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The Challenge and Dilemma of Charting a Course to Constitutionally Protect the Severely Mentally Ill Capital Defendant from the Death Penalty

Lyn Entzeroth

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**THE CHALLENGE AND DILEMMA OF CHARTING A
COURSE TO CONSTITUTIONALLY PROTECT THE
SEVERELY MENTALLY ILL CAPITAL DEFENDANT FROM
THE DEATH PENALTY**

*Lyn Entzeroth**

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I. INTRODUCTION

Reiterating constitutional principles it has trumpeted since the mid-1970s, the Supreme Court, in 2008, stated: “capital punishment must be limited to those offenders who commit ‘a narrow category of the most serious crimes’ and whose extreme culpability makes them ‘the most deserving of execution.’”¹ This constitutional proclamation provides assurance that only the “worst of the worst” will suffer an execution.² Fulfilling this promise, however, proves, at best, to be an elusive task. More than thirty years have passed since the Supreme Court handed down its pivotal decisions in *Furman v. Georgia*³ and *Gregg v. Georgia*.⁴ Over the course of this time, courts have struggled with the two related questions: (1) who falls within the narrow category that may be slated for death, and (2) what characteristics constitute extreme culpability deserving of execution. America’s obstinate adherence to the death penalty forces a confrontation with these questions as well as demanding an on-going review of the Eighth Amendment’s proscription against cruel and unusual punishment. Yet answering these questions is only the beginning. Intimately entangled with the resolution of these issues is the dilemma of who decides and how the decision is made to protect some individuals from the executioner’s needle while condemning others to its lethal force.

This article examines these issues in the context of an important and emerging constitutional challenge to the death penalty: whether the death penalty can be imposed on capital defendants who suffer from severe mental illness at the time of the commission of their crimes.⁵ The American Bar Association, the American Psychiatric Association, the

1. *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2650 (2008) (quoting *Roper v. Simmons*, 543 U.S. 551, 568 (2005), (quoting *Atkins v. Virginia*, 536 U.S. 304, 319 (2002)).

2. *Kennedy*, 128 S. Ct. at 2650.

3. 408 U.S. 238 (1972).

4. 428 U.S. 153 (1976).

5. The offenders at issue in this article are individuals who would not meet the statutory definition of insanity so as to avoid criminal liability.

American Psychological Association, and the National Alliance for the Mentally Ill all endorse a death penalty exemption for the severely mentally ill.⁶ Recent law review articles⁷ suggest that such an exemption may even be compelled by the Supreme Court's decisions in *Roper v. Simmons*⁸ and *Atkins v. Virginia*.⁹ However, the jurisprudence of death and the process by which the Court makes these determinations is complicated, contradictory, and does not lend itself to easy analysis or solutions. A realistic assessment of how the Supreme Court may consider the question of the Eighth Amendment's protection for severely

6. *Recommendation and Report on the Death Penalty and Persons with Mental Disabilities*, 30 MENTAL & PHYSICAL DISABILITY L. REP. 668 (2006) [hereinafter *ABA Recommendation and Report*]. See also Ronald J. Tabak, *Executing People with Mental Disabilities: How We Can Mitigate an Aggravating Situation*, 25 ST. LOUIS U. PUB. L. REV. 283 (2006) (discussing the then-proposed ABA recommendation, reasons for the recommendation, and examples of executions of severely mentally ill capital offenders); Ronald J. Tabak, *Overview of Task Force Proposal on Mental Disability and the Death Penalty*, 54 CATH. U. L. REV. 1123 (2005) (discussing background and development of task force and recommendation to provide death penalty exemptions based on mental illness or disability); Christopher Slobogin, *Mental Disorder as an Exemption from the Death Penalty: The ABA-IRR Task Force Recommendations*, 54 CATH. U. L. REV. 1133 (2005) (discussing recommendations and potential controversies of recommendations); John Parry, *The Death Penalty and Persons with Mental Disabilities: A Lethal Dose of Stigma, Sanism, Fear of Violence, and Faulty Predictions of Dangerousness*, 29 MENTAL & PHYSICAL DISABILITY L. REP. 667 (2005) (discussing the critical need filled by ABA recommendation).

7. See, e.g., Pam Wilkins, *Rethinking Categorical Prohibitions on Capital Punishment*, 40 U. MEM. L. REV. 423. (2009); Bruce Winick, *The Supreme Court's Evolving Death Penalty Jurisprudence: Severe Mental Illness as the Next Frontier*, 50 B.C. L. REV. 785 (2009) (arguing that the Court's decisions in *Atkins* and *Roper* "set a new course" that should be extended to mentally ill offenders); Nita Farahany, *Cruel and Unequal Punishments*, 86 WASH. U. L. REV. 859 (2009) (analyzing equal protection issues raised by *Atkins* and *Roper*, particularly with respect to other mentally disabled offenders); Robert Batey, *Categorical Bars to Execution: Civilizing the Death Penalty*, 45 HOUS. L. REV. 1493 (2009) (arguing for extension of categorical death penalty exemptions to include mentally ill offenders); Saby Ghoshray, *Tracing the Moral Contours of the Evolving Standards of Decency: The Supreme Court's Capital Jurisprudence Post-Roper*, 45 J. CATH. LEGAL STUDIES 561 (2007) (contending *Atkins* and *Roper* signal change in scope of Eighth Amendment protection and arguing for inclusion of mentally ill within Eighth Amendment's protection); Christopher Slobogin, *What Atkins Could Mean for People with Mental Illness*, 33 N.M. L. REV. 293 (2003) (proposing an equal protection challenge particularly given the lack of state legislation creating a death penalty exemption for mentally ill offenders); see also Bethany Bryant, Comment, *Expanding Atkins and Roper: A Diagnostic Approach to Excluding the Death Penalty as a Punishment for Schizophrenic Offenders*, 78 MISS. L.J. 905 (2009) (observing that while *Atkins* and *Roper* indicate greater Eighth Amendment protection, the legislative record at this time might not be adequate for the Supreme Court); 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 (2007) (asserting death penalty exemption unlikely in near future).

8. 543 U.S. 551 (2005).

9. 536 U.S. 304 (2002).

mentally ill offenders forces an unmasking of the true workings of the modern death penalty.

At the outset, this article briefly sets out the problem of mental illness among capital offenders and the death row population and reviews the characteristics of severe mental illnesses, such as schizophrenia, that plague some individuals who are sentenced to die. In order to contextualize the severely mentally ill offender's place within the United States' modern death penalty structure, the article traces the constitutional development of our current capital punishment systems. This discussion considers how the Court crafts and justifies death penalty exemptions, examines how state legislative action plays a pivotal role in the development of these exemptions, and contemplates how an exemption for the severely mentally ill fits within this line of death penalty jurisprudence. Because of the importance of state actions in the evolution of death penalty exemptions, the article presents current state legislative and judicial action with respect to a death penalty exemption for the severely mentally ill. The article then confronts the constitutional challenges in the development of an Eighth Amendment exemption for the severely mentally ill offender and considers ways that might prove effective in creating an exemption, as well as the limitations of this process and the dilemmas it creates.

II. THE IMPOSITION OF THE DEATH PENALTY ON THE SEVERELY MENTALLY ILL

A significant number of America's condemned prisoners suffer from serious mental illness, including reality-distorting disorders such as schizophrenia and psychosis. Studies indicate that the number of severely mentally ill individuals on death row awaiting execution has risen steadily since the implementation of the modern death penalty system in the United States.¹⁰ By some estimates, 5% to 10% of condemned prisoners in the United States have been diagnosed with some form of serious mental illness.¹¹ Given that there are roughly 3200

10. *State v. Ketterer*, 111 Ohio St.3d 70, 106, 2006-Ohio-5283, 855 N.E.2d 48, 86 (Stratton, J., concurring) (stating "[o]ver the past 30 years, the number of people on death row with mental illness and other disabilities has steadily increased. Although precise statistics are not available, it is estimated that five to ten percent of people on death row have a serious mental illness"); NAT'L MENTAL HEALTH ASSN, POSITION STATEMENT 54: DEATH PENALTY & PEOPLE WITH MENTAL ILLNESSES (2010), <http://www.nmha.org/go/position-statements/54>.

11. See Vidisha Barua, "*Synthetic Sanity*": *A Way Around the Eighth Amendment?*, 44 NO. 4 CRIM. L. BULL. 4 (July-Aug. 2008); Henry F. Fradella, *Competing Views on the Quagmire of Synthetically Restoring Competency to Be Executed*, 41 NO. 4 CRIM. L. BULL. 8 (Aug. 2005).

to 3300 prisoners facing execution in the United States,¹² these estimates suggest that between 165 and 330 current death row prisoners suffer from serious mental illness.¹³ Thus, whether a state can constitutionally impose and carry out the death penalty on a severely mentally ill offender is an issue that could affect a significant number of current and future capital prisoners.

The phrase “mental illness” covers a wide range of conditions and disabilities. For the purpose of this discussion on establishing constitutional recognition of a death penalty exemption for the severely mentally ill, the article focuses on severe mental illnesses falling within Axis I of the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV). This limited focus, however, may be too narrow, too simplistic, as it may fail to include capital defendants with severe brain injuries or similar impairments that raise concerns analogous to those individuals with an Axis I diagnosis.¹⁴ Nonetheless, this article relies on Axis I diagnoses because that is the classification used by the ABA in its recommendation to exclude the severely mentally ill offender from the death penalty.¹⁵

DSM-IV Axis I diagnoses include severe clinical disorders such as schizophrenia and other psychotic disorders,¹⁶ which often reflect an individual’s real break with or disassociation from reality and rational thought processes. Briefly defined, schizophrenia is “a disorder that lasts for at least 6 months and includes at least 1 month of active-phase symptoms (i.e., two [or more] of the following: delusions, hallucinations, disorganized speech, grossly disorganized or catatonic behavior, negative symptoms).”¹⁷ A psychotic disorder is a mental disorder involving the onset of “delusions, hallucinations, disorganized

12. The NAACP Legal Defense and Education Fund Statistics reports that, as of July 2009, 3279 prisoners await execution in the United States. Criminal Justice Project, *Death Row U.S.A., DEATH PENALTY INFORMATION CENTER* (2009), www.deathpenaltyinfo.org/documents/DRUSASummer2009.pdf. The American Civil Liberties Union estimates that since the mid-1970s, jurisdictions in the United States have executed more than sixty people suffering from mental retardation or mental illness. See Lyn Entzeroth, *The Death Penalty and Mental Illness*, 20 AMICUS J. 41, 41 n.5 (2009) (citing *Mental Illness and the Death Penalty in the United State*, AM. CIVIL LIBERTIES UNION, 2010 <http://www.aclu.org/capital/mentalillness/10617pub20050131.html>).

13. See Barua, *supra* note 11; Fradella, *supra* note 11.

14. AM. PSYCHIATRIC ASS’N, DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS, (4th ed. 2000) at 27-37 [hereinafter “DSM-IV”].

15. See *supra* note 6, p. 531; *infra* pp. 559-60 (discussing ABA Recommendation to exclude severely mentally ill offenders from death penalty).

16. DSM-IV, *supra* note 14, at 27-28.

17. *Id.* at 298.

speech (e.g., frequent derailment or incoherence), or greatly disorganized or catatonic behavior.”¹⁸ Mental illness on this scale is truly debilitating.

Severe mental disorders, such as schizophrenia and psychosis, present significant death penalty concerns. Even though a person suffering from severe mental illness may be held criminally liable for his wrongful conduct, severe mental illness can often strip the individual of the degree of culpability and blameworthiness that the Constitution demands before a state can inflict the punishment of death. If, as the Court insists,¹⁹ the death penalty is reserved for those whose conduct and mental state demonstrate “extreme culpability,” then how can the death penalty be imposed on someone who, at the time of the commission of his capital offense, suffered from delusions, hallucinations, disorganized speech, grossly or greatly disorganized behavior, and/or incoherence?²⁰ Yet, to simply assume that the diminished culpability of the severely mentally ill offender will suffice to convince the U.S. Supreme Court to spare these individuals would ignore or at least underestimate the history of the modern death penalty and its evolution.

III. THE DEVELOPMENT OF THE MODERN AMERICAN DEATH PENALTY

Although many states and the federal government have carried out executions throughout American history and continue to do so today, capital punishment is not practiced in all American jurisdictions, nor is it imposed in all cases of capital murder.²¹ Even as early as the 1780s and 1790s, Americans vigorously debated the death penalty,²² and prominent early Americans, such as Thomas Jefferson, advocated restricting the

18. *Id.* at 329.

19. *See, e.g.*, *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2650 (2008); *Roper v. Simmons*, 543 U.S. 551, 568 (2005); *Atkins v. Virginia*, 536 U.S. 304, 319 (2002).

20. As noted earlier, these characteristics are some of the characteristics set out in the DSM-IV Axis I diagnosis of schizophrenia and psychosis. *See supra*, note 14-18 and accompanying text.

21. The first state to abolish executions was Michigan in 1846; the most recent state to abolish executions was New Mexico in 2009. There are still two inmates on death row in New Mexico; however, the punishment is not available for future defendants. DEATH PENALTY INFORMATION CENTER (2010), <http://www.deathpenaltyinfo.org/documents/FactSheet.pdf>. As of early 2010, fifteen states have abolished capital punishment. DEATH PENALTY INFORMATION CENTER (2010), <http://www.deathpenaltyinfo.org/documents/FactSheet.pdf>. Other states have legislation pending to abolish the death penalty. *See* DEATH PENALTY INFORMATION CENTER (2010), <http://deathpenaltyinfo.org/recent-legislative-activity#2010>.

22. STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* 88-111 (2002); John Bessler, *Revisiting Beccaria's Vision: The Enlightenment, America's Death Penalty, and the Abolition Movement*, 4 *NW. J.L. & SOC. POL'Y* 195, 206-15 (2009).

death penalty to the most serious offenses.²³ In the first half of the twentieth century, the death penalty fluctuated in its popularity and application, rising in use particularly in the 1930s,²⁴ and declining during the 1950s and 1960s.²⁵ By the late 1960s, executions had stopped, although many states and the federal government still had the death penalty “on the books.”²⁶ During this period, a number of observers assumed that the death penalty in the United States would come to a quiet end as was happening in much of Western Europe.²⁷

A. Furman v. Georgia and Gregg v. Georgia: The Establishment of the Modern American Death Penalty Regime

In 1972, as the death penalty appeared on the wane in the United States, the Supreme Court granted certiorari in *Furman v. Georgia*,²⁸ to consider the Eighth Amendment implications of the death penalty. A divided Supreme Court, in an unusually concise one-paragraph per curiam opinion,²⁹ ruled that the death penalty system that existed in

23. Banner, *supra* note 22. For a detailed discussion of the history of the death penalty in the United States and the abolitionist movements and efforts in the nineteenth and twentieth centuries, see *Furman v. Georgia*, 408 U.S. 238, 334-42 (1972) (Marshall, J. concurring).

24. Banner, *supra* note 22; *Furman*, 408 U.S. at 334-42 (Marshall, J. concurring).

25. See AGAINST THE DEATH PENALTY: INTERNATIONAL INITIATIVES AND IMPLICATIONS (John Yorke ed., 2009); Banner, *supra* note 22; LINDA CARTER & ELLEN KREITZBERG, UNDERSTANDING CAPITAL PUNISHMENT LAW 43-44 (2d ed. 2008); VICTOR STREIB, DEATH PENALTY IN A NUTSHELL 27-41 (2008); *Furman*, 408 U.S. at 334-42 (Marshall, J. concurring).

26. Banner, *supra* note 22; Carter & Kreitzberg, *supra* note 25, at 43-44; Streib, *supra* note 25, at 27-41.

27. Banner, *supra* note 22; Carter & Kreitzberg, *supra* note 25, at 43-44; Streib, *supra* note 25, at 27-41.

28. 408 U.S. 238 (1972). The previous year, the Court rejected a broad constitutional challenge to the death penalty based on the Due Process Clause of the Fourteenth Amendment. *McGautha v. California*, 402 U.S. 183 (1971).

29. Although *Furman* voided all death sentences and death penalty statutes then in effect, the per curiam opinion is remarkably spare. The per curiam opinion is set forth in its entirety below:

Petitioner in No. 69-5003 was convicted of murder in Georgia and was sentenced to death pursuant to Ga.Code Ann. § 26-1005 (Supp.1971) (effective prior to July 1, 1969). 225 Ga. 253, 167 S.E.2d 628 (1969). Petitioner in No. 69-5030 was convicted of rape in Georgia and was sentenced to death pursuant to Ga.Code Ann. § 26-1302 (Supp.1971) (effective prior to July 1, 1969). 225 Ga. 790, 171 S.E.2d 501 (1969). Petitioner in No. 69-5031 was convicted of rape in Texas and was sentenced to death pursuant to Vernon's Tex.Penal Code, Art. 1189 (1961). 447 S.W.2d 932 (Ct.Crim.App.1969). Certiorari was granted limited to the following question: ‘Does the imposition and carrying out of the death penalty in (these cases) constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments?’ 403 U.S. 952, 91 S. Ct. 2287, 29 L.Ed.2d 863 (1971). The Court holds that the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. The judgment in each case is therefore reversed insofar as it

Georgia and Texas violated the Cruel and Unusual Punishments Clause of the Eighth Amendment. Each justice wrote a separate opinion setting out his distinct views as to why the death penalty, as it existed in 1972 in the United States, was unconstitutional or—in the case of the four dissenters—why it was not unconstitutional.³⁰ Although the Court did not find that the death penalty was a *per se* violation of the Eighth Amendment, the five justices making up the *Furman* majority concluded that the death penalty deprived defendants of their humanity under a random, arbitrary system³¹ that provided capital juries with virtually unrestricted discretion to sentence the defendant to either life or death.³²

leaves undisturbed the death sentence imposed, and the cases are remanded for further proceedings. So ordered.

Furman, 408 U.S. at 239-40.

30. Justices Douglas, Brennan, Stewart, White and Marshall wrote opinions concurring in the judgment. Chief Justice Burger and Justices Blackmun, Powell, and Rehnquist issued dissenting opinions. For discussion and excerpts of each justice's opinion, see RANDALL COYNE & LYN ENTZEROTH, *CAPITAL PUNISHMENT & THE JUDICIAL PROCESS* 148-54 (3d ed. 2006).

31. Justice Douglas stated that it would be "'cruel and unusual' to apply the death penalty—or any other penalty—selectively to minorities whose numbers are few, who are outcasts of society, and who are unpopular, but whom society is willing to see suffer though it would not countenance general application of the same penalty across the board." *Furman*, 408 U.S. at 244-45. Justice Brennan observed, "The infliction of a severe punishment by the State cannot comport with human dignity when it is nothing more than the pointless infliction of suffering. If there is a significantly less severe punishment adequate to achieve the purposes for which the punishment is inflicted, the punishment inflicted is unnecessary and therefore excessive." *Id.* at 279 (citation omitted). Justice Stewart reflected:

The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity.

Id. at 306. Justice White opined that although the death penalty was not *per se* unconstitutional, given the infrequency with which the death penalty was being carried out in the early 1970s, the punishment had reached or was reaching the point where "its imposition would . . . be the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. A penalty with such negligible returns to the State would be patently excessive and cruel and unusual punishment violative of the Eighth Amendment." *Id.* at 312-13. After providing a detailed history of the death penalty, the constitutional development of the Eighth Amendment, and the retributive and deterrent value of the death penalty, Justice Marshall concluded that "the death penalty is an excessive and unnecessary punishment that violates the Eighth Amendment." *Id.* at 358-59.

32. In describing the death penalty systems of the early 1970s, Justice Douglas stated:

[W]e deal with a system of law and of justice that leaves to the uncontrolled discretion of judges or juries the determination whether defendants committing these crimes should die or be imprisoned. Under these laws no standards govern the selection of the penalty. People live or die, dependent on the whim of one man or of 12.

Furman, 408 U.S. at 253. Likewise, Justice Brennan commented:

[O]ur procedures in death cases, rather than resulting in the selection of 'extreme' cases for this punishment, actually sanction an arbitrary selection. For this Court has held that juries may, as they do, make the decision whether to impose a death sentence wholly

Because of these defects, a majority of the Court held that the death sentences of William Henry Furman and the other petitioners violated the Eighth Amendment.³³

The effect of *Furman* was to render all death sentences across the country void and to render all death penalty systems in place at that time unsustainable from a constitutional standpoint. Some contemporaneous commentators thought that *Furman* marked the demise of the death

unguided by standards governing that decision. In other words, our procedures are not constructed to guard against the totally capricious selection of criminals for the punishment of death.

Id. at 294-95 (citation omitted). In an oft-quoted description of the death penalty system in place at the time the Court decided *Furman*, Justice Stewart stated:

These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed. My concurring Brothers have demonstrated that, if any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race. But racial discrimination has not been proved, and I put it to one side. I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.

Id. at 309-10 (citation and footnotes omitted). Justice White offered this view:

I can do no more than state a conclusion based on 10 years of almost daily exposure to the facts and circumstances of hundreds and hundreds of federal and state criminal cases involving crimes for which death is the authorized penalty. That conclusion, as I have said, is that the death penalty is exacted with great infrequency even for the most atrocious crimes and that there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not.

Id. at 313. Justice Marshall also observed that “capital punishment is imposed discriminatorily against certain identifiable classes of people.” *Id.* at 364. Supporting this conclusion, Justice Marshall recounted:

Regarding discrimination, it has been said that ‘(i)t is usually the poor, the illiterate, the underprivileged, the member of the minority group—the man who, because he is without means, and is defended by a court-appointed attorney—who becomes society’s sacrificial lamb’ Indeed, a look at the bare statistics regarding executions is enough to betray much of the discrimination. A total of 3,859 persons have been executed since 1930, of whom 1,751 were white and 2,066 were Negro. Of the executions, 3,334 were for murder; 1,664 of the executed murderers were white and 1,630 were Negro; 455 persons, including 48 whites and 405 Negroes, were executed for rape. It is immediately apparent that Negroes were executed far more often than whites in proportion to their percentage of the population. Studies indicate that while the higher rate of execution among Negroes is partially due to a higher rate of crime, there is evidence of racial discrimination. Racial or other discriminations should not be surprising.

Furman, 408 U.S. at 364-65 (footnotes omitted).

33. For further discussion on William Furman and his case, see Carol Steiker, *Furman v. Georgia: Not an End, But a Beginning*, in *DEATH PENALTY STORIES*, 94, 127 (John H. Blume & Jordan Steiker eds., 2009).

penalty in the United States.³⁴ Justices Douglas and Marshall expressed the hope that the opinion would signal the end of the death penalty in the United States,³⁵ and Justice White stated that, in light of *Furman*, the death penalty “for all practical purposes had run its course.”³⁶ Evidently, many state legislators did not share these sentiments, and at the state level, various groups began to advocate, reshape, and craft a death penalty system that addressed the objections expressed by the *Furman* majority.³⁷ As a result, during the early 1970s, a number of states enacted revised death penalty laws, some of which were informed by a provision in the Model Penal Code put forth by the American Law Institute (ALI) during the early 1960s.³⁸

In 1976, the Supreme Court granted certiorari to examine the constitutionality of some of these revised death penalty statutes, selecting for review cases from five states: Georgia,³⁹ Florida,⁴⁰ Texas,⁴¹ Louisiana,⁴² and North Carolina.⁴³ The Court found the death penalty systems in Georgia,⁴⁴ Florida,⁴⁵ and Texas⁴⁶ to be constitutional, but held that the mandatory death penalty systems in Louisiana⁴⁷ and North Carolina⁴⁸ were unconstitutional. In its plurality opinion in *Gregg v. Georgia*,⁴⁹ the Court specifically found that the death penalty was not a per se violation of the Eighth Amendment. In support of this conclusion, the Court first noted that not only was there a long common law history of the death penalty in the United States, but also after

34. For example, as the Washington Post “editorialized ‘We trust that the death chambers will now be dismantled.’” Steiker, *supra* note 33, at 102.

35. Steiker, *supra* note 33, at 102-03.

36. *Furman*, 408 U.S. at 313 (White, J., concurring); Steiker, *supra* note 33, at 103.

37. For a discussion on the political backlash to the *Furman* decision, see Corrina Barrett Lain, *Furman Fundamentals*, 82 WASH. L. REV. 1 (2007).

38. The American Law Institute has now abandoned its efforts to provide a model statute on capital punishment. *See infra* p. 543.

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

40. *Proffitt v. Florida*, 428 U.S. 242 (1976).

41. *Jurek v. Texas*, 428 U.S. 262 (1976).

42. *Roberts v. Louisiana*, 428 U.S. 325 (1976).

43. *Woodson v. North Carolina*, 428 U.S. 280 (1976).

44. *Gregg*, 428 U.S. 153.

45. *Proffitt*, 428 U.S. 242.

46. *Jurek*, 428 U.S. 262.

47. *Roberts*, 428 U.S. 325.

48. *Woodson*, 428 U.S. 280.

49. 428 U.S. 153. Justice Stewart announced the plurality opinion in which he and Justices Powell and Stevens found the revised death penalty statute of Georgia to be constitutional. Chief Justice Burger and Justices White, Blackmun and Rehnquist concurred in the judgment. Justices Brennan and Marshall dissented. *See infra* p. 542 (discussing Justice Stevens’ recent concurring opinion in *Baze v. Rees*, 128 S. Ct. 1520 (2008)).

Furman, thirty-five states enacted revised death penalty statutes. Yet, the Court insisted that history and practice alone were not sufficient to determine if the death penalty comported with Eighth Amendment guarantees. Rather, the *Gregg* Court maintained that the ultimate question was whether the death penalty “comports with the basic concept of human decency at the core of the [Eighth] amendment.”⁵⁰

While acknowledging that the death penalty is unique in its severity and irrevocable nature, the *Gregg* Court nonetheless accepted the arguments that the death penalty serves the social goals of retribution and deterrence. With respect to retribution, the plurality observed that while retribution may be an unappealing goal of punishment, it was not a forbidden legal objective and it was not inconsistent with the dignity of man.⁵¹ As to deterrence, the *Gregg* plurality found that even though the evidence was inconclusive as to whether the death penalty deterred future capital offenses, state legislatures were the proper governmental bodies to resolve this complex issue.⁵² The Court then concluded that to the extent that application of the death penalty in a particular case or under certain circumstances advances the legitimate social goals of retribution and deterrence, the Court was unwilling to say that the death penalty constituted a per se violation of the Eighth Amendment.⁵³

The Court next turned to the revised death penalty statutes of Georgia, Florida, Texas, Louisiana, and North Carolina to determine whether the processes and systems established by these state legislatures comported with the Eighth Amendment. As discussed above, in *Furman*, the justices found that unguided, uncontrolled jury discretion in imposing the death sentence was too arbitrary, too capricious, and too random to withstand constitutional scrutiny. Louisiana and North Carolina responded to these constitutional concerns by creating a mandatory death penalty system—no discretion, no problem. The Court rejected this approach, holding that although the death penalty schemes at issue in *Furman* were unconstitutional because they allowed too much discretion, the mandatory death penalty systems of Louisiana and North Carolina were unconstitutional because they permitted no discretion.⁵⁴ The Court found that the Eighth Amendment required capital juries to

50. *Gregg*, 428 U.S. at 182.

51. *Id.* at 183-84.

52. *Id.* at 184-87. The deterrence debate continues, although the weight of evidence shows a lack of deterrence. See John J. Donohue, III & Justin Wolfers, *Estimating the Impact of the Death Penalty on Murder*, 11 AM. L. & ECON. REV. 249 (2009).

53. *Gregg*, 428 U.S. at 187.

54. *Woodson*, 428 U.S. at 292-93; *Roberts*, 428 U.S. at 336.

have some discretion to impose sentences less than death in capital cases.⁵⁵ In contrast, the systems of Georgia, Florida, and Texas allowed varying degrees of jury discretion while providing statutory guidance to the jury as to what types of cases or what characteristics of the defendant might warrant the death penalty.⁵⁶ The Court found that a guided decision-making process that still maintained some degree of jury discretion did not violate the Eighth Amendment.

These cases—*Furman* in 1972 and *Gregg* and the four companion cases in 1976—form the constitutional basis of the modern death penalty system in the United States. In essence, a majority of the Court has concluded that to the extent the death penalty carries out the legitimate goals of retribution and deterrence it is not a per se violation of the Eighth Amendment. Further, statutes that provide juries with criteria, like aggravating factors, to guide their sentencing decision, and allow the jury discretion, often based on mitigating factors, to impose a sentence less than death are generally going to be found constitutional.⁵⁷

In the thirty-plus years since the Supreme Court sanctioned the newest regime of death penalty statutes, American capital punishment has remained controversial and has come under withering criticism from both inside and outside the United States. Some of the most damning critiques have come from past and present Supreme Court justices who ultimately concluded that the system is hopelessly flawed. For example, Justice Harry Blackmun, who voted to sustain the death penalty during most of his judicial career, came to view the modern death penalty

55. *Woodson*, 428 U.S. at 292-93; *Roberts*, 428 U.S. at 336.

56. *Walker v. Georgia*, 129 S. Ct. 453 (2008) (Stevens, J., statement on denial of certiorari) (discussing and criticizing the current perfunctory proportionality review of Georgia Supreme Court in death penalty cases); Bidish Sarma, *Furman's Resurrection: Proportionality Review and the Supreme Court's Second Chance to Fulfill Furman's Promise*, 2009 CARDOZO L. REV. DE NOVO 238. For further discussions on the current status of the death penalty in Georgia and the extent to which the promises of *Gregg* have not been kept, see Therese Michelle Day, *Death Penalty Law*, 61 MERCER L. REV. 99 (2009) (providing survey of Georgia death penalty cases from 2008-2009); Kristen Nugent, *Proportionality and Prosecutorial Discretion: Challenges to the Constitutionality of Georgia's Death Penalty Laws and Procedures Amidst the Deficiencies of the State's Mandatory Appellate Review Structure*, 64 U. MIAMI L. REV. 175 (2009) (discussing current Georgia death penalty system and its shortcomings).

57. In addition to the constitutionally required narrowing requirements of modern death penalty statutes, the Supreme Court has continued to make clear that the capital defendant has the constitutional right to present broad mitigating evidence, and the state is obligated to make sure that the jury is able to fully consider and give effect to that evidence. See *Smith v. Texas*, 543 U.S. 37 (2004); *Penry v. Johnson*, 532 U.S. 782 (2001); *Penry v. Lynaugh*, 492 U.S. 302 (1989) (overturned on other grounds); *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Lockett v. Ohio*, 438 U.S. 586 (1978).

system as constitutionally unworkable.⁵⁸ In his dissent from the denial of certiorari review in *Callins v. Collins*,⁵⁹ Justice Blackmun wrote:

Our collective conscience will remain uneasy. Twenty years have passed since this Court declared that the death penalty must be imposed fairly, and with reasonable consistency, or not at all, *see Furman v. Georgia*, and, despite the effort of the States and courts to devise legal formulas and procedural rules to meet this daunting challenge, the death penalty remains fraught with arbitrariness, discrimination, caprice, and mistake. This is not to say that the problems with the death penalty today are identical to those that were present 20 years ago. Rather, the problems that were pursued down one hole with procedural rules and verbal formulas have come to the surface somewhere else, just as virulent and pernicious as they were in their original form. Experience has taught us that the constitutional goal of eliminating arbitrariness and discrimination from the administration of death, can never be achieved without compromising an equally essential component of fundamental fairness-individualized sentencing.⁶⁰

Justice Scalia, who continues to ardently support the application of the death penalty by state and federal governments, has expressed tremendous frustration with the Court's death penalty jurisprudence. Writing in *Walton v. Arizona*,⁶¹ Justice Scalia stated:

Pursuant to *Furman*, and in order "to achieve a more rational and equitable administration of the death penalty," we require that States "channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance.'" In the next breath, however, we say that "the State cannot channel the sentencer's discretion . . . to consider any relevant [mitigating] information offered by the defendant," and that the sentencer must enjoy unconstrained discretion to decide whether any sympathetic factors bearing on the defendant or the crime indicate that he does not "deserve to be sentenced to death." The latter requirement quite obviously destroys whatever rationality and predictability the former requirement was designed to achieve.⁶²

58. *Callins v. Collins*, 510 U.S. 1141, 1143-44 (1994) (Blackmun, J., dissent from denial of certiorari).

59. *Id.*

60. *Callins*, 510 U.S. at 1143-44 (Blackmun, J., dissent from denial of certiorari) (citations omitted).

61. 497 U.S. 639 (1990) (citations omitted) (overruled in part by *Ring v. Arizona*, 536 U.S. 584 (2002)).

62. *Walton*, 497 U.S. at 664-65.

In stark contrast to Justice Blackmun's solution, Justice Scalia's resolution to the constitutional inconsistencies and internal incompatibility of the modern U.S. death penalty system is to eliminate the constitutional requirement of discretion and the broad presentation of mitigating evidence.⁶³

In *Kansas v. Marsh*,⁶⁴ Justice Souter, in dissent, expressed concerns about the fairness and reliability of America's death penalty system, particularly in light of the danger of executing an innocent person. In this regard, Justice Souter opined:

Today, a new body of fact must be accounted for in deciding what, in practical terms, the Eighth Amendment guarantees should tolerate, for the period starting in 1989 has seen repeated exonerations of convicts under death sentences, in numbers never imagined before the development of DNA tests. We cannot face up to these facts and still hold that the guarantee of morally justifiable sentencing is hollow enough to allow maximizing death sentences, by requiring them when juries fail to find the worst degree of culpability: when, by a State's own standards and a State's own characterization, the case for death is "doubtful."⁶⁵

More recently, Justice Stevens in *Baze v. Rees*,⁶⁶ said in a concurring opinion that he had been persuaded that:

Current decisions by state legislatures, by the Congress of the United States, and by this Court to retain the death penalty as a part of our law are the product of habit and inattention rather than an acceptable deliberative process that weighs the costs and risks of administering that penalty against its identifiable benefits, and rest in part on a faulty assumption about the retributive force of the death penalty.⁶⁷

63. In *Woodson v. North Carolina*, 428 U.S. 280, 292-93(1976), and *Roberts v. Louisiana*, 428 U.S. 325, 336 (1976), the Court specifically found that the Eighth Amendment's evolving standards of decency prohibit mandatory death sentences. The *Woodson* Court detailed the long repudiation of the mandatory death penalty by states and the federal government finding "[t]he consistent course charted by the state legislatures and by Congress since the middle of the past century demonstrates that the aversion of jurors to mandatory death penalty statutes is shared by society at large." *Woodson*, 428 U.S. at 295.

64. 548 U.S. 163 (2006).

65. *Id.* at 207-08. For a chilling account of a case where an innocent man may have very well been executed, see David Grann, *Trial by Fire*, THE NEW YORKER, Sept. 7, 2009, at 42-52.

66. 128 S. Ct. 1520 (2008).

67. *Id.* at 1547.

It is noteworthy that Justice Stevens was one of the three justices who signed the plurality opinion in *Gregg v. Georgia*, in which the Court sanctioned the modern death penalty system.⁶⁸

The inherent constitutional flaws and significant practical problems presented in creating a workable and constitutional death penalty system were made plain in a recent resolution by the American Law Institute. On October 23, 2009, the ALI Council, with a few abstentions, adopted the following resolution, which had been approved by the ALI membership: “For reasons stated in Part V of the Council’s report to the membership, the Institute withdraws Section 210.6 of the Model Penal Code in light of the current intractable institutional and structural obstacles to ensuring a minimally adequate system for administering capital punishment.”⁶⁹ Thus, the ALI, whose Model Penal Code formed the intellectual framework for modern death penalty statutes, refuses to tinker any longer with the machinery of death.⁷⁰

B. *Limitations on the Modern Death Penalty*

Despite the misgivings of various justices and prominent American legal organizations about the fairness and constitutional workability of the modern death penalty, there does not appear to be a majority on the current Supreme Court willing to find that the modern death penalty regime is unconstitutional—at least on a whole-scale level.⁷¹ Rather what has emerged since 1976 is the Court’s creation of discrete circumstances in which the Eighth Amendment restricts the reach of the death penalty.

As the Court stated in *Kennedy v. Louisiana*,⁷² for the infliction of the death penalty to fall within the parameters of constitutional acceptability its imposition in a particular case or on a particular person must comport with the evolving standards of decency that mark the

68. See *supra* note 49.

69. Message From ALI Director Lance Liebman, AMERICAN LAW INSTITUTE (2009), http://www.ali.org/_news/10232009.htm. See *Report of the Council to the Membership of the American Law Institute on the Matter of the Death Penalty*, AMERICAN LAW INSTITUTE (Apr. 15, 2009), http://www.ali.org/doc/Capital%20Punishment_web.pdf.

70. See *Callins*, 510 U.S. at 1145 (Blackmun, J., dissenting from denial of certiorari) (stating “[f]rom this day forward, I shall no longer tinker with the machinery of death”).

71. In contrast, Justices Marshall and Brennan concluded that the death penalty violated the Eighth and Fourteenth Amendments under all circumstances and it therefore is a per se unconstitutional form of punishment. *Gregg v. Georgia*, 428 U.S. 153, 229-31, 240-41 (1976) (Brennan and Marshall, JJ., dissenting).

72. 128 S. Ct. 2641 (2008).

progress of a maturing society⁷³ and must “be graduated and proportioned to [the] offense.”⁷⁴ In the majority opinion, Justice Kennedy observed: “When the law punishes by death, it risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint.”⁷⁵ In keeping with this observation, Justice Kennedy stated:

For these reasons we have explained that capital punishment must “be limited to those offenders who commit ‘a narrow category of the most serious crimes’ and whose extreme culpability makes them ‘the most deserving of execution.’” Though the death penalty is not invariably unconstitutional, the Court insists upon confining the instances in which the punishment can be imposed.⁷⁶

Accordingly, the Court has found that there are certain groups of individuals upon whom or certain circumstances under which the death penalty may not be constitutionally imposed.

For example, the Supreme Court recognized in *Coker v. Georgia*,⁷⁷ and more recently in *Kennedy v. Louisiana*,⁷⁸ that in cases of crimes against the individual, the death penalty is an appropriate punishment only for the crime of capital murder.⁷⁹ The Court has held that the death penalty is not an appropriate punishment for the crime of the rape,⁸⁰ even

73. *Id.* at 2649. A century ago, the Court described the Eighth Amendment as a constitutional device designed to restrain legislative “power [that] might be tempted to cruelty.” *Weems v. United States*, 217 U.S. 349, 373 (1910). The *Weems* Court specifically stated that the meaning of the Eighth Amendment was not limited to punishments prohibited in England at the time of the Stuarts and noted that “a principle, to be vital, must be capable of wider application than the mischief which gave it birth.” *Weems*, 217 U.S. at 373. Approximately fifty years after *Weems*, the Court in *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958) (footnote omitted), set out the following oft-quoted description of the Eighth Amendment: “the words of the Eighth Amendment are not precise, and that their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.” *Id.*

74. For early cases developing the scope and meaning of the Eighth Amendment, see *Trop v. Dulles*, 356 U.S. 86, (1958), and *Weems v. United States*, 217 U.S. 349 (1910).

75. *Kennedy*, 128 S. Ct. at 2650.

76. *Id.* at 2650.

77. 433 U.S. 584 (1977).

78. 128 S. Ct. 2641.

79. The *Kennedy* Court stated:

Our concern here is limited to crimes against individual persons. We do not address, for example, crimes defining and punishing treason, espionage, terrorism, and drug kingpin activity, which are offenses against the State. As it relates to crimes against individuals, though, the death penalty should not be expanded to instances where the victim’s life was not taken.

Kennedy, 128 S. Ct. at 2659.

80. *Coker*, 433 U.S. at 584.

the horrific rape of a young child.⁸¹ Moreover, even when a crime results in the death of the victim, the Court demands that the defendant have sufficient knowledge of and participation in the murder—that is, there must be a sufficient degree of personal culpability before the State can constitutionally punish an individual by killing him.⁸² In determining that the Eighth Amendment imposes these limitations on the death penalty, the Court considers the history and standards of the Eighth Amendment and the evolution of the Eighth Amendment's protection of the dignity of man. Moreover, the Court looks, often as a first or critical step in its analysis, at whether state statutes provide for or prohibit the death penalty in a particular set of circumstances. Arguably, the Court views state statutes as providing the objective standards and norms that create a consensus on the appropriateness of the imposition of the death penalty in a particular type of case or on a particular person.⁸³

In addition to these constitutional restrictions on the death penalty, the Court has found that there are certain groups or classes of persons on whom the death penalty cannot be constitutionally imposed. For example, in *Atkins v. Virginia*,⁸⁴ the Court held that the death penalty cannot be constitutionally imposed on someone who is mentally retarded, although the Court left it to the states to craft the actual standards and processes by which states determine whether a person is mentally retarded and therefore death penalty ineligible.⁸⁵ Likewise, in *Roper v. Simmons*,⁸⁶ the Court held that the death penalty cannot be constitutionally imposed on anyone who was under the age of eighteen

81. *Kennedy*, 128 S. Ct. at 2641.

82. *See Tison v. Arizona*, 481 U.S. 137, 157-58 (1987) (holding “reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state, a mental state that may be taken into account in making a capital sentencing judgment when that conduct causes its natural, though also not inevitable, lethal result”); *Enmund v. Florida*, 458 U.S. 782, 801 (1982) (holding that imposing death penalty on defendant who aided and abetted in robbery, which resulted in two deaths, but who himself “did not commit and had no intention of committing or causing [the murders] does not measurably contribute to the retributive end of ensuring that the criminal gets his just deserts. This is the judgment of most of the legislatures that have recently addressed the matter, and we have no reason to disagree with that judgment for purposes of construing and applying the Eighth Amendment”).

83. *See Penry v. Lynaugh*, 492 U.S. 302, 315-18 (1989).

84. 536 U.S. 304 (2002).

85. *Id.* Of course crafting this criteria and process can result in some states under-protecting those with mental retardation and allows for a fair amount of discretion and variation in how this constitutional protection is implemented. As discussed, *infra*, such inconsistent applications of *Atkins*' standard arguably reflects the interplay of the democratic process and the scope of constitutional protection.

86. 543 U.S. 551 (2005).

at the time of the commission of his capital offense. As commentators have noted,⁸⁷ these two cases provide powerful analogies to the position and status of the severely mentally ill offender.

C. *The Development of Eighth Amendment Protection for Mentally Retarded and Juvenile Offenders*

The constitutional exemptions established in *Roper* and *Atkins* tracked similar paths in their development. First, both decisions overturned fairly recent Supreme Court precedent. In 2005, *Roper* overturned *Stanford v. Kentucky*,⁸⁸ a 1989 decision in which the Court found that the Eighth Amendment did not prohibit states from executing sixteen- and seventeen-year-olds. In 2002, *Atkins* overturned *Penry v. Lynaugh*,⁸⁹ a 1989 decision in which the Court found no constitutional violation in executing mentally retarded offenders.

Second, prior to *Atkins* and *Roper*, a defendant's youth or mental retardation was generally considered a mitigating factor that the defendant could present to persuade the jury to impose a punishment less than death.⁹⁰ However, with respect to both a defendant's status as either a youthful or mentally retarded offender, that status could serve as a double-edged sword.⁹¹ Both the Supreme Court and commentators researching the use of these potentially mitigating factors recognized that many jurors viewed these qualities as making the defendant more dangerous and deserving of death.⁹² Accordingly, there existed a danger that jurors would misinterpret the evidence of youth or limited intellectual capacity and use that evidence to punish the defendant in an inappropriately excessive manner.

Third, there was strong social opposition to the execution of juveniles and mentally retarded offenders. The ABA, professional

87. *Id.* See, e.g., Wilkins, *supra* note 7; Winick, *supra* note 7; Farahany, *supra* note 7; Batey, *supra* note 7; Ghoshray, *supra* note 7.

88. 492 U.S. 361 (1989).

89. 492 U.S. 302 (1989).

90. *Eddings v. Oklahoma*, 455 U.S. 104 (1982) (requiring state to give mitigating effect to defendant's youth as a factor to impose sentence less than death); *Penry v. Lynaugh*, 492 U.S. 302 (1989) (requiring state to give mitigating effect to a defendant's mental retardation).

91. Deborah Denno, *Testing Penry and its Progeny*, 22 AM. J. CRIM. L. 1, 12, n.75 (1994) (discussing double-edge sword effect of youth and mental retardation).

92. *Tennard v. Dretke*, 542 U.S. 274, 288-89 (2004) (discussing danger that mental limitations could be used as aggravating rather than mitigating evidence); J. Richard Broughton, *Off the Rails on a Crazy Train?: The Structural Consequences of Atkins and Modern Death Penalty Jurisprudence*, 11 WIDENER L. REV. 1, 11 & n.56 (2004) (listing cases discussing double-edged sword effect); Denno, *supra* note 91; Slobogin, *supra* note 6, at 1151 (noting that in *Tennard v. Dretke*, the prosecutor advised jury that the defendant's low IQ was evidence of dangerousness).

organizations, religious organizations, and international organizations representing the interests of juveniles⁹³ and the mentally disabled⁹⁴ strongly advocated for the abolition of the death penalty for these groups. Further, the Court recognized in *Atkins* that “within the world

93. For example, the following amicus curiae briefs were filed in support of a constitutional exemption for juvenile offenders: Brief for A.B.A. as Amicus Curiae Supporting Respondent, *Roper v. Simmons*, 543 U.S. 551 (2004) (No. 03-633), 2004 WL 1617399; Brief for President James Earl Carter et al. as Amici Curiae Supporting Respondent, *Roper v. Simmons*, 543 U.S. 552 (2004) (No. 03-633), 2004 WL 1636446 (amicus curiae brief of Nobel Prize winners); Brief for American Psychological Ass’n and the Missouri Psychological Ass’n as Amici Curiae Supporting Respondent, *Roper v. Simmons*, 543 U.S. 551 (2004) (No. 03-633), 2004 WL 1636447; Brief for Morton Abramowitz et al. as Amici Curiae Supporting Respondent, *Roper v. Simmons*, 543 U.S. 551 (2004) (No. 03-633), 2004 WL 1636448 (amicus curiae brief of former American diplomats); Brief for the NAACP Legal Defense and Educational Fund, Inc. et al. as Amici Curiae Supporting Respondent, *Roper v. Simmons*, 543 U.S. 551 (2004) (No. 03-633), 2004 WL 1636450; Brief for the Constitution Projects as Amicus Curiae Supporting Respondent, *Roper v. Simmons*, 543 U.S. 551 (2004) (No. 03-633), 2004 WL 1636451; Brief for the Coalition for Juvenile Justice as Amicus Curiae Supporting Respondent, *Roper v. Simmons*, 543 U.S. 551 (2004) (No. 03-633), 2004 WL 1628522; Brief for American Medical Ass’n et al. as Amici Curiae Supporting Respondent, *Roper v. Simmons*, 543 U.S. 551 (2004) (No. 03-633), 2004 WL 1633549; Brief for National Legal Aid and Defender Ass’n as Amicus Curiae Supporting Respondent, *Roper v. Simmons*, 543 U.S. 551 (2004) (No. 03-633), 2004 WL 1633550; Brief for Human Rights Committee of the Bar of England and Wales et al. as Amici Curiae Supporting Respondent, *Roper v. Simmons*, 543 U.S. 551 (2004) (No. 03-633), 2004 WL 1628523; Brief for United States Conference of Catholic Bishops et al. as Amici Curiae Supporting Respondent, *Roper v. Simmons*, 543 U.S. 551 (2004) (No. 03-633), 2004 WL 1617400; Brief for Murder Victims’ Families for Reconciliation as Amici Curiae Supporting Respondent, *Roper v. Simmons*, 543 U.S. 551 (2004) (No. 03-633), 2004 WL 1588549; Brief for European Union et al. as Amici Curiae Supporting Respondent, *Roper v. Simmons*, 543 U.S. 551 (2004) (No. 03-633), 2004 WL 1619203; Brief for Juvenile Law Center et al. as Amici Curiae Supporting Respondent, *Roper v. Simmons*, 543 U.S. 551 (2004) (No. 03-633), 2004 WL 1660637.

94. In *Atkins v. Virginia*, the following organizations moved to file an amicus curiae brief in support of a constitutional exemption for mentally retarded offenders: American Association on Mental Retardation, the Arc of the United States, American Orthopsychiatric Association, Physicians for Human Rights, American Network of Community Options and Resources, Joseph P. Kennedy, Jr. Foundation, Judge David L. Bazelon Center for Mental Health Law, National Association of Protection and Advocacy Systems, American Bar Association, American Civil Liberties Union, ACLU of North Carolina, Equal Justice Initiative of Alabama, American Jewish Committee, Commission on Social Action of Reform Judaism, Evangelical Lutheran Church in America, Foundation for the Preservation of the Mahayana Tradition, Inc., General Board of Church and Society and General Board of Global Ministries of the United Methodist Church, General Synod of The United Church of Christ, Clifton Kirkpatrick, as Stated Clerk of the General Assembly of the Presbyterian Church (U.S.A.), Masjid Malcolm Shabazz, the Mennonite Central Committee U.S. Washington Office, Progressive Jewish Alliance, Unitarian Universalist Association, United States Conference of Catholic Bishops (formerly known as the United States Catholic Conference), American Psychological Association, American Psychiatric Association, American Academy of Psychiatry and Law, former American diplomats, and the European Union. Joint Motion of All Amici in *McCarver v. North Carolina*, No. 00-8727, to Have Their McCarver Amicus Briefs Considered In This Case Supporting Petitioner, *Atkins v. Virginia*, 536 U.S. 304 (2001) (No. 00-8452), 2001 WL 1682012.

community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved.”⁹⁵ In *Roper*, the Court noted that in 2005 only the United States and Somalia had failed to ratify treaties barring the execution of juveniles, and only seven countries—Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, the Democratic Republic of Congo, and China—had executed a juvenile since 1990.⁹⁶

Fourth, in both *Atkins* and *Roper*, the Court found that characteristics inherent in these groups of individuals make the death penalty an excessive punishment when imposed on them. Specifically, the Court found that the goals of retribution and deterrence did not justify the imposition of the death penalty on either young offenders or mentally retarded offenders given the offenders’ lower culpability and blameworthiness. As the *Atkins* Court stated:

Those mentally retarded persons who meet the law’s requirements for criminal responsibility should be tried and punished when they commit crimes. Because of their disabilities in areas of reasoning, judgment, and control of their impulses, however, they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct. Moreover, their impairments can jeopardize the reliability and fairness of capital proceedings against mentally retarded defendants.⁹⁷

With respect to retribution, the *Atkins* Court said that the severity of the punishment “necessarily depends on the culpability of the offender.”⁹⁸ Due to the diminished intellectual abilities, as well as diminished reasoning and impulse control of those individuals with mental retardation, the Court found that their moral culpability is diminished, and the goal of retribution is not advanced to the degree demanded for the constitutional imposition of the death penalty.⁹⁹

With respect to deterrence, the *Atkins* Court found:

It is the same cognitive and behavioral impairments that make these defendants less morally culpable—for example, the diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses—that also make it less likely that they can process the information of the possibility of

95. *Atkins*, 536 U.S. at 316, n.21.

96. *Roper*, 543 U.S. at 576-77.

97. *Atkins*, 536 U.S. at 306-07.

98. *Id.* at 319.

99. *Id.*

execution as a penalty and, as a result, control their conduct based upon that information. Nor will exempting the mentally retarded from execution lessen the deterrent effect of the death penalty with respect to offenders who are not mentally retarded. Such individuals are unprotected by the exemption and will continue to face the threat of execution. Thus, executing the mentally retarded will not measurably further the goal of deterrence.¹⁰⁰

Thus, the Court found that the execution of mentally retarded offenders did not advance either retribution or deterrence.¹⁰¹

The Court applied similar reasoning with respect to juvenile offenders in *Roper*. The *Roper* Court relied on scientific and sociological studies, which showed that, as a whole, persons under the age of eighteen have an undeveloped sense of responsibility and are more vulnerable to negative influence.¹⁰² Further, the Court found that an adolescent is more malleable and subject to change than an adult.¹⁰³ According to the Court, these factors render the juvenile offender less culpable and less likely to be fairly considered the worst of the worst.¹⁰⁴ Relying on reasoning similar to that employed in *Atkins*, the *Roper* Court found that the death penalty is less likely to be appropriate retribution for the act of a juvenile offender, and the death penalty is unlikely to deter juvenile behavior.¹⁰⁵ Therefore, like in *Atkins*, the *Roper* Court found that the death penalty, when imposed on juveniles, did not adequately advance the goals of retribution or deterrence to warrant its imposition.

The importance of a capital defendant's mental state and the degree of culpability also serve to curb the imposition of the death penalty on individuals who play a fairly minor role in the commission of a murder. In *Enmund v. Florida*,¹⁰⁶ the Court looked at the culpability of an offender who played a peripheral role in a crime resulting in a homicide.¹⁰⁷ The Court found that the defendant's limited role in the crime and limited culpability in the homicide were insufficient to support a death sentence.¹⁰⁸ Even in *Tison v. Arizona*,¹⁰⁹ where the

100. *Id.* at 320.

101. *Id.* at 321.

102. *Roper*, 543 U.S. at 568-69.

103. *Id.* at 570.

104. *Id.*

105. *Id.* at 570-74.

106. 458 U.S. 782 (1982).

107. *Id.*

108. *Id.* at 797-801.

109. 481 U.S. 137 (1987).

Court perversely sanctioned the death penalty on two young offenders who did not actually commit the murders for which they were sentenced to death, the Court nonetheless stated:

A critical facet of the individualized determination of culpability required in capital cases is the mental state with which the defendant commits the crime. Deeply ingrained in our legal tradition is the idea that the more purposeful is the criminal conduct, the more serious is the offense, and, therefore, the more severely it ought to be punished.¹¹⁰

These cases suggest that culpability is the touchstone for the constitutional appropriateness of the death penalty. Yet, the determination of culpability seems a bit like quicksilver, eluding a secure grasp. For example, how does one explain the Court's 1989 conclusion that mentally retarded and juvenile offenders have sufficient culpability to be sentenced to death,¹¹¹ while in 2002 and 2005, the Court found that these two same groups lack sufficient culpability?¹¹² The essential characteristics of these groups did not change in that short period of time. The culpability of the mentally disabled or youthful offender was no different in the late 1980s than it was in the early twenty-first century. Although the Court insists that the ultimate question in its Eighth Amendment jurisprudence is whether the Court finds that the penalty comports with basic standards of decency,¹¹³ there is a fifth, and in my view perhaps dominant, reason for the Court's change of heart in *Atkins* and *Roper*. What really persuaded the Court to exempt the mentally retarded offender and youthful offender is that after 1989, state by state, at a fairly steady pace, state legislatures were restricting the death penalty so that it could not be imposed on teenagers and mentally retarded defendants. By the time the Court decided *Atkins* and *Roper*, at least eighteen death penalty states, many of which previously had allowed the execution of these individuals, now banned their executions.¹¹⁴ The Court found that these state statutory changes provided objective evidence of a national consensus that the execution of these individuals violates the Eighth Amendment.¹¹⁵

110. *Id.* at 156.

111. *Penry v. Lynaugh*, 492 U.S. 302 (1989); *Stanford*, 492 U.S. at 361.

112. *Roper*, 543 U.S. at 551; *Atkins*, 536 U.S. at 304.

113. *Gregg*, 428 U.S. at 173. The Court consistently maintains that the ultimate question of constitutionality rests with it; however, the pattern of recognition of death penalty exemption indicates that state action is often determinative, or at the very least, a critical first step.

114. See *infra* p. 551.

115. *Roper*, 543 U.S. at 564-67; *Atkins*, 536 U.S. at 313-17.

An examination of the Court's 1988 decision in *Thompson v. Oklahoma*¹¹⁶ illustrates the Court's focus on state legislative action and the inevitability that the Court will respond to or be limited by state legislative actions. In *Thompson*, the Court found that the Eighth Amendment forbade the execution of a fifteen-year-old Oklahoma boy based in significant part on what states were legislatively providing.¹¹⁷ The *Thompson* Court found:

Most state legislatures have not expressly confronted the question of establishing a minimum age for imposition of the death penalty. In 14 States, capital punishment is not authorized at all, and in 19 others capital punishment is authorized but no minimum age is expressly stated in the death penalty statute. One might argue on the basis of this body of legislation that there is no chronological age at which the imposition of the death penalty is unconstitutional and that our current standards of decency would still tolerate the execution of 10-year-old children. We think it self-evident that such an argument is unacceptable; indeed, no such argument has been advanced in this case. If, therefore, we accept the premise that some offenders are simply too young to be put to death, it is reasonable to put this group of statutes to one side because they do not focus on the question of where the chronological age line should be drawn. When we confine our attention to the 18 States that have expressly established a minimum age in their death-penalty statutes, we find that all of them require that the defendant have attained at least the age of 16 at the time of the capital offense.¹¹⁸

These eighteen death penalty states then provided an adequate consensus that the imposition of the death penalty on fifteen-year-olds violated the Eighth Amendment.¹¹⁹

In contrast, in *Stanford v. Kentucky*,¹²⁰ the Court found that fifteen death penalty states prohibiting the imposition of the death penalty on sixteen-year-olds and twelve death penalty states prohibiting the imposition of the death penalty on seventeen-year-olds was not enough to show a national consensus that the Eighth Amendment prohibited the execution of sixteen- and seventeen-year-old offenders.¹²¹ By 2005, eighteen death penalty states prohibited the imposition of the death

116. 487 U.S. 815 (1988).

117. *Id.*

118. *Thompson*, 487 U.S. at 826-29.

119. *Id.* at 828-29.

120. 492 U.S. 361 (1989), *overruled by* *Roper v. Simmons*, 543 U.S. 5512 (2005).

121. *Stanford*, 492 U.S. at 370-71.

penalty on sixteen- and seventeen-year-olds, and the Court found the necessary consensus to recognize a death penalty exemption for juvenile offenders.

A similar study of state statutes emerges in the context of the imposition of the death penalty on mentally retarded offenders. In *Penry v. Lynaugh*,¹²² the Court found that there was no national consensus prohibiting the imposition of the death penalty on mentally retarded offenders because only one or two states and the federal government prohibited the execution of these offenders. At the conclusion of Justice O'Connor's opinion for the Court in *Penry*, she stated, "While a national consensus against execution of the mentally retarded may someday emerge reflecting the 'evolving standards of decency that mark the progress of a maturing society,' there is insufficient evidence of such a consensus today."¹²³ By 2002, when eighteen death penalty states prohibited the execution of a mentally retarded offender, the balance tipped in favor of protection.¹²⁴

D. The Process of Counting States to Find a National Consensus on the Meaning of the Eighth Amendment

This "counting" of states to determine the scope of the Eighth Amendment occurs in other cases. For example, in *Kennedy v. Louisiana*,¹²⁵ the Court found it important that only six states allowed the death penalty for child rape, and only Louisiana had actually imposed that penalty for the crime. The fact that only six states had statutes providing the death penalty for child rape demonstrated that there was a national consensus that the punishment was disproportionate and that it violated evolving standards of decency.¹²⁶ Likewise, in *Coker v. Georgia*,¹²⁷ the Court found that the evidence that only Georgia and two other states allowed the death penalty for rape was critical in showing a national consensus that the punishment was disproportionate for the crime.¹²⁸ In *Enmund v. Florida*,¹²⁹ the Court found that the fact

122. 492 U.S. 302 (1989), *overruled by* *Atkins v. Virginia*, 536 U.S. 304 (2002).

123. *Penry v. Lynaugh*, 492 U.S. 302, 340 (1989).

124. *See Atkins v. Virginia*, 536 U.S. 304 (2002).

125. 128 S. Ct. 2641 (2008).

126. *Id.* at 2653.

127. 433 U.S. 584 (1977).

128. As the *Coker* Court stated, "[a]s advised by recent cases, we seek guidance in history and from the objective evidence of the country's present judgment concerning the acceptability of death as a penalty for rape of an adult woman. At no time in the last 50 years have a majority of the States authorized death as a punishment for rape. In 1925, 18 States, the District of Columbia, and the Federal Government authorized capital punishment for the rape of an adult female. By 1971 just

that only eight jurisdictions allowed capital punishment for offenders with minor roles in the homicide at issue demonstrated that the punishment violated evolving standards of decency. In contrast, in *Tison v. Arizona*,¹³⁰ the Court found that imposition of the death penalty was constitutionally tolerable where eleven states would impose the penalty in similar cases.

Indeed, in the Court's post-*Furman* cases, the Court often falls back on state legislative action to support its Eighth Amendment jurisprudence. Perhaps part of this course of action reflects the political backlash the Court experienced in response to *Furman*.¹³¹ The Court seemed to reveal as much in *Coker v. Georgia*, which was issued a year after *Gregg v. Georgia*. The *Coker* Court stated:

With their death penalty statutes for the most part invalidated, the States were faced with the choice of enacting modified capital punishment laws in an attempt to satisfy the requirements of *Furman* or of being satisfied with life imprisonment as the ultimate punishment for any offense. Thirty-five States immediately reinstated the death penalty for at least limited kinds of crime. This public judgment as to the acceptability of capital punishment, evidenced by the immediate, post-*Furman* legislative reaction in a large majority of the States, heavily influenced the Court to sustain the death penalty for murder in *Gregg v. Georgia*.¹³²

However, the *Coker* Court further noted:

But if the "most marked indication of society's endorsement of the death penalty for murder is the legislative response to *Furman*," it should also be a telling datum that the public judgment with respect to rape, as reflected in the statutes providing the punishment for that crime, has been dramatically different. In reviving death penalty laws to satisfy *Furman's* mandate, none of the States that had not previously authorized death for rape chose to include rape among capital felonies. Of the 16 States in which rape had been a capital offense, only three provided the death penalty for rape of an adult woman in their revised

prior to the decision in *Furman v. Georgia*, that number had declined, but not substantially, to 16 States plus the Federal Government. *Furman* then invalidated most of the capital punishment statutes in this country, including the rape statutes, because, among other reasons, of the manner in which the death penalty was imposed and utilized under those laws." *Id.* at 593.

129. 458 U.S. 782, 792 (1982).

130. 481 U.S. 137 (1987).

131. See Roderick M. Hills, Jr., *Counting States*, 32 HARV. J.L. & PUB. POL'Y. 17 (2009); Lain, *supra* note 37. It is also worth keeping in mind that changes in the makeup of the Court's justices can affect not only substantive interpretation of the law but also process determinations.

132. *Coker*, 433 U.S. at 593-94.

statutes Georgia, North Carolina, and Louisiana. In the latter two States, the death penalty was mandatory for those found guilty, and those laws were invalidated by *Woodson* and *Roberts*. When Louisiana and North Carolina, responding to those decisions, again revised their capital punishment laws, they reenacted the death penalty for murder but not for rape; none of the seven other legislatures that to our knowledge have amended or replaced their death penalty statutes since July 2, 1976, including four States (in addition to Louisiana and North Carolina) that had authorized the death sentence for rape prior to 1972 and had reacted to *Furman* with mandatory statutes, included rape among the crimes for which death was an authorized punishment.¹³³

Thus, the counting of states and statutes appears to be intimately tied to the protection that the Eighth Amendment affords.

In the context of protecting juvenile and mentally retarded offenders, this number seems to be eighteen death penalty states, or thirty combined death penalty and non-death penalty states.¹³⁴ Perhaps embarrassed by having a magic number of eighteen drive Eighth Amendment protection, the *Atkins* Court insisted that it was the pattern and trend of state exemptions that compelled its finding of constitutional protection for mentally retarded offenders.¹³⁵ It is worth noting that in the years immediately prior to the 2002 *Atkins* decision, the number of states protecting the mentally retarded offender was increasing markedly. With respect to juvenile offenders, the trend to craft legislative protection was slower and less dramatic; yet, eighteen death penalty states, or thirty combined death penalty and non-death penalty states, protecting youthful offenders proved sufficient to garner constitutional protection for this class of capital defendants.

E. Eighth Amendment Protection for “Insane” Prisoners at the Time of Execution

In addition to the *Atkins* and *Roper* restrictions on the death penalty, the Court recognizes that the Eighth Amendment prohibits the government from executing someone determined to be “insane” at the

133. *Id.* at 594-95.

134. Justice Scalia has indicated that in the process of discerning death penalty exemptions for classes of individuals, only the legislative exemptions of death penalty states should count. He would not consider non-death penalty states in this calculation. See *Stanford v. Kentucky*, 492 U.S. 361, 371, n.2.

135. *Atkins*, 536 U.S. at 315.

time of his execution. As the Court explained in *Ford v. Wainwright*,¹³⁶ the common law prohibition on the execution of the insane existed even before the ratification of the Eighth Amendment in 1791. With respect to contemporary attitudes at the time of ratification, Blackstone viewed the execution of the insane as barbaric and “inhumane.”¹³⁷ Similarly, Sir Edward Coke, described such executions as “a miserable spectacle, both against Law, and of extream inhumanity and cruelty, and can be no example to others.”¹³⁸ Therefore, based on the “original” meaning of the Eighth Amendment, the execution of the insane is a cruel and unusual punishment.¹³⁹

Moreover, when the Court decided *Ford* in 1986, no state allowed the execution of a capital defendant who was deemed insane at the time of his execution.¹⁴⁰ Thus, applying the legislative standards and norms of the late twentieth century, Justice Marshall’s plurality opinion in *Ford* concluded that the execution of the insane, which served no deterrent or retributive purpose,¹⁴¹ violated the evolving standards of decency of the Eighth Amendment.¹⁴² In 2007, in *Panetti v. Quarterman*,¹⁴³ the Court reiterated that the execution of the insane is unconstitutional under the Eighth Amendment and clarified that a state cannot execute someone who is unable to rationally understand either the reason for or the reality of his execution. Writing for the *Panetti* Court, Justice Kennedy expressed deep concern for condemned prisoners suffering from severe mental illnesses that produce psychosis or delusional thought patterns that deprive the prisoner of a rational understanding of his fate or the reason the State has imposed that fate.¹⁴⁴

IV. CURRENT CONSTITUTIONAL PROTECTION FOR THE SEVERELY MENTALLY ILL OFFENDER

It appears then from this line of death penalty cases that a majority of the Court abides a death penalty system that arguably guides juror

136. 477 U.S. 399, 407-10 (1986).

137. *Id.* at 406 (citing 4 W. BLACKSTONE, COMMENTARIES *24-25); Lyn Entzeroth, *The Illusion of Sanity: The Constitutional and Moral Danger of Medicating Condemned Prisoners in Order to Execute Them*, 76 TENN. L. REV. 641, 644 (2009).

138. *Ford*, 477 U.S. at 407 (citing 3 E. COKE, INSTITUTES 6 (6th ed. 1680)). See Entzeroth, *supra* note 137.

139. Entzeroth, *supra* note 137.

140. *Ford*, 477 U.S. at 408.

141. *Id.* at 407-08.

142. *Id.* at 408.

143. 551 U.S. 930 (2007).

144. *Id.* at 960, 962.

discretion to find a defendant eligible for the death penalty while allowing the capital jury sufficient discretion to give effect to mitigating evidence that would provide for a sentence other than death.¹⁴⁵ Nonetheless, the Court has concluded that the Eighth Amendment precludes a state from executing someone for a crime against an individual that does not result in death.¹⁴⁶ Further, a state cannot execute an individual for a crime that results in death unless the defendant either has sufficient knowledge of or participation in the death of the victim.¹⁴⁷ Likewise, the government cannot execute someone who is mentally retarded,¹⁴⁸ the government cannot execute someone who was under the age of eighteen at the time of the commission of the crime;¹⁴⁹ and the government cannot execute someone who is insane at the time of his or her execution—that is, a person who lacks a rational understanding of reason for the execution or the reality of it.¹⁵⁰

These exclusions, however, do not adequately protect individuals who suffer from severe mental illness, such as schizophrenia or other psychotic or delusional disorders, even though, as Justice Kennedy observed in *Panetti*, these disorders can disable and deprive their victims of rational thought processes and control.¹⁵¹ In reality, the “insanity” exemption remains remarkably narrow, affording very little real protection for the severely mentally ill. For example, when the Supreme Court remanded *Ford* and *Panetti* for further consideration, the lower federal courts determined that both Alvin Ford, the capital defendant in *Ford v. Wainwright*, and Scott Panetti, the capital defendant in *Panetti v. Quarterman*, were “sane,” despite the fact that both men had well-documented histories of debilitating mental health illness.¹⁵²

145. *But see* *Baze v. Rees*, 128 S. Ct. 1520, 1547 (2008) (Stevens, J., concurring).

146. *Kennedy v. Louisiana*, 128 S. Ct. 2641 (2008).

147. *See* *Tison v. Arizona*, 481 U.S. 137 (1987); *Enmund v. Florida*, 458 U.S. 782 (1982).

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

149. *Roper v. Simmons*, 543 U.S. 551 (2005).

150. *Panetti*, 551 U.S. 930 (2007); *Ford*, 477 U.S. 399 (1989).

151. *Panetti*, 551 U.S. at 960, 962.

152. In the remand of Scott Panetti’s case, the federal district court concluded that:

Panetti is seriously mentally ill. He has suffered from severe mental illness, aggravated by alcohol and substance abuse, since well before he murdered Joe and Amanda Alvarado. He was under the influence of this severe mental illness when he killed the Alvarados as well as when he insisted on representing himself at trial.

Panetti v. Quarterman, No. A-04-CA-042-SS, 2008 WL 2338498, at *36 (W.D.Tex. Mar. 26, 2008). The court further stated that while there is mixed evidence on the extent of malingering behaviors, “it is not seriously disputable that Panetti suffers from paranoid delusions of some type, and these delusions may well have contributed to his murder of Joe and Amanda Alvarado.” *Id.* Nonetheless, the court concluded that Panetti had a rational understanding of the causal connection between his crime and his pending execution. The court recognized that Panetti is a mentally ill, delusional man

Likewise, the exemption for mental retardation is generally not applicable in cases of mental illness. In *Atkins*, the Court left it to the states to devise statutes that winnow out the mentally retarded offender from the punishment of death.¹⁵³ Most states adopted standards similar to the diagnostic criteria in the DSM-IV for mental retardation, which sets an intelligence quotient, or IQ standard, as well as an onset age of eighteen for an individual to meet the diagnosis of mental retardation.¹⁵⁴ An individual suffering from mental illness does not necessarily have a low IQ, although it is certainly possible for a person to have both a low IQ and mental illness. However, many individuals with severe mental illness fall outside the statutory mental retardation exemptions provided by states and the federal government.

Consequently, although the Court has construed the Eighth Amendment to protect from execution teenagers, mentally retarded offenders, and persons deemed “insane” at the time of their execution, the Eighth Amendment currently does not protect all or even a substantial majority of severely mentally ill capital defendants. Yet, such severely mentally ill prisoners, those suffering from psychosis or schizophrenia, possess many of the same attributes, including diminished culpability and blameworthiness, as others who have been

and that Panetti “was mentally ill when he committed his crime and continues to be mentally ill today.” *Id.* at *37. Still, the district court determined that Panetti “has both a factual and rational understanding of his crime, his impending death, and the causal retributive connection between the two. Therefore, if any mentally ill person is competent to be executed for his crimes, this record establishes it is Scott Panetti.” *Id.*

153. *Atkins*, 536 U.S. at 317.

154. The DSM-IV diagnostic criteria for mental retardation is set out below:

- A. Significantly subaverage intellectual functioning: an IQ of approximately 70 or below on an individually administered IQ test (for infants, a clinical judgment of significantly subaverage intellectual functioning).
- B. Concurrent deficits or impairments in present adaptive functioning (i.e., the person’s effectiveness in meeting the standards expected for his or her age by his or her cultural group) in at least two of the following areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety.
- C. The onset is before 18 years.

DSM-IV, *supra* note 14, at 319. For examples of state statutes exempting the mentally retarded offender from the death penalty and establishing criteria for that determination, see e.g. ARIZ. REV. STAT. ANN. § 13-753 (2010); ARK. CODE ANN. § 5-4-618 (2010); CAL. PENAL CODE § 1376 (2010); COLO. REV. STAT. § 18-1.3-1102 (2010); FLA. STAT. § 921.137 (2010); IDAHO CODE ANN. § 19-2515A (2010); 725 ILL. COM. STAT. ANN. § 5/114-1 (2010); IND. CODE §§ 35-36-9-2 (2010), 35-36-9-6 (2010); KY. REV. STAT. ANN. §§ 532.130 (2010), 532.140 (2010); NEB. REV. STAT. § 28-105.01 (2010); N.C. GEN. STAT. § 15A-2005 (2010); OKLA. STAT. tit. 21, § 701.10b (2010); TENN. CODE ANN. § 39-13-203 (2010); UTAH CODE ANN. § 76-3-207 (LexisNexis 2010); VA. CODE ANN. § 19.2-264.3:1.1 (2010).

exempted from the death penalty.¹⁵⁵ For example, schizophrenia is defined by the National Institute of Mental Health as “a chronic, severe, and disabling brain disorder.”¹⁵⁶ Individuals diagnosed with schizophrenia suffer from hallucinations, delusions, thought disorders, movement disorders, with hearing voices being the most common hallucination.¹⁵⁷ Moreover, cognitive symptoms that can accompany this disability include a “poor . . . ability to understand information and use it to make decisions,” “[t]rouble focusing or paying attention,” and “[p]roblems with . . . the ability to use information immediately after learning it.”¹⁵⁸ Often individuals with schizophrenia display a lack of understanding of the consequence of their actions, particularly when the individual suffers from delusions or hallucinations,¹⁵⁹ and a lack or limited control of impulses, which can arise from the limits the illness imposes on the individual’s ability to process and use information or to control behavior, particularly behavior resulting from delusions caused by their mental illness.¹⁶⁰ These attributes are not unlike the limited judgment, reasoning and impulse control of mentally retarded and juvenile offenders. Moreover, these qualities provide strong evidence of diminished culpability or blameworthiness, which should place those who suffer these illnesses outside the category of the worst of the worst.

Further, the defendant who suffers from severe mental illness may be at greater risk of an unfair trial or inadequate defense. For example, a jury may very well view the defendant’s mental illness as an aggravating factor, which could increase the risk that a jury would impose an excessive or inappropriate sentence.¹⁶¹ Likewise, a defendant who suffers from severe mental illness may lack or have a limited ability to assist in his defense, make rational legal decisions, or adequately advise his lawyer about meaningful defenses.¹⁶² Particularly during the capital sentencing phase of trial, a severely mentally ill defendant may be unable to meaningfully assist his lawyer in developing and presenting

155. For a discussion on potential equal protection challenges for severely mental ill offenders, see Farahany, *supra* note 7; Slobogin, *supra* note 7.

156. NAT’L MENTAL HEALTH ASS’N, *Death Penalty & People with Mental Illnesses* (2006), <http://www.nimh.nih.gov/health/publications/schizophrenia/complete-index.shtml>.

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. See, e.g., *Unjust Death Penalty*, THE JOURNAL GAZETTE, Jan. 6, 2009, available at <http://www.journalgazette.net/apps/pbcs.dll/article?AID=/20090106/EDIT07/901060316>.

162. *Id.* For a discussion of Scott Panetti’s mental illness and its effect on his capital trial, see Panetti v. Quarterman, No. A-04-CA-042-SS, 2008 WL 2338498 (W.D.Tex. Mar. 26, 2008).

mitigating evidence to the jury. These same concerns also plagued the sentencing process of juvenile and mentally retarded offenders.

An additional concern surfaces when the state seeks to execute the severely mentally ill. As discussed earlier, *Ford* and *Panetti* give constitutional effect to the long-standing common law prohibition of the execution of the insane. This exemption, however, raises the specter of the government forcibly medicating the condemned prisoner with anti-psychotic drugs to render the “insane” capital defendant “sane” enough to execute. Because anti-psychotic drugs exist to treat mental illness such as schizophrenia, a defendant, who otherwise is exempt from execution under *Ford* and *Panetti*, may be forced to take medication for the sole purpose of rendering him ready for execution.¹⁶³ Further adding to the moral dilemmas created by this macabre situation, a capital defendant may actually forgo medically appropriate and humane treatment for his mental illness to avoid execution.¹⁶⁴

As some commentators have observed,¹⁶⁵ the parallels between the severely mentally ill and the individuals protected by *Atkins* and *Roper* are remarkable. Like juvenile offenders and mentally retarded offenders, the severely mentally ill often lack or have diminished impulse control and have difficulty comprehending the consequences of their actions. These limitations are due to the mental illness, particularly when that mental illness includes hallucinations or other delusions or thought distortions. Like in *Roper* and *Atkins*, these characteristics diminish both the blameworthiness of the severely mentally ill offender and reduce the deterrence effect of the death penalty. Also, like youth and mental retardation, while mental illness should be treated as a mitigating factor, it could easily be viewed as an aggravating factor instead.

In response to these concerns, the ABA House of Delegates, in August of 2006, adopted a recommendation barring the imposition of the death penalty on persons with mental disabilities, including severe mental illness.¹⁶⁶ The American Psychiatric Association, the American Psychological Association, and the National Alliance for the Mentally Ill also endorse this death penalty exemption.¹⁶⁷ In accord with these

163. Entzeroth, *supra* note 137.

164. *Id.*

165. Winick, *supra* note 7; Farahany, *supra* note 7; Batey, *supra* note 7; *see also* Bryant, *supra* note 7; Shin, *supra* note 7.

166. *ABA Recommendation and Report*, *supra* note 6. *See also* Richard J. Bonnie, *Panetti v. Quarterman: Mental Illness, the Death Penalty, and Human Dignity*, 5 OHIO ST. J. CRIM. L. 257 (2007); Parry, *supra* note 6.

167. *ABA Recommendation and Report*, *supra* note 6

views, the United Nations Commission on Human Rights also seeks an end to the imposition of the death penalty on individuals suffering from mental illness.¹⁶⁸ Thus, as with juvenile and mentally retarded offenders, leading national and international organizations support a death penalty exemption for the severely mentally ill.

In the second paragraph, the ABA recommendation advises:

Defendants should not be executed or sentenced to death if, at the time of the offense, they had a severe mental disorder or disability that significantly impaired their capacity (a) to appreciate the nature, consequences or wrongfulness of their conduct, (b) to exercise rational judgment in relation to conduct, or (c) to conform their conduct to the requirements of the law. A disorder manifested primarily by repeated criminal conduct or attributable solely to the acute effects of voluntary use of alcohol or other drugs does not, standing alone, constitute a mental disorder or disability for purposes of this provision.¹⁶⁹

According to the ABA Recommendation and Report, this recommendation would “prohibit execution of persons with severe mental disabilities whose demonstrated impairments of mental and emotional functioning at the time of the offense would render a death sentence disproportionate to their culpability.”¹⁷⁰ The ABA recommendation focuses on limiting the application of the death penalty to persons who possess a sufficient degree of blameworthiness for a constitutionally proportional imposition of the death penalty¹⁷¹ and is meant to apply the principles of *Atkins v. Virginia*¹⁷² and *Roper v. Simmons*¹⁷³ to persons with severe mental illness, particularly persons suffering from DSM-IV-Tr. Axis I diagnoses, including schizophrenia and psychotic disorders.¹⁷⁴

Of course, an ABA recommendation is a far cry from a Supreme Court pronouncement banning the execution of the severely mentally

168. AMNESTY INTERNATIONAL USA, *Death Penalty and Mental Illness* (2010), <http://www.amnestyusa.org/death-penalty/death-penalty-facts/death-penalty-and-mental-illness/page.do?id=1101090>; Comm’n on Human Rights Res. 2003/67, The question of the death penalty, 58th Sess., Apr. 24, 2003, U.N. Doc. E/CN.4/RES/2003/67 (found in *Compendium of United Nations standards and norms in crime prevention and criminal justice*, subsection 23, available at http://www.unodc.org/pdf/compendium/compendium_2006_part_01_05.pdf); Comm’n on Human Rights Res. 2000/65, The question of the death penalty, 55th Sess., Apr. 26, 2000, U.N. Doc. E/CN.4/RES/2000/65; Entzeroth, *supra* note 12.

169. *ABA Recommendation and Report*, *supra* note 6, at 668.

170. *Id.* at 670.

171. *Id.*

172. 536 U.S. 304 (2002) (prohibiting execution of mentally retarded).

173. 543 U.S. 551 (2005) (prohibiting execution of juveniles).

174. *ABA Recommendation and Report*, *supra* note 6, at 670.

ill.¹⁷⁵ As noted earlier, several commentators have suggested that the decisions of *Roper* and *Atkins* compel a constitutional exemption for the severely mentally ill.¹⁷⁶ Moreover, the unique characteristics of the mentally ill offender, the historic constitutional and common law exemption for “insane” offenders, and the risks of forced medication to render the mentally ill fit for execution present perhaps even stronger arguments that evolving standards of decency include protection of this group of individuals. Yet, this observation is only part of the equation. Still remaining are the crucial questions of what state legislatures are doing on this issue and what effect state legislative action will have or should have in making a constitutional exemption for the severely mentally ill a reality.

V. BRINGING THE DEATH PENALTY EXEMPTION FOR THE SEVERELY MENTALLY ILL TO REALITY

As compelling as the analogies between the mentally ill offender and the offenders at issue in *Atkins* and *Roper* are, and as troubling and morally fraught as the execution of mentally ill defendants is, the Court’s record on crafting death penalty exemptions unfortunately suggests a continued tough road ahead. Looking at *Atkins* and *Roper*, the tipping point in these cases was the fact that eighteen death penalty states, plus the then-twelve non-death penalty states, prohibited the execution of juvenile and mentally retarded offenders. It was the legislative actions of the states that compelled the Court to conclude that there was a national consensus to ban the execution of mentally retarded and juvenile offenders.¹⁷⁷

175. Indeed, in another context, Justice Alito has indicated how the Court might limit the impact of an ABA recommendation. See *Bobby v. Van Hook*, 130 S. Ct. 13, 20 (2009) (Alito, J., concurring). In discussing ABA standards for counsel in capital mitigation investigation and the bearing of those standards in reviewing the constitutionality of counsel’s performance, Justice Alito said:

The ABA is a venerable organization with a history of service to the bar, but it is, after all, a private group with limited membership. The views of the association’s members, not to mention the views of the members of the advisory committee that formulated the 2003 Guidelines, do not necessarily reflect the views of the American bar as a whole. It is the responsibility of the courts to determine the nature of the work that a defense attorney must do in a capital case in order to meet the obligations imposed by the Constitution, and I see no reason why the ABA Guidelines should be given a privileged position in making that determination.

Id.

176. Winick, *supra* note 7; Farahany, *supra* note 7; Batey, *supra* note 7.

177. *But see* Batey, *supra* note 7, at 1525-27 (2009) (arguing that legislative consensus may not be necessary in light of *Atkins* and *Panetti*); Winick, *supra* note 7.

More recently, the Supreme Court addressed the issue of whether the Eighth Amendment erects a categorical prohibition on imposing life without parole on juveniles who commit non-homicide offenses, including juveniles as young as thirteen.¹⁷⁸ During oral arguments in *Sullivan v. Florida* and *Graham v. Florida*, the justices asked a number of questions about how many states allowed such sentences and how many states imposed such sentences.¹⁷⁹ In deciding that the Eighth Amendment prohibits the imposition of a sentence without the possibility of parole, the Court considered state legislative action a critical component of its analysis.¹⁸⁰ As it has indicated in cases such as *Atkins* and *Roper*, the *Graham* Court stated that the starting point for its Eighth Amendment analysis is objective evidence of national consensus, and “ [t]he “clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country’s legislatures.” ’ ’¹⁸¹

The Court’s approach to construing the meaning of the Eighth Amendment suggests strongly that, in crafting a death penalty exemption for the severely mentally ill, one must consider and take into account the process by which the Court crafts its exemption as well as the substantive merits of the case. If “counting” is a process that matters to the Court,¹⁸² then we need to count. As of February 2010, fifteen states prohibited the death penalty in all circumstances; therefore, since *Roper* and *Atkins*, there have been three additional states that prohibit executions.¹⁸³ In 2003, then-Illinois Governor George Ryan commuted all death sentences in his state, and for a period of time there was a moratorium on the death penalty in Illinois.¹⁸⁴ Maryland, which had a commission study its system of capital punishment,¹⁸⁵ recently enacted

178. See Transcript of Oral Argument, *Sullivan v. Florida*, 130 S. Ct. 2059 (2009) (No. 08-7621); Transcript of Oral Argument, *Graham v. Florida*, 130 S. Ct. 2011 (2010) (No. 08-7412).

179. Transcript of Oral Argument at 3, 14-16, 20-23, 25-32, 49-50, *Sullivan v. Florida*, 130 S. Ct. 2059 (2009) (No. 08-7621); Transcript of Oral Argument at 3-4, 23, 26-27, 343-35, 42, *Graham v. Florida*, 130 S. Ct. 2011 (2010) (No. 08-7412).

180. *Graham v. Florida*, 130 S. Ct. 2011 (2010).

181. *Id.* at 2023 (quoting *Atkins*, 536 U.S. at 312).

182. See Hills, Jr., *supra*, note 131.

183. New Jersey, New Mexico and New York are the most recent states to abolish the death penalty. DEATH PENALTY INFORMATION CENTER (2010), <http://www.deathpenaltyinfo.org/documents/FactSheet.pdf>

184. See Jodi Wilgoren, *Citing Issues of Fairness, Governor Empties Illinois Death Row*, N.Y. TIMES (Jan. 12, 2003).

185. See MARYLAND COMMISSION ON CAPITAL PUNISHMENT, FINAL REPORT TO THE GENERAL ASSEMBLY (Md. 2008), *available at* <http://www.goccp.maryland.gov/capital-punishment/documents/death-penalty-commission-final-report.pdf>.

significant restrictions on the imposition of the death penalty.¹⁸⁶ Legislation is pending in several states to abolish the death penalty.¹⁸⁷ Other states, such as New Hampshire, California, Tennessee, Nevada, and North Carolina, have created commissions to study the death penalty.¹⁸⁸ Thus, countering a more than thirty-year trend of expanding and embracing capital punishment, states are moving away from or imposing greater restrictions on the use of the death penalty.

As to exemptions for mentally ill offenders, all death penalty states forbid the execution of someone who is deemed “insane” at the time of his execution.¹⁸⁹ As discussed earlier, these exemptions are constitutionally required and also trace their origin to a common law prohibition on such executions that existed at the time of the ratification of the Eighth Amendment. Although these exemptions do not cover most severely mentally ill prisoners, the prohibition indicates the long-standing societal revulsion at executing a severely mentally disabled individual. However, these exemptions do not correlate with the defendant’s mental illness and culpability at the time of the commission of his crime; rather, the exemptions concern the offender’s mental health at the time of execution.

186. MD. CODE ANN. CRIM. LAW, § 2-202. It is interesting that, in an effort to ensure greater accuracy and fewer wrongful convictions, Maryland Code, Criminal Law, § 2-202, requires “the State presents the court or jury with (i) biological evidence or DNA evidence that links the defendant to the act of murder; (ii) a video taped, voluntary interrogation and confession of the defendant to the murder; or (iii) a video recording that conclusively links the defendant to the murder.” Also § 202(c), provides: “A defendant may not be sentenced to death, but shall be sentenced to imprisonment for life without the possibility of parole subject to the requirements of § 2-203(1) of this subtitle or imprisonment for life, if the State relies solely on evidence provided by eyewitnesses.”

187. See DEATH PENALTY INFORMATION CENTER (2010), <http://deathpenaltyinfo.org/recent-legislative-activity#2010>. According to the Death Penalty Information Center, legislation is pending to abolish the death in Kentucky, Nebraska, South Dakota, and Washington. On February 19, 2010, a bill to abolish the death penalty in Kansas lost by a tie vote, 20-20, in the state senate. DEATH PENALTY INFORMATION CENTER (2010), <http://www.deathpenaltyinfo.org/>.

188. See S. Res. 44, 2003-04 Leg., Reg. Sess. (Cal. 2004) (establishing California Commission of Fair Administration of Justice to study death penalty in California); A.C.R. 3, 71st Leg., 17th Spec. Sess. (Nev. 2001) (authorizing legislative commission to study death penalty); H.B. 520, 2009 Leg., Reg. Sess. (N.H. 2009) (establishing a commission to study death penalty in New Hampshire); H.B. 163, 1999 Gen. Assemb., Reg. Sess. (N.C. 1999) (enacted) (assigning to Legislative Research Commission task of looking at imposition of death penalty on mentally retarded offenders and prohibiting death penalty obtained on basis of race); S.B. 1911, 105th Gen. Assemb., Reg. Sess. (Tenn. 2007) (enacted) (creating a committee to study administration of death penalty). See also DEATH PENALTY INFORMATION CENTER (2010), <http://www.deathpenaltyinfo.org/recent-legislative-activity>.

189. See *Panetti v. Quarterman*, 551 U.S. 930 (2007); *Ford v. Wainwright*, 477 U.S. 399 (1986).

To date, Connecticut is the only death penalty state that explicitly bans the execution of someone who is mentally ill at the time of the commission of the offense. The Connecticut statute on point provides:

The court shall not impose the sentence of death on the defendant if the jury or, if there is no jury, the court finds by a special verdict, as provided in subsection (e), that at the time of the offense (1) the defendant was under the age of eighteen years, or (2) the defendant was a person with mental retardation, as defined in section 1-1g, or (3) 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, or (4) the defendant was criminally liable under sections 53a-8, 53a-9 and 53a-10 for the offense, which was committed by another, but the defendant's participation in such offense was relatively minor, although not so minor as to constitute a defense to prosecution, or (5) the defendant could not reasonably have foreseen that the defendant's conduct in the course of commission of the offense of which the defendant was convicted would cause, or would create a grave risk of causing, death to another person.¹⁹⁰

Several states, however, have legislation pending that would implement a death penalty exemption for severely mentally ill offenders. Indiana presents an interesting case study. Indiana established a commission, known as the Bowser Commission, to look at the imposition of the death penalty on the mentally ill. The Bowser Commission¹⁹¹ issued a report in November 2007 recommending the exemption of the severely mentally ill from the death penalty. In accord with this recommendation, Indiana, Senate Bill No. 22, introduced on January 7, 2009, prohibits the imposition of the death penalty on an individual judicially determined to have a severe mental illness. The bill defines severe mental illness as one or more of the following mental disorders: schizophrenia, schizoaffective disorder, bipolar disorder, major depression, and delusional disorder. In connection with this legislative development, there has been sympathetic media coverage of Joseph Corcoran, a paranoid schizophrenic, who a jury sentenced to

190. CONN. GEN. STAT. § 53a-46a (2010).

191. FINAL REPORT OF THE BOWSER COMMISSION (Nov. 2007). According to the Final Report, "the Bowser Commission was named in honor of the late Senator Anita Bowser. Senator Bowser had a long-time interest in studying whether the death penalty was suitable in any case, but particularly in cases when the defendants were afflicted with either mental illness or mental retardation." *Id.* at 4.

death for the murder of his brother, his sister's fiancé, and two other men.¹⁹² At this time, the Indiana bill exempting the severely mentally ill from the death penalty has been referred to the state Senate Committee on the Judiciary.

North Carolina also has legislation pending that would seek to give effect to the ABA recommendation to prohibit the imposition of the death penalty on the severely mentally ill.¹⁹³ The proposed legislation provides: “[n]otwithstanding any provision of law to the contrary, no defendant who was under the influence of a severe mental disability at the time of the commission of the criminal offense shall be sentenced to death.”¹⁹⁴ The North Carolina bill defines severe mental illness as:

Any mental disability or defect that significantly impairs a person's capacity to do any of the following: (i) appreciate the nature, consequences, or wrongfulness of the person's conduct in the criminal offense; (ii) exercise rational judgment in relation to the criminal offense; or (iii) conform the person's conduct to the requirements of the law in connection with the criminal offense. A mental disability manifested primarily by repeated criminal conduct or attributable solely to the acute effects of alcohol or other drugs does not, standing alone, constitute a severe mental disability for purposes of this section.¹⁹⁵

The Tennessee commission¹⁹⁶ studying the death penalty had, among its tasks, the duty to determine “[w]hether the law provides adequate protection for specific vulnerable populations such as the mentally retarded . . . and the mentally ill; whether persons suffering from mental illness constitute a disproportionate number of those on death row and what criteria should be used in judging the level of mental illness involved; and whether or not people with mental illness should be

192. *Unjust Death Penalty*, THE JOURNAL GAZETTE, Jan. 6, 2009, available at <http://www.journalgazette.net/apps/pbcs.dll/article?AID=/20090106/EDIT07/901060316>. Mr. Corcoran's case has been remanded by the U.S. Supreme Court to the Seventh Circuit for further consideration of claims that the Seventh Circuit did not consider. Included among these claims is Mr. Corcoran's challenge to the imposition of the death penalty on one who is mentally ill. *Corcoran v. Levenhagen*, 130 S. Ct. 8 (2009). On remand, the Seventh Circuit vacated Mr. Corcoran's death sentence based on unreasonable findings of fact by the Indiana Supreme Court. *Corcoran v. Levenhagen*, 593 F.3d 547, 552 (7th Cir. 2010). The Circuit Court did not reach Mr. Corcoran's Eighth Amendment claim that the execution of the mentally ill is prohibited because Mr. Corcoran had not exhausted his state avenues for relief on this issue. *Id.* at 555.

193. Capital Procedure/Severe Mental Disability, S.B. 309, Gen. Assemb. (N.C. 2009).

194. S.B. 309, Gen. Assemb. (N.C. 2009).

195. *Id.* As of September 2010, the legislation in North Carolina is still pending.

196. For a discussion of the Tennessee Commission, see William Redick, *Is Tennessee Going to Fix its Death Penalty?*, 45-SEP TENN. B.J. 12 (Sept. 2009).

executed.”¹⁹⁷ Pennsylvania has legislation pending to investigate the death penalty and to impose a moratorium on executions;¹⁹⁸ the study would include an examination of the types of protection provided to vulnerable groups, including the mentally ill.¹⁹⁹

All death penalty states allow a defendant to present mitigating evidence of mental illness to the jury as a reason not to impose a sentence of death.²⁰⁰ States also recognize that mental illness can, under

197. TENN. CODE ANN. § 39-13-209(c)(3) (2009).

198. S.B. 1110, Gen. Assemb., Reg. Sess. (Pa. 2009).

199. S.B. 1110 § 3(b)(7), Gen. Assemb., Reg. Sess. (Pa. 2009).

200. For examples of statutory mitigating factors taking into account the offender’s mental state at the time of the commission of the crime, see ALA. CODE § 13A-5-51 (2010) (“capital offense was committed while the defendant was under the influence of extreme mental or emotional disturbance,” “capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired”); ARIZ. REV. STAT. ANN. § 13-751 (2010) (“defendant’s capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution”); ARK. CODE ANN. § 5-4-605 (1987) (“capital murder was committed while the defendant was under extreme mental or emotional disturbance,” “capital murder was committed while the capacity of the defendant to appreciate the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of law was impaired as a result of mental disease or defect”); CAL. PENAL CODE § 190.3 (West 2010) (“[w]hether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance,” “[w]hether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect”); COLO. REV. STAT. ANN. § 18-1.3-1302 (West 2009) (“defendant’s capacity to appreciate wrongfulness of the defendant’s conduct or to conform the defendant’s conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution,” “emotional state of the defendant at the time the crime was committed”); DEL. CODE ANN. tit. 11 § 4209 (2010) (not setting out specific statutory mitigating factors, but allowing presentation of mitigating evidence); FLA. STAT. ANN. § 921.141 (2010) (“capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance,” “capacity of the defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired”); GA. CODE ANN. § 17-10-30 (2010) & State Court Rules Unified Appeal Report of Trial Judge (not setting out specific statutory mitigating factors, but allowing presentation of mitigating evidence, including defendant’s mental state and ability to appreciate the wrongfulness of his acts); IDAHO CODE ANN. § 19-2515 (2010) (not setting out specific statutory mitigating factors, but allowing presentation of mitigating evidence); 720 ILL. COMP. STAT. ANN. 5/9-1 (2010) (“murder was committed while the defendant was under the influence of extreme mental or emotional disturbance, although not such as to constitute a defense to prosecution,” “defendant suffers from a reduced mental capacity”); IND. CODE § 35-50-2-9 (2010) (“defendant was under the influence of extreme mental or emotional disturbance when the murder was committed,” “defendant’s capacity to appreciate the criminality of the defendant’s conduct or to conform that conduct to the requirements of law was substantially impaired as a result of mental disease or defect”); KAN. STAT. ANN. § 21-4626 (2009) (“crime was committed while the defendant was under the influence of extreme mental or emotional disturbances,” “capacity of the defendant to appreciate the criminality of the defendant’s conduct or to conform the defendant’s conduct to the requirements of law was substantially impaired,” “[a]t the time of the crime, the defendant was suffering from post-traumatic stress syndrome caused by violence or abuse by the victim”); KY. REV. STAT. ANN. § 532.025

(LexisNexis 2010) (“capital offense was committed while the defendant was under the influence of extreme mental or emotional disturbance even though the influence of extreme mental or emotional disturbance is not sufficient to constitute a defense to the crime,” “[a]t the time of the capital offense, the capacity of the defendant to appreciate the criminality of his conduct to the requirements of law was impaired as a result of mental illness or retardation or intoxication even though the impairment of the capacity of the defendant to appreciate the criminality of his conduct or to conform the conduct to the requirements of law is insufficient to constitute a defense to the crime”); LA. CODE CRIM. PROC. art. 905.5 (2010) (“offense was committed while the offender was under the influence of extreme mental or emotional disturbance,” “[a]t the time of the offense the capacity of the offender to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect”); MD. CODE ANN., CRIM. LAW, § 2-303 (LexisNexis 2010) (“murder was committed while the capacity of the defendant to appreciate the criminality of the defendant's conduct or to conform that conduct to the requirements of law was substantially impaired due to emotional disturbance, mental disorder, or mental incapacity”); MISS. CODE ANN. § 99-19-101 (1972) (“offense was committed while the defendant was under the influence of extreme mental or emotional disturbance,” “capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired”); MO. ANN. STAT. § 565.032 (West 2010) (“murder . . . committed while the defendant was under the influence of extreme mental or emotional disturbance,” “capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired”); MONT. CODE ANN. § 46-18-304 (2010) (“offense was committed while the defendant was under the influence of extreme mental or emotional disturbance,” “capacity of the defendant to appreciate the criminality of the defendant's conduct or to conform the defendant's conduct to the requirements of law was substantially impaired”); NEB. REV. STAT. § 29-2523 (2010) (“crime was committed while the offender was under the influence of extreme mental or emotional disturbance,” “[a]t the time of the crime, the capacity of the defendant to appreciate the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of law was impaired as a result of mental illness”); NEV. REV. STAT. ANN. § 200.035 (LexisNexis 2010) (“murder was committed while the defendant was under the influence of extreme mental or emotional disturbance”); N.H. REV. STAT. ANN. § 630:5 (2010) (“defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, regardless of whether the capacity was so impaired as to constitute a defense to the charge,” “defendant committed the offense under severe mental or emotional disturbance”); N.C. GEN. STAT. ANN. § 15A-2000 (West 2010) (“capital felony was committed while the defendant was under the influence of mental or emotional disturbance,” “capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired”); OHIO REV. CODE ANN. § 2929.04 (2010) (“[w]hether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of the offender's conduct or to conform the offender's conduct to the requirements of the law”); OKLA. STAT. ANN. tit. 21 § 701.7 (2010) (not setting out specific statutory mitigating factors, but allowing presentation of mitigating evidence); OR. REV. STAT. § 163.150 (2009) (“extent of the mental and emotional pressure under which the defendant was acting at the time the offense was committed”); 42 PA. CONS. STAT. ANN. § 9711 (2010) (statutory mitigating factors include “defendant was under the influence of extreme mental or emotional disturbance” and “capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired”); S.C. CODE ANN. § 16-3-20 (2009) (“murder was committed while the defendant was under the influence of mental or emotional disturbance,” “capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired,” “mentality of the defendant at the time of the crime”); S.D. CODIFIED LAWS § 23A-27A-2 (2010) (not setting out specific statutory mitigating factors, but allowing presentation of mitigating evidence); TENN. CODE ANN. § 39-13-204 (2010) (“murder was committed while the defendant was under the influence of

certain circumstances, relieve the defendant of criminal liability altogether although the person may be committed to a mental health facility for an extended period.

Although the Court in *Roper* and *Atkins* tended to focus on state legislative action, state court decisions and state court action interpreting state constitutional provisions also seem highly relevant to the evolution of standards of decency. States can express policy and constitutional principles through judicial action and interpretation of state constitutional doctrine as well as through state legislative action.²⁰¹ It is worth noting then that some state court judges have expressed significant doubts about the constitutionality of executing the severely mentally ill, although these views are expressed in dissenting or non-controlling opinions.²⁰²

For example, in his dissent in *Corcoran v. State*,²⁰³ Justice Rucker of the Indiana Supreme Court expressed the view that a sentence of

extreme mental or emotional disturbance,” “capacity of the defendant to appreciate the wrongfulness of the defendant's conduct or to conform the defendant's conduct to the requirements of the law was substantially impaired as a result of mental disease or defect or intoxication, which was insufficient to establish a defense to the crime but which substantially affected the defendant's judgment”); TEX. CODE CRIM. PROC. ANN. art. 37.071 (2009) (jury “shall consider all evidence admitted at the guilt or innocence stage and the punishment stage, including evidence of the defendant's background or character or the circumstances of the offense that militates for or mitigates against the imposition of the death penalty”); UTAH CODE ANN. § 76-3-207 (LexisNexis 2010) (“homicide was committed while the defendant was under the influence of mental or emotional disturbance,” “at the time of the homicide, the capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirement of law was impaired as a result of a mental condition”); VA. CODE ANN. § 19.2-264.4 (2010) (“capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance,” “at the time of the commission of the capital felony, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was significantly impaired”); WASH. REV. CODE § 10.95.070 (2010) (“[w]hether the murder was committed while the defendant was under the influence of extreme mental disturbance,” “[w]hether, at the time of the murder, the capacity of the defendant to appreciate the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired as a result of mental disease or defect”); WYO. STAT. ANN. § 6-2-102 (2010) (“murder was committed while the defendant was under the influence of extreme mental or emotional disturbance,” “capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired”).

201. For a discussion of the use of state constitutions to advance individual liberty and protection, see William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502 (1977).

202. See *Corcoran v. State*, 774 N.E.2d 495, 502 (Ind.2002) (Rucker, J., dissenting); *State v. Nelson*, 173 N.J. 417, 803 A.2d 1, 41 (2002) (Zazzali, J., concurring); *State v. Scott*, 92 Ohio St.3d 1, 748 N.E.2d 11, 19-20 (2001) (Pfeifer, J., dissenting).

203. 774 N.E.2d 495, 503 (Ind.2002) (Rucker, J., dissenting). See Jon Laramore, *Indiana Constitutional Developments: Evolution on Individual Rights*, 42 INDIANA L. REV. 909, 930-

death for a person suffering from severe mental illness violates Article I, § 18 of the Indiana Constitution, which provides that “[c]ruel and unusual punishments shall not be inflicted. All penalties shall be proportioned to the nature of the offense.” In *Overstreet v. State*,²⁰⁴ Justice Rucker noted that “a state is free as a matter of its own constitutional law to confer rights above the floor of constitutional safeguards found in the United States Constitution,”²⁰⁵ and stated his belief that the Indiana Constitution provides greater protection than the federal constitution.²⁰⁶ Justice Rucker then opined:

In this case, precedent from the United States Supreme Court, albeit in a slightly different context, informs my view on the question of whether certain mentally ill prisoners should be excluded from execution. In *Atkins v. Virginia*, the Court held that executions of the mentally retarded violated the Eighth Amendment. Importantly the Court declared that the basis for this prohibition is the mentally retarded person's “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.” Of course, Indiana's statutory prohibition on executing the mentally retarded predates *Atkins* by eight years. And there is no claim in this case that *Overstreet* is mentally retarded. But the logic and underlying rationale of *Atkins* applies with equal force here. That is to say, if a person who is mentally ill suffers from the same “diminished capacities” as a person who is mentally retarded, then logic dictates it would be equally offensive to the prohibition against cruel and unusual punishment to execute that mentally ill person.

. . . .

Punishment is cruel and unusual under Article I, Section 16 if it “makes no measurable contribution to acceptable goals of punishment, but rather constitutes only purposeless and needless imposition of pain and suffering.” Because I see no principled distinction between the diminished capacities exhibited by *Overstreet* and the diminished capacities that exempt the mentally retarded from execution, I would declare that executing *Overstreet* constitutes purposeless and needless imposition of pain and suffering thereby violating the Cruel and

31(2009) (discussing *Overstreet* and Justice Rucker's separate views with respect to mentally ill capital offenders).

204. 877 N.E.2d 144 (Ind. 2007).

205. *Id.* at 175 (citing *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 81 (1980); *Cooper v. California*, 386 U.S. 58, 62 (1967)).

206. *Overstreet*, 877 N.E.2d at 175.

Unusual Punishment provision of the Indiana Constitution. Therefore, I would remand this cause to the post-conviction court with instructions to impose a sentence of life imprisonment without parole.²⁰⁷

It is interesting that Justice Boehm, another Indiana justice, observed in his dissent in *Baird v. State*²⁰⁸ that, with respect to *Ford* hearings and determinations of insanity, courts need “to exercise extreme caution in executing a person whose mental health is plainly questionable unless we can be certain the person does not meet the *Ford* standard, much less another more restrictive standard that may now apply in light of *Atkins* and *Roper*.”²⁰⁹ Justice Boehm emphasized the difficulties in making a *Ford* determination, particularly given *Atkins*’ attention to “the longstanding doctrine that the severity of the punishment must be correlated to the culpability of the defendant.”²¹⁰

In his dissenting opinion in *State v. Scott*, Supreme Court of Ohio Justice Pfeiffer stated: “[t]his court could declare that in the interests of protecting human dignity, Section 9, Article I of the Ohio Constitution prohibits the execution of a convict with a severe mental illness. I believe that the ‘evolving standards of decency that mark the progress of’ Ohio call for such a judicial declaration.”²¹¹ Similarly, in her concurring opinion in *State v. Ketterer*,²¹² Ohio Supreme Court Justice Evelyn Lundberg Stratton stated that courts should reconsider the imposition of the death penalty on someone suffering from severe mental illness, particularly in light of polls showing diminished public support for the execution of mentally ill prisoners,²¹³ and the ABA recommendation to exempt the mentally ill.²¹⁴ While expressing her personal view “that the time has come for our society to add persons with severe mental illness to the category of those excluded from application of the death penalty, I believe that the line should be drawn by the General Assembly, not by a court.”²¹⁵ Justice Stratton then stated

207. *Id.* at 175 (footnote and citations omitted).

208. 833 N.E.2d 28 (Ind. 2005).

209. *Id.* at 35 (Boehm, J., dissenting).

210. *Id.*

211. 92 Ohio St.3d 1, 748 N.E.2d 11, 20 (2001).

212. 111 Ohio St.3d 70, 2006-Ohio-5283, 855 N.E.2d 48, at ¶¶224-50 (Stratton, J., concurring).

213. *Ketterer*, 111 Ohio St.3d at ¶232 (citing Kevin Drew, *Arkansas Prepares to Execute Mentally Ill Inmate*, CNN.COM, Jan. 5, 2004, at <http://www.cnn.com/2004/LAW/01/05/singleton.death.row/index.html>).

214. *Ketterer*, 111 Ohio St.3d at ¶¶233-36.

215. *Id.* at ¶248.

that she would “urge our General Assembly to consider legislation setting the criteria for determining when a person with a severe mental illness should be excluded from the penalty of death.”²¹⁶

Despite the views of individual state court justices, no state court has extended the *Atkins* and *Roper* rationale to severe mental illness. Indeed, a substantial number of state courts have expressly refused to extend these constitutional principles to mental illness and continue to find that the imposition of the death penalty on a mentally ill offender is constitutional. For example, in *State v. Hancock*,²¹⁷ the Ohio Supreme Court observed that no court had extended *Atkins* to mental illness and it specifically refused to do so, rejecting the claim that mental illness is comparable in terms of blameworthiness to mental retardation. In *Reese v. State*,²¹⁸ the Florida Supreme Court declined to equate mental illness or severe emotional disturbance at time of the offense with mental

216. *Id.*

217. 108 Ohio St.3d 57, 2006-Ohio-160, 840 N.E.2d 1032, at ¶¶156-158; *see also* *State v. Lawson*, slip copy, 2008 WL 4964319, *8 (Ohio App. 12 Dist., Nov. 24, 2008); *State v. Johnson*, 207 S.W.3d 24, 50-51 (Mo. 2006) (refusing to find death penalty disproportionate when imposed on an individual with mental illness and declining to extend *Atkins* to capital defendants with mental illness); *Johnson v. Com.*, No. 2006-SC-000548-MR, 2008 WL 4270731, *6 (Ky. Sept. 18, 2008) (unpublished) (finding defendant “has made absolutely no showing that a national consensus in this country, with a consistency of the direction of change against such executions, has arisen against executions of those with mental illness. Johnson’s mental illness has not been demonstrated to be a reason to prohibit his execution”); *Sprouse v. State*, No. AP-74933, 2007 WL 283152, *8 (Tex. Crim. App. Jan. 31, 2007) (unpublished) (declining to extend *Atkins* to mental illness).

218. 14 So.3d 913, 920 (Fla. 2009); *see also* *Nixon v. State*, 2 So.3d 137 (Fla. 2009) (reaffirming no constitutional death penalty exemption based on mental illness at time of offense); *Lawrence v. State*, 969 So.2d 294, 300, n.9 (Fla. 2007) (rejecting assertion that Equal Protection Clause requires an extension of *Atkins* to include mental illness); *Diaz v. State*, 945 So.2d 1136, 1151 (Fla. 2006) (finding “neither this Court nor the Supreme Court has recognized mental illness as a per se bar to execution”). In *Carroll v. Crosby*, No. 6:05-cv-857-Orl-31KRS, 2008 WL 2557555, *18-19 (M.D.Fla. June 20, 2008) (unpublished), the federal district court for the Middle District of Florida stated:

Despite persuasive arguments and strong expert opinions in support of its application, the extension of *Atkins* to the mentally ill could prove to be difficult to implement. Unlike mental retardation, mental illness is not as “technically” defined and “scientifically” diagnosed. It is a broad and ambiguous term that can encompass a wide array of mental disorders. Thus, it could be difficult to know where to draw the line. Furthermore, there is no consensus in state legislation supporting a categorical exclusion for the mentally ill. Perhaps someday, law and medical science will develop to a point where mental illness is recognized as providing an exemption from the death penalty. But that is not the state of the law at this time, and *Atkins* cannot be read to support Petitioner’s position. Accordingly, since the Florida court’s decision was reasonable in light of federal law, Petitioner’s claim must be denied.

Id. at *18-19.

retardation or to extend *Atkins* to mental illness. In *Lewis v. State*,²¹⁹ the Georgia Supreme Court declined to extend *Atkins* to mental illness and found no support for the claim that the execution of severely mentally ill prisoners violates the Eighth Amendment. In *Commonwealth v. Baumhammers*,²²⁰ the Pennsylvania Supreme Court declined to craft a severe mental illness exemption in light of *Atkins*. Likewise, lower federal courts in habeas review have declined to extend *Atkins* and *Roper* to severely mentally ill capital defendants.²²¹

Even though no state court has found a blanket exemption for the severely mentally ill, state courts often find that a defendant's mental illness may warrant a finding that the death penalty is disproportionate as applied in a particular case. For example, in *State v. Thompson*,²²² the Tennessee Court of Criminal Appeals found the death penalty a disproportionate punishment where the defendant, who had murdered his wife, had a lengthy and well-documented history of mental illness throughout his adult life and no significant criminal history. In *Haynes v. State*,²²³ the Nevada Supreme Court found the death penalty disproportionate when imposed on a mentally ill man who was likely delusional at the time he committed the murder for which he had been sentenced to death. In *Cooper v. State*,²²⁴ the Florida Supreme Court

219. 279 Ga. 756, 620 S.E.2d 778, 786 (2005). See also *Hall v. Brannan*, 284 Ga. 716, 670 S.E.2d 87, 96-97 (2008) (“as an independent, alternative holding, we conclude that, unlike the case of juvenile offenders and mentally retarded persons, there is no consensus discernible in the nation or in Georgia sufficient to show that evolving standards of decency require a constitutional ban, under either the Constitution of the United States or under the Georgia Constitution, on executing all persons with mental illnesses, particularly persons who have shown only the sort of mental health evidence that Brannan has shown”).

220. 599 Pa. 1, 960 A.2d 59, 96-97 (2008), cert. denied, 130 S. Ct. 104 (2009).

221. *In re Neville*, 440 F.3d 220, 221 (5th Cir. 2006) (noting that *Atkins* and *Roper* did not create a new rule of constitutional law protecting the severely mentally ill from the death penalty); *Franklin v. Bradshaw*, slip copy, 2009 WL 649581, *74 (S.D. Ohio Mar. 9, 2009) (unpublished) (finding extending *Atkins* to severe mental illness is outside a federal court's habeas authority); *Alba v. Quarterman*, 621 F.Supp. 2d 396, 430 (E.D. Tex. 2008) (finding state court refusal to extend *Atkins* to severe mental illness was not an unreasonable application of Supreme Court precedent and also was consistent with 5th Circuit precedent); *Green v. Quarterman*, No. H-07-827, 2008 WL 442356, *7 (S.D. Tex. Feb. 15, 2008) (finding that the federal court lacks authority in habeas review to extend *Atkins* to mental illness).

222. No. E2005-01790-CCA-R3-DD, 2007 WL 1217233, *36 (Tenn. Crim. App. Apr. 25, 2007) (unreported, currently on appeal to the Tennessee Supreme Court).

223. 103 Nev. 309, 739 P.2d 497, 503-04 (1987).

224. 739 So.2d 82, 86 (Fla. 1999). See also *Crook v. State*, 908 So.2d 350 (Fla. 2005) (finding death penalty disproportionate for twenty-year-old offender with mental deficiencies including organic brain damage); *Larkins v. State*, 739 So.2d 90, 95 (Fla. 1999) (“The killing here appears to be similar to the killing that occurred in *Livingston* and to have resulted from impulsive actions of a man with a history of mental illness who was easily disturbed by outside forces.”); *Offord v. State*,

found the death sentence disproportionate in the case of an eighteen-year-old man with no prior criminal record who had been diagnosed with brain damage, borderline mental retardation, and paranoid schizophrenia. In *State v. Roque*,²²⁵ the Arizona Supreme Court found a death sentence disproportionate based on the defendant's mental illness and low intellectual capacity.

While the preceding cases and discussions suggest that the use of mental illness as a mitigating factor protects the mentally ill, in reality juries frequently impose death sentences on the severely mentally ill and appellate courts regularly uphold those sentences. For example, in *State v. Johnson*,²²⁶ the Missouri Supreme Court refused to find the death penalty disproportionate when imposed on an individual with mental illness and specifically declined to extend *Atkins* to mentally ill capital defendants. In *Dennis v. State*,²²⁷ the Utah Supreme Court refused to find the death penalty excessive in light of the deliberateness of the mentally ill defendant's crime. In *Rodgers v. State*,²²⁸ the Florida Supreme Court upheld a death sentence in a case where the defendant, who had an extensive history of mental illness, pleaded guilty, waived mitigation, and sought the death penalty. The Florida court found the death penalty appropriate because the two aggravating factors outweighed the mitigating factors. Likewise, the Arizona Supreme Court in *State v. Boggs*²²⁹ found that mitigating evidence of the defendant's poor mental health and difficult upbringing did not warrant leniency given the lack of causal connection between the defendant's poor mental health and his crime.

So where does this leave the legislative and state judicial consideration of mental illness and the death penalty? All states prohibit the execution of someone who is so mentally ill that he is deemed insane at the time of execution. While this legislative status is relevant, it is not

959 So.2d 187, 193 (Fla. 2007) (finding death sentence disproportionate where there was only one aggravating factor and defendant had lifelong, well-established history of severe mental illness).

225. 213 Ariz. 193, 141 P.3d 368, 405-06 (2006).

226. 207 S.W.3d 24, 50-51 (Mo. 2006).

227. 13 P.2d 434, 440-42 (Nev. 2000).

228. 3 So.3d 1127 (Fla. 2009). *See also* Gill v. State, 14 So.3d 946, 964-65 (Fla. 2009) (death penalty not disproportionate despite defendant's history of mental health problems given "magnitude of [] aggravating factors"); Hauser v. State, 701 So.2d 329 (Fla. 1997) (finding death penalty not disproportionate where defendant pleaded guilty and asked lawyers not to present mitigating evidence where three aggravating factors outweighed mitigating evidence including long history of mental health problems); Davis v. State, 2 So.3d 952, 965-66 (Fla. 2008) (finding death sentence not disproportionate despite evidence of defendant's brain damage and chronic mental illness).

229. 218 Ariz. 325, 185 P.3d 111, 130 (2008).

precisely on point, and it is unclear how far the Court would extend this analogy. All states provide that mental illness can be introduced as mitigating evidence.²³⁰ However, in *Penry* and *Stanford*, the Court refused to find that the mitigating evidence of youth and mental retardation, in and of itself, amounted to a constitutional prohibition on execution due to these characteristics or conditions. The ABA and other noteworthy professional organizations recommend a death penalty exemption for the mentally ill.²³¹ Although relevant and important to the development of an exemption, an ABA recommendation is usually not considered persuasive, on its own, by the Supreme Court. Some state appellate justices are raising significant state constitutional concerns about the imposition of the death penalty on the severely mentally ill, which may offer further evidence of a consensus prohibiting the execution of these individuals. However, these views have not yet garnered a majority on any state court to protect the severely mentally ill on state constitutional grounds.²³²

Unfortunately, the evidence that seemed of critical concern to the Court in *Akins* and *Roper* was that eighteen death penalty states expressly banned the execution of mentally retarded and juvenile offenders, respectively. These eighteen states, plus the then-twelve non-death penalty states, provided the Court with sufficient evidence to show a national consensus that the imposition of the death penalty violated the Eighth Amendment. This number, eighteen death penalty states, is consistent with the Court's requirement of state legislative consensus in *Thompson* and *Stanford*. With respect to showing a national consensus to exempt the severely mentally ill, there are now three more non-death penalty states, but specific mental illness legislative exemptions in death penalty states do not look as significant as they did in *Roper* and *Atkins*. Only one state explicitly bans the execution of the mentally ill, although legislation is pending in other states. The status of explicit legislative exemption is not comparable to the legislative statutes present in *Roper* or *Atkins*, which may prove a significant stumbling block in efforts to achieve a constitutional exemption.

These observations are not meant to underplay the legislative, judicial, and social action being taken on behalf of the severely mentally ill in the death penalty context. They show, however, that what seemed to drive the Court's jurisprudence in *Atkins* and *Roper* was not, or at

230. See *supra* note 200.

231. See *supra* note 6 & pp. 558-60.

232. See *supra* pp. 468-73

least was not simply, the compelling arguments of culpability, retribution, and deterrence, which the Court stressed as the constitutional underpinnings of the death penalty. Rather, a significant part of what drove the Court to change its earlier position with respect to mentally retarded and juvenile offenders was the emergence of eighteen death penalty states statutorily protecting these individuals. To the extent that the Supreme Court is looking for state statutes explicitly prohibiting the death penalty on the severely mentally ill, there is not as direct or explicit legislative protection for the mentally ill as there was for mentally retarded offenders in 2002, or juvenile offenders in 2005.²³³ The current status of state legislation is more analogous to *Penry* than *Atkins*. As discussed earlier, the Court in *Penry* did not find the legislative record sufficient to show a consensus that there was an evolving standard of decency protecting mentally retarded offenders from the death penalty.²³⁴ Again, this observation is not intended to discount the powerful analogy between the defendants protected in *Atkins* and severely mentally ill defendants.²³⁵ Rather taken together these observations are intended as a frank assessment of the Court's record of construing the Eighth Amendment and a realistic assessment of the task at hand in crafting an exemption for the severely mentally ill.

The fact that few states provide explicit exemptions for the severely mentally ill means that advocates for these individuals must engage in the messy, slow process of state-by-state protection for this class of capital defendants. Steps are underway in a few states, and these efforts need to continue and expand. Advocates should also look at state constitutions for protection of the severely mentally ill and use state constitutions to seek state court protection for these offenders. Based on the Court's track record on crafting death penalty exemptions for classes of individuals, going back to state legislatures and enacting state legislative exemptions remains a critical step in building a national consensus to protect the severely mentally ill.

The Supreme Court has not yet agreed to hear an exemption challenge for the seriously mentally ill. On October 5, 2009, the Supreme Court denied certiorari review in *Baumhammers v. Pennsylvania*,²³⁶ which involved the petition of Richard Scott Baumhammers, a former lawyer suffering from a delusional disorder of

233. See *supra* pp. 561-63.

234. See *supra* pp. 551-62.

235. See *supra* pp. 555-61.

236. 130 S. Ct. 104 (2009).

persecutory or paranoid schizophrenia,²³⁷ who awaits execution in Pennsylvania. In his certiorari petition to the U.S. Supreme Court, Baumhammers argued, inter alia, that in light of *Atkins*, the imposition of the death penalty on someone suffering from mental illness violates the Eighth Amendment.²³⁸ The Court declined to address the issue or hear Baumhammers' case.²³⁹

VI. CONSTITUTIONAL DEVELOPMENT AND EIGHTH AMENDMENT
EVOLUTION: REALISTIC ASSESSMENTS, PRAGMATIC SUGGESTIONS,
AND MEANINGFUL METHODS TO GIVE EFFECT TO THE PROMISE OF
ATKINS, ROPER, AND PANETTI

The Court's decision to not hear *Baumhammers* leaves open the opportunity to build a better record in the state legislatures before the Court acts on this issue, which, given the Court's approach to Eighth Amendment exemptions in other cases, appears a wise step to take in crafting a successful argument for the recognition of an exemption for the severely mentally ill. As noted at the outset, for better or for worse, the dance of death penalty law is more than simply the substance or merits of the constitutional claim or argument. Seeking constitutional protection from an inappropriate or unwarranted death sentence imposed on a mentally ill offender also requires advocates to consider and plan for arguments addressing how the Court discerns and develops its Eighth Amendment jurisprudence. The Eighth Amendment's "evolving standard of decency that marks the progress of a maturing society" standard explicitly invites this element of process into the substantive discussion of the meaning of cruel and unusual punishment.²⁴⁰ The Court's recognition that the Eighth Amendment's protection evolves and grows more protective as society moves to a more humane system of justice means that there must be some system, or process, or measure of this evolution. Accordingly, the Court must have some method for seeing or determining how that evolution occurs.

Counting state statutes stood front and center in both *Atkins* and *Roper*, and this counting is consistent with other post-*Gregg* death penalty decisions. Recognizing this element of Eighth Amendment analysis is critical to providing a full-bodied, successful constitutional

237. Petition for Writ of Certiorari, *Baumhammers v. Pennsylvania*, No. 08-1455 (May 25, 2009), 2009 WL 1486859.

238. *Id.* at *27-33.

239. *Baumhammers*, 130 S. Ct. at 104.

240. Lain, *supra* note 37, at 10.

argument for severely mentally ill capital defendants. In this regard, it is important to keep in mind the relationship between the democratic process and the development of the Eighth Amendment as well as the Court's concerns that its processes not step too far outside public sentiments.²⁴¹ In discussing a process of constitutional construction that has been referred to as democratic constitutionalism,²⁴² Professors Robert Post and Reva Siegel observe:

The premise of democratic constitutionalism is that the authority of the Constitution depends on its democratic legitimacy, upon the Constitution's ability to inspire Americans to recognize it as their Constitution. This belief is sustained by traditions of popular engagement that authorize citizens to make claims about the Constitution's meaning and to oppose their government—through constitutional lawmaking, electoral politics, and the institutions of civil society—when they believe that it is not respecting the Constitution. Government officials, in turn, both resist and respond to these citizen claims. These complex patterns of exchange have historically shaped the meaning of our Constitution.²⁴³

While recognizing the special role of courts to declare and enforce rights and to constrain government, Professors Post and Siegel posit that “judicial authority to enforce the Constitution, like the authority of all government officials, ultimately depends on the confidence of citizens. If courts interpret the Constitution in terms that diverge from the deeply held convictions of the American people, Americans will find ways to communicate their objections and resist judicial judgments.”²⁴⁴ Reflecting these concerns, commentators have observed that when the Court leaps out too far ahead of legislative actions or diverges too far from the practices of the democratic institutions, there is often a loud, public rebuke of the Court.²⁴⁵ Arguably, when the Court overturned all death penalty statutes in *Furman*, it suffered a public rebuke by the

241. Hills, Jr., *supra* note 131; Lain, *supra* note 37.

242. See GOODWIN LIU, PAMELA KARLAN & CHRISTOPHER SCHROEDER, KEEPING FAITH WITH THE CONSTITUTION (American Constitution Society for Law and Policy 2009); John W. Whitehead & John Beckett, *A Dysfunctional Supreme Court: Remedies and a Comparative Analysis*, 4 CHARL. L. REV. 171, 186 (2009) (describing democratic constitutionalism); IT IS A CONSTITUTION WE ARE EXPOUNDING: COLLECTED WRITINGS ON INTERPRETING OUR FOUNDING DOCUMENT, (American Constitution Society for Law and Policy 2009) [hereinafter IT IS A CONSTITUTION].

243. Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 374 (2007). See also Liu et al., *supra* note 242; Whitehead & Beckett, *supra* note 242; IT IS A CONSTITUTION, *supra* note 242.

244. Post & Siegel, *supra* note 243.

245. Hills, Jr., *supra*, note 131, at 22-24; Lain, *supra*, note 37, at 46-55.

states that reworked and reestablished death penalty statutes.²⁴⁶ The death penalty regime set out in *Gregg* and its companion cases arguably fell more in line with state legislative action.²⁴⁷

Taking into account these concerns, an argument can be made that courts should look to what is happening in the nation's democratic institutions and let that guide the shape that the Constitution is to take in the future.²⁴⁸ In this way, it is arguably appropriate and even preferred to allow the process of protecting the severely mentally ill to work its way through state democratic systems just as the exemptions for the mentally retarded and juvenile offenders worked their way through the state legislative processes. And indeed, this approach seems to be the post-*Gregg* model that the Court has relied upon in construing the scope of the Eighth Amendment's protection in the area of capital punishment.²⁴⁹

But when courts cleave too closely to states as a guide for the meaning of the Eighth Amendment, the results may prove constitutionally unsatisfying and unworkable. Consider Justice Blackmun who, after consistently voting to uphold capital punishment statutes during most of his career, despaired at the end over the constitutional inadequacies of the modern death penalty system.²⁵⁰ The

246. Hills, Jr., *supra*, note 131, at 22-24; Lain, *supra*, note 37, at 46-55.

247. Hills, Jr., *supra*, note 131, at 22-24; Lain, *supra*, note 37, at 55-64.

248. See Post & Siegel, *supra* note 243. See also Liu et al., *supra* note 242.

249. Justice Souter in his dissent in *District Attorney's Office for Third Judicial Dist. v. Osborne*, 129 S. Ct. 2308, 2340 (2009) (Souter, J., dissenting), noted this concern in the context of the development of substantive due process rights. Justice Souter opined:

As for determining the right moment for a court to decide whether substantive due process requires recognition of an individual right unsanctioned by tradition (or the invalidation of traditional law), I certainly agree with the Court that the beginning of wisdom is to go slow. Substantive due process expresses the conception that the liberty it protects is a freedom from arbitrary government action, from restraints lacking any reasonable justification, and a substantive due process claim requires attention to two closely related elements that call for great care on the part of a court. It is crucial, first, to be clear about whose understanding it is that is being taken as the touchstone of what is arbitrary and outside the sphere of reasonable judgment. And it is just as essential to recognize how much time society needs in order to work through a given issue before it makes sense to ask whether a law or practice on the subject is beyond the pale of reasonable choice, and subject to being struck down as violating due process.

It goes without saying that the conception of the reasonable looks to the prevailing understanding of the broad society, not to individual notions that a judge may entertain for himself alone, and in applying a national constitution the society of reference is the nation. On specific issues, widely shared understandings within the national society can change as interests claimed under the rubric of liberty evolve into recognition, or are recast in light of experience and accumulated knowledge.

Id. at 2340-41.

250. See *supra* p. 541.

more modest efforts of *Gregg* and modern death penalty constitutional law, which followed and deferred more to state legislative action, failed, in Justice Blackmun's view, to meet the constitutional objectives and obligations of the Cruel and Unusual Punishments Clause.²⁵¹ Likewise, the ALI abandoned its efforts to craft or revise a model death penalty statute because the system is not workable.²⁵² If the ALI cannot craft a model statute, can the Court comfortably rely on state statutory action as the lead guide in Eighth Amendment death penalty limits?

With respect to severely mentally ill defendants, a slow, incremental, cautious approach that counts states in order to discern the evolving standards of decency that guide the Eighth Amendment will undoubtedly mean that states will kill severely mentally ill prisoners while an exemption inches its way through legislatures across the country. In other words, an individual, who is not sufficiently culpable to be punished by death when viewed in comparison with other protected groups, will be executed under the counting regime to which the Court adheres. While it is undoubtedly critical for the Court to be sufficiently deferential to the democratic branches and the legislative process, there are limits to waiting for the states to act. To risk stating the obvious, would relying on such an approach to constitutional construction have allowed a 1950s Supreme Court to bring a constitutional end to the entrenched segregationist practices of the Deep South?²⁵³

Moreover, a rigid approach to counting states does not seem to be a particularly principled way to interpret such important constitutional protection.²⁵⁴ The pattern of Eighth Amendment cases suggests, if not expressly at least implicitly, that there must be eighteen death penalty states, or thirty death penalty and non-death penalty states combined, before a certain class of defendants is constitutionally protected from execution that would otherwise be disproportionate.²⁵⁵ This method seems an odd way for constitutional protection to evolve. While perhaps connected to the consensus of the states, this aspect of discerning the meaning of the Eighth Amendment does not appear particularly connected to the stated constitutional goal of tying the death penalty to

251. See *Callins v. Collins*, 510 U.S. 1141, 1143-44 (1994) (Blackmun, J., dissent from denial of certiorari).

252. See *supra* pp. 542-43.

253. Laurence Tribe, *Foreword*, in *IT IS A CONSTITUTION WE ARE EXPOUNDING: COLLECTED WRITINGS ON INTERPRETING OUR FOUNDING DOCUMENT* (American Constitution Society for Law and Policy 2009).

254. Hills, Jr., *supra* note 132.

255. See *supra* pp. 551-55, 562-63.

culpability. Further, relying on state legislative action does not necessarily insulate the Court from public rebuke or attack when it interprets the Eighth Amendment. For example, some of the public response to *Roper*, which focused on the reference in the opinion to the international community in the opinion, was quite strident in its criticism of the Court.

Despite the criticisms and shortcomings of the “counting” method of constitutional construction, the reality is that counting is part of the game. Thus, when advocates for the mentally ill marshal their arguments, they must deal with this aspect of capital punishment law. Acceptance of this aspect of the Eighth Amendment, however, does not mean that the advocates for severely mentally ill offenders must accept defeat. For example, advocates could assert that in the last eight years, the Court has broadened the Eighth Amendment’s standard of decency by recognizing that the Eighth Amendment precludes the imposition of the death penalty on any individual who, due to a medically established mental condition, is less culpable or at least possesses no greater culpability than juveniles or mentally retarded offenders. Looking at the Eighth Amendment from a broader principle of culpability that correlates to a defendant’s documented medical condition would provide an argument that the consensus already exists to protect the severely mentally ill whose culpability is no greater than that of the mentally retarded or juvenile offender. In support of this argument, advocates can urge that even in the absence of eighteen death penalty states explicitly exempting the mentally ill from the death penalty, multiple state actions show a national consensus protecting the severely mentally ill: (1) states giving effect to the constitutional prohibition on executing juveniles and mentally retarded offenders indicate state recognition that certain characteristics—that are also associated with severe mental illness—must limit the death penalty; (2) statutes prohibiting the execution of “insane” prisoners illustrate the universal revulsion generated by executing individuals who lack a rational understanding of their circumstances; (3) statutes providing that mental illness is a mitigating factor demonstrate the strong societal view that mental illness is a reason not to impose the death penalty; (4) current trend of state statutory restrictions or prohibitions on the use of the death penalty is evidence of a general movement away from the death penalty; (5) in addition to Connecticut’s statutory exemption for the severely mentally ill, other state legislatures are in the process of crafting statutory protection for this group of capital offenders; (6) state justices have raised concerns about the execution of the mentally ill based on provisions in state

constitutions; and (7) the actions of the ABA and ALI demonstrate major legal organizations' significant concerns about the continued use of the death penalty in general and as applied to mentally ill offenders.

Although this argument may be appealing, in the end, it will probably not prevail. Rather, it is very likely that the Court will look at the severely mentally ill as a category or class of offenders that is separate and distinct from juvenile or mentally retarded offenders and that is seeking a separate and unique exemption from the death penalty. If the Court deals with the severely mentally ill as falling within a new or wholly separate category of Eighth Amendment exemptions, then the Court may only be willing to count those statutes and legislative actions bearing directly on the mentally ill. If the Court analyzes this exemption in isolation, then the precedents of *Atkins* and *Roper* may be probative, but not determinative, and the legislative record for this exemption at this time is probably not sufficient for the Court to find that a consensus exempting the severely mentally ill. Instead, as discussed earlier, efforts to establish recognition for a death penalty exemption for the severely mentally ill will require the additional hard work of crafting specific state exemptions for the mentally ill, such as is currently underway in Indiana and North Carolina.

VII. CONCLUSION

In light of the Court's past practices, including its holdings and analysis in *Atkins* and *Roper*, it seems likely that the Court will look at and demand separate state legislative exemptions explicitly protecting the severely mentally ill who, at the time of the commission of their crime, lacked the requisite culpability to have the death penalty imposed upon them. Since the reinstatement of the death penalty in *Gregg*, the Court appears to avoid the use of broad protections and broad challenges to the death penalty. Rather the Court inches forward, and often backward, on the constitutional scope of the death penalty in America on a case-by-case basis requiring states to take the lead on any systemic change to the modern death penalty regime. My reluctant conclusion is that the Court is going to engage in an isolated, narrow approach to constitutional construction on this issue, and while *Atkins* and *Roper* may be useful, they will not be determinative. Moreover, to look at this issue as only about the constitutional exemption and not about the process by which the constitutional exemption becomes a reality is to misread the Court. Such an approach would underestimate the frustrating realities of modern death penalty jurisprudence and would

cause advocates to miss an essential component of a successful constitutional challenge.

Thus, from a pragmatic—albeit disappointing—point of view, the future of the constitutional death penalty exemption for the severely mentally ill is as dependent on the state legislative process as it is on the Court. While recognizing the compelling analogies between the severely mentally ill and other vulnerable groups exempt from the death penalty, as well as the influential positions of the ABA, the ALI and other professional organizations representing the mentally ill, at this point in time, the Court is going to look to state legislatures, and what happens in those legislative bodies, in my view, is likely to be determinative of the future of this exemption from the death penalty.