduct these individuals repeatedly display. The law requires them to “use their intact cognitive skills and abilities to overcome their impairments” and resist their antisocial urges.²⁶⁰ These deficits should not constitute a basis for considering that their culpability or deterability has been reduced. People suffering from colorblindness, for example, may have difficulty, when driving, determining the color of traffic signals. This deficit, even though physiological, however, would not be considered to reduce their culpability should they run a red light and cause an accident. We would expect them to overcome whatever deficit in color vision they had in this regard.²⁶¹ Similarly, even if there is a

²⁵⁵ *Id.* at 10.

²⁵⁶ *Id.*

²⁵⁷ *Id.* at 11-12.

²⁵⁸ *Id.*

²⁵⁹ *Id.* at 12.

²⁶⁰ *Id.*

²⁶¹

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

physiological basis for those diagnosed with APD or psychopathy that causes them to lack empathy for others, for example, we would not consider this deficiency to be a sufficient ground for reduced culpability or deterability. 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. Those diagnosed with APD or psychopathy “may have a problem 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.”²⁶² 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 paraphilia²⁶³ also does not produce diminution of culpability or deterability sufficient to justify an exclusion from the death penalty under the Eighth Amendment. Certainly the most serious of these “conditions” is pedophilia, the sexual abuse of young children. 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 deserve capital punishment. There is nothing in the diagnostic criteria for pedophilia or the other paraphilias that suggests that individuals diagnosed with these disorders suffer from any cognitive impairment that affects their ability to understand the wrongfulness of their

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.

Morse, *supra* note 202, at 1071.

²⁶² Hart, *supra* note 190, at 16.

²⁶³ See *supra* note 192.

conduct or that renders them irrational in any respect or unable to control their actions.²⁶⁴ People with these diagnoses may experience strong urges to gratify their aberrant sexual desires, but there is nothing in the diagnostic criteria to suggest that they are unable to avoid acting on their urges.²⁶⁵ The actions of sex offenders are “purposeful, planned, and goal-directed,” and in no way beyond their ability to control.²⁶⁶ The clinical literature suggests that sex offenders are able to exercise self control, and that teaching them to do so is the objective of sex offender treatment.²⁶⁷ Their difficulty in controlling their sexual urges may make them appropriate candidates for civil commitment under Sexually Violent Predator laws,²⁶⁸ 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 can be made with regard to those who engage in criminal conduct while voluntarily intoxicated. 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. Even if their substance abuse can be considered an addiction or to have a genetic

²⁶⁴ SCHOPP, *supra* note 173, at 38; WINICK, *supra* note 181, at 127; Winick, *supra* note 199, at 523-24.

²⁶⁵ SCHOPP, *supra* note 173, at 524 n.118, 609-21, 709; Morse, *supra* note 202, at 1070-71; Stephen J. Morse, *Fear of Danger, Flight from Culpability*, 4 PSYCHOL. PUB. POL’Y & LAW 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 201, 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.”); Winick, *supra* note 199, at 521-22.

²⁶⁶ *Id.* at 524. Accord Robert F. Schopp, Civil Commitment and Sexual Predators: Competence and Condemnation, 4 Psychol. Pub. Pol’y & Law 323, 376 (1998).

²⁶⁷ 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. 116-37 (1998); Park Elliot Dietz, *Sex Offenses: Behavioral Aspects*, in 4 ENCYCLOPEDIA OF CRIME AND JUSTICE 1485, 1490 (Sanford M. Kadish ed., 1983); William L. Marshall, et al., *Issues in Sexual Assault*, in HANDBOOK OF SEXUAL ASSAULT: ISSUES AND THEORIES AND TREATMENT OF THE OFFENDER 343, 391 (William L. Marshall et al., eds., 1990) (hereinafter HANDBOOK); William D. Pithers, *Relapse Prevention with Sexual Aggressors, A Method for Maintaining Therapeutic Gain and Enhancing External Supervision*, in HANDBOOK, *supra*, at 355.

²⁶⁸ See *Kansas v. Crane*, 534 U.S. 407 (2002); *Kansas v. Hendricks*, 521 U.S. 346 (1997).

component, and even if their intoxication reduced their impulse control in the context of their committing a capital crime, we would not consider this to reduce their culpability or deterability sufficiently to exempt them from capital punishment. Even though some people who abuse alcohol and illegal drugs can be considered to have an illness, their substance abuse is voluntary conduct that we hold them responsible for failing to avoid. Contemporary societal norms, quite simply, consider those who commit criminal acts while voluntarily intoxicated to be blameworthy.²⁶⁹ That this is so is confirmed by an empirical study showing that jury behavior in capital sentencing draws a distinction between character issues perceived to be within the offender's control, such as non-statutory mitigating factors of alcoholism and substance abuse, and those perceived to be non-volitional, such as the statutory mitigating factors of age, mental retardation, mental illness, extreme duress, and extreme mental or emotional disturbance.²⁷⁰ The juries considered the latter, but not the former, to be legitimate reasons for sentencing a capital defendant to life imprisonment without possibility of parole instead of death.²⁷¹ Except in rare instances, we expect people to refrain from engaging in voluntary behavior, such as substance abuse, which causes them to act in ways that may harm others. Even if they suffer from drug addiction or alcoholism, we generally hold them responsible for not having resisted temptation or for having taken the steps that led to their addiction. That intoxication is considered a mitigating factor in death penalty decision making demonstrates that individuals in this category are thought to be less blameworthy for their conduct than those with APD or pedophilia. However, the tendency of jurors to give little weight to intoxication as a mitigator shows that these offenders are considered deserving of retribution and subject to deterrence. Individuals who commit

²⁶⁹ MELTON, *supra* note 150, at 230 (noting that claim of voluntary intoxication “seldom supports” the insanity defense).

²⁷⁰ Brooke M. Butler & Gary Moran, *The Role of Death Qualification in Venirepersons' Evaluations of Aggravating and Mitigating Circumstances in Capital Trials*, 26 LAW & HUM. BEHAV. 175, 183 (2002) (study of venirepersons).

²⁷¹ *See supra* note 223.

capital crimes while voluntarily intoxicated therefore generally should not be exempted from capital punishment under the Eighth Amendment.

In the Eighth Amendment context, the question is whether the individual's condition produced a functional impairment of cognition or volition that can be considered to significantly reduce culpability or deterability. The major mental illnesses can have these effects, but APD, psychopathy, and pedophilia do not, unless those diagnosed with these conditions also are given a co-occurring diagnosis of a major mental illness.. While the immediate effects of intoxication may impair cognition and impulse control, if the individual chose voluntarily to become intoxicated, we rarely will consider that his responsibility is diminished for conduct taken while under the influence of the substances he has consumed. He should have known better and could have refrained, we would say, and therefore he is blameworthy for his conduct and subject to deterrence.

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. However, the concepts of culpability and deterability have a significant normative content, and the ultimate determination is a legal one. These are essentially value questions, and we tend to ascribe responsibility to people to take precautions to overcome their deficits when it is possible and within their control, and hold them responsible when they fail to do so. At the present state of our knowledge, unless the offender is diagnosed with one of the major mental illnesses, he rarely, if at all, will be able to qualify for the Eighth Amendment proportionality exemption from capital punishment. Even if the offender suffers from one of the major mental illnesses, clinical testimony will assist the Trier of fact to determine whether, at the time of the

offense, the effects of the offender's illness so diminished culpability and deterability to render capital punishment unconstitutional.

Our understanding of the nature and causes of mental illness will advance over time, and new knowledge may change the way we view some of the disorders and our willingness to consider whether those who suffer from them have diminished responsibility for their conduct. Moreover, our societal norms concerning the concepts of culpability and deterability remain in flux. The question of the extent to which reduced culpability and deterability would render capital punishment a disproportionate penalty in violation of the Eighth Amendment is an essentially normative question, and societal views on this question will inevitably change as our understanding concerning the nature and causes of mental illness change. Indeed, the Eighth Amendment, informed as it is by the "evolving standards of decency that mark the progress of a maturing society,"²⁷² embraces a dynamic conception of proportionality and of cruel and unusual punishment.

Which mental illnesses should exempt an offender from capital punishment and in what circumstances are issues that probably lack clear social consensus 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."²⁷³ These societal attitudes will change over time as we increasingly come to understand many mental illnesses as *medical* illnesses producing effects that are symptoms of illness outside the individual's control, rather than being due to moral depravity. What

²⁷² *Trop*, 356 U.S. at 101 (1958).

²⁷³ See MICHAEL PERLIN, *supra* note 198, at 384-87 (discussing how sanist judges mischaracterize mentally ill defendants and misadjudicate their cases); Michael 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 (1999). Michael Perlin, *On "Sanism,"* 46 SMU L. REV 373, 393-97 (1992) (a list of ten commonplace sanist myths, including that the mentally ill are lazy and less than human, presumably too incompetent to make independent decisions regarding their own lives, and constitute the most dangerous breed of criminal defendant).

constitutes sufficiently severe mental illness to disqualify an offender from capital punishment may start as a small category, but expand over time as societal norms in this area change. If the Supreme Court extends *Atkins* and *Roper* to serious mental illness, as suggested here, then the process of determining this issue on a case-by-case basis will constitute a form of structural due process,²⁷⁴ allowing us to monitor and measure evolving societal 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.

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

Assuming that the Eighth Amendment ban decreed in *Atkins* and *Roper* should extend to at least some offenders with severe mental illnesses that similarly reduce their culpability and deterability, a significant question is how this issue should be determined. 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.²⁷⁵ If the Eighth Amendment exclusion issue is determined pre-trial, either by the trial judge or by a special jury, this would remove the death penalty from consideration for cases in which the

²⁷⁴ See Laurence H. Tribe, *Structural Due Process*, 10 Harv. C.R.-C.L. L. Rev. 269, 294-96 (1975).

²⁷⁵ Bowers, CAPITAL PUNISHMENT, *supra* note 65, at 425-26.

offender's mental illness would render capital punishment a disproportionate penalty. Such a preliminary determination would occur following a hearing at which expert clinical testimony would be adduced. In such cases, if capital punishment were determined to be a disproportionate penalty in view of the offender's mental illness at the time of the offense, the death penalty would be removed from consideration and the case would proceed as a non-capital homicide case. In the alternative, the Eighth Amendment exclusion 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. Indeed, it is possible to conclude that allowing the capital jury at the penalty phase to consider evidence of mental illness would be all that should be required, and that a pretrial determination of the issue would be unnecessary.

How should these issues be determined? In declaring the death penalty for those with mental retardation unconstitutional, the Supreme Court in *Atkins* declined to specify procedures for determining whether a particular offender was mentally retarded, preferring to leave this procedural question to the states.²⁷⁶ In thinking about the question of how the mental illness death penalty exemption determination should be made, we should consider which procedural device would best effectuate the underlying Eighth Amendment values. In addition, we should take into account considerations of accuracy, cost, and therapeutic jurisprudence.²⁷⁷

²⁷⁶ *Atkins v. Virginia*, 536 U.S. 304, 317 (2002).

²⁷⁷ Therapeutic jurisprudence is an interdisciplinary field of legal research and law reform that focuses attention on the psychological wellbeing of those affected by law, legal processes, and how the law is applied. *See generally* BRUCE J. WINICK, *CIVIL COMMITMENT: A THERAPEUTIC JURISPRUDENCE MODEL* (2005); JUDGING IN A THERAPEUTIC KEY: THERAPEUTIC JURISPRUDENCE AND THE COURTS (Bruce J. Winick & David B. Wexler, eds. 2003); PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION (Dennis P. Stolle, David B. Wexler & Bruce J. Winick, eds. 2000); LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE (David B. Wexler & Bruce J. Winick, eds. 1997).

I elsewhere set forth in greater detail the reasons why the mental illness death penalty exclusion issue should be resolved pretrial by the trial judge.²⁷⁸ Such a pretrial judicial determination has been the general approach adopted by the states in the wake of *Atkins* for determination of the mental retardation exclusion issue.²⁷⁹ 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. Capital jury selection procedures bias resulting juries in favor of capital punishment,²⁸⁰ and empirical research has demonstrated that capital juries also are biased by having heard and determined the facts of the heinous murder.²⁸¹ Such juries have been shown to

²⁷⁸ See generally Winick, *Determining When Severe Mental Illness Should Disqualify a Defendant from Capital Punishment*, in MENTAL DISORDER AND THE CRIMINAL LAW, *supra* note 190 (manuscript).

²⁷⁹ James W. Ellis, *Mental Retardation and the Death Penalty: A Guide to State Legislative Issues*, 27 MENTAL & PHYSICAL DISABILITY L. REV. 11, 15 (2003). See also DPIC, STATES THAT HAVE CHANGED THEIR STATUTES TO COMPLY WITH THE SUPREME COURT'S DECISION IN ATKINS v. VIRGINIA (2008), at <http://www.deathpenaltyinfo.org/states-have-changed-their-statutes-comply-supreme-courts-decision-atkins-v-virginia> (table of states changing death penalty statutes after *Atkins*).

²⁸⁰ 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 generally, Susan D. Rozelle, *The Principled Executioner: Capital Juries' Bias and the Benefits of True Bifurcation*, 38 ARIZ. ST. L. J. 769 (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 65, at 385; Winick, *supra* note 49. This produces capital juries that are more likely to convict and impose death than juries as a whole. 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 (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 (2006); William J. Bowers & Wanda D. Foglia, *Still Singularly Agonizing: Law's Failure to Purge Arbitrariness from Capital Sentencing*, 39 CRIM. L. BULL. 51 (2003); Robert Fitzgerald & Phoebe C. Ellsworth, *Due Process vs. Crime Control*, 8 L. & HUM. BEHAV. 31 (1984); Craig Haney, et. al., *Modern Death Qualification: New Data on Its Biasing Effects*, 18 L. & HUM. BEHAV. 619 (1994); Michael L. Neices & Ronald C. Dillehay, *Death Qualification and Conviction Process: Witt and Witherspoon Compared.*, 5 BEHAV. SCI. & L. 479 (1987); Rozelle, *supra*; Winick, *supra* note 49 (Mich L. Rev). Moreover, the elaborate *voir dire* inquiry into attitudes on capital punishment and exercise of challenges for themselves bias the capital jury in favor of death and perhaps in favor of guilt. Craig Haney, *On the Selection of Capital Juries: The Biasing Effects of the Death-Qualification Process*, 8 L. & HUM. BEHAV. 31, 121-32; Craig Haney, *Juries and the Death Penalty: Readdressing the Witherspoon Question*, 26 CRIME & DELINQ. 26, 512-27 (1980).

²⁸¹ 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, 1046-49 (2001); Bowers, et. al., CAPITAL PUNISHMENT, *supra* note 65, at 413, 426-32; William J. Bowers, et. al., *Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-Trial Experience, and Premature Decision Making*, 83 CORNELL L. REV. 1474 (1998); Bowers & Foglia, *supra*, at 65; *Still Singularly Agonizing: Law's Failure to Purge Arbitrariness from Capital Sentencing*, 39 CRIM. LL BULL. 51 (2003); Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 CORNELL L. REV. 1 (1993).

apply a presumption in favor of death²⁸² and to misunderstand or disregard their role with regard to mitigating circumstances.²⁸³ 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.²⁸⁴ The trial judge is presumptively less subject to these biases and misconceptions, and better able to understand the clinical testimony and decide the legal/constitutional issue in question.²⁸⁵

Accuracy in the determination of this issue would be increased by having the issue resolved pretrial by the judge rather than post trial by the capital jury. The Supreme Court has frequently noted that "death is different," requiring heightened procedural protections to minimize the risk of erroneous execution.²⁸⁶ 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 constitutes an important consideration in determining the procedures that should be used to make the mental illness exclusion determination. The Supreme Court has frequently emphasized the importance of jury behavior in capital sentencing as an indication of community values in assessing the

²⁸² See Bowers et. al., CAPITAL PUNISHMENT, *supra* note 65, at 427, 431-32, 440.

²⁸³ See Bowers et. al., CAPITAL PUNISHMENT, *supra* note 65, at 437-38, 440.

²⁸⁴ Perlin, *supra* note 150, at 274; Slobogin, *supra* note 62, at 19-23; Slobogin, *supra* note 36, at 305, 313. See also *supra* note 150 and accompanying text.

²⁸⁵ 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.

²⁸⁶ See, e.g., California v. Ramos, 463 U.S. 992, 999 (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); Gardner v. Florida, 430 U.S. 349, 357-58 (1977) (plurality opinion); Gregg v. Georgia, 428 U.S. 153, 187 (1976); Woodson v. North Carolina, 428 U.S. 280, 295-96 (1976) (plurality opinion).

constitutionality of capital punishment.²⁸⁷ 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. This consideration may argue in favor of having the jury decide the mental illness death penalty exemption question because jury behavior in making such determinations could provide evidence of community attitudes on the continued acceptability of capital punishment for this category of offenders. Because juries reflect the “conscience of the community” more than do judges, the argument might be advanced that the determination of the mental illness exclusion from capital punishment should be made by the jury. Justice Breyer has made a similar argument in the context of the Court’s invalidation of judicial fact finding in capital cases in *Ring v. Arizona*.²⁸⁸ Although the Court had 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.”²⁸⁹ 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.²⁹⁰ This advantage, according to Justice Breyer, stems from their 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.”²⁹¹

Justice Breyer’s argument, however, does not support having the jury rather than the judge make the mental illness death penalty exclusion determination. First, this analysis is

²⁸⁷ See, e.g., *Coker*, 433 U.S. 584, 596-97; *Enmund*, 458 U.S. 782, 794 (1976); *Woodson*, 428 U.S. 280, 293 (plurality opinion).

²⁸⁸ 536 U.S. 584 (2002).

²⁸⁹ *Id.* at 615-16 (Breyer, J., concurring) (quoting *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968)).

²⁹⁰ *Id.* at 614 (Breyer, J., concurring).

²⁹¹ *Id.* at 615-16 (Breyer, J., concurring) (quoting *Spaziano v. Florida*, 468 U.S. 447, 486, 481 (1984)).

undermined by the death qualification process that characterizes American jury selection practices in capital cases.²⁹² These practices produce juries more willing to impose death and to favor conviction than juries as a whole.²⁹³ These jury selection practices result in juries that do not reflect the conscience of the community. Instead, they reflect “community sentiment purged of its reluctance to impose a death sentence.”²⁹⁴ 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.”²⁹⁵ 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.

In addition, empirical studies demonstrate capital juries also are biased by having already heard and determined the heinous facts of the crime,²⁹⁶ frequently misunderstand or disregard their role in making death penalty decisions,²⁹⁷ reject or diminish the importance of mitigating circumstances,²⁹⁸ and misunderstand or ignore the jury instructions they are given.²⁹⁹ These 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 death qualification 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.

²⁹² See *supra* note 280 and accompanying text.

²⁹³ *Id.*

²⁹⁴ Winick, *supra* note 49, at 80.

²⁹⁵ *Id.* at 81.

²⁹⁶ See *supra* note 281 and accompanying text.

²⁹⁷ See *supra* note 283 and accompanying text.

²⁹⁸ See *supra* notes 283-834 and accompanying text.

²⁹⁹ Bowers et. al., CAPITAL PUNISHMENT, *supra* note 65, at 437-40; Eisenberg & Wells, *supra* note 281.

In any event, under the suggestion made here judges would play this role only in determining pretrial motions raising the issue of whether the defendant's mental illness at the time of the offense should bar the possibility of a death sentence. Should the judge deny such a motion, the capital jury, at the penalty phase that would follow any verdict of guilt, would make the actual determination of whether the defendant deserved the death penalty. In making this determination, the capital jury would have the opportunity to reflect the "conscience of the community" to the extent that it was able to.

As judges would be more accurate decision-makers on the mental illness death penalty exclusion question, allowing the issue to be determined, at least preliminarily, by trial judges would actually provide more reliable evidence of community attitudes. Properly understood, then, Eighth Amendment values argue for judicial rather than jury determinations of the issue. These Eighth Amendment values coalesce with considerations of accuracy, cost, and therapeutic jurisprudence to support assigning this task to the trial judge at a pretrial hearing.

Having the judge make the determination pretrial will 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,³⁰⁰ with the result that determining the exclusion question at an early time can avoid much needless cost and delay. Having the issue resolved at an early point also can be justified based on therapeutic jurisprudence considerations.³⁰¹ Capital trials are significantly more stressful than non-capital trials, with the result that determining the issue at an early point will avoid much stress for the trial judge, the attorneys, the jury, and the defendant. Moreover, although the families of the victim may often seek the death penalty, rather than providing closure and enabling them to come to terms with their loss, capital trials and the

³⁰⁰ United States v. Nelson, 419 F.Supp.2d 891, 893 (E.D.La., 2006); New Mexico v. Flores, 135 N.M. 759, 764 (N.M. 2004); DPIC, COSTS OF THE DEATH PENALTY, at <http://www.deathpenaltyinfo.org/article.php?did=108>.

³⁰¹ See *supra* note 277.

long delays between capital sentencing and execution may actually prevent their wounds from healing.³⁰² 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 the family 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.

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. Trial judges are accustomed to making such mixed law/fact determinations in a variety of pretrial hearing contexts. They presumably would be more neutral decision makers than capital juries, less subject to the biasing affects of capital jury selection and trial processes and to the misunderstandings and irrational prejudice against those with mental illness that many jurors will have. 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.

V. CONCLUSION

³⁰² JAMES R. ACKER & DAVID R. KARP, WOUNDS THAT DO NOT BIND: VICTIM-BASED PERSPECTIVES ON THE DEATH PENALTY 154 (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) (Panel One, Keynote Address); 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 65, 613, 621 (2003).

The Eighth Amendment's ban on cruel and unusual punishments, as presently construed, does not prohibit the death penalty.³⁰³ Although the Eighth Amendment is dynamic, and may some day be read to ban capital punishment, the Supreme Court is not yet ready to conclude that contemporary standards have rejected the extreme penalty, rendering it cruel and unusual.³⁰⁴ The Court has acknowledged, however, that death is different; it is "a punishment different from all other sanctions in kind rather than degree."³⁰⁵ 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 penalty than any other criminal sentence.³⁰⁶ 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,³⁰⁷ or to require a mandatory death sentence upon conviction of certain crimes.³⁰⁸ Thus, the Court's death penalty jurisprudence since the mid-1970's 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.

³⁰³ *Gregg v. Georgia*, 428 U.S. 153, 187 (1976); *Proffitt v. Florida*, 428 U.S. 242, 247 (1976); *Jurek v. Texas*, 428 U.S. 262, 268 (1976).

³⁰⁴ The Supreme Court's eighth amendment jurisprudence would permit reconsideration of the constitutional question should society reject capital punishment in the future. See *Gregg v. Georgia*, 428 U.S. at 173 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

³⁰⁵ *Woodson v. North Carolina*, 428 U.S. 280, 303-04 (1976) (plurality opinion); accord *Walton v. Arizona*, 497 U.S. 639, 682 (1990); *Clemons v. Mississippi*, 494 U.S. 738, 750 n.4 (1990); *Furman v. Georgia*, 408 U.S. 238, 306 (1972) (Stewart, J., concurring).

³⁰⁶ See *supra* note 286 and accompanying text.

³⁰⁷ *Coker v. Georgia*, 433 U.S. 584, 599-600 (1977) (plurality opinion) (unconstitutional for crime of rape of adult woman); *Enmund v. Florida*, 458 U.S. 782 (1982) (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).

³⁰⁸ *Roberts v. Louisiana*, 431 U.S. 633 (1977) (per curiam) (unconstitutional to require death penalty for intentional killing of a firefighter or peace officer engaged in performance of duties); *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) ('the 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.').

The Court's 2002 decision in *Atkins* and 2005 decision in *Roper*, however, set a new course. 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. 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 deterability of such offenders. 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, will have sufficiently diminished culpability and deterability 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 abolishing capital punishment, and only the beginning of other objective indicia that contemporary societal standards would reject the death penalty. However, 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 deterability 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.

Unlike for mental retardation and juvenile status, however, the determination of when the death penalty would be disproportionate to the offender's culpability and deterability should be made on a case-by-case basis. The effects of mental illness are quite variable, and not all mental

illnesses will diminish responsibility sufficiently to satisfy the Eighth Amendment standard. 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 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/constitutional determinations called for. 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 will reflect the conscience of the community on the death penalty question.

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. Even 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.³⁰⁹ 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.

If severe mental illness is the next frontier for the Court's emerging 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 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.³¹⁰ New Jersey has recently repealed its death penalty,³¹¹ and in many jurisdictions, juries appear to be imposing death less frequently. While principles of democracy and federalism may incline the Court to leave to the states the basic question of whether to have the death penalty, its emerging conception of

³⁰⁹ See *supra* note 29 and accompanying text.

³¹⁰ Adam Liptak, *Consensus on Counting the Innocent: We Can't*, N.Y. TIMES, Mar. 25, 2008, available at <http://www.nytimes.com/2008/03/25/us/25bar.html?pagewanted=print>; DPIC, *supra* note 145 (table showing 130 death row exonerations in the U.S. since 1973).

³¹¹ Jeremy W. Peters, *Death Penalty Repealed in New Jersey*, N.Y. TIMES, Dec. 17, 2007, available at <http://www.nytimes.com/2007/12/17/nyregion/17cnd-jersey.html?bl&ex=1198040400&en=5041e607dad7dce7&ei=5087%0A>.

proportionality could allow a future Court to respond to evolving values, by concluding that it has become per se cruel and unusual.