

## COMMENTS

# CRUELTY TO THE MENTALLY ILL: AN EIGHTH AMENDMENT CHALLENGE TO THE ABOLITION OF THE INSANITY DEFENSE

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“[T]here could be no greater cruelty than trying, convicting, and punishing a person wholly unable to understand the nature and consequence of his act . . . .”<sup>1</sup>

#### INTRODUCTION

On the morning of June 20, 2001, Andrea Yates drew a bath in the guest bathroom and one by one held her five young children under water until each drowned.<sup>2</sup> Yates did not dispute that she killed her children.<sup>3</sup> Nevertheless, a Texas jury acquitted her of all criminal charges.<sup>4</sup> This is because Yates suffered from such severe mental disease<sup>5</sup> that criminal liability could not attach to her actions. This

1. *Sinclair v. State*, 132 So. 581, 585 (Miss. 1931) (Ethridge, J., concurring).

2. See, e.g., *Insanity Defense Works for Yates*, DALLAS MORNING NEWS, July 27, 2006, at 4 (discussing the underlying facts of the Andrea Yates trial); *Woman Not Guilty in Retrial in the Deaths of Her 5 Children*, N.Y. TIMES, July 27, 2006, at A1 [hereinafter *Woman Not Guilty*] (reporting the Andrea Yates trial verdict of not guilty by reason of insanity and discussing the details of her children’s deaths); *Yates Found Not Guilty by Reason of Insanity*, SEATTLE TIMES, July 27, 2006, at A1 (reporting on the Andrea Yates trial).

3. See, e.g., Susan Reimer, *A Fresh Look Into the Eyes of Killer Mom*, ORLANDO SENTINEL, Mar. 9, 2004, at E1 (detailing Andrea Yates’ killing of her five children).

4. See, e.g., *Woman Not Guilty*, *supra* note 2 (reporting the Andrea Yates trial verdict).

5. Yates suffered from severe postpartum psychosis and, in a delusional state, believed that she was possessed by Satan and killed her children in order to save them from hell. *Id.*

case illustrates the centuries-old<sup>6</sup> Anglo-American criminal defense of insanity.

At first blush the acquittal of a confessed killer may seem wrong, a grave injustice even. The insanity defense, however, serves a purpose higher than the punishment of those committing otherwise criminal acts: it represents society's moral and social judgment that individuals unable to understand or control their conduct deserve treatment, not punishment.<sup>7</sup> Thus, if such a person poses a continuing danger, he or she may be confined in a non-punitive setting for psychiatric treatment,<sup>8</sup> but should not be imprisoned. Accordingly, the acquittal of Yates, a victim of severe mental disease, represents the insanity defense's proper function: separating society's mentally ill citizens for treatment, rather than punishment.

A relatively recent trend, however, has been the abolition of the affirmative insanity defense. Since 1979, four states—Montana, Idaho, Utah, and Kansas—have eliminated the defense.<sup>9</sup> This new policy, the mens rea approach,<sup>10</sup> markedly departs from fundamental Anglo-American criminal-law principles<sup>11</sup> and is anathema to our

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6. See DONALD H.J. HERMANN, *THE INSANITY DEFENSE: PHILOSOPHICAL, HISTORICAL AND LEGAL PERSPECTIVES* 22 (1983) (explaining that insanity was recognized as a defense for criminal conduct in England as early as 1268).

7. See *United States v. Freeman*, 357 F.2d 606, 615 (2d Cir. 1966) (stating that the insanity defense represents “the law’s conscientious efforts to place in a separate category, people who cannot be justly held ‘responsible’ for their acts”); MODEL PENAL CODE § 4.01 cmt. at 165 (1985) (characterizing the purpose of the insanity defense as “etch[ing] a decent working line between the areas assigned to the authorities responsible for public health and those responsible for the correction of offenders”); WAYNE R. LAFAVE, *CRIMINAL LAW* § 7.1 (4th ed. 2003) (explaining the function of the insanity defense as separating from the criminal-justice system those who should only be subjected to medical-custodial measures, as their mental state precludes the kind of personal culpability necessary for punitive measures).

8. After a finding of not guilty by reason of insanity, defendants are typically committed to mental institutions for psychiatric treatment. LAFAVE, *supra* note 7, § 8.4. In some jurisdictions commitment to a psychiatric institution is mandatory after an insanity acquittal. See, e.g., *Jones v. United States*, 463 U.S. 354, 370 n.20 (1983) (upholding constitutionality of mandatory commitment for insanity acquittees). In other jurisdictions commitment is ordered only if it is found that the defendant’s insanity continues or that the defendant is dangerous. See SANFORD H. KADISH & STEPHEN J. SCHULHOFER, *CRIMINAL LAW AND ITS PROCESSES* 882-84 (7th ed. 2001) (surveying various approaches taken by the states towards the post-trial disposition of insanity acquittees).

9. *Clark v. Arizona*, 126 S. Ct. 2709, 2721-22 (2006).

10. See discussion *infra* Part I.B.1 (defining the mens rea approach).

11. See *United States v. Denny-Shaffer*, 2 F.3d 999, 1012 (10th Cir. 1993) (stating that, while the particular insanity standard has differed throughout American legal history, our common law has always rejected “assign[ing] criminal responsibility to an actor who was unable, at the time he or she committed the crime, to know either what was being done or that it was wrong”); *United States v. Pohlot*, 827 F.2d 889, 900 (3d Cir. 1987) (discussing Congress’ consideration and rejection of a proposal to abolish the insanity defense and quoting a House Report that found “[abolition]

common-law tradition of treating, rather than punishing, the insane.<sup>12</sup> The mens rea model removes the legal mechanism society has traditionally used to distinguish blameworthy from non-blameworthy offenders, and allows criminal punishment, including the death penalty,<sup>13</sup> for morally blameless insane offenders.<sup>14</sup> Consequently, the abolition of the insanity defense represents a fundamental injustice against society's mentally ill,<sup>15</sup> and it is time for the Supreme Court to rectify this wrong.

The Supreme Court has only addressed the constitutional implications of the insanity defense from a due process perspective.<sup>16</sup> However, the Court's recent Eighth Amendment jurisprudence in the analogous area of capital punishment for mentally deficient offenders<sup>17</sup> provides compelling rules and reasoning against certain punishments for the mentally deficient, which the Court may logically apply to the insane-offender context. Applying the Eighth

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would alter that fundamental basis of Anglo-American criminal law: the existence of moral culpability as a prerequisite for punishment").

12. See *supra* note 7 and accompanying text (discussing the insanity defense's traditional function of separating society's inculpable for treatment rather than punitive correction).

13. Otherwise insane offenders do commit capital crimes, and without an affirmative insanity defense such offenders face capital punishment. See, e.g., *Woman Not Guilty*, *supra* note 2 (reporting that a Texas jury found Andrea Yates not guilty by reason of insanity of drowning her five children); see also TEX. PENAL CODE ANN. § 19.03(a)(7)-(8) (Vernon 2006) (providing that the murder of more than one person during the same offense or the murder a person under six years of age is a capital crime in Texas).

14. See discussion *infra* Part I.B (discussing the mens rea approach adopted by Montana, Idaho, Utah, and Kansas and illustrating how this policy leads to the punishment of legally blameless insane defendants).

15. See MODEL PENAL CODE § 4.01 cmt. at 166 (1985) (concluding that those who satisfy an insanity standard are legally irresponsible, and the imposition of criminal punishment is therefore "futile and unjust").

16. The Eighth Amendment implications of abolishing the insanity defense have been addressed at the state level, however. See *State v. Cowan*, 861 P.2d 884, 889 (Mont. 1993) (holding that sentencing the defendant, a paranoid schizophrenic, to prison after a trial in which he was not afforded an affirmative insanity defense violated the Eighth Amendment); *State v. Korell*, 690 P.2d 992, 1002 (Mont. 1984) (holding that Montana's abolition of the insanity defense did not violate the Eighth Amendment's prohibition against cruel and unusual punishments). The Supreme Court has addressed the Eighth Amendment rights of the insane in the context of executing insane inmates. See *Ford v. Wainwright*, 477 U.S. 399, 410 (1986) (holding that the Eighth Amendment prohibits executing insane prisoners). *Wainwright* addressed the Eighth Amendment implications of executing a prisoner who became insane while in prison, *after* his conviction. Legal insanity was not a factor during the commission of the criminal offense. Thus, *Wainwright* did not reach the constitutionality of the insanity defense.

17. See *Roper v. Simmons*, 543 U.S. 551, 572-75 (2005) (holding that the juvenile death penalty violates the Eighth Amendment's prohibition against cruel and unusual punishments); *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (holding that capital punishment for mentally retarded offenders violates the Eighth Amendment's prohibition against cruel and unusual punishments).

Amendment analysis employed in this analogous area of jurisprudence, determining whether there is a national consensus against punishing the insane and supplementing this consensus with the Court's independent judgment, reveals that punishing the insane violates the Eighth Amendment's prohibition against excessive punishments. There is currently an overwhelming national consensus against punishing insane offenders,<sup>18</sup> a consensus justified by the independent determination that punishing persons unable to control their thoughts or actions neither contributes to generally accepted penal goals,<sup>19</sup> nor is proportional to the insane offender's personal culpability.<sup>20</sup> Consequently, criminal punishment for insane offenders is categorically "excessive"<sup>21</sup> and constitutes punishment that the Court has traditionally deemed cruel and unusual in violation of the Eighth Amendment to the United States Constitution.<sup>22</sup> Thus, although currently untested, the Eighth Amendment may offer an effective approach towards granting federal constitutional protection to the insanity defense, thereby safeguarding mentally ill citizens against undeserved criminal punishment.

This Comment addresses the present gap in insanity-defense laws created by the defense's abolition and offers an Eighth Amendment based remedy. Part I reviews the history and evolution of the insanity defense in Anglo-American law. It then describes how four states have statutorily abolished the defense. It concludes with a discussion of *Clark v. Arizona*,<sup>23</sup> the Court's most recent decision on the constitutionality of the insanity defense. Part II turns to the Eighth Amendment, examining its historical understanding and the contemporary evolving-standards-of-decency analysis, through which the Court assesses the constitutionality of modern-day punishments. Part II concludes with a discussion of *Robinson v. California*<sup>24</sup> and

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18. See discussion *infra* Part V.A (surveying state policy regarding the insanity defense and arguing that the forty-six states that provide the defense constitute a national consensus under the Court's Eighth Amendment precedent).

19. See discussion *infra* Part V.B.1 (arguing that criminal punishment for insane offenders fails to effectively advance the penological goals of retribution, deterrence, rehabilitation, or incapacitation).

20. See discussion *infra* Part V.C.1 (explaining the insane offender's absence of culpability, on account of his or her severe mental disease, and arguing that any punishment is categorically disproportionate).

21. See discussion *infra* Part II.A (defining unconstitutionally "excessive" punishment as that which fails to contribute to acceptable penal goals or is grossly disproportionate to the severity of the crime).

22. See discussion *infra* Parts II-III (discussing the Supreme Court's jurisprudence on unconstitutionally excessive punishments).

23. 126 S. Ct. 2709 (2006).

24. 370 U.S. 660 (1962).

*Powell v. Texas*,<sup>25</sup> two non-death-penalty Eighth Amendment decisions that illustrate contrasting approaches to Eighth Amendment interpretation. Part III examines the Court's recent Eighth Amendment death-penalty jurisprudence, focusing on two decisions involving mentally deficient offenders, *Roper v. Simmons*<sup>26</sup> and *Atkins v. Virginia*,<sup>27</sup> where the Court expanded the Eighth Amendment to protect two groups—minors and the mentally retarded—against the imposition of capital punishment.<sup>28</sup> Part IV argues that these recent precedents are sufficiently analogous, legally and factually, to the insane-offender context; therefore, the Court should apply the rules and reasoning of these decisions to the issue of punishing the insane. Part V then applies the *Roper* and *Atkins* Eighth Amendment analyses to the issue of criminal punishment for otherwise insane offenders, the end result of abolishing the insanity defense. Part V concludes that under these new precedents, abolition of the insanity defense results in unconstitutionally excessive punishments, in violation of the Eighth Amendment to the Constitution. Accordingly, this Comment concludes that the safeguard against this constitutional violation—the affirmative insanity defense—merits constitutional protection.

#### I. THE INSANITY DEFENSE AND ITS ABOLITION

Excusing the mentally disordered from responsibility for their actions has ancient roots.<sup>29</sup> The criminal insanity defense, in particular, has enjoyed a rich tradition in Anglo-American jurisprudence.<sup>30</sup> Recently, however, states have experimented with

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25. 392 U.S. 514 (1968).

26. 543 U.S. 551 (2005).

27. 536 U.S. 304 (2002).

28. See *Roper*, 543 U.S. at 578 (holding that the Eighth Amendment forbids capital punishment for offenders who were under the age of eighteen when their offenses were committed); *Atkins*, 536 U.S. at 321 (holding that the Eighth Amendment prohibits the imposition of the death penalty on mentally retarded offenders).

29. Ancient Hebrew law allowed for the exculpation of the mentally deficient. See HERMANN, *supra* note 6, at 18-19 (quoting the Talmud's stipulation that mentally deficient actors were not to be punished for offensive actions "because with them only the act is of consequence while the intention is of no consequence") (internal citation omitted). Similarly, early Roman legal sources from the fourth-century B.C. refer to the incapacity of the insane. See *id.* at 20 (discussing the Twelve Tables, the Romans' earliest legal source, which recognized the mental incapacities of the insane). Sixth-century A.D. codifications of Roman law include explicit references to the exculpatory effect of insanity. See *id.* (detailing Justinian's sixth-century codification of Roman law, which recognized insanity's exculpatory significance for contractual and delictual obligations).

30. See *id.* at 22 (noting insanity's recognition as an excuse for criminal conduct in thirteenth-century England); see also ALEC BUCHANAN, PSYCHIATRIC ASPECTS OF

the misguided policy of abolishing the insanity defense,<sup>31</sup> a policy that leads to criminal punishment<sup>32</sup> for undeserving defendants.<sup>33</sup> These states afford mentally diseased offenders a far narrower mechanism for the reduction of criminal responsibility.<sup>34</sup>

#### A. *The Insanity Defense Generally*

The insanity defense is an affirmative defense, in that the defendant, who usually carries the subsequent burden of persuasion at trial, must raise it.<sup>35</sup> It is also considered a complete defense, in that it results in a total acquittal, even if the government has proved all elements of the crime beyond a reasonable doubt.<sup>36</sup>

American jurisprudence consists of multiple standards for the insanity defense, each with important differences.<sup>37</sup> All variants, however, trace their origin to three traditional insanity standards: the *M'Naghten* standard,<sup>38</sup> the irresistible-impulse test,<sup>39</sup> and the product-

JUSTIFICATION, EXCUSE AND MITIGATION: THE JURISPRUDENCE OF MENTAL ABNORMALITY IN ANGLO-AMERICAN CRIMINAL LAW 84 (2000) (quoting the writings of eighth-century Archbishop of York, Egbert: “[i]f a man fall out of his senses or wits, and it come to pass that he kill someone, let his kinsmen pay for the victim, and preserve the slayer against all else of that kind”).

31. See *Clark v. Arizona*, 126 S. Ct. 2709, 2721-22 (2006) (observing that four states—Idaho, Kansas, Montana, and Utah—have eliminated the affirmative insanity defense since 1979).

32. See discussion *infra* Part I.B.2 (explaining how the mens rea approach adopted by Montana, Idaho, Utah, and Kansas results in criminal punishment for mentally diseased offenders whose conduct would not be criminal in states employing an affirmative insanity defense).

33. See discussion *infra* Part V.B.2 (arguing that the lack of free will among insane offenders renders that entire class categorically inculpable).

34. See discussion *infra* Part I.B.1 (discussing the mens rea model and explaining its limited ability to reduce criminal responsibility for mentally diseased offenders).

35. 21 AM. JUR. 2D *Criminal Law* § 47 (2006).

36. The insanity defense falls under the category of excuse defenses. Paul H. Robinson, *A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability*, 23 UCLA L. REV. 266, 275 (1975). An excuse defense justifies complete acquittal based on the defendant's lack of criminal responsibility resulting from some personal characteristic, such as mental disability. LAFAVE, *supra* note 7, § 9.1(a)(4). Legally, the *action* is still considered wrongful, but criminal liability does not attach to the *actor* on account of the personal disability that renders him blameless. Robinson, *supra*, at 275. In the insanity-defense context, the disability justifying acquittal is the defendant's mental disease, which precludes control over his actions thereby rendering him unaccountable for his otherwise criminal conduct.

37. See *Clark*, 126 S. Ct. at 2720 (canvassing American insanity defenses and categorizing the multiplicity of tests as fitting into one of four groups: cognitive incapacity, moral incapacity, volitional incapacity, the product-of-mental-illness tests, or a combination thereof).

38. The *M'Naghten* standard, commonly referred to as the “right-wrong” test, holds that there is no criminal responsibility if, at the time of the crime, the accused “was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.” Harlow M. Huckabee, *Mental Disability: Evidence on Mens Rea Versus the Insanity Defenses*, 20 W. ST. U. L. REV. 435, 442 (1993)

of-mental-illness test.<sup>40</sup> The various approaches currently employed by the states<sup>41</sup> incorporate the basic elements of these foundational standards.<sup>42</sup>

### B. *The Abolition of the Insanity Defense*

Despite the historic use of the insanity defense in Anglo-American jurisprudence and its wide acceptance among American states, many scholars and lawmakers strongly criticize the defense and advocate its abolition.<sup>43</sup> Currently, Montana, Idaho, Utah, and Kansas<sup>44</sup> have

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(quoting *M'Naghten's Case*, (1843) 8 Eng. Rep. 718, 722 (H.L.)); see also LAFAVE, *supra* note 7, § 7.2 (discussing the *M'Naghten* insanity defense, including its origin in the 1843 English trial of Daniel M'Naghten, contemporary interpretations of the *M'Naghten* test's elements, and modern criticisms of the *M'Naghten* standard). See generally *United States v. Freeman*, 357 F.2d 606, 615-21 (2d Cir. 1966) (surveying the history and development of the *M'Naghten* standard, including contemporary criticisms). *M'Naghten* is the standard presently used in England and Ireland, and historically has comprised the basis of the insanity defense in almost every American state at some point. FAYE BOLAND, *ANGLO-AMERICAN INSANITY DEFENSE REFORM: THE WAR BETWEEN LAW AND MEDICINE I* (1999). Accordingly, the *M'Naghten* rule is arguably the most influential development in Anglo-American insanity jurisprudence. See *id.* (reviewing the history and evolution of the *M'Naghten* rule and arguing that it is the historical reference point for the Anglo-American insanity defense). The two prongs of the *M'Naghten* rule form the basis of the modern cognitive and moral incapacity standards. *Clark*, 126 S. Ct. at 2720.

39. The irresistible-impulse test, typically used as a supplement to the *M'Naghten* standard, compels the court to acquit by reason of insanity if the accused had a mental disease or defect that kept him from controlling the conduct involved in the crime, despite the fact that he may have understood the wrongfulness of his actions under *M'Naghten*. See *Huckabee*, *supra* note 38, at 442-43 (defining the irresistible-impulse test). Modern volitional incapacity standards emanate from the irresistible-impulse test. See *Clark*, 126 S. Ct. at 2720 (noting this standard's two-hundred-year history and explaining its modern-day influence).

40. The product test broadly states that the defendant should be acquitted if his criminal act was the product of any mental disease. *Durham v. United States*, 214 F.2d 862, 874-75 (D.D.C. 1954). See generally *Freeman*, 357 F.2d at 621-22 (surveying the development of the product test, and reviewing its criticisms). Currently, the product insanity defense is only employed in the state of New Hampshire. *Clark*, 126 S. Ct. at 2721; see also *State v. Plante*, 594 A.2d 1279, 1283 (N.H. 1991) (citing *State v. Jones*, 50 N.H. 369 (1871)) (stating New Hampshire's product test for insanity).

41. See *infra* note 190 and accompanying text (listing the types of insanity defenses currently used by the forty-six states that provide it, the federal jurisdiction, and the District of Columbia). Although the aforementioned standards represent the historical basis for present-day insanity law, a fourth standard was promulgated by the American Legal Institute ("ALI") in 1962, which has proved influential for the modern insanity-defense law. The ALI's test for insanity states, "[a] person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of the law." MODEL PENAL CODE § 4.01 (1985). This standard, an amalgam of a volitional and moral incapacity test, is the basis for the insanity defense in fourteen jurisdictions. *Clark*, 126 S. Ct. at 2721.

42. *Clark*, 126 S. Ct. at 2720-21.

43. See LAFAVE, *supra* note 7, § 7.1(d) (listing popular criticisms of the insanity defense, such as that its key terms are often so vague that the defense invites speculations rather than factual determinations; there is no reliable medical basis for

adopted this policy, which employs the alternative mens rea approach.<sup>45</sup>

1. *The mens rea approach*

The mens rea approach involves the use of mental-disability evidence to negate the mens rea element<sup>46</sup> of the offense charged.<sup>47</sup> It allows the defendant to use evidence of mental disease to rebut or disprove the prosecution's case by establishing that the defendant, by virtue of his disease, was incapable of forming the mental state required for the crime charged.<sup>48</sup>

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distinguishing between the man who is personally blameworthy for his mental makeup and the man who is not; the determination of how best to deal with mentally disordered persons who commit crimes is better dealt with after traditional conviction; it may be therapeutically beneficial to treat societal deviants as culpable for their actions rather than as involuntary victims of sickness; and that the insanity defense is an unfair "rich-man's defense" in that only the wealthy can afford the expert resources necessary for a successful defense); *see also* BOLAND, *supra* note 38, at 73, 75, 77 (citing criticisms of the insanity defense, such as that the defense is often expressed with such vagueness as to give no basis for evaluating the multitude of varying standards, that the exculpation for insanity is simply unjustifiable, and that there is public support for the defense's elimination since many Americans view a correlation between rising crime rates and the proliferation of insanity acquittals). *But see* NATIONAL COMMISSION ON THE INSANITY DEFENSE, MYTHS & REALITIES: A REPORT OF THE NATIONAL COMMISSION ON THE INSANITY DEFENSE 14, 22-23 (1983) (criticizing the proposition that the insanity defense is a "rich-man's defense" as unfounded and finding that the public's support for abolition of the defense is based on the misguided "myth" that the defense is overused).

44. IDAHO CODE ANN. § 18-207 (2004); KAN. STAT. ANN. § 22-3220 (1995); MONT. CODE ANN. §§ 46-14-102, 46-14-311 (2005); UTAH CODE ANN. § 76-2-305 (2003).

45. These states were not the first to experiment with abolishing the insanity defense. Mississippi, Louisiana, and Washington abolished their insanity defenses in the early twentieth century. Ultimately, however, their respective state supreme courts held these policies unconstitutional. *See* Sinclair v. State, 132 So. 581, 585 (Miss. 1931) (holding that a statute that abolished the insanity defense in homicide cases violated the due-process clause of the Mississippi Constitution); State v. Lange, 123 So. 639, 641 (La. 1929) (holding that a statute which prevented defendants from asserting an insanity defense violated the Louisiana Constitution); State v. Strasbourg, 110 P. 1020, 1025 (Wash. 1910) (holding that a statute that eliminated the criminal insanity defense contravened the Washington Constitution's due-process clause); *see also* Rita Buitendorp, Note, *A Statutory Lesson from "Big Sky Country" on Abolishing the Insanity Defense*, 30 VAL. U. L. REV. 965, 965 n.4 (1996) (delineating the historical precedents to Montana's abolition of its insanity defense).

46. *See* Huckabee, *supra* note 38, at 445 (defining mens rea as a legal concept meaning a guilty mind, wrongful purpose or criminal intent, or the requisite mental state of the offense charged).

47. *Id.* at 442.

48. *See, e.g.*, MONT. CODE ANN. § 46-14-102 ("Evidence that the defendant suffered from a mental disease or defect or developmental disability is admissible to prove that the defendant did or did not have a state of mind that is an element of the offense."); UTAH CODE ANN. § 76-2-305(1) ("[I]t is a defense to a prosecution under any statute or ordinance that the defendant, as a result of mental illness, lacked the mental state required as an element of the offense charged. Mental illness is not otherwise a defense.").

Whereas an affirmative insanity defense is a separate and independent defense, serving to exculpate the offender even if all elements of the prosecution's case are proved beyond a reasonable doubt, the mens rea approach is not independent of the prosecution's case. The mens rea approach is concerned with disproving an element of the prosecution's case, thereby defending the accused against the charges. If the prosecution proves all elements of the case beyond a reasonable doubt, then the defendant is convicted, irrespective of whether his disease was sufficiently severe to satisfy a traditional insanity test.

## 2. *Abolition in practice*

In 1979, Montana became the first state to successfully abolish its affirmative insanity defense, adopting a mens rea approach instead.<sup>49</sup> In *State v. Cowan*,<sup>50</sup> the Montana Supreme Court upheld the state's mens rea approach against due process<sup>51</sup> and Eighth Amendment<sup>52</sup> challenges. The Supreme Court denied review,<sup>53</sup> thus allowing Montana's new approach to stand.

In the early 1980s, Idaho and Utah followed Montana's lead. In 1982, the Idaho Legislature repealed that state's affirmative insanity defense, replacing it with a mens rea approach.<sup>54</sup> In *State v. Searcy*,<sup>55</sup> the Idaho Supreme Court upheld the state's mens rea approach

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49. See MONT. CODE ANN. § 46-14-102 ("Evidence that the defendant suffered from a mental disease or defect or developmental disability is admissible to prove that the defendant did or did not have a state of mind that is an element of the offense."); Buitendorp, *supra* note 45, at 977 n.76 (discussing the anti-crime politics that motivated Montana legislators to experiment with abolishing the insanity defense). Prior to abolition, Montana used a variant of the American Legal Institute's Model Penal Code insanity test. Buitendorp, *supra* note 45, at 979.

50. 861 P.2d 884 (Mont. 1993).

51. See *id.* at 888 (asserting that the Montana Supreme Court had previously "affirmed the constitutionality of the abolition of the insanity defense" against due-process challenges and reaffirming that Montana's mens rea approach does not "establish a conclusive or un rebuttable presumption of criminal intent," and therefore does not violate due process).

52. See *id.* at 889 (holding that sentencing the defendant to prison does not violate the Eighth and Fourteenth Amendments, even though he suffered from mental disease).

53. *Cowan v. Montana*, 511 U.S. 1005 (1994).

54. See Brian Elkins, *Idaho's Repeal of the Insanity Defense: What Are We Trying to Prove?*, 31 IDAHO L. REV. 151, 156 (1994) (exploring the legal history behind Idaho's abolition of the insanity defense); see also IDAHO CODE ANN. § 18-207(1)-(3) (2004) ("Mental condition shall not be a defense to any charge of criminal conduct. . . . Nothing herein is intended to prevent the admission of expert evidence on the issue of any state of mind which is an element of the offense, subject to the rules of evidence."). Before its abolition, Idaho's insanity defense was a variant of the ALI's insanity test. Elkins, *supra*, at 156.

55. 798 P.2d 914 (Idaho 1990).

against a due process challenge.<sup>56</sup> Utah followed suit in 1983 when its legislature abolished the state's traditional insanity defense and adopted a mens rea model.<sup>57</sup> In *State v. Herrera*,<sup>58</sup> the Utah Supreme Court affirmed the constitutionality of Utah's mens rea statute.<sup>59</sup>

In 1995, Kansas became the latest state to abolish the affirmative insanity defense and employ a mens rea approach.<sup>60</sup> In *State v. Bethel*,<sup>61</sup> the Kansas Supreme Court affirmed the constitutionality of Kansas' mens rea statute against due process and Eighth Amendment challenges.<sup>62</sup> In its opinion, the *Bethel* court noted the persuasiveness of Idaho,<sup>63</sup> Montana,<sup>64</sup> and Utah's<sup>65</sup> high court decisions on the constitutionality of the mens rea approach.<sup>66</sup>

The statutory changes adopted by Montana, Idaho, Utah, and Kansas may not appear important, as the new statutory language seems somewhat similar to traditional insanity defenses. These reforms, however, can dramatically affect the outcome of criminal cases dealing with mentally disordered offenders. The following

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56. See *id.* at 919 (holding that the due-process clauses of the Federal and Idaho Constitutions do not guarantee a criminal insanity defense).

57. See *State v. Herrera*, 895 P.2d 359, 361 (Utah 1995) (discussing the political and legislative history of Utah's 1983 abolition of its traditional insanity defense); see also UTAH CODE ANN. § 76-2-305(1) (2003) ("[I]t is a defense to a prosecution under any statute or ordinance that the defendant, as a result of mental illness, lacked the mental state required as an element of the offense charged. Mental illness is not otherwise a defense."). Before the 1983 repeal, Utah used a variation of the *M'Naghten* rule. See *Herrera*, 895 P.2d at 361-62 (describing Utah's pre-1983 law as allowing the defendant to invoke the insanity defense on the ground that he or she committed the act but did not understand the wrongfulness of the conduct).

58. 895 P.2d 359 (Utah 1995).

59. See Catherine E. Lilly, Comment, *State v. Herrera: The Utah Supreme Court Rules in Favor of Utah's Controversial Insanity Defense Statute*, 22 J. CONTEMP. L. 221, 224 (1996) (explaining that *Herrera* affirmed the constitutionality of Utah's mens rea statute against challenges based on due process, burden of proof, equal protection, the right against self-incrimination, and cruel and unusual punishment).

60. See KAN. STAT. ANN. § 22-3220 (1995) ("It is a defense to a prosecution under any statute that the defendant, as a result of mental disease or defect, lacked the mental state required as an element of the offense charged. Mental disease or defect is not otherwise a defense."); see also Marc Rosen, Comment, *Insanity Denied: Abolition of the Insanity Defense in Kansas*, 8 KAN. J.L. & PUB. POL'Y 253, 253 (1999) (discussing the Kansas Legislature's 1995 repeal of the affirmative insanity defense and arguing that the new legislation was passed to placate public concerns over the impropriety of the traditional defense's use). Prior to the abolition of its insanity defense, Kansas adhered to the *M'Naghten* rule. Jenny Williams, Comment, *Reduction in the Protection for Mentally Ill Criminal Defendants: Kansas Upholds the Replacement of the M'Naghten Approach with the Mens Rea Approach, Effectively Eliminating the Insanity Defense*, 44 WASHBURN L.J. 213, 213 (2004).

61. 66 P.3d 840 (Kan. 2003).

62. *Id.* at 841-42, 854.

63. *State v. Searcy*, 798 P.2d 914 (Idaho 1990).

64. *State v. Korell*, 690 P.2d 992 (Mont. 1984).

65. *State v. Herrera*, 895 P.2d 359 (Utah 1995).

66. See *id.* at 846-51 (emphasizing the cogency of the *Searcy*, *Korell*, and *Herrera* decisions' constitutional analyses).

insanity cases illustrate this point. In one case, the defendant stabbed his daughter over one-hundred-and-fifty times because he believed she was possessed by the devil.<sup>67</sup> In a second case, the defendant extracted all of her daughter's teeth because she believed Satan was inside of them.<sup>68</sup> In a third case, the defendant threw his baby out of a window because he believed assailants, who did not exist, were pursuing him.<sup>69</sup> In a fourth case, the defendant, suffering from severe delusions, castrated his young son.<sup>70</sup> In a final case, the defendant, suffering from delusions that his parents would soon be tortured, killed them to save them from a painful death.<sup>71</sup>

These defendants all suffered from severe mental disorders and all satisfied the applicable insanity defense statutes and were, therefore, not held criminally responsible.<sup>72</sup> If tried in jurisdictions that had adopted the mens rea approach, however, all would have been guilty of crimes because evidence of the defendants' delusions, while admissible, would not negate the requisite mens rea of the offenses committed.<sup>73</sup> The defendant in case five, for example, knowingly and purposefully caused the deaths of his parents.<sup>74</sup> Under the mens rea approach his delusions regarding their impending torture would not negate his knowing and purposeful acts, and he would therefore be guilty of murder, as his mental state would satisfy the mens rea element of that crime.<sup>75</sup> The same would hold true for the other defendants had they been tried in mens rea jurisdictions, since they all intended their particular actions and evidence of their mental diseases would have been irrelevant for purposes of criminal

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67. R.D. Mackay, *Fact and Fiction About the Insanity Defense*, 1990 CRIM. L. REV. 247, 250 (1990), analyzed in Rosen, *supra* note 60, at 261-62.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. Under the mens rea approach these defendants would have to disprove the prosecution's case by establishing that, by virtue of their delusions, they were incapable of forming the intent to commit their crimes. See discussion *infra* Part I.B.1 (defining the mens rea approach). Although these defendants' delusions caused them to commit crimes for reasons not grounded in reality, the delusions did not inhibit these defendants' *intent* to act as they did. Rosen, *supra* note 60, at 262. See generally 22 C.J.S. *Criminal Law* § 132 (2006) (summarizing authorities, which hold that insanity does not preclude a criminal mens rea or a general intent to commit the criminal act). Hence, these defendants could not satisfy the mens rea test and all would be found guilty.

74. Rosen, *supra* note 60, at 262.

75. See MODEL PENAL CODE § 210.2 (Proposed Official Draft 1962) (defining murder as purposely or knowingly causing the death of another human being); see also *United States v. Pohlot*, 827 F.2d 889, 900 (3d Cir. 1987) (“[A] man who commits murder because he feels compelled by demons still possesses the mens rea required for murder.”).

responsibility.<sup>76</sup> In fact, severe mental disease will very rarely wholly preclude the requisite mens rea, as such illnesses can delude reality and inhibit moral understanding, but rarely will preclude the formation of intent for one's actions.<sup>77</sup> Hence, the insanity defense reforms adopted by Montana, Idaho, Utah, and Kansas unfairly subject an entire class of criminal defendants, wholly unable to control their thoughts or actions, to punishments that would not attach to conduct committed in affirmative-insanity-defense jurisdictions.

C. *Clark v. Arizona: The Court Addresses a Narrowing of the Insanity Defense*

On June 29, 2006, the Supreme Court decided *Clark v. Arizona*,<sup>78</sup> the Court's most recent decision addressing the constitutionality of the insanity defense. Although *Clark* did not specifically address the constitutionality of abolishing the insanity defense, the case addressed the similar issue of a state's authority to substantially limit the defense, and is therefore instructive for the issue of abolition.

Petitioner Clark, a paranoid schizophrenic, was convicted of first-degree murder and sentenced to life imprisonment after he failed to

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76. Another helpful way to illustrate the substantive differences between the affirmative insanity defense and the mens rea model is through the often-cited "lemon-squeezer" example, succinctly stated in *State v. Herrera*, the decision upholding the constitutionality of Utah's mens rea approach:

If A kills B, thinking that he is merely squeezing a grapefruit, A does not have the requisite mens rea for murder and would be acquitted under both the prior and new law. . . . However, if A kills B, thinking that B is an enemy soldier and that the killing is justified as self-defense, then A has the requisite mens rea for murder and could be convicted under the new law but not under the prior law, because he knowingly and intentionally took another's life. Under the amended provision, it does not matter whether A understood that the act was wrong.

895 P.2d 359, 362 (Utah 1995). Thus, under the mens rea model, one laboring under severe delusions, detached from reality and wholly unable to comprehend the wrongness of his actions, is criminally condemned. Such a policy is a dramatic departure from centuries of Anglo-American jurisprudence, which historically has deemed such actor's morally blameless and undeserving of punishment. See *supra* note 38 (discussing the *M'Naghten* standard for insanity, the oldest and most influential insanity test, which protects from punishment those persons unable to understand the wrongfulness of their actions); *supra* note 30 and accompanying text (noting the insanity defense's rich common law tradition, a history dating to at least thirteenth-century England); see also *United States v. Baldi*, 344 U.S. 561, 570 (1953) (Frankfurter, J., dissenting) ("Ever since our ancestral common law emerged out of the darkness of its early barbaric days, it has been a postulate of Western civilization that the taking of life by the hand of an insane person is not murder.").

77. See *Pohlot*, 827 F.2d at 900 ("Only in the rare case, however, will even a legally insane defendant actually lack the requisite mens rea purely because of mental defect. . . . Mental illness rarely, if ever, renders a person incapable of understanding what he or she is doing.") (internal quotations and citations omitted).

78. 126 S. Ct. 2709 (2006).

satisfy Arizona's narrowed *M'Naghten* insanity standard.<sup>79</sup> Clark challenged the constitutionality of Arizona's insanity defense statute on due process grounds,<sup>80</sup> arguing that the two-pronged *M'Naghten* rule represents the minimum insanity defense a state must provide criminal defendants.<sup>81</sup>

The Court rejected Clark's argument,<sup>82</sup> reasoning that there is no historical basis for recognizing the *M'Naghten* formula as a fundamental principle that limits the traditional rights of a state to define the crimes and defenses within its jurisdiction.<sup>83</sup> Thus, the Court held that a narrow version of the *M'Naghten* rule comports with the Fourteenth Amendment due process guarantee.<sup>84</sup> Further, the Court reaffirmed the principle that the type of insanity defense, including the allocation of the burden of persuasion,<sup>85</sup> is entirely

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79. *Id.* at 2717-18. In reaction to John Hinckley's successful insanity defense in 1981, Arizona implemented several reforms to its insanity-defense statute. John Gibeaut, *A Matter Over Mind*, 92 A.B.A. J. 32, 33 (2006). The Arizona legislature dropped the cognitive incapacity part of the *M'Naghten* rule (knowing the nature and quality of the act) and retained only the moral incapacity prong (knowing the wrongfulness of the act). *Id.* Additionally, Arizona shifted the burden of proof for establishing insanity from the prosecutor to the defendant and raised the standard of proof for defendants from a preponderance of the evidence to clear and convincing evidence. *Id.* Consequently, under current Arizona law a defendant will not receive an insanity acquittal unless he demonstrates, by clear and convincing evidence, that "at the time of the commission of the criminal act [he] was afflicted with a mental disease or defect of such severity that [he] did not know the criminal act was wrong." *Clark*, 126 S. Ct. at 2719.

80. The case presented two issues before the Court: (1) whether an insanity statute stated solely in terms of moral incapacity violates due process; and (2) whether limiting defense evidence of mental illness solely to the issue of insanity, thus eliminating its applicability to the issue of the crime's mens rea, violates due process. *Id.* at 2716.

81. *Id.* at 2719; *see also* Brief for the Petitioner at 37, *Clark v. Arizona*, 126 S. Ct. 2709 (2006) (No. 05-5966).

82. *See Clark*, 126 S. Ct. at 2716 (holding that due process is not violated by "Arizona's use of an insanity test stated solely in terms of the capacity to tell whether an act charged as a crime was right or wrong").

83. *See id.* at 2722 ("[I]t is clear that no particular formulation has evolved into a baseline for due process, and that the insanity rule, like the conceptualization of criminal offenses, is substantially open to state choice."). The Court further noted that the cognitive incapacity prong of the *M'Naghten* rule is a sub-part of the moral incapacity prong and, therefore, an insanity standard composed solely of the latter prong also encompasses the former prong. *See id.* at 2722-23 (stating that the moral incapacity standard does not necessarily require an analysis of the defendant's cognitive capacity to understand the nature and quality of his actions, but cognitive incapacity is itself sufficient to demonstrate moral incapacity).

84. *Id.* at 2716.

85. With respect to Clark's second due-process argument—limiting the admissibility of evidence on the accused's mental state—the Court held that Arizona's law comports with the Fourteenth Amendment guarantee of due process, reasoning that Arizona is free to define its insanity defense standard, and establish a presumption on sanity, "by placing the burden of persuasion on defendants who claim incapacity as an excuse from customary criminal responsibility," so long as

within the state's prerogative.<sup>86</sup> Significantly, the Court did not address the Eighth Amendment implications of restricting the insanity defense, nor whether a state is free to abolish the defense altogether.<sup>87</sup> Consequently, the issue of whether abolition of the affirmative insanity defense violates the Eighth Amendment of the federal Constitution remains unanswered by the Supreme Court.

## II. THE EIGHTH AMENDMENT

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."<sup>88</sup> This provision is applicable to the states through the Fourteenth Amendment.<sup>89</sup>

### A. *The Historic and Contemporary Meaning of the Eighth Amendment*

The Supreme Court has interpreted the Eighth Amendment to prohibit not only punishments that are inherently barbaric,<sup>90</sup> but also punishments that are excessive in relation to the crime committed.<sup>91</sup> Two considerations determine whether a punishment is excessive, and the violation of either may render a punishment unconstitutional.<sup>92</sup> "First, the punishment must not involve the unnecessary and wanton infliction of pain."<sup>93</sup> A punishment comports with this criterion if it contributes to acceptable penal

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"Arizona has sensible reasons to assign the risks as it has done by channeling the evidence." *Id.* at 2732, 2736.

86. *Id.* at 2732.

87. *See id.* at 2721 n.20 ("[The Court has never held] that the Constitution mandates an insanity defense, nor . . . that the Constitution does not so require. This case does not call upon us to decide the matter.").

88. U.S. CONST. amend. VIII. *See generally* *Furman v. Georgia*, 408 U.S. 238, 316-29 (1972) (Marshall, J., concurring) (canvassing the history and development of the Eighth Amendment, including its English predecessor doctrine, the similar principles espoused in the state constitutions of revolutionary America from which the Amendment derived its language, and its development and application in contemporary constitutional jurisprudence).

89. U.S. CONST. amend. XIV; *Furman*, 408 U.S. at 239-40; *Robinson v. California*, 370 U.S. 660, 666-67 (1962).

90. *Coker v. Georgia*, 433 U.S. 584, 592 (1977).

91. *See Weems v. United States*, 217 U.S. 349, 367 (1910) (explaining that the Eighth Amendment bars excessive punishments because "it is a precept of justice that punishment for crime should be graduated and proportioned to the offense").

92. *Coker*, 433 U.S. at 592; *see also* *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) ("When a form of punishment in the abstract . . . rather than in the particular . . . is under consideration, the inquiry into 'excessiveness' has two aspects."). This Comment's thesis comports with this principle, as its focus is not on a specific form of punishment for a specific defendant, but instead this Comment considers punishment generally, for an entire class of offenders, for any and all crimes.

93. *Gregg*, 428 U.S. at 173.

goals<sup>94</sup> such as deterrence, rehabilitation, retribution, or incapacitation.<sup>95</sup> Second, the punishment must be proportional.<sup>96</sup> Proportionality requires that all punishments be tailored to the severity of the crime itself<sup>97</sup> and, in the capital-punishment context, to the offender's personal culpability.<sup>98</sup> In other words, punishment is unconstitutionally disproportionate if its severity is not relatively equivalent to the seriousness of the offense,<sup>99</sup> as would be the death

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94. See *Rhodes v. Chapman*, 452 U.S. 337, 346 ("Among unnecessary and wanton inflictions of pain are those [punishments] that are totally without penological justification.") (internal quotations omitted); see also *Gregg*, 428 U.S. at 183 (explaining that punishment "totally without penological justification . . . results in the gratuitous infliction of suffering" and is therefore violative of the Eighth Amendment's proscription against excessive punishments).

95. See *Ewing v. California*, 538 U.S. 11, 25 (2003) (explaining that the principle justifications for criminal punishment are "incapacitation, deterrence, retribution, or rehabilitation"); *United States v. LaBonte*, 520 U.S. 751, 779 (1997) (Breyer, J., dissenting) (noting the traditional goals of punishment as "deterrence, incapacitation, just deserts, [and] rehabilitation"); see also 24 C.J.S. *Criminal Law* § 1997 (2006) (discussing the traditional retributive, deterrent, rehabilitative, and preventive goals of punishment and explaining that the United States Constitution does not require a particular theory as the justification for punishment, but rather legislatures are free to justify criminal sentences on any one theory or combination thereof).

96. See *Gregg*, 428 U.S. at 173 (explaining that sanctions "grossly out of proportion" to the severity of the offense are unconstitutionally excessive); see also *Weems*, 217 U.S. at 372-73 (adopting proportionality as a constitutional standard under the Eighth Amendment). But see 24 C.J.S. *Criminal Law* § 2197 (2006) (suggesting that the principle of gross disproportion, which rejects the idea that there must be a strict proportion between crime and punishment under the Eighth Amendment, implies that proportionality is not a constitutional guarantee). See generally *Solem v. Helm*, 463 U.S. 277, 284-90 (1983) (canvassing the history and development of proportionality principles in English and American common law).

97. See *Solem*, 463 U.S. at 290-91 (holding that all criminal sentences must be proportional to the offense, and creating a three-part proportionality analysis, which considers (1) the gravity of the offense and the severity of punishment, (2) sentences of other criminals within the same jurisdiction, and (3) sentences for the same offense in other jurisdictions); *Rummel v. Estelle*, 445 U.S. 263, 274 n.11 (1980) (recognizing that non-death-penalty criminal sentences may be unconstitutionally disproportionate); see also *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991) ("The Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are 'grossly disproportionate' to the crime.").

98. See *Enmund v. Florida*, 458 U.S. 782, 801 (1982) ("For purposes of imposing the death penalty . . . punishment must be tailored to . . . personal responsibility and moral guilt."); *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (stating that considerations of the "character" and "propensities" of the individual offender are necessary for the imposition of a "just and appropriate" punishment and that in capital cases such considerations are a constitutional requirement); see also *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring) (explaining that Court precedent reflects the belief that a nexus is required between the defendant's moral blame and the imposition of capital punishment).

99. See *Solem*, 463 U.S. at 284, 296, 303 (explaining the "deeply rooted" Anglo-American principle that punishment be proportioned to the offense and holding that a life sentence was unconstitutionally disproportionate for the offense of passing a "no account" check for \$100).

sentence for a petty theft.<sup>100</sup> And, in capital cases, punishment is also disproportionate if its severity is not comparable to the blameworthiness of the offender,<sup>101</sup> as would be the case of a death sentence for an offender with a diminished culpability on account of mental deficiency.<sup>102</sup> Thus, in certain contexts, the individual characteristics and personal culpability of the offender are critical in determining whether a punishment comports with the Eighth Amendment. The Court's excessiveness jurisprudence, which accounts for individual culpability, is not expressly limited to the death-penalty context.<sup>103</sup> In practice, however, considerations of individual culpability, under an Eighth Amendment excessiveness analysis, have largely been limited to capital cases.<sup>104</sup>

The Eighth Amendment's ban on cruel and unusual punishments applies, at a minimum, to those forms of punishment that had been considered cruel and unusual at the time of the Bill of Rights' adoption.<sup>105</sup> In addition to draconian punishments condemned by

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100. See *Robinson v. California*, 370 U.S. 660, 675 (Douglas, J., concurring) (stating that capital punishment for petty crimes is unconstitutionally disproportional).

101. See *Enmund*, 458 U.S. at 798 (stating in capital cases courts must consider the personal culpability of the individual defendant in sentencing because "we insist on individualized consideration as a constitutional requirement in imposing the death sentence" (quoting *Lockett v. Ohio*, 438 U.S. 586, 605 (1978))); see also *Coker v. Georgia*, 433 U.S. 584, 598 (1977) (holding that death is a disproportionate punishment for rapists because such offenders lack the "moral depravity" necessary to justify capital punishment).

102. See *Roper v. Simmons*, 543 U.S. 551, 578 (2005) (holding that the execution of juveniles is unconstitutional under the Eighth Amendment because juveniles possess a diminished culpability on account of their underdeveloped mental state); *Atkins v. Virginia*, 536 U.S. 304, 306, 321 (2002) (holding that the Eighth Amendment prohibits the imposition of capital punishment for mentally retarded offenders because they possess a diminished culpability on account of their mental deficiencies).

103. See *Solem*, 463 U.S. at 289 (noting that the Court has never drawn a distinction between imprisonment and execution when applying Eighth Amendment proportionality principles); 24 C.J.S. *Criminal Law* § 2197 (2006) (explaining that the prohibition against disproportional punishments is not limited to capital punishment, as the ban applies to all penalties, but that challenges based on the disproportionality of non-death-penalty sentences are rarely successful).

104. See *Rummel v. Estelle*, 445 U.S. 263, 272 (1980) ("Outside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare."); see also *Stanford v. Kentucky*, 492 U.S. 361, 393-94 (1989) (Brennan, J., dissenting) (surveying the importance of individual culpability in constitutional capital sentencing jurisprudence).

105. *Ford v. Wainwright*, 477 U.S. 399, 405 (1986). Interestingly, the Supreme Court has itself recognized that punishing the insane was not acceptable at common law. See *Penry v. Lynaugh*, 492 U.S. 302, 331 (1986) (citing William Blackstone's discussions of the common law's exculpatory disposition towards the actions of "lunatics," and observing that "[i]t was well settled at common law that . . . 'lunatics[]' were not subject to punishment for criminal acts committed under [that incapacity]").

the common law in 1789,<sup>106</sup> the Eighth Amendment forbids punishments that violate contemporary values of human dignity.<sup>107</sup> That is, punishments that modern society deems sufficiently excessive or inhumane as to offend our sense of decency are also unconstitutional.

To apply this framework and determine which modern-day punishments are sufficiently excessive as to be cruel and unusual, courts look to the “evolving standards of decency that mark the progress of a maturing society.”<sup>108</sup> These evolving standards are determined by an examination of state policy and legislation,<sup>109</sup> which, according to the Court, represents the “clearest and most reliable objective evidence of contemporary values . . . .”<sup>110</sup> This objective analysis of a national consensus is then supplemented by the Court’s independent judgment of the punishment’s constitutionality.<sup>111</sup> Thus, Eighth Amendment violations are determined in one of two ways: first, whether society considered the challenged punishment cruel and unusual at the time the Eighth Amendment was drafted; or second, whether the challenged punishment violates contemporary standards of decency.

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106. See *Robinson v. California*, 370 U.S. 660, 675 (1962) (Douglas, J., concurring) (noting that punishments considered cruel and unusual at the time of the Eighth Amendment’s framing included “burning at the stake, crucifixion, breaking on the wheel’, quartering, the rack and thumbscrew, and in some circumstances even solitary confinement”) (citations omitted).

107. See *Ford*, 477 U.S. at 406 (explaining that the Court considers modern societal values when determining the constitutionality of punishments because the Eighth Amendment protects against violations of “fundamental human dignity,” as well against “barbarous” punishments).

108. See *id.* (quoting *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958) (plurality opinion)); *Trop*, 356 U.S. at 100-01 (“The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. . . . The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”).

109. See *Atkins v. Virginia*, 536 U.S. 304, 312 (2002) (“Proportionality review under those evolving standards should be informed by . . . ‘the legislation enacted by the country’s legislatures.’” (quoting *Penry*, 492 U.S. at 331)); see also *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (“Eighth Amendment judgments . . . should be informed by . . . the public attitudes concerning a particular sentence—history and precedent, legislative attitudes, and the response of juries reflected in their sentencing decisions are to be consulted.”).

110. *Penry*, 492 U.S. at 331.

111. See *Atkins*, 536 U.S. at 313 (“[I]n cases involving a consensus, our own judgment is ‘brought to bear’ by asking whether there is reason to disagree with the judgment reached by the citizenry and its legislators.” (quoting *Coker*, 433 U.S. at 597)); see also 24 C.J.S. *Criminal Law* § 2197 (2006) (explaining that the Court’s determination into the excessiveness of a punishment includes an independent analysis into the constitutional propriety of agreeing or disagreeing with the national consensus’ judgment).

B. *Robinson and Powell: Contrasting Interpretations of the Eighth Amendment's Applicability to Non-Death-Penalty Cases*

In *Robinson v. California*,<sup>112</sup> decided in 1962, the Supreme Court held that a statute prescribing imprisonment for narcotic addiction, solely based on the person's status as an addict, is cruel and unusual punishment in violation of the Eighth Amendment.<sup>113</sup> The law violated the Eighth Amendment not because the punishment itself (ninety days imprisonment) was cruel and unusual, but because the so-called criminal act, an illness, was not deserving of punishment.<sup>114</sup> "Even one day in prison," the Court noted, "would be a cruel and unusual punishment for the 'crime' of having a common cold."<sup>115</sup> Thus, *Robinson* held that a law punishing a blameless individual is unconstitutionally excessive. Although the *Robinson* Court deemed the defendant blameless because his illness was not a criminal act, the rationale implies that other individuals lacking culpability on account of personal characteristics, such as a severe mental defect, are similarly protected from criminal punishment under the Eighth Amendment.

*Robinson* signaled a potential change in the Court's approach towards interpreting the Eighth Amendment.<sup>116</sup> It appeared that the Court viewed the Eighth Amendment as prohibiting punishment not only for status offenses, but also for morally blameless offenders.<sup>117</sup> However, this approach never materialized into a lasting doctrine, as the Court, just six years after *Robinson*, decided *Powell v. Texas*,<sup>118</sup>

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112. 370 U.S. 660 (1962).

113. *Id.* at 667.

114. *See id.* at 666-67 (analogizing a narcotic addiction, "an illness which may be contracted innocently or involuntarily," to other mental or physical diseases, and concluding that the mere status of illness is insufficient to justify criminal punishment).

115. *Id.* at 667.

116. *See* Joshua Dressler, *Kent Greenawalt, Criminal Responsibility, and the Supreme Court: How a Moderate Scholar Can Appear Immoderate Thirty Years Later*, 74 NOTRE DAME L. REV. 1507, 1509-10 (1999) (discussing the historical importance of *Robinson*); David Robinson, Jr., *Powell v. Texas: The Case of the Intoxicated Shoeshine Man Some Reflections a Generation Later by a Participant*, 26 AM. J. CRIM. L. 401, 435-36 (1999) (speculating that *Robinson* could have been interpreted as establishing a constitutional requirement for self-control before punishment may be imposed).

117. Dressler, *supra* note 116, at 1510. According to Justice Douglas:

I do not see how under our system being an addict can be punished as a crime. If addicts can be punished for their addiction, then the insane can also be punished for their insanity. Each has a disease and each must be treated as a sick person . . . . [An addict may] be confined for treatment or for the protection of society. Cruel and unusual punishment results not from confinement, but from convicting the addict of a crime.

*Robinson*, 370 U.S. at 674-76 (Douglas, J., concurring) (footnote omitted).

118. 392 U.S. 514 (1968).

wherein it foreclosed the potential for *Robinson* as a new basis for Eighth Amendment interpretation in non-death-penalty cases.<sup>119</sup>

In *Powell*, the Court held that the prosecution of chronic alcoholics, under a statute criminalizing public drunkenness, did not violate the Eighth Amendment's prohibition against cruel and unusual punishments.<sup>120</sup> Drawing analogies to the insanity defense,<sup>121</sup> the Court rejected the proposition that the Eighth Amendment categorically prohibits criminal punishment for being in a condition that the person is powerless to change.<sup>122</sup> Thus, the Court seemed to back away from *Robinson's* implication that the Eighth Amendment is violated by punishing acts, in the non-capital context, that are involuntary due to a condition the offender is powerless to change.<sup>123</sup>

After *Robinson* and *Powell*, the Court's position appears to be that the Eighth Amendment does not require an offender to commit a

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119. See Jeffrey Rowe, Comment, *Revisiting Robinson: The Eighth Amendment as Constitutional Support for Theories of Criminal Responsibility*, 5 U. MD. L.J. RACE, RELIGION, GENDER, & CLASS 95, 98 (2005) (explaining *Powell's* effect on post-*Robinson* Eighth Amendment interpretation).

120. *Powell*, 392 U.S. at 517.

121. According to the Court:

Nothing could be less fruitful than for this Court to be impelled into defining some sort of insanity test in constitutional terms. Yet, that task would seem to follow inexorably from an extension of *Robinson* to this case. If a person in the "condition" of being a chronic alcoholic cannot be criminally punished as a constitutional matter for being drunk in public, it would seem to follow that a person who contends that, in terms of one test, "his unlawful act was the product of mental disease or mental defect," would state an issue of constitutional dimension with regard to his criminal responsibility had he been tried under some different and perhaps lesser standard, e.g., the right-wrong test of *M'Naghten's Case*.

*Id.* at 536 (citation omitted).

122. *Id.* at 532-33. Here, it is important to note the distinction between punishing the "diseased" alcoholic, as dealt with in *Powell*, and criminal punishment for the insane offender. The theory that the alcoholic is controlled by a disease does not enjoy much legal support, as alcoholism is commonly viewed as voluntarily brought about by the alcoholic's free choice to begin drinking. See Jodie English, *The Light Between Twilight and Dusk: Federal Criminal Law and the Volitional Insanity Defense*, 40 HASTINGS L.J. 1, 21 (1988) (explaining the differences between the disease concept of alcoholism and legal insanity in terms of the *Powell* decision's relevance for the constitutional bounds of the insanity defense). This is distinguishable from mental disorders that satisfy legal insanity tests. Such diseases have never been recognized as conditions that one may voluntarily chose or forgo. *Id.* Accordingly, alcoholism does not involve an individual who is powerless to control his behavior, which is a central concern in legal insanity cases. Thus, *Powell* is arguably distinguishable, on its facts, from cases involving the diseased insane offender.

123. See *Robinson*, *supra* note 116, at 437 (arguing that *Powell* foreclosed the possibility of interpreting *Robinson* as establishing the rule that self-control was a constitutional requirement for the imposition of punishment). But see Heathcote W. Wales, *An Analysis of the Proposal to "Abolish" the Insanity Defense in S.I: Squeezing a Lemon*, 124 U. PA. L. REV. 687, 704 (1976) (arguing that dictum of five justices in *Powell* (Justice White's concurrence and the four dissenters) suggests that a majority on the *Powell* Court believed that the punishment of those who acted under compulsion may violate the Eighth Amendment).

voluntary act before courts may impose punishment,<sup>124</sup> and that the Eighth Amendment, except in death-penalty cases,<sup>125</sup> is not concerned with the moral culpability of the individual offender. There are compelling reasons, however, for the Court to abandon this restrictive interpretation of the Eighth Amendment.<sup>126</sup> With respect to the narrow context of mentally diseased offenders, the Court's Eighth Amendment analysis should return to considerations of individual culpability similar to the approach adopted in *Robinson* and in the Court's contemporary death-penalty jurisprudence.

### III. EIGHTH AMENDMENT DEATH-PENALTY JURISPRUDENCE

The Supreme Court's Eighth Amendment jurisprudence is characterized by a general unwillingness to address personal culpability issues,<sup>127</sup> except in the capital-punishment context.<sup>128</sup> Accordingly, this Comment looks to the Court's Eighth Amendment death-penalty jurisprudence for guidance on the issue of the Eighth Amendment implications of abolishing the insanity defense. Specifically, it analyzes the recent cases of *Atkins v. Virginia*,<sup>129</sup> concerning capital punishment for the mentally retarded, and *Roper v. Simmons*,<sup>130</sup> concerning the juvenile death penalty. These cases are particularly relevant to insanity doctrine because both involve the

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124. Rowe, *supra* note 119, at 98.

125. See discussion *infra* Part IV (describing and criticizing the Court's reluctance to extend its Eighth Amendment death-penalty rulings to non-death-penalty contexts).

126. See discussion *infra* Part IV (addressing the similarities between the Court's Eighth Amendment death-penalty cases and cases involving mentally diseased offenders, and arguing that these similarities require consistent application of the Eighth Amendment to both contexts).

127. See *supra* note 104 and accompanying text (explaining that the Court's Eighth Amendment jurisprudence accounts for the personal responsibility of the individual offender only in capital cases). But see *Robinson v. California*, 370 U.S. 660, 667 (1962) (holding that the punishment of a drug addict solely for his status as an addict violates the Punishments Clause because such "offenders" are morally blameless and therefore such punishment is unconstitutionally disproportionate). Although the Court's non-death-penalty Eighth Amendment jurisprudence has since moved away from the type of personal-culpability considerations employed in *Robinson*, this decision illustrates the feasibility of a return to such proportionality analyses. Moreover, the Court has never overruled *Robinson*.

128. See 24 C.J.S. *Criminal Law* § 2197 (2006) (explaining that proportionality challenges to criminal sentences under the Eighth Amendment are typically successful only in the death-penalty context); see also Daniel J. Nusbaum, Note, *The Craziest Reform of Them All: A Critical Analysis of the Constitutional Implications of "Abolishing" the Insanity Defense*, 87 CORNELL L. REV. 1509, 1569 (2002) (arguing that an Eighth Amendment challenge to the abolition of the insanity defense likely would fail because the Supreme Court has only been receptive to such claims when capital punishment is involved).

129. 536 U.S. 304 (2002).

130. 543 U.S. 551 (2005).

Eighth Amendment implications of punishing mentally deficient offenders.

A. *Atkins v. Virginia: The Court Extends Eighth Amendment Protections to the Mentally Retarded*

In *Atkins v. Virginia*,<sup>131</sup> the Court held that the imposition of the death penalty on the mentally retarded is a cruel and unusual punishment in violation of the Eighth Amendment.<sup>132</sup> The Court began its Eighth Amendment analysis by examining the capital punishment policies of the states through the evolving-standards-of-decency lens.<sup>133</sup> The Court based its analysis on state policies enacted since 1989, the year when the Court ruled that there was *not* a national consensus against capital punishment for the mentally retarded.<sup>134</sup> Since 1989, seventeen states had enacted legislation prohibiting capital punishment for the mentally retarded, bringing the total number of jurisdictions prohibiting such punishment to thirty-one.<sup>135</sup> The Court found this evidence to constitute a national consensus against executing mentally retarded offenders.<sup>136</sup>

The Court then determined whether there were independent reasons, underlying the national consensus, that justified a prohibition against executing the mentally retarded. It found such justification in the fact that executing the mentally retarded did not further the principle goals of capital punishment; namely, retribution and deterrence.<sup>137</sup> The Court found that due to disabilities in the areas of reason, judgment, and impulse control,<sup>138</sup> a mentally

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131. 536 U.S. 304 (2002).

132. *Id.* at 321.

133. *See id.* at 313 (“[W]e shall first review the judgment of legislatures that have addressed the suitability of imposing the death penalty on the mentally retarded . . .”).

134. *See Penry v. Lynaugh*, 492 U.S. 302, 334 (1989) (holding that the federal prohibition against capital punishment for the mentally retarded, combined with Maryland’s similar prohibition and the fourteen states that rejected the death penalty completely, did not provide sufficient evidence of a national consensus against capital punishment for mentally retarded offenders).

135. *See Atkins*, 536 U.S. at 314-15 (noting that thirty states and the federal government proscribe capital punishment for mentally retarded offenders).

136. *Id.* at 316.

137. *See id.* at 319 (“Unless the imposition of the death penalty on a mentally retarded person ‘measurably contributes to one or both of these goals, it is “nothing more than purposeless and needless imposition of pain and suffering,” and hence an unconstitutional punishment.’” (quoting *Edmund v. Florida*, 458 U.S. 782, 798 (1982))).

138. *See id.* at 318 (finding that although mentally retarded persons often know right from wrong, studies show that their mental impairments result in “diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others”).

retarded individual does not “act with the level of moral culpability that characterizes the most serious adult criminal conduct.”<sup>139</sup> The Court then concluded that the mentally retarded, as a class, possess a diminished culpability that requires a correspondingly diminished degree of punishment.<sup>140</sup> Under this principle, the Court reasoned that the death penalty, reserved exclusively for the most depraved murderers, is a disproportionately severe form of retribution for the mentally retarded.<sup>141</sup> This is because retribution—defined as society’s interest in imposing suffering upon an offender commensurate with the suffering caused by the offense<sup>142</sup>—requires that the severity of punishment correspond to the culpability of the offender.<sup>143</sup> The execution of mentally retarded offenders, who as a class possess a diminished culpability, is necessarily disproportionate to the offender’s blameworthiness, and therefore fails to serve retributive goals.

With respect to deterrence—the interest in preventing future crimes through the example of punishment<sup>144</sup>—the Court found that the mental disabilities of mentally retarded persons “make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information.”<sup>145</sup> Hence, it is unlikely that the death penalty will have any deterrent effect on the prospective mentally retarded offender. Further, removing the threat of execution for the mentally retarded will not affect capital punishment’s deterrent effect on offenders who are not mentally retarded, as such people will still face the death penalty.<sup>146</sup> The Court concluded, therefore, that the execution of the mentally retarded failed to advance either of the penal interests that justify capital punishment, a judgment echoed by the national consensus.<sup>147</sup>

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139. *Id.* at 306.

140. *Id.* at 319.

141. *Id.*

142. LAFAVE, *supra* note 7, § 1.5(a) (3).

143. *Atkins*, 536 U.S. at 319.

144. LAFAVE, *supra* note 7, § 1.5(a) (4).

145. *Atkins*, 536 U.S. at 320.

146. *Id.*

147. *Id.* at 321. The Court supplemented this independent judgment against the execution of the mentally retarded with the additional justification that the mental disabilities of mentally retarded persons can “jeopardize the reliability and fairness” of their trial. *Id.* at 306-07, 320-21 (reasoning that mentally retarded persons, in the aggregate, face a special risk of wrongful conviction and execution on account of the heightened possibility that they will make false confessions, their lesser ability to give meaningful assistance to counsel, their lesser ability to testify on their own behalf, the fact that they are often poor witnesses, and the heightened possibility that their

Because the Court found that states had created a national consensus against executing mentally retarded offenders, and because there were independent reasons underlying this consensus, the Court held that the death penalty is an unconstitutionally excessive punishment for mentally retarded persons.<sup>148</sup> Thus, the Court extended Eighth Amendment protections to mentally retarded criminals, setting forth the categorical rule against executing the mentally retarded.

*B. Roper v. Simmons: The Court Extends Eighth Amendment Protections to Juveniles*

Three years later, the *Atkins* precedent set the stage for the Court to reconsider the constitutionality of capital punishment for juvenile offenders.<sup>149</sup> In *Roper v. Simmons*,<sup>150</sup> the Court held that the Eighth Amendment forbids executing offenders who were under the age of eighteen when they committed their offense.<sup>151</sup>

The Court began by reviewing objective indicia of a national consensus on juvenile capital punishment, as expressed by state policy.<sup>152</sup> The evidence paralleled that which the *Atkins* Court deemed sufficient for a national consensus. Thirty states prohibited the juvenile death penalty,<sup>153</sup> and of the twenty states without a formal prohibition on the practice, executions of juvenile offenders were “infrequent.”<sup>154</sup> Based on this evidence, the Court found that there was a national consensus against the juvenile death penalty.<sup>155</sup>

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courtroom demeanor may convey a false lack of remorse). Based on these reasons, the Court rendered a categorical rule against executing the mentally retarded.

148. *Id.* at 321 (“[T]he Constitution ‘places a substantive restriction on the State’s power to take the life’ of a mentally retarded offender”) (quoting *Ford v. Wainwright*, 477 U.S. 399, 405 (1986)).

149. *See* *Stanford v. Kentucky*, 492 U.S. 361, 380 (1989), *overruled by* *Roper v. Simmons*, 543 U.S. 551 (2001) (holding that the Eighth and Fourteenth Amendments do not prohibit capital punishment for juvenile offenders over 15 but under 18); *see also* *State ex rel. Simmons v. Roper*, 112 S.W.3d 397, 413 (Mo. 2003) (reversing a seventeen-year-old’s death sentence because a national consensus against the juvenile death penalty had developed since *Stanford* was decided).

150. 543 U.S. 551 (2005).

151. *Id.* at 578.

152. *See id.* at 564 (“The beginning point is a review of objective indicia of consensus, as expressed in particular by the enactments of legislatures that have addressed the question.”).

153. This figure comprises the twelve states that forbid capital punishment altogether and eighteen states that maintained it for adults, but expressly forbid it for juvenile offenders by either provision or judicial interpretation. *Id.*

154. *See id.* at 565 (noting that in the past ten years, only Oklahoma, Texas, and Virginia have executed juvenile offenders); *see also id.* (explaining that in December, 2003, the Kentucky Governor commuted the death sentence of Kevin Stanford—the very defendant whose death sentence was upheld by the Supreme Court in *Stanford v.*

The Court then applied its independent judgment to determine whether, consistent with the national consensus, the Eighth Amendment forbids executing juveniles. Following the logic of *Atkins*, the Court examined the mental deficiencies inherent in all juveniles and concluded that such deficiencies inhibit the advancement of capital punishment's penal goals.<sup>156</sup> The Court found three key differences between juveniles and adults, which lessens the moral culpability of juvenile offenders. First, there is a lack of maturity and an underdeveloped sense of responsibility among youths under the age of eighteen.<sup>157</sup> Second, juveniles are more "vulnerable or susceptible" to negative influences and pressures.<sup>158</sup> Finally, juveniles have an underdeveloped sense of character and personality.<sup>159</sup> As in *Atkins*, the *Roper* Court concluded that these mental deficiencies diminish the culpability of juveniles as a class.<sup>160</sup>

Following the principles set forth in *Atkins*, the Court found that the diminished culpability of the juvenile offender renders capital punishment a less effective mechanism for advancing retribution interests because the required correlation between the severity of punishment and the blameworthiness of the offender is not satisfied.<sup>161</sup> Similarly, the Court reasoned that the mental deficiencies

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*Kentucky*—to a sentence of life imprisonment because, in the Governor's words, "We ought not be executing people who, legally, were children").

155. *See id.* at 567 (finding further evidence for a national consensus against the juvenile death penalty in the Federal Death Penalty Act of 1994, wherein Congress determined that the death penalty should not extend to juveniles).

156. *See id.* at 569-73 (analyzing the underdeveloped mental capacity of juveniles and concluding that the immaturity, vulnerability, and underdeveloped personality concomitant with youth detracts from the deterrent and retributive justifications for executing juveniles).

157. *See id.* at 569 (finding that these qualities result in ill-considered decisions and conduct in youths, that juveniles are disproportionately represented in all categories of reckless behavior, and that based on these immaturities most states prohibit juveniles from voting, serving on juries, or marrying without parental consent).

158. *See id.* (citing scientific sources indicating that youth is a period when people are most susceptible to influence and psychological damage, as evidenced by the "prevailing circumstance that juveniles have less control, or less experience with control, over their own environment," and that juveniles "lack the freedom that adults have to extricate themselves from a criminogenic setting").

159. *See id.* at 570 (citing scientific findings that the personality traits of a juvenile are transitory).

160. *See id.* ("The susceptibility of juveniles to immature and irresponsible behavior means 'their irresponsible conduct is not as morally reprehensible as that of an adult.'" (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1987))).

161. *See id.* at 571 ("[T]he case for retribution is not as strong with a minor as with an adult. Retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished . . . by reason of youth and immaturity.").

of minors lessen the deterrent effect of the juvenile death penalty.<sup>162</sup> Thus, the Court concluded that the execution of minors fails to advance the goals of the death penalty.<sup>163</sup>

Based on the national consensus against the juvenile death penalty and the independent judgment underlying this consensus, largely determined by considering the individual culpability of juvenile offenders, the Court concluded that society views juvenile offenders as “categorically less culpable than the average criminal” and declared the execution of minors an unconstitutional punishment under the Eighth Amendment.<sup>164</sup> Thus, the Court extended Eighth Amendment protection to juvenile criminals and set forth the categorical rule against the juvenile death penalty.

#### IV. UNDER THE EVOLVING-STANDARDS-OF-DECENCY ANALYSIS, DEATH IS *NOT* DIFFERENT

The Supreme Court has been reluctant to decide Eighth Amendment cases outside the death-penalty context.<sup>165</sup> Consequently, a ruling granting Eighth Amendment protection to the insanity defense will require the Court to narrowly modify this dismissive approach to Eighth Amendment jurisprudence. However, compelling reason exists for such a doctrinal shift, at least with respect to the narrow area of criminal punishment for insane offenders.

All criminal cases involve the potential for some form of state-imposed punishment. When determining whether a form of punishment *itself* is sufficiently barbaric and therefore unconstitutionally cruel and unusual, the focus is properly on the type of punishment, without regard to the individual characteristics of the punished.<sup>166</sup> However, when determining whether a

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162. *See id.* at 571-72 (noting that the same qualities that render juveniles less culpable, “suggest[s] . . . that juveniles will be less susceptible to deterrence” and “[t]he likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually not existent” (quoting *Thompson*, 487 U.S. at 837)).

163. *See id.* at 572 (concluding that neither deterrence nor retribution justify the execution of minors).

164. *Id.* at 567-68 (quoting *Atkins v. Virginia*, 536 U.S. 304, 315 (2002)).

165. *See supra* note 127-128 and accompanying text (discussing the Court’s unwillingness to extend Eighth Amendment protections outside of the death penalty context and noting the rarity of successful Eighth Amendment challenges in non-capital cases).

166. For example, forms of punishments inherently cruel and unusual include burning at the stake, crucifixion, quartering, and thumbscrews. *Robinson v. California*, 370 U.S. 660, 675 (1962) (Douglas, J., concurring). Such punishments violate the Eighth Amendment solely because of their barbaric form. *Id.* In

punishment is unconstitutionally excessive under the evolving-standards-of-decency analysis, the analysis should not focus exclusively on the form or severity of the punishment. Rather, the individual characteristics of the offender must be considered.<sup>167</sup> This is because the Eighth Amendment's conditions for avoiding excessive punishments, ensuring proportionality and furthering penal goals, often require that the punishment be tailored to the offense *and* the blameworthiness of the offender.<sup>168</sup>

The Court has rightly adopted this approach in capital cases.<sup>169</sup> However, this analysis should not be strictly limited based on the form of ultimate punishment, such that the Eighth Amendment is applied differently to otherwise similar legal and factual contexts. Of course capital punishment, "unique in its severity and irrevocability,"<sup>170</sup> is distinct from all other forms of punishment.<sup>171</sup> The mere fact that the ultimate sentence may differ in otherwise analogous cases, however, fails to provide a principled basis for avoiding consistent application of constitutional principles to similar legal and factual contexts.<sup>172</sup> Rather, uniform and consistent

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determining the constitutionality of such draconian forms of punishments, therefore, the individual characteristics of the punished are irrelevant. *Id.* at 676.

167. See discussion *supra* Parts III.A-B (explaining the Eighth Amendment analysis employed in *Atkins* and *Roper*, which accounts for the individual characteristics of the offender and lessens the offender's personal culpability based on mental deficiency).

168. See *supra* notes 97-102 and accompanying text (discussing the Eighth Amendment's prohibition against excessive punishments, which requires, *inter alia*, that punishments correlate to the severity of the offense and the moral blame of the offender); discussion *infra* Part V.B.1 (illustrating how incarcerating mentally deficient insane offenders violates the Eighth Amendment's prohibition against excessive punishments because such punishment fails to advance acceptable penal goals); discussion *infra* Part V.B.2 (illustrating how the Eighth Amendment's prohibition against disproportional punishments is violated by punishing insane offenders because such punishment fails to correspond to such offenders' individual culpability).

169. See, e.g., *Enmund v. Florida*, 458 U.S. 782, 798 (1982) (stating that the Court must consider personal culpability in capital sentencing because "we insist on 'individualized consideration as a constitutional requirement in imposing the death sentence'" (quoting *Lockett v. Ohio*, 438 U.S. 586, 605 (1978))).

170. *Gregg v. Georgia*, 428 U.S. 153, 187 (1976).

171. See *Furman v. Georgia*, 408 U.S. 238, 306 (1972) (Stewart, J., concurring) ("[D]eath differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation . . . . And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity."); see also Note, *The Rhetoric of Difference and the Legitimacy of Capital Punishment*, 114 HARV. L. REV. 1599, 1599 n.1 (2001) (discussing the origins of the principle that death is a categorically different form of punishment). *But see id.* at 1619-22 (arguing that the claim that death is categorically different from other forms of punishment is not philosophically sound).

172. The Court endorsed this principle in *Solem v. Helm*, stating:

There is no basis for the State's assertion that the general principle of proportionality does not apply to felony prison sentences. The constitutional language itself suggests no exception for imprisonment. We

excessiveness principles should govern similar cases involving the imposition of any punishment,<sup>173</sup> irrespective of the punishment's severity or form.<sup>174</sup>

When citizens seek the protection of the Eighth Amendment, justice requires that that protection be equally available and effective for all similarly situated citizens facing punishment at the hands of the State.<sup>175</sup> Foreclosing constitutional protections based solely on the potential sentence is not supported by other areas of constitutional criminal law. Professor Erwin Chemerinsky illustrates this point by analogizing the Court's anomalous death-is-different jurisprudence to other areas of constitutional criminal law, such as the Fourth Amendment protection against unreasonable searches and seizures, the Fifth Amendment right against self-incrimination, and the Sixth Amendment right to trial by jury, all of which apply

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have recognized that the Eighth Amendment imposes "parallel limitations" on bail, fines, and other punishments, and the text is explicit that bail and fines may not be excessive. It would be anomalous indeed if the lesser punishment of a fine and the greater punishment of death were both subject to proportionality analysis, but the intermediate punishment of imprisonment were not.

463 U.S. 277, 288-89 (1983) (citation and footnote omitted). The Court subsequently stepped back from this principle, overruling *Solem's* holding that proportionality analysis is required in all criminal cases. *Harmelin v. Michigan*, 501 U.S. 957, 965 (1991). The reasoning in *Solem*, however, was sound, in its textual reading of the Eighth Amendment and its historical analysis, both of which supported the conclusion that the Eighth Amendment does not draw distinctions between punishments based on degree. 463 U.S. at 288-90. The Court should, therefore, return to the interpretation of the Eighth Amendment it espoused in *Solem*, which recognizes the necessity of consistent Eighth Amendment application.

173. See Daniel Suleiman, Note, *The Capital Punishment Exception: A Case for Constitutionalizing the Substantive Criminal Law*, 104 COLUM. L. REV. 426, 458 (2004) (criticizing the Court's "death is different" justification for applying different Eighth Amendment standards to otherwise similar cases, and arguing that such distinctions run counter to the underlying rationale, "a concern for justice," for regulating criminal punishment).

174. Importantly, capital punishment is not necessarily a worse sanction than imprisonment. Although common sense instructs that life is preferable to death, this is not a categorical rule. There are situations when the conditions of life, particularly a life of incarceration, may lead an individual to prefer death. Consider death-row prisoner John Martini's statement:

I just don't want to live . . . . Even if I win the appeals, they will put me in the [prison] population. That's the same thing. It's no life, and if they put me in protective custody, again, who wants to live 23 hours in the cell? It just isn't life.

George James, *The Machinery of Death*, N.Y. TIMES, June 16, 1996, at NJ1. This preference of death over a life of imprisonment offers further evidence that capital cases are *not* necessarily different from other felony cases solely because the punishment is thought to be a more severe penalty.

175. See Suleiman, *supra* note 173, at 452 (arguing for abandonment of the Supreme Court's death-is-different jurisprudence and an extension of the requirements of blame and proportionality to non-capital cases because injustice, as traditionally understood and loathed by our constitutional framework, results from inconsistent application of the Eighth Amendment).

equally to capital and non-capital cases.<sup>176</sup> It would be unreasonable, and arguably unconstitutional, to apply different constitutional standards in these important areas of criminal law, and it is similarly unreasonable to do so in the Eighth Amendment context.

The combination of the abolition of the insanity defense and the Court's reluctance to afford Eighth Amendment guarantees to similarly situated prisoners has resulted in an injustice against mentally diseased offenders. The Court has a constitutional duty to correct this injustice,<sup>177</sup> and can accomplish this by uniformly applying the Eighth Amendment evolving-standards-of-decency analysis where cases are similar. As mentally diseased insane offenders suffer from a deficient mental state<sup>178</sup> similar to that of mentally retarded and juvenile offenders,<sup>179</sup> they bear the concomitant diminished culpability. Despite the fact that *Atkins* and *Roper* were capital cases, this similarity justifies the application of the Eighth Amendment analyses from *Atkins* and *Roper*.<sup>180</sup> Accordingly, the Court's recent Eighth Amendment death-penalty jurisprudence concerning mentally deficient offenders should be extended to the analogous area of criminal punishment for insane offenders, thereby redressing the current denial of constitutional protections to mentally diseased offenders recently granted to the similarly mentally deficient offenders in *Atkins* and *Roper*.

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176. Erwin Chemerinsky, *Evolving Standards of Decency in 2003—Is the Death Penalty on Life Support?*, 29 U. DAYTON L. REV. 201, 220 (2004).

177. See *Weems v. United States*, 217 U.S. 349, 378-79 (1910) (asserting the judiciary's duty to determine whether legislation conflicts with the Constitution, declaring the judiciary's constitutional supremacy to legislatures in such cases, and explaining that this duty and status requires the Court to void unconstitutional legislation).

178. See *infra* notes 255-260 and 265-267 (discussing the mental deficiencies common to insane offenders, including distorted abilities to process information, communicate, reason, and exercise impulse control; a vulnerability to external and internal influences; and a clouded or absent sense of personal responsibility).

179. See discussion *infra* Parts V.B.1.a-b, V.B.2 (comparing the mental deficiencies of mentally retarded and juvenile offenders and the diminished culpability attached to such offenders, with the mental deficiencies of insane offenders).

180. It is important to note that there is not always a clear distinction between capital offenses and offenses committed by insane offenders. There is overlap, in that insane offenders also commit capital crimes. See, e.g., *Woman Not Guilty*, *supra* note 2 (reporting that Andrea Yates, found not guilty by reason of insanity by a Texas jury, drowned her five children); see also TEX. PENAL CODE ANN. § 19.03(a)(7)-(8) (Vernon 2006) (stating that it is a capital crime in the state of Texas to murder more than one person during the same offense or to murder a person under six years of age). There is, therefore, a greater likelihood for insane offenders to face the death penalty in jurisdictions that have abolished the affirmative insanity defense. This supports the argument that the reasoning from the Court's Eighth Amendment death penalty jurisprudence should be extended to the issue of criminal punishment for insane offenders.

## V. THE EIGHTH AMENDMENT AND THE INSANITY DEFENSE

The Eighth Amendment's protections are not static.<sup>181</sup> From time to time, as contemporary attitudes towards punishment shift, the acceptability of particular punishments must be reevaluated.<sup>182</sup> Thus, while historical practice may protect other areas of constitutional law simply because a punishment enjoyed a period of acceptability, such acceptability should not enshrine that punishment in perpetual constitutional protection.<sup>183</sup> Despite our common-law heritage of immunizing the insane from punishment, the recent practice of abolishing the insanity defense has escaped Eighth Amendment scrutiny. The progressive nature of the Eighth Amendment illustrates that this recent practice is not immune from constitutional reconsideration,<sup>184</sup> and centuries of legal history illustrate that punishing the insane is categorically excessive, in a manner that the Eighth Amendment has traditionally prohibited. Thus, it is time for the Supreme Court to address the Eighth Amendment implications of the abolition of the insanity defense, apply the evolving-standards-of-decency analysis from recent analogous cases involving mentally deficient offenders, and hold that the punishment of the insane is a violation of the Eighth Amendment.

Application of the Eighth Amendment's evolving-standards-of-decency analysis to the question of whether the Constitution requires an affirmative insanity defense consists of two steps. The analysis begins with a review of state legislation and policy towards the defense.<sup>185</sup> That is, whether a sufficient number of states provide an insanity defense, thereby constituting a national consensus. Next, the

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181. *Furman v. Georgia*, 408 U.S. 238, 328 (1972).

182. *See id.* (insisting that the Punishments Clause is subject to continuous reexamination in accordance with contemporary attitudes and beliefs); *Weems v. United States*, 217 U.S. 349, 378 (1910) (characterizing the Eighth Amendment as "progressive," and stating that its meaning and protections may expand as "public opinion becomes enlightened by a humane justice"); *cf. Ex parte Wilson*, 114 U.S. 417, 427-28 (1885) (explaining that shifts in public opinion transformed the once acceptable punishments of whipping and stocks to "infamous" punishments under the meaning of the Fifth Amendment, thereby changing the constitutional protections that govern the procedures involving such punishments).

183. *See, e.g.,* Samuel C. Kaplan, "Grab Bag of Principles" or Principled Grab Bag?: *The Constitutionalization of Common Law*, 49 S.C. L. REV. 463, 469-72 (1998) (analyzing the Supreme Court's treatment of historical practice in shaping constitutional rights, and explaining how tradition is often a justification for constitutionalizing a particular practice).

184. *Furman*, 408 U.S. at 328 (reviewing precedent establishing the Court's willingness to reevaluate punishments for excessiveness, even where such punishment is "familiar and widely accepted").

185. *See Atkins v. Virginia*, 536 U.S. 304, 312 (2002) (reiterating that the first step in the Eighth Amendment analysis is a review of state legislation addressing the challenged punishment).

analysis requires an independent judgment supporting the necessity of an insanity defense.<sup>186</sup> More precisely, the Court must examine whether there is justification, independent of the objective indicia of state policy, for guaranteeing an insanity defense.

An analysis of state policy reveals that there is an overwhelming national consensus against punishing insane offenders. This consensus is underscored by two independent justifications for proscribing the criminal punishment of insane offenders. First, such punishment fails to measurably advance acceptable penological interests, resulting in an “unnecessary and wanton infliction of pain.”<sup>187</sup> Second, such punishment is a disproportionate penalty on account of the inculpability inherent to all insane offenders as a class.<sup>188</sup> Both conclusions render punishment unconstitutionally excessive under the Eighth Amendment.<sup>189</sup> Thus, the two prongs of the Eighth Amendment’s evolving-standards-of-decency analysis are satisfied and the criminal punishment of insane offenders constitutes an unconstitutionally excessive punishment. Accordingly, the affirmative insanity defense, the legal safeguard against this constitutional violation, merits constitutional protection.

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186. See *id.* at 313 (“[I]n cases involving a consensus, our own judgment is ‘brought to bear’ by asking whether there is reason to disagree with the judgment reached by the citizenry and its legislators.” (quoting *Coker v. Georgia*, 433 U.S. 584, 597 (1977))). *Contra* *Stanford v. Kentucky*, 492 U.S. 361, 379 (1989) (arguing against the desirability and constitutionality of the Court exercising its own independent judgment in an Eighth Amendment analysis because “‘evolving standards of decency that mark the progress of a maturing society[.]’ . . . [have never been] a shorthand reference to the preferences of a majority of this Court . . . . [T]o say and mean that, is to replace judges of the law with a committee of philosopher-kings.”) (citation omitted). This opinion, however, was overruled by *Roper* in 2005. Accordingly, the Eighth Amendment analysis articulated in *Roper*, which employed the Court’s “independent judgment,” after identifying a national consensus, is the controlling precedent. *Roper v. Simmons*, 543 U.S. 551, 564 (2005).

187. See *Hope v. Pelzer*, 536 U.S. 730, 737 (2002) (stating that punishments “totally without penological justification” constitute unconstitutionally excessive “unnecessary and wanton inflictions of pain”) (citation and internal quotation marks omitted); *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (interpreting the Eighth Amendment as prohibiting sanctions “so totally without penological justification that it results in the gratuitous infliction of suffering”).

188. See discussion *supra* Part IV (arguing that the Court’s Eighth Amendment death penalty jurisprudence, which accounts for personal culpability in determining the constitutionality of the challenged punishment, should be extended to the insane-offender context); *cf. Roper*, 543 U.S. at 589 (2005) (O’Connor, J., dissenting) (explaining that the proportionality analysis for death penalty cases must consider personal responsibility and moral blame); *Enmund v. Florida*, 458 U.S. 782, 798 (1982) (stating that in capital cases the courts must consider individual culpability of the defendant in sentencing because “we insist on ‘individualized consideration as a constitutional requirement in imposing the death sentence’” (quoting *Lockett v. Ohio*, 438 U.S. 586, 605 (1978))).

189. See *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (asserting that the Eighth Amendment’s excessiveness proscription is violated by a punishment that is either disproportionate or fails to advance acceptable penal goals).

*A. A Review of the States*

A basic review of state legislation reveals that a national consensus does exist against criminal punishment for insane offenders. In all, forty-six states, the federal government, and the District of Columbia employ some form of an affirmative insanity defense for criminal defendants,<sup>190</sup> signifying these jurisdictions' view that criminal

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190. Eighteen states and the federal government employ some version of the two-pronged *M'Naghten* rule. See 18 U.S.C. § 17 (2006); ALA. CODE § 13A-3-1 (1975); CAL. PENAL CODE § 25 (West 1999); COLO. REV. STAT. § 16-8-101.5 (2006); FLA. STAT. ANN. § 775.027 (West 1998); IOWA CODE ANN. § 701.4 (West 2003); MINN. STAT. ANN. § 611.026 (West 2003); MO. ANN. STAT. § 562.086 (West 2001); NEV. REV. STAT. § 194.010 (2003); N.J. STAT. ANN. § 2C:4-1 (West 2005); N.Y. PENAL LAW § 40.15 (McKinney 2004); N.D. CENT. CODE § 12.1-04.1-01(1) (1997); 18 PA. CONS. STAT. § 315 (2002); TENN. CODE ANN. § 39-11-501 (2002); WASH. REV. CODE ANN. § 9A.12.010 (West 2007); Stevens v. State, 806 So. 2d 1031, 1050-51 (Miss. 2001) (stating that in Mississippi the *M'Naghten* test is used to determine legal insanity); State v. Harms, 643 N.W.2d 359, 378-79 (Neb. 2002) (noting that the two-pronged *M'Naghten* rule is the test for legal insanity in Nebraska); State v. Thompson, 402 S.E.2d 386, 390 (N.C. 1991) (stating that North Carolina uses the two-pronged *M'Naghten* rule); Burrows v. State, 640 P.2d 533, 540-41 (Okla. Crim. App. 1982) (noting that Oklahoma uses the two-part *M'Naghten* rule to determine criminal insanity). One state, Alaska, uses only the *M'Naghten* rule's cognitive incapacity prong. See ALASKA STAT. § 12.47.010 (2004) ("In a prosecution for a crime, it is an affirmative defense that when the defendant engaged in the criminal conduct, the defendant was unable, as a result of a mental disease or defect, to appreciate the nature and quality of that conduct."). Ten states have adopted only the moral incapacity prong of the *M'Naghten* rule. ARIZ. REV. STAT. ANN. § 13-502 (West 2001); DEL. CODE ANN., tit. 11, § 401 (1995); 720 ILL. COMP. STAT. ANN. 5/6-2 (West 2003); IND. CODE ANN. § 35-41-3-6 (West 2004); LA. REV. STAT. ANN. § 14:14 (2004); ME. REV. STAT. ANN., tit. 17-A, § 39 (2006); OHIO REV. CODE ANN. § 2901.01(A)(14) (LexisNexis 2006); S.C. CODE ANN. § 17-24-10 (2003); S.D. CODIFIED LAWS § 22-1-2(20) (2005); TEX. PENAL CODE ANN. § 8.01 (Vernon 2006). Three states use a two-prong *M'Naghten* rule supplemented with the irresistible-impulse test. See MICH. COMP. LAWS SERV. § 768.21a (LexisNexis 2004); State v. Hartley, 565 P.2d 658, 660-61 (N.M. 1977) (discussing the history of New Mexico's experience with its two-pronged *M'Naghten* rule and reaffirming New Mexico's use of the *M'Naghten* rule supplemented with an irresistible-impulse test); Bennett v. Commonwealth, 511 S.E.2d 439, 446-47 (Va. 1999) (noting that Virginia recognizes both the *M'Naghten* rule and the irresistible-impulse doctrine as tests for determining legal insanity). Thirteen states and the District of Columbia have adopted the Model Penal Code insanity test, which looks to whether the defendant lacked the capacity to appreciate the wrongful nature of the act due to mental disease or defect. ARK. CODE ANN. § 5-2-312 (2006); CONN. GEN. STAT. § 53a-13 (2000); GA. CODE ANN. §§ 16-3-2, 16-3-3 (2003); HAW. REV. STAT. ANN. § 704-400 (LexisNexis 2003); KY. REV. STAT. ANN. § 504.020 (West 2003); MD. CODE ANN., CRIM. PROC. § 3-109 (LexisNexis 2001); ORE. REV. STAT. § 161.295 (2005); VT. STAT. ANN., tit. 13, § 4801 (1998); WIS. STAT. ANN. § 971.15 (West 2006); WYO. STAT. ANN. § 7-11-304 (2005); Maledo v. United States, 767 A.2d 267, 269 (D.C. 2001) (articulating the insanity test used in the District of Columbia, which is based on the American Legal Institute's Model Penal Code); Commonwealth v. McLaughlin, 729 N.E.2d 252, 255 (Mass. 2000) (articulating Massachusetts' insanity test, which is based on the American Legal Institute's Model Penal Code); State v. Martinez, 651 A.2d 1189, 1193 (R.I. 1994) (articulating Rhode Island's insanity test, which is based on the American Legal Institute's Model Penal Code); State v. Lockhart, 542 S.E.2d 443, 451 (W. Va. 2000) (identifying the Model Penal Code test for an insanity defense as the test in West Virginia); MODEL PENAL CODE § 4.01(1) (Proposed Official Draft 1962). One state, New Hampshire, uses a

responsibility should not attach to the acts of insane persons. Only a substantial minority of states—Montana, Idaho, Utah, and Kansas—do not subscribe to the position that an insane offender, who otherwise possesses the requisite mens rea, should not be criminally liable for his actions.

Applying the reasoning of *Atkins*<sup>191</sup> and *Roper*,<sup>192</sup> it is evident that a strong national consensus exists against holding an insane actor criminally responsible. In both *Atkins* and *Roper* the Court determined that a national consensus existed based on the policies of thirty states forbidding the punishment in question.<sup>193</sup> When *Atkins* and *Roper* were decided, twenty states allowed the sentencing judge or jury to impose the form of punishment that these decisions subsequently deemed unconstitutional. Nevertheless, the Court determined that this forty-percent minority failed to negate the national consensus formed by the policies of the remaining sixty percent of states. By this standard, a national consensus to protect the insanity defense is overwhelming. If thirty states prohibiting a form of punishment constitutes a national consensus for Eighth Amendment purposes, then forty-six states should certainly form such a consensus. Accordingly, the objective indicia of state policy reveal that an overwhelming national consensus exists against criminal punishment for insane offenders.

*B. Independent Justifications for Proscribing the Punishment of Insane Offenders*

The next step in the Eighth Amendment analysis requires an independent determination, consistent with and supplementing the national consensus, justifying a constitutional requirement of the insanity defense.<sup>194</sup> There are two such justifications: first, the primary penological interests justifying criminal punishment are poorly served, if at all, by punishing the insane; and second, criminal

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product insanity test. See *State v. Plante*, 594 A.2d 1279, 1283 (N.H. 1991) (citing *State v. Jones*, 50 N.H. 369 (1871)) (explaining that New Hampshire's insanity rule requires an acquittal if the defendant's crime was the product of a mental disease).

191. See *Atkins*, 536 U.S. at 313-16 (reasoning that thirty states plus the federal government forbidding capital punishment for the mentally retarded constitutes a national consensus against such punishment).

192. See *Roper*, 543 U.S. at 564-68 (reasoning that thirty states banning the juvenile death penalty constitutes a national consensus against such punishment).

193. See *supra* notes 135-136 and 152-164 and accompanying text (discussing the evolving-standards-of-decency analyses employed *Atkins* and *Roper*).

194. See *supra* notes 138-148 and 152-164 and accompanying text (discussing the Eighth Amendment analysis employed in *Atkins* and *Roper*, which involved the Court's independent judgment of the constitutionality of the challenged punishment).

punishment is a categorically disproportionate penalty for the inculpable insane offender. Consequently, such punishment is unconstitutionally excessive under the Eighth Amendment.<sup>195</sup>

1. *Punishing otherwise insane offenders fails to measurably advance acceptable penological interests*

If states deny the affirmative defense of insanity, criminal convictions for the insane will result.<sup>196</sup> If the subsequent criminal sentence fails to advance acceptable goals of punishment<sup>197</sup> then such punishment is “nothing more than the purposeless and needless imposition of pain and suffering,” and therefore unconstitutionally excessive.<sup>198</sup> An analysis of the applicability of the traditional theories of punishment—retribution, deterrence, rehabilitation, and incapacitation<sup>199</sup>—to the context of the insane offender reveals that these goals are not advanced by punishing such offenders. Consequently, such punishment is unconstitutional.

a. *Retribution*

Under the theory of retribution, punishment is justified because society has an interest in imposing merited suffering upon offenders proportional to the harm that their crime caused society.<sup>200</sup> However,

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195. See discussion *supra* Part II.A (discussing the modern interpretation of the Eighth Amendment, including the proscription of excessive punishments, which are those that fail to measurably contribute to acceptable penal interests or are disproportionate).

196. See discussion *supra* Part I.B.2 (illustrating how adoption of a mens rea model will result in the criminal conviction of otherwise insane offenders).

197. It is unclear the extent to which penal goals must be advanced for a punishment to satisfy this excessiveness requirement. Recent Court decisions speak of a “measurable” furtherance of penal goals. *E.g.*, *Atkins v. Virginia*, 536 U.S. 304, 319 (2002); *Enmund v. Florida*, 458 U.S. 782, 798 (1982). However, *Roper*, the Court’s most recent decision applying an Eighth Amendment excessiveness analysis, used a particularly stringent standard for measurable advancement, finding that the goal of deterrence was not furthered by the punishment in question because the evidence was “unclear.” 543 U.S. at 571-72. Moreover, the *Roper* Court refused to defer to the determinations of legislatures regarding the efficacy of sentencing policy. *Id.* This suggests that the Court is now applying heightened standard to the determination of whether penal goals are advanced, requiring “clear” evidence, which satisfies the Court’s independent judgment, rather than deferring to the findings of state legislatures.

198. *Coker v. Georgia*, 433 U.S. 584, 592 (1977).

199. See *supra* note 95 and accompanying text (explaining that these four theories of punishment have been recognized by the Supreme Court, and other legal authorities, as the traditional justifications for state-imposed sanctions).

200. LAFAVE, *supra* note 7, § 7.1(c)(6); see also IMMANUEL KANT, THE PHILOSOPHY OF LAW: AN EXPOSITION OF THE FUNDAMENTAL PRINCIPLES OF JURISPRUDENCE AS THE SCIENCE OF RIGHT 194 (W. Hastie trans., Edinburgh, T. & T. Clark 1887), available at [http://olldownload.libertyfund.org/Texts/Kant0142/PhilosophyOfLaw/0139\\_Bk.pdf](http://olldownload.libertyfund.org/Texts/Kant0142/PhilosophyOfLaw/0139_Bk.pdf) (“The Right of administering Punishment is the Right of the Sovereign as the Supreme Power to inflict pain upon a Subject on account of a Crime committed by

there are limits and conditions on punishment under retributive theory.<sup>201</sup> In addition to having committed the wrongful act, the perpetrator must be deserving of the degree of punishment.<sup>202</sup> Specifically, retribution requires that the punishment be proportional to the personal culpability of the offender.<sup>203</sup> If the offender possesses diminished culpability, then the punishment must be correspondingly lessened.<sup>204</sup> Similarly, if the offender is entirely inculpable then any punishment is undeserved and the goals of retribution are not served.<sup>205</sup>

One who lacks free will, irrespective of his otherwise wrongful acts, is an inculpable individual<sup>206</sup> for whom punishment fails to serve the

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him.”); Michele Cotton, *Back with a Vengeance: The Resilience of Retribution as an Articulated Purpose of Criminal Punishment*, 37 AM. CRIM. L. REV. 1313, 1315 (2000) (defining retribution as a concept directed at imposing merited harm upon an offender for his wrongful conduct, and not for advancing social goals, such as reforming wrongdoers).

201. See Wales, *supra* note 123, at 700 (arguing that retributive justifications for punishment substantially restrict the government’s authority to punish its citizens because retribution requires moral blame for the imposition of punishment).

202. See Michael Vitiello, *Three Strikes: Can We Return to Rationality?*, 87 J. CRIM. L. & CRIMINOLOGY 395, 427 (1997) (arguing that punishments not tailored to the offender’s personal culpability are unjustifiable under the theory of retribution).

203. See *Tison v. Arizona*, 481 U.S. 137, 149 (1987) (“The heart of retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender.”); LAFAVE, *supra* note 7, § 1.5(a)(6) n.43 (explaining that retribution requires that “the severity of the sanctions visited on the offender should be proportioned to the degree of his culpability” (quoting F. Allen, *THE DECLINE OF THE REHABILITATIVE IDEAL* 66 (1981))); 24 C.J.S. *Criminal Law* § 2001 (2006) (explaining the principle that punishment must be proportionate to the crime, and stating that this proportionality analysis requires considerations of the particular circumstances of the offense and the “particular character of the defendant”).

204. See *Atkins v. Virginia*, 536 U.S. 304, 319 (2002) (holding that mentally retarded offenders are categorically exempt from the harshest form of American punishment, the death penalty, because their diminished culpability requires a diminished degree of punishment).

205. The theory of retribution justifies punishment based on the moral culpability of the punished. KADISH & SCHULHOFER, *supra* note 8, at 107-08 (citing Michael S. Moore, *The Moral Worth of Retribution*, in FERDINAND SCHOEMAN, *RESPONSIBILITY, CHARACTER AND EMOTIONS* 179 (1987)). If the offender lacks blameworthiness, then his actions do not merit punishment. See English, *supra* note 122, at 24 (arguing that blameworthiness has been a condition precedent to criminal punishment in our common law heritage since the twelfth century); *id.* (explaining that moral culpability is a necessary condition for the imposition of punishment under retributive theory); see also MODEL PENAL CODE § 2.05 cmt. at 283 (1985) (recognizing as a fundamental principle the fact that crime means condemnation and one cannot be condemned if their act was not culpable). Any punishment inflicted upon the blameless is therefore excessive, as it bears no relation to culpability.

206. See *State v. Herrera*, 895 P.2d 359, 375 (Utah 1995) (Stewart, Assoc. C.J., dissenting) (“[W]ithout the consent of the will, human actions cannot be considered as culpable; nor where there is no will to commit an offense, is there any just reason why a party should incur the penalties of law made for the punishment of crimes and offenses.” (quoting 1 RUSSELL ON CRIMES 2 (4th ed. 1865))).

goals of retribution.<sup>207</sup> This is because retribution justifies punishment on the ground that the offender made the free choice to commit the wrongful act, a choice unaffected by factors external to his or her will.<sup>208</sup> It is this free choice to commit, or forgo, the blameworthy act that renders the offender deserving of punishment.<sup>209</sup> Conversely, the absence of free will precludes the attachment of blame to the actor's behavior, and therefore negates the propriety of retributive punishment.

The criminally insane offender is characterized by a complete absence of free will over his actions.<sup>210</sup> By definition, the insane offender's acts result from a mental disease, not a controllable conscious choice.<sup>211</sup> Because the insane offender lacks a free will he is inculpable, and therefore his punishment does not further the penal goal of retribution.<sup>212</sup>

The Court applied similar reasoning in *Atkins* and *Roper*. In *Atkins*, the Court held that mentally retarded persons possess a diminished culpability on account of their mental deficiencies.<sup>213</sup> Because of this diminished culpability, the Court found that capital punishment is

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207. See English, *supra* note 122, at 26 (arguing that an essential element of retributive theory is that people possess free will).

208. *Id.*

209. *Id.*

210. See 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 24 (1769), *quoted in* *Atkins v. Virginia*, 536 U.S. 304, 340 (2002) (Scalia, J., dissenting) (observing that lunatics are characterized by a "deficiency in will"). Blackstone argues that this "deficient will" prevents the attachment of guilt because "the concurrence of the will, when it has its choice either to do or to avoid the act in question, [is] the only thing that renders human actions either praiseworthy or culpable." 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 20-21 (1769), *quoted in* Michele Cotton, *A Foolish Consistency: Keeping Determinism Out of the Criminal Law*, 15 B.U. PUB. INT. L.J. 1, 5 n.16 (2005); see also Wales, *supra* note 123, at 703 (questioning the wisdom and constitutionality of abolishing the insanity defense because the insane offender lacks a "will to control the physical act of his physical body"). The fact that the majority of insanity standards require the offender to labor under a mental disease or defect, which prevents the actor from understanding his conduct, illustrates that an insane offender by definition lacks the capacity for free choice. Since free choice is a necessary element of a volitional act it follows that an insane offender does not exercise free will over his actions. BLACK'S LAW DICTIONARY 1605 (8th ed. 2004).

211. See, e.g., MODEL PENAL CODE § 4.01 (Proposed Official Draft 1962) (requiring an insanity acquittal if it is found that the defendant's conduct was the result of mental disease that caused the defendant to lack substantial capacity to either appreciate the wrongfulness of his conduct or conform his conduct to the law). Under this insanity standard, the defendant's actions will have been the result of a mental disease, which either clouded his cognition or inhibited his volitional control. In either event, the defendant's conduct was not the result of free will.

212. See *United States v. Freeman*, 357 F.2d 606, 615 (2d Cir. 1966) (declaring that retribution is never served by punishing the "incompetent" insane offender, and warning that such a policy must be avoided because "a need for retribution can never be permitted in a civilized society to degenerate into a sadistic form of revenge").

213. *Atkins*, 536 U.S. at 318.

categorically excessive for mentally retarded persons.<sup>214</sup> The Court reasoned that diminished culpability must translate into lesser punishment, otherwise retribution, which requires a correlation between the punishment and the offender's blameworthiness, is not served. Analogously, the insane offender is characterized by a complete absence of moral culpability, on account of the absence of free will involved with the offense.<sup>215</sup> Therefore, under the logic of *Atkins*, criminal punishment should not attach to the actions of an individual who is without personal culpability.<sup>216</sup> To do so is inconsistent with the theory of retribution.

Similarly, in *Roper* the Court held that retribution is not proportional, and hence excessive, if the government imposes the law's most severe punishment—the death penalty—on an individual with a diminished personal culpability inherent to their youthful mental state and personality.<sup>217</sup> This conclusion applies with equal force to insane offenders who, by reason of their mental disease, lack a free will and are thus not morally culpable for their actions. Accordingly, retribution is not served by punishing insane offenders, and retributive theory cannot justify such punishment.

*b. Deterrence*

The theory of deterrence justifies punishment as a means to prevent future crimes.<sup>218</sup> By giving society an example of the consequences of wrongful actions, other would-be offenders are

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214. See *id.* at 321 (“[T]he Constitution ‘places a substantive restriction on the State’s power to take the life’ of a mentally retarded offender.” (quoting *Ford v. Wainwright*, 477 U.S. 399, 405 (1986))).

215. See *supra* note 210 (discussing William Blackstone’s contention that the absence of free will in “lunatics” precludes the attachment of culpability to their otherwise criminal conduct); see also *United States v. Brawner*, 471 F.2d 969, 986 (D.C. 1972) (emphasizing the lack of a free will as “the root of origin of the insanity defense”).

216. See *Atkins*, 536 U.S. at 318-21 (holding that executing the mentally retarded is unconstitutionally excessive and reasoning that the diminished culpability of such offenders, on account of their mental disability, requires a correspondingly lessened punishment under the Eighth Amendment). But see *id.* at 350-51 (Scalia, J., dissenting) (“Surely culpability, and deservedness of . . . retribution, depends not merely . . . upon the mental capacity of the criminal (above the level where he is able to distinguish right from wrong) but also upon the depravity of the crime . . .”). Here, Justice Scalia argues that the depravity of the crime should factor into the propriety of retributive punishment, notwithstanding the mental capacity of the offender. However, Scalia’s qualification that mental capacity below the ability to “distinguish right from wrong” should factor into the propriety of retributive punishment, supports the conclusion that punishing insane offenders, who by definition cannot “distinguish right from wrong,” does not further the interest of retribution.

217. *Roper v. Simmons*, 543 U.S. 551, 572 (2005).

218. KADISH & SCHULHOFER, *supra* note 8, at 115-16.

deterred from similar conduct.<sup>219</sup> This theory breaks down, however, when applied to the punishment of otherwise insane offenders. Consequently, deterrence is not served through such punishment.

Deterrence is effective only if people view the lessons of the offender as applicable to them, which is likely if they can identify with the offender and the circumstances of the offense.<sup>220</sup> A sane person is unlikely to identify with an insane offender or the offending situation, and thus is not susceptible to the deterrent effect of punishing the insane.<sup>221</sup> Nor would an insane person learn any deterring lessons from the punishment of other insane offenders.<sup>222</sup> It is the same mental disease that causes an insane offender's criminal conduct, which also makes that offender incapable of understanding or learning from the punishment of others.<sup>223</sup>

This logic was incorporated in *Atkins*, where the Court found that "it is the same cognitive and behavioral impairments that make [mentally retarded] defendants less morally culpable . . . that also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information."<sup>224</sup> Similarly, in *Roper* the Court found the very characteristics rendering a juvenile less culpable, an underdeveloped mental state and personality, also render juveniles less susceptible to deterrence.<sup>225</sup> Since criminal

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219. See LAFAVE, *supra* note 7, § 7.1(c)(4) (explaining that deterrence reinforces the law-abiding tendencies of the general public through the example of punishing those who have failed to abide by the rule of law).

220. See English, *supra* note 122, at 26 n.134 (citing A. GOLDSTEIN, *THE INSANITY DEFENSE* 13 (1967)).

221. See *Robinson v. California*, 370 U.S. 660, 668 (1962) (Douglas, J., concurring) ("Nothing can more strongly illustrate the popular ignorance respecting insanity than the proposition, equally objectionable in its humanity and its logic, that the insane should be punished for criminal acts, in order to deter other insane persons from doing the same thing." (quoting ISAAC RAY, *TREATISE ON THE MEDICAL JURISPRUDENCE OF INSANITY* 56 (5th ed. 1871))); LAFAVE, *supra* note 7, § 7.1(c)(4) (stating that the punishment of the insane fails to serve as a deterring example to ordinary offenders); see also MODEL PENAL CODE § 4.01 cmt. at 166 (1985) (stating that the legally insane are "plainly beyond the deterrent influence of the law").

222. *United States v. Freeman*, 357 F.2d 606, 615 (2d Cir. 1966) ("Those who are substantially unable to restrain their conduct are, by definition, undeterrable and . . . those who are unaware of or do not appreciate the nature and quality of their actions can hardly be expected rationally to weigh the consequences of their conduct."); see LAFAVE, *supra* note 7, § 7.1(c)(4) (stating that insane people who think they are sane are unlikely to identify with another insane defendant).

223. See *infra* notes 255-261 and accompanying text (explaining that the mental diseases of insane offenders typically distort the capability to understand and process information, to reason logically, the ability to learn from experience, and the ability to understand the conduct of others).

224. *Atkins v. Virginia*, 536 U.S. 304, 320 (2002).

225. See *Roper v. Simmons*, 543 U.S. 551, 571-72 (2005) ("[T]he likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any

punishment for insane offenders is unlikely to prevent future crimes committed by either sane or insane persons, the criminal justice system is not likely to deter future crime by punishing insane persons for criminal offenses. Hence, the theory of deterrence cannot serve as a justification for punishing the insane.

*c. Rehabilitation*

Rehabilitation is the interest in preventing recidivism through assisting and facilitating the offender's transition to a lawful lifestyle.<sup>226</sup> This penological interest presumes the effectiveness of employing therapeutic measures inside prison.<sup>227</sup> While the rehabilitation programs of America's penal institutions may serve to reform the ordinary, mentally sound inmate, the unique challenges posed by the insane offender's severe mental disorder require therapeutic measures beyond the capacities of ordinary prison facilities.<sup>228</sup>

Prison rehabilitation programs, where they even exist, are often under-funded and given low priority, frequently resulting in ineffective treatments for inmates, a problem particularly acute for the severely mentally diseased prisoner.<sup>229</sup> Moreover, the rehabilitation of an insane offender requires specialized psychiatric treatments, therapy that differs significantly from that appropriate for mentally sound inmates.<sup>230</sup> Consequently, ordinary prison

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weight to the possibility of execution is so remote as to be virtually nonexistent.” (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 837 (1987)).

226. See ALCOHOL, DRUG ABUSE, AND MENTAL HEALTH ADMIN., U.S. DEP'T OF HEALTH AND HUMAN SERVS., *THE MENTALLY DISORDERED OFFENDER* 175 (1986) (discussing the meaning and purpose of criminal rehabilitation); LAFAVE, *supra* note 7, § 1.5(a)(3) (explaining rehabilitation as the process of reforming criminals, through therapeutic measures, so that they return to society cured of their criminal tendencies).

227. English, *supra* note 122, at 25.

228. See *United States v. Freeman*, 357 F.2d 606, 615, 626 n.61 (2d Cir. 1966) (stating that the rehabilitation of the legally insane is never served through criminal sentencing because the mentally ill will not be “miraculously cured and rehabilitated in a place [prison] we know to be traditionally incapable of producing such resurrections”).

229. See ALCOHOL, DRUG ABUSE, AND MENTAL HEALTH ADMIN., U.S. DEP'T OF HEALTH AND HUMAN SERVS., *supra* note 226, at 149 (discussing the lack of therapeutic commitment programs for mentally ill criminal offenders in the criminal-justice and mental-health systems, and stating that “[w]ith few exceptions, mentally disordered offenders receive substandard treatment”); English, *supra* note 122, at 25 (stating that prisoners have no right to rehabilitative therapies and legislatures are often reluctant to fund such programs, and noting that there is “widespread doubt” as to whether such treatment could even be effective in the prison setting).

230. See English, *supra* note 122, at 25 (noting the common acceptance that rehabilitation of the insane is best achieved through treatment different from that appropriate for ordinary prisoners).

rehabilitation measures are likely inadequate to effectively treat, and therefore reform, the otherwise insane offender.<sup>231</sup> Committing such offenders to psychiatric institutions, the typical destination for insane persons acquitted of criminal liability,<sup>232</sup> more optimally serves the goals of rehabilitation.<sup>233</sup>

Because prison is the likely destination of otherwise insane offenders who are not afforded an affirmative insanity defense,<sup>234</sup> and

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231. Of course, some level of psychiatric treatment is available during traditional incarceration. However, given the uniquely challenging psychiatric conditions of many mentally diseased offenders and the limited resources available for prison treatment, successful therapy is unlikely while incarcerated. See Brief for the Treatment Advocacy Center as Amicus Curiae in Support of Neither Party at 15, 17, *Clark v. Arizona*, 126 S. Ct. 2709 (2006) (No. 05-5966) (discussing the particularly challenging treatment issues posed by mentally diseased patients). In addition to a lack of resources, the conflicting goals of therapy and security also detract from successful prison therapies for insane offenders. Psychiatric therapy requires increased degrees of responsibility for the patient's own judgment and actions, and a corresponding reduction in institutional control. LAFAYE, *supra* note 7, § 8.4(b). Prison, on the other hand, is concerned with security, which typically requires physical confinement to a cell and strict control over the inmate's life. See *id.* (arguing that the goals of security and therapy are often irreconcilable and "resolved by favoring security over therapy").

232. See *supra* note 8 (explaining procedures after a finding of not guilty by reason of insanity, namely the commitment to a mental institution for psychiatric treatment).

233. See *Freeman*, 357 F.2d at 615 (opining that the rehabilitation of insane offenders is only achievable through commitment to specialized mental institutions). But see *Hoptowit v. Ray*, 682 F.2d 1237, 1253 (9th Cir. 1982) (finding that, in order to satisfy the Eighth Amendment, prisons unable to adequately treat the mental illnesses of inmates must ensure that prisoners' medical needs and emergencies are met by competent outside physicians and facilities). The procedures set forth in *Hoptowit* potentially diminish the danger of insane offenders going untreated or poorly treated while incarcerated. However, the potential for a transfer to a psychiatric institution does not eliminate this danger. After all, it is the same understaffed and under-resourced prison facilities that are responsible for discovering the mental illness requiring a mental health transfer. The same problems of prison health services, which render such facilities ineffective at treating the insane within prison, also make it less likely that such facilities have the resources or expertise to initially diagnose a prisoner as sufficiently diseased to require the receipt of services by an outside medical provider. Moreover, referrals to outside facilities are not always guaranteed. See 72 C.J.S. *Prisons* § 86 (2006) (explaining that prisoners' rights to mental health services are limited, and determinations as to nature and extent of treatment are "within the prerogative of prison officials"). In *Hoptowit*, for example, such referrals were only required if the outside facilities were reasonably accessible, and if the prison could not provide adequate services within its own walls. 682 F.2d at 1253. Further, the prisoner's right to mental health services is protected by the deferential "deliberate indifference" standard, which requires a showing of purposeful and deliberate indifference on the part of prison officials to the prisoner's medical need, making the legal enforcement of this right particularly challenging. 60 AM. JUR. 2D *Penal and Correctional* § 203 (2006). Hence, referrals to outside psychiatric facilities are a poor safeguard against the dangers of mentally diseased prisoners going untreated.

234. See *supra* notes 67-75 and accompanying text (illustrating that criminal conviction for otherwise insane offenders is the likely result of abolishing the affirmative insanity defense).

because prison rehabilitative efforts are likely inadequate for the effective treatment and reformation of the insane, the theory of rehabilitation is ill-served by their punitive imprisonment. Accordingly, the penal interest of rehabilitation fails to justify the criminal punishment of insane offenders.

*d. Incapacitation*

The last interest justifying criminal punishment is society's interest in incapacitating offenders to protect the rest of society from the danger they pose.<sup>235</sup> Admittedly, locking up insane offenders temporarily serves the goal of incapacitation, as the offender is removed from the community for the duration of the sentence.<sup>236</sup> However, the underlying goal of incapacitation—protection for society<sup>237</sup>—is potentially undermined by such punishment. This is because society is not guaranteed that the insane offender will receive psychiatric treatment while in prison, which deprives society of long-term, sustainable protection from dangerous insane offenders.<sup>238</sup> In fact, imprisoning insane offenders may directly endanger society, as the mental condition which resulted in the original criminal conduct could be worsened through a term of imprisonment.<sup>239</sup> Accordingly, the imprisonment of otherwise insane offenders runs counter to the goals of incapacitation.

A better approach for protecting society is to provide an affirmative insanity defense, thereby assuring that insane individuals acquitted of crimes will be committed to psychiatric institutions until their dangerous propensities subside.<sup>240</sup> This guarantees that insane

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235. See *Gregg v. Georgia*, 428 U.S. 153, 183 n.28 (1976) (stating that incapacitation is concerned with removing dangerous members of society so as to prevent future crimes that they may otherwise have committed); see also Cotton, *supra* note 200, at 1316 (defining incapacitation).

236. See *State v. Korell*, 690 P.2d 992, 1002 (Mont. 1984) (arguing that incarcerating the insane serves the “goal[] of protect[ing] society”); cf. *State v. Stacy*, 601 S.W.2d 696, 704 (Tenn. 1980) (Henry, J., dissenting) (“In a very real sense the confinement of the insane is the punishment of the innocent; the release of the insane is the punishment of society.”).

237. See 24 C.J.S. *Criminal Law* § 1997 (2006) (explaining that while states are free to justify criminal punishment under the various theories of retribution, rehabilitation, deterrence, and prevention, the overriding interest is always the protection of society).

238. English, *supra* note 122, at 24.

239. See *United States v. Freeman*, 357 F.2d 606, 626 n.61 (2d Cir. 1966) (“[I]f we send [insane offenders] to prison, they may come back to haunt society after their release, more mentally disturbed, more irresponsible, and more crime prone than ever before, because whatever the prison does to men it does not cure mental illness.”).

240. See English, *supra*, note 122, at 24 (explaining that most states require insanity acquittees to be “automatically, involuntarily, and indefinitely committed” to mental

offenders receive proper psychiatric and rehabilitative therapy and arguably assures that the level of treatment is superior to that offered in a penal institution.<sup>241</sup> In comparison to psychiatric commitment, the protective purpose of incapacitation is poorly served by the punitive imprisonment of insane offenders. Consequently, the penal interest in incapacitation is an inadequate justification for punishing insane offenders.

Removing the insanity defense from the criminal law ensures that insane offenders will receive criminal punishment for their otherwise excusable misconduct. Such punishment does not further the goals of retribution and deterrence, does not effectively advance the goal of rehabilitation, and runs counter to the underlying principle of incapacitation. Accordingly, punishing the insane fails to measurably contribute to acceptable penological goals,<sup>242</sup> and is therefore an unconstitutionally excessive “wanton infliction of pain.”<sup>243</sup>

2. *Criminal punishment is a categorically disproportionate penalty for the inculpable insane offender*

The Eighth Amendment requires proportionality in punishment.<sup>244</sup> Implicit in this requirement is that criminal sentencing be proportional to the offender’s personal culpability.<sup>245</sup> If a

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health institutions); *supra* note 8 (discussing institutional commitment procedures of the states).

241. See discussion *supra* Part V.B.1.c (discussing the shortcomings of mental health services for insane offenders in a prison setting).

242. Proponents of abolishing the insanity defense may argue that criminal punishment has an important symbolic value, serving as an expression of societal norms against unwanted conduct. See EMILE DURKHEIM, *THE DIVISION OF LAW IN SOCIETY*, in KADISH & SCHULHOFER, *supra* note 8, at 106-07 (explaining punishment’s function of maintaining social cohesion by expressing society’s common aversion to criminal behavior); JOEL FEINBERG, *DOING AND DESERVING*, in KADISH & SCHULHOFER, *supra* note 8, at 105-06 (discussing the symbolic value of criminal punishment). But symbolic expression of community values is not a traditional penological interest underlying criminal punishment for Eighth Amendment purposes. See, e.g., *supra* note 95 and accompanying text (discussing four justifications, recognized by the Supreme Court, for criminal punishment: incapacitation, deterrence, retribution, and rehabilitations); see also LAFAVE, *supra* note 7, § 7.1(c) (discussing the traditional justifications of punishment, of which symbolism is not included). Accordingly, while criminal punishment is arguably a valuable mechanism for expressing societal aversion to particular conduct, this interest does not justify punishment for Eighth Amendment purposes.

243. *Gregg v. Georgia*, 42 U.S. 153, 173 (1976) (Burger, C.J., dissenting) (quoting *Furman v. Georgia*, 408 U.S. 238, 392-93 (1972)).

244. *Id.*

245. *Coker v. Georgia*, 433 U.S. 584, 598 (1977) (holding that death is a disproportional punishment for rapists because such offenders lack the “moral depravity” necessary to justify capital punishment); 24 C.J.S. *Criminal Law* § 2001 (2006) (explaining that a proportionality analysis requires considerations of the particular circumstances of the offense and the “particular character of the defendant”); see also *supra* notes 96-104 and accompanying text (explaining the

punishment is grossly disproportionate, then it may violate the Eighth Amendment's proscription against excessive punishments, despite that punishment's furtherance of acceptable penal interests.<sup>246</sup> The insane offender is categorically inculpable by virtue of the mental disease that inhibits or controls his faculties or actions. Accordingly, the conviction of such individuals necessarily results in punishment incomparable to their moral blameworthiness. Such punishment is, therefore, grossly disproportionate and unconstitutionally excessive under the Eighth Amendment.

The criminally insane offender is characterized by a complete absence of free will over his actions.<sup>247</sup> By definition, the insane offender's criminal actions result from a mental disease, not a controllable conscious choice.<sup>248</sup> Because free will is a necessary condition for the attachment of moral blame,<sup>249</sup> the insane offender's absence of will renders him categorically blameless.<sup>250</sup> This absence of personal culpability renders any punishment disproportional, as the required fit between the severity of punishment and the extent of personal blame cannot be met. That is, *any* punishment fails to correlate to the offender's personal blame, which is altogether absent. Accordingly, punishing otherwise insane offenders violates the Eighth Amendment's proportionality requirement.

The Court applied similar reasoning in *Atkins* and *Roper*, cases involving the analogous context of mentally deficient offenders. *Atkins* found that mentally retarded offenders, by reason of their

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Eighth Amendment's requirement that punishment be proportional to the severity of the crime and the blameworthiness of the offender).

246. *Coker*, 433 U.S. at 592 n.4 (stating that a death sentence is a disproportionate punishment for a rapist and is therefore an unconstitutionally excessive punishment under the Eighth Amendment, even though such punishment may serve legitimate goals of punishment).

247. See *supra* note 210 (explaining the absence of will created by the insane offender's severe psychological deficiencies).

248. See, e.g., *supra* note 211 (explaining the Model Penal Code's insanity standard, which requires acquittal only if the defendant's conduct was caused by mental disease and not the result of free will).

249. See English, *supra* note 122, at 26 (arguing that free will is a condition precedent to punishment because it is the offender's conscious choice to commit the wrongful act that creates blame and justifies punishment); Rowe, *supra* note 119, at 110 (explaining that moral blame attaches only to the actions of those capable of conforming their conduct to societal norms of wrongful behavior).

250. See *United States v. Freeman*, 357 F.2d 606, 615 (2d Cir. 1966) (characterizing insane offenders as "truly irresponsible" on account of their "lack [of] substantial capacity to control their actions"); English, *supra* note 122, at 26-27 (explaining that the insanity defense evolved from the principle that individuals "so psychologically deficient that they could not be blamed justly for their misconduct" should not be punished).

“subaverage intellectual functioning,”<sup>251</sup> have “diminished capacities to understand and process information, to communicate, . . . to learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others.”<sup>252</sup> Based on these mental impairments, the Court held that such offenders are less culpable than normal offenders and, thus, do not deserve capital punishment.<sup>253</sup> The rationale is that a lessened culpability requires a lessened degree of punishment. Such logic is applicable to the analogous situation of punishment for mentally deficient insane offenders.

Similar to the mentally retarded, insane offenders,<sup>254</sup> by reason of their mental disease, possess severely limited or distorted capabilities to understand and process information,<sup>255</sup> to communicate effectively,<sup>256</sup> to reason logically,<sup>257</sup> to learn from experience,<sup>258</sup> to

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251. See *Atkins v. Virginia*, 536 U.S. 304, 308 n.3 (2002) (referring to the American Association of Mental Retardation’s definition of mental retardation as “substantial limitations in present functioning . . . characterized by significantly subaverage intellectual functioning”).

252. *Id.* at 318.

253. *Id.*

254. It is important to note that “insanity” is a legal term of art and not a condition recognized by the medical community. Of course, there is a necessary overlap between medically recognized conditions and the diseases that form the basis of a defendant’s insanity defense. For instance, schizophrenia is a condition recognized by the medical community and is also a disease prevalent in legally insane offenders. See AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 297 (4th ed. 2000) (classifying schizophrenia as a medically recognized psychiatric disorder); Mayo Clinic Staff, *Schizophrenia and Chronic Mental Illness*, MAYOCLINIC.COM, Feb. 6, 2006, <http://www.mayoclinic.com/health/schizophrenia/DS00196/DSECTION=1> (defining the mental illness of schizophrenia); see also Blaine Harden & Nina Bernstein, *Legally Insane: A Special Report; Voices in His Head Muted, A Killer Rejoins the World*, N.Y. TIMES, July 31, 2000, at A1 (discussing the case of Dennis Sweeney, who in 1980 killed former Congressman Allard K. Lowenstein and was subsequently found not guilty by reason of insanity based on his paranoid-schizophrenic condition).

255. See Brief for the Treatment Advocacy Center as Amicus Curiae in Support of Neither Party, *supra* note 231, at 11 (citing research showing patients who suffer from severe mental disease are unable to differentiate psychosis-induced delusions and hallucinations from reality); BUCHANAN, *supra* note 30, at 72 (noting that mentally disordered offenders are often characterized by lacking the capability to process information received); AM. PSYCHIATRIC ASS’N, *supra* note 254, at 299-300 (finding that schizophrenics experience disorganized thinking, often resulting in grossly disorganized behavior, and typically possess a deficit in processing perception and sensory stimuli); Mayo Clinic Staff, *Schizophrenia and Chronic Mental Illness: Signs and Symptoms*, MAYOCLINIC.COM, Feb. 6, 2006, <http://www.mayoclinic.com/health/schizophrenia/DS00196/DSECTION=2> (finding that a cognitive symptom of schizophrenia is difficulty understanding incoming information).

256. See BUCHANAN, *supra* note 30, at 69 (citing English psychologist J. Cutting’s finding that a typical characteristic of schizophrenia is a reduced “capacity to experience and communicate emotion”); Mayo Clinic Staff, *Schizophrenia and Chronic Mental Illness: Signs and Symptoms*, *supra* note 255 (noting that schizophrenia is characterized by poor social functioning, social isolation, and inappropriate displays of emotion).

understand the conduct of others,<sup>259</sup> and to exercise impulse control or even the ability to act upon their own free will.<sup>260</sup> In fact, the offender who satisfies a legal standard for insanity (not understanding the nature and quality of one's actions, for example) may lack these abilities altogether.<sup>261</sup> This severe mental deficiency, controlling volition or inhibiting cognition, negates these offenders' free will, rendering this class categorically inculpable.<sup>262</sup> Under the logic of *Atkins*, which links the degree of punishment to the degree of culpability, the absence of blame attached to the actions of otherwise insane offenders must result in an absence of punishment.

The *Roper* Court reached similar conclusions based on the mental deficiencies of juvenile offenders. In *Roper*, the Court found that

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257. See JOHNNY L. MATSON & VIRGINIA E. FEE, SOCIAL SKILLS DIFFICULTIES AMONG PERSONS WITH MENTAL RETARDATION, in HANDBOOK OF MENTAL RETARDATION 468-78 (Johnny L. Matson & James A. Mulick eds., 2d ed. 1991) (discussing common characteristics of mentally diseased persons, including illogical behavior and thought processes); see also LAFAVE, *supra* note 7, § 7.2(a) (noting that offenders who satisfy the *M'Naghten* standard, the most common insanity defense in American jurisdictions, must suffer from a defect in reasoning as a result of their mental disease).

258. See BUCHANAN, *supra* note 30, at 76 (finding that people with schizophrenia fail to properly "segmentalize" life's experiences, resulting in a tendency to focus on information in parts and an inability to understand experiences as a whole). Moreover, studies suggest that schizophrenics have difficulty processing and comprehending information that is presented visually, a disadvantage that further complicates the process of learning. *Id.*

259. See *id.* at 69 (citing studies which found that chronic schizophrenic patients possess a decreased ability to identify emotional themes, such as affection or reprimand, and a decreased ability to recognize emotions present in photographs of faces); AM. PSYCHIATRIC ASS'N, *supra* note 254, at 302 (finding that schizophrenics are often characterized by substantially impaired interpersonal functioning and social isolation).

260. See BUCHANAN, *supra* note 30, at 70 (stating that some mentally disordered people "lack a normal ability to control their behavior"); see also *id.* (discussing specific examples of mentally disordered persons exhibiting a complete lack of impulse control, such as a patient who lodged a pencil in his right eye who claimed that the Biblical passage Matthew 5:29 led him to such an act; a patient who castrated himself in response to the passage Matthew 19:12; and the case of a patient whose mental disorder led her to frequently attack her own daughter, to whom she was otherwise very affectionate). Delusions, defined as false beliefs despite uncontroverted evidence to the contrary, are also prevalent in mentally disordered offenders. Buchanan, *supra* note 30, at 75; Donna M. Praiss, Note and Comment, *Constitutional Protection of Confessions Made by Mentally Retarded Defendants*, 14 AM. J.L. & MED. 431, 445 n.109 (1989). Delusions can direct or control one's behavior, resulting in actions outside of one's willful control. See *id.* (describing the case of a delusional man who attacked his parents with a meat cleaver because he was convinced they were machines who had kidnapped him).

261. The behavior of the defendant who extracted all of her daughter's teeth because she believed that the devil was inside of them exemplifies such substantial impairments of reason and the inability to learn from experience. See *supra* note 68 and accompanying text.

262. See discussion *supra* Part V.B.1.a (examining the relation between free will and culpability, and arguing that the absence of the former precludes the latter).

juvenile offenders, by reason of their underdeveloped minds, possess an underdeveloped sense of responsibility, are more susceptible to negative influences, and have an underdeveloped sense of character that leads to an inability to extricate themselves from criminal situations.<sup>263</sup> The Court concluded that these deficiencies diminish the culpability of juvenile offenders, requiring a correlative diminishment in the degree of punishment that can be constitutionally imposed on minors.<sup>264</sup>

The insane offender possesses similar mental deficiencies, but to a much greater degree. As a result of severe mental disease, the insane offender possesses a clouded or absent sense of personal responsibility,<sup>265</sup> is more vulnerable to negative internal or external pressures (such as the influence of others or their own delusions),<sup>266</sup> and has similarly transitory personality traits due to the fluctuating effects of their disease.<sup>267</sup> Again, such severe disease precludes the exercise of free will and negates moral blame. Based on analogous mental deficiencies and diminished culpability, it is reasonable to extend the legal conclusions of *Roper* to the insane-offender context and hold that the absence of culpability among the insane renders criminal punishment categorically disproportionate.

*Atkins* and *Roper* involved legal considerations concerning the appropriate punishment for offenders who possess a diminished culpability. Further, these precedents were decided in factual contexts involving mentally deficient offenders. The question concerning the constitutionality of criminal punishment for insane

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263. *Roper v. Simmons*, 543 U.S. 551, 569-70 (2005) (citing Laurence Steinberg & Elizabeth Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 53 AM. PSYCHOLOGIST 1009, 1014 (2003)).

264. *See id.* at 575, 578 (finding that capital punishment is disproportionate to the diminished culpability of juvenile offenders and consequently holding that the Eighth Amendment forbids the imposition of the law's most severe punishment—the death penalty—on minors).

265. *See* BUCHANAN, *supra* note 30, at 65 (explaining that a schizophrenic often sees his own actions as “automatic” and noting that a schizophrenic often observes his conduct from the perspective of a detached spectator). Given that a schizophrenic may view his own behavior from the perspective of a spectator, it logically follows that a sense of personal responsibility for those actions is diminished or absent.

266. For example, symptoms of schizophrenia, a common mental disease associated with insanity acquittals, include the “oppressive awareness” of one’s own inability to effectively or healthily cope with or manage a given internal or external situation. *Id.* at 64.

267. *See id.* at 64-65 (noting that a common symptom of schizophrenia is “depersonalization,” which has been defined, for medical purposes, as “a state in which the individual feels completely changed from what he was previously” and ceases to “recognize himself as a personality”).

offenders involves similar legal and factual considerations, and it is therefore reasonable to apply the principles of *Atkins* and *Roper* to this analogous issue. Accordingly, just as the diminished culpability of the mentally retarded and juvenile offenders requires a diminished punishment, the absence of culpability of the insane offender requires an absence of punishment.<sup>268</sup> Therefore, any criminal sentence for the insane offender represents a disproportionate punishment, which violates the Eighth Amendment's prohibition against excessive punishments.

In sum, the evolving-standards-of-decency analysis reveals that there is an overwhelming national consensus against punishing insane offenders. The propriety of this consensus is supported by the independent determination that such punishment fails to serve traditional penological goals. Additionally, the independent justification that such punishment is disproportionate for the inculpable class of insane offenders also supports this consensus and renders such punishment unconstitutionally excessive. These requirements satisfy the Eighth Amendment's evolving-standards-of-decency analysis. Thus, the abolition of the insanity defense, and the concomitant punishment of insane offenders, violates the Eighth Amendment. Accordingly, the mechanism to safeguard against this constitutional violation—the affirmative insanity defense—deserves constitutional protection.

#### CONCLUSION

The affirmative insanity defense enjoys a rich tradition in Anglo-American jurisprudence and continues in an overwhelming majority of American states. The modern-day practice is grounded in the well-settled principle that those unable to understand or control their behavior are without moral blame, and are therefore undeserving of punishment. To punish such offenders represents an unjustifiable infliction of suffering upon the guiltless, which is counter to our ideas of decency and justice. It is the healthy functioning of these legal principles and societal norms that have protected the insanity defense for centuries.

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268. The Supreme Court has already recognized the general principle that mental disease can reduce the culpability of criminal offenders. See *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring) (“[D]efendants who commit criminal acts that are attributable to . . . emotional and mental problems, may be less culpable than defendants who have no such excuse.”). Hence, it is not unreasonable to extend this diminished-culpability rationale to allow for complete exculpation in cases where the diseased offender's actions are entirely the result of disease, and not a function of free will.

The recent abolition of the insanity defense in Montana, Idaho, Utah, and Kansas exemplifies a dramatic departure from our common-law heritage and modern principles of humanity. This abolition, and the ensuing criminal punishment of otherwise insane offenders, represents a continuing miscarriage of justice, which the Court must address. The Eighth Amendment's proscription against cruel and unusual punishments has always afforded our citizens a minimum level of protection against unjustified punishment at the hands of the State. The imposition of State punishment upon the inculpable in Montana, Idaho, Utah, and Kansas, screams out for the constitutional protection that the Court has historically provided through the Eighth Amendment. It is time for the Supreme Court to address this wrong, and recent Court precedents offer a logical and workable basis for extending Eighth Amendment protection to the blameless class of insane offenders.

The Court has addressed the relationship between individual culpability and excessive punishments in the analogous area of capital punishment for mentally deficient offenders. In that context, the Court held that the Eighth Amendment forbids the execution of juveniles and the mentally retarded due to those groups' diminished personal culpability and the resulting failure of capital punishment to measurably advance acceptable penal interests. The legal and factual similarities between this area of jurisprudence and the issue of punishment in general for insane offenders offers a logical basis for applying the same rules and reasoning to both contexts.

Applying the Eighth Amendment principles set forth in *Atkins* and *Roper* to the insane-offender context, it is evident that punishing the insane violates the Eighth Amendment's prohibition against excessive punishments. There is an overwhelming national consensus against punishing the criminally insane, supported by the independent reasoning that such punishment poorly serves commonly accepted penal interests and is grossly disproportionate to the moral culpability of this class of offenders. Accordingly, the Court should apply its recent Eighth Amendment death-penalty rules and reasoning to the criminally insane offender context and grant all mentally deficient defendants the constitutional protection of an insanity defense, thereby protecting society's guiltless from unjust punishments.