

# ARTICLE

## CATEGORICAL BARS TO EXECUTION: CIVILIZING THE DEATH PENALTY\*

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## I. INTRODUCTION

In a wide-ranging February 2008 radio interview with the BBC, Justice Antonin Scalia offered the following barb about international attitudes toward the death penalty: “[T]o get self-righteous about the thing as Europeans tend to do about the American death penalty is really quite ridiculous.”<sup>1</sup> This comment starkly displays the Justice’s lack of understanding regarding a remarkable development in American capital punishment law. For thirty years the U.S. Supreme Court has sought to ameliorate America’s death penalty to more closely align it with international standards. Conscious of worldwide hostility toward capital punishment, but unwilling to end it entirely, the Court has tried to avoid egregious applications of the death penalty by removing entire classes of cases from its reach: juveniles, the mentally retarded and mentally ill, and those who have not intentionally caused death (nor intentionally aided another in causing death).

In recent years, the Court succeeded in prohibiting the execution of those who were under the age of eighteen or mentally retarded when their crimes were committed.<sup>2</sup> Its work regarding the mentally ill and defendants not proved to have intentionally killed, while well begun,<sup>3</sup> has not yet been completed. This Article describes the steps the Court has already taken and sketches what remains to be done.

The Justices of the Supreme Court have long been aware that the United States’ maintenance of the death penalty stands in stark contrast to international norms.<sup>4</sup> Indeed, in concluding

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1. *Scalia Says He Sees a Role for Physical Interrogations*, N.Y. TIMES, Feb. 13, 2008, at A17.

2. *See Roper v. Simmons*, 543 U.S. 551, 578 (2005) (holding that the Eighth and Fourteenth Amendments are violated by subjecting minors to the death penalty); *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (holding that imposing the death penalty on mentally retarded offenders violates the Constitution).

3. *See Kennedy v. Louisiana*, 128 S. Ct. 2641, 2664–65 (2008) (ruling against the death penalty for child rape); *Panetti v. Quarterman*, 127 S. Ct. 2842, 2859–62 (2007) (discussing that an offender’s mental illness must be taken into account in determining the appropriateness of the death penalty for that offender); *Ford v. Wainwright*, 477 U.S. 399, 409–10 (1986) (holding the death penalty is prohibited for mentally insane prisoners); *Enmund v. Florida*, 458 U.S. 782, 797, 801 (1982) (concluding that the death penalty is not appropriate for crimes other than intentional killings); *Coker v. Georgia*, 433 U.S. 584, 600 (1977) (determining that the death penalty is excessive punishment for the rape of an adult woman).

4. *See, e.g.*, Edith M. Lederer, *UN Votes Against Death Penalty*, INT’L BUS. TIMES, Dec. 18, 2007, [http://www.ibtimes.com/articles/20071218/un-votes-against-death-penalty\\_all.htm](http://www.ibtimes.com/articles/20071218/un-votes-against-death-penalty_all.htm) (discussing a moratorium on the death penalty reflecting the majority view of the world opinion towards it). *See generally* WILLIAM A. SCHABAS, *THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW* 196–97, 199, 204, 211 (3d ed. 2002)

his 1972 opinion in *Furman v. Georgia*, arguing that the death penalty is cruel and unusual in all circumstances, Justice Marshall challenged his brethren to “achieve ‘a major milestone in the long road up from barbarism’ and join the approximately 70 other jurisdictions in the world which celebrate their regard for civilization and humanity by shunning capital punishment.”<sup>5</sup> Much like the “international” argument made in favor of *Brown v. Board of Education*<sup>6</sup>—that ending segregation would improve America’s standing in the world community, thus enabling the country to better wage the Cold War<sup>7</sup>—Justice Marshall was implying that ending capital punishment might reap similar benefits.

The Court’s 1976 decision in *Gregg v. Georgia*, upholding the death penalty when imposed on a case-by-case basis under a properly crafted statute, showed that the majority was not willing to go as far as Justice Marshall desired.<sup>8</sup> But almost immediately after its decision in *Gregg*, the Court began to achieve part of what Justice Marshall championed. The Court did so by using the Eighth Amendment’s Cruel and Unusual Punishment Clause to impose categorical limits on the death penalty—banning capital punishment for the rape of an adult woman in 1977,<sup>9</sup> disapproving the death sentence of an accomplice to a felony murder in 1982,<sup>10</sup> and barring the execution of a seriously mentally ill prisoner in 1986.<sup>11</sup> A period of retrenchment followed—the Court approved the death sentences of two felony murder accomplices in 1987<sup>12</sup> and of a mentally

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(exploring the evolution of the death penalty prohibitions within the international arena).

5. *Furman v. Georgia*, 408 U.S. 238, 371 (1972) (Marshall, J., concurring) (internal footnote omitted) (quoting RAMSEY CLARK, *CRIME IN AMERICA* 336 (1970)).

6. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

7. See Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 524 (1980) (“[T]he [*Brown*] decision helped to provide immediate credibility to America’s struggle with Communist countries to win the hearts and minds of emerging third world peoples.”); Derrick A. Bell, Jr., *Racial Remediation: An Historical Perspective on Current Conditions*, 52 NOTRE DAME LAW. 5, 12 (1976) (asserting that the *Brown* decision, which abolished apartheid policies in the United States, strengthened America’s position during the Cold War).

8. See *Gregg v. Georgia*, 428 U.S. 153, 195 (1976). For further discussion on the Georgia statute and the Court’s endorsement of it, see LINDA E. CARTER ET AL., *UNDERSTANDING CAPITAL PUNISHMENT LAW* 44–46 (2d ed. 2008).

9. *Coker v. Georgia*, 433 U.S. 584 (1977); see *infra* text accompanying notes 62–73.

10. *Enmund v. Florida*, 458 U.S. 782 (1982); see *infra* text accompanying notes 121–29.

11. *Ford v. Wainwright*, 477 U.S. 399 (1986); see *infra* text accompanying notes 152–57.

12. *Tison v. Arizona*, 481 U.S. 137 (1987); see *infra* text accompanying notes 130–47.

retarded defendant in 1989,<sup>13</sup> and equivocated regarding executing juveniles in 1988 and 1989.<sup>14</sup> But, in recent years, the Court has accelerated its program to civilize the death penalty. The Court overruled its previous decisions regarding mental retardation in 2002<sup>15</sup> and youth in 2005,<sup>16</sup> reaffirmed the ban on executing the insane in 2007,<sup>17</sup> and extended the prohibition of the death penalty as a punishment for rape to include cases with child victims in 2008.<sup>18</sup> In doing so, the Court established categorical bars to application of the death penalty under the Eighth Amendment. Tellingly, in the recent cases overruling prior precedents, the Court has cited the overwhelming international opposition to executing the mentally retarded<sup>19</sup> and those criminals who were under the age of eighteen when they committed their offenses.<sup>20</sup> This notation implicitly acknowledges the Court's desire to bring America's use of the death penalty closer to the international norm.

Of course, throughout this period there has been a consistent line of dissent—most flamboyantly from Justice Scalia—arguing that the Eighth Amendment provides no warrant for removing categories of defendants from the threat of execution.<sup>21</sup> This argument, which essentially thumbs its nose at the Court's commitment to construe the Cruel and Unusual Punishment Clause according to “civilized standards”—“the evolving

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13. *Penry v. Lynaugh*, 492 U.S. 302 (1989); *see infra* text accompanying notes 23–28.

14. *See infra* text accompanying notes 41–44. *Compare* *Stanford v. Kentucky*, 492 U.S. 361, 380 (1989) (allowing execution of those 16 or older at the time of the offense), *with* *Thompson v. Oklahoma*, 487 U.S. 815, 838 (1988) (disallowing execution of a 15-year-old).

15. *Atkins v. Virginia*, 536 U.S. 304 (2002) (overruling *Penry*); *see infra* text accompanying notes 29–39.

16. *Roper v. Simmons*, 543 U.S. 551 (2005) (overruling *Stanford*); *see infra* text accompanying notes 40–61.

17. *See* *Panetti v. Quarterman*, 127 S. Ct. 2842 (2007); *infra* text accompanying notes 160–68.

18. *Kennedy v. Louisiana*, 128 S. Ct. 2641 (2008); *see infra* text accompanying notes 91–106.

19. *See Atkins*, 536 U.S. at 316 n.21; *infra* text accompanying notes 37–39.

20. *See Roper*, 543 U.S. at 575–78; *infra* text accompanying notes 56–61.

21. Quoting himself, Scalia's dissent in *Atkins* presented his originalist position: The Eighth Amendment is addressed to always-and-everywhere “cruel” punishments, such as the rack and the thumbscrew. But where the punishment is in itself permissible, “[t]he Eighth Amendment is not a ratchet, whereby a temporary consensus on leniency for a particular crime fixes a permanent constitutional maximum, disabling the States from giving effect to altered beliefs and responding to changed social conditions.”

*Atkins*, 536 U.S. at 349 (Scalia, J., dissenting) (quoting *Harmelin v. Michigan*, 501 U.S. 957, 990 (1991) (plurality opinion)).

standards of decency that mark the progress of a maturing society”<sup>22</sup>—has never commanded a majority on the Court, and this Article assumes that it never will.

Part II of this Article begins with the more recent decisions establishing categorical limits on the death penalty, casting them as models for analysis. Part III then turns to the unfinished business of limiting the death penalty to those who intentionally killed or intentionally aided another to kill, discussing what has been accomplished and recommending steps to be taken in future decisions. The categorical bar on executing the seriously mentally ill is the focus of Part IV, which ends by advocating the extension of this bar to those who suffered serious mental illness at the time they committed their crimes.

## II. ESTABLISHED CATEGORICAL BARS

The U.S. Supreme Court’s decisions in *Atkins v. Virginia* and *Roper v. Simmons* are jurisprudential models for establishing categorical limits on capital punishment under the Eighth Amendment. In each case, the Court confronted the confusion of its prior decisions and resolved that confusion by adopting a clear rule. The new rule not only provided clarity, but also reined in the death penalty, preventing its application in an entire class of cases in which the propriety of capital punishment is at least questionable and at worst outrageous. The Court disapproved case-by-case determination in favor of a categorical limit, in order to prevent the egregious cases that inevitably slip through individual analysis.

### A. Mental Retardation

Regarding mental retardation, the Court embraced case-by-case determination in its 1989 decision in *Penry v. Lynaugh*.<sup>23</sup> Leading a five-person majority, Justice O’Connor refused to adopt a categorical rule regarding retardation, instead opting to

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22. *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958) (plurality opinion). *Trop*’s crucial language has been quoted with approval in numerous majority opinions. *See, e.g., Roper*, 543 U.S. at 560–61; *Atkins*, 536 U.S. at 311–12; *Hudson v. McMillian*, 503 U.S. 1, 8 (1992); *Browning-Ferris Indus. v. Kelco Disposal*, 492 U.S. 257, 264 n.4 (1989); *Penry v. Lynaugh*, 492 U.S. 302, 330–31 (1989); *McCleskey v. Kemp*, 481 U.S. 279, 300 (1987); *Ford v. Wainwright*, 477 U.S. 399, 406 (1986); *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981); *Estelle v. Gamble*, 429 U.S. 97, 102 (1976); *McGautha v. California*, 402 U.S. 183, 202 (1971); *Witherspoon v. Illinois*, 391 U.S. 510, 519 n.15 (1968); *see also* Edward Lazarus, *Two Important Supreme Court Anniversaries for 2008: The Cases of Trop v. Dulles, Concerning Citizenship, and Cooper v. Aaron, Concerning Civil Rights Enforcement*, FINDLAW, Jan. 3, 2008, <http://writ.lp.findlaw.com/lazarus/20080103.html>.

23. *Penry*, 492 U.S. at 335.

allow the sentencer in a capital case to consider retardation as a mitigating factor:

[M]ental retardation is a factor that may well lessen a defendant's culpability for a capital offense. But we cannot conclude today that the Eighth Amendment precludes the execution of any mentally retarded person . . . simply by virtue of his or her mental retardation alone. So long as sentencers can consider and give effect to mitigating evidence of mental retardation in imposing sentence, an individualized determination whether "death is the appropriate punishment" can be made in each particular case.<sup>24</sup>

The four dissenters in *Penry* argued for a categorical bar.<sup>25</sup> Justice Brennan particularly focused on the insufficiency of case-by-case determination: "The consideration of mental retardation as a mitigating factor is inadequate to guarantee, as the Constitution requires, that an individual who is not fully blameworthy for his or her crime because of a mental disability does not receive the death penalty."<sup>26</sup> This is because case-by-case analysis sometimes fails; there is "no assurance that an adequate individualized determination of whether the death penalty is a proportionate punishment will be made at the conclusion of each capital trial."<sup>27</sup> Brennan then quoted a newspaper column making the kind of argument that might subvert a sentencer's appropriate consideration of mental retardation:

Indeed, a sentencer will entirely discount an offender's retardation as a factor mitigating against imposition of a death sentence if it adopts this line of reasoning: "It appears to us that there is all the more reason to execute a killer if he is also . . . retarded. Killers often kill again; [a] retarded killer is more to be feared than a . . . normal killer. There is also far less possibility of his ever becoming a useful citizen."<sup>28</sup>

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24. *Id.* at 340. Though Chief Justice Rehnquist and Justices White, Kennedy, and Scalia refused to join this language in Justice O'Connor's opinion, it is clear from their separate opinion that they agreed with her preference for a case-by-case consideration of the relevance of mental retardation. *See id.* at 358 (Scalia, J., concurring in part and dissenting in part).

25. *See id.* at 343–49 (Brennan, J., concurring in part and dissenting in part); *id.* at 350 (Stevens, J., concurring in part and dissenting in part). Justice Marshall joined Justice Brennan's opinion, and Justice Blackmun joined with Justice Stevens. *Id.* at 341 (Brennan, J., concurring in part and dissenting in part); *id.* at 349 (Stevens, J., concurring in part and dissenting in part).

26. *Id.* at 346–47 (Brennan, J., concurring in part and dissenting in part).

27. *Id.* at 347.

28. *Id.* (quoting *Upholding Law and Order*, HARTSVILLE (S.C.) MESSENGER, June

Thirteen years later Brennan's reasoning garnered the support of a majority. Writing in *Atkins v. Virginia* for six justices (including O'Connor and Kennedy, both members of the *Penry* majority), Justice Stevens (who dissented in *Penry*) first set out the general framework for analysis under the Cruel and Unusual Punishment Clause. He recognized, as many Justices had before, that its dictates respond to "the evolving standards of decency that mark the progress of a maturing society."<sup>29</sup> To judge those evolving standards regarding the execution of the mentally retarded, Stevens looked to trends in legislative actions and jury decisions, both of which had been running against execution.<sup>30</sup>

The majority's use of these statistics drew spirited dissents from both Chief Justice Rehnquist and Justice Scalia, claiming "that the Court's assessment . . . more resembles a *post hoc* rationalization for the majority's subjectively preferred result rather than any objective effort to ascertain the content of an evolving standard of decency."<sup>31</sup> There is some merit to this criticism, for the majority seemed driven to its conclusion not principally by its statistics, but more so by the policy reasons it turned to after its examination of legislative and judicial trends.

Justice Stevens's opinion in *Atkins* found that executing the mentally retarded did not serve the twin goals of capital punishment relied upon in *Gregg v. Georgia*: retribution and deterrence.<sup>32</sup> The diminished cognitive functions of the mentally retarded make them less culpable for their actions; as such, they are inappropriate candidates for the ultimate retribution.<sup>33</sup> For the same reason, the mentally retarded are also less likely to be deterred by the threat of death.<sup>34</sup> Though Justice Scalia's dissent warred mightily with these two contentions,<sup>35</sup> the majority's

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24, 1987, at 5B). For a similar argument by Brennan regarding case-by-case consideration of the defendant's youth, see *infra* note 43.

29. *Atkins v. Virginia*, 536 U.S. 304, 311–12 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)); see also *supra* note 22 and accompanying text.

30. See *id.* at 313–16. Justice O'Connor had used a similar line of analysis, though with contrary results, thirteen years earlier in *Penry v. Lynaugh*. See *Penry*, 490 U.S. at 333–34.

31. *Atkins*, 536 U.S. at 322 (Rehnquist, C.J., dissenting); see *id.* at 321–25; *id.* at 342–47 (Scalia, J., dissenting). Scalia repeatedly heaped scorn on Stevens's arguments, speaking of "[t]he Court's thrashing about for evidence of a 'consensus'" and describing one of the majority's contentions as "[e]ven less compelling (if possible)." *Id.* at 346 (internal citation omitted). Justice Thomas joined both dissents. *Id.* at 321 (Rehnquist, C.J., dissenting); *id.* at 337 (Scalia, J., dissenting).

32. See *Gregg v. Georgia*, 428 U.S. 153, 183–86 (1976) (plurality opinion).

33. See *Atkins*, 536 U.S. at 319 ("[T]he lesser culpability of the mentally retarded offender surely does not merit [the death penalty].").

34. *Id.* at 319–20.

35. See *id.* at 349–52 (Scalia, J., dissenting).

commitment to them was unshakeable. Stevens did not even acknowledge Scalia's contrary arguments, much less try to refute them. The *Atkins* Court thus disclosed its apparently ironclad belief that executing the mentally retarded is simply wrong, something a civilized society should never do.

Two further points made by the majority underscored this belief. Near the close of his opinion, Stevens reiterated Justice Brennan's argument from *Penry* that "[m]entally retarded defendants in the aggregate face a special risk of wrongful execution" because of:

the lesser ability of mentally retarded defendants to make a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors. Mentally retarded defendants may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes.<sup>36</sup>

In addition to this contention that case-by-case consideration of the mitigating effect of mental retardation is likely to produce unacceptable results,<sup>37</sup> Stevens also recounted the widespread support for a categorical ban among the American public (as shown through opinion polls), by significant professional organizations and religious groups, and "within the world community, [where] the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved."<sup>38</sup> Though these latter arguments drew withering fire from the *Atkins* dissenters,<sup>39</sup> they might well reflect the source of the majority's steadfast commitment that a mentally retarded defendant shall never again be executed in the United States.

### B. Youth

The model for establishing categorical bans on the death penalty that *Atkins* provided was deployed three years later in *Roper v. Simmons*, regarding capital punishment for juveniles.<sup>40</sup> In *Roper*, the Court confronted a more confusing set of prior

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36. *Id.* at 320–21 (majority opinion). Justice Stevens also mentioned the greater propensity of mentally retarded defendants to give false confessions. *Id.* at 321 & n.25.

37. For Justice Scalia's response, see *id.* at 352 (Scalia, J., dissenting).

38. *Id.* at 316 n.21 (majority opinion).

39. See *id.* at 325–27 (Rehnquist, C.J., dissenting) (primarily attacking the use of polling data); *id.* at 347–48 (Scalia, J., dissenting) (awarding to this part of Stevens's opinion "the Prize for the Court's Most Feeble Effort to fabricate 'national consensus'").

40. See *Roper v. Simmons*, 543 U.S. 551, 563–64 (2005).

precedents than it had in *Atkins*. In 1988, a divided Court in *Thompson v. Oklahoma* disapproved of the execution of a defendant who was fifteen at the time he committed his crime,<sup>41</sup> but in 1989 the still-fractured Court upheld death sentences for defendants who were sixteen and seventeen at the time of their crimes' commissions, in *Stanford v. Kentucky*.<sup>42</sup> The only justice on the prevailing side of these two decisions was Sandra Day O'Connor,<sup>43</sup> whose crucial position appeared to be that while there was no national consensus regarding the age at which an offender is too young to be a candidate for execution, it was unconstitutional to execute a juvenile under a statute that sets no minimum age of eligibility for capital punishment.<sup>44</sup>

The 2005 decision in *Roper v. Simmons* swept away all this confusion, establishing a categorical ban on executing criminals who were under eighteen when they committed their crimes.<sup>45</sup> Justice Kennedy (who was on the prevailing side in *Stanford* and did not participate in *Thompson*) wrote the opinion of the Court over dissents by Justices O'Connor and Scalia.<sup>46</sup> The majority opinion in *Roper* explicitly followed the pattern of *Atkins*,<sup>47</sup> first looking at the trend of legislative and jury decisions and then evaluating the execution of juveniles in terms of retribution and deterrence.<sup>48</sup>

Once again, the Court's discernment of a "national consensus against the death penalty for juveniles" proved

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41. *Thompson v. Oklahoma*, 487 U.S. 815, 838 (1988).

42. *Stanford v. Kentucky*, 492 U.S. 361, 371–72 (1989).

43. Justices Brennan, Marshall, Blackmun, and Stevens composed the plurality in *Thompson* and dissented in *Stanford*. *Id.* at 382 (Brennan, J., dissenting); *Thompson*, 487 U.S. at 818. Chief Justice Rehnquist and Justices White and Scalia dissented in *Thompson* but were among the plurality in *Stanford*. *Stanford*, 492 U.S. at 364 (plurality opinion); *Thompson*, 487 U.S. at 859 (Scalia, J., dissenting). Justice Kennedy took no part in *Thompson* and joined the plurality in *Stanford*. *Stanford*, 492 U.S. at 364 (plurality opinion); *Thompson*, 487 U.S. at 838.

Brennan's dissent in *Stanford*, similar to his dissent in *Penry*, *see supra* text accompanying notes 26–30, emphasized that "it is constitutionally inadequate that a juvenile offender's level of responsibility be taken into account only along with a host of other factors that the court or jury may decide outweigh that want of responsibility," in part because regarding delinquent juveniles, "society's presumption of a capacity for mature judgment at 18 is much too generous." *Stanford*, 492 U.S. at 396–97 & n.11 (Brennan, J., dissenting).

44. *See id.* at 380–82 (O'Connor, J., concurring in part and concurring in the judgment); *Thompson*, 487 U.S. at 857–58 (O'Connor, J., concurring in the judgment).

45. *Roper v. Simmons*, 543 U.S. 551, 575 (2005).

46. *Id.* at 555. Chief Justice Rehnquist and Justice Thomas joined the Scalia dissent. *Id.* at 607 (Scalia, J., dissenting).

47. "Just as the *Atkins* Court reconsidered the issue decided in *Penry*, we now reconsider the issue decided in *Stanford*." *Id.* at 564 (majority opinion).

48. *Id.* at 564–72.

contentious,<sup>49</sup> with both dissenting opinions quarreling extensively with Justice Kennedy's deployment of the relevant statistics.<sup>50</sup> Once again, however, the majority proved impervious to this line of attack.

A similar pattern appeared in the Justices' treatment of retribution and deterrence. Kennedy first described the psychological differences between youths and adults that "render suspect any conclusion that a juvenile falls among the worst offenders": greater impetuosity, more vulnerability to outside pressure, and the generally transitory nature of youthful personality traits.<sup>51</sup> Given these differences, the Court had little difficulty in concluding that "the case for retribution is not as strong with a minor as with an adult," and that "the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence."<sup>52</sup> Both O'Connor and Scalia disagreed at length with these conclusions,<sup>53</sup> but to no avail.

As in *Atkins*, the majority's unwillingness to take on the dissenters on these points suggests other motivations. Justice Kennedy implied those motivations, again similarly to *Atkins*, first in arguing the inadequacy of considering youth on a case-by-case basis:

The differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty . . . . An unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death. In some cases a defendant's youth may even be counted against him.<sup>54</sup>

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49. *Id.* at 564; *see id.* at 564–67 (using the "direction of change" of various states to piece together a national consensus).

50. *See id.* at 594–97 (O'Connor, J., dissenting); *id.* at 608–13 (Scalia, J., dissenting). As in his *Atkins* dissent, Justice Scalia's rhetoric flamed again in *Roper*: The majority's "implausible assertion of national consensus" rests "on the flimsiest of grounds;" indeed, "[w]ords have no meaning" if the Court's assertion is accepted. *Id.* at 608–10.

51. *See id.* at 569–70 (majority opinion).

52. *Id.* at 571.

53. *See id.* at 599–603 (O'Connor, J., dissenting); *id.* at 615–21 (Scalia, J., dissenting).

54. *Id.* at 572–73 (majority opinion). The opinion went on to note that the prosecutor in the *Roper* case suggested that the defendant's youth was an "aggravating rather than mitigating" factor. *Id.*

Allowing individual determinations of the relevance of youth—championed in both dissents<sup>55</sup>—is thus considered unacceptable because of the risk of error; even one such erroneous execution is too much for the majority to countenance.

This revulsion perhaps stemmed from the second clue given by Kennedy as to the Court's motivations: his six-paragraph, 1,150-word discussion of "the overwhelming weight of international opinion against the juvenile death penalty."<sup>56</sup> Beginning with "the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty,"<sup>57</sup> this discussion canvassed article 37 of the United Nations Convention on the Rights of the Child ("which every country in the world has ratified save for the United States and Somalia")<sup>58</sup> and other international agreements prohibiting the execution of juveniles, the paucity of such executions outside the United States in recent years, and the abandonment of the death penalty for juveniles in Great Britain, the jurisprudential source of the prohibition on cruel and unusual punishment, decades before it abolished capital punishment entirely.<sup>59</sup> This reliance on foreign law drew particular scorn from Justice Scalia, epitomized in his jibe, "[b]ecause I do not believe that the meaning of our Eighth Amendment . . . should be determined by the subjective views of five Members of this Court *and like-minded foreigners*, I dissent."<sup>60</sup> But in this instance, Justice Kennedy chose to respond to the dissent, perhaps signaling the significance of the majority's reliance on international legal opinion. After several general sentences celebrating America's Constitution and its "innovative principles," the Court concluded, "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."<sup>61</sup>

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55. *Id.* at 602–03 (O'Connor, J., dissenting); *id.* at 620–21 (Scalia, J., dissenting).

56. *Id.* at 578 (majority opinion).

57. *Id.* at 575.

58. *Id.* at 576 (citing the Convention on the Rights of the Child, G.A. Res. 44/25, U.N. Doc. A/Res/44/25 (Nov. 20, 1989)).

59. *See id.* at 576–78.

60. *Id.* at 608 (Scalia, J., dissenting) (emphasis added); *see id.* at 622–28 (expanding on his view that international opinion should play no part in the Court's decision). Justice O'Connor parted company with her fellow dissenters on this point, arguing that international law could be relevant to interpretation of the Eighth Amendment. *See id.* at 604–05 (O'Connor, J., dissenting).

61. *Id.* at 578 (majority opinion).

In deciding whether to impose categorical bars on capital punishment, both *Atkins* and *Roper* looked to trends in legislative and jury decisionmaking and assessed the proposed bar in terms of retribution and deterrence. However, these inquiries seem less important than concern about the possibility of unacceptable executions without a categorical bar, as well as acknowledgment of the climate of opinion, particularly international opinion, that makes such executions unacceptable. The majorities in both cases, responding to this climate of opinion, took steps to render America's death penalty more civilized and hence more palatable to the rest of the world. As the next two Parts of this Article demonstrate, a similar approach should be taken regarding two other proposed categorical limits to execution, for those not proven to have intentionally killed and for the seriously mentally ill.

### III. INCOMPLETE CATEGORICAL BARS

The campaign to limit the death penalty to those who have killed intentionally or intentionally aided another to kill is, from the Supreme Court's perspective, the longest-standing contemporary effort to establish a categorical bar to capital punishment. One prong of the campaign, initiated by the Court in 1977, has sought to limit the death penalty to murder and other crimes necessarily involving the taking of a human life; the other, first discussed by a Justice in 1978, has focused on those convicted of such a crime, but without proof of an intent to kill. Neither prong of the campaign has experienced the success realized in *Atkins* and *Roper*, but the following Subparts outline how the achievements of the past can be extended to further ameliorate America's death penalty.

#### A. *Nonhomicides*

In 1977 in *Coker v. Georgia*, the U.S. Supreme Court held that death could not be the penalty for the rape of an adult woman.<sup>62</sup> Justice White's plurality opinion so contended,<sup>63</sup> and though Justices Brennan and Marshall merely concurred in the judgment—content as they were in reasserting their position that the death penalty is cruel and unusual in all

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62. *Coker v. Georgia*, 433 U.S. 584, 600 (1977).

63. *Id.* at 599. Justices Stewart, Blackmun, and Stevens joined White's opinion. *Id.* at 586.

circumstances<sup>64</sup>—it cannot be doubted that they supported the narrower position taken by Justice White.<sup>65</sup>

The plurality opinion in *Coker* largely set the pattern for later analyses of categorical bars to capital punishment<sup>66</sup> by looking first to trends in legislative and jury decisions and then to jurisprudential concepts. After describing a strong trend against executing rapists,<sup>67</sup> Justice White expounded the precepts that no doubt underlay that trend:

[I]n terms of moral depravity and of the injury to the person and to the public, [rape] does not compare with murder, which does involve the unjustified taking of human life. Although it may be accompanied by another crime, rape by definition does not include the death of or even the serious injury to another person. The murderer kills; the rapist, if no more than that, does not. Life is over for the victim of the murderer; for the rape victim, life may not be nearly so happy as it was, but it is not over and normally is not beyond repair. We have the abiding conviction that the death penalty, which “is unique in its severity and irrevocability,” is an excessive penalty for the rapist who, as such, does not take human life.<sup>68</sup>

This ringing jurisprudential conviction<sup>69</sup> suggests that the plurality had simply decided that in the United States the death penalty should no longer be imposed for rape.<sup>70</sup> Thus they rejected the argument, pressed by Justice Powell in his separate opinion in *Coker*, that the propriety of a capital sentence for rape should be judged based on the aggravating circumstances of each

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64. See *id.* at 600 (Brennan, J., concurring in the judgment); *id.* (Marshall, J., concurring in the judgment).

65. Chief Justice Burger assumed as much in his *Coker* dissent. See *id.* at 612 n.7 (Burger, C.J., dissenting).

66. See, e.g., *supra* note 30 and accompanying text (discussing *Atkins v. Virginia*); *supra* notes 47–48 and accompanying text (discussing *Roper v. Simmons*).

67. *Coker*, 433 U.S. at 593–97 (plurality opinion). Chief Justice Burger’s dissent, joined by then-Justice Rehnquist, disputed this conclusion. See *id.* at 613–19 (Burger, C.J., dissenting). Justice Powell’s concurrence read the evidence to “support” only “the conclusion that society finds the death penalty unacceptable for the crime of rape in the absence of excessive brutality or severe injury.” *Id.* at 604 (Powell, J., concurring in the judgment and dissenting in part).

68. *Id.* at 598 (plurality opinion) (internal footnote and citation omitted) (quoting *Gregg v. Georgia*, 428 U.S. 153, 187 (1976) (plurality opinion)). For a contrary view, see *Coker*, 433 U.S. at 619–21 (Burger, C.J., dissenting).

69. As has been noted, White’s jurisprudential discussion sounded themes of retribution, with little attention to deterrence. See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 62 (4th ed. 2006).

70. See *id.* at 61. An unvoiced, but suspected, source of this conviction was the demonstrated racial disparity in capital sentencing for rape. Black rapists of white women were far more likely to be sentenced to death, especially in the South. See *id.* at 61 n.28.

case.<sup>71</sup> It should also be noted that the plurality invoked the weight of international opinion: “It is thus not irrelevant here that out of 60 major nations in the world surveyed in 1965, only 3 retained the death penalty for rape where death did not ensue.”<sup>72</sup>

The reasoning of the *Coker* plurality implied that death should never be the sentence for any rape, but Justice White limited his holding to the “rape of an adult woman.”<sup>73</sup> This phraseology allowed one court subsequently to rule that the Constitution permits the execution of a child rapist. The Louisiana Supreme Court first held to this effect in 1996, ruling on a pretrial motion.<sup>74</sup> The U.S. Supreme Court denied review, with three justices noting that the pretrial nature of the case might pose a jurisdictional bar to certiorari.<sup>75</sup> The Louisiana court reaffirmed its position in 2007, this time on appellate review after trial and sentencing.<sup>76</sup> In 2008, the U.S. Supreme Court reversed by a vote of five to four, holding squarely in *Kennedy v. Louisiana* that “the Eighth Amendment prohibits the death penalty for this offense.”<sup>77</sup>

The Louisiana Supreme Court in *Kennedy* made an effort to justify its holding both statistically and jurisprudentially, but neither effort was convincing. The Louisiana Supreme Court acknowledged that only five states punished child rape by execution,<sup>78</sup> but tried to give weight to its statistical argument by adding those states that would allow capital punishment for

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71. See *Coker*, 433 U.S. at 603–04 (Powell, J., concurring in the judgment and dissenting in part).

72. *Id.* at 596 n.10 (plurality opinion).

73. *Id.* at 592. One possible reason for this limitation was that the legislative trend regarding child rape was not quite as strong as the trend against imposing death for rape of an adult. See *id.* at 595–96. While Georgia was the only jurisdiction in 1977 that authorized a death sentence for adult rape, two other states, Florida and Mississippi, joined Georgia in punishing child rape by execution. *Id.*

74. See *State v. Wilson*, 685 So. 2d 1063, 1073 (La. 1996) (denying a motion to quash the indictment of a man charged with raping a five-year-old girl).

75. *Bethley v. Louisiana*, 520 U.S. 1259, 1259 (1997).

76. See *State v. Kennedy (Kennedy I)*, 957 So. 2d 757, 793 (La. 2007) (upholding the death penalty in the case of aggravated rape of a child), *rev'd sub. nom.*, *Kennedy v. Louisiana (Kennedy II)*, 128 S. Ct. 2641, 2664–65 (2008) (ruling that child rape does not merit the death penalty).

77. *Kennedy II*, 128 S. Ct. at 2646.

78. *Kennedy I*, 957 So. 2d at 784. Legislation in Texas subsequently raised the number to six; see *Kennedy II*, 128 S. Ct. at 2651; Death Penalty Information Center, Death Penalty for Offenses Other than Murder, <http://www.deathpenaltyinfo.org/article.php?&did=2347> (last visited Jan. 30, 2009); see also Editorial, *Death to Child Rapists?*, L.A. TIMES, June 5, 2007, at A20; Marci Hamilton, *States Move to Enact Laws Allowing the Death Penalty for Pedophiles: A Good Sign with Respect to Public Dedication to Protecting Children, But Potentially Not the Most Effective Way to Do So*, FINDLAW, May 31, 2007, <http://writ.lp.findlaw.com/hamilton/20070531.html>.

other crimes not requiring proof of a death: “extraordinary crimes against the government, *i.e.*, treason, espionage, aircraft piracy”; aggravated kidnapping; aggravated assault by a prisoner; and drug “kingpin” statutes.<sup>79</sup> Aggregating capital offenses not requiring proof of a death in this way is not methodologically sound, because it masks the fact that each of these subcategories only includes a handful of jurisdictions: by the Louisiana Supreme Court’s count, six for crimes against the government, four for aggravated kidnapping, one for aggravated assault by a prisoner, and two for drug kingpin statutes. And the state supreme court did not even mention the extraordinarily few sentences of death actually handed down under these statutes.<sup>80</sup>

The state court’s jurisprudential argument in *Kennedy* was similarly weak. Attempting to distinguish *Atkins* and *Roper*, the Louisiana court pointed out that “unlike the young or mentally retarded, [child rapists] share no common characteristic tending to mitigate the moral culpability of their crimes.”<sup>81</sup> But the state supreme court made no real attempt to distinguish *Coker*’s “abiding conviction that the death penalty . . . is an excessive penalty for the rapist who . . . does not take human life,”<sup>82</sup> other than to assert the state’s special responsibility to care for its children.<sup>83</sup>

The state court decision in *Kennedy* was flatly inconsistent with the fundamental reasoning of *Coker v. Georgia*, and the U.S. Supreme Court properly reversed it, imposing a categorical bar to the imposition of the death penalty for child rape.<sup>84</sup> International opinion certainly supports such a holding, as “only China, Iran, Jordan, Mongolia, the Philippines, Uganda, and Uzbekistan still retain the death penalty for child rape.”<sup>85</sup> Further, child rape

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79. *Kennedy I*, 957 So. 2d at 786–88. The sole dissenter in the Louisiana Supreme Court was unconvinced: “Despite recent legislative enactments in other states, nothing approaching a consensus exists in capital jurisdictions on the appropriateness of the death penalty for non-homicide crimes.” *Id.* at 794 (Calogero, C.J., dissenting).

80. *See id.* at 786–88 (majority opinion). The only two are *Kennedy* and Richard Davis, a Louisiana child rape defendant who was sentenced after *Kennedy*. *See Kennedy II*, 128 S. Ct. at 2657; Death Penalty Information Center, *supra* note 78; *see also* Loresha Wilson, *Death for Rapist: Jury Says Man Should Die for Assaulting 5-Year-Old*, SHREVEPORT TIMES, Dec. 13, 2007, at 1A.

81. *Kennedy I*, 957 So. 2d at 788–89.

82. *Coker v. Georgia*, 433 U.S. 584, 598 (1977) (plurality opinion) (internal citation omitted).

83. *See Kennedy I*, 957 So. 2d at 789. *But see* Hamilton, *supra* note 78 (“[P]edophile-death-penalty laws are, in the end, a distraction from what needs to be done to truly protect the most children possible, the most effectively.”).

84. *See Kennedy II*, 128 S. Ct. at 2652–64 (“[T]he death penalty is not a proportional punishment for the rape of a child.”).

85. Carli J. Wilcox, Comment, *Is South Carolina’s New Capital Child Rape Statute*

cases seem particularly inappropriate for case-by-case determination, because of the great potential that the horrendous circumstances of the crime will blot out all mitigating evidence, even the fact that no human life was taken. Indeed, this may well have happened in *Kennedy*, where arguably gruesome photographs of the eight-year-old victim's extensive injuries were admitted.<sup>86</sup> In addition, the victim (fourteen at the time of trial) sat in the witness box crying for several minutes before her testimony began, broke down during direct examination such that a recess was required, and sat in court crying while the jury viewed a videotape of her being questioned soon after the rape.<sup>87</sup> Finally, the prosecutor made over-the-top arguments about the victim's suffering at both the guilt<sup>88</sup> and sentencing phases.<sup>89</sup> In this atmosphere, it is little wonder that the jury ignored the defendant's "limited mental functioning," which one expert characterized as being "on the cusp of mild mental retardation,"<sup>90</sup> and above all, the fact that his crime did not result in the loss of human life.

In reversing the Louisiana Supreme Court, Justice Kennedy's majority opinion for the U.S. Supreme Court largely followed the model set in *Atkins* and *Roper*. The Court first found

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*Unconstitutional as Cruel and Unusual Under the Eighth Amendment?*, 1 CHARLESTON L. REV. 315, 342–43 (2007).

86. See *Kennedy I*, 957 So. 2d at 761 (describing the victim's physical injuries); *State v. Kennedy*, No. 05-KA-1981, 2007 WL 1471652, at \*53 (La. May 22, 2007). In upholding the admission of the photographs, the court characterized them as "not so gruesome as to be overwhelming." *Id.*

87. *Kennedy I*, 957 So. 2d at 767–68.

88. "You saw L.H. [the victim] in the courtroom; how hard it was for her to come in here. You can only imagine. She's telling you what happened to her. She can't go to her Dad [the defendant, her stepfather], because he is the monster. Only you can protect her." *Kennedy*, 2007 WL 1471652, at \*51.

89. "You want to know what L.H. [the victim] wants, or what she thinks. . . . She deserves, L.H. does, to have a time and place to where he's sentenced to die. She deserves that. She deserves that because of what she's been through." *Id.* at \*59. After an objection, the prosecutor continued, playing on the fact that Kennedy is the victim's stepfather:

Those of you that have children know that people have nightmares. They want the lights on, don't they. They want you to check under the bed; make sure there is no monster. Make sure there's nothing under the bed, Daddy. Make sure all of these things. . . . Tell L.H. we're turning out the light. You can go to sleep baby, because we're going to make sure—we're going to make sure that you sleep. We're going to make sure; turn out the light and rest easy.

*Id.* The prosecutor concluded, apparently referring to the photographs of the victim's injuries: "That's how he touched L.H., and that's how he left her. That's his footprint in the sand. That's his footprint. This is wrong. He is wrong. Give him the death penalty for what he has done." *Id.*

90. *Id.* at \*45, \*48. *But see id.* at \*46 (displaying another expert's characterization of the defendant as "an average high school graduate" whose speech "show[ed] no impairment in thought processes").

that legislative adoption of the death penalty for child rape in six states was not enough to overcome the consensus shown by the opposition of forty-four states and the federal government,<sup>91</sup> and by the paucity of jury decisions to punish child rape with death.<sup>92</sup> Turning to the rationales for punishment, Justice Kennedy acknowledged that the death penalty for child rape could serve some retributive or deterrent function, but emphasized the “incongruity” of capital punishment to the defendant’s crime: “In measuring retribution . . . it is appropriate to distinguish between a particularly depraved murder that merits death as a form of retribution and the crime of child rape.”<sup>93</sup> Regarding deterrence, the majority opinion questioned the effectiveness of deterrence (because the availability of the capital punishment might increase both the underreporting of child rape and the danger to the victim), ultimately concluding that “uncertainty on the point makes the argument for the penalty less compelling than for homicide crimes.”<sup>94</sup>

These contentions by the majority are not overwhelmingly persuasive, as Justice Alito’s dissent pointed out.<sup>95</sup> Only six states have authorized execution for child rape, according to the dissent, because *Coker*’s broad language “stunted legislative consideration of the question,”<sup>96</sup> and considering the recency of most of these statutes, the small number of death sentences handed down is not surprising.<sup>97</sup> As for the Court’s arguments

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91. See *Kennedy v. Louisiana (Kennedy II)*, 128 S. Ct. 2641, 2651–53 (2008). Since the Supreme Court’s decision in *Kennedy*, controversy has arisen because the Court (and all the briefing parties) overlooked the 2006 amendment of the Uniform Code of Military Justice to allow the death penalty for child rape. See Linda Greenhouse, *In Court Ruling on Executions, a Factual Flaw*, N.Y. TIMES, July 2, 2008, at A1, available at <http://www.nytimes.com/2008/07/02/washington/02scotus.html> (“It turns out that Justice Kennedy’s confident assertion about the absence of federal law was wrong.”); Linda Greenhouse, *Justice Dept. Admits Error in Failure to Brief Court*, N.Y. TIMES, July 3, 2008, at A15, available at <http://www.nytimes.com/2008/07/03/us/03scotus.html>. The Supreme Court subsequently denied Louisiana’s petition for a rehearing based on this misunderstanding. *Kennedy v. Louisiana*, 129 S. Ct. 1 (2008).

92. *Kennedy II*, 128 S. Ct. at 2657–58.

93. *Id.* at 2662.

94. *Id.* at 2664.

95. *Id.* at 2665 (Alito, J., dissenting). Chief Justice Roberts and Justices Scalia and Thomas joined the dissent. The absence of a separate, more sarcastic dissent by Scalia, as in *Atkins* and *Roper*, is noteworthy, especially in light of the scant attention—one clause, *id.* at 2677—the *Kennedy* dissent gives to the originalist interpretation of the Eighth Amendment. See *supra* note 21.

96. *Kennedy II*, 128 S. Ct. at 2665 (Alito, J., dissenting). The majority’s response was, “We see little evidence of this.” See *id.* at 2654–55 (majority opinion) (citing evidence suggesting that state legislatures and courts understand that *Coker*’s holding is limited to the rape of adult women).

97. *Id.* at 2672 & n.7 (Alito, J., dissenting).

relating to retribution and deterrence, the *Kennedy* dissent fundamentally disagreed that homicide crimes are categorically different from the rape of a child:

[I]s it really true that every person who is convicted of capital murder and sentenced to death is more morally depraved than every child rapist?

....

... [T]he loss of human life represents a unique harm, but that does not explain why other grievous harms are insufficient to permit a death sentence.<sup>98</sup>

As in *Atkins* and *Roper*, the relative weakness of the majority's arguments in *Kennedy* suggests that the Court was animated by other concerns. One was certainly the unacceptability of case-by-case determination in child rape death penalty cases. Because this crime "in many cases will overwhelm a decent person's judgment," Justice Kennedy wrote, "we have no confidence that the imposition of the death penalty would not be so arbitrary as to be 'freakis[h].'"<sup>99</sup>

Concern regarding international opinion did not surface in the majority opinion in *Kennedy v. Louisiana*,<sup>100</sup> but one can discern its subterranean effects in the Court's discussion of its role in fashioning death penalty law, which pervades the majority opinion. Again and again, Justice Kennedy emphasized the Court's restraining role on the excesses of capital punishment, its duty to impose "civilized standards."<sup>101</sup> The introductory section to the majority's analysis identified the danger the Supreme Court must guard against: "When the law punishes by death, it risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint," which is why "the Court insists upon confining the instances in which the punishment can be imposed."<sup>102</sup> After the

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98. *Id.* at 2676.

99. *Id.* at 2661 (majority opinion) (quoting *Furman v. Georgia*, 408 U.S. 238, 310 (1972) (Stewart, J., concurring)). The Court also pointed out that "[t]he problem of unreliable, induced, and even imagined child testimony means there is a 'special risk of wrongful execution' in some child rape cases." *Id.* at 2663 (quoting *Atkins v. Virginia*, 536 U.S. 304, 321 (2002)).

100. See The International Dogs that Did Not Bark in *Kennedy*, Posting of Douglas A. Berman to Sentencing Law and Policy, [http://sentencing.typepad.com/sentencing\\_law\\_and\\_policy/2008/07/the-internation.html](http://sentencing.typepad.com/sentencing_law_and_policy/2008/07/the-internation.html) (July 13, 2008, 12:23 EST) (contrasting the *Kennedy* opinion with *Roper*, in which the Court relied heavily upon international law to interpret the Eighth Amendment).

101. *Kennedy II*, 128 S. Ct. at 2658 (quoting *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (plurality opinion)).

102. *Id.* at 2650.

opinion's discussion of consensus, Justice Kennedy returned to the rhetoric of confinement in a lengthy preamble to consideration of retribution and deterrence, sounding the following notes:

[D]ecency, in its essence, presumes respect for the individual and thus moderation or restraint in the application of capital punishment.

....

Our response . . . has been to insist upon confining the instances in which capital punishment may be imposed.

....

. . . [Large numbers of executions for child rape] could not be reconciled with our evolving standards of decency and the necessity to constrain the use of the death penalty.<sup>103</sup>

“[M]oderation,” “restraint,” “confin[ement],” “constrain[t]”—these are the watchwords of the *Kennedy* Court, sounded too in the opinion's coda, referring yet again to the “evolving standards of decency,” which “require[] that use of the death penalty be restrained. The rule of evolving standards of decency . . . means that resort to the penalty must be reserved for the worst of crimes and limited in its instances of application.”<sup>104</sup>

Though the dissent criticized the majority's use of such “[c]onclusory” terms,<sup>105</sup> they nevertheless betoken the essence of the Court's motivation: Influenced by opposition to capital punishment, both foreign and domestic, a majority of the Court in *Kennedy* sought to civilize the death penalty by “reserving its use, at this stage of evolving standards and in cases of crimes against individuals, for crimes that take the life of the victim.”<sup>106</sup>

The limitation of *Kennedy*'s holding to “crimes against individuals” reflected the Court's decision to distinguish child rape from “treason, espionage, terrorism, and drug kingpin activity, which are offenses against the state.”<sup>107</sup> This distinction may prove elusive—why is being a drug kingpin a crime against the state?<sup>108</sup> where does airline hijacking fall?—and ought to be

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103. *Id.* at 2658–60; *see also id.* at 2661 (“Evolving standards of decency are difficult to reconcile with a regime that seeks to expand the death penalty to an area where standards to confine its use are indefinite and obscure.”).

104. *Id.* at 2664–65 (quoting *Trop*, 356 U.S. at 101).

105. *Id.* at 2677 (Alito, J., dissenting).

106. *Id.* at 2665 (majority opinion).

107. *Id.* at 2659.

108. *See id.* at 2676 (Alito, J., dissenting) (observing that “the Court makes no effort to explain why the harm caused by such crimes is necessarily greater than the harm caused by the rape of young children”).

abandoned. The Supreme Court should use the reasoning of *Coker* and *Kennedy* to ban the execution of all those convicted of crimes that do not necessitate the death of the victim. Aggravated kidnapping, aggravated assault by a prisoner, being a drug kingpin, aircraft hijacking, and even espionage, terrorism, and treason, as long as they do not involve the taking of a human life, do not merit the punishment of death. Though these issues are not likely to arise—no one has been executed for any of these crimes since Ethel and Julius Rosenberg in 1953,<sup>109</sup> and no one currently faces death for any of them without an allegation that a human life was taken<sup>110</sup>—the Supreme Court should be ready to strike down any such sentence as cruel and unusual. A civilized legal system should reserve capital punishment for charges requiring proof of a human death.

*B. Lack of Intent to Kill*

Not only should the death penalty be reserved for cases involving the death of the victim, but it should also be limited to charges requiring proof of an intent to kill. Justice White, the author of the plurality opinion in *Coker v. Georgia*, advanced this argument one year after *Coker* in his separate opinion in *Lockett v. Ohio*,<sup>111</sup> and then implemented it in his 1982 opinion for the Court in *Enmund v. Florida*.<sup>112</sup> Unfortunately, the Supreme Court retreated from its *Enmund* holding five years later in *Tison v. Arizona*.<sup>113</sup> Each of these cases involved death sentences for murder in which use of the felony murder rule obviated any need to prove that the defendants intended to kill; the defendants in these cases also were not the direct agents of death, but instead accomplices to the killers in the underlying felonies, further lessening their culpability.<sup>114</sup>

As a step toward bringing America's death penalty closer to international norms in cases such as these, the Court should revisit *Enmund* and *Tison* and embrace the notion first

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109. See generally Doug Linder, Trial of the Rosenbergs: An Account, [http://www.law.umkc.edu/faculty/projects/ftrials/rosenb/ROS\\_ACCT.HTM](http://www.law.umkc.edu/faculty/projects/ftrials/rosenb/ROS_ACCT.HTM) (last visited Jan. 30, 2009) (recounting the tale of espionage and the death sentence at its conclusion—controversial even at that early date).

110. See *supra* note 80 and accompanying text.

111. See *Lockett v. Ohio*, 438 U.S. 586, 624–28 (1978) (White, J., concurring in part, dissenting in part, and concurring in the judgments of the Court); see also CARTER ET AL., *supra* note 8, at 70 n.47.

112. *Enmund v. Florida*, 458 U.S. 782, 797 (1982).

113. *Tison v. Arizona*, 481 U.S. 137 (1987).

114. See generally DRESSLER, *supra* note 69, § 31.06 (discussing the felony-murder rule, including its rationales and criticisms).

advocated by Justice White in 1978: “[I]t violates the Eighth Amendment to impose the penalty of death without a finding that the defendant possessed a purpose to cause the death of the victim.”<sup>115</sup> Following his model in *Coker*, Justice White’s separate opinion in *Lockett* supported his contention both statistically and jurisprudentially. While acknowledging that “approximately half of the States have not legislatively foreclosed the possibility of imposing the death penalty upon those who do not intend to cause death,”<sup>116</sup> Justice White focused his statistical analysis on the number of such sentences actually imposed by juries, finding no more than eight executions of a person convicted of homicide without proof of an intent to kill since 1954.<sup>117</sup> He concluded that “[i]t is clear from recent history that the infliction of death under circumstances where there is no purpose to take life has been widely rejected as grossly out of proportion to the seriousness of the crime.”<sup>118</sup>

Justice White’s jurisprudential analysis first relied on the limited deterrence provided by the death penalty in cases of unintentional homicide:

The value of capital punishment as a deterrent to those lacking a purpose to kill is extremely attenuated. Whatever questions may be raised concerning the efficacy of the death penalty as a deterrent to intentional murders—and that debate rages on—its function in deterring individuals from becoming involved in ventures in which death may unintentionally result is even more doubtful.<sup>119</sup>

Regarding retribution, Justice White did not deny the relevance to punishment of “engag[ing] in serious criminal conduct which poses a substantial risk of violence,” and which

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115. *Lockett*, 438 U.S. at 624 (White, J., concurring in part, dissenting in part, and concurring in the judgments of the Court). Justice White used “purpose” and “intent” interchangeably; see *id.* at 624–25. For purposes of this Article, there is no merit in teasing out the distinctions between them. Cf. Robert Batey, *Judicial Exploitation of Mens Rea Confusion, at Common Law and Under the Model Penal Code*, 18 GA. ST. U. L. REV. 341, 380–99 (2001) (discussing common law concepts of specific intent).

116. *Lockett*, 438 U.S. at 624–25 (White, J., concurring in part, dissenting in part, and concurring in the judgments of the Court).

117. *Id.* In disagreeing with Justice White, the separate opinions of Justices Blackmun and Rehnquist both cited this fact. See *id.* at 614 n.2 (Blackmun, J., concurring in part and concurring in the judgment); *id.* at 635–36 (Rehnquist, J., concurring in part and dissenting in part). The plurality opinion by Chief Justice Burger granted the defendant relief on other grounds. *Id.* at 589 (plurality opinion). Justice Marshall’s concurrence in the judgment likewise did not address Justice White’s argument. *Id.* at 619 (Marshall, J., concurring in the judgment).

118. *Id.* at 625 (White, J., concurring in part, dissenting in part, and concurring in the judgments of the Court).

119. *Id.*

results, albeit unintentionally, in a death, but concluded that “society has made a judgment, which has deep roots in the history of the criminal law, distinguishing at least for purpose of the imposition of the death penalty between the culpability of those who acted with and those who acted without a purpose to destroy human life.”<sup>120</sup>

Four years after his separate opinion in *Lockett*, Justice White had the opportunity to base an opinion of the Court on these principles, in *Enmund v. Florida*.<sup>121</sup> His decision in *Enmund* was essentially an expanded version of his argument in *Lockett*. In the statistical part of the *Enmund* majority opinion, Justice White devoted more space to the work of legislatures, concluding (over the protests of Justice O’Connor’s dissent) that “only a small minority of jurisdictions—eight—allow the death penalty to be imposed solely because the defendant somehow participated in a robbery in the course of which a murder was committed.”<sup>122</sup> Still, as in *Lockett*, his primary statistical emphasis was on the very few sentences of death actually imposed on accomplices to felony murder.<sup>123</sup> Regarding deterrence and retribution, Justice White recapitulated his contentions in *Lockett*, quoting Justice Frankfurter to the effect that “it seems likely that ‘capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation,’”<sup>124</sup> and reasoning that in light of “Enmund’s culpability—what [his] intentions, expectations, and actions were,” “[p]utting Enmund to death to avenge two killings that he did not commit and had no intention of committing or causing does not measurably contribute to the retributive end of ensuring that the criminal gets his just deserts.”<sup>125</sup>

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120. *Id.* at 626 (internal citation omitted). Though Justice White did not use the term “retribution,” his argument rather clearly invoked the concept. *See id.* (affirming that such criminal activity “deserves serious punishment regardless of whether or not” the criminal intends to kill).

121. *Enmund v. Florida*, 458 U.S. 782, 801 (1982). Joining Justice White in the majority were Justices Brennan, Marshall, Blackmun, and Stevens. Blackmun apparently changed his mind since disagreeing with White’s argument in *Lockett*. *See supra* note 117.

122. *Id.* at 792 (majority opinion); *see id.* at 789–93 (reviewing the limitations imposed by various states on the death penalty). *But see id.* at 819–23 (O’Connor, J., dissenting). Chief Justice Burger and Justices Powell and Rehnquist joined O’Connor’s dissent.

123. *Id.* at 794–96 (majority opinion). The dissent characterized this evidence as “impressive,” but stated that it “cannot be accepted uncritically.” *Id.* at 818 (O’Connor, J., dissenting).

124. *Id.* at 799 (majority opinion) (quoting *Fisher v. United States*, 328 U.S. 463, 484 (1946) (Frankfurter, J., dissenting)); *see id.* at 798–801 (arguing that capital punishment for nonpremeditated murder violates Eighth Amendment principles).

125. *Id.* at 800–01.

Justice O'Connor's dissent denigrated the majority's jurisprudential points as "legislative judgments," and instead concluded that case-by-case consideration of the defendant's lack of an intent to kill would avoid the imposition of cruel and unusual punishment.<sup>126</sup> But O'Connor's own disposition of Enmund's case raised doubts about this conclusion because even she would have remanded for a new sentencing hearing, largely because she disagreed with the sentencer's consideration of Enmund's facts. "Because of the peculiar circumstances of this case, I conclude that the trial court did not give sufficient consideration to the petitioner's role in the crimes, and thus did not consider the mitigating circumstances proffered by the defendant at his sentencing hearing."<sup>127</sup> Apparently, even from the dissenting Justices' perspective, Enmund's case was one in which case-by-case consideration of lack of an intent to kill did not avoid an unacceptable result.

To forestall such results, the *Enmund* majority adopted a categorical bar to the death penalty.<sup>128</sup> As support for its bar, the Court turned to international opinion, with Justice White noting that America's use of the felony murder rule is almost unique: "[T]he doctrine of felony murder has been abolished in England and India, severely restricted in Canada and a number of other Commonwealth countries, and is unknown in continental Europe."<sup>129</sup> Thus, *Enmund* seemed to effect a significant restriction on capital punishment in the United States, bringing it more in accord with international norms.

Just five years later, however, the Court undercut *Enmund* in its 1987 opinion in *Tison v. Arizona*.<sup>130</sup> Curiously, Justice White—without explanation—abandoned the rule he had advocated in *Lockett* and *Enmund*,<sup>131</sup> and provided the fifth vote

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126. *Id.* at 826 & n.42 (O'Connor, J., dissenting). "I believe that the factfinder is best able to assess the defendant's blameworthiness." *Id.*

127. *Id.* at 828–29.

128. As in *Coker*, see *supra* text accompanying note 73, White phrased the categorical bar somewhat more narrowly than his reasoning justified, applying only to a defendant "who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed." *Enmund*, 458 U.S. at 797 (majority opinion).

129. *Enmund*, 458 U.S. at 796 n.22.

130. *Tison v. Arizona*, 481 U.S. 137 (1987).

131. Compare *Cabana v. Bullock*, 474 U.S. 376, 386 (1986) (*Enmund* "imposes a categorical rule: a person who has not in fact killed, attempted to kill, or intended that a killing take place or that lethal force be used may not be sentenced to death"), with *Tison*, 481 U.S. at 158 (holding that "major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement"). Some scholars have attempted an explanation for this change in thought. See Richard A. Rosen, *Felony Murder and the Eighth Amendment Jurisprudence of Death*, 31 B.C. L. REV. 1103, 1151 (1990) ("The facts of *Tison* are extreme, and perhaps explain

in support of a majority opinion written by Justice O'Connor, author of the dissent in *Enmund*.<sup>132</sup> Justice O'Connor's opinion for the Court in *Tison* did not overrule *Enmund*, but instead limited its application to "minor actor[s]" in the felony that triggered the felony murder rule.<sup>133</sup> For defendants whose "degree of participation in the crimes was major rather than minor," imposition of the death penalty does not require proof of an intent to kill, but only of the lesser mental state of "reckless indifference to human life."<sup>134</sup>

The *Tison* majority attempted to justify this result statistically by focusing on legislative actions regarding what it termed "midrange felony-murder cases."<sup>135</sup> Predictably, Justice Brennan's dissent reparsed these statistics to reach a different conclusion,<sup>136</sup> and further emphasized, as had the Court in *Enmund*, the paucity of actual death sentences handed down under these statutes.<sup>137</sup>

Turning to jurisprudential analysis, Justice O'Connor stressed the culpability of the person who acts with reckless disregard for human life:

[S]ome nonintentional murderers may be among the most dangerous and inhumane of all—the person who tortures another not caring whether the victim lives or dies, or the robber who shoots someone in the course of the robbery, utterly indifferent to the fact that the desire to rob may

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Justice White's abrupt abandonment of this decade-long effort to require an intent to kill as a prerequisite for the death penalty."); see also Christopher E. Smith, *Bright-Line Rules and the Supreme Court: The Tension Between Clarity in Legal Doctrine and Justices' Policy Preferences*, 16 OHIO N.U. L. REV. 119, 133–37 (1989) (hypothesizing that the majority opinion was a judicial compromise designed to condemn the *Tison* defendants without overruling *Enmund*).

132. *Tison*, 481 U.S. at 138. The majority also included Justices Powell and Rehnquist (by 1986 the Chief Justice), who had joined O'Connor's dissent in *Enmund*, and newly appointed Justice Scalia. The four dissenters in *Tison* had all been in the majority in *Enmund*: Justices Brennan, Marshall, Blackmun, and Stevens.

133. See *id.* at 149–50 (noting that the *Tison* brothers' case fell between two extreme poles: one represented by the "minor actor" *Enmund*, and the other marked by a felony murderer who actually killed, attempted to kill, or intended to kill).

134. *Id.* at 151.

135. See *id.* at 152–55. The majority found "apparent consensus that substantial participation in a violent felony under circumstances likely to result in the loss of innocent human life may justify the death penalty even absent an 'intent to kill.'" *Id.* at 154.

136. See *id.* at 174–75 (Brennan, J., dissenting). The dissent concluded that "approximately three-fifths of American jurisdictions do not authorize the death penalty for a nontriggerman absent a finding that he intended to kill." *Id.* at 175.

137. See *id.* at 176–80 (noting that the infrequency of death sentences for felony murder suggests the states are reluctant to impose this penalty, and that when it is imposed it is likely to be "arbitrary and therefore unconstitutional").

have the unintended consequence of killing the victim as well as taking the victim's property. This reckless indifference to the value of human life may be every bit as shocking to the moral sense as an "intent to kill."<sup>138</sup>

Thus from a retributive perspective,<sup>139</sup> the *Tison* majority equated reckless indifference to human life to the intent to kill.<sup>140</sup> The dissent vigorously objected to this equation on the commonsensical ground that there is a difference between risking death and desiring it.<sup>141</sup> Justice Brennan expressed what was perhaps his fundamental concern with the majority's result in this way: "The State's ultimate sanction—if it is ever to be used—must be reserved for those whose culpability is greatest."<sup>142</sup>

For the dissenters in *Tison*, this concern was buttressed by the fact that the felony murder rule is "a living fossil," rejected, at least in capital cases, "in virtually all European and Commonwealth countries."<sup>143</sup> Requiring that a defendant be eligible for execution only upon proof of an intent to kill would bring American practice closer to the international standard.

Presaging an argument he would later make regarding the mentally retarded,<sup>144</sup> Justice Brennan also implied that such a rule would protect against the vagaries of case-by-case determination, in which the mitigating force of the defendant's lack of an intent to kill might be overlooked in the presence of "an irresistible wave of public passion."<sup>145</sup> The case of the *Tison*

138. *Id.* at 157 (majority opinion).

139. Other than to mention the role deterrence played in *Enmund*, both Justice O'Connor and Justice Brennan had little to say regarding it. *But cf. id.* at 180–82 (Brennan, J., dissenting) (discussing the need for proportionality as a limit on both deterrence and retribution).

140. *See id.* at 157–58 (majority opinion) ("[S]ome nonintentional murderers may be among the most dangerous and inhumane of all . . .").

141. *See id.* at 170–71 (Brennan, J., dissenting).

[W]hen evaluating such a defendant's mental state, a determination that the defendant acted with intent is qualitatively different from a determination that the defendant acted with reckless indifference to human life. The difference lies in the nature of the choice each has made. The reckless actor has not *chosen* to bring about the killing in the way the intentional actor has. The person who chooses to act recklessly and is indifferent to the possibility of fatal consequences often deserves serious punishment. But because that person has not chosen to kill, his or her moral and criminal culpability is of a different degree than that of one who killed or intended to kill.

*Id.*; *see also id.* at 168–70.

142. *Id.* at 171.

143. *Id.* at 159–60; *see also id.* at 177 & n.15 (listing countries that have abolished or limited the death penalty since the *Enmund* decision).

144. *See supra* text accompanying notes 26–28 (discussing Brennan's concerns over prejudicial treatment of mentally handicapped individuals in *Penry*).

145. *Tison*, 481 U.S. at 182–83 (Brennan, J., dissenting) (quoting *Moore v. Dempsey*,

brothers, whose participation in their father's escape from prison led to his shotgun murder of a family of four, produced just such a wave, "a towering yell' for retribution and justice,"<sup>146</sup> directed at the brothers because their father had died before being apprehended. From these facts, Brennan concluded, "[T]he decision to execute these petitioners . . . appears responsive less to reason than to other, more visceral, demands."<sup>147</sup> Of course, a categorical bar would have prevented this result.

*Tison* was a serious misstep.<sup>148</sup> The Court should return to the path it set out upon in *Enmund*, in order to adopt the rule first advocated by Justice White in *Lockett*: The death penalty should be available only if the state has proved that the defendant—whether the direct agent of death or an accomplice—intended to kill.<sup>149</sup>

#### IV. EMERGING CATEGORICAL BARS

For over twenty years the Supreme Court has held that it is cruel and unusual punishment to execute an insane person; this

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261 U.S. 86, 91 (1923)).

146. *Id.* at 159 (quoting a comment in the *Arizona Republic*); see also ALAN M. DERSHOWITZ, *THE BEST DEFENSE* 300–02 (1982) (detailing the unparalleled press coverage of the hunt for the Tison gang).

147. *Tison*, 481 U.S. at 183–84 (Brennan, J., dissenting). Cooler heads ultimately prevailed, and the Tison brothers avoided the death penalty. See David McCord, *State Death Sentencing for Felony Murder Accomplices Under the Enmund and Tison Standards*, 32 ARIZ. ST. L.J. 843, 874 (2000).

148. See McCord, *supra* note 147, at 856–60 (noting that the Court stretched the *Enmund* holding to reach its decision in *Tison*); Steven F. Shatz, *The Eighth Amendment, the Death Penalty, and Ordinary Robbery-Burglary Murderers: A California Case Study*, 59 FLA. L. REV. 719, 763–64 (2007) (explaining that the *Tison* Court did not take into account "professional opinion within this country and international practice. . . . Academic commentators, with divergent views about the death penalty generally, have joined in rejecting felony-murder as a basis for death eligibility"); Andrew H. Friedman, Note, *Tison v. Arizona: The Death Penalty and the Non-Triggerman: The Scales of Justice Are Broken*, 75 CORNELL L. REV. 123, 152–53 (1989) (decrying the potential "adverse public impact" of the Court's decision); Melanie A. Renken, Comment, *Revisiting Tison v. Arizona: The Constitutionality of Imposing the Death Penalty on Defendants Who Did Not Kill or Intend to Kill*, 51 ST. LOUIS U. L.J. 895, 932 (2007) (noting that in allowing the death penalty for felony murder, *Tison* departs from international standards).

149. In *Kennedy v. Louisiana*, the Court implied some receptivity to such an argument. After glossing *Tison* in its survey of Supreme Court cases on categorical bars to execution (the defendants' "involvement . . . was active, recklessly indifferent, and substantial"), the Court phrased its holding as "a death sentence for one who raped but did not kill a child, and who did not intend to assist another in killing the child, is unconstitutional." *Kennedy v. Louisiana (Kennedy II)*, 128 S. Ct. 2641, 2650–51 (2008). The emphasis on intent, and the concomitant failure to include a recklessly indifferent accomplice to a child rape that results in death, may suggest that *Tison* is ripe for overruling.

position was reaffirmed in 2007 in *Panetti v. Quarterman*.<sup>150</sup> The Court's cases have wrestled with how to define the level of mental illness that would bar execution. While the defendant's mental state at the time of a proposed execution is no doubt an important issue, the Court should also confront the related and more serious question of mental illness at the time of the crime. Consistent with its establishment of other categorical bars to the death penalty—especially *Atkins's* holding that a defendant who is mentally retarded at the time of the crime lacks sufficient culpability to be a fit subject for capital punishment<sup>151</sup>—the Court should rule that a defendant suffering from a serious mental disease or defect at the time of his or her crime is ineligible for capital punishment.

A. *Serious Mental Illness at the Time of Execution*

*Ford v. Wainwright*, a 1986 Supreme Court decision, disapproved the execution of a presently insane death row inmate.<sup>152</sup> A five-Justice majority held, in an opinion by Justice Marshall, that “the Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane.”<sup>153</sup> The majority opinion looked both to statistics—“Today, no State in the Union permits the execution of the insane”<sup>154</sup>—and to the jurisprudence of punishment. Borrowing from Edward Coke, the Court noted that carrying out the death penalty on the insane “provides no example to others and thus contributes nothing to whatever deterrence value is intended to be served by capital punishment,”<sup>155</sup> and also “question[ed] the retributive value of executing a person who has no comprehension of why he has been singled out and stripped of his fundamental right to life.”<sup>156</sup> Among other rationales, the Court also emphasized “the

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150. *Panetti v. Quarterman*, 127 S. Ct. 2842, 2847 (2007).

151. *See supra* text accompanying notes 32–36 (noting that the diminished capacity of mentally handicapped individuals makes capital punishment unsuitable as a deterrent or retributive punishment for such individuals).

152. *Ford v. Wainwright*, 477 U.S. 399, 401 (1986).

153. *Id.* at 409–10. Justices Brennan, Blackmun, Powell, and Stevens signed this part of Marshall's opinion. Justice Rehnquist's dissent, joined by Chief Justice Burger, “[found] it unnecessary to ‘constitutionalize’ the already uniform view that the insane should not be executed,” *id.* at 435 (Rehnquist, J., dissenting), a position with which Justice O'Connor, joined by Justice White, was “in full agreement.” *Id.* at 427 (O'Connor, J., concurring in the result in part and dissenting in part).

154. *Id.* at 408 (majority opinion).

155. *Id.* at 407–08 (citing 3 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND 6 (Lawbook Exch., Ltd. 2002) (1817)).

156. *Id.* at 409; *see also id.* at 408 (“We know of virtually no authority condoning the execution of the insane at English common law.”).

natural abhorrence civilized societies feel at killing one who has no capacity to come to grips with his own conscience or deity.”<sup>157</sup>

The Court in *Ford* gave no further clue as to the definition of insanity for this purpose; that task fell to Justice Powell in his concurring opinion. Because his vote gave Marshall his majority, Powell’s concurrence was pivotal, and his definition of insanity became the controlling standard after *Ford*:<sup>158</sup> “[T]hat those who are executed know the fact of their impending execution and the reason for it.”<sup>159</sup>

The proper definition of insanity that bars execution was again before the Court in 2007 in *Panetti*. As the lower federal courts had found, and as Justice Kennedy’s opinion for a five-Justice majority<sup>160</sup> accepted, *Panetti* met a narrow concept of the *Ford* definition of insanity: “[F]irst, petitioner is aware that he committed the murders; second, he is aware that he will be executed; and, third, he is aware that the reason the State has given for the execution is his commission of the crimes in question.”<sup>161</sup> But *Panetti*’s counsel argued that his delusional client, who had an extensive history of mental illness,<sup>162</sup> lacked a rational understanding of the reason for his execution. One mental health professional testified that *Panetti* sees his death as “part of spiritual warfare . . . between the demons and the forces of the darkness and God and the angels and the forces of light,” and “believes in earnest that the stated reason [for his execution] is a ‘sham’ and the State in truth wants to execute him ‘to stop him from preaching.’”<sup>163</sup>

The Court concluded that executing a person who held such a belief could constitute cruel and unusual punishment: “Petitioner’s submission is that he suffers from a severe, documented mental illness that is the source of gross delusions preventing him from comprehending the meaning and purpose of the punishment to which he has been sentenced. This argument,

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157. *Id.* at 409; *see also id.* at 407 (“[T]he execution of an insane person simply offends humanity . . .”).

158. *See* CARTER ET AL., *supra* note 8, at 263–64.

159. *Ford*, 477 U.S. at 422 (Powell, J., concurring in part and concurring in the judgment). This definition rejected a further requirement, used in some American states, that “a defendant cannot be executed unless he is able to assist in his own defense.” *Id.* at 422 n.3.

160. Justices Stevens, Souter, Ginsburg, and Breyer joined Kennedy’s opinion. Justice Thomas dissented, joined by Chief Justice Roberts and Justices Scalia and Alito. *Panetti v. Quarterman*, 127 S. Ct. 2842, 2847 (2007).

161. *Id.* at 2860.

162. *See id.* at 2848 (detailing the petitioner’s mental illness history, including numerous hospitalizations for mental disorders).

163. *Id.* at 2859.

we hold, should have been considered.”<sup>164</sup> In support of this conclusion, Justice Kennedy canvassed all the reasons given in *Ford* for barring execution of the insane; highlighted how one of them, retribution, would not be served by executing someone with Panetti’s delusions; and then argued that “under a similar logic the other rationales set forth by *Ford* fail to align with” the lower courts’ narrow definition of insanity.<sup>165</sup>

While rejecting the lower courts’ narrow definition of *Ford*’s insanity test, the *Panetti* majority did not substitute one of its own, preferring to remand the case so that the lower courts might propound a broader definition after full development of the facts relating to Panetti’s mental illness.<sup>166</sup> But the Court did suggest certain lodestars for the lower courts’ analysis: of course *Ford*, but also *Atkins v. Virginia* and *Roper v. Simmons*.<sup>167</sup> Perhaps seeing these references as handwriting on the wall, Justice Thomas’s dissent objected to the majority’s “half-baked holding,” deploring both its extension of *Ford*—“today’s opinion can be understood only as holding for the first time that the Eighth Amendment requires ‘rational understanding’”—and the absence of some aspects of the usual analytic framework regarding categorical bars to execution (specifically, statistics regarding legislation adopting a rational understanding prerequisite for execution).<sup>168</sup>

*Panetti* will in all likelihood lead to the extension of *Ford* that Thomas feared, broadening the categorical bar against executing the insane to include more of those who are severely mentally ill.<sup>169</sup> While not justifiable by the sort of statistics the

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164. *Id.* at 2862.

165. *See id.* at 2860–61 (stressing the lower court’s inconsistencies with the *Ford* opinion). Regarding retribution, Kennedy wrote:

The potential for a prisoner’s recognition of the severity of the offense and the objective of community vindication are called in question . . . if the prisoner’s mental state is so distorted by a mental illness that his awareness of the crime and punishment has little or no relation to the understanding of those concepts shared by the community as a whole.

*Id.* at 2861.

166. *Id.* at 2862–63.

167. *Id.* at 2863.

168. *Id.* at 2873–74 (Thomas, J., dissenting). The bulk of the dissent objected even to consideration of Panetti’s claims, finding them barred by provisions of the Anti-Terrorism and Effective Death Penalty Act. *See id.* at 2864–67. For the majority’s contrary holding, see *id.* at 2858–59 (majority opinion).

169. *See* Richard J. Bonnie, Panetti v. Quarterman: *Mental Illness, the Death Penalty, and Human Dignity*, 5 OHIO ST. J. CRIM. L. 257, 270–71 (2007) (expounding on Justice Kennedy’s understanding of *Ford* and noting that a bar on executing criminals with mental illnesses may include those with psychotic disorders); Mark Hansen, *Mentally Ill Death Row Inmates Get Another Chance*, ABA J. E-REPORT (Am. Bar Ass’n,

dissent wanted, this change arguably accords with the purposes of punishment, as cursorily sketched by the *Panetti* majority, and undoubtedly serves to bring America's death penalty closer to a punishment "civilized societies" might impose.<sup>170</sup>

*B. Serious Mental Illness at the Time of the Crime*

*Panetti v. Quarterman* begs a broader question, however. Panetti suffered from a serious mental illness at the time of the commission of his crime, which ought to render him ineligible for the death penalty regardless of his mental state at the time of his proposed execution. Though the Supreme Court has never established this categorical bar, its precedents—especially *Atkins v. Virginia*—strongly imply it.

The facts of Scott Panetti's case illustrate the problem. In 1992 Panetti shot and killed the parents of his estranged wife while she and her daughter looked on and then held the wife and daughter hostage for several hours.<sup>171</sup> A pretrial psychiatric evaluation

indicated that petitioner suffered from a fragmented personality, delusions, and hallucinations. The evaluation noted that petitioner had been hospitalized numerous times for these disorders. Evidence later revealed that doctors had prescribed medication for petitioner's mental disorders that, in the opinion of one expert, would be difficult for a person not suffering from extreme psychosis even to tolerate. ("I can't imagine anybody getting that dose waking up for two to three days. You cannot take that kind of medication if you are close to normal without absolutely being put out.")<sup>172</sup>

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Chi., Ill.), July 6, 2007 (mentioning that the order to remand articulated no standard for all competency determinations but instructed the lower courts to consider other Eighth Amendment precedents); Christopher Slobogin, *The Supreme Court's Recent Mental Health Cases: Rulings of Questionable Competence*, CRIM. JUST., Fall 2007, at 8, 15 (suggesting that under the *Panetti* majority's rationale, a delusional offender like Panetti would not be considered competent); Michael L. Perlin, *Insanity is Smashing Up Against My Soul: Panetti v. Quarterman and Questions that Won't Go Away* 22 (N.Y. L. Sch. Leg. Studs. Res. Paper Series 07/08 No. 25, 2008), available at <http://www.ssrn.com/abstract=1130890> (*Panetti* "clarifies [the] *Ford* substantive test to demand that the prisoner possess a 'rational understanding' of all the reasons he is to be executed").

170. *Panetti*, 127 S. Ct. at 2860 (quoting *Ford v. Wainwright*, 477 U.S. 399, 409 (1986)).

171. *Id.* at 2848.

172. *Id.* (internal citations omitted).

Petitioner's wife described one psychotic episode in a petition she filed in 1986 seeking extraordinary relief from the Texas state courts. She explained that petitioner had become convinced the devil had possessed their home and that, in an effort to cleanse their surroundings, petitioner had buried a number of

Despite these mental problems and the fact that Panetti had stopped taking his antipsychotic medication, he was found competent to stand trial and to represent himself both at trial and at his capital sentencing hearing. Not surprisingly, his performance before the jury, as related by his standby counsel, was

“bizarre,’ ‘scary,’ and ‘trance-like.’ According to the attorney, petitioner’s behavior both in private and in front of the jury made it evident that he was suffering from ‘mental incompetence,’ and the net effect of this dynamic was to render the trial ‘truly a judicial farce, and a mockery of self-representation.’”<sup>173</sup>

Thus it is also not surprising that Panetti’s jury rejected his insanity defense at trial and sentenced him to death.

At Panetti’s capital sentencing hearing, the jury would have been allowed to consider his serious mental illness as a mitigating factor.<sup>174</sup> But the Eighth Amendment arguably requires more: that such illness, like mental retardation, should bar application of the death penalty. This argument, first sounded by legal academics,<sup>175</sup> has since been implemented first by the Task Force on Mental Disability and the Death Penalty established by the Individual Rights and Responsibilities Section of the American Bar Association,<sup>176</sup> and ultimately adopted by the

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valuables next to the house and engaged in other rituals.

*Id.* (internal citation omitted).

173. *Id.* at 2849 (internal citations omitted).

174. See *Eddings v. Oklahoma*, 455 U.S. 104, 116 (1982) (“[J]ust as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background and mental and emotional development of a youthful defendant be duly considered in sentencing.”).

175. Several law review articles have suggested a number of grounds why the seriously mentally ill should not be executed, including the Eighth Amendment. See, e.g., John H. Blume & Sheri Lynn Johnson, *Killing the Non-Willing: Atkins, the Volitionally Incapacitated, and the Death Penalty*, 55 S.C. L. REV. 93 (2003); Christopher Slobogin, *Mental Illness and the Death Penalty*, 1 CAL. CRIM. L. REV. 3 (2000), available at <http://www.boalt.org/bjcl/v1/v1slobogin.htm> [hereinafter Slobogin, *Mental Illness*]; Christopher Slobogin, *What Atkins Could Mean for People with Mental Illness*, 33 N.M. L. REV. 293, 313 (2003) [hereinafter Slobogin, *What Atkins Could Mean*]; Bruce J. Winick, *The Supreme Court’s Emerging Death Penalty Jurisprudence: Severe Mental Illness as the Next Frontier*, (U. Miami Sch. L. No. 2008-31, 2008), available at <http://www.ssrn.com/abstract=1291781>.

176. Christopher Slobogin, *Mental Disorder as an Exemption from the Death Penalty: The ABA-IRR Task Force Recommendations*, 54 CATH. U. L. REV. 1133, 1133–34 (2005) [hereinafter Slobogin, *Mental Disorder as an Exemption*]; Ronald J. Tabak, *Executing People with Mental Disabilities: How We Can Mitigate an Aggravating Situation*, 25 ST. LOUIS U. PUB. L. REV. 283, 283–84 (2006) [hereinafter Tabak, *Executing People with Mental Disabilities*]; Ronald J. Tabak, *Overview of the Task Force Proposal on Mental Disability and the Death Penalty*, 54 CATH. U. L. REV. 1123, 1126 (2005).

ABA's House of Delegates, as well as by the American Psychiatric Association, the American Psychological Association, and the National Alliance for the Mentally Ill.<sup>177</sup>

The crucial language in the joint recommendation is:

Defendants should not be executed or sentenced to death if, at the time of the offense, they had a severe mental disorder or disability that significantly impaired their capacity (a) to appreciate the nature, consequences or wrongfulness of their conduct, (b) to exercise rational judgment in relation to conduct, or (c) to conform their conduct to the requirements of the law. A disorder manifested primarily by repeated criminal conduct or attributable solely to the acute effects of voluntary use of alcohol or other drugs does not, standing alone, constitute a mental disorder or disability for purposes of this provision.<sup>178</sup>

The commentary to the recommendation indicates that it is limited to serious mental disorders, "includ[ing] schizophrenia and other psychotic disorders, mania, major depressive disorder, and dissociative disorders . . . . In their acute state, all of these disorders are typically associated with delusions . . . hallucinations . . . extremely disorganized thinking, or very significant disruption of consciousness, memory and perception of the environment."<sup>179</sup> A further limitation on mental illnesses that would bar the death penalty is the requirement that the disease seriously impair the defendant's ability to satisfy the core competencies of criminal law: to understand wrongfulness, to judge conduct rationally, and to conform.<sup>180</sup>

While this recommendation seems designed for legislative enactment, the U.S. Supreme Court should consider whether the Cruel and Unusual Punishment Clause requires its adoption. To be sure, executing those who meet this test cannot be said to further either retribution or deterrence. If the mentally retarded

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177. Am. Bar Ass'n, *Recommendation and Report on the Death Penalty and Persons with Mental Disabilities*, 30 MENTAL & PHYS. DISABILITY L. REP. 668, 668 (2006).

178. *Id.* The recommendation also reiterates the *Atkins* rule and fleshes out the dictates of *Ford v. Wainwright*. *Id.* at 669, 675–76.

179. *Id.* at 670. Other mental abnormalities might "on rare occasions, become 'severe' . . . . For instance, some persons whose predominant diagnosis is a personality disorder . . . may at times experience more significant dysfunction. Thus, people with borderline personality disorder can experience 'psychotic-like symptoms . . . during times of stress.'" *Id.* at 671 (quoting AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 708 (4th ed. 2000)); see also Eileen P. Ryan & Sarah B. Berson, *Mental Illness and the Death Penalty*, 25 ST. LOUIS U. PUB. L. REV. 351, 365–66 (2006) (contrasting Axis I psychiatric disorders with personality disorders).

180. See Am. Bar Ass'n, *supra* note 177, at 671–72 (recommending findings of significant impairment to ensure that exemption applies only to offenders less culpable and less deterrable than the average murderer).

and juveniles are significantly less culpable and less deterrable because of their statuses, so too are those suffering from serious mental disease as defined by the American Bar Association. As Christopher Slobogin concluded:

[I]f—as *Atkins* seems to indicate—the most important factors in determining which murderers may be put to death are relative culpability and deterrability, there may even not be any *plausible* reasons for differentiating between execution of people with mental illness and execution of people with mental retardation or juveniles.<sup>181</sup>

Like the mentally retarded and juveniles (and like those who do not both kill and intend to kill), persons with serious mental illness as defined by the ABA recommendation are significantly less blameworthy and significantly less subject to criminal law's deterrent force than the typical candidate for capital punishment.

Added to these contentions is the manifest inadequacy of case-by-case determination when the capital defendant suffers from mental illness. The overwhelming consensus is that sentencers, rather than weighing mental illness as a mitigating factor, are just as likely to consider it an aggravating factor, as showing future dangerousness.<sup>182</sup> This failure of case-by-case adjudication is exacerbated by mentally ill defendants' demeanor at trial—as in Panetti's case—and by their “sharply constrict[ed] . . . ability ‘to give meaningful assistance to their counsel.’”<sup>183</sup> As with the mentally retarded and juveniles, case-by-case determination creates an unacceptably high risk of an incorrect result for the seriously mentally ill capital defendant.

And of course the international community joins the consensus of domestic professional organizations expressed in the American Bar Association recommendation. As a recent law review note indicates,

[T]he 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.” In 2004, it passed another resolution concerning the death penalty, using the same language to call on

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181. Slobogin, *What Atkins Could Mean*, *supra* note 175, at 293; *see also* Blume & Johnson, *supra* note 175, at 126–30; Helen Shin, Note, *Is the Death of the Death Penalty Near? The Impact of Atkins and Roper on the Future of Capital Punishment for Mentally Ill Defendants*, 76 *FORDHAM L. REV.* 465, 511–13, 515–16 (2007).

182. Blume & Johnson, *supra* note 175, at 131; Slobogin, *Mental Disorder as an Exemption*, *supra* note 176, at 1150–51; Slobogin, *What Atkins Could Mean*, *supra* note 175, at 305; Tabak, *Executing People with Mental Disabilities*, *supra* note 176, at 288.

183. Blume & Johnson, *supra* note 175, at 130.

nations that still maintain the death penalty to stop imposing it on individuals with any 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.” In addition, the European Union . . . has also expressed disapproval of the practice of executing persons with severe mental illness . . . .<sup>184</sup>

Based on this evidence, the world community would certainly welcome the Supreme Court’s effort to further civilize America’s death penalty by holding that it may not be imposed on those suffering serious mental illness at the time of the commission of their crimes.

As noted by one of its main academic supporters, the major defect in the argument for this categorical bar is the lack of legislative adoption of anything like the ABA recommendation,<sup>185</sup> only Connecticut has passed such a statute.<sup>186</sup> Some proponents of a constitutional bar nevertheless marshal considerable evidence of a national consensus, pointing to legislative adoption of death penalty moratoria, prevailing sentencing practices, executive clemencies and moratoria, judicial opinions, and popular polls.<sup>187</sup> But such contentions may not be necessary.

The *Panetti* opinion implies that not every step in the interpretation of a categorical bar need be supported by evidence of a national consensus. If such a consensus supported the result in *Ford*, it should also support any logical consequence of *Ford*’s reasoning, including the requirement likely to flow from *Panetti*, that a candidate for execution must have a rational understanding of why he is about to be killed.<sup>188</sup> As Justice

184. Shin, *supra* note 181, at 506 (internal footnotes omitted).

185. See Slobogin, *What Atkins Could Mean*, *supra* note 175, at 297–98, 313.

186. See CONN. GEN. STAT. ANN. § 53a-46a(h)(3) (West 2007) (“The court shall not impose the sentence of death . . . if . . . 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 . . .”).

187. See Shin, *supra* note 181, at 494–504; Stephanie Zywiec, Note, *Executing the Insane: A Look at Death Penalty Schemes in Arkansas, Georgia, and Texas*, 12 SUFFOLK J. TRIAL & APP. ADVOC. 93, 114–16 (2007); see also Blume & Johnson, *supra* note 175, at 109–25 (arguing that a national consensus opposes the execution of persons who could not control their conduct as a result of mental illness).

188. See *supra* text accompanying notes 166–68; see also Carol S. Steiker, *Panetti v. Quarterman: Is There a “Rational Understanding” of the Supreme Court’s Eighth Amendment Jurisprudence?*, 5 OHIO ST. J. CRIM. L. 285, 297 (2007) (“Perhaps the Court

Thomas pointed out in dissent, the *Panetti* majority felt no need to justify this holding by citing evidence of a national consensus regarding rational understanding.<sup>189</sup>

The Court could use similar reasoning to extend *Atkins* to the severely mentally ill, who are in many respects less culpable and less deterrable than the mentally retarded.<sup>190</sup> In fact, a powerful argument has been made that after establishing a categorical bar for the mentally retarded, the failure to do so for the seriously mentally ill would violate their equal protection rights, by discriminating against them on the basis of mental disability.<sup>191</sup> To avoid this result, and to keep faith with the reasoning of *Atkins* (and *Roper*), the Court should hold that the death penalty should not be imposed on a person who at the time of the commission of the crime suffered a severe mental illness, even in the absence of evidence of widespread legislative adoption.

## V. CONCLUSION

A majority of the Supreme Court appears committed to curbing some of the excesses of America's death penalty by establishing and extending a set of categorical bars to execution. *Atkins v. Virginia*, *Roper v. Simmons*, and *Kennedy v. Louisiana* exemplify this trend by categorically banning the death penalty for the mentally retarded, juveniles, and those charged with child rape, respectively. The Court needs to complete this work by limiting the death penalty to the crime of murder and by overruling *Tison v. Arizona*, so that only those who have intentionally killed or intentionally aided another to kill will be eligible for death. The Supreme Court should also complement the *Ford–Panetti* ban on executing the seriously mentally ill by holding that severe mental illness at the time of the crime also bars capital punishment. These steps will help to bring America's death penalty closer to international norms and closer to “civilized standards” of criminal punishment.

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meant to suggest that . . . consensus [is] relevant only to the ‘big picture’ question about whether a practice—execution of the insane—is constitutionally permissible, but not to the more technical question of what exactly counts as ‘insane.’”).

189. See *supra* note 168 and accompanying text.

190. See Slobogin, *Mental Disorder as an Exemption*, *supra* note 176, at 1147 (“[A]n offender who meets the strict criteria in [the ABA] recommendation is likely to experience more dysfunction at the time of the offense than the typical offender with retardation.”).

191. See Slobogin, *What Atkins Could Mean*, *supra* note 175, at 298–303; see also Slobogin, *Mental Illness*, *supra* note 175.