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Cover Page Footnote
J.D. Candidate, 2008, Fordham University School of Law; B.A., 2002, Barnard College. I would like to thank Professor Alison Nathan for her insight and guidance during the writing process, as well as the tremendously helpful minilessons on the small whiteboard in her office. I am also grateful to my family and friends for their endless love, support, and encouragement.
IS THE DEATH OF THE DEATH PENALTY NEAR?  
THE IMPACT OF ATKINS AND ROPER ON THE  
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MENTALLY ILL DEFENDANTS

Helen Shin*

In recent years, the U.S. Supreme Court has created two categorical exemptions to the death penalty. In Atkins v. Virginia, the Court exempted mentally retarded offenders. Three years later, in Roper v. Simmons, the Court extended the protection to juveniles. Based on these cases, the practices of foreign countries, and the opinions of professional organizations with relevant expertise, legal scholars speculate that the Court may, in the future, categorically exclude severely mentally ill offenders from the death penalty. This Note examines the feasibility of such an exemption for the mentally ill and considers its possible repercussions.

INTRODUCTION

Legal scholar Herbert Packer once wrote, "[T]he law treats man's conduct as autonomous and willed, not because it is, but because it is desirable to proceed as if it were."¹ For offenders suffering from severe mental illnesses which at times cause them to be incapable of controlling their actions, the law's treatment of their conduct as deliberate for the sake of judicial convenience or to avoid complication is an injustice. It inadequately addresses an individual's uniqueness and posits intent where there may be none. Advances in psychiatry and psychology in the past several decades have revealed that certain severe mental illnesses render individuals who suffer from them powerless to control their own thoughts and/or behavior.² Moreover, such people are often not even aware that they

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2. See, e.g., Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders 276 (4th ed. 1994) (stating that psychotic symptoms of people who suffer from
Recently, legislatures and courts have crafted and interpreted laws in a manner that reveals their respect for, and recognition of, the validity of the mental health sciences—psychiatry and psychology—often relying on developments in the two related disciplines in enacting legislation and deciding cases.5

Over the past twenty years, the U.S. Supreme Court has made several landmark decisions regarding mental capacity and capital punishment.6 In 1986, the Supreme Court held that the Eighth Amendment of the Constitution prohibits states from inflicting the death penalty on capital prisoners who are “insane” and thus not competent for execution.7 Within the past five years, the Court further determined that mentally retarded defendants8 and juveniles9 are categorically precluded from the death penalty. In this way, the Supreme Court carved out exemptions for different groups of criminal defendants from the death penalty. Therefore, in light of these decisions, as well as developments in the Court’s understanding of psychiatry and psychology, legal scholars speculate10 that mentally ill defendants may join the list of people who are categorically protected from being executed.11

schizophrenia substantially impair their ability to think and behave appropriately, sometimes causing them to act bizarrely, become agitated, or speak incoherently).

3. See Stefano Pallanti et al., Awareness of Illness and Subjective Experience of Cognitive Complaints in Patients with Bipolar I and Bipolar II Disorder, 156 Am. J. Psychiatry 1094, 1095 (1999) (stating that one trait of people with bipolar II disorder is poor awareness of their own mental illness).

4. For example, in light of scholarship in the field of mental health, Congress recognized that mental illness is a valid disability when it passed the Americans with Disabilities Act of 1990. Pub. L. No. 101-336, 104 Stat. 327 (codified at 42 U.S.C. §§ 12101–12213) (2000)). Another example is a Florida statute that requires a panel of three psychiatrists to determine the mental competency of a death row inmate “to understand the nature of the death penalty and the reasons why it was imposed upon him” when it appears that the death row inmate may be insane. Fla. Stat. § 922.07(1)-(2) (1985).

5. A Florida statute, Fla. Stat. § 922.07(2) (1985), and the expertise of mental health professionals was relevant in Ford v. Wainwright, 477 U.S. 399 (1986), a death penalty case reviewed by the U.S. Supreme Court. Though the governor decided to permit the defendant’s execution without explanation, he complied with the state’s procedural statute and required three psychiatrists to evaluate the sanity of a death row inmate. Ford, 477 U.S. at 403–04, 412–13. In Ford, the Supreme Court ultimately decided to ban executions of capital offenders who are found to be insane. See generally 477 U.S. at 399–418.


7. Ford, 477 U.S. 399; see also supra note 5.


10. See also Dora W. Klein, Categorical Exclusions from Capital Punishment: How Many Wrongs Make a Right?, 72 Brook. L. Rev. 1211 (2007) (discussing more expansively the effects of categorical death penalty exclusions). This Note focuses more narrowly on the category of mentally ill offenders.

11. For a definition of “mental illness” in the context of the death penalty, see infra Part I.C.1. Both law and science recognize “mental illness” and “mental retardation” as two distinct classifications. While they share certain similar traits and symptoms, fundamental differences distinguish them from each other. Importantly, the Supreme Court has only banned the execution of mentally retarded offenders. Atkins, 536 U.S. 304. There are two major differences: (1) the determination of whether a person is mentally retarded involves an intelligence inquiry while intelligence is an irrelevant factor in determining whether a
The legal community and the American public have long held strong opinions about the death penalty. Following the 2002 Atkins v. Virginia decision, in which the Supreme Court ruled that sentencing mentally retarded criminals to death violated the Constitution, law journals and the media devoted much attention to the question of whether the Court's ban on executions of mentally retarded offenders could apply similarly to mentally ill offenders. Since Atkins, there have been several relevant and significant developments in the legal arena that shed light on what may lie ahead for mentally ill criminals. The most significant advance in capital punishment jurisprudence after Atkins came in 2005 when the Supreme Court ruled against the constitutionality of the juvenile death penalty in Roper v. Simmons. This Note applies the analysis used by the Court in Roper and Atkins to scrutinize the constitutionality of sanctioning executions of severely mentally ill offenders in light of new developments in the law and science. Furthermore, this Note considers what impact a categorical exemption for the mentally ill may have on the ongoing controversial debate about the overall validity of the death penalty.

In response to Atkins and Roper, experts in the legal community and relevant professional organizations, such as the American Psychiatric Association, have voiced their opinions in reports, position statements, and relevant professional organizations, such as the American Psychiatric Association, have voiced their opinions in reports, position statements, and relevant professional organizations, such as the American Psychiatric Association, have voiced their opinions in reports, position statements,

person suffers from a mental illness; and (2) the time of onset differs for mental retardation versus mental illness—mental retardation is a permanent condition which mainly arises in infancy and must be present by the time a person turns eighteen, whereas mental illness can be diagnosed at any age with many episodes of more severe mental illnesses (e.g., schizophrenia) occurring in adulthood. For a detailed discussion regarding how mental illness differs from mental retardation, see infra text accompanying notes 193–200.

In addition, this Note discusses the definition of “insanity” (or rather, the difficulty of defining the term) and distinguishes it from “mental illness” in relation to the death penalty. See infra text accompanying notes 201–20. The relevant distinction here, is that the Supreme Court's ban on executing the “insane” applies to criminals who have already been sentenced to death but are found to be mentally incompetent at the time of the execution; the subject of this Note, however, is an offender's mental condition at the time of the offense. See generally infra text accompanying notes 205–07.

12. See generally Atkins, 536 U.S. 304.
14. See generally 543 U.S. 551.
15. See, e.g., ABA Section of Individual Rights and Responsibilities et al., Recommendation 122A (2006) [hereinafter ABA Recommendation 122A], available at http://www.abanet.org/media/docs/122A.pdf (calling for states to end the practice of executing or sentencing to death mentally ill defendants who are significantly limited in their intellectual functioning, adaptive behavior, or those defendants who have severe mental disorders or disabilities).
and essays, which specifically address issues regarding execution of the mentally ill. In addition, national, international, and foreign groups have expressed concerns about the United States’ stance on the death penalty. Nongovernmental organizations (NGOs) and human rights groups have also weighed in on whether mentally disabled defendants should be eligible for death sentences, as well as on the broader debate about the overall legitimacy of the death penalty. Devotion to this issue is due in large part to the alarming number of mentally ill death row inmates, which raises concerns among not only human rights groups, but among professional mental health organizations, the legal community, and the American public.

Many scholars have considered the impact of Atkins on the future of capital punishment in the United States with respect to mentally ill defendants, presumably because the body of knowledge about mental retardation is related in several ways to that of mental illness. Roper, which

Psychiatric Ass’n, Diminished Responsibility in Capital Sentencing: Position Statement (2004), available at http://www.psych.org/edu/other_res/lib_archives/archives/200406.pdf. Furthermore, prior to the Atkins and Roper decisions, the American Psychological Association also set forth a resolution calling for a moratorium on carrying out death penalty sentences in the United States. One reason the American Psychological Association gave for the moratorium was that “death penalty prosecutions may involve persons with serious mental illness or mental retardation” and “[p]rocedural problems, such as assessing competency, take on particular importance in cases where the death penalty is applied to such populations.” Am. Psychological Ass’n, The Death Penalty in the United States (Aug. 2001), http://www.apa.org/pi/deathpenalty.html.


19. See generally Am. Civil Liberties Union, supra note 17.

20. See Am. Civil Liberties Union, supra note 18 (revealing that five to ten percent of death row inmates have a serious mental illness, and according to a professor of psychiatry at New York University, almost all death row inmates had damaged brains due to trauma or illness); see also Amnesty Int’l, supra note 18, at 20 (estimating that five to ten percent of death row inmates suffer from serious mental illness).

21. See, e.g., Richard C. Dieter, Introduction to the Presentations: The Path to an Eighth Amendment Analysis of Mental Illness and Capital Punishment, 54 Cath. U. L. Rev. 1117 (2005) (introducing the topic of the symposium, The Death Penalty and Mental Illness, and explaining that the Supreme Court and the entire country is reevaluating the death penalty in light of recent findings of inexcusable mistakes and injustices as well as a greater understanding of mental illness).

22. See, e.g., Kevin Drew, Executed Mentally Ill Inmate Heard Voices Until End, CNN.com, Jan. 6, 2004, http://www.cnn.com/2004/LAW/01/06/singleton.death.row/index.html (telling the story of a mentally ill man who was executed in Arkansas, and noting that although Americans generally support the death penalty, public opinion is divided with regard to executing the mentally ill).

23. See supra note 13 and accompanying text.
only three years after Atkins carved out a second group of people—juveniles—who were excluded from the death penalty, led people to wonder whether the Supreme Court was beginning a wave of categorically exempting certain groups of offenders from capital punishment in order to adhere to its long-held principle of narrowly confining the death penalty to the most serious criminals.24

Given the significant changes and developments in not only this nation’s death penalty jurisprudence due to Atkins and Roper, but also the practices of foreign countries and the opinions of numerous professional organizations with germane expertise, the field is ripe for speculation about the future of the death penalty in the United States. This Note’s examination of these recent developments seeks to add a fresh perspective to the debate about the applicability of the death penalty to the narrow class of severely mentally ill defendants.

Part I.A of this Note begins by examining the relevant legal history of capital punishment in the United States and explains the Supreme Court’s rationale for upholding the death penalty as a legitimate form of punishment. Additionally, this section offers examples of capital defendants with mental illnesses to provide a human aspect to the controversy, and to illustrate how existing laws and past precedent are inadequate legal safeguards for mentally ill defendants in American courts.25

Part I.B discusses two recent Supreme Court death penalty cases—Atkins and Roper. These cases provide the substantive background for this Note’s assertion that the country is moving in the direction of creating categorical exemptions to the death penalty for certain groups, although it is questionable whether these carve outs are helpful in advancing the interests of death penalty opponents. The cases also set forth the Supreme Court’s criteria for creating an exemption to the death penalty for a particular class of offenders. The requirements promulgated by the Court in Roper and Atkins provide the framework through which this Note scrutinizes the applicability of the death penalty to mentally ill offenders in Parts II and III.

Part I.C defines mental illness as it relates to capital punishment inquiries. In defining mental illness, this section relies on definitions promulgated by experts in the mental health profession and established mental health organizations. Furthermore, this section distinguishes mental


25. See Amnesty Int’l, supra note 18, at 170–88 (listing names and short profiles of 100 mentally ill prisoners who have been executed in the United States since reinstating capital punishment in 1977).
illness—which is the subject of this Note—from mental retardation and insanity, which have been previously addressed by the Supreme Court.

Part II applies the test the Supreme Court used in *Roper* and *Atkins* to analyze whether or not mentally ill criminals should, or reasonably could, also be a category that is protected from the death penalty as a matter of law. Employing the test, Part II.A questions if there is a national consensus about whether the death penalty is still permissible in this country for mentally ill defendants. In examining whether there is a domestic consensus or at least a trend toward abolishing the death penalty for the mentally ill, this Note provides an overview of relevant state capital punishment laws existing in the United States.\textsuperscript{26} Furthermore, this section discusses what Americans, specifically jurors, judges, and legislators—through their jury decisions, practices of courts in general, and state legislation—as well as the international community have voiced in the recent past regarding executions of mentally ill defendants. This section also summarizes medical, legal, and academic scholarship disseminated by experts in recent years, particularly the views and recommendations they have put forth in light of *Atkins* and *Roper*. Such information provides a more complete understanding of whether a consensus exists about this issue upon which courts and legislatures can act. In view of the overwhelming opposition to capital punishment from the world community and professional mental health and legal organizations, as well as the more ambivalent opinion of the American public as evidenced in popular polls, this Note examines whether such opinions carry any actual weight in American courts and state legislatures.

Part II.B shifts focus to the proportionality analysis the Supreme Court used in *Roper*\textsuperscript{27} and *Atkins*\textsuperscript{28} to determine whether a particular punishment—here, the death penalty—is appropriate for the crime committed and the particular criminal. Specifically, it examines whether the goals of deterrence and retribution are met by permitting executions of mentally ill defendants.

Finally, Part III discusses the implications of the *Roper* and *Atkins* decisions on the information provided in Parts II.A–B. Specifically, this Note argues that there is a growing national and international consensus against subjecting mentally ill defendants to capital punishment. While such a consensus is already present in the foreign arena and among legal, mental health, and medical experts, the laws in this country have not yet

\textsuperscript{26} Such a survey is necessary because each state creates its own rules limiting capital punishment. See, e.g., Ford v. Wainwright, 477 U.S. 399, 416–17 (1986) (stating that the Supreme Court “leave[s] to the State the task of developing appropriate ways to enforce the constitutional restriction [on inflicting the death penalty on the insane] upon its execution of sentences”).

\textsuperscript{27} See 543 U.S. 551, 571–72 (2005); see also infra text accompanying notes 162–66 (examining the Court’s proportionality review in *Roper*).

\textsuperscript{28} See 536 U.S. 304, 318–20 (2002); see also infra text accompanying notes 99–106 (discussing the Court’s examination of the deterrent and retributive effects of the death penalty on mentally retarded persons).
caught up to science and the rest of the world, impeding a clear domestic consensus on the issue. However, this Note urges courts and lawmakers to stay abreast of “evolving standards of decency” as the Supreme Court did in *Roper* and *Atkins* to determine whether the death penalty is so disproportionate as to be deemed cruel and unusual, as reflected in contemporary international and foreign consensus, and as articulated by modern, relevant communities of legal and mental health experts. Doing so will further limit the reach of the death penalty when society no longer tolerates such a punishment for the mentally ill. The Note opines that the rumblings in the international community and among professional organizations with germane expertise against permitting executions of mentally ill offenders are evidence that the time is drawing near for the barring of such executions. Importantly, however, this Note recognizes that the Supreme Court most heavily relied on death penalty legislation of individual states to provide the primary evidence for the existence of a national consensus concerning mentally retarded and juvenile defendants at the time of the *Atkins* and *Roper* decisions. As such, the Note concludes that such an objective legislative multistate consensus is not yet visible with respect to mentally ill offenders. This Note therefore recommends that state legislatures that still sanction capital punishment consider whether executing mentally ill defendants comports with the standards set forth in these two Supreme Court decisions. After states supporting the death penalty critically examine the constitutionality of their legislation concerning execution of the mentally ill in light of *Atkins* and *Roper*, those that determine that such punishment is improper must accordingly alter their laws. If enough states change their laws and there is consistency in the states’ direction of change such that a national legal consensus does appear, the Supreme Court will likely be compelled by “evolving standards of decency” to make a national decision to categorically exclude the mentally ill from the death penalty.

The Note concludes by hypothesizing about what effect a ban on executions of the mentally ill would have on the goals of death penalty advocates and opponents. Presumably, opponents would consider it a victory and a shift toward total abolition if the law took a bite out of the death penalty by categorically excluding mentally ill offenders. Based on similar reasoning, it would seem that death penalty supporters would dislike the additional restriction. Counterintuitively, however, this Note suggests that death penalty proponents may perceive an exemption for the severely mentally ill as evidence that whatever flaws there may have been before in death penalty laws have been identified and fixed, and that the potential for unfair executions are thereby eliminated. In the long run, the exclusion of yet another class of people from the death penalty, by acting as a safeguard, may actually make capital punishment a more strongly rooted institution in this country.

I. THE HISTORY OF THE DEATH PENALTY IN THE UNITED STATES AND THE DEFINITION OF MENTAL ILLNESS

A. Overview of the Death Penalty in the United States

1. The History of the Death Penalty

The Eighth Amendment, which was added to the U.S. Constitution in 1791, succinctly prohibits the infliction of "cruel and unusual punishments" and "excessive" sanctions, and the Fourteenth Amendment applies this provision to the states. In *Trop v. Dulles*, Chief Justice Earl Warren set forth the guiding constitutional principle that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." He also emphasized that "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man." The plurality's deference to "evolving standards of decency" in the *Trop* decision eventually became the framework the Court used to decide several landmark death penalty cases in the late twentieth and early twenty-first centuries.

In 1972, the Supreme Court effectively placed a moratorium on the death penalty when, in *Furman v. Georgia*, it reviewed the country's use of capital punishment and held existing state death penalty statutes
unconstitutional. Three of the five Justices in the majority argued that application of the death penalty in an “arbitrary” and haphazard manner that disproportionately discriminated against certain minority groups was unconstitutional. The two other Justices in the majority maintained that capital punishment was unconstitutional per se, in all cases and not just in cases where its application was “arbitrary.” Notably, Justice William Brennan, Jr., used the “evolving standards of decency” principle in this case to support his argument that the death penalty wholly violated the Constitution because it was cruel and unusual in all cases. Moreover, Justice Thurgood Marshall stated that

[p]erhaps the most important principle in analyzing ‘cruel and unusual’ punishment questions is one that is reiterated again and again in the prior opinions of the Court: i.e., the cruel and unusual language ‘must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.’

He further noted that a penalty that was permissible at one point in the country’s history “is not necessarily permissible today,” recognizing the elastic nature of an analysis of “evolving standards of decency.”

In light of the Furman decision, which effectively voided forty death penalty statutes and commuted the sentences of 629 death row inmates around the nation, state legislatures began revising their capital punishment statutes and proposing new statutes that sought to rectify the problems identified by the Court in Furman. Four years later, the Supreme Court revisited the constitutionality of the death penalty in Gregg v. Georgia. It determined that Georgia’s newly revised capital statutes

37. Id. at 240, 242, 256–57 (Douglas, J., concurring). Justice William O. Douglas stated that “[i]t would seem to be incontestable that the death penalty inflicted on one defendant is ‘unusual’ if it discriminates against him by reason of his race, religion, wealth, social position, or class, or if it is imposed under a procedure that gives room for the play of such prejudices.” Id. at 242; see id. at 308–10 (Stewart, J., concurring); id. at 310–11, 313–14 (White, J., concurring).
38. Id. at 305–06 (Brennan, J., concurring); id. at 358–60, 369–71 (Marshall, J., concurring).
39. Id. at 269–305 (Brennan, J., concurring) (creating a cumulative test with four principles to determine whether a punishment violated the Eighth Amendment, and including as the third principle, whether contemporary society has objectively indicated its acceptance of the punishment); see also Varland, supra note 24, at 317–20 (discussing the Furman case).
41. Id. at 329.
43. See Amnesty Int’l, supra note 18, at 7; DPIC Introduction to the Death Penalty, supra note 42 (stating that Florida led the states in rewriting death penalty laws in response to Furman and that thirty-four other states also drafted new death penalty legislation and sentencing guidelines to eliminate the problems discussed in Furman).
now passed constitutional muster, in effect reopening the door for states to resume sentencing executions.\textsuperscript{45} Ten years later, detecting another flaw with capital punishment laws, the Supreme Court held in \textit{Ford v. Wainwright} that the Eighth Amendment prohibits states from carrying out the death penalty on defendants who are insane.\textsuperscript{46} The majority decided that such punishment was "cruel and unusual" according to common law, stating that the Eighth Amendment proscribed "barbarous methods" condemned in 1789 at the time the Bill of Rights was adopted\textsuperscript{47} as well as violations of "fundamental human dignity" based on contemporary values.\textsuperscript{48} The Court noted several historical theories for why the common law did not condone the practice of executing the insane (e.g., "offends humanity," "madness is its own punishment," it has no proper deterrent or retributive value, religion and/or morals forbid it),\textsuperscript{49} and pointed out that all the states adhered to the principle of not executing the insane.\textsuperscript{50} The fact that no states permitted the execution of insane prisoners provided ample evidence that the Eighth Amendment effectively prohibits states from carrying out a death sentence upon an insane defendant.\textsuperscript{51} However, the Court left it to the individual states to determine the definition of competence for execution and the procedures they should use to assess whether a prisoner meets the standard of insanity.\textsuperscript{52}

In \textit{Thompson v. Oklahoma}, the Supreme Court decided that the Eighth and Fourteenth Amendments further forbid the imposition of the death penalty on offenders who were under the age of sixteen at the time of their crime.\textsuperscript{53} The Court discussed state legislation, the practice of juries, the number of actual executions, the opinions of professional organizations, as

\textsuperscript{45} \textit{Id.} at 207. The first execution following the moratorium occurred on January 17, 1977, when Utah executed Gary Gilmore by firing squad. DPIC Introduction to the Death Penalty, \textit{supra} note 42 (noting that Gilmore did not challenge his death sentence). The same year, Oklahoma became the first state to adopt lethal injection as a method of execution. \textit{Id.}

\textsuperscript{46} \textit{Ford v. Wainwright}, 477 U.S. 399 (1986).


\textsuperscript{49} \textit{Id.} at 407–08 (mentioning various sources that may provide the reason for the English common law forbidding executions of the insane).

\textsuperscript{50} \textit{Id.} at 407–10.

\textsuperscript{51} \textit{Id.} at 409–10 (stating that the Eighth Amendment supports such a limitation regardless of whether its purpose is to protect the insane capital defendant "from fear and pain without comfort of understanding" or to protect society's dignity "from the barbarity of exacting mindless vengeance."). \textit{Id.} at 410.

\textsuperscript{52} \textit{Id.} at 416–17; \textit{see also Amnesty Int'l}, \textit{supra} note 18, at 121 (stating that the \textit{Ford} Court failed to provide standards and procedures for determining whether a prisoner was insane).

\textsuperscript{53} \textit{Thompson v. Oklahoma}, 487 U.S. 815 (1988) (setting aside the death sentence that had been imposed on the fifteen-year-old defendant). Looking at the standards of decency at the time, the Court noted that sixteen was the lowest age specified as permissible in death penalty states that set a minimum age requirement. \textit{Id.} at 826–29.
well as the views of "other nations that share our Anglo-American heritage, and . . . leading members of the Western European community" to explain why it was compelled to reach such a conclusion.54

The following year on the same day, the Supreme Court decided two capital punishment cases—Stanford v. Kentucky55 and Penry v. Lynaugh.56 In Stanford, the Court relied on the facts that 22 of the 37 death penalty states allowed 16-year-old offenders to be sentenced to death and that 25 of the 37 states permitted it for 17-year-old offenders to conclude that a national consensus did not exist about the issue of executing 16- and 17-year-old offenders.57 Moreover, a plurality of the Court rejected the suggestion that the Justices' judgment should bear on whether juvenile executions were acceptable.58 The Court decided in Penry that mentally retarded offenders should not be exempt from receiving death sentences under the requirements of the Eighth Amendment, noting that the legislative lay of the land did not provide sufficient evidence of a national consensus against it.59 The Court found it persuasive that, at the time of its decision in 1989, only two states had enacted legislation making it illegal to sentence mentally retarded persons to death and only fourteen states outlawed capital punishment altogether.60

In the cases discussed above, the Supreme Court closely analyzed the protections provided by the Eighth Amendment. Likewise, the issue examined in this Note—whether the law as it has evolved still permits the imposition of capital punishment on mentally ill offenders—is grounded in an interpretation of the constitutional ban on "cruel and unusual punishment."61

2. Mentally Ill Defendants on Death Row

Although mentally retarded and juvenile offenders are now categorically shielded from receiving the death penalty, there are still many death row prisoners who suffer from severe mental illnesses and/or brain damage, and act under states of delusion or hallucination. Furthermore, many of them come from backgrounds of poverty, child abuse, racism, deprivation, and societal marginalization—factors that may have affected them at the time they committed their crimes.62 Although such factors can be considered

54. Id. at 826–33.
55. 492 U.S. 361 (1989). However, less than twenty years later, the Court overruled Stanford in Roper.
58. See id. at 377–78 (plurality opinion of Scalia, J., joined by Rehnquist, C.J., and White & Kennedy, JJ.).
60. Id.
61. U.S. Const. amend. VIII.
62. See Amnesty Int'l, supra note 18, at 170–88 (listing 100 people who have been executed since 1977 who had mental health problems, including some with additional neurological, social, or developmental problems). For example, Morris Mason committed a capital murder after having unsuccessfully asked his parole officer twice in the previous
mitigating factors, the absolute protection afforded to juveniles and the mentally retarded against the death penalty has not been afforded to mentally ill criminals as a matter of law. In light of the recent developments regarding capital punishment, it is appropriate to take a fresh look at how such changes may affect mentally ill offenders.

B. Twenty-First-Century Developments in Death Penalty Jurisprudence: The Supreme Court's Two Categorical Exemptions

Following the decisions discussed in Part I.A.1, the Supreme Court granted certiorari to two cases to reexamine issues it had decided less than twenty years earlier. In 1989, the Court held that the Eighth Amendment neither prohibited executing persons with mental retardation\(^6\) nor banned imposing the death penalty on defendants for crimes committed by sixteen or seventeen year olds.\(^6\) Then, in 2002, the Court revisited the issue of whether it was still constitutional to impose the death penalty on mentally retarded defendants in \textit{Atkins}. Shortly thereafter, in 2005, the Court also reviewed whether the Eighth Amendment permitted executing juveniles under eighteen years of age in \textit{Roper}. In both \textit{Atkins} and \textit{Roper}, the Supreme Court limited the scope of the death penalty under the Eighth Amendment, categorically excluding certain narrow classes of persons from its reach.\(^6\)

week for help for his alcohol and drug abuse problem. \textit{id} at 170. He had even asked to be placed in a halfway house on the eve of the murder but no such facilities were available in the state. \textit{id}. Mason had a long history of mental illness, including paranoid schizophrenia, and had spent time in three different state mental institutions. \textit{id}. Also, in the eight years before his 1978 trial, three different psychiatrists had independently diagnosed Mason with paranoid schizophrenia, but he was nevertheless executed in 1985. \textit{id}.

In the same year, a manic depressive man named Charles Rumbaugh was executed in Texas for committing murder during a robbery shortly after escaping from a mental institution where he was receiving treatment for his illness. \textit{id}. He had given up on his appeals and had given up on trying to get treatment for his illness—essentially choosing to die. \textit{id}.

Texas executed another man, Troy Kunkle, in 2005 for a crime he committed when he was just over eighteen years old. \textit{id} at 187–88. He did not have a criminal record but had been abused as a child by his mentally ill parents; his father had been physically abusive and had severe mood swings, and his mother had neglected him. \textit{id}. The prosecution in the case used Kunkle’s problems at school, which occurred at the same time his father was abusing him, to convince the jury to impose the death penalty. \textit{id} at 187. A psychologist determined post-conviction that Kunkle suffered from schizophrenia and that much of his childhood behavioral problems were related to his mother’s neglect and his father’s psychotic and aggressive conduct toward him. \textit{id} at 187–88. Alarming, the psychologist also stated that an expert evaluation at the trial would have likely revealed Kunkle’s mental disorder, but the jury never heard any expert testimony. \textit{id} at 188.

These stories illustrate the need for lawmakers and courts to seriously consider the effects of mental illnesses on criminal defendants facing the death penalty.

\(^6\) \textit{Penry}, 492 U.S. 302.


\(^6\) \textit{See infra} Part I.B.
1. Atkins Bans Execution of Mentally Retarded Offenders

   a. Facts and Background

   In Atkins, the Supreme Court reviewed the case of Daryl Renard Atkins, who had been sentenced to death for abduction, armed robbery, and capital murder. Along with an accomplice, he kidnapped and robbed a man while armed with a semiautomatic handgun. Atkins and his accomplice drove the victim to an ATM, where cameras recorded them withdrawing cash, before taking him to an isolated location where they shot and killed him.

   In the penalty phase of Atkins's trial, a forensic psychologist testified that Atkins was mildly mentally retarded, basing that conclusion on interviews with people who knew Atkins, school and court records, and a standard intelligence test, which indicated that Atkins had an IQ score of fifty-nine. The psychologist also stated that mental retardation occurs in only about one percent of the population. Nevertheless, the jury sentenced Atkins to death in two separate sentencing hearings, and the Supreme Court of Virginia affirmed the decision. However, the U.S. Supreme Court granted certiorari to reexamine the propriety of executing mentally retarded defendants in light of dramatic changes in state legislation since Penry and the concerns of the dissenting judges in the lower court.

   b. The Supreme Court’s Analysis

   The Court began by setting forth the Eighth Amendment principle that punishment for a crime should be """"graduated and proportioned to [the]
The Court further explained that this concept of proportionality has been repeatedly applied in Eighth Amendment cases and that the determination of whether a punishment is excessive is judged by currently prevailing standards rather than those that existed at the time the Bill of Rights was adopted. The Supreme Court asserted that proportionality analysis under evolving standards should be based mainly on objective factors. The Court explained that "the clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." However, the Court clarified that, while objective evidence is of great importance in the analysis, it does not wholly determine the issue because "the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment." In other words, even if a consensus exists, the Court can still rely on its own judgment and question whether there are reasons to disagree with the prevailing opinion.

Using the analysis discussed above, the Court first reviewed the legislative landscape to determine whether a national consensus existed with respect to executions of mentally retarded offenders, and noted the vast changes that had occurred since its decision in Penry. Significantly, at the time Penry was decided, only two states that sanctioned the death penalty had banned the execution of mentally retarded criminals, but since then sixteen more states had also made the practice illegal. Moreover, rather than simply the number of states that had made the change, the Court found it significant that there was a "consistency of the direction of change." The Court also relied on the fact that legislatures that had addressed the issue had voted overwhelmingly in favor of prohibiting such

74. Id. at 311 (alteration in original) (quoting Weems v. United States, 217 U.S. 349, 367 (1910), in which the Supreme Court held that a twelve-year jail sentence with hard and painful labor was excessive for the crime of falsifying records).
75. Id.
77. Id. (quoting Penry, 492 U.S. at 331).
78. Id. (quoting Coker v. Georgia, 433 U.S. 584, 597 (1977)).
79. See id. at 313. In Justice Antonin Scalia's dissent, he sharply criticizes the majority for assuming that the Justices have the power of independent examination in Eighth Amendment issues. Id. at 348–49. In addition, he states his belief that the majority based its decision more on the Justices' own "feelings and intuition" rather than an actual consensus. Id. Scholars have criticized this aspect of the majority's opinion as well. See generally J. Richard Broughton, Essay, The Second Death of Capital Punishment, 58 Fla. L. Rev. 639 (2006).
80. See generally Atkins, 536 U.S. at 313–17.
81. Id. at 314–15. A total of thirty states prohibited executing mentally retarded criminals; twelve of those states had banned the death penalty altogether and eighteen maintained it but exempted the mentally retarded. Id. at 313–15. Furthermore, no states had passed laws reinstating the power to execute mentally retarded defendants. Id. at 315–16.
82. Id. at 315.
sentences, and even in states that still allowed them, the practice was rare.\(^8\)
The Court thus stated that current legislation and practices provided "powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal."\(^8^1\)

Justice John Paul Stevens, delivering the majority opinion, stated that the practice of executing mentally retarded offenders had "become truly unusual," and that it was "fair to say that a national consensus has developed against it."\(^8^2\) Significantly, in addition to a legislative consensus, there was also a social, professional, and international consensus against imposing the death penalty on mentally retarded offenders that provided further support for the Court’s conclusion.\(^8^3\) Justice Stevens addressed the relevance of the opinions of "organizations with germane expertise,"\(^8^4\) "widely diverse religious communities,"\(^8^5\) "world community" practices,\(^8^6\) and "polling data."\(^8^7\) He concluded that, while such "factors are by no means dispositive, their consistency with the legislative evidence lends further support to [the] conclusion that there is a consensus among those who have addressed the issue."\(^8^8\)

The majority pointed out that the only issue about which there was some disagreement was how to determine which offenders are actually mentally retarded.\(^8^9\) Because not all people who claim to be mentally retarded will be "so impaired as to fall within the range of mentally retarded offenders

\(^8^3\) Id. at 315–16. For example, executions had not been carried out for decades in New Jersey and New Hampshire although the law still sanctioned them. Id. at 316. Furthermore, even among states that continued executions with no prohibition regarding the mentally retarded, only five states had executed criminals with IQs under seventy since the Penry decision. Id. at 316 & n.20.

\(^8^4\) Id. at 315–16.

\(^8^5\) Id. at 316.

\(^8^6\) Id. at 316 n.21. Justice John Paul Stevens stated that the "legislative judgment" upon which the Court relies to determine the existence of a national consensus "reflects a much broader social and professional consensus." Id.

\(^8^7\) Id. The relevant professional and social organizations the Supreme Court cited as having "adopted official positions opposing the imposition of the death penalty upon a mentally retarded offender" include such groups as the American Psychological Association and the AAMR, which filed amici curiae briefs. Id.

\(^8^8\) Id. Religious communities "reflecting Christian, Jewish, Muslim, and Buddhist traditions" also filed an amicus curiae brief "explaining that even though their views about the death penalty differ, they all 'share a conviction that the execution of persons with mental retardation cannot be morally justified.'" Id. (quoting Brief for United States Catholic Conference et al. as Amici Curiae Supporting Petitioner, McCarver v. North Carolina, 533 U.S. 975 (2001) (No. 00-8727)).

\(^8^9\) Id. Justice Stevens observed that there was widespread disapproval within the world community of imposing the death penalty on criminals with mental retardation. Id. (citing Brief for European Union as Amicus Curiae Supporting Petitioner, McCarver, 533 U.S. 975 (No. 00-8727)).

\(^9^0\) Id. Polling data revealed a widespread consensus among Americans, even among supporters of the death penalty, that imposing the death penalty on mentally retarded offenders was wrong. Id.

\(^9^1\) Id.

\(^9^2\) Id. at 317 (noting that Virginia disputes the claim that Daryl Renard Atkins is mentally retarded).
about whom there is a national consensus, the Court gave individual states the responsibility to develop proper means to enforce the ban on executing mentally retarded criminals.

The Court then examined the merits of the consensus against executing the mentally retarded, observing that it "reflects widespread judgment about the relative culpability of mentally retarded offenders, and the relationship between mental retardation and the penological purposes served by the death penalty." The Court reasoned that mentally retarded defendants should not be given the death penalty because they have diminished capacity to conform their behavior to the requirements of the law. The Court stated that "by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others." As such, the Court held that the personal culpability of such defendants was also diminished and warranted a categorical exclusion from the death penalty.

Additionally, the Court provided two more reasons for its holding. First, it was doubtful that deterrence and retribution (justifications supporting the death penalty) were applicable to mentally retarded offenders. The goal of retribution is to punish an offender appropriately depending on his or her culpability, and the death penalty must therefore be imposed narrowly for only the "most serious crimes." Because of the decreased culpability of mentally retarded offenders, the Court reasoned that they did not merit the most severe of punishments as retribution. With regard to deterrence, which seeks to prevent prospective offenders from committing capital crimes, the theory is that the severity of the death penalty will inhibit potential criminals from engaging in capital crimes. However, the Court reasoned that the cognitive and behavioral difficulties of the mentally retarded make it less likely that they will understand the possibility of execution and control their behavior accordingly.

93. Id.
94. Id.
95. Id.
96. Id. at 318–21.
97. Id. at 318.
98. Id. at 318–19 (noting, however, that the impairments of mentally retarded criminals did not warrant an exemption from criminal sanctions entirely).
99. Id. at 318–21. If permitting executions of mentally retarded criminals would not "measurably contribute[] to one or both of these goals, it "is nothing more than the purposeless and needless imposition of pain and suffering," and hence an unconstitutional punishment." Id. at 319 (quoting Enmund v. Florida, 458 U.S. 782, 798 (1982) (citation omitted)).
100. Id.
101. Id. This has been part of the Court's jurisprudence since Gregg v. Georgia, 428 U.S. 153 (1976).
102. See supra notes 96–98 and accompanying text.
103. Atkins, 536 U.S. at 319.
104. Id. at 319–20.
105. Id. at 320. Moreover, the Court believed that the exemption would not lessen the deterrent effect the death penalty would have on criminals who are not mentally retarded. Id.
Therefore, the Court stated that the goals of retribution and deterrence were not achieved by allowing the death penalty for mentally retarded offenders.\textsuperscript{106} 

Second, the Court believed that "[m]entally retarded defendants in the aggregate face a special risk of wrongful execution."\textsuperscript{107} It stated that there is a high and grave risk of imposing the death penalty "in spite of factors which may call for a less severe penalty" on mentally retarded defendants because of the possibilities of false confessions, inability to provide meaningful assistance to their attorneys, and difficulty testifying on their own behalf.\textsuperscript{108} Furthermore, it reasoned that there is a risk that juries may interpret the demeanor of mentally retarded defendants as lacking remorse for their offenses.\textsuperscript{109} 

Therefore, the Supreme Court ruled that executions of mentally retarded defendants violated the Eighth Amendment’s ban on "cruel and unusual punishment."\textsuperscript{110} The majority deemed such a punishment excessive for mentally retarded offenders according to prevailing standards of decency and believed neither the deterrent or retributive purpose was applicable to the mentally retarded.\textsuperscript{111} \textit{Atkins} effectively overruled \textit{Penry}, which had first examined the issue of whether mentally retarded criminals should be exempt from the death penalty and denied such an exception.\textsuperscript{112} 

\section*{2. \textit{Roper} Bans Execution of Juveniles}

a. \textit{Facts and Background}

Just three years after the Supreme Court decided \textit{Atkins}, and sixteen years after \textit{Stanford},\textsuperscript{113} it undertook to answer whether juveniles under eighteen years of age at the time of their capital offense should also be categorically excluded from being sentenced to death based on the Eighth

\begin{itemize}
\item\textsuperscript{106} Id. at 319–20.
\item\textsuperscript{107} Id. at 321.
\item\textsuperscript{108} Id. at 320–21. The Court also noted that relying on mental retardation as a mitigating factor can be like a "two-edged sword" because a jury can see it instead as an aggravating factor. Id. at 321.
\item\textsuperscript{109} Id. at 321.
\item\textsuperscript{110} U.S. Const. amend. VIII; see generally \textit{Atkins}, 536 U.S. at 311–21.
\item\textsuperscript{111} \textit{Atkins}, 536 U.S. at 311–21. Importantly, the Court did not decide that capital punishment was disproportionate to the crime of murder, of which the defendant had been convicted; rather, it determined that the punishment was excessive for this kind of defendant. Id. at 320–21; see also Dieter, supra note 21, at 1120 (recognizing the distinction made in \textit{Atkins} between punishment that is disproportionate to the crime and punishment that is excessive for a particular defendant); Timothy S. Hall, \textit{Mental Status and Criminal Culpability After Atkins v. Virginia}, 29 U. Dayton L. Rev. 355, 361 (2004) (noting that in contrast to the analysis in \textit{Ford}, Atkins was exempted from the death penalty because he belonged to a class of people diagnosed with mental retardation rather than because of his particular mental handicap).
\item\textsuperscript{112} \textit{Atkins}, 536 U.S. at 335.
\item\textsuperscript{113} See supra notes 55, 57–58 and accompanying text.
\end{itemize}
Amendment prohibition in Roper. The Roper ruling abrogated the Court's earlier holding in Stanford. The Court determined in this most recent case that the Eighth and Fourteenth Amendments prohibited the execution of juveniles, specifically those under the age of eighteen at the time they committed their capital crimes.

In Roper, the defendant, Christopher Simmons, was seventeen years old when he planned and committed capital murder. Prior to committing the crime, Simmons discussed his plan with two younger friends, fifteen-year-old Charles Benjamin and sixteen-year-old John Tessmer. Assuring his proposed accomplices that they could "get away with it" because they were juveniles, Simmons described his plan of breaking and entering into the victim's home, tying her up, committing burglary, and murdering her. Tessmer decided against participating in the crime on the night of the murder, but Simmons and Benjamin followed through with the plan and broke into Shirley Crook's home. After binding her hands and covering her eyes and mouth, they drove her to a railroad trestle along a river. There, they bound her hands and feet together, covered her face with duct tape, and threw her off a bridge to her death. Simmons then bragged to friends that he had killed a woman "because the bitch seen my face."

Fishermen found Crook's body in the river, and police arrested Simmons the next day. After being read his Miranda rights, he waived his right to an attorney, confessed to the murder, and agreed to reenact the crime. The prosecutor charged Simmons with burglary, kidnapping, stealing, and first-degree murder and tried him as an adult. The jury convicted him of murder, and the trial judge sentenced him to death upon the jury's recommendation. After several unsuccessful attempts for post-conviction relief, Simmons received a rehearing from the Missouri Supreme Court.

114. See supra notes 30–32 and accompanying text (explaining the Eighth Amendment and its applicability).
115. See Roper v. Simmons, 543 U.S. 551, 574 (2005) (declaring that "Stanford v. Kentucky should be deemed no longer controlling" and criticizing its earlier decision's failure to consider the number of states that had banned the death penalty as part of the consensus against the juvenile death penalty).
116. Id. at 578.
117. Id. at 555–57.
118. Id. at 556.
119. Id.
120. Id. Shirley Crook was not the originally intended victim, but Christopher Simmons later confessed that when he recognized her from a previous car accident in which they had both been involved, he became more determined to murder her. Id.
121. Id. at 556–57.
122. Id. at 557.
123. Id. (quoting Simmons).
124. Id.
125. Id.
126. Id. Simmons was seventeen at the time of his crime, and Missouri's laws permitted seventeen year olds to be tried as adults. Id. (citing Mo. Rev. Stat. §§ 211.021 (2000), 211.031 (Supp. 2003)).
127. Id. at 557–58.
The Missouri Supreme Court agreed with Simmons's argument that the Court's reasoning in *Atkins* established a constitutional ban on imposing the death penalty on juveniles who were under eighteen at the time of their crimes. In so deciding, the Missouri Supreme Court abandoned the U.S. Supreme Court's holding in *Stanford*. The U.S. Supreme Court granted certiorari and affirmed.

**b. The Supreme Court's Analysis**

The standard that the Supreme Court used to determine the constitutionality of applying the death penalty to juveniles under eighteen years of age at the time of their offense was """"evolving standards of decency that mark the progress of a maturing society."""" As in *Atkins*, the Court also briefly discussed its historical jurisprudence concerning the Eighth Amendment, stressing the individual's right to be free from excessive sanctions, the government's duty to respect the """"dignity of all persons,"" and the notion that punishments should be commensurate with the offense. The Court relied on the plurality opinion in *Thompson* to provide the relevant factors that must be considered in an examination of current standards of decency.

The Court reviewed its decisions in *Stanford* and *Penry*, in which it had ruled, respectively, that the Constitution did not prohibit executing juveniles under the age of eighteen at the time of their crime, and that it also did not require a categorical exemption from the death penalty for

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128. *Id.* at 558–60.
129. *Id.* at 559–60. Setting aside the death penalty, the Missouri Supreme Court resented Simmons to """"life imprisonment without eligibility for probation, parole, or release except by act of the Governor."""" *Id.* at 560 (quoting State ex rel. Simmons v. Roper, 112 S.W.3d 397, 413 (Mo. 2003) (en banc)).
130. See *supra* notes 55, 57–58 and accompanying text. The Missouri Supreme Court relied on its observations that a national consensus had developed since *Stanford* against the execution of juveniles. *Roper*, 543 U.S. at 559–60 (citing *Simmons*, 112 S.W.3d at 399).
132. *Id.* at 560–61 (citing Trop v. Dulles, 356 U.S. 86, 100–01 (1958) (plurality opinion)).
134. *Roper*, 543 U.S. at 560 (discussing the Court's explanation of the Eighth Amendment in *Atkins*).
135. *Id.*
136. *Id.* (citing Weems v. United States, 217 U.S. 349, 367 (1910)).
137. See *supra* notes 53–54 and accompanying text (discussing *Thompson*).
138. See generally *Roper*, 543 U.S. at 561–62. Some of the relevant factors in *Thompson* included state legislation, jury verdicts, the number of executions, views of professional organizations, international and foreign views and practices, moral reprehensibility, the relative culpability of particular offenders, and retribution and deterrence. 487 U.S. at 818–38.
139. The Court in *Stanford* relied on contemporary standards of decency in the United States at the time of its decision to hold that the Eighth and Fourteenth Amendments did not forbid executing sixteen- and seventeen-year-old offenders. *Roper*, 543 U.S. at 562 (citing *Stanford* v. Kentucky, 492 U.S. 361, 370–71 (1989)).
140. See *Roper*, 543 U.S. at 562 (discussing *Stanford*); see also *supra* notes 57–58 and accompanying text (discussing *Stanford*).
mentally retarded offenders. The Court noted that standards of decency had evolved so significantly since Penry that it had found it necessary in Atkins to reverse its earlier decision. Just as the Atkins Court reconsidered the issue decided in Penry," the Roper Court would "now reconsider the issue decided in Stanford."

The Court in Roper followed the analysis used in Atkins and first looked at legislative statistics, state practices, and trends, noting that the "evidence of national consensus against the death penalty for juveniles is similar, and in some respects parallel, to the evidence Atkins held sufficient to demonstrate a national consensus against the death penalty for the mentally retarded." Noting similarities in Atkins, the Court pointed out that thirty states prohibited the juvenile death penalty, and that the practice is infrequent even in the twenty states where it is not formally prohibited. Furthermore, in 2003 the governor of Kentucky decided to grant clemency to Kevin Stanford, "the very defendant whose death sentence the Court had upheld in Stanford v. Kentucky," modifying his sentence to life imprisonment without parole and declaring that the state ought not execute legal minors.

The Court also considered how specific standards had evolved since its ruling in Stanford as well as the more general direction of change. In the fifteen years since Stanford, five states had prohibited the juvenile death penalty through legislative enactments and judicial decisions. Although the change from Penry to Atkins was more dramatic in terms of the number of states that had altered their legislation to ban executions of the mentally retarded during the period between the two decisions, the Court "still consider[ed] the change from Stanford to this case to be significant." The Court believed that the changes that had occurred since Stanford reflected a "consistency of the direction of change" as in Atkins, and that any differences in the abolition rates between Atkins and

141. See Roper, 543 U.S. at 562–63 (discussing Penry); see also supra notes 59–60 and accompanying text (discussing Penry).
142. Roper, 543 U.S. at 563–64 (reviewing the Court’s reasoning in Atkins).
143. Id. at 564.
144. Id.; see also id. at 564–67 (analyzing whether there is a national consensus regarding the acceptability of imposing the death penalty on juveniles).
145. Id. at 564. The thirty states are comprised of eighteen death penalty states that “exclude juveniles from its reach” by “express provision or judicial interpretation,” and twelve states that have abandoned the death penalty entirely. Id.; see also supra note 81 and accompanying text (discussing Atkins v. Virginia, 536 U.S. 304, 313–16 (2002)).
146. Roper, 543 U.S. at 564–65. Only three states had executed juveniles in the ten years before Roper, and only six states had done so since Stanford. Id.; see also supra note 83 and accompanying text (discussing the Court’s reliance in Atkins, 536 U.S. at 315–16, on factors such as the rarity of executions in death penalty states to confirm that a national consensus had developed).
147. Roper, 543 U.S. at 565.
148. Id. at 565–66.
149. Id. at 565.
150. Id.
151. Id. at 565–66 (quoting Atkins, 536 U.S. at 315). Moreover, the Court found it significant that in light of recent crackdowns on juvenile crime and the popularity of
Roper were “counterbalanced by the consistent direction of the change.”\textsuperscript{152} It concluded that the criteria discussed above “provide[d] sufficient evidence that today our society views juveniles . . . as ‘categorically less culpable than the average criminal.’”\textsuperscript{153}

The Court then provided several reasons for why the diminished culpability of juveniles required that they be categorically exempt from the death penalty under the Eighth Amendment.\textsuperscript{154} It stated that the Eighth Amendment applied to the death penalty with “special force” because it was the most severe of punishments.\textsuperscript{155} Therefore, the Court reasoned that its imposition must be limited to the narrow category of those offenders who commit the most serious crimes and whose “extreme culpability” render them “‘the most deserving of execution.’”\textsuperscript{156} Due to the severity of the punishment, a capital defendant may raise virtually any mitigating factors about his character or the circumstances of the crime to lessen the sentence.\textsuperscript{157} The Court reasoned that juveniles under eighteen could not reliably be considered among the “worst offenders” despite the seriousness of their crimes because, as compared to adults (a) juveniles are generally less mature, less responsible, and often make poor or reckless decisions;\textsuperscript{158} (b) juveniles are “more vulnerable or susceptible to negative influences and outside pressures, including peer pressure”;\textsuperscript{159} and (c) juveniles’ characters are not as developed, with more transient personality traits.\textsuperscript{160} Based on these factors, the Court determined that the irresponsible behavior of juveniles could not be considered as “‘morally reprehensible as that of an adult.’”\textsuperscript{161}

anticrime legislation, no states had acted to reinstate the juvenile death penalty since Stanford. Id. at 566.
\textsuperscript{152}  Id. at 566; see id. at 566–67 (explaining that the slower rate of change in juvenile death penalty legislation may be because at the time of Stanford, twelve death penalty states had already banned the execution of offenders under age eighteen, and fifteen states had banned the practice for those under seventeen, in contrast to just two states that had forbidden executing the mentally retarded when the Court decided Penry). “If anything,” the Court stated, “this shows that the impropriety of executing juveniles between 16 and 18 years of age gained wide recognition earlier than the impropriety of executing the mentally retarded.” Id. at 566–67.
\textsuperscript{153}  Id. at 567 (quoting the language of Atkins, 536 U.S. at 316, regarding the mentally retarded).
\textsuperscript{154}  Id. at 568–71.
\textsuperscript{155}  Id. at 568 (citing Thompson v. Oklahoma, 487 U.S. 815, 856 (1988) (O’Connor, J., concurring)).
\textsuperscript{156}  Id. (quoting Atkins, 536 U.S. at 319).
\textsuperscript{157}  Id. (citing Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality opinion)).
\textsuperscript{158}  Id. at 569 (citing Johnson v. Texas, 509 U.S. 350, 367 (1993) (stating that most states recognize the immaturity and irresponsible nature of juveniles, and do not allow them to vote, serve on juries, or marry without parental consent)).
\textsuperscript{159}  Id. (citing Eddings v. Oklahoma, 455 U.S. 104, 115 (1982)).
\textsuperscript{160}  Id. at 570 (citing Erik H. Erikson, Identity: Youth and Crisis (1968)).
\textsuperscript{161}  Id. (quoting Thompson v. Oklahoma, 487 U.S. 815, 835 (1988) (plurality opinion)). In addition, it is more understandable that a minor might be unable to flee from negative influences, and there is also a greater possibility for a minor to be reformed. Id. Thus, from a moral standpoint, the Court thought it was unfair to treat and punish juveniles and adults equally. Id. at 570–71.
With regard to penological justifications, the Court felt that "neither retribution nor deterrence provides adequate justification for imposing the death penalty on juvenile offenders." The Court thought imposing the most severe penalty on them would make retribution substantially disproportionate. Moreover, it was questionable whether the possibility of execution would have a significant deterrent effect on minors because "the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence." The Court believed that the punishment of life imprisonment with no possibility of parole for minors was severe enough.

The Court acknowledged, without conceding its argument, that there may be rare cases in which psychologically mature juvenile offenders commit heinous and depraved crimes meriting death. However, the Court found it more convincing that the "differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability." Furthermore, the Court recognized that some would object to the creation of a categorical rule because people do not suddenly undergo a significant change upon turning eighteen. The Court explained, however, that a line had to be drawn, and it relied on "where society draws the line for many purposes between childhood and adulthood" to determine that eighteen was a proper age for death penalty eligibility.

Finally, the Court devoted the last portion of its majority opinion to the views of the international community, foreign countries, and groups such as the Human Rights Committee of the Bar of England and Wales, declaring that "[t]he opinion of the world community, while not controlling [the] outcome, does provide respected and significant confirmation" for the Court’s conclusion to disallow the juvenile death penalty. While stating

162. *Id.* at 572.
163. *See supra* notes 154–61 and accompanying text.
165. *Id.* The Court also quoted *Thompson*, stating that it is highly unlikely that teenage offenders will have made "the kind of cost-benefit analysis that attaches any weight to the possibility of execution." *Id.* at 572 (quoting *Thompson*, 487 U.S. at 837).
166. *Id.* at 572; see also *id.* at 573–74 (stating that the state can take away some of a juvenile offender’s basic liberties but that it “cannot extinguish his life and his potential to attain a mature understanding of his own humanity”).
167. *Id.* at 572–73.
168. *Id.* The Court noted that in some cases, including this one when it was before the lower court, it is possible for a juvenile offender’s age to be counted as an aggravating rather than mitigating factor. *Id.* at 573. The Court found this unacceptable. *Id.*
169. *Id.* at 574.
170. *Id.*
171. *Id.* at 575–79. Notably, the Court in *Roper* discussed the views of the world community at length in the actual text of the opinion, whereas in *Atkins* the Court included its discussion about international and foreign opinions and practices, views of professional and religious organizations, and polling data in a mere footnote. 536 U.S. 304, 316 n.21 (2002).
that the ultimate responsibility of interpreting the Eighth Amendment lies with the Court and that world reality is not controlling, the Court nevertheless launched into a lengthy discourse about international opinions and practices.\textsuperscript{173} In addition to the United States' position as the only country to officially sanction the juvenile death penalty,\textsuperscript{174} it had also not signed the United Nations Convention on the Rights of the Child, which expressly prohibits the practice.\textsuperscript{175} Other multinational agreements contain a prohibition against imposing the death penalty on juveniles under the age of eighteen, including the International Covenant on Civil and Political Rights,\textsuperscript{176} the American Convention on Human Rights,\textsuperscript{177} and the African Charter on the Rights and Welfare of the Child.\textsuperscript{178} Additionally, in 1990, the United States was only one of eight countries that executed juvenile criminals, and since then all seven other countries have abolished the practice or publicly renounced it.\textsuperscript{179} The Court concluded its discussion by stating, "It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom."\textsuperscript{180}

As a result of all of the considerations discussed above, the Supreme Court held that the Eighth and Fourteenth Amendments prohibited imposing the death penalty on juvenile offenders who were under eighteen at the time of their crimes.\textsuperscript{181}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{173} \textit{Id.} at 575–79. The Court justified its examination of international and foreign views by citing previous decisions in which the Court found international authorities and laws of other nations to be instructive for interpreting the Eighth Amendment, including, among others, \textit{Trop v. Dulles}, 356 U.S. 86, 102–03 (1958) (plurality opinion); \textit{Atkins}, 536 U.S. at 317 n.21; and \textit{Thompson v. Oklahoma}, 487 U.S. 815, 830–31 & n.31 (1988) (plurality opinion).
\item \textsuperscript{174} \textit{Roper}, 543 U.S. at 575.
\item \textsuperscript{175} \textit{Id.} at 576 (citing the Convention on the Rights of the Child, art. 37, \textit{opened for signature} Nov. 20, 1989, 1577 U.N.T.S. 3). Every country in the world has ratified the convention without reservations about this particular provision, except for the United States and Somalia, which are not parties to the agreement. \textit{Id.} at 576.
\item \textsuperscript{176} \textit{Id.} (citing the International Covenant on Civil and Political Rights, art. 6(5), \textit{opened for signature} Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368). The United States has signed and ratified the convention subject to a reservation about this provision. \textit{Id.} at 567.
\item \textsuperscript{177} \textit{Id.} (citing the Organization of American States, American Convention on Human Rights, art. 4(5), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (entered into force on July 8, 1978)).
\item \textsuperscript{178} \textit{Id.} (citing the African Charter on the Rights and Welfare of the Child, art. 5(3), \textit{adopted} July 11, 1990, OAU Doc. CAB/LEG/24.9/49 (entered into force on Nov. 29, 1999)).
\item \textsuperscript{179} \textit{See id.} at 577. The other seven countries are China, Yemen, Iran, Pakistan, Nigeria, the Democratic Republic of Congo, and Saudi Arabia. \textit{Id.} Furthermore, the Court considered it instructive that the United Kingdom, where the principles behind the Eighth Amendment originated, had abolished the juvenile death penalty long before the covenants discussed above were created. \textit{Roper}, 543 U.S. at 577–78; \textit{see also supra} notes 175–78.
\item \textsuperscript{180} \textit{Roper}, 543 U.S. at 578 (addressing possible concerns about Constitutional fidelity and interpretation).
\item \textsuperscript{181} \textit{Id.}
\end{itemize}
\end{footnotesize}
C. Defining Mental Illness in Relation to the Death Penalty

1. Definition of Mental Illness

Mental illness is defined as “[a]ny of various conditions characterized by impairment of an individual’s normal cognitive, emotional, or behavioral functioning, and caused by social, psychological, biochemical, genetic, or other factors, such as infection or head trauma.” Common mental illnesses experienced by death row inmates range from depression and recurrent thoughts of death or suicide to bipolar disorder, post-traumatic stress disorder, schizophrenia, and borderline personality disorder. People suffering from mental illnesses cannot overcome them through willpower, and their mental illnesses are unrelated to their intelligence or character. However, current treatments for serious mental illnesses are very effective, with between seventy and ninety percent of people having significantly reduced symptoms and better quality of life when treated with a combination of pharmacological medicine and psychosocial support.

For the purposes of this Note, and with respect to the death penalty specifically, only severe mental illness will be discussed. Mental illnesses fall along a “continuum of severity,” with the most serious conditions affecting five to ten million adults (roughly 2.6–5.4%) in the United States. The term “severe mental illness” does not encompass all mental illnesses, but is narrowly defined by the American Psychiatric Association as disorders with psychotic features that are accompanied by some functional impairment and for which medication or hospitalization is often required. For example, schizophrenia and bipolar illness fall under the umbrella of “severe mental illness,” while mental illnesses such as depression or anxiety do not.

182. Am. Civil Liberties Union, supra note 18.
183. Id.
184. See Amnesty Int’l, supra note 18, at 17 (citing National Alliance on Mental Illness, About Mental Illness, www.nami.org/Content/NavigationMenu/Inform_Yourself/About_Mental_Illness/About_Mental_Illness.htm (last visited Sept. 9, 2007)).
185. See id. (citing National Alliance on Mental Illness, supra note 184). Although effective treatments exist, because many mentally ill individuals remain untreated, the repercussions for both the individuals and society are alarming. The economic cost to the United States of untreated mental illness exceeds $100 billion annually and results in “unnecessary disability, unemployment, substance abuse, homelessness, inappropriate incarceration, suicide and wasted lives.” Id.
186. National Alliance on Mental Illness, supra note 184; see also Amnesty Int’l, supra note 18, at 17–18 (stating that the term mental illness can incorporate numerous conditions, some of which are more serious than others).
188. See id.; see also Amnesty Int’l, supra note 18, at 18–20 (listing several mental illnesses that are frequently mentioned when questioning whether the United States ought to allow executions of mentally ill offenders).
Borrowing from the American Bar Association’s (ABA) Recommendation 122A, a person is considered to have a severe mental disorder or disability when he or she has an illness that is roughly equivalent to disorders that mental health experts would deem the most serious “Axis I diagnoses.”\textsuperscript{190} Conditions such as schizophrenia and other psychotic illnesses, major depressive disorders, mania, and dissociative disorders fall under the “Axis I diagnoses” umbrella.\textsuperscript{191} These mental illnesses are all generally associated in their acute state with hallucinations, delusions, disorganized thoughts, or significant disturbances in consciousness, perception of the environment, and memory.\textsuperscript{192}

2. Distinguishing Mental Illness from Mental Retardation and Insanity

The Eighth Amendment protection extended categorically to mentally retarded criminals in \textit{Atkins} or insane offenders does not provide severely mentally ill defendants, who are not also mentally retarded, with similar safeguards against the death penalty. As such, it is necessary for those also seeking a categorical exemption for the mentally ill to understand how mental retardation and insanity differ from mental illness.

Mental retardation is defined as “‘[s]ubnormal intellectual development as a result of congenital causes, brain injury, or disease’” and is “‘characterized by any of various cognitive deficiencies, including impaired learning, social, and vocational ability.’”\textsuperscript{193} Mental illnesses and mental retardation share certain similarities. For example, with regard to etiology, mental retardation has biological components, as do mental illnesses.\textsuperscript{194} However, one way in which the two differ is in the time of initial onset. Specifically, mental retardation can arise at birth, infancy, or in early childhood, and must be present by the time one turns eighteen years old.\textsuperscript{195} On the other hand, with mental illnesses such as schizophrenia, one may first experience a psychotic episode at some point in his or her twenties.\textsuperscript{196} Stated more generally, mental retardation is a permanent developmental disability, while mental illness is not necessarily present consistently or all the time, whether because of remission or treatment.\textsuperscript{197}

\textsuperscript{190} ABA Recommendation 122A, \textit{supra} note 15, at 6–7.
\textsuperscript{191} \textit{See id.} at 7.
\textsuperscript{192} \textit{See id.}
\textsuperscript{193} Death Penalty Info. Ctr., Mental Illness and the Death Penalty, http://www.deathpenaltyinfo.org/article.php?did=782&scid=66 (last visited Aug. 27, 2007) (quoting The American Heritage Dictionary of the English Language 1098 (4th ed. 2000)); \textit{see also} Am. Psychiatric Ass’n, \textit{supra} note 2, at 39–46 (stating that a person is diagnosed with mental retardation if he or she is of sub-average intelligence and is limited in adaptive functioning before the age of eighteen).
\textsuperscript{194} \textit{See supra} note 182 and accompanying text (stating that mental illness can be caused by biochemical factors).
\textsuperscript{195} Am. Psychiatric Ass’n, \textit{supra} note 2, at 44.
\textsuperscript{196} \textit{Id.} at 282.
\textsuperscript{197} \textit{See} Amnesty Int’l, \textit{supra} note 18, at 18.
Another difference is that mentally retarded people, by definition, must be of subaverage intelligence, but there is no intelligence calculation that factors into determining whether someone suffers from mental illnesses. Therefore, while there are some overlapping characteristics between mental illness and mental retardation, they are still considered two distinct and separate classifications by the law and the mental health and medical professions.

In Ford v. Wainwright, the Supreme Court formally constitutionalized the ban on executing death row prisoners who were found to be insane or, in broader terms, not competent for execution. Justice Lewis F. Powell offered his definition of insanity in his concurring opinion, stating that Eighth Amendment protection against the death penalty should extend only to those offenders whose mental illness renders them unable to understand the nature of the death penalty and why they are subject to it. Notably, the Ford Court’s ruling was limited to capital defendants who had already been convicted and sentenced to death, after having been found competent at the time of the offense, at trial, and at sentencing. The Court essentially recognized that a capital offender’s mental condition could be dynamic over time. Simply stated, a prisoner could become insane when he had not been before. Insanity, as defined and understood in Ford, for purposes of determining competence for execution, deals specifically with a defendant’s mental state at the time of execution rather than at the time of the offense. This Note focuses on a person’s mental illness at the time of the offense and, as such, a lengthier discussion of the Court’s definition of

198. See supra note 193 and accompanying text.
199. See, e.g., Am. Psychiatric Ass’n, supra note 2, at 273–74. However, a person with a mental illness such as schizophrenia may experience cognitive disturbances, for example, difficulty focusing. Id. at 274–78.
200. See generally Izutsu, supra note 13, at 1015–20 (discussing the similarities and differences between mental illness and mental retardation).
201. See generally Ford v. Wainwright, 477 U.S. 399 (1986); see also Amnesty Int’l, supra note 18, at 120–24 (discussing the meaning of insanity as understood in Ford and explaining that the Court’s decision to leave the determination to the states of what procedures to use to evaluate a prisoner’s competence for execution has led to inconsistent approaches).
202. Ford, 477 U.S. at 422 (Powell, J., concurring); see also Amnesty Int’l, supra note 18, at 120–21 (discussing the standard set forth by the Ford Court, arguably as the minimal standard to determine whether a death row inmate is competent for execution).
203. See Ford, 477 U.S. at 401–04 (stating that the capital defendant challenging his competency for execution had not suggested that he had been incompetent at the time of his crime, at trial, or at sentencing in 1974, but that behavioral and mental changes that occurred after sentencing in 1982 rendered him incompetent for execution because he was unable to understand the nature of the death penalty and the reasons why it was imposed on him).
204. See Hall, supra note 111, at 358–59. Hall further states that a mental disorder that renders a person unable to understand the nature of the death penalty and why it is about to be imposed on him may be treatable, and thus Ford has generated a wealth of literature addressing the ethical and legal concerns of medicating prisoners on death row to restore their competence to be executed. Id. at 359.
205. See Ford, 477 U.S. at 401–04; Slobogin, supra note 13, at 298 n.41.
“insanity” in *Ford* is beyond its scope. The inquiries in *Roper* and *Atkins* reflect this narrower focus.

Insanity is also used as a defense to absolve defendants from criminal responsibility. For example, pointing to his mental state at the time of the crime, a defendant may enter a plea such as “not guilty by reason of insanity” at the beginning of a capital trial. The legal definition of insanity in modern times comes from the 1843 English *M’Naghten Case*. The M’Naghten Rule states that

‘[t]o establish a defense on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.’

The exact legal standard for insanity in the United States varies from state to state and has been frequently revised, but the insanity defense always focuses on the defendant's mental state at the time of the crime. The

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206. Determining “insanity” or competence to be executed according to the *Ford* standard has also been the subject of criticism and concern by death penalty opponents because the Court only provided the minimum components required to determine competency for execution and did not mandate procedures that courts should follow to determine a death row inmate’s sanity. See supra notes 52, 201 and accompanying text; see also Amnesty Int'l, supra note 18, at 120–32 (discussing *Ford* and arguing that it has been ineffective in bringing about adequate reform in the judicial system in the twenty years following it). However, because the analysis in this Note is based on *Roper* and *Atkins*, which examined circumstances at the time of the offense, this Note refrains from delving deeper into the issues surrounding a criminal’s mental state at the time of execution.

207. In *Roper v. Simmons*, the Court specifically ruled that the death penalty should not be imposed on offenders who were juveniles “when their crimes were committed.” 543 U.S. 551, 578 (2005). Furthermore, both *Roper*, 543 U.S. at 571–75, and *Atkins*, 536 U.S. 304, 317–21 (2002), discussed retribution and deterrence in the context of what the offender’s mental state would have been at the time of the crime and whether the diminished culpability of both mentally retarded and juvenile defendants merits a sanction as extreme as the death penalty. See also Slobogin, supra note 13, at 298 n.41 (stating that the relevant time frame for analyzing mental state under *Atkins* is the time of the offense, unlike *Ford*, which inquired about a defendant's mental state at the time of execution).


209. See Amnesty Int’l, supra note 18, at 15.

210. See id. at 15 & n.38. The case involved a man named Daniel M’Naghten who shot the secretary to the prime minister while suffering from paranoid schizophrenia. *Id.* The jury rendered a verdict of not guilty by reason of insanity and in response to public concern, the House of Lords crafted what are known as the M’Naghten Rules to establish a basis for when a person can be acquitted due to insanity. *Id.*

211. Hall, supra note 111, at 356 (quoting M’Naghten’s Case, (1843) 8 Eng. Rep. 718, 722 (H.L.)); see also Amnesty Int’l, supra note 18, at 15 n.38 (also citing the M’Naghten Rule).

212. See Hall, supra note 111, at 356–57; Amnesty Int’l, supra note 18, at 15 (noting further that in the United States, the insanity defense was broadened in some jurisdictions to absolve defendants from criminal responsibility if they were unable to control their actions to the requirement of the law).
insanity defense "recognize[s] that in certain circumstances, it does not further the interests of justice to punish those who, although committing a wrongful act, did not do so with culpable intent." Therefore, if a defendant can successfully prove insanity at the time of the offense, an insanity plea results in acquittal of the criminal charges against him.

However, the existence of an insanity defense does not, as many people believe, provide a way for capital criminals to escape justice. First, several states have tightened their insanity laws or have abolished the insanity defense altogether. Furthermore, even a ruling of insanity by the trial court still has serious consequences. For example, if a defendant is found not guilty by reason of insanity, he is not released from detention but is committed involuntarily to a psychiatric facility. Moreover, the insanity defense is rarely successful, with less than half of one percent of trials actually resulting in exculpation due to insanity. Evidently, the insanity defense is often an inadequate safeguard for mentally ill defendants. Therefore proponents of the notion of excluding mentally ill offenders from the death penalty contend that a categorical exemption is both necessary to fill in the holes left by the insanity defense and plausible in light of the Roper and Atkins decisions.

214. See id. at 356 (pointing out that an insanity plea is by definition a plea of not guilty).
215. See Hooper, supra note 208, at 412. Many people object to the insanity defense because they think it allows violent criminals to go unpunished. Id. Additionally, graduate students polled by James Hooper often incorrectly estimated the number of criminal trials that result in successful showings of insanity. Id.
216. See Amnesty Int'l, supra note 18, at 15; Hooper, supra note 208, at 413; see also Blume & Johnson, supra note 13, at 138–39 (stating that four states—Kansas, Idaho, Montana, and Utah—have abolished the insanity defense entirely).
217. See Amnesty Int'l, supra note 18, at 15.
218. See Hooper, supra note 208, at 412 (providing the statistic); see also Amnesty Int'l, supra note 18, at 15 (noting that the defense is successful in only a small minority of cases).
219. See Amnesty Int'l, supra note 18, at 15–17. The report further notes that even evidence of a defendant's mental health that is introduced as mitigating evidence or as a relevant factor in determining the defendant's mental competence at various stages in the capital proceeding frequently fails to protect mentally ill defendants. Id. at 16–17. In addition, even states that alternatively allow verdicts of "guilty but mentally ill," have been widely criticized. Id. at 16. Defendants found guilty but mentally ill are supposed to receive mental health care during their prison sentences, but the reality is that prisoners are often not even receiving minimal psychiatric care, much less optimal treatment. Id. at 16; see Hooper, supra note 208, at 413–14. As such, the guilty but mentally ill verdict appears to be ineffective as a means of prevention and treatment for mentally ill criminals. See Amnesty Int'l, supra note 18, at 16; see also Blume & Johnson, supra note 13, at 138–39 (stating that the problem with the insanity defense is that it provides extremely narrow protection).
220. See, e.g., Amnesty Int'l, supra note 18, at 15–41 (discussing how the insanity defense and other supposed safeguards have been unsuccessful in protecting many mentally ill offenders and what a categorical exemption for the mentally ill from the death penalty can achieve); Blume & Johnson, supra note 13, at 121–22 (stating that professional mental-health organizations unanimously agree that the capital punishment system in its current state does not sufficiently address the complexity of cases concerning mentally ill offenders); Hooper, supra note 208, at 416 (stating that because of "the capricious manner in which the death penalty is meted out, the United States would do well to listen to the experts on human behavior and change our laws").
II. APPLICATION OF ROPER AND ATKINS TO SEVERELY MENTALLY ILL CAPITAL DEFENDANTS

In Roper and Atkins, the Supreme Court relied on several factors to conclude that juveniles and mentally retarded persons ought to be categorically exempt from the death penalty. The Court placed the most weight on evidence of a national consensus against executing juveniles and the mentally retarded, stating that standards of decency had evolved significantly since earlier cases when it had denied death penalty exclusion for such classes of offenders. In determining whether a consensus existed against allowing the death penalty for these categories of persons, the Court looked to such things as state legislation, sentencing practices by courts and juries, and popular polls. In addition, it also looked at international and foreign laws and practices, as well as the professional stances of organizations with germane expertise, though it noted that such evidence was merely instructive and supportive rather than determinative of the Court's ultimate decision. The Court also performed a proportionality analysis in each case to determine whether the deterrent and retributive goals of the death penalty were being met by allowing mentally retarded and juvenile defendants to be executed.

Part II of this Note applies the analysis the Supreme Court used in Roper and Atkins to severely mentally ill offenders and examines whether they should be categorically exempt from the death penalty.

221. See generally supra Part I.B.1.b (explaining the Court's reasoning in Atkins for holding that mentally retarded offenders cannot be executed), Part I.B.2.b (discussing the Supreme Court's reasoning for determining that juveniles deserved categorical exemption from the death penalty in Roper).


223. See Roper v. Simmons, 543 U.S. 551, 575–78 (2005) (discussing the current views held by the international community and foreign countries concerning the juvenile death penalty); Atkins v. Virginia, 536 U.S. 304, 316 n.21 (2002) (discussing the opinions of professional organizations, religious communities, and the world community, as well as polling data among Americans who overwhelmingly disapprove of executing the mentally retarded).

224. See Atkins, 536 U.S. at 316 n.21 (stating that the professional organizations with relevant expertise opposed capital punishment for mentally retarded offenders).

225. See Roper, 543 U.S. at 575 (stating that the views and practices of the international community do "not become controlling, for the task of interpreting the Eighth Amendment remains [the Supreme Court's] responsibility"); Atkins, 536 U.S. at 316 n.21 (stating that a consensus among relevant professional organizations, views of religious groups, and disapproval from the world community about executing mentally retarded persons were factors that were "by no means dispositive" although "their consistency with the legislative evidence lends further support to [the Court's] conclusion that there is a consensus").

226. Atkins, 536 U.S. at 318–20; see also supra notes 99–106 and accompanying text (discussing the proportionality analysis).

227. Roper, 543 U.S. at 571–73; see also supra notes 162–66 and accompanying text (describing the deterrence and retribution analyses).
A. Consensus

1. National Consensus

   a. State Legislation

   Connecticut is the only state that has legislatively proscribed imposing the death penalty on mentally ill defendants who, despite their mental illnesses, were competent to be executed. 228 Connecticut's law states that courts cannot impose a death sentence on a defendant if the jury or court concludes "that at the time of the offense . . . 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." 229 This single state statute shielding the mentally ill from the death penalty stands in stark contrast to the legislative landscape of the states when Roper and Atkins were decided. At the time of Roper and Atkins, there was much greater statutory opposition to the practice of executing juveniles and mentally retarded offenders than there currently is against executing the mentally ill. 230

   There is little evidence that other states are considering following Connecticut's lead in imposing such a categorical ban. 231 However, most states have capital statutes that implicate mental illness as a mitigating factor. 232 Furthermore, twenty-eight of the thirty-eight states that sanction the death penalty allow mental illness to have a mitigating impact by permitting the jury to consider the defendant's capacity "to appreciate the criminality [or wrongfulness] of his conduct or to conform his conduct to the requirements of the law." 233 Several statutes even stipulate that impairments in capacity may be due to mental illness, mental disease, or

228. Conn. Gen. Stat. § 53a-46a(h) (2006); see also Slobogin, supra note 13, at 297–98 (discussing the Supreme Court's reliance on legislation to help determine whether standards of decency are evolving, and pointing out that in contrast to the legislative sentiment regarding executing people with mental retardation, Connecticut is the only state that has banned the death penalty for mentally ill defendants).


230. See Roper, 543 U.S. at 564 (stating that thirty states, including the twelve states that rejected the death penalty entirely, also prohibit the juvenile death penalty); Atkins, 536 U.S. at 313–15. The Court in Atkins noted that a national consensus concerning the execution of mentally retarded offenders existed because, in addition to the states that no longer had the death penalty, close to twenty states had enacted legislation exempting the mentally retarded from the death penalty while maintaining it as a legitimate form of punishment. 536 U.S. at 313–15. Moreover, states had been moving consistently in the direction of such a prohibition. Id.

231. See, e.g., Slobogin, supra note 13, at 298 (noting the dearth of state legislation and proposals for legislation about exempting defendants with mental illness from receiving death sentences).

232. See Izutsu, supra note 13, at 1004–06 (discussing state death penalty statutes and severe mental illness as a mitigating factor).

233. Id. at 1005 & nn.68 & 69 (alteration in original) (quoting statutes of several states, including Arkansas, California, Florida, Kentucky, New Jersey, and Virginia).
mental defect. This pattern of inclusion of mental illness provisions in death penalty laws suggests that many states recognize that mental illness can affect a person’s culpability and that an offender’s mental illness, if present, ought to be considered during sentencing.

Since Atkins and Roper, the number of states that legislatively prohibit the death penalty has not changed—twelve states do not permit executions and thirty-eight states do. Of the thirty-eight death penalty states, however, four have not executed anyone since 1976. Moreover, New York’s death penalty statute was overturned in 2004, and although one man still remains on New York’s death row, capital punishment has not been reinstated.

In 2006, New Jersey became the first jurisdiction to enact a one-year moratorium on executions through a 55–21 vote by the legislative assembly. Acting Governor Richard Codey signed the bill into law on January 12, 2006, and the moratorium is effective in New Jersey until January 15, 2007. During the year, the state commissioned a task force to study the costs and fairness of imposing the death penalty. Prior to New Jersey’s moratorium and task force study, North Carolina and California also conducted legislative examinations of their respective capital punishment systems, but they did so without halting executions. Although the moratorium is not specifically a response to concerns about executing mentally ill defendants, presumably the task force’s inquiry into the fairness of imposing the death penalty will encompass an examination of the fairness of imposing capital punishment on mentally ill criminals.

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234. See id. at 1005 & n.70 (citing statutes from several different states that explicitly refer to mental illnesses, diseases, or defects).

235. See id. at 1006. The author notes, however, that the statutory provisions do not precisely explain what mental illness or impairment of capacity means. Id. Nevertheless, the author believes that such criteria would certainly include people suffering from severe mental illnesses. Id.


240. See Rubac, supra note 239.

241. See id.

242. See DPIC 2006 Year End Report, supra note 238, at 1; Death Penalty Info. Ctr., Costs of the Death Penalty, http://www.deathpenaltyinfo.org/article.php?did=108&scid=7 (last visited Aug. 31, 2007) (stating that North Carolina’s death penalty study was the most comprehensive in the country). The study revealed that North Carolina spends $2.16 million more per execution than on a non-death penalty, life imprisonment case. Id. California’s study results showed that it spends $90 million more per year on capital cases than on ordinary costs of the justice system. Id.
Thus, this legislative moratorium may be a sign of reform and change in death penalty laws concerning, among others, the mentally ill.

Professor J. Richard Broughton critiques the Supreme Court’s decisions in *Atkins* and *Roper*—which concluded that a national consensus had developed—as being not based on a “meaningful numeric majority of jurisdictions that imposed capital punishment but prohibited the practice of executing the mentally retarded” or juveniles. Rather, it was based on “the consistency of the direction of change” following *Penry* and *Stanford* respectively. Stating that evidence of a national consensus was too tenuous, Broughton criticizes the Court for formulating a new understanding of what signifies a national consensus concerning a certain death penalty practice, elaborating that “[n]ational consensus now may be understood simply as a significant trend. . . . But a trend does not a consensus make.”

Proponents of a categorical ban on executing mentally ill criminals or those that assert that a trend is developing against executing the mentally ill may also be subject to the same criticism: A mere trend toward restricting the scope of the death penalty for the mentally ill through statewide death penalty studies and legislative acts without a numeric majority of states adhering to the ban is insufficient to meet the national consensus criteria. The Court’s reliance on the state-counting model in *Penry* also supports the notion that a national consensus with respect to the propriety of imposing the death penalty on mentally ill criminals can only exist if there is cold, hard data confirming that many state statutes outlaw the practice. Furthermore, another legal expert in capital punishment writes that, although many similar assertions can be made about people with severe mental illness as were made in *Atkins* about mentally retarded persons, and although the Court is willing to look at more subjective factors, “a determination that evolving standards of decency have been abridged still requires some evidence of statutory evolution, and that evidence simply does not exist with respect to the execution of people with mental illness.”


244. Id. at 646–47 (quoting Roper v. Simmons, 543 U.S. 551, 566 (2005)); see also *Atkins*, 536 U.S. at 315 (setting forth the “consistency of the direction of change” analysis).


246. See *Penry* v. Lynaugh, 492 U.S. 302, 334 (1989) (stating that evidence of two states having prohibited capital punishment for mentally retarded offenders and fourteen states having eliminated the death penalty entirely was insufficient to indicate a national consensus).

b. Practice of the Courts in Sentencing, Clemencies, Judicial Opinions, and Moratoriums

i. Sentencing Practices of Courts

The number of death penalty sentences issued by American courts per year has dropped sharply since 1998, declining from 298 sentences in 1998 to 128 sentences in 2005. In 2006, the number of death sentences was expected to fall to a thirty-year low. Furthermore, the actual number of capital sentences carried out in the United States has also decreased from 98 in 1999 to just 53 in 2006. In addition, 2006 had the lowest number of executions nationwide since 1996 when only 45 death sentences were carried out. As of August 16, 2007, there have only been 33 executions. Admittedly, the low number may be partially attributable to recent lethal injection court cases, which impermanently froze some executions. If the controversy concerning lethal injection is resolved, the number of executions may rise again. The number of executions is nevertheless down about forty percent since its highest point in 1999.

The death row population has also decreased, with about 3366 awaiting execution in 2006 as opposed to the 3625 who were on death row in 1999. Specifically with regard to mentally ill offenders, there are other reasons to believe that standards are evolving in death penalty jurisprudence. The imposition of the death penalty by juries on mentally ill offenders who lack the ability to control their conduct or are volitionally impaired is so

248. See DPIC Facts, supra note 236, at 3.
249. See DPIC 2006 Year End Report, supra note 238, at 1–2 (estimating approximately 114 death sentences based on six-month projections).
250. Id. at 1.
251. Id. at 2.
252. See DPIC Facts, supra note 236, at 1.
253. According to the Death Penalty Information Center, controversies about lethal injection have resulted in stays of executions in several states, including Arkansas, California, Delaware, Maryland, Missouri, New Jersey, Ohio, and South Dakota. DPIC 2006 Year End Report, supra note 238, at 1–2. Specifically, sixteen death row inmates were granted stays in 2006 based partially or wholly on challenges to the lethal injection process. See Death Penalty Info. Ctr., Lethal Injections: Some Cases Stayed, Other Executions Proceed, http://www.deathpenaltyinfo.org/article.php?id=1686&scid=64 (last visited Sept. 1, 2007) [hereinafter DPIC Lethal Injections]. Anesthesiology studies have shown that lethal injections could be causing unnecessarily excruciating pain and that inmates who received the injections may have been conscious throughout the process. See DPIC 2006 Year End Report, supra note 238, at 1–2. Many argue that this is a violation of the Eighth Amendment’s ban on cruel and unusual punishment. See DPIC Lethal Injections, supra. Despite the existence of claims against lethal injection, many other states have continued executing death row inmates. See id.
255. See id.
256. See id. at 1–2 (stating that there has been a continuous annual decrease in the number of people on death row since 2000, after twenty-five years of steadily increasing numbers).
infrequent as to be practically unknown. Furthermore, upon review by governors and officials, some death row inmates are being granted clemencies because of their mental illnesses.

ii. Clemencies

Since 1976, more than 200 clemencies have been granted for people on death row for humanitarian reasons. Among them are several death row inmates who were granted clemency because of their mental illnesses.

For example, in 1993 Missouri’s then-Governor Mel Carnahan granted clemency to Bobbie Shaw because it was evident that in addition to being mentally retarded he also suffered from mental illness. In Georgia in 2002, the state parole board commuted Alexander Williams’s death sentence to life without parole because he suffered from mental illness and was a juvenile at the time of his offense. Governor Mitch Daniels of Indiana also commuted the death sentence of a severely mentally ill man, Arthur P. Baird II, to life without parole in 2005 after many jurors from his trial, upon learning post-sentencing about his mental illness, declared that Baird deserved life imprisonment rather than death due to his mental illness.

Even though courts continue to sentence mentally ill defendants to death, often without proper testimony during the trial to even inform the judge or jury about the defendant’s illness, these examples suggest that those who have the authority to sentence and grant clemencies to death row inmates frown upon executing the mentally ill.

iii. Opinions of State Judges

Non-majority opinions, namely concurrences and dissenting opinions, often carry great weight in shaping future decisions. In State v. Ketterer,
decided in October 2006, Justice Evelyn Lundberg Stratton’s concurrence called upon Ohio’s state legislature to review its death penalty laws to exempt defendants with serious mental illnesses from the death penalty.\(^{264}\)

The defendant, Donald Ketterer, was sentenced to death for the murder of his friend, and upon appeal, the Supreme Court of Ohio affirmed the decision.\(^{265}\) In her concurrence, Justice Lundberg Stratton conceded that Ketterer was guilty of committing a brutal murder, but took issue with the fact that the law had been inadequate in accounting for his serious mental illness.\(^{266}\) Ketterer had a lifelong history of mental illnesses, the most serious of which was bipolar disorder which made it difficult, if not impossible, for him to control his impulses.\(^{267}\) Moreover, his mental illness included manic and depressive symptoms, as well as psychotic features such as auditory hallucinations and paranoia.\(^{268}\) Nevertheless, Ketterer did not meet the criteria for being deemed not guilty by reason of insanity.\(^{269}\)

Justice Lundberg Stratton believed that the undisputed testimony about Ketterer’s serious mental illness placed him in a different classification of people from those without mental illnesses.\(^{270}\) She stated, however, that she had to “reluctantly concur in the affirmance of Ketterer’s sentence of death” because the current law of Ohio state so required.\(^{271}\) She did not contest Ketterer’s guilt and acknowledged that the current laws supported his death sentence.\(^{272}\) However, she criticized the current laws,\(^{273}\) declaring that “the time has come to reexamine whether we, as a society, should administer the death penalty to a person with a serious mental illness.”\(^{274}\) In assessing whether current laws permitting executions of the mentally ill are constitutional, one factor she considered was the ABA’s task force and its recommendations about mental illness and the death


\(^{265}\) Id. at 56, 58 (majority opinion).

\(^{266}\) Id. at 81–82 (Lundberg Stratton, J., concurring).

\(^{267}\) Id. at 82–84 (Lundberg Stratton, J., concurring).

\(^{268}\) Id. at 82–83 (explaining that Donald Ketterer had begun hearing his father’s voice a year after he passed away, and that people with bipolar disorder often act inappropriately, engaging in unethical or illegal activities because of their impaired judgment and lack of impulse control).

\(^{269}\) Id. at 82.

\(^{270}\) Id.

\(^{271}\) Id. at 87.

\(^{272}\) Id. at 84.

\(^{273}\) See id. (quoting Eddings v. Oklahoma, 455 U.S. 104, 110 (1982) (stating that the law “requires ‘a system of capital punishment at once consistent and principled but also humane and sensible to the uniqueness of the individual’’’)); see also id. (citing Atkins v. Virginia, 536 U.S. 304, 321 (2002) (providing that “evolving standards of decency” should dictate whether executing a particular class of offenders was violative of the Eighth Amendment)).

\(^{274}\) Ketterer, 855 N.E.2d at 82 (Lundberg Stratton, J., concurring); see also id. at 87 (reiterating that society must now reevaluate whether severely mentally ill persons ought to be executed).
penalty.275 According to Justice Lundberg Stratton, the ABA's recommendations and the fact that all or part of the recommendations were adopted by organizations such as the National Alliance on Mental Illness, the American Psychological Association, and the American Psychiatric Association provided evidence that society opposes executing severely mentally ill defendants.276

In addition to looking at societal views about executing the mentally ill, Justice Lundberg Stratton compared mental illness to mental retardation, concluding that many of the arguments made and accepted by the Supreme Court concerning mentally retarded offenders in Atkins can also be made for mentally ill defendants because they share many of the same characteristics.277 Specifically, she opined that severely mentally ill defendants, like mentally retarded defendants, "have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others."278 Furthermore, she stated that there is no proof that people in either group are more likely than others to engage in criminal conduct, although there is a great deal of evidence that they frequently act impulsively rather than according to a premeditated plan.279 As a result of such deficiencies, the Atkins Court felt it proper to hold that mentally retarded criminals have diminished personal culpability although they are not exempt from criminal sanctions.280 Justice Lundberg Stratton believed the same argument could be made for mentally ill defendants, but acknowledged that mental illness is not as easy to define and identify as mental retardation.281 However, she went on to say that modern medical and scientific knowledge may make it easier to quantify mental illness as a defense.282

Justice Lundberg Stratton concluded by stating that, although it was her personal belief that mentally ill defendants ought to now be categorically precluded from capital punishment, "the line should be drawn by the General Assembly, not by a court."283 In urging the general assembly of Ohio to consider passing legislation about the mentally ill and the death penalty, she wrote, "[N]othing prevents the legislature from examining and using those same evolving standards [used in Atkins]. . . . The general

276. See Ketterer, 855 N.E.2d at 84–85 (Lundberg Stratton, J., concurring).
277. Id. at 86–87.
278. Id. at 86 (citing Atkins, 536 U.S. at 318).
279. Id. (citing Atkins, 536 U.S. at 318).
280. Atkins, 536 U.S. at 318.
281. Ketterer, 855 N.E.2d at 86–87 (stating, for example, that mental retardation has objective symptoms and is permanent, whereas mental illness is a much broader category with varying treatments, diagnoses, and periods of remission).
282. Id. at 87.
283. Id.
assembly would be the proper body to examine these variations, take public testimony, hear from experts in the field, and fashion criteria for the judicial system to apply."  

Other state judges have voiced their belief that the rationale in *Atkins* should likewise apply to mentally ill defendants and protect them from the death penalty. For example, in *Corcoran v. State*, Justice Robert D. Rucker dissented because he did not believe the death penalty was appropriate for severely mentally ill defendants. Relying on *Atkins*, he stated that "the underlying rationale for prohibiting executions of the mentally retarded is just as compelling for prohibiting executions of the seriously mentally ill, namely evolving standards of decency." Justice Rucker was persuaded that life without the possibility of parole was a more appropriate punishment because of the defendant's severe mental illness. Justice Rucker aligned himself with Justice Paul E. Pfeifer of the Ohio Supreme Court, who stated even prior to the *Atkins* ruling, "Mental illness is a medical disease. . . . As a society, we have always treated those with mental illness differently from those without. In the interest of human dignity, we must continue to do so. . . . I believe that executing a convict with a severe mental illness is a cruel and unusual punishment."  

However, such beliefs are far from uniform among judges. Some state justices think *Atkins* has no relevance to mentally ill defendants. In *State v. Weik*, for example, the Supreme Court of South Carolina wrote, "while it violates the Eighth Amendment to impose a death sentence on a mentally retarded defendant, the imposition of such a sentence upon a mentally ill person is not disproportionate."  

While it is disappointing to those who favor outlawing the death penalty for the mentally ill, the fact that the opinions discussed above, which favor categorically excluding mentally ill defendants from the death penalty, are dissenting and concurring opinions further demonstrates that such a belief is not utterly pervasive among judges.

iv. Moratoriums

Since 1973, over 120 death row inmates have been freed due to evidence of their innocence, and between 2000 and 2004 thirty-five people were

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284. Id. (stating also that it is the legislature’s duty to consider and act upon evolving standards of decency concerning the mentally ill and the death penalty).
286. Id.
287. Id. at 503.
289. State v. Weik, 587 S.E.2d 683, 687 (S.C. 2003) (citations omitted). The state’s experts had diagnosed the defendant in this case with schizotypal personality disorder, and the defendant’s experts had diagnosed him with paranoid schizophrenia. All of the experts agreed that the defendant had paranoid beliefs involving the Central Intelligence Agency and the Masons. Id. at 80 & n.2.
released and exonerated. In addition, in Illinois, former Governor George Ryan issued a blanket commutation on the sentences of all death row prisoners in the state just days before leaving office in January 2003. He expressed concerns about the "demon of error" in the capital system and commuted essentially all of the 167 death sentences in the state to life imprisonment without parole. Former Governor Ryan’s commutation order followed a moratorium he had placed on the death penalty in Illinois in 2000. Illinois’s moratorium is currently continuing well into its seventh year. Similarly, Governor Jeb Bush also issued an executive order declaring a moratorium on all executions in Florida in light of lethal injection problems, pending a review of lethal injection methods. Although these two state moratoriums on the death penalty do not specifically deal with mentally ill defendants, they are signs of states’ willingness to review problems that are brought to their attention regarding the death penalty.

c. Juries and Popular Polls

Polls and jury behavior can provide an objective indication of public sentiment and contemporary values. Unfortunately, there is little data available that directly addresses how many times or how often juries are asked to consider the death penalty for mentally ill offenders, and how often they do, in fact, sentence severely mentally ill offenders to death. However, there is evidence of jurors speaking out against the death penalty for mentally ill offenders after they have already been sentenced to death.

290. See DPIC Facts, supra note 236, at 2.
292. Id. Governor George Ryan’s decision affected 156 death row inmates and eleven others who had been sentenced to death but were not in the custody of the department of corrections because they were awaiting trials in other cases or resentencing. See id. Four death row prisoners were pardoned after it was found that they had been tortured into confessing to crimes they did not commit; three death row prisoners had their sentences reduced to forty years to make their sentences similar to those of their codefendants; and the remaining death row inmates had their sentences commuted to life without parole. See id.; see also DPIC Clemency, supra note 258 (discussing Illinois’s broad commutation grant regarding death sentences in 2003).
294. DPIC 2006 Year End Report, supra note 238, at 1.
296. In both Roper and Atkins, the Court relied on some factual information provided by certain nongovernmental organizations (NGOs) in their amici curiae briefs but did not consider the personal opinions of such NGOs as determinative of the outcome of each case. Therefore, while the opinions and work of NGOs and the influence of the media are important and relevant to issues about the death penalty because they play active roles in informing the public and in pressuring legislative bodies and politicians to make reforms, this Note refrains from pursuing a lengthy discussion about NGOs and the media.
For example, in early 2004, the state parole board of Georgia commuted Willie James Hall's death sentence to one of life imprisonment without parole after six jurors testified that they would have chosen life without parole had it been offered at the time of the trial.297 Also, in offering clemency to Arthur P. Baird II,298 jurors from his trial expressed their belief that Baird deserved life imprisonment without parole, which was not available at the time of his sentencing, rather than the death penalty due to his severe mental illness.299 Furthermore, in 1999, Governor James Gilmore of Virginia granted clemency to Calvin Swann, noting that prison officials described Swann's behavior on death row as "nothing short of bizarre and totally devoid of rationality."300 Moreover, the prosecuting attorney stated that he would not have pursued the death penalty if life imprisonment without parole had been available at the time the case was tried.301 Most importantly, however, in granting clemency Governor Gilmore stated that the jury had been misinformed about the extent of Swann's mental illness.302 By making such a statement and preventing Swann's execution, Governor Gilmore implied that, had the jury been properly informed about the severity of Swann's mental illness, it would have chosen not to impose the death penalty.

A Gallup poll from May 2006 revealed that overall support for the death penalty had dropped from 80% in 1994 to 65% at the present time.303 Moreover, a greater percentage of respondents choose life without parole over the death penalty when given the choice between the two sentencing options.304 A comparison among the May 2006 poll, May 2004 poll, and May 2003 poll reveals that support for the death penalty has been dropping incrementally both when considered alone and as an alternative.305 Overall support for the death penalty dropped 9% from 2003 to 2006,306 and support for life imprisonment without possibility of parole as an alternative

297. See DPIC Clemency, supra note 258 (adding that, in making its decision, the board also considered Willie James Hall's good behavior in prison and clean criminal record prior to the murder).
298. See supra note 262 and accompanying text.
299. DPIC Clemency, supra note 258.
300. Id.
301. Id.
302. Id.
303. See DPIC Facts, supra note 236, at 4.
304. See id. Specifically, 48% of the respondents preferred life without parole, 47% preferred the death penalty, and 5% had no opinion. Id. The Gallup poll was conducted from May 5 to 7, 2006, on approximately 500 adults eighteen years of age and older nationwide, with a margin of sampling error of plus or minus five. Polling Report, Crime / Law Enforcement, http://pollingreport.com/crime.htm (last visited Sept. 1, 2007).
306. See Moore, supra note 305 (listing the results of the 2004 and 2003 Gallup polls); Polling Report, supra note 304 (stating that 74% supported the death penalty in May 2003 and that support fell to 65% in 2006).
to the death penalty rose 4% from 2003 to 2006.307 Perhaps most telling, though, is the fact that in a 2002 Gallup poll, 75% of those surveyed opposed executing the mentally ill.308 Thus, even though almost two-thirds of Americans generally supported the death penalty, an even greater percentage of Americans were against imposing it on mentally ill offenders.309

In the examples provided above, clemencies were granted to mentally ill death row inmates due to assumptions or actual findings that juries would not have sentenced them to death had there been an alternative. It appears that if given an option, many juries may prefer sentencing a mentally ill defendant to life imprisonment over capital punishment. Furthermore, the numbers from the 2006 Gallup poll revealed that the public marginally favored life without parole over its alternative—the death penalty.310 Since the poll respondents are all presumably potential jurors, the Gallup poll further supports the notion that juries may disfavor the death penalty as punishment for mentally ill criminals if life imprisonment is a possibility. Nevertheless, despite such data and implications, the fact remains that juries continue to impose the death penalty, although it is unknown how many of the estimated 114 death sentences in 2006 were imposed on mentally ill defendants.311 Thus, there is no clear pattern among juries of either leaning away from or toward executing the mentally ill. In addition, despite the drop in support for the death penalty in the past several years, according to a recent Gallup poll, more than half of the poll participants still supported it.312 The statistics merely demonstrate an overall trend of waning public support for the death penalty.313 Nevertheless, specifically with regard to public opinion about the propriety of executing mentally ill offenders, the Gallup poll from 2002 in which three-fourths of those surveyed said that they opposed it, provides compelling evidence that Americans are against executions when they involve mentally ill persons.314

307. See Polling Report, supra note 304 (providing statistics that show an increase in support for life imprisonment rather than the death penalty from 44% in 2003 to 48% in 2006); see also DPIC Facts, supra note 236, at 4 (providing Gallup poll results from May 2006); Moore, supra note 305 (listing May 2004 and May 2003 Gallup poll results).
309. See id. (comparing Gallup poll data from 2002 and 2003).
310. See generally supra notes 304–05, 307 and accompanying text.
311. See supra note 249 and accompanying text. The statistics about death sentences in the Death Penalty Information Center’s 2006 Year End Report do not specify how many death sentences were imposed on mentally ill offenders. See generally DPIC 2006 Year End Report, supra note 238.
312. See supra notes 303, 305–06 and accompanying text. The 2006 poll did not specifically ask participants whether they would still support the death penalty if it was imposed on mentally ill defendants. Thus it is difficult to draw any conclusions about the public’s current support for executing mentally ill offenders.
313. It is uncertain from this statistic alone whether the general trend of decreasing support for the death penalty also extends to the public’s view of imposing the death penalty on mentally ill defendants in particular.
314. See supra text accompanying notes 308–09.
2. International Consensus and Foreign Law

International communities oppose capital punishment as a general matter, but also specifically for individuals with mental disorders. After World War II, the United Nations (U.N.) General Assembly adopted the Universal Declaration of Human Rights, which proclaimed a "right to life." During the 1950s and 1960s, many international human rights treaties were drafted, such as the International Covenant on Civil and Political Rights, which the United States has ratified, and the European Convention on Human Rights, which provided for the right to life and led to many Western European nations stopping their use of the death penalty. By the 1980s, there was a de facto abolition of the death penalty in Western Europe. Also, in the 1980s, the U.N. General Assembly adopted the Second Optional Protocol to the International Covenant on Civil and Political Rights, which seeks to abolish the death penalty around the world. Furthermore, in 1990, member nations of the Organization of American States signed the Protocol to the American Convention on Human Rights to Abolish the Death Penalty.

The European Union and the Council of Europe have conditioned countries' membership on the abolition of the death penalty, and as such, even nations that once had harsh capital punishment systems, such as Turkey, have promised to abandon the death penalty to gain admission to the European Union. In addition, with the exception of Turkey, every European country has signed Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, which proscribes the death penalty in peacetime. Currently, more than half of the countries in the world have

315. See Am. Civil Liberties Union, supra note 17, at 1.
317. See Death Penalty Info. Ctr., supra note 316.
318. Id.
320. Protocol to the American Convention on Human Rights to Abolish the Death Penalty, June 8, 1990, O.A.S.T.S. 73. The United States is a member of the Organization of American States, but it has not signed or ratified this treaty. Am. Civil Liberties Union, supra note 17, at 2–3.
321. See Am. Civil Liberties Union, supra note 17, at 3.
323. See id.; Am. Civil Liberties Union, supra note 17, at 3.
legally or by practice abolished the death penalty.\textsuperscript{324} Sixty-nine countries still retain the death penalty, but in 2005 executions occurred in only twenty-two countries, with ninety-four percent of known executions taking place in just four countries: China, Iran, Saudi Arabia, and the United States.\textsuperscript{325}

With regard to mentally ill offenders in particular, the U.N. Commission on Human Rights passed a resolution in 1999 urging countries “not to impose the death penalty on a person suffering from any form of mental disorder.”\textsuperscript{326} In 2004, it passed another resolution concerning the death penalty, using the same language to call on nations that still maintain the death penalty to stop imposing it on individuals with any form of mental disorder.\textsuperscript{327} Certainly, severe mental illness would be considered a form of mental disorder. In 1997, the U.N. Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions stated in a report that governments that continue to use capital punishment on “the mentally ill are particularly called upon to bring their domestic legislation into conformity with international legal standards.”\textsuperscript{328} In addition, the European Union, whose brief the Supreme Court cited in \textit{Atkins},\textsuperscript{329} has also expressed disapproval of the practice of executing persons with severe mental illness through letters urging states to commute death sentences of mentally ill death row prisoners.\textsuperscript{330}

Despite the overwhelming international consensus opposing the death penalty on mentally ill offenders, among the Supreme Court Justices there is disagreement about the relevance and degree to which the Court should rely on foreign laws and practices. In examining the constitutionality of the punishment at issue in \textit{Trop}, the Supreme Court looked at the mores in the United States as well as the punishments other countries used in similar circumstances.\textsuperscript{331} However, several years later in \textit{Thompson}, for example, Justice Antonin Scalia dissented:

\begin{itemize}
\item \textsuperscript{325} See id.
\item \textsuperscript{326} See Am. Civil Liberties Union, supra note 17, at 5 (quoting Res. 1999/61, supra note 17).
\item \textsuperscript{329} See supra note 89.
\item \textsuperscript{331} Trop v. Dulles, 356 U.S. 86, 102–03 (1958) (plurality opinion).
\end{itemize}
ATKINS, ROPER, AND THE DEATH PENALTY

We must never forget that it is a Constitution for the United States of America that we are expounding. . . . [W]here there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of [the Supreme] Court may think them to be, cannot be imposed upon Americans through the Constitution.  

In addition, Justice Scalia declared in his dissent in Atkins that “the practices of the ‘world community,’ whose notions of justice are (thankfully) not always those of our people” are irrelevant to Eighth Amendment analysis. He even quoted his own dissent from Thompson to support his argument that foreign laws have no place in American courts.

Notably, however, from Atkins to Roper, reliance on international consensus seems to have grown somewhat because discussion about the views of the world community, which in Atkins was limited to a mere footnote in the majority opinion, leapt into the actual text of the Roper opinion in a much lengthier discourse. International opinion is still by no means determinative of what the outcome of an issue before the Court ought to be, as explicitly stated in both cases, but nevertheless can be persuasive and at the least can lend support to the Court’s resolution on an issue. In particular, if the Supreme Court ever examines whether it is

332. Thompson v. Oklahoma, 487 U.S. 815, 868–69 n.4 (1988) (Scalia, J., dissenting) (opining that death penalty practices of foreign countries—which the majority referred to in its opinion—should not be deemed relevant, particularly if there is not first a domestic consensus).

333. Atkins, 536 U.S. 304, 347–48 (2002) (Scalia, J., dissenting). Justice Scalia also criticized the Court’s decision, stating,

[T]he Prize for the Court’s Most Feeble Effort to fabricate ‘national consensus’ must go to its appeal (deservedly relegated to a footnote) to the views of assorted professional and religious organizations, members of the so-called ‘world community,’ and respondents to opinion polls. . . . [T]he views of professional and religious organizations and the results of opinion polls are irrelevant. Equally irrelevant are the practices of the ‘world community.’  

Id. at 347.

334. Id. at 348 (quoting Thompson, 487 U.S. at 868–69 n.4 (Scalia, J., dissenting)); see also Roper v. Simmons, 543 U.S. 551, 627 (Scalia, J., dissenting) (stating that the Court “should either profess its willingness to reconsider all . . . matters in light of the views of foreigners, or else it should cease putting forth foreigners’ views as part of the reasoned basis of its decisions,” and criticizing the majority decisions, stating that “[t]o invoke alien law when it agrees with one’s own thinking, and ignore it otherwise, is not reasoned decisionmaking, but sophistry”).

335. Atkins, 536 U.S. at 316–17 n.21 (noting that “within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved”).

336. See Roper, 543 U.S. at 575–78.

337. See id. at 575 (stating that the opinions and practices of other nations are not controlling because it is the Court’s responsibility to interpret the Eighth Amendment); Atkins, 536 U.S. at 316–17 n.21 (“Although these factors are by no means dispositive, their consistency with the legislative evidence lends further support to [the] conclusion that there is a consensus among those who have addressed the issue.”).

338. See Roper, 543 U.S. at 578 (“It does not lessen our fidelity to the Constitution . . . to acknowledge that the express affirmation of certain fundamental rights by other nations and
appropriate to allow executions for mentally ill criminals, it may again look to the international community for guidance. If it does, the Court will likely determine that there is ample evidence of international and foreign opposition to executing the mentally ill.\textsuperscript{339}

3. Consensus Among Professional Organizations

Among professional mental health organizations, there is abundant evidence that they are opposed to the practice of imposing the death penalty on mentally ill offenders. In late 2004, the American Psychiatric Association approved and released a position statement regarding diminished responsibility in capital sentencing, which specifically addressed an individual’s mental health at the time of his or her offense.\textsuperscript{340} It asserts,

Defendants shall not be sentenced to death or executed 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 their conduct, or (c) to conform their conduct to the requirements of the law.\textsuperscript{341}

In the commentary following the statement above, the organization explains that American laws, such as those permitting an insanity defense, have long recognized that severe mental disorders diminish an individual’s responsibility for criminal acts and that execution may be cruel and excessive punishment for such offenders.\textsuperscript{342} It also points out that juries, when faced with evidence of aggravating factors, have frequently devalued evidence of a mental illness as a mitigating factor that diminishes culpability.\textsuperscript{343} Therefore, the American Psychiatric Association believes that “[s]trong evidence of diminished responsibility due to mental illness should preclude a death sentence and should not be weighed against evidence in aggravation.”\textsuperscript{344} Furthermore, it opines that the \textit{Atkins} concerns and rationale for precluding the death penalty for mentally retarded defendants are equally applicable to severely mentally ill defendants.\textsuperscript{345}

In another position statement, the American Psychiatric Association states, “Defendants should not be executed or sentenced to death if, at the

\textsuperscript{339} See generally supra notes 315–30.
\textsuperscript{341} Id. (adding that 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”).
\textsuperscript{342} Id.
\textsuperscript{343} Id.
\textsuperscript{344} Id.
\textsuperscript{345} See id.
time of the offense, they had significant limitations in both their intellectual functioning and adaptive behavior, as expressed in conceptual, social, and practical adaptive skills, resulting from mental retardation, dementia, or a traumatic brain injury.” 346 The association stated that its purpose in adopting this position statement was to urge legislatures and courts to extend the Supreme Court’s ruling in Atkins to dementia and traumatic brain injury, which involve equivalent levels of impairments as mental retardation.347

A third position statement promulgated by the American Psychiatric Association concerns mentally ill prisoners already on death row.348 While the primary focus of this Note is on people who are mentally ill at the time of their crime, the association’s position statement regarding mentally ill death row inmates is nevertheless relevant because it demonstrates how strongly the organization opposes permitting executions of mentally ill offenders. It states,

A sentence of death should not be carried out if the prisoner has a mental disorder or disability that significantly impairs his or her capacity (i) to make a rational decision to forego or terminate post-conviction proceedings available to challenge the validity of the conviction or sentence; (ii) to understand or communicate pertinent information, or otherwise assist counsel, in relation to specific claims bearing on the validity of the conviction or sentence that cannot be fairly resolved without the prisoner’s participation; or (iii) to understand the nature and purpose of the punishment, or to appreciate the reason for its imposition in the prisoner’s own case.349

In the preface, the association acknowledges that not all psychiatrists have the same beliefs about the “moral legitimacy and social utility” of capital punishment but states that they are, however, “uniformly troubled by the prospect of executing people whose offenses were linked to serious mental disorders or whose mental disorders prevent a fair adjudication.”350 Because of such concerns, the American Psychiatric Association chose to adopt this position statement. The association asserts that the only sensible policy is to automatically commute a death sentence to a lesser punishment once a prisoner has been found incompetent for execution.351

347. See id. (stating that the position statement was developed in collaboration with the ABA Task Force on Mental Disability and the Death Penalty).
349. Id.
350. Id.
351. Id. The American Psychiatric Association reaches this conclusion based on evidence that some courts have allowed the government to forcibly medicate incompetent prisoners to restore them to be competent for execution. The organization considers such treatment barbaric and a violation of fundamental ethical norms of the mental-health professions. Id.
Even before the *Atkins* and *Roper* decisions, another mental health organization, the American Psychological Association, also put forward its position on the death penalty and mentally ill offenders, declaring,

WHEREAS death penalty prosecutions may involve persons with serious mental illness or mental retardation. Procedural problems, such as assessing competency, take on particular importance in cases where the death penalty is applied to such populations; . . .

THEREFORE, BE IT RESOLVED, that the American Psychological Association:

Calls upon each jurisdiction in the United States that imposes capital punishment not to carry out the death penalty until the jurisdiction implements policies and procedures that can be shown through psychological and other social science research to ameliorate the deficiencies identified above.  

In the legal community, the ABA passed a resolution at its annual conference on August 8, 2006, recommending that states stop sentencing mentally ill or disabled criminals to death.  

Without favoring or opposing the death penalty, the ABA urged jurisdictions that permit capital punishment to end their practice of executing or sentencing defendants to death if “at the time of the offense, they had significant limitations in both their intellectual functioning and adaptive behavior . . . resulting from mental retardation, dementia, or a traumatic brain injury.”  

Furthermore, the ABA recommended that defendants who, at the time of their offense, “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” should also not be executed or given the death penalty.  

The language used by the ABA in Recommendation 122A mirrors the language used by the American Psychiatric Association in its various position statements concerning mental illness and the death penalty.  

The American Psychiatric Association and the American Psychological Association have both officially endorsed the ABA’s resolution. The ABA states that its recommendations are, in part, meant to “prohibit execution of persons with severe mental disabilities whose demonstrated

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352. Am. Psychological Ass’n, *supra* note 16 (citations omitted).
355. Id.
356. Compare *infra* text accompanying notes 369–70 (discussing the ABA’s language), with *supra* text accompanying notes 341, 346 (discussing the American Psychiatric Association’s language in its position statements).
impairments of mental and emotional functioning at the time of the offense would render a death sentence disproportionate to their culpability." 358

In the aggregate, the opinions and policy positions of respected legal and mental health organizations provide abundant evidence of a professional consensus in opposition to allowing the execution of severely mentally ill offenders.

B. Proportionality Analysis: Deterrence and Retribution

Examining the proportionality of a punishment to an individual’s culpability is a vital part of the Eighth Amendment analysis. The Supreme Court conducted proportionality examinations in both Roper 359 and Atkins. 360 Retribution and deterrence of violent crimes by potential offenders are the two social purposes served by the death penalty. 361 If imposing the death penalty on a severely mentally ill defendant does not demonstrably contribute to both retribution and deterrence, "it 'is nothing more than the purposeless and needless imposition of pain and suffering,' and hence an unconstitutional punishment." 362

The goal of retribution requires that an offender be punished in proportion to his or her culpability. 363 In Roper, the Court confirmed that once the diminished culpability of a class of offenders is recognized, "the penological justifications for the death penalty apply to them with lesser force." 364 If, as with juveniles and mentally retarded offenders, courts accept that severely mentally ill defendants also have diminished culpability due to the nature of their illness (e.g., impairments in perception and cognition, and frequent inability to control their impulses), justice is not achieved by allowing mentally ill offenders to be sentenced to death—the most extreme penal sanction for crimes. 365 Because capital punishment assumes that a condemned criminal is fully culpable, any diminished culpability results in the punishment of death being disproportionate. 366 Thus, the retributive goal fails. 367 Therefore, the diminished culpability of mentally ill defendants ought to preclude them from the death penalty, since allowing it would not further the goal of retribution.

With respect to deterrence, the theory is that the severity of capital punishment will inhibit prospective criminals from committing violent

358. See id. at 5 (stating that the terms "disability" and "disorder" are used interchangeably and that only those offenders with severe mental disorders or disabilities ought to be precluded from the death penalty).
359. See 543 U.S. 551, 571–73 (2005); see also supra text accompanying notes 162–66 (describing the Court’s proportionality analysis in Roper).
360. See 536 U.S. 304, 318–20 (2002); see also supra text accompanying notes 99–106 (discussing the Atkins Court’s analyses of deterrence and retribution).
361. Roper, 543 U.S. at 571.
363. See Roper, 543 U.S. at 571; Atkins, 536 U.S. at 319.
364. Roper, 543 U.S. at 571.
365. See Izutsu, supra note 13, at 1021–22; Amnesty Int’l, supra note 18, at 51.
366. See Amnesty Int’l, supra note 18, at 51.
367. See id.
The same argument made by the Court in Atkins about the weak deterrent effect on mentally retarded defendants can also be made about defendants with severe mental illness. In Atkins, the Court stated,

"[T]he same cognitive and behavioral impairments that make [mentally retarded] 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 execution as a penalty and, as a result, control their conduct based upon that information."

People with severe mental illness manifest many of the same difficulties that mentally retarded people struggle with, such as those the Atkins Court listed above and those discussed in Part I.C.1 of this Note. The inability of persons with severe mental illness to control their impulses, to engage in logical reasoning, and to control their conduct based on information about the penal consequences of criminal action provides persuasive evidence that the death penalty has little to no deterrent effect on mentally ill offenders. As one author writes, "The failure to make the critical connection between conduct and legal consequences directly affects the capacity of the defendant [with severe mental illness] to be deterred."

Furthermore, a mentally ill defendant may not refrain from committing a crime because cognitive impairments or delusions may lead to the false belief that he or she is acting according to reality. Moreover, in asserting that the death penalty does not have a strong deterrent effect on severely mentally ill defendants who are often unable to control their actions, Amnesty International points out that "[c]ertainly no one believes that the death penalty can deter people from becoming psychotic."

More broadly, although there are still some politicians who support the death penalty based on the theory of deterrence, the pure notion that the death penalty has any deterrent effect is being questioned and criticized. "[I]n a civilized society . . . to deliberately kill an individual so that he may serve as an example to others seems untenable." A survey of former and current presidents of the country's leading academic criminological societies revealed that eighty-four percent of them did not believe that the

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368. Atkins, 536 U.S. at 320.
369. Id.
370. See State v. Ketterer, 855 N.E.2d 48, 85 (Ohio 2006) (Lundberg Stratton, J., concurring) (stating that deterrence has little value as a reason for executing severely mentally ill offenders who have diminished abilities to plan and control their impulses); see also Amnesty Int'l, supra note 18, at 49–51; Izutsu, supra note 13, at 1021.
371. Izutsu, supra note 13, at 1021.
372. Id.
373. Amnesty Int'l, supra note 18, at 50.
374. See id. at 49–50.
375. Id. (stating that it seems unfair to use the death penalty to deter others because it punishes the prisoner for the potential crimes of others rather than just what he or she has done).
death penalty was an actual deterrent to murder.\textsuperscript{376} Only twelve percent of the criminologists accepted the idea that the death penalty was a deterrent, and four percent had no opinion.\textsuperscript{377} Interestingly, the South, which is responsible for eighty percent of all executions in the country also happens to have the highest murder rates.\textsuperscript{378} The Northeast, in contrast, which accounts for less than one percent of all executions, has the lowest murder rates.\textsuperscript{379} Furthermore, a poll conducted in 1995 on police chiefs in the United States revealed that the majority of them reject the notion that the death penalty is effective as a law enforcement tool to reduce violent crime or, in other words, to deter capital crimes.\textsuperscript{380} Additionally, among other methods of trying to reduce violent crime, expanding the death penalty was thought to be the least effective method, supported by only one percent of the police chiefs.\textsuperscript{381} Such statistics make one question whether the death penalty is in fact meeting its goal of deterring others from committing capital crimes.

III. IS THE END OF THE DEATH PENALTY IN SIGHT FOR THE MENTALLY ILL?

The Supreme Court has not yet addressed the issue of whether mentally ill defendants ought to be categorically exempt from being sentenced to death. Collectively, the cases examined in Parts I.A and I.B set forth the judicial history leading to categorical exclusions from the death penalty for certain other groups in \textit{Atkins} and \textit{Roper}, namely mentally retarded and juvenile offenders. Looking at the development of the Supreme Court’s death penalty jurisprudence,\textsuperscript{382} it is evident that the Court is moving in the direction of narrowing the applicability of the death penalty so as to preclude offenders with diminished culpability. Based on this trend, the Court may again exclude other categories of people if it deems it necessary according to its constitutional interpretations as well as evolving standards of decency.\textsuperscript{383} Applying the Supreme Court’s analysis of youth in \textit{Roper} and mental retardation in \textit{Atkins} to current facts about mental illness, there is strong support for the notion that, like juveniles and mentally retarded offenders, severely mentally ill criminals ought also to receive categorical protection from the death penalty.\textsuperscript{384}

\begin{itemize}
\item \textsuperscript{376} See DPIC Facts, supra note 236, at 3.
\item \textsuperscript{377} See id. at 3.
\item \textsuperscript{378} See id.
\item \textsuperscript{379} See id. This Note only points out the correlation between death penalty and murder rates in different regions of the United States and does not assume that either is the cause of the other.
\item \textsuperscript{380} See id. at 4.
\item \textsuperscript{381} See id. (listing methods such as reducing drug abuse and having longer jail sentences as being more effective for reducing violent crime rates).
\item \textsuperscript{382} See generally supra Part I.A-B.
\item \textsuperscript{383} See supra text accompanying note 24.
\item \textsuperscript{384} See supra Part I.C (defining severe mental illness, and explaining why the death penalty inquiry in this Note was limited to a narrow category of only the most serious mental illnesses).
\end{itemize}
Experts in the legal, psychological, and psychiatric professions\textsuperscript{385} as well as the U.N., foreign countries, and other international groups have presented myriad reasons for why persons with serious mental illness should not be subject to capital punishment.\textsuperscript{386} Observing that such professional organizations, transnational bodies, and nations have in large part been disapproving of permitting executions of mentally ill criminals,\textsuperscript{387} this Note concludes that a consensus exists among them that merits a more limited application of the death penalty and perhaps even a complete abolition of the death penalty in the future.

Despite the overwhelming consensus of the international community, foreign nations, and legal and mental health organizations, it is still unlikely that the Supreme Court will decide to immediately exclude mentally ill criminals from the death penalty. This is mainly due to the fact that state counting was the most objective and therefore most significant indicator in \textit{Atkins} and \textit{Roper} of a national consensus, and according to this Note's analysis in Part II.A.1.a, there is only tenuous evidence of state death penalty laws providing categorical exemptions for the mentally ill.\textsuperscript{388} Undoubtedly, current practices of juries\textsuperscript{389} and courts in sentencing,\textsuperscript{390} examples of clemencies for mentally ill death row inmates,\textsuperscript{391} opinions of state justices,\textsuperscript{392} moratoriums,\textsuperscript{393} and public opinion about executing the severely mentally ill\textsuperscript{394} are all relevant in assessing whether standards of decency are evolving in the United States about the appropriateness of imposing capital punishment on the mentally ill. As Justice Lundberg Stratton pointed out, however, without the requisite evidence of state legislation outlawing the practice, it is difficult for judges to impose bans on executing mentally ill defendants based on other persuasive reasons offered by foreign countries, relevant expert organizations, and the American public.\textsuperscript{395}

Given the strong opinions of the world community, mental health experts, and legal organizations, and the public's changing views about permitting mentally ill offenders to be sentenced to death, legislatures and courts in death penalty states ought to evaluate existing statutes using the framework of \textit{Atkins} and \textit{Roper}. As a starting point, they can examine

\begin{itemize}
\item \textsuperscript{385} See generally supra Part II.A.3.
\item \textsuperscript{386} See generally supra Part II.A.2.
\item \textsuperscript{387} See generally supra Part II.A.2–3.
\item \textsuperscript{388} See supra notes 76–84 and accompanying text (discussing the \textit{Atkins} Court's investigation of state legislation and its emphasis on looking to state laws as objective evidence of a consensus); see also supra notes 144–53 and accompanying text (discussing the Court's study of state legislation in \textit{Roper}); Part II.A.1.a (analyzing whether there is a national legislative consensus among states concerning mental illness and the death penalty).
\item \textsuperscript{389} See supra Part II.A.1.c.
\item \textsuperscript{390} See supra Part II.A.1.b.i.
\item \textsuperscript{391} See supra Part II.A.1.b.ii.
\item \textsuperscript{392} See supra Part II.A.1.b.iv.
\item \textsuperscript{393} See supra Part II.A.1.b.iii.
\item \textsuperscript{394} See supra Part II.A.1.c.
\item \textsuperscript{395} See supra text accompanying notes 264–84.
\end{itemize}
whether such a punishment achieves the proper penological purposes of deterrence and retribution for mentally ill offenders. Enactment of appropriate legislation protecting the narrow class of severely mentally ill offenders from execution should be considered if there are sufficient reasons to believe that the characteristics of mentally ill offenders render them less culpable and less susceptible to deterrence than the average capital criminal. In addition, with respect to retribution, which requires that the severity of a punishment be commensurate with the offender's culpability, state legislatures can use the analyses of Roper and Atkins to investigate and determine whether mentally ill offenders have diminished culpability. Given the inability of many severely mentally ill people to control their behavior or thoughts, this Note argues that the penological goals of the death penalty are not met by permitting such people to be executed. States that perform the proportionality analysis outlined in Part II.B will likely conclude that the death penalty is a disproportionately harsh punishment for mentally ill offenders, which does not advance the states' goals of proper retribution and deterrence. If states determine that neither retributive nor deterrent goals are satisfied by permitting the mentally ill to be executed, the states' justifications become significantly weaker for allowing the imposition of the most extreme criminal sanction on offenders with diminished culpability. Therefore, they will be compelled to reform their laws accordingly.

At the present time, evidence is lacking of a national consensus in state legislation that would suffice for the Supreme Court to grant a categorical exclusion for severely mentally ill criminals from the death penalty. Although the current legislative landscape may render the Supreme Court, and courts in general, unable to provide severely mentally ill defendants with categorical protection, state legislatures do have the ability to examine factors such as those discussed above. In other words, notwithstanding the state legislation obstacle which courts would encounter, state legislative bodies have wide discretion to pass and amend laws concerning the matter. Legislatures therefore ought to fashion more protective laws for the courts to apply based on proportionality analyses and social, professional, and international opinions condemning the death penalty as a form of punishment for the mentally ill.

This Note does not argue that mentally ill offenders should be exempt from severe criminal sanctions. It merely points out that nearly all of the same arguments that were offered and accepted by the Supreme Court regarding the diminished culpability of juveniles and mentally retarded persons, and the deterrent and retributive effects of imposing the death

396. See generally supra Part II.B.
397. See generally Part II.A.1.a.
398. See generally supra Part II.A.1.a.
399. See generally supra Part II.A.1.b–c.
400. See supra text accompanying notes 283–84; see generally Part II.
penalty on such defendants in *Roper* and *Atkins*, can also be made convincingly about the severely mentally ill.

In the words of Thomas Jefferson,

"[L]aws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times."

**CONCLUSION**

An end to the death penalty for mentally ill offenders is not immediately likely given the dearth of state laws protecting the mentally ill, which are necessary to constitute a national consensus. However, for opponents of the death penalty, it may actually be good that the Supreme Court will not soon carve out another death penalty exception. In fact, in the long run, advocating for the categorical exemption may be counterproductive to their goal of eradicating the penalty in this country. While opponents may think that chopping away in small increments at the death penalty is the way to ultimately abolish it, proponents of capital punishment can argue that each exception made by the Supreme Court for a certain class of people actually prunes the death penalty and mends its flaws. In effect, another categorical exception could strengthen proponents' defense of the death penalty because it would provide them with ammunition to contend that capital punishment laws are being perfected and becoming fairer by building in safeguards. Ironically, an exemption for the mentally ill could make the death penalty a longer lasting and more established institution in this country.

Therefore, while opponents of the death penalty may at first be disheartened to learn that an exception for the mentally ill is not likely imminent, they should be pleased to know that this is not a victory for death penalty supporters either. There is growing disapproval of the death penalty, particularly for mentally ill offenders, among the international community, the American public, and numerous organizations with germane expertise. As such, and in light of new developments in death penalty jurisprudence, the time is ripe for death penalty laws with respect to mentally ill individuals to be reexamined by courts and legislatures through the lenses of *Atkins* and *Roper* and altered in accordance with evolving standards of decency.

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401. Furman v. Georgia, 408 U.S. 238, 409 n.7 (1972) (Blackmun, J., dissenting) (quoting Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), in 15 The Writings of Thomas Jefferson 40–42 (Memorial ed. 1904)); see also State v. Ketterer, 855 N.E.2d 48, 87 (Ohio 2006) (Lundberg Stratton, J., concurring) (concluding the opinion with Thomas Jefferson's quote from *Furman*).